[ORAL ARGUMENT SCHEDULED FOR NOVEMBER 30, 2021]

No. 21-5254

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DONALD J. TRUMP,

Plaintiff-Appellant,

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*.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia (No. 1:21-cv-02769-TSC) (Hon. Tanya S. Chutkan)

BRIEF *AMICI CURIAE* OF FORMER DEPARTMENT OF JUSTICE OFFICIALS IN SUPPORT OF APPELLEES

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amici curiae* represent that counsel for all parties have been sent notice of the filing of this brief. Plaintiff-Appellant and Defendants-Appellees all consent to *amici curiae*'s participation.[1]

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amici curiae* certify that a separate brief is necessary. *Amici* are former Department of Justice ("DOJ") officials who are familiar with Congress's broad oversight authority, as well as the process of negotiation and accommodation that the executive branch generally engages in to determine how Congress's oversight authority can be respected in a manner that is sensitive to executive branch interests. As former DOJ officials, *amici* respect those executive branch interests and, in particular, appreciate the important interests executive privilege serves, but they also understand that in some cases those interests are outweighed by Congress's need for information. Here, *amici* believe that the documents at issue should be turned over, given the importance of the House investigation into the January 6th attack on the Capitol and

[1] Pursuant to Fed. R. App. P. 29(a), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission.

given the current president's reasonable determination that executive privilege should not be asserted in this case.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND *AMICI*

Except for *amici* former Department of Justice officials and any other *amici* who had not yet entered an appearance in this case as of the filing of the Brief for Appellants, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellants.

II. RULING UNDER REVIEW

Reference to the ruling under review appears in the Brief for Appellants.

III. RELATED CASES

Reference to any related cases pending before this Court appears in the Brief for Appellants.

Dated: November 22, 2021 By: /s/ Brianne J. Gorod
Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

Page(s)

Books, Articles, and Other Authorities

TABLE OF AUTHORITIES – cont'd

Page(s)

INTEREST OF *AMICI CURIAE*

Amici are former Department of Justice ("DOJ") officials who are familiar with Congress's broad oversight authority, as well as the process of negotiation and accommodation that the executive branch generally engages in to determine how Congress's oversight authority can be respected in a manner that is consistent with executive branch interests. As former DOJ officials, *amici* respect those executive branch interests and, in particular, appreciate the important interests executive privilege serves, but they also understand that in some cases those interests are outweighed by Congress's need for information. Here, *amici* believe that the documents at issue should be turned over, given the importance of the House investigation into the January 6th attack on the Capitol and given the current president's reasonable determination that executive privilege should not be asserted in this case.

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

INTRODUCTION

On January 6, 2021, following months of efforts to undermine public confidence in the integrity of the 2020 presidential election, then-President Trump implored a crowd of thousands to "fight like hell" or they wouldn't "have a country anymore." Bryan Naylor, *Read Trump's Jan. 6 Speech, A Key Part Of Impeachment Trial*, NPR (Feb. 10, 2021), https://www.npr.org/2021/02/10/966396848/read-

trumps-jan-6-speech-a-key-part-of-impeachment-trial. Soon after, the President's supporters breached the Capitol in a bid to prevent Congress from certifying the results of the election. This unprecedented attack resulted in five deaths, at least 140 assaults, and the most significant destruction of the capitol complex since the War of 1812. *The Attack: The Jan. 6 Siege of the U.S. Capitol Was Neither a Spontaneous Act Nor an Isolated Event*, Wash. Post (Oct. 31, 2021), https://www.washingtonpost.com/politics/interactive/2021/jan-6-insurrection-capitol/.

