No. 21A272

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, FORMER 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, ET AL.

RESPONSE OF THE EXECUTIVE BRANCH RESPONDENTS IN OPPOSITION TO THE APPLICATION FOR A STAY OF THE MANDATE AND INJUNCTION PENDING DISPOSITION OF THE PETITION FOR A WRIT OF CERTIORARI

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The Solicitor General, on behalf of respondents National Archives and Records Administration (NARA) and David Ferriero, in his official capacity as Archivist of the United States (collectively, the Archivist), respectfully files this response in opposition to the application for a stay of the mandate and an injunction pending certiorari and any further proceedings in this Court.

Pursuant to the Presidential Records Act (PRA or Act), 44 U.S.C. 2201 et seq., the United States House Select Committee to Investigate the January 6th Attack on the United States Capitol (Committee) requested that the Archivist of the United States grant it access to presidential records bearing on its investigation into that unprecedented attack on the Capitol. The Archivist is identifying responsive records on a rolling basis, and the

Executive Branch is engaged in a negotiated accommodation process that has led the Committee to withdraw or defer its request as to certain records, including some that implicate particular Executive Branch interests. This appeal involves certain other records from the first three tranches identified by the Archivist, which total fewer than 800 pages.

After careful consideration and in light of the extraordinary events of January 6, President Biden concluded that granting the Committee access to those records is in the best interests of the United States and that an assertion of executive privilege therefore is not justified. Applicant, former President Trump, filed suit seeking to block the Archivist from conveying those records to the Committee. Both the district court and the court of appeals denied his request for a preliminary injunction, concluding that he could not satisfy any of the requirements for such relief.

Applicant's request for an injunction pending further proceedings in this Court, like his request in the lower courts, turns primarily on his claim that providing the records to the Committee would harm the Executive Branch and, by extension, the public. But the Constitution vests the Executive power in the incumbent President, who is best positioned to make those assessments. And President Biden has determined that an assertion of executive privilege over the specific records at issue here is not in the interests of the Nation. A judicial decision allowing a former

President to override that considered judgment would be an unprecedented intrusion on the incumbent President's Article II authority. And even if that extraordinary step could be warranted in some circumstances, the court of appeals correctly held that no such circumstances exist here. The exceptional events of January 6 amply justify President Biden's determination that assertion of the privilege is unwarranted with respect to the records at issue here, and applicant has not even attempted to offer "any specific countervailing need for confidentiality." Appl. App. A47.

Applicant's related challenge to the Committee's ability to request the records in the first place also lacks merit. The Committee's request furthers a legitimate legislative inquiry into an attack directed at Congress itself. And given applicant's participation in the rally that immediately preceded the January 6 attack and the White House's responsibilities over responding to threats to government operations, the Committee reasonably sought presidential records to advance its investigation. Applicant asserts that the Committee's request is overbroad. But this appeal concerns only a discrete set of records, and applicant does not argue that even a single page of those records is beyond the scope of the Committee's legitimate inquiry.

Moreover, applicant has not demonstrated that he would suffer irreparable harm were the Archivist to permit the Committee to access the requested records. As the court of appeals emphasized,

he does not assert any privacy or other personal interest in the records. Indeed, he has not raised any specific objection as to any of the documents at issue. Instead, applicant asserts only a generalized interest in protecting the confidentiality of presidential communications. But President Biden's determination that granting the Committee's request for access to those documents is in the best interests of the Nation not only renders applicant's contrary assertion insufficient to establish irreparable harm, but also demonstrates that the equities support access by the Committee. The application for an injunction should be denied.

STATEMENT

A. The Presidential Records Act

The PRA establishes a framework for preserving, retaining, and accessing Presidential records. The Act expressly provides that the United States -- not the President -- has "complete ownership" of those records, and further provides that upon the completion of a President's final term in office, "the Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President." 44 U.S.C. 2202, 2203(g)(1).

Although the PRA generally requires the Archivist to provide public access to presidential records within five years, an outgoing President may restrict access to certain categories of records for up to 12 years after the end of the President's final

term. 44 U.S.C. 2203(g)(1), 2204(a) and (b)(2). Even during the period of restricted access, however, presidential records in those categories must be made available in certain circumstances. 44 U.S.C. 2205. As relevant here, the Archivist shall make otherwise "restricted" presidential records available on request "to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof if such records contain information that is needed for the conduct of its business and that is not otherwise available," "subject to any rights, defenses, or privileges which the United States or any agency or person may invoke." 44 U.S.C. 2205(2)(C). Implementing regulations and an Executive Order issued in 2009 specify that, upon receipt of such a request, the Archivist must provide written notice to the incumbent President and the former President of his intent to disclose records in sufficient detail to allow any appropriate assertion of executive privilege. 36 C.F.R. 1270.44(c); see Exec. Order No. 13,489, § 2, 3 C.F.R. 191, 192 (2009 comp.). If the Archivist does not receive notice of an assertion of executive privilege within 30 days, he will release them to Congress. Ibid.

If a former President asserts a claim of executive privilege, the Archivist must consult with the incumbent President "to determine whether the incumbent President will uphold the claim." 36 C.F.R. 1270.44(f)(1). If the incumbent President does not

uphold the claim or does not make a determination within the allotted time, the regulations direct the Archivist to disclose the records to Congress unless a court directs the Archivist to withhold them. See 36 C.F.R. 1270.44(f)(3); see also Exec. Order No. 13,489, § 4(b) (providing that "the Archivist shall abide by any instructions given him by the incumbent President or his designee unless otherwise directed by a final court order"). If the sitting President upholds the former President's assertion of privilege, the Archivist may not release the records absent a court order. 36 C.F.R. 1270.44(f)(2). The PRA provides the United States District Court for the District of Columbia with jurisdiction over any action brought by a former President challenging the Archivist's decision to release the documents notwithstanding his privilege claim. 44 U.S.C. 2204(e).

