No. 26-474

IN THE
Supreme Court of the United States

PETER K. NAVARRO,
Petitioner,
v.
UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

Brief *Amicus Curiae* of Citizens United, Citizens United Foundation, and The Presidential Coalition, LLC in Support of Petitioner

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 1

A. The Subpoena 1

B. District Court Proceedings 2

C. Circuit Court Proceedings 5

SUMMARY OF ARGUMENT 9

ARGUMENT

I. THE COURTS BELOW REFUSED TO CONSIDER THE J6 COMMITTEE'S FAILURE TO TAKE REASONABLE STEPS TO ADDRESS THE ISSUE WITH FORMER PRESIDENT TRUMP 11

II. THE COURTS BELOW ERRED IN RULING THAT THE "WILLFULLY" REQUIREMENT IN 2 U.S.C. § 192 WOULD BE MET DESPITE DR. NAVARRO'S REASONABLE ASSERTION OF A VALID DEFENSE 13

A. Dr. Navarro's Assertion of the Executive Privilege Defense Negated the "Willfully" Element Required by 2 U.S.C. § 192 . . . 13

B. The Defense Raised by Dr. Navarro Was Justified to Support the Purpose behind Executive Privilege Reflected in the Precedents of this Court 18

III. THE CIRCUIT COURT ERRED IN RULING THAT THE DISTRICT COURT CORRECTLY DETERMINED THAT EXECUTIVE PRIVILEGE DID NOT APPLY . . 19

A. The Decision to Deny Dr. Navarro the Right to Assert a Defense Based on Executive Privilege Was Contrary to this Court's Precedent. 19

B. Dr. Navarro's Defense Was Raised in Good Faith Based on the Law at that Time and Should Not Be Barred because a Subsequent Judicial Decision Might Prevent Its Invocation 21

IV. DR. NAVARRO HAD GOOD REASON TO BELIEVE THAT HE HAD NO DUTY TO COMPLY WITH THE CONGRESSIONAL SUBPOENA 22

CONCLUSION 27

TABLE OF AUTHORITIES

Page

STATUTES

2 U.S.C. § 192 . . . . . 2, 5, 13
3 U.S.C. § 102 20

CASES

Elonis v. United States, 575 U.S. 723 (2015) 15
Licavoli v. United States,
294 F.2d 207 (D.C. Cir. 1961) 4, 10, 15
Morissette v. United States, 342 U.S. 246 (1952) . 15
Nixon v. Adm'r of Gen. Servs.,
433 U.S. 425 (1977) 16, 19, 22
Potter v. United States, 155 U.S. 438 (1894) 14
Trump v. Mazars USA, LLP,
591 U.S. 848 (2020) 11, 17
Trump v. Thompson, 142 S. Ct. 680 (2022) . . 16, 17
United States v. Floris, No. 1:26MJ-00185
(D.D.C. 2026) 15
United States v. Nixon, 418 U.S. 683 (1974) . . 16, 19

MISCELLANEOUS

C. Ryan Barber & Sadie Gurman, "Judge Rejects Claims Against Ex-FBI Staff," *Wall Street Journal* (Nov. 3, 2026) 15
Steven Bradbury, "Immunity of the Former Counsel to the President From Compelled Congressional Testimony," 31 Op. O.L.C. 191 (July 10, 2007) 25
Kyle Cheney, "See the 1960 Electoral College certificates that the false Trump electors say justify their gambit," *Politico* (Feb. 7, 2022) . . . 7
"Commissioned Officers and Similarly Titled Staff," *White House Transition Project* (2021) . 6

Ron Elving, "Objecting To Electoral Votes In Congress Recalls Bitter Moments In History," *NPR* (Jan. 5, 2021). 7
Steven Engel, "Congressional Oversight of the White House," 45 Op. O.L.C. __ (Jan. 8, 2021) 26
John Harmon, "Memorandum to all Heads of Offices, Divisions, Bureaus and Boards of the Department of Justice," *OLC* (May 23, 1977) 23
Julie Kelly, January 6: How Democrats Used the Capitol Protest to Launch a War on Terror Against the Political Right (2025). 12
"Interim Report on the Failures and Politicization of the January 6th Select Committee" (Dec. 17, 2024) 12
Derek T. Muller, "Electoral Votes Regularly Given," 55 Ga. L. Rev. no.4 1529 (2021) 7
Theodore Olson, "Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege," 8 Op. O.L.C. 101 (May 30, 1984) 24
Theodore Olson, "Congressional Demand for Deposition of Counsel to the President Fred Fielding," *OLC* (July 23, 1982) 23
Frank Pavone, "24 STRAIGHT MINUTES of Democrats denying election results," *YouTube* (Aug. 4, 2023) 7
"Pelosi just made an unprecedented move. Here's why," *CNN Politics* (July 22, 2021). 8
Joseph Ratliff, "Past Electoral College Vote Objections by Democrats, Explained," *AllSides.com* (Jan. 7, 2021) 7

