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, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REPLY TO BRIEFS IN OPPOSITION

This Court should reject Respondents' attempt to minimize the unprecedented nature of the congressional records request at issue. This case presents the Court with an important question concerning the parameters of congressional requests for a former President's records and the extent to which executive confidentiality extends beyond a President's term of office. For future Presidents to seek and acquire candid advice from their advisers, they must know the steps necessary to preserve the confidences of those advisers and what steps Congress, or other third parties, must take to invade those confidences. Despite Respondents' beleaguered attempts to avoid review, the Petition presents a strong example of an important and novel question affecting the institution of the presidency.

In addition, members of the Committee have made clear that the request is not arising from any legitimate legislative purpose but rather from their campaign to harm a political rival. Chairman Thompson admitted his goal was to uncover information that could result in a criminal referral to the Department of Justice.[1] Likewise, Committee Co-Chairman Elizabeth Cheney stated that the Committee is "looking at … whether what [President

[1] Tom Hamburger, Jacqueline Alemany, Josh Dawsey, and Matt Zapotosky, *Thompson says Jan. 6 committee focused on Trump's hours of silence during attack, weighing criminal referrals*, WASHINGTON POST (Dec. 23, 2021 at 7:00 P.M. EST), https://www.washingtonpost.com/politics/january-6-thompson-trump/2021/12/23/36318a92-6.

Trump] did constitutes … a crime."[2] Committee member Adam Kinzinger wrote in a recent opinion article that "[w]e cannot move on [from January 6th] without holding those responsible accountable for their actions and for their incitement of that violence."[3] Kinzinger, along with fellow member Adam Schiff, also noted the need to determine President Trump's actions to see if his conduct was "possibly criminal."[4] [5] Committee member Jamie Raskin, who led the failed impeachment attempt against President Trump, noted that he hopes to use the proceedings to block President Trump from being elected to a successive Presidential term.[6]

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[2] Ryan Nobles and Paul LeBlanc, *January 6 investigators don't rule out concluding Trump's actions constituted a crime*, CNN (Jan. 6, 2022 at 11:25 P.M. EST), https://www.cnn.com/2022/01/06/politics/january-6-investigation-criminal-activity-trump/index.html.

[3] Adam Kinzinger, *Jan. 6 committee Republican member: We are in the fight of our lives*, USA TODAY (Jan. 6, 2022 at 8:00 A.M. EST), https://www.usatoday.com/story/opinion/2022/01/06/january-6-committee-defend-democracy/9094023002/.

[4] Ed Pilkington, *Capitol attack: Trump not immune from criminal referral, lawmakers insist*, THE GUARDIAN (Jan. 9, 2022 at 1:11 P.M. EST), https://www.theguardian.com/us-news/2022/jan/09/capitol-attack-trump-criminal-referral-raskin-kinzinger-incompetent-coward-14th-amendment.

[5] Michael S. Schmidt and Luke Broadwater, *Jan. 6 Committee Weighs Possibility of Criminal Referrals*, NY TIMES (Dec. 20, 2021), https://www.nytimes.com/2021/12/20/us/politics/jan-6-committee-trump-criminal-referral.html.

[6] *Id.*

Committee member Raskin has a pecuniary interest in the investigation, arising from a book he recently released concerning the Capitol riot.[7] Committee member Elaine Luria suggested that the goal of the investigation is to "hold people accountable" for the riot at the Capitol.[8] Indeed, nearly every member of the Committee has exposed their true intentions: they are using this investigation as a political ploy to attack President Trump, not for any proper legislative purpose.

The Court has consistently maintained that Congress cannot undertake a legislative investigation of an official if the "gravamen" of the investigation rests on "suspicions of criminality." *Kilbourn v. Thompson*, 103 U.S. 168, 193, 195 (1880). After all, Congress is not a Junior Varsity Department of Justice.