B. The January 6 Attack And The Committee's Investigation

1. On January 6, 2021, Congress convened a Joint Session to certify the results of the Electoral College vote in the 2020 Presidential Election. Appl. App. A7. That morning, supporters of then-President Trump attended a rally on The Ellipse, just south of the White House. Ibid. During his remarks at the rally, President Trump asserted that the election had been "stolen" and urged the audience to "walk down * * * to the Capitol" to "demand that Congress do the right thing and only count the electors that have been lawfully slated." Ibid. (citation omitted). Applicant

further urged the audience to "fight like hell" because "you'll never take back our country with weakness." Id. at A7-A8 (citation omitted).

Shortly after applicant's remarks, as the Joint Session of Congress began its work, a large crowd -- which included individuals "armed with weapons and wearing full tactical gear" -- amassed outside the Capitol. Appl. App. A8; Staff Rep. of Senate Comm. on Homeland Sec. & Governmental Affairs & Senate Comm. on Rules & Admin., 117th Cong., 1st Sess., Examining the U.S. Capitol Attack: A Review of the Security, Planning, and Response Failures on January 6, at 23, 28-29 (June 8, 2021) (HSGAC Report). The crowd "overwhelmed law enforcement and scaled walls, smashed through barricades, and shattered windows to gain access to the interior of the Capitol." Appl. App. A8. "As rioters poured into the building, members of the House and Senate, as well as Vice President Pence, were hurriedly evacuated from the House and Senate Chambers." Ibid. Rioters subsequently "breached the Senate chamber," and "[i]n the House chamber, Capitol Police officers 'barricaded the door with furniture and drew their weapons to hold off rioters.'" Ibid. (citation omitted).

Those events "marked the most significant breach of the Capitol in over 200 years." HSGAC Report 21. The attack "resulted in multiple deaths, physical harm to over 140 members of law enforcement, and terror and trauma among [congressional] staff, in-

stitutional employees, press and Members." H.R. Res. 503, 117th Cong. 1, 1st Sess. (2021) (Resolution 503). The riot also damaged or destroyed elements of the Capitol Building's infrastructure and "precious artwork," leaving broken glass, blood, and even feces throughout the building. Appl. App. A9 (citation omitted).

2. In June 2021, the House voted to establish the Committee to, inter alia, "investigate and report upon the facts, circumstances, and causes" of the January 6 attack. Resolution 503, § 3(1). To that end, Resolution 503 authorizes the Committee to inquire into a range of matters relevant to the events of January 6, including "influencing factors that contributed to the attack," § 4(a)(2)(B), and the federal government's "structure, coordination, operational plans, policies, and procedures, * * * particularly with respect to detecting, preventing, preparing for, and responding to" the attack, § 4(a)(2)(B). The Committee is tasked with producing a report identifying "changes in law, policy, procedures, rules, or regulations that could be taken" to "prevent future acts of violence * * * targeted at American democratic institutions," "improve the security posture of the United States Capitol Complex," and "strengthen the security and resilience of the United States and American democratic institutions." § 4(c); see § 4(a)(3).

3. On August 25, 2021, the Committee submitted a request to the Archivist for access to presidential records it believes are

relevant to its investigation. Appl. App. A11; see C.A. App. 33-44. The Archivist is identifying records responsive to the Committee's request on a rolling basis. On August 30, 2021, the Archivist notified applicant of his intent to provide the Committee with access to the first tranche of records, which comprises 136 pages, seven of which were withdrawn as non-responsive upon further review. Appl. App. A12.

On October 8, 2021, President Biden, through the Counsel to the President, informed the Archivist that he had determined that "an assertion of executive privilege is not in the best interests of the United States, and therefore is not justified as to any of the documents" in the first tranche. Appl. App. A12. In the President's judgment, given the "extraordinary events" that occurred on January 6, Congress had a "compelling need in service of its legislative functions" to understand the circumstances that led to the events of that day in order "to ensure nothing similar ever happens again." Ibid. The President "specified that his decision 'applied solely' to the documents in the first tranche." Id. at A13 (brackets and citation omitted).

Applicant informed the Archivist that he was asserting executive privilege over 46 pages of the records in the first tranche. Appl. App. A12. President Biden declined to uphold applicant's assertion of privilege, citing his earlier determination that "an assertion of executive privilege is not in the best interests of

the United States, and therefore is not justified." C.A. App. 160; see Appl. App. A13. President Biden therefore instructed the Archivist to provide the records in the first tranche that applicant identified as privileged to the Committee 30 days after informing applicant of the pending disclosure. Appl. App. A14.

In September, the Archivist notified President Biden and applicant that he had identified two additional tranches of responsive records, totaling 888 pages. Appl. App. A14. Following negotiations with the Executive Branch, the Committee agreed to defer its request for 50 pages of those records related to the exercise of exclusive presidential authorities. Id. at A15-A16; see Letter from Jonathan C. Su, Deputy White House Counsel, to Kristin L. Amerling, Chief Counsel, the Committee (Dec. 16, 2021) (Su Letter), https://go.usa.gov/xt3ba. Another three pages were withdrawn after NARA determined they were not presidential records. Appl. App. A14-A16. At the conclusion of the review period, applicant asserted executive privilege over 724 of the remaining pages in the two tranches, and President Biden again declined to uphold the privilege assertion, citing the same reasons he had given as to the first tranche. Ibid. The President instructed the Archivist to grant the Committee access to those records 30 days after notifying applicant of the pending disclosure. Id. at A16.

