No. 26-474

In the Supreme Court of the United States

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

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

BRIEF OF AMICUS CURIAE ARTICLE III PROJECT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTERESTS OF AMICUS CURIAE ii
INTRODUCTION 1
SUMMARY OF ARGUMENT 3
ARGUMENT 4
I. Congressional Document Requests Are Handled via Good-Faith Negotiations Between the Branches. 4
II. Denying a Good-Faith Defense to Section 192 Would Materially Impair the Accommodations Process. 9
A. Denying a Good-Faith Defense is Inconsistent with the Law Governing Accommodations Negotiations 10
B. Stripping the Good-Faith Defense from Section 192 Empowers Congress to Weaponize Subpoenas 12
III. The Court Should Grant Certiorari to Protect Executive Officials When This Issue Recurs. 14
CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

Cases

Elonis v. United States,
575 U.S. 723 (2015) 12

Licavoli v. United States,
294 F.2d 207 (D.C. Cir. 1961) 13

Morissette v. United States,
342 U.S. 246 (1952) 12

Senate Select Committee on Presidential Campaign Activities v. Nixon,
498 F.2d 725 (D.C. Cir. 1974) 6

Trump v. Mazars USA, LLP,
591 U.S. 848 (2020) 6, 9, 10, 12

United States v. Am. Tel. & Tel. Co.,
567 F.2d 121 (D.C. Cir. 1977) 7, 8, 10

United States v. American Telephone & Telegraph Company,
551 F.2d 384 (D.C. Cir. 1976) 7

United States v. Bannon,
101 F.4th 16 (D.C. Cir. 2024).....14

United States v. Bannon,
No. 22-3086, 2025 WL 1503223
(D.C. Cir. May 27, 2025) 14

United States v. Bryan,
339 U.S. 323 (1950) 13

United States v. Navarro,
651 F. Supp. 3d 212 (D.D.C. 2023) 11

Statutes

2 U.S.C. § 192 .....1, 3, 4

Other Authorities

Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982), *reprinted in* H.R. Rep. No. 99-435, pt. 2 (1986)..... 9

3 Annals of Cong. 536 (1792) 6

Assertion of Executive Privilege in Response to a Congressional Subpoena,
5 Op. O.L.C. 27 (1981)..... 8

Congressional Requests for Confidential Executive Branch Information,
13 Op. O.L.C. 153 (1989)..... 5

Cong. Rsch. Serv., RL34097, Congress's Contempt Power and the Enforcement of Congressional Subpoenas (2017) 13

Dawn E. Johnsen, *Executive Privilege Since United States v. Nixon: Issues of Motivation and Accommodation*, 83 Minn. L. Rev. 1127 (1999)..... 5

Hearings on S. 2170 et al. before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 94th Cong., 1st Sess., 87 (1975) 5

History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress: Part I — Presidential Invocations of Executive Privilege Vis-à-Vis Congress, 6 Op. O.L.C. 751 (1982) 6

History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress: Part II — Invocations of Executive Privilege by Executive Officials, 6 Op. O.L.C. 782 (1983) 6

Jonathan David Shaub, *The Executive's Privilege*, 70 Duke L.J. 1 (2020) 10

Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 Minn. L. Rev. 461 (1987) 5, 10

Sean M. Stiff, Legislative Attorney, Cong. Rsch. Serv., *Statement Before the S. Judiciary Comm., Subcomm. on Fed. Cts., Oversight, Agency Action & Fed. Rts., Breaking the Logjam Part 3: Restoring Transparency and Accountability in the Accommodation Process* (Sept. 20, 2023)..... 5

Subpoena from H. Comm. on the Judiciary to Jack Morgan (Sept. 14, 2023), attached as Ex. W to Compl. for Declaratory & Injunctive Relief, *Comm. on the Judiciary v. Daly*, No. 1:24-cv-00815 (D.D.C. Mar. 21, 2024) 15

