No. 21-932

In the Supreme Court of the United States

DONALD J. TRUMP, IN HIS CAPACITY AS THE 45TH PRESIDENT OF THE UNITED STATES,

Petitioner,

v.

BENNIE G. THOMPSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE UNITED STATES HOUSE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL; THE UNITED STATES HOUSE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL; NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF FOR FORMER WHITE HOUSE CHIEF OF STAFF MARK R. MEADOWS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the records request from the Select Committee to Investigate the January 6th Attack on the United States Capitol to the National Archives and Records Administration violates the Constitution or laws of the United States entitling President Trump to a preliminary injunction prohibiting production of the records to the Select Committee.

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae Mark R. Meadows is currently a senior partner at the Conservative Partnership Institute in Washington, D.C. He previously served as Chief of Staff to President Donald J. Trump from March 31, 2020, until January 20, 2021, and before that as a Member of the U.S. House of Representatives, representing North Carolina's 11th Congressional District, from January 3, 2013, to March 30, 2020.

During the January 6th attack that is the focus of Respondent Select Committee's investigation, *Amicus* served as White House Chief of Staff. On September 23, 2021, the Select Committee served a subpoena on *Amicus* seeking documents and testimony related to his tenure as White House Chief of Staff on and around January 6th. Over the ensuing weeks, *Amicus* negotiated with the Select Committee, through counsel, in an effort to respond appropriately to the subpoena while fulfilling his obligations as a former Executive Branch official. Many of the records that *Amicus* created, reviewed, or received during his tenure as White House Chief of Staff are now Presidential records in the custody of Respondent NARA. They are likely included among the documents directly at issue in this case, and in any event, the outcome of this case will bear directly

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[1] No party's counsel authored any part of this brief. No person or entity, other than *amicus curiae* and his counsel, paid for the preparation or submission of this brief. All parties received timely notice and have consented to the filing of this brief.

on whether and to what extent those documents are produced to the Select Committee.

The Select Committee also issued a subpoena on November 22 to *Amicus*'s cell phone carrier, seeking data about all of the calls and text messages made on his personal devices. When *Amicus* learned of this new third-party subpoena, he had already produced thousands of non-privileged documents, including emails and text messages from his personal devices and accounts, to the Select Committee. Members of the Select Committee have since made several of those communications public, including in at least one instance with false and misleading edits.[2] The Select Committee has further made clear through its communications with *Amicus* that it seeks his testimony in order to probe his communications with then-President Trump—communications which lie at the core of Executive Privilege.

On December 8, 2021, *Amicus* filed a civil action in the U.S. District Court for the District of Columbia challenging the Select Committee's September 23 subpoena issued to him and its

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[2] A spokesperson for the Select Committee admitted that it altered a text message graphic that Congressman Adam Schiff presented during the business meeting to report *Amicus* for a House vote on contempt. *See* Virginia Aabram, *Jan. 6 committee admits to altering text message between Mark Meadows and Jim Jordan*, Wash. Examiner (Dec. 15, 2021 12:41 PM), https://www.washingtonexaminer.com/news/jan-6-committee-admits-to-altering-text-message-between-mark-meadows-and-jim-jordan.

November 22 subpoena issued to his cell phone carrier. *See Meadows* v. *Pelosi*, No. 1:21-cv-03217 (D.D.C.). That action remains pending. On December 14, 2021, the U.S. House of Representatives cited *Amicus* for contempt based on his alleged failure to appear to give testimony on December 8. *Amicus* had initially agreed to a voluntary appearance before the Select Committee on that date as part of his efforts to reach a mutually agreeable accommodation whereby he would maintain the former President's claims of Executive Privilege and immunity from compulsion to provide congressional testimony as a senior White House aide. He withdrew the offer to appear voluntarily when it became clear that the Select Committee would not honor previously agreed-upon conditions, including the condition that the Select Committee would make a good faith effort not to ask questions which would require answers subject to privilege.