4. Although this preliminary injunction appeal concerns only the records from those first three tranches, review of other

records remains ongoing. See NARA, Records Related to the Request for Presidential Records by the House Select Committee to Investigate the January 6th Attack on the United States Capitol, https://www.archives.gov/foia/january-6-committee (providing relevant correspondence, including the letters cited below).

In October, the Archivist notified President Biden and applicant that he had identified another set of responsive records, including 40 pages from the Office of Records Management and 511 pages from the National Security Council (NSC). See Letter from Dana A. Remus, White House Counsel, to David Ferriero, Archivist of the United States 1 (Dec. 17, 2021). On November 15, applicant asserted privilege over six pages from the Office of Records Management, and President Biden declined to uphold that assertion. Ibid. As to the documents originating from the NSC, the Counsel to the President informed the Archivist that the Executive Branch had reached an agreement with the Committee to defer or withdraw its request for the vast majority of the records. Ibid. Among other things, that accommodation reflected the Executive Branch's "longstanding and important interests in maintaining the confidentiality" of "the NSC's deliberative process." Su Letter 2.

At the conclusion of the review period (which was extended to facilitate additional consideration), applicant asserted executive privilege over 17 pages of the remaining NSC records. See Letter from Donald J. Trump to David S. Ferriero, Archivist of the United

States 1 (Dec. 22, 2021). President Biden again declined to uphold the assertion and directed the Archivist to produce the records to the Committee 30 days after providing notice to applicant. See Letter from Dana A. Remus, White House Counsel, to David Ferriero, Archivist of the United States 1 (Dec. 23, 2021).

C. Proceedings Below

1. On October 18, 2021, applicant filed this suit "solely in his official capacity as a former President," seeking declaratory and injunctive relief that would prevent the Archivist from providing access to any presidential records that are or may be privileged. Compl. ¶ 20; see Compl. 25-26. Applicant also filed a motion for a preliminary injunction.

The district court denied the motion on November 9, 2021. See Appl. App. E1-E39. The court concluded that applicant was unlikely to prevail on his claim that executive privilege bars the Archivist from providing the Committee with access to the documents at issue. Id. at E12-E21. The court also determined that applicant was not likely to succeed in establishing that the Committee acted beyond its legal authority in requesting the records. Id. at E23-E36. Finally, the court held that applicant had failed to establish that production of the records would cause irreparable harm, and that the balance of the equities and the public interest weighed against an injunction. Id. at E36-39.

2. Applicant appealed, and the court of appeals granted his

request for an administrative injunction barring disclosure of the records at issue while that court considered his appeal. See Appl. App. C1. The court also ordered expedited briefing and argument. See id. at C1-C2.

On December 9, 2021, the court of appeals affirmed the denial of a preliminary injunction. Appl. App. A1-A68. The court observed that, "[w]hile the underlying lawsuit challenges the full span of the January 6th Committee's request for presidential records, this preliminary injunction appeal involves the narrower question of whether [applicant's] assertion of executive privilege as to a subset of documents in the Archivist's first three tranches requires that those documents be withheld from the Committee." Id. at A19. Although recognizing that applicant had subsequently claimed privilege over six pages from a fourth tranche, the court noted that applicant had "not raised any arguments about those six pages" in his appeal. Id. at A20 n.7. "[A]ny potential future claims," the court explained, "are neither ripe for constitutional adjudication nor capable of supporting [a] preliminary injunction, since courts should not reach out to evaluate a former President's executive privilege claim based on 'future possibilities for constitutional conflict.'" Id. at A19-A20 (quoting Nixon v. Administrator of General Services, 433 U.S. 425, 444-445 (1977) (GSA)).

On the "narrower question" before it, Appl. App. A19, the court of appeals determined that applicant is unlikely to prevail

because "a rare and formidable alignment of factors supports the disclosure of the documents at issue." Id. at A37. Among those factors were "President Biden's carefully reasoned and cabined determination that a claim of executive privilege is not in the interests of the United States"; "Congress's uniquely vital interest in studying the January 6th attack on itself to formulate remedial legislation and to safeguard its constitutional and legislative operations"; and applicant's "failure even to allege, let alone demonstrate, any particularized harm that would arise" from granting the Committee access to the "particular documents" as to which he sought a preliminary injunction. Id. at A5.

The court of appeals observed that applicant's "sole objection" to the release of the records at issue "is that disclosure" of presidential records "would 'burden the presidency generally,' in light of the need for 'candid advice' and the potential for a 'chilling effect.'" Appl. App. A47 (brackets and citation omitted). But the court concluded that this generalized objection "is not close to enough" to justify an injunction overriding the incumbent President's decision. Id. at A48. The court explained that "[w]hen a former and incumbent President disagree about the need to preserve the confidentiality of presidential communications, the incumbent's judgment warrants deference because it is the incumbent who is 'vitally concerned with and in the best position to assess the present and future needs of the Executive

Branch.'" Ibid. (quoting GSA, 433 U.S. at 449).

The court of appeals also emphasized that "when the Executive and Congress together have already determined that [a] 'demonstrated and specific' need for disclosure" exists, "[a] court would be hard-pressed * * * to tell the President that he has miscalculated the interests of the United States, and to start an interbranch conflict that the President and Congress have averted." Appl. App. A36-A37 (citation omitted). The court found it unnecessary to determine "to what extent" a court could "second guess a sitting President's judgment that invoking privilege is not in the best interests of the United States," because applicant "decisively" failed to show that such second-guessing was appropriate in light of the confluence of factors supporting disclosure here. Id. at A6 & n.2.