Subpoena from H. Comm. on the Judiciary to Mark Daly (Sept. 14, 2023), attached as Ex. V to Compl. for Declaratory & Injunctive Relief, *Comm. on the Judiciary v. Daly*, No. 1:24-cv-00815 (D.D.C. Mar. 21, 2024).....15

Subpoena from H. Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol to Benjamin Williamson (Nov. 9, 2021) 15

Subpoena from H. Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol to Cassidy Hutchinson (Nov. 9, 2021).....15

Subpoena from H. Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol to Molly Michael (Nov. 9, 2021) 15

INTERESTS OF AMICUS CURIAE[1]

The Article III Project ("A3P") is a nonprofit organization focused on advocating for constitutionalist judicial reform and fighting against the politicization and weaponization of the justice system. Since it was founded in 2019, A3P has been a leader in defending the separation of powers and the Constitution while at the same time opposing lawfare and efforts to undermine the prerogatives of the Executive Branch.

Amicus curiae has an interest in this case because it concerns a ruling by the DC Circuit that will further enable the weaponization of Congressional oversight. Amicus curiae files this brief to explain how existing precedent and longstanding historical practice apply to this case.

INTRODUCTION

This separation of powers dispute will dictate the terms of engagement for increasingly common disputes between the Legislative and Executive branches. If left undisturbed, the DC Circuit's holding that an executive branch official can violate 2 U.S.C. § 192 (contempt of Congress) via a good-faith invocation of executive privilege threatens to upset a centuries-old constitutional practice and subject executive officials to unjust criminal liability.

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[1] No part of this brief was written by counsel for any party. No party, or any other person or entity other than amicus, monetarily contributed to the preparation or submission of this brief. The parties received notice of the planned filing at least 10 days before the deadline.

For more than 200 years, Congress and the President have used a constitutionally informed system of good-faith negotiations to reach compromises on Congressional subpoenas and document requests. This process has worked surprisingly well; this Court has only been called upon once to mediate a dispute between the two branches over a request for executive documents.

Because this practice, known as the "accommodations process," has been so universal for so long, it has become enshrined in legal doctrine informed by core separation of powers principles. The courts, Congress, and the Executive all recognize an obligation for Congress and the Executive branch to engage in good-faith negotiation over Congressional requests for Executive documents. And because the practice has been so effective, the courts have had no occasion to establish the formal law governing such negotiations. There are fewer than a handful of relevant cases because these disputes have been settled in good faith out of court for the entire duration of the Republic.

The ruling below threatens to destabilize this equilibrium. Rather than recognize the critical importance of good-faith in the accommodations process, the DC Circuit held that good-faith was irrelevant to a contempt of Congress conviction. That holding threatens the very foundation of the accommodations process, which requires that both Congress and the executive negotiate in good faith. Giving Congress the tools to inflict criminal liability on executive officials who misstep in good faith threatens to dramatically rebalance the relevant incentives.

It also threatens to unfairly inflict criminal liability on executive officials like Dr. Peter Navarro. The effectiveness of the accommodations process means that there is almost no settled law controlling the invocation of privilege or other protections during the process. If good-faith is no defense to a Section 192 charge, executive officials are left in the lurch. When attempting to protect the constitutional prerogatives of the Executive in the face of Congressional demands, they are forced to predict how a court will resolve their claims, but they have no law to guide them. If they predict wrong, they go to prison. Such a result is deeply unfair.

This Court should grant certiorari to explain that an executive official does not violate Section 192 when they refuse to comply with a Congressional demand based on a good-faith assertion of Executive privilege. Such a holding is necessary to preserve the integrity of the accommodations process and bring about just results for Executive officials who receive Congressional subpoenas.

SUMMARY OF ARGUMENT

The accommodations process has deep historical roots and has proven to be an effective tool for the resolution of interbranch disputes over Congressional document requests. The process has also been constitutionalized in the few judicial decisions to consider it. Any upset to the balance of authority or the obligation of the branches to negotiate in good faith would threaten the accommodations process.