Amicus's civil case against the Select Committee presents distinct issues from those presented here. But this case provides an important opportunity for the Court to address and resolve issues that will have important implications for *Amicus* and for many other subjects of congressional investigations, now and in the future that involve the continued protection of materials and information subject to valid claims of Executive Privilege by a former President.

INTRODUCTION & SUMMARY OF ARGUMENT

This Court needs to address the questions presented here about Executive Privilege for former Presidents and the scope of Congress's investigative authority. These questions are important both to preserving the Separation of Powers and to protecting the rights of private citizens whom Congress targets in its investigations. And while it is important for the Court to get the answers right, it is just as important for the Court to provide definitive answers, whatever they may be. Without this Court's definitive guidance, *Amicus* and other similarly situated former Executive Branch officials must navigate the competing positions of Congress and past and incumbent Presidents at significant personal risk.

The Court cannot avoid these questions simply by leaving them to the "political branches." Almost a year-and-a-half ago, this Court noted that "disputes over congressional demands for presidential documents have not ended up in court" throughout most of our Nation's history but have instead "been hashed out in the hurly-burly, the give-and-take of the political process between the legislative and the executive." *Trump* v. *Mazars USA, LLP*, 140 S. Ct. 2019, 2029 (2020) (internal quotation omitted). But unfortunately, it has become increasingly common both for these disputes to arise and for them to spill over into the courts. The Select Committee investigation at issue here is not only the subject of this action by former President Trump, but also several civil actions by *Amicus* and other Select

Committee targets, and a pending criminal prosecution against one such target.

Several factors converge to make continued litigation—and the consequent need for this Court to weigh in—unavoidable. The Select Committee is conducting a broad and intrusive investigation that includes subpoenas to dozens of private citizens; demands for records from 15 social media companies;[3] demands for bank records;[4] and third-party subpoenas for the call and text records of more than 100 people.[5] The present dispute over documents in NARA's custody is just the tip of the iceberg.

The Biden Administration has also made the unprecedented decision to claim that Executive Privilege is waived over the subjects of the Select Committee's inquiry, notwithstanding former

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[3] *See* Select Committee, *Select Committee Demands Records Related to January 6th Attack from Social Media Companies* (Aug. 27, 2021), https://january6th.house.gov/news/press-releases/select-committee-demands-records-related-january-6th-attack-social-media-0.

[4] *See* Katyeln Polantz & Mary Kay Mallonee, *January 6 committee ramps up efforts to uncover funding behind Capitol riot*, CNN (Dec. 27, 2021), https://www.cnn.com/2021/12/24/politics/taylor-budowich-trump-spokesman-jan-6-committee/index.html.

[5] *See* Cohen et al., *Exclusive: January 6 committee casts a wide net with over 100 subpoenas for phone records*, CNN Politics (Dec. 7, 2021), https://www.cnn.com/2021/12/07/politics/january-6-committee-phone-records/index.html.

President Trump's instruction to *Amicus* and other former Executive Branch officials to maintain the privilege. Former officials are thus left to navigate conflicting instructions from the incumbent President and the former President under whom they served. If they follow President Biden's direction and provide privileged testimony to Congress, they effectively moot President Trump's assertion of Executive Privilege— as well as this Court's opportunity to clarify waiver of privilege held by former Presidents.[6] If they follow President Trump's direction and defy a subpoena without first seeking judicial recourse (as *Amicus* has), they face the prospect of prosecution for contempt under 2 U.S.C. § 192.[7]

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[6] *Amicus* Meadows's case raises additional issues not presented here, including the absolute immunity enjoyed by a President's most senior White House aides against compelled testimony before Congress. Attorneys General of both parties and the Office of Legal Counsel have long recognized this immunity for current and former Chiefs of Staff and Counsels to the President. *See, e.g.*, *Assertion of Executive Privilege with Respect to Clemency Decision*, 23 Op. O.L.C. 1, 5 (1999). This Court has not yet had occasion to address this immunity and its contours. But of course, appearing before Congress to testify in response to a subpoena would effectively waive this immunity as well.