The court of appeals determined that the other preliminary-injunction factors supported denial of relief as well. Because applicant sought a preliminary injunction "solely in his 'official capacity as a former President,'" the court explained, the only irreparable harm that could support relief would be harm "to the present and future interests of the Executive Branch itself." Appl. App. A63 (citations omitted). As to those interests, however, the court deferred to the determination by the incumbent President, who "is 'in the best position to assess the present and future needs of the Executive Branch' and to determine whether

disclosure 'impermissibly intrudes into the executive function.'" Id. at A64 (citation omitted). The court likewise concluded that the balance of equities and public interest weighed against further delaying release of the documents to the Committee, because "the legislature is proceeding with urgency to prevent violent attacks on the federal government and disruptions to the peaceful transfer of power." Id. at A66.

The court of appeals extended its administrative injunction to allow applicant to file an application for injunctive relief in this Court. Appl. App. A68 n.20.

ARGUMENT

The application for a stay of the mandate and an injunction pending further review should be denied. A temporary injunction generally requires the movant to demonstrate that his "claims are likely to prevail, that denying [him] relief would lead to irreparable injury, and that granting relief would not harm the public interest." Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020) (per curiam). A similar standard applies to a request for a stay pending certiorari. See Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam); Appl. 7-8. Unlike a stay, however, an injunction "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by the lower courts." Ohio Citizens for Responsible Energy, Inc. v. NRC, 479 U.S. 1312, 1313 (1986) (Scalia, J.,

in chambers). A request for an injunction pending certiorari thus "'demands a significantly higher justification' than a request for a stay." Respect Maine PAC v. McKee, 562 U.S. 996, 996 (2010) (citation omitted). Such an injunction should be granted "'sparingly and only in the most critical and exigent circumstances,'" such as when "the legal rights at issue are 'indisputably clear,'" Wisconsin Right to Life, Inc. v. FEC, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (citations omitted); see Roman Catholic Diocese, 141 S. Ct. at 66 (granting injunction where "applicants ha[d] clearly established their entitlement to relief"). Applicant has not met that heavy burden.*

I. APPLICANT HAS NOT ESTABLISHED THAT HE IS LIKELY TO SUCCEED ON THE MERITS, MUCH LESS THAT HIS RIGHTS ARE INDISPUTABLY CLEAR

Applicant asserts two related challenges to the release of the relevant presidential records to the Committee. He contends that (A) the records are protected by executive privilege (Appl. 20-21), and (B) the Committee lacks authority to request them (Appl. 11-20). Neither contention has merit.

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* Despite his acknowledged failure to raise arguments about records identified after the first three tranches in the court of appeals, Appl. App. A20 n.7, applicant asks this Court to "enjoin all productions of all privileged and restricted records while this Court reviews the matter." Appl. 6 n.2; see id. at 3 n.1. Applicant is not entitled to any form of injunctive relief, but certainly not with respect to records for which he has made no effort to demonstrate a continued need for confidentiality. The court of appeals correctly held that such "future claims" are "neither ripe for constitutional adjudication nor capable of supporting [a] preliminary injunction." Appl. App. A19.

A. The Incumbent President's Affirmative Decision Not To Assert Executive Privilege Is Entitled To Substantial Deference

President Biden concluded that asserting executive privilege to bar the Committee's access to the records at issue was not "in the best interests of the United States." Appl. App. A12 (citation omitted). The President grounded that conclusion in a careful weighing of Congress's "compelling need in service of its legislative functions" against the Executive Branch's interest in maintaining the confidentiality of the documents at issue. Ibid. Applicant now asks the federal courts to override the sitting President's judgment about the interests of the Nation and the Executive Branch. The court of appeals correctly held that applicant's invocation of a generalized interest in confidentiality falls far short of justifying that extraordinary step.

1. It is well settled that a sitting President may assert executive privilege to prevent disclosure of sensitive Executive Branch communications. See United States v. Nixon, 418 U.S. 683, 705-706 (1974) (describing that principle as "too plain to require further discussion" and as having "constitutional underpinnings"). In Nixon v. Administrator of General Services, 433 U.S. 425 (1977), this Court held that a former President could assert in some circumstances the component of executive privilege protecting "confidentiality of Presidential communications" that took place during his tenure. Id. at 447. GSA did not involve a situation where the incumbent President affirmatively determined that an assertion

of executive privilege by a former President is unwarranted. But the Court's analysis -- and the very nature of executive privilege -- indicate that the incumbent President's determination must be controlling, at least absent extraordinary circumstances.

The Court explained that executive privilege, including the presidential communications privilege, "is not for the benefit of the President as an individual, but for the benefit of the Republic." GSA, 433 U.S. at 449 (citation omitted). The privilege furthers the Executive's substantial interests in safeguarding the confidentiality of its communications and maintaining the autonomy of the Branch against incursion from coordinate Branches. See Nixon, 418 U.S. at 705-706. At the same time, "[e]xecutive privilege is an extraordinary assertion of power 'not to be lightly invoked.'" Cheney v. United States Dist. Ct., 542 U.S. 367, 389 (2004) (citation omitted). The President therefore is vested with the responsibility to weigh the need to protect the confidential communications against the asserted need for the information.

It is the "incumbent President" -- not a former President -- who is "vitally concerned with and in the best position to assess the present and future needs of the Executive Branch," and thus to evaluate whether an assertion of executive privilege will further or diminish the Executive Branch's interests in any given circumstance. GSA, 433 U.S. at 449. "Article II 'makes a single President responsible for the actions of the Executive Branch,'" Free

Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 496-497 (2010) (citation omitted), and allowing a former President to override the decisions of an incumbent President would be an extraordinary intrusion into the latter's ability to discharge his constitutional responsibilities.

Indeed, just as one Congress cannot bind a future one, see Dorsey v. United States, 567 U.S. 260, 274 (2012), Presidents generally cannot bind their successors, see Biodiversity Assocs. v. Cables, 357 F.3d 1152, 1172 (10th Cir.), cert. denied, 543 U.S. 817 (2004). A former President cannot veto decisions by his successor to, say, declassify information that he had classified, or unwind a state-secrets assertion he had made. The same should presumptively be true of an incumbent President's determination about whether an assertion of executive privilege would be in the national interest.