The DC Circuit's interpretation of Section 192 threatens to do just that. By rejecting a good-faith defense to a Section 192 charge, the decision below tips

the balance of power in favor of Congress. Executive branch officials can now be held in contempt of Congress for good-faith actions in spite of the total lack of governing law. This empowers Congress to weaponize subpoenas by insisting on total compliance and threatening criminal sanctions for even reasonable actions by the Executive branch.

The Court should adopt a more reasonable interpretation of Section 192 that preserves the accommodations process and prevents more Executive branch officials from being held criminally liable for reasonable attempts to vindicate the President's constitutional prerogatives.

ARGUMENT

I. Congressional Document Requests Are Handled via Good-Faith Negotiations Between the Branches.

The ruling of the DC Circuit intrudes on two centuries of good-faith negotiations between Congress and the Executive branch. Disputes between the branches over Congressional subpoenas and corresponding invocations of Executive privilege date back to the founding era and have always been handled via a system of good-faith negotiations that has come to be known as the "accommodations process." The ruling of the DC Circuit below threatens to upend this flexible, good-faith process in spite of its historical and legal pedigree.

Historically, disputes over Congressional subpoenas to the Executive have been resolved in the "hurly-burly, the give-and-take of the political process

between the legislative and the executive." *Hearings on S. 2170 et al. before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations*, 94th Cong., 1st Sess., 87 (1975) (A. Scalia, Assistant Attorney General, Office of Legal Counsel). The accommodations process is a fluid and flexible process that can involve letters, voluntary productions of documents, formal and informal claims of privilege, and compromises of every stripe. See Sean M. Stiff, Legislative Attorney, Cong. Rsch. Serv., *Statement Before the S. Judiciary Comm., Subcomm. on Fed. Cts., Oversight, Agency Action & Fed. Rts., Breaking the Logjam Part 3: Restoring Transparency and Accountability in the Accommodation Process* (Sept. 20, 2023). The process "requires that each branch explain to the other why it believes its needs to be legitimate" so that together the branches can "assess the needs of one branch and relate them to those of the other." *Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153 (1989). The branches do not just negotiate disclosure, but the timing, form, and conditions of disclosure, often before the President is directly involved in the process or asked to invoke privilege. *See* Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 Minn. L. Rev. 461, 512 (1987); Dawn E. Johnsen, *Executive Privilege Since United States v. Nixon: Issues of Motivation and Accommodation*, 83 Minn. L. Rev. 1127, 1138–39 (1999).

The accommodations process has its roots in George Washington's response to the very first Congressional request for Executive documents. *See*

Trump v. Mazars USA, LLP, 591 U.S. 848, 859 (2020). Having received an inquiry from the House of Representatives, Washington called a meeting of the Cabinet (which included both Alexander Hamilton and Thomas Jefferson) to decide how to proceed. *See id.* (citing 1 Writings of Thomas Jefferson 189 (P. Ford ed. 1892)). Washington decided that some of the requested documents were too secret to disclose and arranged meetings with Congress to discuss the request. After the meetings, the House narrowed its request. *Id.* (citing 1 Writings of Thomas Jefferson 190 (P. Ford ed. 1892); 3 Annals of Cong. 536 (1792)).

This practice of good-faith negotiation and compromise continued relatively unchanged for the next two hundred years. Dozens of presidential administrations have engaged in accommodations negotiations with Congress over the scope and nature of document requests. *See generally History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress: Part I — Presidential Invocations of Executive Privilege Vis-à-Vis Congress*, 6 Op. O.L.C. 751 (1982). Over the same period, sub-Presidential officials approached Congressional document requests in the same way. *See generally History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress: Part II — Invocations of Executive Privilege by Executive Officials*, 6 Op. O.L.C. 782 (1983). The process proceeded informally for almost 200 years, with neither branch resorting to the judiciary. Remarkably, the seminal decision on interbranch executive privilege disputes was not issued until 1974, when the DC Circuit decided *Senate Select*

Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974).