[7] This is not to say that the Department of Justice could prove that a defendant "willfully" defied a subpoena, 2 U.S.C. 192, where he maintained a good-faith assertion of Executive Privilege and testimonial immunity. *Cf. Garner* v. *United States*, 424 U.S. 648, 663 n.18 (1976). But the mere threat of prosecution can have a coercive effect that forces a party to give up his legal rights. *See, e.g.*, *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 118–19 (2007).

It is therefore unsurprising that *Amicus* and others have sought recourse in the federal courts and will continue to press their claims to finality. And there are several good reasons why the Court should grant review now to provide much-needed clarity for the many former Executive officials like *Amicus* who are trying in good faith to navigate an unprecedented congressional investigation.

First, the petition raises important and timely issues that require this Court's prompt resolution. While this Court has made clear that a former President may assert the fundamental protections of Executive Privilege, *see United States* v. *Nixon*, 418 U.S. 683, 708 (1974) ("*Nixon I*"); *Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S. 425, 439 (1977) ("*Nixon II*"), it has never had the occasion to opine on whether Congress and the incumbent President may agree to override those protections. The Court should grant review to protect the Separation of Powers and to provide important legal guidance for former Executive Branch officials like *Amicus* who face conflicting directives on privilege.

The petition also raises important questions about the scope of Congress's investigative authority. While it may not always be simple to articulate what constitutes "a 'valid legislative purpose,'" *Mazars*, 140 S. Ct. at 2031 (quoting *Quinn* v. *United States*, 349 U.S. 155, 161 (1955)), the Court has made clear that "Congress may not issue a subpoena for the purpose of 'law enforcement,'" *id.* at 2032 (quoting *Quinn*, 349 U.S. at 161); and that "'there is no congressional power to expose for the sake of

exposure,'" *ibid.* (quoting *Watkins* v. *United States*, 354 U.S. 178, 200 (1957)). Yet, there is strong evidence that these are precisely the aims of the Select Committee and its members in targeting of *Amicus* and other former officials. In any event, the D.C. Circuit failed to apply the proper standard under *Mazars* for evaluating Congress's effort to obtain Presidential records.

Second, the issues presented here are as "fundamental to the operation of Government," *Nixon I*, 418 U.S. at 708 (1974), as any other aspect of Executive Privilege. For Executive Privilege to fulfill its intended purpose of allowing full and free communication among Presidential advisors, it must be able to survive a party change in the Presidency and a hostile Congress.[8] *Amicus* served as White House Chief of Staff and experienced firsthand the importance of confidentiality in advising a President.

Third, this case presents an opportunity for the Court to provide a needed check on continued growth of congressional investigations, which has coincided with an escalation of Congress's investigative tactics. Just a few years ago, it was nearly unheard of for Congress to subpoena

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[8] *See Nixon I*, 418 U.S. at 708 (explaining "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking" and that Executive Privilege ensures that "[a] President and those who assist him [remain] free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately").

communications carriers for the call and messaging records of private citizens. A few months ago, the Select Committee did so for the records of more than 100 individuals. While this case involves Presidential records in NARA's custody, rather than personal phone records, it provides an important opportunity for the Court to address these trends—and to restore equilibrium to a burgeoning imbalance in the Separation of Powers.

ARGUMENT

I. The Petition Raises Important Questions with Relevance Far Beyond This Case Concerning the Privileges of Former Presidential Administrations and the Scope of Congress's Investigative Authority.

The Court should grant review here to address important issues that matter for *Amicus*, for other former Executive Branch officials, and for pending litigation in several lower courts. *Amicus* and other similarly situated former officials have been trying in good faith to respond to subpoenas from the Select Committee while honoring their obligations as former officials and navigating unprecedented legal terrain. This case provides not only the opportunity to clarify the law but to do so in a timely way that will have real salutary effects.

