No. 21A272

IN THE

Supreme Court of the United States

DONALD J. TRUMP,
Applicant,

v.

BENNIE G. THOMPSON, ET AL.,
Respondents.

On Application for Stay of Mandate Pending Disposition of Petition for Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit and Injunction Pending Review

MOTION FOR LEAVE TO FILE AND BRIEF OF FORMER EXECUTIVE BRANCH LAWYERS AS *AMICI CURIAE* IN OPPOSITION TO APPLICATION FOR INJUNCTION PENDING REVIEW

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December 29, 2021

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Pursuant to Supreme Court Rule 37.2(b), *amici curiae* respectfully move for leave to file the attached brief in support of Respondents. Applicant Donald J. Trump and Respondents Bennie G. Thompson and the U.S. House Select Committee to Investigate the January 6th Attack on the United States Capitol consent. Respondents David S. Ferriero and the National Archives and Records Administration take no position.

Amici are former Department of Justice ("DOJ") and White House lawyers who are familiar with Congress's broad oversight authority, as well as the process of negotiation and accommodation that the executive branch generally engages in to determine how Congress's oversight authority can be respected in a manner that is consistent with executive branch

interests. As former DOJ and White House lawyers, *amici* respect those executive branch interests, but they also understand that in some cases those interests are outweighed by Congress's need for information.

Amici thus have a strong interest in ensuring that this litigation is resolved in a manner that considers the interests of both Congress and the executive branch. Here, after losing his bid for reelection, the President attended a rally funded in significant part by a donor to his campaign and encouraged his supporters to thwart Congress's certification of those election results. Congress is now investigating those events and determining how to prevent unsuccessful candidates from attempting to undermine our democracy in the future. *Amici* believe that the documents at issue should be turned over given, among other things, the importance of the House investigation into the January 6th attack and the current president's reasonable determination that executive privilege should not be asserted in this case.

Permitting the filing of the proposed brief would offer an important perspective to this Court: that former president Trump's arguments are at odds with our nation's rich history of congressional investigations. The proposed brief also explains why a request for the records of a former president do not raise the same separation of powers concerns as a request for the records of an incumbent president, and why a former president's assertion of executive privilege is due at most limited consideration when the incumbent president declines to assert the privilege.

For the foregoing reasons, *amici* respectfully request that they be allowed to file the attached brief of *amici curiae*.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

Amici are former Department of Justice ("DOJ") and White House lawyers who are familiar with Congress's broad oversight authority, as well as the process of negotiation and accommodation that the executive branch generally engages in to determine how Congress's oversight authority can be respected in a manner that is consistent with executive branch interests. As former DOJ and White House lawyers, *amici* respect those executive branch interests, but they also understand that in some cases those interests are outweighed by Congress's need for information. Here, after losing his bid for reelection, the President attended a rally funded in significant part by a donor to his campaign and encouraged his supporters to thwart Congress's certification of those election results. Congress is now investigating those events and determining how to prevent unsuccessful candidates from attempting to undermine our democracy in the future. *Amici* believe that the documents at issue should be turned over, given, among other things, the importance of the House investigation into the January 6th attack and given the current president's reasonable determination that executive privilege should not be asserted in this case.

A full listing of *amici* appears in the Appendix.

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[1] Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

On January 6, 2021, following months of efforts to undermine public confidence in the integrity of the 2020 presidential election, then-President Trump, having just lost his bid for re-election, implored a crowd of thousands of his political supporters to "fight like hell" or they wouldn't "have a country anymore." Bryan Naylor, *Read Trump's Jan. 6 Speech, A Key Part Of Impeachment Trial*, NPR (Feb. 10, 2021), https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial. Soon after, the President's supporters breached the Capitol in a bid to prevent Congress from certifying the election results. This attack resulted in five deaths, at least 140 assaults, and the most significant destruction of the capitol complex since the War of 1812. *The Attack: The Jan. 6 Siege of the U.S. Capitol Was Neither a Spontaneous Act Nor an Isolated Event*, Wash. Post (Oct. 31, 2021), https://www.washingtonpost.com/politics/interactive/2021/jan-6-insurrection-capitol/.