Though nothing in the Constitution requires the accommodations process, its historical pedigree and practical usefulness have promoted it to the effective status of legal doctrine. Shortly after *Senate Select Committee*, the DC Circuit decided *United States v. American Telephone & Telegraph Company*, 551 F.2d 384, 394 (D.C. Cir. 1976). There, the court considered a dispute between the Justice Department and a House subcommittee over subpoenas served on AT&T. In its opinion, the DC Circuit catalogued the thorny legal issues before it and then refused to decide any of them. Rather than issue a decision, the court "pause[d] to allow for further efforts at a settlement." *United States v. Am. Tel. & Tel. Co.*, 551 F.2d 384, 394 (D.C. Cir. 1976). Citing the long history of the accommodations process, the court declined to issue a decision, leaving the subpoena "pendente lite" and remanding to the district court "for further proceedings during which the parties and counsel are requested to attempt to negotiate a settlement." *Id.* at 395.

When negotiations failed, the case returned to the DC Circuit and the court explained at greater length the importance of the accommodations process. The court wrote that "[t]he framers ... expect[ed] that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system." *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977). The

court went on to explain that the accommodations process is built into the Constitutional order itself:

> [Because] it was a deliberate feature of the constitutional scheme to leave the allocation of powers unclear in certain situations, the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive modus vivendi, which positively promotes the functioning of our system. The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.

Id. at 130.

The modern consensus is that the accommodations process is a required part of Congressional demands for Executive documents or testimony. The Department of Justice views the process as "an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch." *Assertion of Executive Privilege in Response to a Congressional Subpoena*, 5 Op. O.L.C. 27, 31 (1981). President Reagan made the accommodations process Executive branch policy in an often-cited memorandum that dictated that "good faith negotiations between Congress and the Executive branch have minimized the need for invoking Executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches." *Procedures Governing Responses to Congressional Requests for*

Information (Nov. 4, 1982), *reprinted in* H.R. Rep. No. 99-435, pt. 2, at 1106 (1986).

By complying with their obligation to negotiate in good faith, the Executive and Legislative branch have been able to resolve nearly every conflict over Congressional subpoenas without judicial intervention. But now, Congress seeks to tip the previously stable balance of power in its own favor by reducing the role good faith plays in negotiations over Congressional document requests.

II. Denying a Good-Faith Defense to Section 192 Would Materially Impair the Accommodations Process.

The DC Circuit's holding distorts the allocation of power between the Legislative and Executive branches in a way that threatens the viability of the accommodations process. This Court has recognized that courts have a "duty of care" not to "needlessly disturb the compromises and working arrangements that [the Legislative and Executive branches] have reached." *Mazars*, 591 U.S. at 862. The DC Circuit has done exactly that. By holding that good-faith is not a defense to contempt of Congress, it has disturbed the balance of incentives that control the accommodations process, thereby undermining the process in its entirety. The DC Circuit's holding on Section 192 liability conflicts with the well-established accommodations process for two reasons. First, a good faith defense is necessary because the accommodations process owes its very existence to the lack of clarity on when Congress may properly demand Executive documents and testimony. Second, the DC Circuit's

ruling gives Congress the leverage it needs to short-circuit accommodations negotiations.

A. Denying a Good-Faith Defense is Inconsistent with the Law Governing Accommodations Negotiations.

Punishing officials like Dr. Navarro for good-faith invocations of Executive privilege makes little sense where the governing law is manifestly unclear. No one, not even this Court, knows with confidence how the Constitution applies to any given dispute over Congressional requests for Executive documents or testimony. The accommodations process exists because the Constitution "deliberate[ly]" leaves "the allocation of powers unclear" when it comes to such requests. *Am. Tel. & Tel. Co.*, 567 F.2d at 130. In the 237 years since the Constitution was adopted, the judiciary has had little opportunity to clarify matters. The Supreme Court addressed a Congressional subpoena for Presidential records for the first time in *2020*. *See Mazars*, 591 U.S. at 861. Nor are there lower-court decisions that provide meaningful insight; at the time *Mazars* was decided, *Senate Select Committee* was the only lower-court decision on the topic. *Id.* This matters little in the accommodations process, where each branch has developed its own position that it treats as authoritative for the purpose of negotiations. In the absence of controlling judicial precedent each branch often treats its own constitutional understanding as authoritative. *See* Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws*, 71 Minn. L. Rev. 461, 471–84 (1987); Jonathan David Shaub, The *Executive's Privilege*, 70 Duke L.J. 1, 8–10 (2020). This is the essence of the bedrock principle that each branch maintains an independent

obligation to faithfully interpret the Constitution for itself, within its own legitimate sphere of conduct. But the difference can matter a great deal when disputes make their way to court.