After regaining control of the Capitol, clearing the debris, and certifying the election results, the House of Representatives formed a committee to investigate the attack that put our democracy at risk. *See* H.R. 503 § 6. Charged with determining what laws and other measures might be necessary to strengthen our democratic institutions against attempts to undermine them, as well as what additional security measures at the Capitol might be appropriate, H.R. 503 § 4, the House of Representatives Select Committee to Investigate the January 6th Attack ("Committee") requested records of White House communications related to the events of January 6 from the National Archives pursuant to the Presidential Records Act ("PRA"). Enacted in the wake of President Nixon's attempt to cover up his wrongdoing by limiting Congress's access to his presidential papers, H.R. Rep. No. 95-1487, at 5-6 (1977), the PRA struck a balance between Congress's "broad"

investigative authority, *see Watkins v. United States*, 354 U.S. 178, 187 (1957), and the President's need to receive "full and frank" advice, *Nixon v. Adm'r of Gen. Serv.*, 433 U.S. 425, 449 (1977).

While the attack on the Capitol is unprecedented, the investigation here is just the latest in a long line of inquiries designed to aid Congress's efforts to legislate. Indeed, the history of legislative investigations predates the birth of the United States, and Congress has exercised its power to investigate since the beginning of the Republic. As early as 1792, Congress examined a military defeat by "send[ing] for necessary persons, papers and records" from the Washington Administration. *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927). Notably, this history includes several investigations of presidents, cabinet members, and former presidents, and the executive branch officials who were the subjects of these investigations traditionally engaged in "negotiation and compromise" to try to ensure that, consistent with executive branch interests, Congress could get the information it needed. *Trump v. Mazars*, 140 S. Ct. 2019, 2031 (2020). Indeed, recent presidents, including Trump himself, have even explicitly waived executive privilege in order to better facilitate congressional investigations into their administrations. *See* Peter Baker, *Trump Will Not Block Comey From Testifying, White House Says*, N.Y. Times (June 5, 2017), https://www.nytimes.com/2017/06/05/us/politics/trump-will-not-block-comey-from-testifying-white-house-says.html.

Consistent with this long history, the Supreme Court has repeatedly affirmed the existence of Congress's power to investigate and that the scope of that power is coextensive with the scope of Congress's power to legislate. As the Court recently explained, Congress has the "power 'to secure needed information' in order to legislate," and this power "'is an essential and appropriate auxiliary to the legislative function.'" *Mazars*, 140 S. Ct. at 2031 (quoting *McGrain*, 273 U.S. at 161). In discussing the breadth of Congress's investigatory power, the Court has made clear that the judiciary should not second-guess the legislature's judgment as to what investigations will facilitate its exercise of legislative power.

Here, the Committee's request is plainly valid, and former president Trump's arguments that the documents should not be turned over are without merit. To start, Trump argues that the request violates the Constitution and separation of powers. Appellant Br. 22-29, 41-47. While the Supreme Court recently recognized that a court's analysis of congressional requests for the *personal* papers of a *sitting* president should include "special considerations," such as "whether the asserted legislative purpose warrants the significant step of involving the President and his papers" and the extent of the "burdens imposed on the President by [the] subpoena," *Mazars*, 140 S. Ct. at 2035-36, any separation of powers concerns here are significantly lessened given that the Select Committee's request pertains to the *official* papers of a *former* President.

Trump also asserts that the documents should not be turned over because he has asserted executive privilege. But this assertion is due only limited consideration because it is not supported by the incumbent president. While former presidents may retain some ability to assert privilege, the Supreme Court has made clear that executive privilege does not protect former presidents in the same way as sitting presidents because the incumbent president is in the best position to decide when assertions of executive privilege are warranted. *Gen. Servs*., 433 at 449. Here, President Biden has not asserted the privilege, recognizing that "Congress has a compelling need in service of its legislative functions" for the documents. Letter from Dana Remus, White House Counsel, to David S. Ferriero, Archivist of the United States (Oct. 8. 2021), *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/12/letter-from-dana-a-remus-counsel-to-the-president-to-david-ferriero-archivist-of-the-united-states-dated-october-8-2021/.

Finally, the request has a valid legislative purpose. The requested documents would aid the Committee's investigations regarding the need to enact laws that would strengthen our democratic institutions against attempts to undermine and abuse them, as well as strengthen security measures at the Capitol. *See* H.R. 503 § 4. Indeed, the request would exceed Congress's authority only if it were "plainly incompetent or irrelevant to any lawful purpose [of Congress] in the discharge of

[its] duties." *McPhaul*, 364 U.S. at 381 (quoting *Endicott Johnson Corp*., 317 U.S. at 509). Trump has not made—and cannot make—that showing here.

