No. 21A272

IN THE

Supreme Court of the United States

DONALD J. TRUMP,
Applicant,

v.

BENNIE G. THOMPSON, ET AL.,
Respondents.

On Application for a Stay of Mandate and an Injunction Pending Review

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OPPOSITION TO APPLICATION FOR A STAY OF MANDATE AND AN INJUNCTION

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The House of Representatives Select Committee to Investigate the January 6th Attack on the United States Capitol and Chairman Bennie G. Thompson (collectively, the Congressional Respondents) respectfully file this memorandum in opposition to former President Donald J. Trump's application for a stay of the mandate and an injunction pending the disposition of Applicant's petition for a writ of certiorari.

INTRODUCTION

Applicant Donald J. Trump asks this Court to enjoin the Respondents Archivist of the United States and the National Archives and Records Administration from providing requested documents to the Select Committee. Applicant seeks this relief even though he has not made any particularized arguments explaining why disclosure of the specific documents at issue will produce the requisite harm. Applicant cannot meet his burden for obtaining the extraordinary relief he requests from this Court.

The House of Representatives established the Select Committee to investigate the January 6 assault on the United States Capitol as Congress sought to carry out its Constitutional role to count the electoral votes. As authorized by Article I, the Presidential Records Act, and House resolution, the Select Committee requested from the Executive Branch Presidential records relating to the events of that day. After a careful review, and in light of the extraordinary events of January 6, President Biden concluded that granting the Select Committee access to certain of the requested records is in the best interest of the United States and that an assertion of executive privilege therefore is not justified. Applicant, however, filed suit to enjoin the Select

Committee from receiving those records. The district court and the court of appeals carefully and correctly concluded that Applicant could satisfy none of the factors justifying such relief. Applicant has given no valid reason for this Court to intervene and grant the extraordinary relief he seeks.

The court of appeals' decision rests on a correct application of this Court's precedents, and this Court is therefore unlikely to grant certiorari and reverse the judgment below. Further, the requested injunctive relief, even on a temporary basis, would result in an unprecedented intrusion by this Court into the ongoing process of accommodation between the Legislative and Executive branches. And it would cause irreparable harm to the Select Committee by denying it the records it urgently needs to inform its ongoing investigation, including upcoming interviews of scores of witnesses. Obtaining this information promptly is necessary to fulfill the Select Committee's responsibility to understand the events of January 6, and recommend timely legislative changes designed to ensure that those events never recur. The Court should deny the application.

STATEMENT

The relevant legal and factual background is set forth in the Congressional Respondents' opposition to Applicant's petition for a writ of certiorari. *See* Br. in Opp. 2-15.

Particularly relevant here, on December 9, 2021, when the court of appeals issued its opinion affirming the denial of Applicant's motion for a preliminary injunction, the court ordered that its previously issued administrative injunction

would dissolve in 14 days unless Applicant filed a motion for an injunction pending review with this Court, in which event the administrative injunction would dissolve upon the Court's disposition of that motion. Pet. App. 77a n.20.

ARGUMENT

An injunction from this Court, as Applicant seeks here, is extraordinary relief that "demands a significantly higher justification than a request for a stay" because an injunction "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (cleaned up). Accordingly, such relief is granted "only in the most critical and exigent circumstances." *Brown v. Gilmore*, 533 U.S. 1301, 1301 (2001) (Rehnquist, J., in chambers) (citation omitted). Although Applicant frames his request as seeking to stay the court of appeals' mandate under 28 U.S.C. § 2101(f), such a stay will not provide Applicant the affirmative relief he seeks from this Court. Rather, "[t]he only source of authority for this Court to issue an injunction is the All Writs Act, 28 U.S.C. § 1651(a)," *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403 (2012) (Sotomayor, J., in chambers), an extraordinary remedy requiring extraordinary justification.