The district court decision in this case evinces the lack of doctrinal clarity surrounding the accommodations process. In analyzing Navarro's claim of Executive privilege, the district court was forced to admit that it "found no case that speaks to the manner in which a President must invoke Executive privilege in response to a Congressional subpoena to a former aide." *United States v. Navarro*, 651 F. Supp. 3d 212, 223 (D.D.C. 2023). The court solved that dilemma by placing the burden of proof on Navarro to demonstrate an invocation of privilege. *Id.* When Navarro claimed that the President instructed him to invoke privilege in a private conversation and a public statement, the district court held that Navarro did not prove the conversation happened and "offer[ed] no authority" for his position that the public statement mattered. *See id.* at 224–25. But, as the district court itself acknowledged, there is no precedent *at all* about the manner in which a president may invoke executive privilege. It is therefore no surprise that Navarro could not find a case about invocations in public statements.

That is precisely why good-faith must be a defense to contempt of Congress; officials like Navarro are forced to guess about what a court would hold if a dispute makes its way to the judiciary. Without a good-faith defense to Section 192, a wrong guess results in a criminal conviction, no matter how well founded and well intentioned it might have been. As Navarro and the lower courts learned, there are no cases stating

what a President and/or Executive official must do to effectively invoke Executive privilege. The same is true across the field of relevant issues—this Court's precedent on Congressional requests for Presidential documents began just six years ago. *See Mazars*, 591 U.S. at 861.

Convicting an executive official for good-faith refusal to comply with a Congressional subpoena raises substantial fairness concerns of the kind that usually attend strict-liability crimes. In considering such crimes, this Court has always held that "wrongdoing must be conscious to be criminal." *Morissette v. United States*, 342 U.S. 246, 252 (1952). This requires that a defendant know "the facts that make his conduct fit the definition of the offense." *Elonis v. United States*, 575 U.S. 723, 735 (2015). But in accommodations negotiations, no one can possibly know what facts constitute contempt of Congress. It is therefore unjust for the DC Circuit to impose criminal liability on an executive official who acts in good faith during accommodations negotiations.

B. Stripping the Good-Faith Defense from Section 192 Empowers Congress to Weaponize Subpoenas.

If good-faith is not a defense to Section 192 violations for Executive officials, Congress can short-circuit the accommodations process and weaponize subpoenas. For 200 years, each branch has entered accommodations negotiations in good faith, made their arguments, and reached a mutually agreeable compromise. But if an Executive official can be held in contempt of Congress even if he earnestly and reasonably

believes he has no obligation to comply with a subpoena, the historical incentives become distorted. If an Executive official can be jailed for a good-faith position on Executive privilege, Congress has no reason to negotiate. Instead, it can issue a broad subpoena, insist on total compliance and, if the Executive official refuses, refer the official for criminal contempt. To avoid conviction, the Executive official will have to endeavor to provide Congress with exactly the right information—balancing his responsibilities to the President with the need to identify precisely which documents and testimony must be provided to Congress. If the Executive official makes one misstep, even if well intended, he will be criminally liable.

Moreover, because the controlling law is manifestly unclear, Executive officials like Navarro will be on the back foot in every negotiation with Congress. Wherever there is uncertainty over whether the law requires the production of documents or testimony (which is nearly all the time), Congress can simply threaten Executive officials with criminal prosecution. The official will be forced to play a guessing game with criminal consequences. Faced with a total dearth of precedent to guide his decision, he will have to choose whether to accede to the entirety of Congress's demands. If he rightly predicts a future court's ruling, he gets nothing. But if he is wrong, he will go to prison.