William Rehnquist, "Power of Congressional Committee to Compel Attendance of 'White House Staff,'" *OLC* (Feb. 5, 1971) 23
Janet Reno, "Assertion of Executive Privilege With Respect to Clemency Decision," 23 Op. O.L.C. 1 (Sept. 16, 1999) 24
Meg Storm, "Nancy Pelosi Takes Responsibility for Botched January 6 Response in Newly Revealed Video Shot by Her Daughter," *MegynKelly.com* (June 24, 2024) 8
Karl Thompson, "Immunity of the Director of the Office of Political Strategy and Outreach from Congressional Subpoena," 38 Op. O.L.C. 1 (July 25, 2014) 25

INTEREST OF THE *AMICI CURIAE*[1]

Citizens United and Citizens United Foundation are nonprofit organizations, exempt from federal income tax under sections 501(c)(4) and 501(c)(3) of the Internal Revenue Code, respectively. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. The Presidential Coalition, LLC is a political committee.

STATEMENT OF THE CASE

A. The Subpoena.

Petitioner Dr. Peter K. Navarro "served as a senior advisor to President Donald J. Trump during all four years of his [first] term of office." *United States v. Navarro*, 651 F. Supp. 3d 212, 221 (D.D.C. 2023) ("*Navarro I*"). Approximately one year after President Trump left office, on February 9, 2022, the House Select Committee to Investigate the January 6th Attack on the U.S. Capitol ("J6 Committee") served Dr. Navarro with a subpoena for documents and to appear for a deposition on March 2, 2022. Dr. Navarro did not produce any records. In response to a followup

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[1] It is hereby certified that counsel of record for all parties received timely notice of the intention to file this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

request, on February 27, 2022, Dr. Navarro responded by stating in part: "'President Trump has invoked Executive Privilege in this matter.... Accordingly, my hands are tied.'" *Id*.

In correspondence with the J6 Committee, Dr. Navarro explained: the "'privilege is not mine to waive'" and that it would be "incumbent on the Committee to directly negotiate with President Trump and his attorneys regarding any and all things related to this matter." *Navarro I* at 222. Later that day, White House Counsel's office advised Dr. Navarro that "President ... Biden 'had determined that an assertion of executive privilege is not in the national interest, and therefore is not justified....'" *Id*. Dr. Navarro did not appear for a deposition on March 2, 2022.

B. District Court Proceedings.

Three months later, a grand jury indicted Dr. Navarro for two counts of Contempt of Congress in violation of 2 U.S.C. § 192, for refusal to produce documents and failure to appear for the deposition. *Id*. Dr. Navarro moved to dismiss the indictment based on his "'legitimate assertion of Executive Privilege,'" contending that his appearance would "'violate[] the doctrine of Separation of Powers.'" *Navarro I* at 222. For "testimonial immunity," Navarro relied on former President Trump's direction, as well as a series of opinions from the Department of Justice's Office of Legal Counsel ("OLC"), starting with one from 1984 by later-Solicitor General Theodore Olson, in believing that "senior counselors to the President are absolutely immune from compelled congressional process and

therefore cannot be prosecuted for noncompliance." *Id*.; *see also* Petition for Certiorari ("Pet.") at 23.

In denying Dr. Navarro's motion to dismiss, the district court[2] acknowledged that there is "no case that speaks to the manner in which a President must invoke executive privilege." *Navarro I* at 223. The district court noted that President Trump previously asserted Executive Privilege to shield Dr. Navarro from a subpoena using a press release issued November 20, 2021. The Select Committee on the Coronavirus Crisis did not challenge that assertion of immunity, and the district court implied that this was a valid assertion. *Navarro I* at 225; *see* Motion to Dismiss at 5 (Dist. Ct. Doc. 34 ("Doc. 34"); incorrectly identified by the district court as "ECF No. 35-2" (*Navarro I* at 221)). Dr. Navarro responded to the J6 Committee subpoena in similar fashion, but the J6 Committee refused to accept that assertion.

The district court provided only part of the story about Dr. Navarro's effort to resolve the matter, saying: "He wrote the 'privilege is not mine to waive' and that it would be 'incumbent on the Committee to directly negotiate with President Trump and his attorneys regarding any and all things related to this matter.'" *Navarro I* at 221. The rest of the story was reported by neither court below but was set out in Dr. Navarro's Motion to Dismiss, explaining: "**neither the Select Committee nor its staff ever contacted President Trump or his attorneys** to attempt to

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[2] The case was assigned to Judge Amit P. Mehta, who had been appointed by President Obama.

resolve the privilege issues, a long-standing practice strongly encouraged by the Supreme Court." Doc. 34 at 6-7 (emphasis added). Even more surprisingly, the Motion to Dismiss also explains that "the Select Committee counsel ... **did not communicate Dr. Navarro's assertion of Executive Privilege to Chairman Thompson** or his designee." *Id*. at 7, n.10 (emphasis added). The circuit court also failed to mention either of these facts.