That conclusion carries particular force when, as here, the Legislative Branch is requesting the information. In that circumstance, assertion of executive privilege inevitably places the Executive Branch on a "collision course" with a coequal Branch. Cheney, 542 U.S. at 389. Even if Congress cannot directly compel production of the information, it has a number of other tools it can deploy, such as withholding appropriations or declining to enact legislation. "Congressional control over appropriations and legislation is an excellent guarantee that the executive will not

lightly reject a congressional request for information, for it is well aware that such a rejection increases the chance of getting either no legislation or undesired legislation." Nixon v. Sirica, 487 F.2d 700, 778 (D.C. Cir. 1973) (en banc) (Wilkey, J., dissenting) (citation omitted).

Managing such sensitive relations between the Branches is the task of the incumbent President, not the former officeholder. Only the incumbent President may decide whether and how to accommodate congressional information requests as part of "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) (citation omitted). Interbranch accommodation is a central component of our constitutional structure that has been the primary means of resolving informational disputes between the political branches throughout our Nation's history. Ibid. A former President has no role in that interbranch process of negotiation and accommodation. And it would be extraordinary to allow a former President to effectively force the Executive Branch into an unwanted confrontation with Congress.

Moreover, this Court has noted the "obvious political checks against an incumbent's abuse of [executive] privilege," GSA, 433 U.S. at 448, which help ensure that "constitutional confrontation[s]" engendered by assertions of the privilege occur only when necessary, Cheney, 542 U.S. at 389 (citation omitted). Those

political checks do not apply to a former officeholder. Similarly, this Court has observed that "to the extent that the privilege serves as a shield for executive officials against burdensome requests for information which might interfere with the proper performance of their duties, a former President is in less need of it than an incumbent." GSA, 433 U.S. at 448 (citations omitted).

Consistent with those principles, this Court has suggested that even when an incumbent President simply fails to support a former President's assertion of executive privilege, it "detracts from the weight" of the assertion. GSA, 433 U.S. at 449. All the more so here, where the incumbent President has specifically examined the matter and made an affirmative determination that granting a request for records is in the best interests of the Nation.

Indeed, separation-of-powers principles dictate that a court should be extraordinarily hesitant to overrule an incumbent President's affirmative determination not to invoke executive privilege. See Appl. App. A36-A37. When a former President attempts to enlist the judiciary in an effort to override the decision of an incumbent President, a court would be thrust into the "awkward position," Cheney, 542 U.S. at 389, of assessing the "wisdom and soundness," Laird v. Tatum, 408 U.S. 1, 15 (1972), of the incumbent's decision, including a review of the incumbent's estimation of the Executive Branch's near-term and long-term interests. In light of the incumbent President's "constitutional responsibili-

ties and status," his judgment warrants "judicial deference and restraint." Cheney, 542 U.S. at 385 (citation omitted). "Article III courts are generally ill-equipped to superintend or second guess the expert judgment of the sitting President about the current needs of the Executive Branch and the best interests of the United States on matters of such gravity and so squarely within the President's Article II discretion." Appl. App. A40.

2. Applicant has provided no basis for a court to take the extraordinary step of overriding the President's determination that executive privilege should not be asserted here. President Biden concluded that Congress has a compelling need to understand the circumstances that led to the unprecedented attack on Congress itself that occurred on January 6 and to guard against such attacks in the future. He further determined that that need outweighed the Executive's institutional interests in maintaining the confidentiality of the relevant records. See C.A. App. 157. The President emphasized that "the conduct under investigation extends far beyond typical deliberations concerning the proper discharge of the President's constitutional responsibilities," thus in his judgment reducing the Executive's interest in shielding records bearing on that conduct from disclosure to Congress. Id. at 108. And the President found "a sufficient factual predicate for the Select Committee's investigation" into the White House's connection with and response to the events of January 6. Id. at 157.

The President's careful assessment of the Executive Branch's interests in determining whether to allow Congress access to the records at issue in the unique circumstances of its investigation into the events of January 6 does not support applicant's assertion (Appl. 25) that future Presidents will waive executive privilege "with ease."

To the contrary, as the court of appeals recognized, President Biden's decision not to assert executive privilege "is of a piece with decisions made by other Presidents to waive privilege in times of pressing national need." Appl. App. A41 (describing decisions not to assert executive privilege by Presidents Nixon, Reagan, George W. Bush, and Trump). In his petition for a writ of certiorari, applicant contends (Pet. 30-31) that those historical practices are inapposite because the sitting Presidents determined not to assert executive privilege "over their own records," whereas here President Biden's determination concerns materials that predate his presidency. But executive privilege belongs to, and is asserted on behalf of, the institution of the presidency, not individual Presidents. See GSA, 433 U.S. at 449 (observing that executive privilege does not exist "for the benefit of the President as an individual"). The historical examples demonstrate that Presidents -- including applicant himself -- have long recognized that in certain circumstances, assertion of the privilege in response to investigations of unique events of great significance

would not serve the institution of the presidency or the Nation more broadly. They have concluded that the prospect of disclosure in such rare instances will not unduly "discourage candid presentation of views by [their] contemporary advisers." Id. at 448. So too here.

3. Applicant devotes just two pages of his application (Appl. 20-21) to the merits of his executive privilege claim, and even then most of that space is dedicated to establishing that "the particular documents at issue qualify for executive privilege." Appl. 21 (citation omitted). But that has not been contested in this litigation. Appl. App. A51. "[T]he issue in this case is not whether executive privilege could be asserted for each document"; instead, it is "whether a court can override President Biden's reasoned decision to forgo privilege as to them." Ibid. With respect to that determination, the incumbent President is "in the best position to assess the present and future needs of the Executive Branch." GSA, 433 U.S. at 449. And as the court of appeals recognized, applicant has not even attempted to use his "viewpoint as the President during whose term the[] [documents] were created" to "articulat[e] some compelling explanation for nondisclosure." Appl. App. A51.