A prompt answer is important because, however the Court rules, its ruling will guide the parties in all of the related disputes. It will narrow—if not altogether eliminate—the dispute between the Select Committee and the targets of its investigation and may hasten the ultimate resolution of other pending litigation. If the Court were to hold that President Trump has a valid claim of privilege which President Biden cannot waive, or that the Select Committee is not pursuing a valid legislative purpose, then the Select Committee would need to narrow its investigation (or at least go back to the drawing board) in a way that might moot much of the

pending litigation. Or if the Court were to hold that the Select Committee is pursuing a valid legislative purpose and that President Biden's purported waiver is enforceable, then *Amicus* and other former officials would be guided by the Court's decision both in their own litigation and in their broader dealings with the Select Committee. Either way, the Court can narrow or eliminate the need for further litigation by addressing these issues now.

By contrast, the Court's common preference for "percolation," *Arizona* v. *Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting), does not fit well here.

First, most of the litigation arising from the Select Committee's investigation is filed in the U.S. District Court for the District of Columbia and any appeals in such cases will go to the same D.C. Circuit that rendered the decision below. While at least one challenge to the Select Committee's subpoenas has been filed outside the Nation's capital, the Congressional defendants are likely to seek transfer of any such cases to D.D.C. Thus, other Courts of Appeals are unlikely to weigh in at all.

Second, the other outstanding litigation includes a mix of postures, including at least one pending criminal prosecution for contempt of Congress, that may not present as suitable a vehicle. While this case does not present every issue contemplated in the other pending lawsuits, it does squarely present two of the most important issues: the force of a former President's assertion of

Executive Privilege and the scope of Congress's investigative authority.

Finally, there are many targets of the Select Committee's investigation, including *Amicus*, who suffer from the continued legal uncertainty surrounding these issues. *Amicus* has consistently tried in good faith to respond to the Select Committee's subpoena without unilaterally waiving the privileges that former President Trump has instructed him to preserve. In an effort to accommodate the Select Committee, *Amicus* offered to answer written interrogatories whereby any assertion of privilege could be made with careful consideration outside the often-hostile give-and-take of a deposition.[9] The committee rejected all such offers and instead referred *Amicus* to DOJ for contempt of Congress because he maintained the former President's privilege claims. Until this Court addresses the issue, he and the Select Committee are unlikely to reach an accommodation. *Amicus* and others like him therefore face the difficult choice between volunteering potentially privileged information in defiance of the President under whom they served or to resist a congressional subpoena at great personal expense and with the threat of potential prosecution under 2 U.S.C. § 192 (however unfounded such a prosecution might be).

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[9] *See Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach from Congressional Subpoena*, 38 Op. O.L.C. __, *4 (July 15, 2014)

The Court should grant review now to provide clear guidance for Congress, for the current and former President, and for the private citizens like *Amicus* who are caught in their dispute.

1. The Court should grant review to address whether and to what extent Congress and an incumbent President may compel disclosure of privileged matters from the White House tenure of a former President.

This Court made clear decades ago that a former President has the authority to assert Executive Privilege. *See Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S. 425, 439 (1977) ("*Nixon II*"). That conclusion flows from the very premise of the privilege. Executive Privilege for Presidential communications is "fundamental to the operation of Government." *United States* v. *Nixon*, 418 U.S. 683, 708 (1974) ("*Nixon I*"). As this Court has explained, "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Ibid.* As a result, this Court has recognized "a presumptive privilege for Presidential communications * * * inextricably rooted in the separation of powers under the Constitution." *Ibid.*

This protection for Presidential communications would be fleeting and would do little to guard against the chilling of candid advice if it could not survive beyond a President's term. Thus, in *Nixon II*, this Court "reject[ed] the argument that

only an incumbent President may assert [Executive Privilege] and [held] that * * * a former President[] may also be heard to assert [it]." 433 U.S. at 439.