ARGUMENT

I. Legislative Investigations, Including of Sitting and Former Presidents, Have a Long History, and Consistent with This History, the Supreme Court Has Long Recognized the Breadth of Congress's Oversight Authority.

A. The practice of legislative oversight predates the birth of the United States, with "roots [that] lie deep in the British Parliament," James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 159 (1926), and American colonial legislatures quickly replicated the British practice of legislative investigation, C.S. Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. Pa. L. Rev. 691, 708 (1926); *see id.* at 709 (describing 1742 investigation by Pennsylvania Assembly into "riots at an election").

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

In March 1792, for example, the House created a committee to inquire into a significant military defeat. *Mazars*, 140 S. Ct. at 2029. Notably, "Mr. Madison,

who had taken an important part in framing the Constitution only five years before, and four of his associates in that work, were members of the House of Representatives at the time, and all voted [in favor of] the inquiry." *McGrain*, 273 U.S. at 161 (citing 3 Annals of Cong. 494 (1792)). President Washington cooperated with the investigation. *Mazars*, 140 S. Ct. at 2029-30.

Less than a decade later, a House committee investigated the circumstances of the Treasury Secretary's resignation. 10 Annals of Cong. 787-88 (1800). The committee was directed "to examine into the state of the Treasury, the mode of conducting business therein, the expenditures[] of the public money, and to report such facts and statements as will conduce to a full and satisfactory understanding of the state of the Treasury." *Id.* at 796-97. The Treasury Secretary cooperated completely with the committee's "thorough examination." Landis, *supra*, at 172.

Similarly, in 1832, the House investigated whether the former Secretary of War had given a fraudulent contract and whether "the President of the United States had any knowledge of such attempted fraud." Landis, *supra,* at 179 (quoting H.R. Rep. No. 22-502 (1832)). Later, in 1860, Congress created a special committee to determine whether "any person connected with the present Executive Department of this Government" improperly attempted to influence legislation in the House "by any promise, offer, or intimation of employment, patronage, office, favors, or rewards." Cong. Globe, 36th Cong., 1st Sess. 1017-18 (1860).

Former presidents were also often the subjects of congressional investigations. In 1846, former presidents Tyler and Quincy Adams participated in a House committee's investigation of Secretary of State Webster's alleged misuse of a contingent fund during Tyler's presidency. *See* H.R. Rep. No. 29-686, at 22 (1846) ("It was agreed that Mr. Tyler, the late President, might be examined as a witness by interrogatories . . . without requiring his personal attendance before the committee."); *id.* at 27 (recording deposition of former president Adams). Adams's deposition focused on State Department practices for securing confidential files and concerned events that occurred while he was Secretary of State. *Id.* at 27-29. Tyler's interrogatories addressed his management of the State Department as president. H.R. Rep. No 29-684, at 8-11. Decades later, former president Theodore Roosevelt also participated in congressional investigations. *See*, *e.g.*, *Investigation of the United States Steel Corporation: Hearing Before the H. Spec. Comm.*, 62d Cong. 1369-92 (1911) (testimony); *Campaign Contributions: Hearings Before the S. Subcomm. on Privileges and Elections*, 62d Cong. 177-96 (1912) (letter from Roosevelt); *id.* at 469-527 (testimony).

These former presidents who testified before Congress did not raise separation of powers concerns. *See* H.R. Rep. No. 29-686, at 28; *Campaign Contributions*, *supra*, at 473, 486. Notably, Adams had, as a member of Congress, objected to congressional investigations with the "exceptionable and odious properties of