The district court reported that Dr. Navarro asserted in support of his motion to dismiss that "the President *privately* instructed him to assert privilege...." (*Navarro I* at 224), but the court apparently concluded that President Trump's instructions were inadequate, **ruling that his "claimed assertion of executive privilege is unproven, [therefore Dr. Navarro] cannot avoid prosecution for contempt."** *Id.* at 222 (emphasis added).

The district court also granted the Government's motion *in limine* "to preclude [Navarro] from raising defenses relating to his good faith beliefs about the law" and other matters.[3] *Id*. at 238. The district court relied almost exclusively on *Licavoli v. United States*, 294 F.2d 207 (D.C. Cir. 1961), where it believed, "the court rejected 'good faith reliance upon advice of counsel' as a defense to contempt" for refusing to

[3] The other matters on which the defendant was barred from raising defenses were his good faith beliefs about: "public authority; selective prosecution; government misconduct; and the Select Committee's composition." *Navarro I* at 238.

appear before a Senate Select Committee. The district court treated the President's invocation of Executive Privilege as equivalent to a lawyer giving advice. Based on that assumption, the district court effectively removed the "willfully" element of the statute, making the crime one of strict liability, not intent.[4] This prevented Dr. Navarro from making any meaningful defense.

In September 2023, after a two-day trial, a jury found Dr. Navarro guilty on both counts, and he was sentenced to concurrent four-month terms of imprisonment on each count. The D.C. Circuit denied Navarro's motion for release pending appeal, and this Court did the same. *See Navarro v. United States*, 144 S. Ct. 771 (2024) (Roberts, C.J., in chambers). Dr. Navarro completed serving his sentence in July 2024.

C. Circuit Court Proceedings.

On appeal, the D.C. Circuit affirmed the district court's decision on July 21, 2026. *United States v.*

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[4] 2 U.S.C. § 192 provides: "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, **willfully makes default**, or who, having appeared, **refuses to answer** any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months." [Emphasis added.]

Navarro, 182 F.4th 1005, 1027 (D.C. Cir. 2026) ("*Navarro II*").[5] Before addressing the court's decision, there are interesting inclusions and exclusions in the facts set out in the circuit court's opinion, which seemingly can only be understood as an attempt to establish a negative view of Dr. Navarro, and a weak context for the invocation of Executive Privilege.

- The district court described Dr. Navarro as "a senior advisor to President Donald J. Trump during all four years of his term of office ... in various capacities: Deputy Assistant, and later **Assistant, to the President**; Director of Trade and Manufacturing Policy; Director of the White House National Trade Council; and Defense Production Act policy coordinator." *Navarro I* at 221 (emphasis added). But the circuit court opinion diminished Dr. Peter Navarro's role to that of a "**former aide**" to President Trump in his first administration without any identification of his titles, roles, and responsibilities. *Navarro II* at 1009. In fact, Assistant to the President is the highest commissioned officer rank (receiving his commission directly from the President) with the highest staff rank in the White House.[6]

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[5] The panel consisted of Judge Patricia Millett (appointed by President Obama), Judge Cornelia Pillard (appointed by President Obama), and Judge Julianna Michelle Childs (appointed by President Obama to the South Carolina district court and appointed by President Biden to the D.C. Circuit).

[6] The Chief of Staff also has the rank of Assistant to the President. *See* "Commissioned Officers and Similarly Titled Staff," *White House Transition Project* (2021).

- The circuit court states that Dr. Navarro's book "took credit for devising a plan to 'leverage' the Vice President's authority under the Electoral Count Act of 1887 to 'delay certification' of the results of the 2020 presidential election on January 6, 2021." *Navarro II* at 1009. In fact, the plan he "devised" was to ensure that state legislatures had the opportunity to ensure the accuracy of the electoral college vote certified by state election officials. The plan proposed to have members of Congress object to counting the electoral votes of certain states, as congressmen have attempted numerous times in many presidential elections.[7]

- The circuit court somehow found relevant that Dr. Navarro claimed Executive Privilege "**before** even seeing the subpoena...." (*Navarro II* at 1009, 1026)