Failure to resolve the issues raised in this Petition will seriously cripple executive privilege, separation of powers, and the protections of the Presidential Records Act. Consequently, the nature of the interactions between the political branches will be necessarily transformed and a "[d]eeply

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[7] Hillel Italie, *Rep. Jamie Raskin's book 'Unthinkable' coming out Jan. 4*, ASSOCIATED PRESS (Sept. 1, 2021), https://apnews.com/article/entertainment-arts-and-entertainment-0668bb7b1a9285e2ba66634ad0343771.

[8] Zachary Cohen and Annie Grayer, *January 6 committee says it would make criminal referrals if 'appropriate,' but that could be a long way off*, CNN (Dec. 21, 2021 at 6:29 P.M. EST), https://www.cnn.com/2021/12/21/politics/january-6-committee-criminal-referrals/index.html.

embedded traditional way[] of conducting government" will be eroded. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). The Petition should be granted.

ARGUMENT

I. This Case Provides An Appropriate Vehicle For Review Of These Weighty Issues.

Respondents attempt to manufacture vehicle objections in resisting the Court's review. In doing so, they make three arguments. First, according to Respondents, they are entitled to the records under any test, obviating the need for the Court to decide the appropriate scope of the protections of a former President. Second, they argue the Executive and Legislative Branches have engaged in political accommodation upon which this Court should not intrude. Third, Respondents say President Trump has failed to make particularized arguments to defend executive privilege and has waived his facial challenge to the validity of the Committee's entire request. Each point is incorrect.

a. The Lower Courts Did Not Engage In Substantive Framework Analysis; The Court Should Grant The Petition To Clarify The Applicable Test.

Respondents suggest that "this case would be a poor vehicle for addressing" the question presented because "the 'accumulation of forces favoring

disclosure is at least equal to, if not greater than, what has supported the disclosure of the privileged materials of even a sitting President.'" Committee Brief in Opp'n at 17 (citing Pet. App. 51a). Further, they point out, both lower courts "analyzed Congress's purpose under the heightened standard in *Mazars*, and the even more demanding test applicable to executive privilege claims [*Nixon*] by a sitting President" and both found "the Select Committee satisfied those standards too." *Id.* (citing Pet. App. 58a, 5a n.2, 57a-67a). Respondents attempt to frame President Trump's request as one that asks "which test applies." *Id.* According to them, President Trump fails every test, so it will "make no difference to the outcome of this case," which test the Court determines is applicable. *Id.* This oversimplified attempt to manufacture a vehicle issue must fail.

Respondents and the circuit 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. The Court firmly rejected this argument less than two years ago in *Mazars*.

Even worse, Respondents and the lower courts 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.

More broadly the circuit court did not engage in a rigorous framework analysis at all. Instead, the court gave all but dispositive weight to the sitting President and pointed to the January 6th riot as the justification to push the request over the finish line. Pet. App. 53a, 61a-62a. This is not an objective application of a clearly defined test. Rather, it is a decision that rests on the subjective discretion of individual judges. This is not a meaningful standard by which a President could assure his advisers of the confidentiality of their advice. President Trump seeks this Court's review to articulate a clear, objective, and manageable standard for the invasion

of such privilege for all future administrations and former Presidents, including himself.

It is crucial the Court clarify what steps a former President must take to challenge a congressional records request for confidential documents and what standards apply to determine if such an invasion of confidentiality is permitted. The Presidential Records Act ("PRA") explicitly gives former presidents the right to contest the release of their documents and contemplates a scenario where the former and incumbent Presidents are at odds on disclosure. The lower courts and Respondents pay lip service to this right as they effectively erase it by giving all but dispositive weight to the incumbent President's determination.

No one disputes that the incumbent President's determination is weighty, but the question of how it is weighed against a former President's objection is an open and important question that merits the Court's consideration. It cannot be, as Respondents argue and as the lower courts essentially endorsed, that this statutory right is merely the ability to voice dissent and be ignored. This Court should not look the other way and pretend this dispute is a one-off. In polarized times, the action of the Committee sets a precedent future Congresses and Presidents will follow.

b. Respondents' Faux Accommodation Runs Afoul Of The PRA And Provides No Basis To Uphold The Request.