After regaining control of the Capitol, clearing the debris, and certifying the election results, the House of Representatives formed a committee to investigate the attack that put our democracy at risk. *See* H.R. 503, § 6. Charged with determining what laws and other measures might be necessary to strengthen our democratic institutions against attempts to undermine them, as well as what additional security measures at the Capitol might be appropriate, H.R. 503, § 4, the House of Representatives Select Committee to Investigate the January 6th Attack ("Committee") requested records of White House communications related to the January 6th events from the

National Archives pursuant to the Presidential Records Act ("PRA").

While the attack on the Capitol is unprecedented, the investigation here is just the latest in a long line of inquiries designed to aid Congress's efforts to legislate. And this Court has repeatedly affirmed the breadth of Congress's power to investigate, recognizing that courts must uphold a congressional request for records so long as it is not "plainly incompetent or irrelevant to any lawful purpose [of Congress] in the discharge of [its] duties." *McPhaul v. United States*, 364 U.S. 372, 381 (1960) (internal quotations omitted).

The documents requested here plainly satisfy that standard, as they will aid the Committee's investigation into numerous pieces of legislation Congress might pass or amend, including laws that would better protect the Capitol complex from violent attacks, possible amendments to the Electoral Count Act, and legislation to enforce section 3 of the Fourteenth Amendment. Moreover, former president Trump's arguments that they should not be turned over are without merit. This Court should deny the request to impose an injunction pending further review.

ARGUMENT

I. Legislative Investigations, Including of Former Presidents, Have a Long History.

The practice of legislative oversight predates the birth of the United States, with "roots [that] lie deep in the British Parliament," James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 159 (1926), and American colonial legislatures quickly replicated the British practice, C.S. Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. Pa. L. Rev. 691, 708

(1926); *see id.* at 709 (describing 1742 investigation by Pennsylvania Assembly into "riots at an election").

In the decades following the nation's Founding, congressional committees regularly conducted investigations concerning "the enactment of new statutes or the administration of existing laws," *Watkins v. United States*, 354 U.S. 178, 192-93 (1957), as well as into presidents and their cabinets, *see, e.g.*, George Galloway, *Investigative Function of Congress*, 21 Am. Pol. Sci. Rev. 47, 48 (1927) (presidents were "the subject of investigation twenty-three times" between 1789 and 1925).

Former presidents were also often the subjects of congressional investigations. In 1846, former presidents Tyler and Quincy Adams participated in a House committee's investigation of Secretary of State Webster's alleged misuse of a contingent fund during Tyler's presidency. *See* H.R. Rep. No. 29-686, at 22 (1846); *id.* at 27. Decades later, former president Theodore Roosevelt also participated in congressional investigations. *See*, *e.g.*, *Investigation of the United States Steel Corporation: Hearing Before the H. Spec. Comm.*, 62d Cong. 1369-92 (1911) (testimony); *Campaign Contributions: Hearings Before the S. Subcomm. on Privileges and Elections*, 62d Cong. 177-96 (1912) (letter from Roosevelt); *id.* at 469-527 (testimony). These former presidents did not raise separation of powers concerns. *See* H.R. Rep. No. 29-686, at 28; *Campaign Contributions*, *supra*, at 473, 486.

Congressional investigations of presidents have continued to the present day, and incumbent presidents have generally engaged in a process of negotiation and accommodation to determine how Congress's oversight authority can be respected in a manner that is sensitive to executive branch interests. Significantly, incumbent presidents have often cooperated