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[7] Challenges during electoral counts are certainly nothing new, as disputes arose regarding elections in 1796, 1780, 1824, 1876, and 1960 (where three competing slates of electors were presented from Hawaii). *See* Ron Elving, "Objecting To Electoral Votes In Congress Recalls Bitter Moments In History," *NPR* (Jan. 5, 2021); Kyle Cheney, "See the 1960 Electoral College certificates that the false Trump electors say justify their gambit," *Politico* (Feb. 7, 2022). *See also* Derek T. Muller, "Electoral Votes Regularly Given," 55 Ga. L. Rev. no.4 1529 (2021) (analysis of challenges made in 1969, 2001, 2005, 2017, and 2021, usually made by Democrat Senators and Representatives). More recently, House Democrat members challenged the electoral counts of 2000, 2004, 2016, and 2020. *See* Joseph Ratliff, "Past Electoral College Vote Objections by Democrats, Explained," *AllSides.com* (Jan. 7, 2021); Frank Pavone, "24 STRAIGHT MINUTES of Democrats denying election results," *YouTube* (Aug. 4, 2023).

(emphasis added), when the issue in the case was whether then-former President Trump had lawfully instructed Dr. Navarro to assert Executive Privilege **after** the subpoena was issued.

- The circuit court then states that when Congress assembled to certify the votes of the Electoral College on January 6, 2021, "a mob of rioters overwhelmed the security perimeter around the Capitol, breached the Capitol itself, and delayed the certification process." *Id*. at 1012. The truth of the events of that day is complicated, and much is still unknown.[8]

- The circuit court describes the formation of the J6 Committee as if it were a normally constituted select committee. *Navarro II* at 1012. The court omits critical details such as the fact that Speaker Pelosi admitted that the method by which its membership was selected was "unprecedented."[9]

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[8] *See* Meg Storm, "Nancy Pelosi Takes Responsibility for Botched January 6 Response in Newly Revealed Video Shot by Her Daughter," *MegynKelly.com* (June 24, 2024).

[9] *See* "Pelosi just made an unprecedented move. Here's why," *CNN Politics* (July 22, 2021). Specifically, Pelosi rejected the appointment of two of the seven members recommended by House Minority Leader Kevin McCarthy, leading McCarthy to withdraw all of his recommendations. Then, Pelosi appointed a lopsided committee of seven Democrats and only two, at best nominal, Republicans (Liz Cheney and Adam Kinzinger) — a decision which even she admitted was "unprecedented." *Id*.

Lastly, further, the circuit court agreed with the district court that the willfulness element of section 192 did not require any more than acting in the knowledge of the facts of the offense. *Navarro II* at 1025-26. That approach, which is inconsistent with the precedents of this Court, transformed Dr. Navarro's demonstrated effort to follow the advice of his former employer, the former President of the United States, into an irrelevancy.

SUMMARY OF ARGUMENT

Disputes over the assertion of Executive Privilege in response to a congressional subpoena should be resolved between Congress and the President, as this Court has observed. However, here there were complicating factors. First, it is no coincidence that it was Dr. Navarro who had assembled detailed information about election irregularities which stood against the very premise and political objectives of the J6 Committee. Additionally, the J6 Committee's hostility to former President Trump apparently was so great that it refused to even contact him to negotiate the matter.

Previously, Dr. Navarro had responded to another committee's subpoena, where President Trump directed him not to respond in a press release, and that was accepted by that committee. Here, Dr. Navarro responded in a similar manner, but the J6 Committee, which was perhaps the most partisan and aggressive congressional committee ever assembled — the composition of which Speaker Pelosi described as "unprecedented" — demanded prosecution. Spurred on

by a letter from President Biden's White House counsel disagreeing with President Trump's assertion of the privilege, the full wrath of the Biden Justice Department was unleashed against this one former Assistant to the President. Then, the courts below embraced the Biden Justice Department's position that the method used by Dr. Navarro to assert Executive Privilege here was inadequate. Former government officials without the benefit of government-funded lawyers cannot be expected to have the resources to meet the exacting standards to assert Executive Privilege that were established after the fact by the courts below.

Dr. Navarro relied on numerous Letter Opinions of the Office of Legal Counsel from the Nixon to the Obama Administration which supported his position. There was no indication whatsoever that Dr. Navarro acted "willfully," making the prosecution invalid. To justify prosecution, the courts below relied on the *Licavoli* decision of the D.C. Circuit, which cannot be squared with decisions of this Court, to completely negate the "willfully" requirement in the statute.

There is every reason to believe that the questions involving the assertion of Executive Privilege raised here, which have never been resolved by this Court, will arise again, and this case presents this Court with the opportunity to resolve those issues before they are back, likely on a highly expedited basis.

ARGUMENT

I. THE COURTS BELOW REFUSED TO CONSIDER THE J6 COMMITTEE'S FAILURE TO TAKE REASONABLE STEPS TO ADDRESS THE ISSUE WITH FORMER PRESIDENT TRUMP.