general warrants," *Mazars*, 140 S. Ct. at 2041 (Thomas, J., dissenting) (quoting App. to 8 Cong. Deb. 54 (1833)), but congressional records do not suggest that he objected to providing his own "recollection[s]" to Congress when he was a former president, *see* H.R. Rep. No. 29-686, at 28. Similarly, Tyler, who had refused to comply with a House Committee's request for documents while sitting as president, *see* 67 Cong. Rec. 4549 (1926) (describing Tyler's "insistence on the executive prerogative" in the face of an 1842 House investigation), submitted interrogatories as an ex-president, leaving it to the incumbent president to unsuccessfully object to the House of Representative's "grand inquest" into the "archives and the papers of the executive departments." *Id.* (reproducing Polk's response). Finally, Theodore Roosevelt raised no separation of powers objection to testifying after he was president. *See Campaign Contributions*, *supra*, at 473 (objecting to the committee's use of "hearsay evidence"); *id.* at 486 (objecting that the committee investigated "as to the expense of the Progressives" but not members of other parties).

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

investigations into their administrations. When Congress began investigating the Watergate break-in, President Nixon waived executive privilege for his aides who testified before the Senate Select Committee on Watergate. Christopher Lydon, *President Ends Insistence that Executive Privilege Bars Testimony*, N.Y. Times, May 23, 1973, at 29. Likewise, when Congress investigated the Iran-Contra affair, President Reagan publicly vowed to support the investigation, handed over some three hundred thousand documents, and waived executive privilege for executive officials who testified before Congress. Mark J. Rozell, *Executive Privilege: The Dilemma of Secrecy and Democratic Accountability* 121 (1994). And President George W. Bush and Vice President Cheney spent over three hours answering questions from the congressional commission investigating the 9/11 attacks. Philip Shenon & David E. Sanger, *Bush and Cheney Tell 9/11 Panel of '01 Warnings*, N.Y. Times (April 30, 2004), https://www.nytimes.com/2004/04/30/us/threats-responses-investigation-bush-cheney-tell-9-11-panel-01-warnings.html. The White House did not consider the discussion to be "adversarial," and the Commission found the President and Vice President's answers to be "forthcoming and candid" and to have provided "real insights" into their thinking. *Id.* (quoting White House and Commission officials). Even Trump waived executive privilege to let James Comey testify before Congress "in order to facilitate a swift and thorough examination" of the facts surrounding Trump's abrupt firing of Comey as he led an investigation into

collusion between Russia and the Trump campaign. Matt Ford, *President Trump Checks His Executive Privilege*, The Atlantic (June 5, 2017), https://www.theatlantic.com/politics/archive/2017/06/trump-comey-executive-privilege/529224/.

B. Consistent with this history, the Supreme Court has recognized that Congress's power to investigate is inherent in, and as broad as, its power to legislate. In *McGrain v. Daugherty*, the Court explained that the power to collect information is an essential aspect of the power to legislate: "A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change," and "where the legislative body does not itself possess the requisite information . . . recourse must be had to others who do possess it." 273 U.S. 135, 175 (1927). Two years later, the Court reiterated that "the power of inquiry is an essential and appropriate auxiliary to the legislative function." *Sinclair v. United States*, 279 U.S. 263, 291 (1929).

In *Quinn v. United States*, 349 U.S. 155 (1955), the Court made clear the breadth of Congress's investigatory powers, explaining that "[t]here can be no doubt as to the power of Congress, by itself or through its committees, to investigate matters and conditions relating to contemplated legislation. This power . . . is indeed co-extensive with the power to legislate." *Id.* at 160. The Court emphasized that "[w]ithout the power to investigate . . . Congress could be seriously handicapped in

its efforts to exercise its constitutional function wisely and effectively." *Id.* at 160-61.

The Court also relied on "Congress' broad investigative power" when upholding a statute that required the preservation of materials from the Nixon Administration. Among the "substantial public interests that led Congress to seek to preserve [these] materials" was Congress's "desire to restore public confidence in our political processes" and its "need to understand how [our] political processes had in fact operated" during "the events leading to [Richard Nixon]'s resignation . . . in order to gauge the necessity for remedial legislation." *Gen. Servs*., 433 U.S. at 453.

Just last year, the Supreme Court again confirmed the breadth and importance of Congress's investigative authority, *Mazars*, 140 S. Ct. at 2031, recognizing that without this power, "Congress would be shooting in the dark, unable to legislate 'wisely or effectively.'" *Id.* (quoting *McGrain*, 273 U.S. at 175).