To receive an injunction pending certiorari, the "applicant must demonstrate that the legal rights at issue are indisputably clear." *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (cleaned up). And, as with any injunction, Applicant must demonstrate that he is likely to succeed on the merits—*i.e.*, that this Court is likely to grant certiorari and reverse the court of appeals' judgment—and that the remaining

traditional injunction factors favor relief. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). In evaluating the likelihood of success on the merits when an applicant seeks an injunction pending review from this Court, the proper analysis requires "not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review in the case." *Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring).

Far from being indisputably correct, Applicant's claims have been rejected by every judge to consider them. The unanimity among the lower courts and the alignment of the Executive and Legislative Branches counsel sharply against injunctive relief from this Court. Even if his motion is reviewed under the more forgiving standard applicable to an application for a stay, Applicant is not entitled to relief. He has not established that this Court is likely to grant review and reverse the decision of the court of appeals. Further, as below, Applicant 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. Applicant's request would override the respective judgments of both political branches and impede the urgent business of the Select Committee to investigate the attack on Congress and prevent future attacks. Indeed, Applicant's requested injunction would constitute an unprecedented judicial intrusion into the accommodation process between Congress and the Executive Branch.

Applicant has not carried his burden of showing that the extraordinary remedy of an injunction pending review is justified here, and the application should be denied.

I. This Court Is Unlikely To Grant Certiorari And Reverse The Court Of Appeals' Decision

For the reasons set forth in the Congressional Respondents' brief in opposition to Applicant's petition for a writ of certiorari, this Court's review is unwarranted. *See* Br. in Opp. 15-36. As explained in depth in the brief in opposition, the court of appeals faithfully applied this Court's precedents in rejecting Applicant's attempt to block the Archivist from providing three tranches of requested documents to the Select Committee. That decision does not conflict with the opinions of this Court or any other court. Further, because the court of appeals evaluated the request under multiple standards pressed by Applicant—including ones applicable to a sitting President—and because Applicant has made no particularized arguments for withholding the specific documents at issue, this case is an exceedingly poor vehicle for review. This Court is thus unlikely to grant review and reverse the decision of the court of appeals.

II. The Lack Of Irreparable Injury To Applicant And The Balance Of The Equities Preclude Injunctive Relief

To obtain an injunction from this Court, Applicant must also satisfy the remaining traditional factors required for such relief. That is, he must show that he "is likely to suffer irreparable harm" in the absence of an injunction, that the "balance of equities" tips in his favor, and that "an injunction is in the public interest." *Winter*, 555 U.S. at 20. The latter two factors merge where, as here, the injunction would run against the Government. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

A. Applicant Has Not Established Irreparable Harm

As in the courts below, Applicant fails to show that he will suffer irreparable harm without an injunction barring disclosure of the requested documents. Applicant contends that disclosure will irreparably harm him because "[o]nce disclosed, the information loses its confidential and privileged nature." Appl. 24. But that is not sufficient. Applicant must show harm to the interest the relevant privilege protects. *See Rubin v. United States*, 524 U.S. 1301, 1301 (1998) (Rehnquist, J., in chambers). Applicant has not shown, and cannot show, that the disclosure of the specific documents at issue would harm the purpose behind executive privilege.

Executive privilege exists to "safeguard[] the public interest in candid, confidential deliberations within the Executive Branch." *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2032 (2020). The incumbent President—who is best situated "to assess the present and future needs of the Executive Branch," *Nixon v. Adm'r of Gen. Servs.* (*GSA*), 433 U.S. 425, 449 (1977)—has determined that "an assertion of executive privilege is not in the best interests of the United States." Pet. App. 72a (citation omitted). In contrast to the considered judgment of the current President, Applicant has offered nothing but generalized assertions of harm. As the court of appeals concluded, that is far from sufficient to establish the irreparable harm required for an injunction. Pet. App. 71a-73a.