A dispute over the assertion of Executive Privilege should be resolved between the principals: the Congress and the President. Dr. Navarro was caught in the middle, and the courts saw fit to punish him nevertheless. The J6 Committee refused to contact President Trump to negotiate and resolve the matter, placing an unfair burden on Dr. Navarro. *See Trump v. Mazars USA, LLP*, 591 U.S. 848, 862-63 (2020) ("*Mazars*") ("[D]isputes of this sort can raise important issues concerning relations between the branches ... Congress and the Executive have nonetheless managed for over two centuries to resolve such disputes among themselves....").

The circuit court affirmed the district court's rulings, but took a different approach by addressing the merits of Navarro's claim of Executive Privilege. It described the J6 Committee's subpoena as having ordered:

> Dr. Navarro to appear for a deposition on March 2, 2022, and to produce a schedule of documents by February 23, 2022. That schedule included documents related to the Navarro Report, Green Bay Sweep, claims of fraud in the 2020 election, efforts to contest

> the results of that election, efforts to organize rallies in Washington, D.C., and the January 6th attack on the Capitol. [*Navarro II* at 1013.]

To the extent that the J6 Committee was seeking Dr. Navarro's books, it appears they already had them, but if the subpoena was to learn about communications between Dr. Navarro and President Trump, that would be covered by Executive Privilege. The J6 Committee's agenda was not to focus on Dr. Navarro, but to enact a partisan plan to tar and feather President Trump. The J6 Committee was not entitled to conduct a fishing expedition to obtain communications between President Trump and Dr. Navarro.[10]

Had the J6 Committee reached out to President Trump, there is every reason to believe he would have responded. However, the J6 Committee wanted to keep the pressure on Dr. Navarro. The question now is whether courts will have an appreciation for the burden put on former government employees being subpoenaed.

To assert Executive Privilege in exactly the way that the courts below might have wanted imposes a

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[10] The behavior of the J6 Committee gave neither Navarro nor the court any reason whatsoever to believe that it would act fairly. *See* Committee on House Administration. *See, e.g.,* "Interim Report on the Failures and Politicization of the January 6th Select Committee" (Dec. 17, 2024); Julie Kelly, January 6: How Democrats Used the Capitol Protest to Launch a War on Terror Against the Political Right (2025).

duty on Dr. Navarro that would require him to expend more funds on lawyers than most people have. Dr. Navarro followed the same procedure he did in asserting a defense to the subpoena involving COVID-19 records, but the J6 Committee refused to deal directly with President Trump and worked with the Biden Administration to indict Dr. Navarro in a highly politicized prosecution. The history of the J6 Committee's politicized "investigation" itself demonstrates the grave danger that rights will be lost when courts put excessive burdens on ordinary people that they cannot afford to meet to assert privileges and rights. Rights are not just for the wealthy.

II. THE COURTS BELOW ERRED IN RULING THAT THE "WILLFULLY" REQUIREMENT IN 2 U.S.C. § 192 WOULD BE MET DESPITE DR. NAVARRO'S REASONABLE ASSERTION OF A VALID DEFENSE.

A. Dr. Navarro's Assertion of the Executive Privilege Defense Negated the "Willfully" Element Required by 2 U.S.C. § 192.

Dr. Navarro's good faith assertion of Executive Privilege defeats the contention that he had the requisite intent to "willfully" refuse to comply with the J6 Committee subpoena. Dr. Navarro reasonably believed that President Trump expected him to assert the defense to protect the former President's communications with him. Dr. Navarro also believed that this action upheld the constitutionally mandated Separation of Powers, not just protecting himself, but also ensuring that future Presidents can be assured

that they will receive candid advice from senior advisors who will not fear that after leaving the White House they will be deluged with congressional demands.

At the time Dr. Navarro asserted the defense, "[t]he issue of whether a president must personally invoke the presidential communications privilege remain[ed] an open question." *Navarro II* at 1020 (quoting *Protect Democracy Project, Inc. v. NSA,* 10 F.4th 879, 886 n. 1 (D.C. Cir. 2011)). The circuit court decided, however, that the privilege must be claimed by the current or former President or an official authorized by the President to claim it. *Id.*

To reject Dr. Navarro's defense based on a subsequent judicial determination regarding the necessity for some type of formal invocation of the Executive Privilege by a former President constitutes an injustice to Dr. Navarro, who was left to make his decision about his defense in circumstances of legal uncertainty. He reasonably raised his defense at the time. The fact that the court below imposed a new requirement for the invocation of the privilege long after Dr. Navarro raised his defense does not obviate the reasonableness of the assertion at the time.

