No. 21A272

IN THE

Supreme Court of the United States

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

Applicant,

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; DAVID S. FERRIERO, IN HIS OFFICIAL CAPACITY AS ARCHIVIST OF THE UNITED STATES; AND THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,

Respondents.

ON APPLICATION FOR STAY TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR DISTRICT OF COLUMBIA CIRCUIT.

REPLY TO RESPONDENTS' OPPOSITION TO EMERGENCY APPLICATION FOR A STAY OF MANDATE PENDING DISPOSITION OF THE PETITION FOR CERTIORARI AND INJUNCTION PENDING REVIEW

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In President Trump's Application for a Stay, he argued that this case presents a serious question and is of exceptional importance to the proper functioning of this republic. Applicant's Emergency Application at 8-9. Respondents' briefing only confirms that President Trump is correct. This Court is likely to reverse the circuit court, because the documents in dispute are the type protected by core executive privilege, Congress has not met its burden to explain a legitimate legislative purpose or why congressional need for the information outweighs the need to honor a former president's claim of privilege. The circuit court failed to analyze the issue using an objective standard that will ensure future presidents that the next president from a rival party won't invade their privilege—thereby doing grievous damage to a central protection to the proper functioning of the executive branch.

I. Respondents are wrong that a stay is not within the power of this Court in this case.

Congressional Respondents argue that a stay is not within this Court's power, and that its only authority rests in injunctive relief pursuant to the All Writs Act. Congressional Respondents Opp'n to Application at 3 ("Cong. Opp'n"). This is clearly not true. A stay is "an exercise of judicial discretion," and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009). A stay to fully consider the merits of this case is within the discretion of the Court and is a tool the Court has used throughout history. *See, e.g.*, *Hollingsworth v. Perry*, 558 U.S. 183 (2010); *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020). Indeed, the posture of *Mazars* closely resembles the posture here.

Contrary to Respondents' substantive protestations against a stay, President Trump has shown that the Court is likely to grant review and provide relief. The serious question presented by this petition strongly suggests that there is a "reasonable probability that four Justices will consider the issue *sufficiently meritorious* to grant certiorari." *Hollingsworth*, 558 U.S. at 190 (emphasis added). Given the subjective and highly discretionary precedent the circuit court set below, there is "a *fair prospect* that a majority of the Court will vote to reverse the judgment below," if for no other reason than to clarify a more substantive analysis for future disputes. *Id.* Finally, President Trump has shown with relative ease that there is "a likelihood that irreparable harm will result from the denial of a stay," because this case is focused on a privilege dispute. *Id.* It is a simple principle that the breach of a privilege constitutes irreparable harm. *Hospitality Staffing Sols., LLC v. Reyes*, 736 F. Supp. 2d 192, 200 (D.D.C. 2010). Once disclosed, "the very right sought to be protected has been destroyed." *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1065 (D.C. Cir. 1998) (quoting *In re Ford Motor Co.*, 110 F.3d 954, 963 (3d Cir. 1997)); s*ee also Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) ("Once the documents are surrendered," in other words, "confidentiality will be lost for all time. The *status quo* could never be restored.").

II. In the alternative, however, President Trump satisfies this Court's standard for an injunction.

Even under the well-known standard for injunctive relief, President Trump has met his burden, contrary to Respondents' arguments. When the Supreme Court

considers a request for an injunction, it reflects on the underlying merits and makes a discretionary judgment on whether *this* case should be heard. *Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring).

Respondents make two chief errors. First, they argue that this case does not present a worthy topic for the Court's review, and, second, when considering the underlying merits, the traditional factors that focus on the balance of hardships and public interest merge and defeat President Trump's request. Respondents are wrong on both points.

a. The issue presented to the court is important and worthy of this Court's consideration.

This is an eminently worthy case for the Court to take. Respondents argue that to receive an injunction at the Supreme Court the "legal rights at issue [must be] indisputably clear and that President Trump has failed to make a sufficient showing. Cong. Opp'n at 3 (citing *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (cleaned up)); Executive Respondent's Opp'n to Application ("Exec. Opp'n") at 17 (citing *Wisconsin Right to Life Inc. v. FEC*, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (citations omitted)).