Here, the familiar path of the *Nixon* cases has taken an unprecedented turn: Congress has sought records of the former President, and the former President has asserted Executive Privilege (as in *Nixon II*); but the incumbent President has sided with Congress and purported to waive privilege. This Court has never opined on whether, and to what extent, Congress and an incumbent President may work together in this way to compel disclosure of a former President's privileged matters. But as discussed below, *see* Part II *infra*, the same motivating constitutional principles show why an incumbent President should not be able to waive privilege in the way that President Biden has purported to do here.

2. The Court should also grant review to address the important issues raised in the petition about the extent of Congress's investigative authority.

This Court has made clear that, at least outside the context of a potential impeachment, Congress's inherent authority to investigate is cabined by its legislative role. "[A] congressional subpoena * * * must serve a 'valid legislative purpose,'" *Mazars*, 140 S. Ct. at 2031 (quoting *Quinn* v. *United States*, 349 U.S. 155, 161 (1955))—that is, "it must 'concern[] a subject on which legislation "could be had,"'" *id.* at 2031–32 (quoting *Eastland* v.

United States Serviceman's Fund, 421 U.S. 491, 506 (1975); *McGrain* v. *Daugherty*, 273 U.S. 135, 177 (1927)). While it may be difficult to articulate the precise metes and bounds of that authority, the Court has clearly articulated two categories of investigation that lie beyond them: (i) "Congress may not issue a subpoena for the purpose of 'law enforcement,'" *id.* at 2032 (quoting *Quinn*, 349 U.S. at 161); and (ii) "'there is no congressional power to expose for the sake of exposure,'" *ibid.* (quoting *Watkins* v. *United States*, 354 U.S. 178, 200 (1957)). Here, the Select Committee and its members have openly said that these are its principal aims—at least in their targeting of *Amicus* and other former officials. And their actions bear that out.

Chairman Bennie Thompson made clear that the Select Committee is pursuing a law-enforcement investigation when he announced that witnesses who come before the Select Committee and invoke their Fifth Amendment privileges are "part and parcel guilty to what occurred."[10] Vice Chair of the Select Committee, Liz Cheney, has publicly stated that the Select Committee is focused on determining whether former President Trump "corruptly sought to obstruct or impede Congress' official proceeding to count electoral votes."[11] Member Jamie Raskin

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[10] Tim Hains, *Jan. 6 Committee Chairman Bennie Thompson: If You Plead The Fifth, You're "Part & Parcel Guilty"*, RealClear Politics (Dec. 2, 2021), https://www.realclearpolitics.com/video/2021/12/02/january_6_committee_chairman_bennie_thompson_if_you_plead_the_fifth_youre_part_and_parcel_guilty.html.

[11] 167 Cong. Rec. H7786 (daily ed. Dec. 14, 2021).

recently suggested that the Select Committee should ignore Executive Privilege because it "doesn't cover criminal misconduct, like insurrection or coups."[12] And Member Adam Schiff has described the Select Committee's goal as "exposing all the malefactors and bloodshed that went on here."[13]

It is thus clear that Members of Congress have not heeded this Court's admonitions about the limits of their investigative authority. This case provides one important opportunity to correct any misapprehensions.

The Court should also address legislative purpose because the D.C. Circuit misapplied the framework that this Court recently set out in *Mazars*. There, the Court set out a three-tiered approach to assessing the validity of Congress's aims in obtaining records through an investigation. The lowest burden for Congress applies in cases "that do not involve the President's papers." 140 S. Ct. at 2033. Congress still must show that its requests "relate to a valid legislative purpose or concern a subject on which legislation could be had." *Ibid.* (cleaned up). But it does not need to carry any additional burden.

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[12] @RepRaskin, Twitter (Dec. 2, 2021, 5:40 PM), https://twitter.com/RepRaskin/status/1466537815185891329.

[13] Mary Clare Jalonick, *Capitol riot committee has interviewed 250 people so far*, Associated Press (Dec. 2, 2021), https://apnews.com/article/steve-bannon-donald-trump-elections-capitol-siege-36b68bd9e0c701fea8e6b11f00292604.