Both courts below concluded that Dr. Navarro's conviction can be upheld simply because he intended to refuse to comply with the congressional subpoena. This is contrary to this Court's precedents regarding the necessary mens rea for a criminal conviction for a "willful" action. *Potter v. United States,* 155 U.S. 438, 446 (1894). More than mere intent to commit an act

must be proven. It requires "knowledge and a purpose to do wrong." *Id.* In *Elonis v. United States,* 575 U.S. 723, 734 (2015) (quoting *United States v. Balint*, 258 U.S. 250, 251 (1922)), this Court stated that, as a general rule, "a guilty mind is 'a necessary element in the indictment and proof of every crime.'" As the Court observed in *Morissette v. United States,* 342 U.S. 246, 252 (1952): "wrongdoing must be conscious to be criminal."[11]

The decision below and the precedent the D.C. Circuit considered binding on it — *Licavoli* — cannot be reconciled with the decisions of this Court cited above. The crimped view of the mens rea requirement expressed by the court of appeals prompted it to criminalize conduct that was not activated by any criminal intent. Mere failure to comply with a congressional subpoena without allowing the defendant to demonstrate his reasonable justification for the failure does not supply the requisite mens rea.

The court below acknowledged that "[t]he confidentiality afforded by the presidential communications privilege protects 'the public interest

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[11] On November 2, 2026, U.S. Magistrate Judge Zia Faraqui dismissed an indictment in *United States v. Floris*, No. 1:26MJ-00185 (D.D.C.), which charged two former FBI officials with lying to Congress about their involvement in an investigation of Hunter Biden. A transcript of the ruling from the bench is not yet available, but the *Wall Street Journal* reported that the prosecution had failed to show that defendants "had intent or motive to lie to Congress." C. Ryan Barber & Sadie Gurman, "Judge Rejects Claims Against Ex-FBI Staff," *Wall Street Journal* (Nov. 3, 2026).

in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking.'" *Navarro II* at 1011 (citing *United States v. Nixon,* 418 U.S. 683, 708 (1974) ("*U.S. v. Nixon*")). The circuit court explained that "because that confidentiality would have little value if it dissolved the moment a president's time in office ended, the presidential communications privilege 'survives the individual President's tenure.'" *Navarro II* at 1011 (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977) ("*Nixon v. GSA*")).

This Court has not yet conclusively decided whether a President whose term of office has expired can invoke Executive Privilege with respect to communications that occurred during his term of office, especially if his successor opposes or even purports to rescind its invocation. *Nixon v. GSA* held that former Presidents retain for some period of time a right to assert Executive Privilege over documents generated during their administrations. *Id.* at 449, 451.

The effort to assert Executive Privilege in *Trump v. Thompson* was rejected not because it was invoked by a former President, but because the invocation did not satisfy the test established in *U.S. v. Nixon*. The court below rejected Dr. Navarro's defense because it concluded that Executive Privilege had not been invoked in a satisfactory manner by President Trump. *Navarro II* at 1020-21. However, this Court has never specified what would constitute a satisfactory manner.

In *Trump v. Thompson,* 142 S. Ct. 680 (2022), Justice Kavanaugh stated:

> A former President must be able to successfully invoke the Presidential communications privilege for communications that occurred during his Presidency, even if the current President does not support the privilege claim. Concluding otherwise would eviscerate the executive privilege for Presidential communications. [*Id.* at 680 (Kavanaugh, J., concurring).]

The appropriate analysis in Dr. Navarro's case should be to determine whether, at the time he failed to comply with a congressional subpoena in 2022, President Trump was entitled to invoke Executive Privilege, although no longer in office, to protect his communications with Dr. Navarro that occurred during his first term of office. If so, Dr. Navarro should have been allowed to assert a defense before a jury to his indictment for failing to comply with the subpoena. "[R]ecipients of legislative subpoenas ... have long been understood to retain common law and constitutional privileges with respect to certain materials, such as … governmental communications protected by executive privilege." *Mazars* at 863.

On February 27, 2022, Dr. Navarro wrote to the J6 Committee:

> President Trump has invoked Executive Privilege in this matter; and it is neither my privilege to waive or Joseph Biden's privilege to waive. Accordingly, my hands are tied. Your best course of action is to directly

> negotiate with President Trump and his attorneys regarding any and all things related to this matter. [Pet. at 5.]

President Trump had previously directed Dr. Navarro to invoke Executive Privilege on President Trump's behalf in response to a prior subpoena issued by the House Select Subcommittee on the Coronavirus Crisis. Upon being served with the subpoena that is the subject of this case, Dr. Navarro reasonably believed that President Trump wished to protect the other communications sought by that subpoena. He asserted Executive Privilege as a defense to the first subpoena, and did again with respect to the second subpoena. He was justified in doing so.