Courts have jurisdiction, however, only over live cases and controversies. In *Lux*, the Court specifically noted that "the courts of appeals appear[ed] to be reaching divergent results" on the issue the petitioner was presenting. *Lux v. Rodrigues*, 561 U.S. at 1308. In this case, not only is there no dispute among the circuits on the question, there will be little opportunity for the circuits to weigh in and clarify the

legal issues, because a dispute over presidential records and the Presidential Records Act is generally brought in the District of Columbia federal courts. 44 U.S.C. § 2204 ("The United States District Court for the District of Columbia shall have jurisdiction over any action initiated by the former President asserting that a determination made by the Archivist violates the former President's rights or privileges.").

Indeed, in this case, the legal rights are indisputably clear, they are just in unprecedented conflict. Neither the district court nor the circuit court was able to resolve this clash in an objective fashion that is fair in this case or that presents a framework that can stand the stress of future litigation with integrity intact.

Turning to the traditional factors for deciding a stay application, Respondents further claim President Trump is not entitled to an injunction because he "has again failed to show that he will be irreparably harmed in the absence of an injunction, and the balance of the equities and the public interest likewise weigh against injunctive relief." Cong. Opp'n at 4. Such an assertion is disconnected from the law and facts.

First, as President Trump has fully briefed, he will be irreparably harmed absent an injunction. Respondents' obdurate insistence that no harm would result is premised on an inappropriate refusal to acknowledge the weight of President Trump's status as a recent former President of the United States of America and the reality that this invasion of privilege—despite their strong conviction that it is necessary and appropriate—will set a precedent and will affect the vitality of executive privilege for all president's going forward. The circuit court appeared to suggest that the invasion of President Trump's privilege could be treated as a mulligan for the purposes of

constitutional precedent.[1] App. A at 49. The circuit court and the opposing parties all glossed over the reality that, by the circuit court's own analogy, this is the first strike in a mutually assured destruction scenario. App. A at 49.

Furthermore, the fact that the district and appellate courts ruled against President Trump does not foreclose or even weaken the merits before the Supreme Court. The judgments of the lower courts do not change the weighty facts and implications of this case, nor does Respondents' dismissive view of President's Trump privilege. This *is* an extraordinary case. A President is asserting statutory and constitutional rights that will substantively affect executive privilege for all presidents going forward. This is an issue that penetrates to the heart of the separation of powers and the energy and autonomy of the Executive Branch so carefully crafted by our Founders. This is exactly the kind of serious question the Supreme Court is equipped and indeed designed to consider.

b. Respondents are wrong when they argue the final two traditional factors merge in their favor, because the vindication of President Trump's constitutional rights shifts that presumption.

Respondents made two crucial mistakes while arguing the traditional factors favored their position. First, they claimed the circuit court "faithfully applied" Supreme Court precedent by analyzing the case using the framework of *Nixon v.*

[1] The D.C. Circuit dismissed President Trump's concern that this waiver of his privilege by an immediately subsequent President would have a chilling effect on future administrations and expose the privilege to frequent abuse by political rivals. App. A at 49. Bafflingly, it claimed that future presidents would avoid invading their predecessor's privilege to protect their own—a scenario of presidential mutually assured destruction. *Id.* But the gravity of the Biden Administration's "first strike" cannot be denied based on an excuse that this crisis is unique. In our increasingly polarized nation, there will be more events that one party claims are earth-shattering crises and the other does not.

Adm'r of Gen. Servs., 433 U.S. 425 (1977), (Cong. Opp'n at 5) and the "court of appeals evaluated the request under multiple standards." *Id.* Second, they inappropriately merged the final two factors—the balance of equities and the public interest—in their own favor.

A simple review of the circuit court's opinion reveals no true framework-analysis was done at the circuit court level. The circuit court dismissed the utility of the various standards; it did not engage with them. *See generally*, App. A. As President Trump briefed in full, the court below simply assigned all but dispositive weight to President Biden's decision to waive President Trump's privilege and then justified complete capitulation to that determination on the basis that January 6th was a uniquely terrible event. That is certainly not a framework analysis, let alone an analysis that considered multiple tests.