The highest burden for Congress applies where, as here, Congress goes after "information subject to executive privilege." *Id.* at 2032.[14] In such cases, Congress "must establish a 'demonstrated, specific need" for the [requested] information," *ibid.* (quoting *Nixon I*, 418 U.S. at 713)—in other words, that the information "is 'demonstrably critical' to its legislative purpose," *ibid.* (quoting *Senate Select Comm. on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725, 731 (CADC 1974)).

Finally, the *Mazars* Court articulated an intermediate tier of scrutiny that applies to "congressional subpoenas for the President's information" even when Executive Privilege is not at issue. *Id.* at 2033. Such requests still raise "significant separation of powers issues" since they "unavoidably pit the political branches against one another." *Id.* at 2033–34. Applying the ordinary "valid legislative purpose" standard to such cases is inadequate, this Court recognized: "Any personal paper possessed by a President could potentially 'relate to' a conceivable subject of legislation, for Congress has broad legislative powers that touch on a vast number of subjects." *Ibid.* The Court thus

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[14] Even if the Court were to conclude that Executive Privilege has been waived—which it should not—the requested materials were still plainly privileged at the time the Select Committee made its request. Its articulation of a valid legislative purpose and a corresponding critical need should be assessed from that vantage point. But if not, the intermediate tier of scrutiny established in *Mazars* would still apply to a request for non-privileged Presidential records.

articulated "[a] balanced approach" which requires "a careful analysis that takes adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the 'unique position' of the President." *Id.* at 2035 (quoting *Clinton* v. *Jones*, 520 U.S. 681, 698 (1997)).

In assessing the Select Committee's claim of a valid legislative purpose—and the relationship between such purpose and the need for the information at issue—the D.C. Circuit should have applied the strict *Nixon I* framework (because the Select Committee was indisputably seeking privileged information) or, at a minimum, the intermediate *Mazars* framework. Instead, the Court of Appeals held only that Congress had met its statutory burden under the Presidential Records Act of "show[ing] that presidential records are 'needed for the conduct of its business[.]'" Pet. App. 46a (quoting 44 U.S.C. § 2205(2)(C)). While the court cited the *Nixon* Cases, it wrongly equated the compelling need this Court recognized for evidence in a criminal proceeding with Congress's alleged need to develop potential legislation related to law-enforcement, intelligence, and the transfer of powers between administrations. *See* Pet. App. 47a–48a. Its principal explanation for the connection between those purposes and the documents requested was the suggestion of "a direct linkage between the former President and the events of the day." *Id.* at 47a. But as *Mazars* and the *Nixon* Cases show, the mere relevance of the President and his papers to a

congressional investigation is not enough to prove the validity of a subpoena for Presidential records.

II. The Court Should Hold That President Biden's Purported Waiver Is Inconsistent with the Constitutional Rules of Executive Privilege.

On the merits, *Amicus* respectfully submits that the Court should find no authority for President Biden to waive Executive Privilege as he has purported to do here. This is not a case where the incumbent President is deciding whether to disclose privileged details in carrying out his own statutory or inherent constitutional authorities—for example, in conducting foreign affairs.

What sets this case apart is the undisputed fact that, under the Presidential Records Act, President Biden has no authority to disclose President Trump's records on his own, just as under the Constitution, Congress has no authority to compel the production of the privileged material.[15] Instead, in this instance, Congress and the President are attempting to work together to compel the

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[15] Nor is there any inherent constitutional authority for the incumbent President to force the disclosure of a former President's records. Until the enactment of the Presidential Records Act of 1978, a former President's records were considered his own private property. *See Presidential Records Act (PRA) of 1978*, U.S. Nat'l Archives and Recs. Admin. (January 13, 2021) https://www.archives.gov/presidential-libraries/laws/1978-act.html.

disclosure of privileged communications of a former President, which neither could accomplish alone.[16]

The Court should reject this effort as inconsistent with the "fundamental" principles of Executive Privilege. *Nixon I*, 418 U.S. at 708. As reflected in this Court's *Nixon* decisions, there would be little value in the Executive Privilege if it expired with the President's term. Part of its core purpose is to ensure the President and his advisors are "free to explore alternatives in the process of shaping policies and making decisions * * * in a way many would be unwilling to express except privately." *Nixon I*, 418 U.S. at 708. Immediate disclosure might have a worse chilling effect than disclosure that comes right after the end of the President's term, but not by much.