Applicant's claim (Appl. 24) that disclosure to Congress "would irreparably harm the institution of the Presidency" is unfounded. Indeed, "there has never been an expectation that the confidences of the Executive Office are absolute and

unyielding," *GSA*, 433 U.S. at 450, and there is no basis to "conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure," *United States v. Nixon*, 418 U.S. 683, 712 (1974). History is replete with examples of Presidents (including Applicant himself) declining to assert executive privilege in particular situations without harming the privilege's purposes. *See* Pet. App. 45a-46a. Moreover, the "rare and formidable alignment of factors" favoring disclosure here, Pet. App. 40a, is highly unusual—there is no reason to believe that disclosure under these unique circumstances will harm the candid advice the privilege is meant to protect. Put simply, Applicant offers nothing to overcome the determination of the current President (and the judgment of both the district court and the court of appeals) that disclosure will not harm the Executive Branch's interests.

Applicant also suggests (Appl. 22-23) that his personal constitutional rights are at stake, but executive privilege is for the "benefit of the Republic," "not for the benefit of the President as an individual." *GSA*, 433 U.S. at 449. And, contrary to Applicant's suggestion in his Petition that the records at issue are his "personal records" (Pet. 31), the records belong to the United States pursuant to the Presidential Records Act. 44 U.S.C. § 2202. That Act ended the practice of personal ownership of Presidential records, providing instead that records created by Presidents are owned by the people they serve. Pub. L. No. 95-591, § 3 (1978).

Nor is there any support for Applicant's suggestion (Appl. 23) that, to the extent he is entitled to *assert* executive privilege, he is also entitled to preliminary

injunctive relief. Applicant's executive privilege arguments have been considered and rejected by two courts. And, contrary to Applicant's characterization (Appl. 23), the court of appeals did not hold that the "current President alone can determine the best interests of the Executive Branch." Rather, it held that where, as here, a former President sues in his official capacity seeking to enjoin the disclosure of records in the custody of the United States, the former President must establish harm to the interests of the Executive Branch to be entitled to relief. Pet. App. 71a. Applicant has failed to do so.

B. The Select Committee And The Public Interest Would Be Harmed By Injunctive Relief

The Legislative and Executive Branches each believe that the public interest lies in the prompt disclosure of this information to the Select Committee to aid an ongoing legislative process. Both the district court and the court of appeals have agreed. Pet. App. 74a-75a; 124a-125a. Applicant offers no reason to supplant the determinations of both political branches. *See Nken*, 556 U.S. at 435; *INS v. Legalization Assistance Project of Los Angeles Cnty. Fed'n of Lab.*, 510 U.S. 1301, 1306 (1993) (O'Connor, J, in chambers).

1. It would be unprecedented for this Court to disrupt ongoing negotiations over the exchange of information between the Executive and Legislative Branches. As this Court has explained, it has "a duty of care to ensure that [it] not needlessly disturb the compromises and working arrangements that [the two elected] branches ... themselves have reached." *Mazars*, 140 S. Ct. at 2031 (citation omitted). Although courts have occasionally been called to resolve challenges to the Executive Branch's

withholding of documents based on executive privilege, this Court has made clear that courts should be wary of interfering with the "hurly-burly, the give-and-take of the political process between the legislative and the executive." *Id.* at 2029 (citation omitted). Moreover, it would be extraordinary for an Article III court to *prohibit* the Executive Branch from providing Presidential records to Congress based on the separation of powers.

The longstanding practice of "give-and-take" is ongoing with respect to the Select Committee's request: After discussions with White House officials, the Select Committee has shown a willingness to defer its requests as to certain pages of responsive records, and the Select Committee and the Executive Branch remain in active conversations about future tranches of records. *See* Letter from Jonathan Su, Deputy Counsel to the President, to Kristin Amerling, Deputy Staff Dir. and Chief Counsel for the Select Committee (Dec. 16, 2021), https://perma.cc/FR5G-XEP2. Applicant's requested injunction against the ongoing accommodation between the political branches would be "a significant departure from historical practice." *Mazars*, 140 S. Ct. at 2031.