Indeed, Respondents and the lower court contend that the applicable standard for reviewing the constitutionality of congressional records requests is only whether the request is on a subject on which legislation could be had. This is plainly not the applicable test, as outlined by this Court in *Mazars*.

Even worse, Respondents and the lower court turn *Mazars* on its head by improperly shifting the burden to prove the constitutionality of a congressional request to the party challenging that request. In fact, Congress, not the party challenging the request, must prove that its request serves a valid legislative purpose. Respondents effectively contend that Congress may launch over-broad information requests, and when those requests turn up potentially responsive

information, the burden then shifts to the individual objecting to the request to explain how the request does not serve a valid legislative purpose in light of the allegedly responsive information. This approach, concocted from whole cloth by Respondents, finds no support in logic or this Court's precedents. Logically, the constitutionality of a congressional records request must be determined on its face and before any party searches for potentially responsive information. And under *Mazars*, Congress must justify the specific request it makes by explaining how the actual requested information will inform specific, proposed legislation. The burden is squarely on Congress, and the analysis is limited to the language of the request itself. The constitutionality of over-broad congressional records requests is not judged by a few potentially responsive documents but by the entire request. In sum, the Constitution does not permit congressional fishing expeditions.

If the Court somehow determines the circuit court did faithfully apply the little law that there is on such a novel issue, the circuit court's application underscores all the more the need for this Court to grant certiorari and clarify the law. The circuit court's decision was subjective and does not provide the legal transparency that creates the reliance critical to executive privilege in the future.

Further, Respondents argue that because the government is a defendant, the final two factors merge. Exec. Opp'n. at 40 and Cong. Opp'n at 5 (citing *Nken v. Holder,* 556 U.S. 418, 435 (2009). It is generally true that when the government is the defendant, it is assumed the government is defending the public interest, thus merging those final factors. But this is a controversy that puts President Trump's

constitutional rights in play, and "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). Therefore, in a case like this, as sometimes happens, the court cannot permit the government to minimize the damage to President Trump's constitutional rights and to the presidency as an institution. *See also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 134 S. Ct. 2751 (2014) (noting that "when [a] law . . . is likely unconstitutional, the[ ] interests [of those the government represents, such as voters] do not outweigh [a plaintiff's interest] in having [its] constitutional rights protected"). This exception is particularly strong here, where President Trump's constitutional rights are tightly wound with the separation powers and the health of our republic's tripartite system.

The factors, especially when considered jointly, both weigh in President Trump's favor. Respondents will not be harmed by delay. Despite their insistence that the investigation is urgent, more than a year has passed since January 6, 2021. Years remain before the next transition of power. The Committee and the Court have time to make a swift but measured analysis of these important issues[2] and make sure that in the rush to conduct its investigation, the Committee does not do irreparable structural damage in the process.

[2] This is especially true if Respondents are truly investigating to legislate on measures that will ensure the Capitol is safe and the process of the transition of power is smooth, rather than pursuing larger political goals, outside the scope of their legitimate authority, that must be accomplished soon to have their full effect.

Finally, as noted above, it is in the public interest to grant President Trump's Application. As President Trump briefed initially, denying his Application would "abdicate the responsibility placed by the Constitution upon the judiciary to ensure that the Congress" has not acted illegitimately in issuing this request for privileged information by effectively denying appeal. *Watkins v. United States*, 354 U.S. 178, 198–99 (1957). Permitting the Committee to evade judicial review is not in the public interest.

CONCLUSION

Despite the dismissive protestations of Respondents, this is an important case that will impact all future Presidents, their trusted advisers, and the efficient functioning of the Executive Branch. President Trump held the highest elective office in the land. His constitutional and statutory right to defend his privilege and the sanctity of that office is clear. The question presented merits the attention of the Court. Absent a stay of the circuit court's mandate, the issues in this case could be mooted. The Application should be granted.

Respectfully submitted,

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