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

Congress passed the Presidential Records Act to balance Congress's "broad" investigative authority, *see Watkins*, 354 at 187, and the President's need to receive "full and frank" advice, *Gen. Serv.*, 433 U.S. at 449. Among other things, the PRA provides that "subject to any rights, defenses, or privileges which the United States or any agency or person may invoke, Presidential records shall be made available—

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." 44 U.S.C. § 2205(2)(C). As the PRA's text and history make clear, it was passed to ensure that the public can access presidential records and that Congress can access these records when necessary to fulfill its legislative responsibilities.

Before the PRA was passed, presidents traditionally regarded their papers as personal property, but there were two significant problems with this approach. First, it led to the occasional loss and destruction of important historical records. *See* Carl Bretscher, *The President and Judicial Review under the Records Act*, 60 Geo. Wash. L. Rev. 1477, 1481 & n.34 (1992). Second, it gave presidents an outsized ability to prevent disclosure of their papers at the expense of the vital needs of the other branches of government and the public, forcing Congress to "rel[y] upon the voluntary participation of former presidents and their heirs" to preserve and access their papers. *Id.* This situation was nevertheless viewed as tolerable because, as described above, presidents long had a history of cooperating with congressional investigations to help advance the public interest. But it became untenable during the Watergate investigation, which made clear the need for more clearly delineated limits on the ability of presidents to prevent disclosure of their papers. *Id.* at 1481 (explaining that the PRA was passed against the

backdrop of three related factors: "first, the tradition of private ownership of presidential records; second, the constitutional doctrine of executive privilege, as recognized in the Watergate cases, and third, Congress's reaction to Watergate and subsequent efforts by President Nixon to continue to restrict access to the tapes and documents of his administration").

The Watergate scandal ushered in two significant developments. First, it led the Supreme Court to clarify that executive privilege is not absolute and can yield to the needs of the other branches, especially when the claim of privilege is based "only on the generalized interest in confidentiality." *United States v. Nixon*, 418 U.S. 683, 706, 713 (1974). In that case, the Court concluded that allowing the president to use executive privilege "to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts," *id.* at 712, and therefore the privilege "must yield to the demonstrated, specific need for evidence in a pending criminal trial," *id.* at 713.

Second, soon after his resignation, Nixon entered into an agreement with the General Services Administration ("GSA") which would have prevented others from accessing his presidential papers for a period of three years and would have required the destruction of the White House tapes by September 1984 at the latest. *See Nixon v. Sampson*, 389 F. Supp. 107, 161 (D.D.C. 1975). Through this

agreement, Nixon also asserted the right to destroy any tape at any time, so that he could prevent the tapes being used to "injure, embarrass, or harass any person and properly to safeguard the interests of the United States." *Id.*

Congress acted quickly to prevent the destruction of these infamous tapes, enacting a law aimed at preserving these specific recordings and related presidential records: the Presidential Recordings and Materials Preservation Act ("PRMPA"), Pub. L. 93-526, 88 Stat. 1695 (1974). That law expressly abrogated Nixon's agreement with GSA, prohibiting GSA from destroying the tapes, PRMPA § 102(a), 88 Stat. at 1696, and directing GSA to promulgate regulations providing public access to the tapes, in line with the "need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power" that occurred during Watergate, *id.* § 104 (a)(1), 88 Stat. at 1696. At the same time that the law ensured that Nixon could not unilaterally hide the contents of the tapes, it also preserved the ability of "any party[]" to assert "any legally or constitutionally based right or privilege" which might limit access to the recordings. *Id.* § 104(a)(5), 88 Stat. 1696.

The Supreme Court sanctioned this framework for dealing with presidential papers in *General Services*, holding that the PRMPA struck an appropriate balance between the "substantial public interests" in preserving access to Nixon's records and Nixon's limited "right to assert the privilege." 433 U.S. at 453, 455. As

explained more fully below, the Court reasoned that Nixon's interest in completely preventing disclosure of his papers was outweighed by Congress's interest in "restor[ing] public confidence in our political processes" and "gaug[ing] the necessity for remedial legislation." *Id.* at 453.