Applicant briefly asserts (Appl. 21) that an incumbent President's role under the PRA is limited to "a decision on the legal correctness of the original assertion" of executive privilege by

the former President. But applicant nowhere addresses the court of appeals' holding that he "forfeited this statutory argument by failing to raise it before the district court and before [the court of appeals] in his opening brief." Appl. App. A60. And the argument, in any event, lacks merit. Executive privilege has "constitutional underpinnings" in Article II. Nixon, 418 U.S. at 706. It would thus raise serious constitutional questions if Congress were to "shut[] the sitting President out of any meaningful role in" deciding whether an assertion of the privilege is justified. Appl. App. A61. Nothing in the PRA suggests that Congress attempted to impose such a constitutionally dubious limitation. Cf. GSA, 433 U.S. at 449.

In his petition for a writ of certiorari, applicant additionally contends (Pet. 26) that the lower courts erred in affording deference to the judgment of the incumbent President on whether invocation of executive privilege is warranted in a particular instance. He asserts (ibid.) that the result is a "subjective standard" that will "unnecessarily result in a further politicized judiciary." But as already discussed, see pp. 21-22, supra, the decision whether to invoke executive privilege in response to a congressional request necessarily entails an assessment of the interests of the Executive Branch within the broader context of the congressional investigation and the Executive's ongoing relationship with Congress. It is thus applicant's position that would

risk politicizing the judicial inquiry by inviting courts to override the sitting President's judgment about the best interests of the Executive Branch and thereby "start an interbranch conflict that the President and Congress have averted." Appl. App. A37.

Applicant predicts (Pet. 33) that the decision below will "giv[e] Congress carte blanche authority to demand a former President's records." That prediction lacks foundation. By design, the Executive has the "necessary constitutional means, and personal motives, to resist encroachments" by Congress to undermine its operations through intrusive investigations. The Federalist No. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961); see Nixon, 418 U.S. at 705. "[E]very incumbent President will be the next former President." Appl. App. A49. And every President has a substantial interest in obtaining "fulsome and frank advice from his advisers," Pet. 23, and thus a strong incentive to protect presidential communications (including those of a previous Administration) from disclosure to Congress in order to avoid chilling advice to the incumbent and to future Presidents. See GSA, 433 U.S. at 448.

President Biden has not strayed from protecting those interests. To the contrary, he thus far has made a privilege determination only as to a limited number of responsive records, and has affirmed his intention to consider future questions of privilege on the merits as they arise. Appl. App. A13; see C.A. App. 158.

And as part of the "negotiation and compromise" process for resolving interbranch informational disputes, Mazars, 140 S. Ct. at 2031, the Executive Branch has secured the Committee's agreement to defer or withdraw requests for hundreds of pages of responsive records, including 50 pages of records from the tranches at issue here. Appl. App. A15-A16; see C.A. App. 174; id. at 128 ¶ 25; id. at 124 ¶ 12; Su Letter 1. Like prior decisions not to assert the privilege by Presidents Nixon, Reagan, Bush, and Trump, see pp. 24-25, supra, President Biden's determination that an assertion of privilege is unwarranted as to a discrete set of records requested for an investigation into an unprecedented attack on the Capitol does not suggest that President Biden or his successors will be unwilling to shield other presidential communications and records in the future.

B. The Committee Did Not Exceed Its Authority When It Requested The Relevant Records

Applicant further contends (Appl. 11-20) that the Committee's request for the records is invalid under the Constitution and the PRA, which applicant suggests "tracks the constitutional rule" governing Congress's power to investigate. Appl. 12. The PRA authorizes a former President to challenge the Archivist's planned disclosure of presidential records only on the ground that it "violates the former President's rights or privileges." 44 U.S.C. 2204(e). Consistent with that limitation, applicant acknowledged below that he is not bringing a "freestanding challenge" to the

validity of the Committee's request; instead "all of his arguments about the statutory and constitutional validity of the Committee request" are "part and parcel" of his assertion of executive privilege over "the specific documents at issue here." Appl. App. A63 n.17. The court of appeals correctly held that those arguments provide no reason to disturb President Biden's conclusion that an assertion of the privilege is unwarranted.

1. This Court has held that Congress's constitutional authorities include an implicit but cabined power to investigate. A congressional request for information "is valid only if it is 'related to, and in furtherance of, a legitimate task of the Congress.'" Mazars, 140 S. Ct. at 2031 (quoting Watkins v. United States, 354 U.S. 178, 187 (1957)). One of those tasks is legislation, and this Court has stated that the authority to investigate "is inherent in the legislative process." Watkins, 354 U.S. at 187; see Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 (1975) ("[T]he power to investigate is inherent in the power to make laws."). That investigative authority applies to "subject[s] on which legislation could be had," Mazars, 140 S. Ct. at 2031 (citation omitted), and thus includes "inquiries into the administration of existing laws, studies of proposed laws, and 'surveys of defects in our social, economic or political system for the purpose of enabling Congress to remedy them.'" Ibid. (quoting Watkins, 354 U.S. at 187). And while Congress has no

"general power to inquire into private affairs and compel disclosure," and may not seek information for purposes of "law enforcement" or "to try someone before a committee for any crime or wrongdoing," id. at 2032 (brackets, citation, and internal quotation marks omitted), a congressional investigation is not invalid simply because it might uncover "crime or wrongdoing," McGrain v. Daugherty, 273 U.S. 135, 179-180 (1927).