The unprecedented nature of Applicant's requested relief—and the destabilizing implications this intrusion would have on the balance of powers—weigh decisively against granting his application. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).

2. Further, an injunction would also cause direct, substantial, and immediate harm to the Select Committee and ongoing legislative activities. "The congressional

power to obtain information is broad and indispensable," because "[w]ithout information, Congress would be shooting in the dark, unable to legislate wisely or effectively." *Mazars*, 140 S. Ct. at 2031 (cleaned up); *see also id.* ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." (cleaned up)). Without the information at issue, the Select Committee "may not be able to do the task assigned to it by Congress," and for that reason courts have a "duty" not to interfere with ongoing Congressional investigations. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 505, 511 & n.17 (1975).

The Select Committee's work is of the highest importance and urgency: investigating one of the darkest episodes in our nation's history, a deadly assault on the United States Capitol and Congress, and an unprecedented disruption of the peaceful transfer of power from one President to the next. H. Res. 503, 117th Cong. (2021). The investigation is indispensable to the Select Committee's ability to propose remedial measures to ensure the peaceful transfer of power and prevent future attacks on our democratic institutions. Further, the investigation is vital to the "American people's ability to reconstruct and come to terms with their history." *GSA*, 433 U.S. at 452-53; *see Barenblatt v. United States*, 360 U.S. 109, 127-28 (1959) (noting that Congressional power to investigate threats to overthrow the government "rests on the right of self-preservation, the ultimate value of any society" (cleaned up)).

Applicant argues that delay will not harm the Select Committee because the

next transition of power is "three years away." Appl. 2. But earlier elections are impending and there remains a risk of other attacks on democracy rooted in conduct occurring well before any votes are cast. The Select Committee's task to study and recommend legislation to ensure that an attack like the one on January 6 is not repeated, and that our Nation's democracy is protected from future attacks, is urgent. Moreover, because "the House, unlike the Senate, is not a continuing body," *Eastland*, 421 U.S. at 512, the Select Committee's authorization will expire on January 3, 2023. *See* U.S. Const., Amend. XX, §§ 1, 2. The Select Committee therefore needs the requested documents *now* to shape the direction of its investigation and propose remedial legislation, and Congress needs time to legislate to prevent another attack. Indeed, the Select Committee's investigation has already been negatively impacted: With each passing day, the Select Committee is being forced to conduct its investigation, including interviewing witnesses, without the benefit of the key documents at issue in this case.

Both the Legislative and Executive Branches agree where the public interest lies. The Select Committee has concluded that review of the requested records will best further its critical investigation and the American people's interests. The Executive Branch, acting through the President, has reached the same conclusion. The court of appeals correctly found that the public interest lies in furthering—not interfering with—the political branches' ongoing cooperation to investigate and learn from the assault on democracy. The public interest strongly weighs against this Court's intervention, allowing the politically accountable branches to continue their

ongoing process of negotiation and compromise, and allowing the Select Committee to pursue its efforts to investigate the events of January 6 and guard against disruption to the peaceful transfer of power.

III. The Requested Injunction Would Be Improper

To the extent Applicant requests an injunction prohibiting the National Archives and the Archivist from releasing "any and all records" requested by the Select Committee over which he "asserts executive privilege" (Appl. 27)—including records beyond the three tranches currently at issue in this case—the requested relief is plainly improper. Applicant's complaint does not include factual allegations about future disclosures, which were not ripe for challenge when he filed his complaint, and are not ripe now. *See* C.A. App. 28-29; D. Ct. Dkt. No. 48; Pet. App. 20a-21a. Applicant cannot now ask this Court for relief that is broader than the relief he sought below.

CONCLUSION

For all these reasons, the application for a stay of the mandate and an injunction pending review should be denied.

Respectfully submitted.

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