Following *General Services*, Congress turned its attention to enacting legislation that would apply to all future presidents. *See* H.R. Rep. No. 95-1487, at 6-7 (noting that the principles established by *General Services* "would govern legislation dealing more broadly with control of and access to Presidential papers"). The primary purpose of this legislation was to "establish the public ownership" of presidential papers and to ensure "the preservation and public availability of these records at the end of a Presidential administration." *Id.* at 2. Now, instead of a former president being able to withhold papers for any reason, the papers belong to the public, and it is up to a former president to show that disclosure would not be for "the benefit of the Republic." *Gen. Servs.*, 433 U.S. at 449. In other words, the presumption is in favor of public disclosure.

Congress then debated what framework would best ensure public access to presidential records, while allowing a former president the opportunity to make the showing that disclosure would not be in the public interest. Congress considered, but rejected, legislation that would have subjected presidential papers to Freedom of Information Act standards immediately upon conclusion of a president's tenure,

see H.R. 10998, 95th Cong. (1978), as well as legislation that would have allowed a president to have absolute authority to restrict access to his papers for up to 15 years from the end of his tenure, *see* H.R. 1101, 95th Cong. (1978).

Ultimately, neither of these models properly balanced the need for "ready availability of the records" against a potential to chill the "frankness of advice" presidents receive from their staff. H.R. Rep. 95-1487, at 8. Instead, Congress adopted a framework that closely tracked the PRMPA model endorsed by *General Services*. First, it allowed a president to restrict access to certain categories of papers for up to twelve years, 44 U.S.C. § 2204, ensuring "early public availability" of presidential records, H.R. Rep. 95-1487 at 15. Second, it gave other government actors the ability to access those restricted records as needed: when subject to subpoena or other judicial process, and when necessary for the official "business" of the incumbent president or Congress. 44 U.S.C. § 2205(2). Third, the PRA ensured that a former president would be notified "when the disclosure of particular documents may adversely affect any rights and privileges" he may have. *Id.* at § 2206 (3).

In sum, Congress enacted the PRA in the wake of a scenario that is remarkably similar to the one this Court faces today: a former president attempting to unilaterally withhold documents relevant to a legitimate congressional investigation. In anticipating that such conflicts might recur in the future, the PRA

hewed closely to Supreme Court precedent in ensuring that presidential records would forever be public property with a presumption in favor of disclosure.

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

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

Trump argues that the Committee's request implicates the same separation of powers concerns that the Supreme Court in *Mazars* held apply to congressional requests for information from sitting presidents. Appellant Br. 22. The Court crafted the *Mazars* test, however, to analyze the constitutionality of subpoenas that create a "clash between rival branches of government." *Mazars*, 140 S. Ct. at 2034. Because the request here does not target the personal records of a sitting president, the same separation of powers concerns are not present.

Critically, the Constitution gives former presidents no role in the "ongoing institutional relationship [between] the 'opposite and rival' political branches." *Id.* at 2033-34 (quoting *The Federalist No. 51*, at 349 (J. Cooke ed. 1961) (James Madison)). Article II states that the president "shall hold his office during the term of four years," U.S. Const. art. II, § 1, unless he is impeached and removed from office, *id.* § 4, or replaced in cases of "Inability to discharge the Powers and Duties of the said Office," *id.* § 1. To the Framers, the president's limited tenure was necessary to distinguish American leaders from European monarchs. *The Federalist*

No. 69, *supra*, at 470 (Alexander Hamilton); *id.* at 463 (emphasizing that the president "is to be elected for *four* years" so that "there is a total dissimilitude between *him* and a king of Great Britain"); *see* 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 200 (Jonathan Elliot ed., 1836) (Statement of Richard Law) ("[o]ur President is not a King").