2. The Committee's request for the presidential records at issue here readily satisfies those standards.

The causes of the January 6 attack and the role that government officials may have played in them, or in preparing for or responding to the attack itself, plainly are "subject[s] on which legislation could be had." Mazars, 140 S. Ct. at 2031 (citation omitted). Congress might, for example, enact or amend criminal laws to deter violent conduct targeted at the institutions of government. Congress might impose structural reforms on Executive Branch agencies to prevent their abuse to undermine the electoral process. Congress could address intelligence-sharing and resource-allocation by federal agencies charged with detecting and interdicting threats to the security and integrity of our electoral processes. It also could enact legislation designed to enhance the security of the Capitol and Sessions of Congress. Some of those examples were specifically identified in the resolution establishing the Committee. Resolution 503, § 4(c). And those are

just a few examples of potential reforms that Congress could conclude are appropriate as a result of the Committee's work. See Appl. App. A54.

Applicant asserts (Appl. 13-14) that the Committee is seeking presidential records solely "to meet political objectives" or for "inquisitorial" purposes. President Biden, however, has determined that the Committee has ample reason to believe that presidential records responsive to its request may contain information relevant to its investigation and potential legislation. Among other things, applicant spoke at the rally that immediately preceded the attack, stating that the election was "rigged" and "stolen," and urging his supporters to "demand that Congress do the right thing." Appl. App. A7-A8. Those remarks formed part of the public record on which the investigation is based. Ibid. Moreover, according to the Committee's investigation, in the weeks leading up to January 6, applicant and other White House officials were in regular communication with individuals promoting the January 6 protest. H.R. Rep. No. 152, 117th Cong., 1st Sess. 6 (2021). And a Senate Report alleges that senior government officials were slow to respond to the riot, despite pleas for help from Members of Congress, law enforcement officials, and others. See HSGAC Report 83-95.

The Committee thus has sufficient reason to examine, among other things: (1) what, if anything, applicant, his advisors,

other government officials, and those in close contact with the White House knew about the likelihood of the protest turning violent; (2) when they knew it; (3) what actions they took in response; and (4) how, if at all, their actions or inactions contributed to or encouraged the events of January 6. Far from "fishing," Appl. 19, or looking to the former President and his advisors as a "case study," Appl. 13, the Committee is investigating events involving applicant and other White House officials that have an identifiable factual foundation and relate to a specific, unprecedented attack on the Capitol. That investigation unquestionably serves legitimate legislative purposes. And contrary to applicant's contentions (Appl. 13-14; Supp. Br. 1-3), those legislative purposes are sufficient to support the Committee's request even if some Members also believe that the investigation may "disclose crime or wrongdoing." McGrain, 273 U.S. at 180; see id. at 151-152.

3. Applicant's contrary arguments lack merit.

a. Applicant contends (Appl. 15-16) that the Committee's request is too broad. The court of appeals correctly rejected that contention as irrelevant to this appeal, which involves only a discrete set of documents. Appl. App. A56-A57. As the court explained, applicant "has made no claim" that those documents "are not relevant to the Committee's purpose or that a request capturing those documents is overbroad." Ibid. If future tranches of rec-

ords contain documents that are not "reasonably relevant" to the Committee's legitimate tasks, McPhaul v. United States, 364 U.S. 372, 381 (1960) (citation omitted), they might be deemed non-responsive on further review and thus never scheduled for production, or the Executive Branch could negotiate with the Committee to withdraw or defer its request -- either of which would obviate applicant's concerns.

Indeed, in consultation with the Executive Branch, the Committee has already agreed to withdraw its request for certain documents that, although technically responsive, would not advance the investigation. See Su Letter. It has also agreed to defer its requests for responsive records that touch particular institutional equities of the Executive Branch. Ibid. Those agreements demonstrate that the process of negotiation and accommodation is effectively being used to narrow the Committee's request and to avoid confrontation. See pp. 11-12, supra. Especially against that backdrop, there is no basis for applicant's suggestion (Appl. 15-16) that the courts should categorically bar the Executive Branch from responding to document requests that are initially framed in broad terms. Instead, to the extent that a former President can challenge the scope of a congressional request under the PRA at all, such a challenge is appropriately evaluated only in the context of the specific documents that the Executive Branch agrees to produce. If, at the end of that process, applicant

believes that the planned disclosure contains materials that are not reasonably relevant to the Committee's legitimate purposes, the court of appeals stated that he could "attempt to raise an overbreadth challenge then." Appl. App. A57. But the mere possibility that such a dispute could arise with respect to future documents provides no basis for enjoining production of the documents at issue in this appeal.

b. Applicant likewise misses the mark when he contends (Appl. 15-16) that the Committee should have sought information from other sources before invoking the PRA. As explained above, pp. 32-33, supra, under the particular circumstances presented, the Committee had reasonable grounds for concluding that these presidential records would contain otherwise unavailable information relevant to the causes of and responses to the events of January 6. Applicant does not identify any other sources from which the same information contained in the records at issue here could have been obtained. And even if future tranches of records were relevant to this appeal, the Committee has already demonstrated that it is willing to exhaust efforts to obtain information elsewhere before pressing its request for presidential records bearing on the same information. See Su Letter 1-2.

4. Applicant relies (Appl. 16-20) on this Court's decision in Mazars, supra. That reliance is misplaced.

a. Mazars involved the validity of a committee's attempt to

use its inherent powers to issue compulsory process for personal information about a sitting President. 140 S. Ct. at 2035-2036. This Court concluded that more careful scrutiny was warranted given the "ongoing institutional relationship" between Congress and the Executive Branch and the possibility that Congress might deploy its subpoena power to "'exert an imperious controul' over the Executive Branch" and "aggrandize itself at the President's expense." Id. at 2033-2034 (citation omitted). The Court emphasized the need to protect the "established practice" of accommodation and negotiation between the political Branches. Id. at 2034 (citation omitted). The Court further observed that a congressional request for a President's personal papers raises "a heightened risk" that Congress is acting with an improper motive, given the "documents' personal nature and their less evident connection to a legislative task." Id. at 2035.