B. The Defense Raised by Dr. Navarro Was Justified to Support the Purpose behind Executive Privilege Reflected in Precedents of this Court.

In determining whether the court below erred in denying Dr. Navarro's defense based on Executive Privilege, this Court should consider the effect of the denial on the purpose and function of the privilege. The rejection of his defense has a negative effect on the continuing viability of the privilege, which is intended to assure that presidential advisors provide candid advice without fear of public disclosure. The decision below denied Dr. Navarro the right to assert that his communications with President Trump were protected from disclosure to a congressional committee. This Court has repeatedly recognized that executive privilege is "fundamental to the operation of

Government" (*U.S. v. Nixon* at 708), and "for the benefit of the Republic." *Nixon v. GSA* at 449. The effect of the decision below is to undermine the privilege by making presidential advisors hesitant to provide the candid advice that a President should receive for fear of conviction if they were to be subject to a congressional subpoena to produce confidential communications with the President. They have a duty to protect confidential communications unless the President they serve decides not to assert Executive Privilege. The court below failed to consider the effect of its decision on the future effectiveness of Executive Privilege if advisors can be prosecuted for refusing on reasonable grounds to comply with a congressional subpoena.

III. THE CIRCUIT COURT ERRED IN RULING THAT THE DISTRICT COURT CORRECTLY DETERMINED THAT EXECUTIVE PRIVILEGE DID NOT APPLY.

A. The Decision to Deny Dr. Navarro the Right to Assert a Defense based on Executive Privilege Was Contrary to this Court's Precedent.

This Court has recognized that, under certain circumstances, a former President has the right to invoke Executive Privilege to protect communications that occurred during his administration. *Nixon v. GSA* at 449, 451. This Court has not yet decided whether the incumbent President can waive the invocation of the privilege invoked by a former President.

The determination by the courts below that Dr. Navarro was not entitled to assert a defense based on Executive Privilege because President Trump had not formally invoked the privilege was erroneous. It ignored that a procedure for invoking the privilege by a former President had not been established, although such a procedure could be judicially established. How that privilege is invoked is likely very different during a President's term of office and after it. When a President is in office, he has a significant number of lawyers in the White House Counsel's office, and thousands more in the U.S. Department of Justice. When a President leaves office, none of these resources are available to him, especially, as here, when President Biden was sworn in after facing President Trump in an election. There is no question here that President Biden would have supported the J6 Committee's effort to investigate the activities of his predecessor. A former President has limited taxpayer-funded office staff under the Former Presidents Act of 1958 (codified at 3 U.S.C. § 102). For the first 30 months after leaving office, up to $150,000 per year is authorized in staff salaries, and thereafter, up to $96,000 per year. Beyond that, former Presidents have relied on volunteers and interns. The likelihood that former Presidents can have continuing access to lawyers with expertise in such matters is unknown. In any case, the Court should not expect that a former President would have the same capability to formally assert Executive Privilege after he leaves office as he had when in office.

In the circumstances of this case, it was clear error for the court below to decide that some type of formal

invocation of Executive Privilege was required in order for Dr. Navarro to invoke his defense. Indeed, another congressional committee accepted President Trump's assertion of Executive Privilege by Press Release.

The then-incumbent President, Joe Biden, had purported to waive Executive Privilege with respect to the congressional subpoena at issue here. It has not yet been established whether the incumbent President has the authority to waive a predecessor's invocation of the privilege. The congressional committee here had not contacted President Trump to give him the opportunity to negotiate or contest its subpoena. Here, the subpoena was issued on February 9, 2022, more than a year after President Trump left office in January 2021. He obviously had no opportunity to invoke the privilege before he left office.

The courts below lacked the authority to impose a requirement given the facts of this case that a formal invocation of Executive Privilege by President Trump be proven before Dr. Navarro would be allowed to raise his defense.

B. Dr. Navarro's Defense Was Raised in Good Faith Based on the Law at that Time and Should Not Be Barred because a Subsequent Judicial Decision Might Prevent Its Invocation.

Whether Dr. Navarro should have been allowed to raise a defense based on Executive Privilege should be determined in light of the law as it existed at the time the defense was raised. Dr. Navarro was entitled to

rely on the decision in *Nixon v. GSA*, even if this Court were later to modify its holding and reasoning. It would be fundamentally unfair to deny a defendant the right to a defense reasonably justified under the law at the time because a court later decides to announce a different rule. Thus, even if the court below correctly decided that a former President cannot invoke or has not invoked Executive Privilege in the circumstances of this case, it did not allow the court to uphold Dr. Navarro's conviction on the grounds that his defense should not be allowed because the unsettled law at the time it was raised should later be resolved against his right to raise the defense.