with congressional investigations and explicitly waived executive privilege. When Congress initially investigated the Watergate break-in, President Nixon waived executive privilege for his aides who testified before the Senate Select Committee. Christopher Lydon, *President Ends Insistence that Executive Privilege Bars Testimony*, N.Y. Times, May 23, 1973, at 29. Likewise, when Congress investigated the Iran-Contra affair, President Reagan and President George H.W. Bush both waived executive privilege for executive officials who testified before Congress. Mark J. Rozell, *Executive Privilege: The Dilemma of Secrecy and Democratic Accountability* 121 (1994). And President George W. Bush and Vice President Cheney spent over three hours answering questions from the national commission investigating the 9/11 attacks. Philip Shenon & David E. Sanger, *Bush and Cheney Tell 9/11 Panel of '01 Warnings*, N.Y. Times (Apr. 30, 2004), https://www.nytimes.com/2004/04/30/us/threats-responses-investigation-bush-cheney-tell-9-11-panel-01-warnings.html. Even Trump waived executive privilege to let James Comey testify before Congress "in order to facilitate a swift and thorough examination" of the facts surrounding Trump's abrupt firing of Comey as he led an investigation into collusion between Russia and the Trump campaign. Matt Ford, *President Trump Checks His Executive Privilege*, The Atlantic (June 5, 2017), https://www.theatlantic.com/politics/archive/2017/06/trump-comey-executive-privilege/529224/.

II. The Text and History of the Presidential Records Act Support the Committee's Request for the Presidential Records Sought in This Case.

Congress passed the Presidential Records Act to balance Congress's "broad" investigative authority, *see*

Watkins, 354 U.S. at 187, and the President's need to receive "full and frank" advice, *Gen. Servs.*, 433 U.S. at 449.

Before the PRA was passed, presidents traditionally regarded their papers as personal property, but there were problems with this approach. First, it led to the occasional loss of important historical records. *See* Carl Bretscher, *The President and Judicial Review under the Records Act*, 60 Geo. Wash. L. Rev. 1477, 1481 & n.34 (1992). Second, it gave presidents an outsized ability to prevent disclosure of their papers at the expense of the needs of the other branches of government and the public. *Id.*

The Watergate scandal ushered in two significant developments. First, this Court clarified that executive privilege is not absolute and can yield to other needs, especially when the claim of privilege is based "only on the generalized interest in confidentiality." *United States v. Nixon*, 418 U.S. 683, 706, 713 (1974). Second, Congress passed a law aimed at preserving the Watergate tapes and related presidential records: the Presidential Recordings and Materials Preservation Act ("PRMPA"), Pub. L. 93-526, 88 Stat. 1695 (1974). Among other things, that law directed the General Services Administration to promulgate regulations providing public access to the tapes, in line with the "need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power" that occurred during Watergate, *id.* § 104 (a)(1), 88 Stat. at 1696. The law also preserved the ability of "any party[]" to assert "any legally or constitutionally based right or privilege" which might limit access to the recordings. *Id.* § 104(a)(5), 88 Stat. 1696.

This Court sanctioned this framework for dealing with presidential papers in *Nixon v. Administrator of General Services*, holding that the PRMPA struck an appropriate balance between the "substantial public interests" in preserving access to Nixon's records and Nixon's limited "right to assert the privilege." 433 U.S. 425, 453, 455 (1977).

Following *General Services*, Congress turned its attention to enacting legislation that would apply to all future presidents. *See* H.R. Rep. No. 95-1487, at 6-7 (noting that the principles established by *General Services* "would govern legislation dealing more broadly with control of and access to Presidential papers"). The primary purpose of this legislation was to "establish the public ownership" of presidential papers and to ensure "the preservation and public availability of these records at the end of a Presidential administration." *Id.* at 2.

Congress adopted a framework that closely tracked the PRMPA model endorsed by *General Services*. While allowing a president to restrict access to certain categories of papers for up to twelve years, 44 U.S.C. § 2204, it gave other government actors the ability to access those records when necessary for the official "business" of the incumbent president or Congress. 44 U.S.C. § 2205(2).

In sum, Congress enacted the PRA in the wake of a scenario that is remarkably similar to the one this Court faces today: a former president attempting to withhold documents relevant to a legitimate congressional investigation. In anticipating that such conflicts might recur, the PRA ensured that presidential records would forever be public property with a presumption in favor of disclosure.

III. The Committee Is Entitled to the Presidential Records That It Is Seeking.

A. Permitting Congress to Access the Records of a Former President Does Not Raise the Same Separation of Powers Concerns as Permitting It to Access the Records of a Sitting President.

Trump argues that the Committee's request implicates the same separation of powers concerns that this Court held apply to congressional requests for information from sitting presidents in *Mazars*. Stay Appl. 17-18. This Court crafted the *Mazars* test, however, to analyze the constitutionality of subpoenas that create a "clash between rival branches of government." *Trump v. Mazars*, 140 S. Ct. 2019, 2034 (2020). Because the request here does not target the personal records of a sitting president, the same separation of powers concerns are not present.