Reading the district court and DC Circuit opinions would give one the impression that executive officials have faced this dilemma for more than 60 years since *United States v. Bryan*, 339 U.S. 323 (1950) and *Licavoli v. United States*, 294 F.2d 207 (D.C. Cir.

1961), but that is simply not true. Congressional referrals of Executive officials for criminal contempt were highly unusual until this decade. From 1980 to 2017, Congress referred precisely six Executive officials for criminal contempt. *See* Cong. Rsch. Serv., RL34097, Congress's Contempt Power and the Enforcement of Congressional Subpoenas 31, 47, 52–53, 74–85 (2017). The next six referrals came over the course of only four years, from 2019 to 2023. *See United States v. Bannon*, No. 22-3086, 2025 WL 1503223, at *11 (D.C. Cir. May 27, 2025) (Rao, J., dissenting from denial of rehearing en banc). And it was not until just two years ago that the courts began to consider the implications of Section 192's willfulness standard for Executive officials. *See United States v. Bannon*, 101 F.4th 16, 23 (D.C. Cir. 2024) (noting open questions regarding the interaction of Executive privilege and Section 192).

Now that this Court has a chance to consider the proper mens rea for Section 192 in the context of accommodations negotiations, it should prevent the short-circuiting of those negotiations and hold that good-faith refusal to produce documents on the basis of Executive privilege does not violate Section 192. This will preserve the traditional balance of power between the branches and ensure a healthy accommodations process going forward.

III. The Court Should Grant Certiorari to Protect Executive Officials When This Issue Recurs.

Though disputes between the Legislative and Executive branches over document requests have been

rare historically, the issue presented by this case is likely to recur if the Court does not step in. As noted above, Congress has begun referring Executive branch officials for criminal contempt at a greatly increased rate. *See United States v. Bannon*, No. 22-3086, 2025 WL 1503223, at *11 (D.C. Cir. May 27, 2025) (Rao, J., dissenting from denial of rehearing en banc). As Congress resorts to criminal contempt more often, this will not be the last such petition the Court sees in the coming years.

The Court should step in now to provide clarity for the accommodations process and to protect the Executive officials who stare down potential criminal liability. While many of the cases to proceed up through the DC Circuit have concerned high-level Executive officials, Congress subpoenas people at every level of the Executive branch. Just before it launched the investigation that led to Navarro's contempt referral, Congress investigated the riots at the Capitol on January 6, 2021 and subpoenaed multiple White House aides. *See, e.g.,* Subpoena from H. Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol to Molly Michael (Nov. 9, 2021); Subpoena from H. Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol to Benjamin Williamson (Nov. 9, 2021); Subpoena from H. Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol to Cassidy Hutchinson (Nov. 9, 2021). Recently, Congress has subpoenaed multiple litigation attorneys at the Department of Justice. *See* Subpoena from H. Comm. on the Judiciary to Mark Daly (Sept. 14, 2023), attached as Ex. V to Compl. for Declaratory & Injunctive Relief, *Comm. on the Judiciary v. Daly*, No. 1:24-cv-00815 (D.D.C.

Mar. 21, 2024); Subpoena from H. Comm. on the Judiciary to Jack Morgan (Sept. 14, 2023), attached as Ex. W to Compl. for Declaratory & Injunctive Relief, *Comm. on the Judiciary v. Daly*, No. 1:24-cv-00815 (D.D.C. Mar. 21, 2024). These members of the Executive branch do not have the resources to confidently weather threats of criminal prosecution. But they nonetheless have an obligation to pursue the President's directives and protect his constitutional prerogatives.

The Court should clarify the mens rea requirement of Section 192 so that lower-level Executive employees are not faced with criminal liability every time they make a good-faith misstep in the course of a Congressional investigation. Each of these officials has a constitutional duty to protect the prerogatives of the Executive branch and, above all, the President they all serve. They should not face criminal liability for good-faith execution of that duty in the course of the accommodations process. Nor should Dr. Navarro.

CONCLUSION

For the reasons stated herein, the Court should grant the Petition for Certiorari and reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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