Having a new President from the opposite party endorse the compelled disclosure does not change the chilling effect; if anything, it magnifies it. Unless the Court steps in to say otherwise, Presidential advisors will henceforth need to assume that it only takes a party-change in the Presidency and a sympathetic Committee Chairman in Congress to compel disclosure of their advice and other Presidential communications. And they can rest

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[16] Thus, contrary to the Solicitor General's claim, recognizing President Trump's assertion of Executive Privilege would be no "intrusion into the [incumbent President]'s ability to discharge his constitutional responsibilities," U.S. Br. in Opp. 16, since President Biden has no constitutional responsibility to disclose President Trump's records.

assured that the disclosures their partisan opponents have in mind are calibrated for maximum political gain. This is precisely the sort of threat that this Court recognized as undermining "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *Nixon I*, 418 U.S. at 708.

The fact that the incumbent President apparently consents to this erosion of Presidential prerogative is of no moment. This Court has never held that a President may consent to a violation of the Separation of Powers, and to do so would be particularly problematic in a context such as this which has long-term implications for future Presidents. *Cf. Clinton* v. *City of New York*, 524 U.S. 417 (1998) (invalidating a line-item veto for violating the Separation of Powers notwithstanding both Congressional and Presidential consent to the statutory scheme); *I.N.S.* v. *Chadha*, 462 U.S. 919, 959 (1983) (same for a one-house legislative veto).

The Court should also look past the supposed limiting principle offered by the Solicitor General based on President Biden's invocation of "the 'extraordinary events' that occurred on January 6." U.S. Br. in Opp. 7, 13. For that is no real limiting principle at all. Telling a White House Chief of Staff or another senior advisor that his advice will remain confidential so long as the circumstances are not "extraordinary" is cold comfort. Indeed, consistent with the principles that this Court has recognized, it is precisely the "extraordinary" events like those of January 6, 2021, that require a senior advisor to give

his most "candid, objective, and even blunt" advice. *Nixon I*, 418 U.S. at 708.[17]

III. The Court Should Grant Review to Protect the Separation of Powers, Not Just as an End in Itself But as a Safeguard of Individual Liberty.

This case presents an opportunity for the Court to provide a needed check on continued growth of congressional investigations and the concomitant escalation of Congress's investigative tactics. Here, these issues arise from clashes of the political branches, including a congressional committee, an incumbent President, and a former President. But as the Founding Fathers recognized, the Separation of Powers is not an end in itself. Preserving the proper role and protections of the Presidency, for instance, is "essential * * * to the security of liberty against the enterprises and assaults of ambition, of faction and of anarchy." THE FEDERALIST No. 70, at 471 (A. Hamilton) (J. Cooke ed. 1961); *accord Antonin Scalia*, MEMORIAL TRIBUTES IN THE CONGRESS OF THE UNITED STATES, S. Doc. 114-12, at v ("Every banana republic in the world has a bill of rights. * * * [T]he real key to

[17] That the intrusion and violence at the Capitol on January 6 was abhorrent and unjustifiable does nothing to change the proper analysis. Using the events of the day as a justification to abandon Separation of Powers principles that are the foundation for protection of Executive independence from congressional intrusion is not a prerogative any President should enjoy. Allowing it here would only encourage further politization of an opposition party's searching congressional inquiries into the inner workings of a prior administration.

the distinctiveness of America is the structure of our government.").