IV. DR. NAVARRO HAD GOOD REASON TO BELIEVE THAT HE HAD NO DUTY TO COMPLY WITH THE CONGRESSIONAL SUBPOENA.

As explained *supra*, Dr. Navarro relied in large part on U.S. Justice Department Office of Legal Counsel opinion letters supporting his view that his right and duty was to resist the subpoenas. The first in this series of OLC letters was written during the Nixon Administration by future Chief Justice William Rehnquist:

> The President and his immediate advisors — that is, those who customarily meet with the President on a regular or frequent basis — should be deemed absolutely immune from testimonial compulsion by a congressional committee. They not only may not be examined with respect to their official duties,

> but they may not even be compelled to appear before a congressional committee.[12]

During the Carter administration, John Harmon wrote:

> It has been the position of the Executive branch that the President and his immediate advisors are absolutely immune from testimonial compulsion by congressional committee. Lower-level White House officials have been deemed subject to a congressional subpoena, but might refuse to testify with respect to any matter arising in the course of their official position of advising or formulating advice for the President.[13]

During the Reagan Administration, Theodore Olson wrote: "'[T]he following requests should be routinely declined and, if pressed, be met with assertions of executive privilege: (1) requests for testimony by immediate presidential staff concerning their official activities.'"[14]

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[12] William Rehnquist, "Power of Congressional Committee to Compel Attendance of 'White House Staff'" at 7. *OLC* (Feb. 5, 1971).

[13] John Harmon, "Memorandum to all Heads of Offices, Divisions, Bureaus and Boards of the Department of Justice" at 5. *OLC* (May 23, 1977).

[14] Theodore Olson, "Congressional Demand for Deposition of Counsel to the President Fred Fielding" at 5. *OLC* (July 23, 1982).

Later in the Reagan Administration, Olson wrote, "criminal contempt proceedings are an inappropriate means for resolving document disputes, especially when they involve another governmental entity."[15] He added, "[t]o seek criminal punishment for those who have acted to aid the President's performance of his duty would be … inconsistent with the Constitution." *Id*. at 142.

During the Clinton Administration, future Attorney General Janet Reno wrote that for "documents containing confidential advice, analysis, recommendations, and statements of position … executive privilege may properly be asserted with respect to the foregoing documents and with respect to testimony by Department of White House officials concerning the deliberations and connection with [a presidential] decision."[16]

During the George W. Bush Administration, Steven Bradbury wrote, "[s]ince at least the 1940s, administrations of both political parties have taken the position that the President and his immediate advisors are absolutely immune from testimonial compulsion by a congressional committee.... This

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[15] Theodore Olson, "Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege," 8 Op. O.L.C. 101, 133 (May 30, 1984).

[16] Janet Reno, "Assertion of Executive Privilege With Respect to Clemency Decision," 23 Op. O.L.C. 1, 1 (Sept. 16, 1999).

immunity is absolute and may not be overborne by competing congressional interests."[17]

During the Obama Administration, Karl Thompson wrote:

> Absent immunity for a President's closest advisers, congressional committees could wield their compulsory power to attempt to supervise the President's actions, or to harass those advisers in an effort to influence their conduct, retaliate for actions the committee disliked, or embarrass and weaken the President for partisan gain. Such efforts would risk significant congressional encroachment on, and interference with, the President's prerogatives and his ability to discharge his duties with the advice and assistance of his closest advisers.[18]

Thompson added, "The Court has not yet considered whether Congress may secure the testimony of an immediate presidential adviser through compulsory process." *Id*. at 10.

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[17] Steven Bradbury, "Immunity of the Former Counsel to the President From Compelled Congressional Testimony," 31 Op. O.L.C. 191, 191 (July 10, 2007) (internal quotation marks and citations omitted).

[18] Karl Thompson, "Immunity of the Director of the Office of Political Strategy and Outreach from Congressional Subpoena," 38 Op. O.L.C. 1, 8 (July 25, 2014).

During the first Trump Administration, Steven Engel wrote, "We have long maintained … that the contempt statute does not apply to executive branch officials who resist congressional subpoenas in order to protect the prerogatives of the executive branch."[19] The opinion stated that "[a]ny effort by Congress to arrest a White House official for noncompliance with a subpoena based upon a legitimate separation of powers objection would, besides raising serious practical concerns, likely be unconstitutional." *Id.* at 49.

Based on these and other OLC opinions, consistent over the years and between parties, Dr. Navarro likely believed himself to be well within the bounds of proper conduct in responding to a congressional subpoena.

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[19] Steven Engel, "Congressional Oversight of the White House," 45 Op. O.L.C. __, 50 (Jan. 8, 2021).

CONCLUSION

For the foregoing reasons, these *amici* urge the Court to grant the petition for certiorari.

Respectfully submitted,

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