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

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

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

While former presidents may retain some ability to assert executive privilege because the particular interests served by executive privilege—that is, ensuring that a president "receive[s] the full and frank submissions of facts and opinions upon which effective discharge of his duties depends," *Gen. Servs*., 433 U.S. at 449—would be undermined if the privilege disappeared entirely when a president left office, the Supreme Court has rejected the argument that the privilege protects incumbents and ex-presidents in exactly the same way. Indeed, in surveying the history of how presidential papers have been handled, the Court in *General Services* explained that "[t]he expectation of the confidentiality of executive communications . . . has always been limited and subject to erosion over time." *Id.* at 451.

There, the Court rejected former president Nixon's argument that presidential privilege shielded his records absolutely from "archival scrutiny." *Id.* at 446. The Court explained that while the privilege served one, limited purpose for former presidents, ensuring "full and frank" counsel from their advisors during their term of office, *id.* at 449, the role it serves in protecting incumbents is more expansive, also guarding against "burdensome requests for information which might interfere with the proper performance of their duties," *id.* at 448. Further, incumbent presidents face "political checks" against abuse of the privilege that former

presidents do not, meaning that a former president's claim of privilege should face more stringent judicial scrutiny. *Id.* Further, an incumbent is incentivized to protect confidences of a predecessor when doing otherwise would "discourage candid presentation of views by his contemporary advisers," *id.*, thereby placing the incumbent "in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly," *id.* at 449. Therefore, because the privilege is not "for the benefit of the President as an individual, but for the benefit of the Republic," when the incumbent president does not support a former president's claim of executive privilege, this necessarily "detracts from the weight" of the former president's claim. *Id*.

Indeed, in the years after *General Services*, federal courts have repeatedly required disclosure from former presidents of materials that might otherwise be privileged, holding that the public interest justifies such disclosure. *See, e.g.*, *United States v. Poindexter*, 732 F. Supp. 142, 161 (D.D.C. 1990) (permitting subpoena of former president Ronald Reagan's diaries); *see United States v. North*, 713 F. Supp. 1448, 1449 (D.D.C. 1989) (noting that "[d]eference to the high office of the presidency and the presumptive privilege involved do not prevent requiring the appearance of a former President at a criminal trial provided a sufficient showing has been made that the former President's testimony is essential to assure the

defendant a fair trial"); *see also Nixon v. Fitzgerald*, 457 U.S. 731, 735 n.5 (1982) (noting that the former president submitted to depositions in the case).

C. The Committee's Request for Documents in this Case Falls Well Within Congress's Investigatory Powers, and President Biden Has Not Asserted Executive Privilege.

As described above, this Court must uphold a congressional request for records so long as it is not "plainly incompetent or irrelevant to any lawful purpose [of Congress] in the discharge of [its] duties," *McPhaul*, 364 U.S. at 381 (quoting *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943)).

The Committee's request plainly satisfies this test. On January 6th, the Capitol was attacked by a violent mob that sought to undermine our democratic form of government, and the Committee now seeks to understand that attack and how similar attacks can be prevented in the future. Only by understanding fully what happened on January 6th and in the days leading up to it can Congress determine whether and how to legislate in response to the attack.

There are numerous pieces of legislation that Congress might choose to pass in response to this attack. For example, the Committee is currently considering laws that would "prevent future acts of violence . . . and domestic violent extremism" and enhance the security of the capitol complex. H.R. 503 § 4(c); *cf.* 2 U.S.C. § 1901 (establishing the Capitol Police). In addition, the Twelfth Amendment requires Congress to count the certificates of votes submitted by the state electors, *see* U.S.

Const. amend. XII, and Congress has laid out, in some detail, its process for doing so in the Electoral Count Act, *see* 3 U.S.C. § 15. The records the Committee is seeking may help inform Congress's determination about whether it should modify this procedure to make it less vulnerable to future attacks. On top of that, Congress is also empowered to enforce the provisions of the Fourteenth Amendment, *see* U.S. Const. amend. XIV, § 5, including its prohibition against anyone who had taken an oath to support the Constitution from ever holding office again if they "engaged in insurrection or rebellion" against the Constitution of the United States, U.S. Const. amend. XIV, § 3. The records the Committee seeks may inform legislative efforts to enforce that prohibition. All of these subjects plainly fall within Congress's power to investigate and legislate—they are inquiries into the "administration of existing laws as well as proposed or possibly needed statutes." *Watkins*, 354 U.S. at 187.