Respondents argue that the Executive and Legislative Branches have already reached a compromise, and it would be inappropriate for this Court to intrude upon that political agreement. Even if such a compromise were proper and existed in this case, Congress and the courts must respect the legislative scheme of the PRA.

The two branches, through the legislative process, have already balanced the need for public access (including congressional access) to Presidential records and the need for restrictions on such access to preserve important Executive Branch confidentiality (including constitutional) interests. 44 U.S.C. § 2204(a)(1-6) (expressly listing six categories of Presidential records to be restricted). The inter-branch compromise expressly granted *former* Presidents the power to set the duration (not to exceed 12 years[9]) for how long his own Presidential records shall remain restricted from the public and expressly grants a *former* President, but only the *former* President whose records are sought, the power and authority to waive the restrictions on his own restricted-access Presidential records. 44 U.S.C. § 2204(b)(1)(A-B) (authorizing a *former* President to waive the access restrictions by express agreement or prior publication of the otherwise

[9] The 12-year duration means the access restrictions would remain in place for the next three Presidential elections and Presidential terms of office.

restricted-access information). This compromise between the political branches, however, recognized the role of the judiciary in determining whether "a determination by the Archivist [i.e.. incumbent President] violates the *former President's rights or privileges*." 44 U.S.C. § 2204(e) (emphases added).

Deference to the incumbent President is not respecting interbranch accommodation; it is ignoring the Executive-Congress compromise already enacted into law. The PRA expressly requires the Judicial Branch to resolve disputes whenever an incumbent President attempts to publicly disclose restricted-access Presidential records of a *former* President over the *former* President's objection. In the present case, the District Court and the D.C. Circuit incorrectly, unlawfully, and unconstitutionally resolved this dispute by simply deferring to the incumbent President. This approach is contrary not only to the PRA (to which Congress agreed to be bound) but to executive privilege and separation of powers under the Constitution.

c. The Committee Had The Obligation To Make Particularized Arguments To Justify Its Request But Failed To Do So.

Finally, Respondents assert President Trump failed to make particularized arguments to defend executive privilege and waived his facial challenge to the validity of the Committee's entire request.[10]

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[10] Curiously, Respondents suggest that the overbreadth argument was somehow waived at oral argument. But a

In the most ordinary circumstances, Congress has no "'general' power to inquire into private affairs and compel disclosures." *Trump v. Mazars USA, LLP,* 140 S. Ct. 2019, 2032 (2020) (citing *McGrain v. Daugherty*, 273 U.S. 135, 173-74 (1927)). It must articulate a "valid legislative purpose." *Quinn v. United States*, 349 U.S. 155, 161 (1955). There is a higher bar for proving a valid legislative purpose when Congress contemplates legislation that "raises constitutional issues, such as legislation concerning the Presidency." *Mazars,* 140 S. Ct. at 2036. And when a President's records are the subject of the request, Congress must "adequately identif[y] its aims and explain[] why the President's information will advance its consideration of the possible legislation." *Id.*

Respondents argue that their request met all the tests articulated by this Court, *including the one*

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reading of the transcript quickly dispatches this argument and shows that the question of constitutional and statutory overbreadth was specifically presented to the court. D.C. Cir. Tr. 14:21-15:23. Indeed, at argument, Judge Millett recognized that President Trump's overbreadth argument was not freestanding but rather "part of determining whether those documents should be withheld under either the constitutional executive privilege or the 2204(a) presidential communications privilege." *Id.* at 15:7-10. Indeed, President Trump's overbreadth argument is not a freestanding objection, similar to those used (and perhaps overused) in civil discovery. The burden in those objections is often on a producing party, who must use substantial resources to hunt for responsive documents. Here, the overbreadth argument is rooted in the constitutional and statutory rights of former Presidents. The burden at issue does not arise from a voluminous document review but rather on the broad invasion of a President's confidential deliberative records.