The Select Committee's investigation illustrates why. As noted above, the Select Committee has launched a far-ranging investigation that has already targeted dozens of individual citizens with subpoenas for documents and testimony, has sought to gather social media posts involving countless users, and has demanded call and text records for more than 100 individuals. To the extent Congress is exceeding its constitutional role and authority, it is affecting not only the balance and structure of the Federal Government but also the individual lives of its targets.

There can be no doubt that the scope and methods of Congress's investigations have escalated in recent years, and its pursuit of call and text records provides a particularly jarring example. In its report on Russian interference in the 2016 Presidential election, the Senate Select Committee on Intelligence (SSCI) noted that it was "not aware of any congressional committee that had pursued the production of such data."[18] But SSCI concluded that

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[18] SSCI, *Report of the Select Committee on Intelligence*, *United States Senate*, *on Russian Active Measures Campaigns & Interference in the 2016 U.S. Election*, Volume 5: Counterintelligence Threats and Vulnerabilities, at 21 (116th Cong.), https://www.intelligence.senate.gov/sites/default/files/documents/report_volume5.pdf ("SSCI Report"). SSCI had apparently missed one instance from 1996 in which the Special Committee to Investigate Whitewater Development and Related Matters issued phone-record subpoenas in 1996. *See* Elizabeth

its "investigation required access to electronic communications data, including subscriber information and transactional metadata from electronic communications service providers."[19] No doubt recognizing the grave implications of congressional subpoenas for private citizens' phone records, SSCI "chose to limit its use of this tool and did not, for instance, seek the personal telephonic toll records of Americans except in very limited situations in which other avenues for investigation had been foreclosed."[20] SSCI subsequently became "aware that other congressional committees have since followed suit in pursuing these requests" for individuals' phone records.[21]

Fast-forward to today, and the Select Committee is widely deploying this tactic—a hallmark of law-enforcement investigations—while showing none of SSCI's caution. The Select Committee has targeted phone records for more than 100 Americans[22] without first demonstrating any

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Goitein, *Congressional Access to Americans' Private Communications*, BRENNAN CENTER FOR JUSTICE (Sept. 28, 2021), https://www.brennancenter.org/our-work/analysis-opinion/congressional-access-americans-private-communications.

[19] SSCI Report, at 21 & n.70.

[20] *Id.* at 23.

[21] SSCI Report, at 21 & n.70.

[22] *See* Cohen et al., *Exclusive: January 6 committee casts a wide net with over 100 subpoenas for phone records*, CNN Politics (Dec. 7, 2021), https://www.cnn.com/2021/12/07/politics/january-

legitimate investigative need. The targets have included former officials like *Amicus*, members of Congress itself, and purely private citizens like an Indiana journalist who took pictures during the events of January 6, 2021.[23]

While this Court may rightly be reluctant to police the scope of congressional investigations by addressing in exacting detail what may or may not constitute a valid legislative purpose, it should have no hesitancy to step in and exercise its authority concerning an inquiry that presents a fig leaf of legislative purpose attempting to cover a body of congressional intent to "expose for the sake of exposure" *Mazars*, 140 S. Ct. at 2032, as shown here by the very intent expressed and demonstrated repeatedly by committee members.

Unless this Court steps in, the Select Committee's investigation will represent the greatest expansion of Congress's power to investigate and target private citizens since the days of the House Un-American Activities Committee. That expansion will not only undermine the Separation of Powers

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6-committee-phone-records/index.html. According to public reporting, the Select Committee's subpoenas make no effort to confine the records demanded to include only communications relevant to the subject matters of its inquiry.

[23] *See* Amy Nakamura, *Indiana photojournalist sues House Jan. 6 committee over subpoenaed phone records*, USA TODAY (Dec. 16, 2021), https://www.usatoday.com/story/news/politics/2021/12/16/journalist-sues-house-jan-6-committee-subpoenaed-phone-records/8925921002/.

that protects the institution of the Presidency; it will come at great cost to the private citizens that Congress chooses to target both now and in the future.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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