Critically, the Constitution gives former presidents no role in the "ongoing institutional relationship [between] the 'opposite and rival' political branches." *Id.* at 2033-34 (quoting *The Federalist No. 51*, at 349 (J. Cooke ed., 1961) (James Madison)). Article II states that the president "shall hold his office during the term of four years," U.S. Const. art. II, § 1, unless he is sooner removed or replaced, *id.* §§ 1, 4. To the Framers, the president's limited tenure was necessary to distinguish American leaders from European monarchs. *The Federalist No. 69*, *supra*, at 470 (Alexander Hamilton); *see* 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 200 (Jonathan Elliot ed., 1836) (Statement of Richard Law) ("[o]ur President is not a King").

As a result, when the subject of a records request is not a sitting president, the request does not pit "the

political branches against one another," *Mazars*, 140 S. Ct. at 2034, nor does it give Congress an "institutional advantage," *id.* at 2036. Members of Congress have no reason to use information requests to control the behavior of former presidents because they do not have to work with them on governance matters. And it is impossible for a congressional investigation to "exert an imperious contro[l] over the Executive Branch," *id.* at 2034, when the subject of the investigation no longer controls the executive branch. Finally, if the subject of the request is not in office, there is no danger that the request will transform the "established practice of the political branches," *id.*, with respect to congressional information requests.

In sum, as Theodore Roosevelt explained after his presidency, a former president is "like any other citizen" and has a "plain duty to try to help [a congressional] committee or respond to its invitation, just as anyone else would respond." *Investigation of the United States Steel Corporation*, *supra*, at 1392.

B. Under this Court's Precedent, a Former President's Assertion of Executive Privilege Is Due at Most Limited Consideration When the Incumbent President Declines to Assert the Privilege.

While former presidents may retain some ability to assert executive privilege because the particular interests served by executive privilege—that is, ensuring that a president "receive[s] the full and frank submissions of facts and opinions upon which effective discharge of his duties depends," *Gen. Servs.*, 433 U.S. at 449—would be undermined if the privilege disappeared entirely when a president left office, this Court has rejected the argument that the privilege protects incumbents and ex-presidents in the same way, *id.* at 451 ("[t]he expectation of the confidentiality of

executive communications . . . has always been limited and subject to erosion over time").

In *General Services*, this Court explained that while the privilege serves one, limited purpose for former presidents, ensuring "full and frank" counsel from their advisors during their term of office, *id.* at 449, the role it serves in protecting incumbents is more expansive, also guarding against "burdensome requests for information which might interfere with the proper performance of their duties," *id.* at 448. Further, incumbent presidents face "political checks" against abuse of the privilege that former presidents do not, meaning that a former president's claim of privilege should face more stringent judicial scrutiny. *Id.* Relatedly, an incumbent is incentivized to protect confidences of a predecessor when doing otherwise would "discourage candid presentation of views by his contemporary advisers," *id.*, thereby placing the incumbent "in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly," *id.* at 449. Therefore, because the privilege is not "for the benefit of the President as an individual, but for the benefit of the Republic," when the incumbent president does not support a former president's claim of executive privilege, this necessarily "detracts from the weight" of the former president's claim. *Id.*

C. The Committee's Request for Documents Serves a Valid Legislative Purpose, and President Biden Affirmatively Declined to Assert Executive Privilege.

As noted above, this Court must uphold a congressional request for records so long as it is not "plainly incompetent or irrelevant to any lawful purpose [of Congress] in the discharge of [its] duties." *McPhaul*, 364 U.S. at 381 (internal quotation omitted).

The Committee's request plainly satisfies this test. On January 6th, the Capitol was attacked by a violent mob that sought to undermine our democratic form of government. This attack occurred after the President, having lost his bid for reelection, attended a rally funded in large part by a donor to his campaign and encouraged his supporters to thwart Congress's certification of those election results. *See supra* at 1-2; Lisa Kim, *Trump Campaign Megadonor And Publix Heiress Reportedly Spent More To Promote Jan. 6 Rally Than Previously Known*, Forbes.com (Oct. 16, 2021). The Committee now seeks to understand that attack and how similar attacks can be prevented in the future.