that governs the records of a sitting president. Committee Brief in Opp'n at 14. The Committee has made broad references to the type of legislation it might pursue with the records it requests. It is not even entirely clear from the Committee's statements if it is investigating January 6th as an isolated incident or if it is considering the election challenges more broadly.[11]

Respondents have failed to meet the exacting standards, but if Congress has indeed articulated a sufficiently detailed justification under controlling Supreme Court precedent, this is the perfect case for the Court to take up and clarify objective and clear guideposts. Contrary to Respondents' argument, this Court's review would be not only meaningful, but critical to these important issues, the reliance interests that undergird executive privilege, and the constitutional problems with Congress acting outside the scope of its authority.

II. President Trump's Correct Construction Of The Relevant Statutory And Constitutional Provisions Weighs In Favor Of His Petition.

[11] The conflation of January 6th—the riot at the Capitol Building—with the broader questions about the integrity of the 2020 election, is, of course, grossly improper. President Trump and every American have the right to question whether an election was fair. An attempt by Congress to limit such speech and activity through legislation would be troubling indeed.

a. Respondents Have Not Shown A Substantial Need For The Documents, Nor Have They Articulated A Sufficiently Narrow Legislative Purpose To Breach Executive Privilege.

On the merits, Respondents are again wrong, both when they argue executive privilege must yield to their purported "sufficient showing of need," and when they assert they have demonstrated a legitimate legislative purpose. Committee Brief in Opp'n at 20; Executive Brief in Opp'n at 25. They have not met the constitutional or statutory standards to merit receiving these documents.

The Congressional Respondents cannot escape their failure to seek information from secondary sources *before* propending their records request. The PRA's provisions do not make the existence of Presidential Records a *fast pass* to avoid the effort it would take to locate non-confidential sources. As previously discussed, they have also failed to properly articulate an appropriate legislative purpose.

The burden is on Congress to justify access to such sensitive documents, and the Committee has failed to carry its burden. If the Committee's alleged standard is sufficient, it is nearly impossible to conceive of a request that would be barred under the Presidential Records Act or executive privilege. Congress could invade the privilege of a coordinate branch as a matter of course, destroying the executive privilege for future administrations.

b. The Balance Of Equities Favor President Trump.

Respondents argue that President Trump has not shown this decision will harm the institution of the presidency, but that conclusion is clear. Respondents have feigned political naivete throughout this case, but politics is the lifeblood of a democratic republic, and the consequences of this case are clear. We are living through an intense, hostile political period, and this dispute stems from the most divisive political struggle in recent American history.

III. The PRA Specifically Preserves A President's Rights And Privileges Concerning Presidential Records.

Respondents make brief reference to the records belonging solely to the United States, Executive Brief in Opp'n at 28, but the Presidential Records Act expressly *preserves* a former President's "rights and privileges," including "any constitutionally-based privilege." 44 U.S.C. § 2204(e) (granting jurisdiction to Judicial Branch to protect a *former* President's "rights or privileges") (emphasis added); 44 U.S.C. § 2204(c)(2) (stating *"[n]othing in this Act shall* be construed to confirm, *limit*, or expand *any constitutionally-based privilege* which may be *available to* an incumbent or *former President*") (emphases added). Even 44 U.S.C. § 2205(2), which expressly grants Congress a limited exception to the PRA's 2204(a)(1-6) restrictions on public access to a former President's Presidential

records, makes clear the congressional exception (among others) is "subject to any rights, defenses, or privileges which . . . any . . . person may invoke," including a former President. 44 U.S.C. § 2205(2). This is a chief issue in the current case. The PRA seeks to protect the confidentiality interests of a former President while preserving records for the public good and history.

CONCLUSION

The question presented to the Court is clean, clear, and serious; the Petition should be granted.

Respectfully submitted,

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