The separation-of-powers considerations underlying Mazars are absent where, as here, a congressional committee requests official records belonging to the United States and the incumbent President determines that it is in the best interests of the Nation to be responsive to that request. See Appl. App. A52-A53. In such circumstances, the incumbent President necessarily has determined that providing the Committee with access to the information will not unduly impair the Executive Branch in carrying out its constitutional responsibilities. In fact, it is an injunction barring

disclosure in the face of such a presidential determination that would interfere with the "ongoing institutional relationship" between the Branches by disrupting the "established" process of negotiation and accommodation that Mazars sought to protect. See Mazars, 140 S. Ct. at 2033-2035. And because the Committee seeks access only to official records over which the sitting President has determined that executive privilege should not be asserted, not the personal papers of a sitting President, there is no "heightened risk" that Congress is seeking the materials for the improper purpose of obtaining "'imperious controul' over the Executive Branch." Id. at 2034-2035.

b. In any event, the court of appeals correctly held that the Committee's request accords with the considerations identified in Mazars. Appl. App. A54-A56. The Court in Mazars identified four nonexclusive "special considerations," none of which would preclude making the requested documents available to the Committee.

First, "courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers," including by determining whether "other sources could reasonably provide Congress the information it needs." Mazars, 140 S. Ct. at 2035-2036. Here, the Committee has established its need for information from the White House as part of the Committee's inquiry into the causes of the January 6 attack,

any connections to government officials, and the response once violence broke out at the Capitol. See pp. 32-33, supra. Applicant has not identified any alternative source of information that could substitute for the specific documents at issue here. Nor, more generally, has applicant identified alternative sources that could inform the Committee about what, if anything, the former President, his advisors, and other White House officials contributed to or knew about the events leading up to January 6 and what actions they took or declined to take in preparation for or in response to the January 6 rally and subsequent riot. See Appl. App. A56.

Second, "courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective." Mazars, 140 S. Ct. at 2036. As explained above, the documents at issue here are within the scope of the Committee's legitimate inquiry. That is especially so given the sitting President's judgment that an assertion of executive privilege over these documents is not warranted. The Committee's request more generally is subject to further narrowing through the process of negotiation and accommodation contemplated by the Constitution and the PRA, and applicant is not prevented from asserting executive privilege over other documents in the future.

Third, courts should "be attentive to the nature of the evidence offered by Congress": "The more detailed and substantial

the evidence of Congress's legislative purpose, the better." Mazars, 140 S. Ct. at 2036. Resolution 503 identifies the Committee's task of "investigat[ing] and report[ing] upon the facts, circumstances, and causes" of the January 6 riot, § 3(1), including the federal government's actions in "detecting, preventing, preparing for, and responding" to the riot, § 4(a)(2)(B). It directs the Committee to issue a report containing "recommendations for corrective measures," which include "changes in law" to "prevent future acts of violence * * * targeted at American democratic institutions," to "improve the security posture of the United States Capitol Complex," and to "strengthen the security and resilience of * * * American democratic institutions against violence, domestic terrorism, and domestic violent extremism." § 4(a)(3) and (c). And as noted, the facts in the public domain and developed by the Committee to date are sufficient to warrant a further inquiry into any connections between the actions of the White House and the events of January 6, and to explain why the Committee believes the requested records will advance those legislative goals.

Fourth, courts should "carefully scrutinize[]" any "burdens on the President's time and attention." Mazars, 140 S. Ct. at 2036. But applicant is no longer the sitting President. See GSA, 433 U.S. at 448. Moreover, the applicable regulations permit the Archivist to "adjust any time period or deadline" as needed, 36

C.F.R. 1270.44(g), and the Archivist has exercised that authority to provide sufficient time to review the documents in question. Appl. App. 58-59; see C.A. App. 127 ¶ 23. Applicant identifies no reason to believe similarly reasonable adjustments would not be made in the future should they become necessary.

II. THE REMAINING FACTORS DO NOT SUPPORT INJUNCTIVE RELIEF

The court of appeals also correctly determined that applicant cannot satisfy the remaining preliminary-injunction factors. Appl. App. A63-A67.

A. Applicant has not identified any irreparable harm that would result were the Archivist to permit the Committee to access the relevant official documents in the first three tranches. Because applicant is proceeding "solely in his 'official capacity as a former President,'" Appl. App. A63 (brackets and citation omitted), he cannot rely on any privacy, property, or other interest personal to him. Instead, he argues (Appl. 23-24) only that the release of the records would frustrate "assertions of executive privilege" and thereby "harm the institution of the Presidency." That alleged harm cannot support the requested relief; as noted, executive privilege "is not for the benefit of the President as an individual, but for the benefit of the Republic," GSA, 433 U.S. at 449, and President Biden has determined that the Republic would benefit from allowing the Committee to access the first three tranches of documents.

B. The balance of equities and the public interest, which "merge" where relief is sought against the federal government, Nken v. Holder, 556 U.S. 418, 435 (2009), also weigh against applicant's request. The public has an undeniably strong interest in the expeditious consideration of remedial measures aimed at securing the safety and soundness of our democratic processes and institutions. President Biden has determined that the Committee's timely access to the identified materials furthers that important interest. Any undue delay in providing those records, with the concomitant delay in the completion of the Committee's work, would not.

CONCLUSION

The application should be denied.

Respectfully submitted.

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