There are numerous pieces of legislation that Congress might choose to pass in response to this attack. For example, the Committee is currently considering laws that would "prevent future acts of violence . . . and domestic violent extremism" and enhance the security of the capitol complex in order to ensure that Congress remains able to fulfill its legislative and other constitutional responsibilities without interference. H.R. 503, § 4(c); *cf.* 2 U.S.C. § 1901 (establishing Capitol Police). In addition, the Twelfth Amendment requires Congress to count the certificates of votes submitted by the state electors, *see* U.S. Const. amend. XII, and Congress has laid out its process for doing so in the Electoral Count Act, *see* 3 U.S.C. § 15. The records the Committee is seeking may help inform Congress's determination about whether it should amend the Electoral Count Act to modify this procedure and make it less vulnerable to attack. On top of that, Congress is also empowered to enforce the provisions of the Fourteenth Amendment, *see* U.S. Const. amend. XIV, § 5, including its prohibition against anyone who had taken an oath to support the Constitution from holding

office again if they "engaged in insurrection or rebellion" against the Constitution, U.S. Const. amend. XIV, § 3. The records the Committee seeks may inform legislative efforts to enforce that prohibition.

Significantly, Congress need not point to any specific proposed legislation. "To be a valid legislative inquiry there need be no predictable end result." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 509 (1975). Even requests for a sitting president's papers can be justified by Congress's investigation of "*possible* legislation." *Mazars*, 140 S. Ct. at 2036 (emphasis added).

Trump makes much of this Court's admonition in *Mazars* that Congress may not investigate the president "as a case study." Stay Appl. 13. But this Court made that statement in the context of its determination that Congress should not seek just any personal paper of a president that may tangentially relate to subjects within its legislative jurisdiction: "financial records could relate to economic reform, medical records to health reform, school transcripts to education reform." *Id.* at 2034. That is decidedly not what the Committee is doing here. The Committee is not seeking Trump's personal papers. And it is not studying general social phenomena; it is investigating a physical attack on Congress that was aimed at thwarting the peaceful transfer of power.

Moreover, this Court should not prohibit disclosure of the documents on executive privilege grounds because President Biden has affirmatively declined to assert executive privilege over any of the requested documents based on his considered judgment that Congress's need for them to investigate the January 6th attack outweighs any potential benefit to the executive branch in withholding them.

Here, the President has determined that the records that the Committee is seeking pertain to conduct that "extends far beyond typical deliberations concerning the proper discharge of the President's constitutional responsibilities," *id.*, meaning that releasing them will have little impact on the President's ability to receive "full and frank" advice from his staff, *Gen. Servs.*, 433 U.S. at 449. *See* Letter from Dana Remus, White House Counsel, to David S. Ferriero, Archivist of the United States (Oct. 8. 2021), *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/12/letter-from-dana-a-remus-counsel-to-the-president-to-david-ferriero-archivist-of-the-united-states-dated-october-8-2021/; *cf. Nixon*, 418 U.S. at 706 ("neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances").

The President also concluded that "Congress has a compelling need" for the documents, given that the January 6th attack "reflects a clear and apparent effort to subvert the Constitution itself." Remus Letter, *supra.* As this Court has made clear, the important interests served by executive privilege can be outweighed by other compelling interests. *See Gen. Servs.*, 433 U.S. at 453 (Congress's need to "facilitat[e] a full airing of the events" leading to Nixon's resignation outweighed executive privilege); *Nixon*, 418 U.S. at 713 ("[t]he generalized assertion of privilege *must* yield to the demonstrated, specific need for evidence in a pending criminal trial" (emphasis added)). It is difficult to imagine a more compelling interest than the House's interest in determining what legislation might be necessary to respond to the most significant attack on the Capitol in 200 years and the effort to undermine

our basic form of government that that attack represented.

CONCLUSION

For the foregoing reasons, this Court should not grant the requested injunction.

Respectfully submitted,

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APPENDIX:

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