Significantly, Congress need not point to any specific proposed legislation. "The very nature of the investigative function—like any research—is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 509 (1975). Even requests for a sitting president's papers can be justified by Congress's investigation of "*possible* legislation." *Mazars*, 140 S. Ct. at 2036 (emphasis added).

Trump makes much of the Supreme Court's admonition in *Mazars* that Congress may not investigate the president "as a 'case study' for general legislation." Appellant Br. 31 (quoting *Mazars*, 140 S. Ct. at 2035-36). But the Court made that statement in the context of its determination that Congress should not seek just any personal paper of a president that may tangentially relate to subjects within its legislative jurisdiction: "financial records could relate to economic reform, medical records to health reform, school transcripts to education reform." *Id.* at 2034. That is decidedly not what the Committee is doing here. The Committee is seeking official presidential records, not Trump's personal papers. And it is not studying general social phenomena; it is investigating a physical attack on Congress that was aimed at thwarting the peaceful transfer of power.

Moreover, this Court should not prohibit disclosure of the documents on executive privilege grounds because President Biden has declined to assert executive privilege over any of the requested documents based on his considered judgment that Congress's need for them to investigate the January 6th attack outweighs any potential benefit to the executive branch in withholding them. As noted earlier, the incumbent president is incentivized to assert the privilege on behalf of a predecessor when doing otherwise would "discourage candid presentation of views by his contemporary advisers," and the incumbent also faces "political checks" against abuse of the privilege that a former president does not. *Gen. Servs.*, 433 U.S. at 448.

This places the incumbent president in the "best position" to decide when waiver of executive privilege is warranted. *Id.* at 449.

Here, as the White House Counsel explained, the President has determined that the records that the Committee is seeking reflect conduct that "extends far beyond typical deliberations concerning the proper discharge of the President's constitutional responsibilities," *id.*, meaning that releasing them will have little impact on the President's ability to receive "full and frank" advice from his staff, *Gen. Servs.*, 433 U.S. at 449. *See* Letter from Dana Remus, White House Counsel, to David S. Ferriero, Archivist of the United States (Oct. 8. 2021), *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/12/letter-from-dana-a-remus-counsel-to-the-president-to-david-ferriero-archivist-of-the-united-states-dated-october-8-2021/.

The President also concluded that "Congress has a compelling need in service of its legislative functions" for the documents, given that the January 6th attack "reflects a clear and apparent effort to subvert the Constitution itself." *Id.* As the Supreme Court has made clear, the important interests served by executive privilege can be outweighed by other compelling interests. *See Gen. Servs.*, 433 U.S. at 453 (Congress's need to "facilitat[e] a full airing of the events" leading to Nixon's resignation outweighed executive privilege); *Nixon*, 418 U.S. at 713 ("[t]he generalized assertion of privilege *must* yield to the demonstrated, specific need for

evidence in a pending criminal trial" (emphasis added)); *cf. Poindexter*, 732 F. Supp. at 146 ("courts may and have required former as well as incumbent Presidents to testify in appropriate cases"). It is difficult to imagine a more compelling interest than the House's interest in determining what legislation might be necessary to respond to the most significant attack on the Capitol in 200 years and the effort to undermine our basic form of government that that attack represented.

* * *

In sum, Trump's arguments are at odds with our nation's rich history of congressional investigations and with decades of Supreme Court precedent affirming that Congress possesses broad constitutional power to investigate. If accepted, they would drastically cabin the scope of Congress's power to investigate, expand the ability of former presidents to hide their wrongdoing, and impede Congress's ability to legislate in response to events like the January 6th attack on the Capitol. This Court should affirm the decision of the court below and allow the Committee to access the records it needs to conduct its investigation.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 6,046 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 22nd day of November, 2021.

/s/ Brianne J. Gorod
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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November, 2021, I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: November 22, 2021

/s/ Brianne J. Gorod
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