

IN THE SUPREME COURT OF THE UNITED STATES

No. 21-932

DONALD J. TRUMP,
Petitioner,

v.

BENNIE G. THOMPSON, ET AL.,
Respondents.

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

MOTION FOR EXPEDITED CONSIDERATION OF
THE PETITION FOR A WRIT OF CERTIORARI

Representative Bennie G. Thompson and the House of Representatives Select Committee to Investigate the January 6th Attack on the United States Capitol (the Congressional Respondents) hereby move, pursuant to Supreme Court Rule 21, for expedited consideration of the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

The Archivist of the United States and the National Archives and Records Administration (the Executive Branch Respondents) consent to this motion. Petitioner former President Donald J. Trump also consents to this motion.

The certiorari petition was filed today, December 23, 2021, just over two months after Petitioner initiated this litigation on October 18. Both the Congressional Respondents and the Executive Branch Respondents intend to file

their respective briefs in opposition to the petition on December 30, 2021, alongside their oppositions to Petitioner’s application for an injunction pending review (unless the Court directs the respondents to file a response to that application earlier). The Congressional Respondents respectfully request that the Court then distribute the certiorari petition for consideration by the Court at its conference on January 14, 2022, so that the Court can act promptly if it wishes to consider the petition together with Petitioner’s application for an injunction pending review.

STATEMENT

The House of Representatives adopted House Resolution 503, which established the Select Committee to Investigate the January 6th Attack on the United States Capitol. H. Res. 503, 117th Cong. (2021). Resolution 503 authorizes the Select Committee to (1) “investigate the facts, circumstances, and causes” as well as the “influencing factors” relating to the unprecedented attack on the Capitol; (2) “identify, review, and evaluate the causes of and the lessons learned from” the attack; and (3) “issue a final report to the House” containing “findings, conclusions, and recommendations for corrective measures.” *Id.* § 4(a).

On August 25, 2021, pursuant to express authorization in the Presidential Records Act, 44 U.S.C. § 2205(2)(C), the Select Committee submitted a request to the Archivist of the United States, seeking specified Presidential records now under the control of the Archivist. The request seeks records related to the events of January 6, preparations and communications leading up to the attack on Congress, the White House’s delayed response to that attack, the 2020 election outcome and the attacks

on the integrity of the election system, and the disruption of the traditional peaceful transfer of power. Pet. App. 11a.

On a rolling basis, the Archivist notified Petitioner of his intent to provide the Select Committee with access to certain records that he identified as responsive to the Select Committee's request. After a negotiated accommodation process that resulted in deferring the Select Committee's request as to some records, President Biden informed the Archivist that "an assertion of executive privilege is not in the best interests of the United States, and therefore is not justified" as to the remaining documents from the first three tranches of documents identified by the Archivist. See Pet. App. 11a-16a.

Petitioner responded to the Archivist that he was asserting executive privilege over certain records from the first three tranches, and that he was making a "protective assertion of constitutionally based privilege" over all additional records the Archivist might identify. Pet. App. 12a-15a. President Biden notified the Archivist that he would not uphold Petitioner's assertion of executive privilege as to the documents at issue from the first three tranches, and instructed the Archivist to provide those records to the Select Committee. *Id.* On October 18, 2021, Petitioner filed this suit "in his official capacity as a former President" against Chairman Thompson, the Select Committee, the Archivist, and the National Archives and Records Administration. *Id.* at 17a. The next day, Petitioner sought a preliminary injunction to prohibit the Archivist and the National Archives from complying with the Select Committee's request. *Id.*

Following expedited briefing and argument, the district court denied Petitioner’s motion, concluding that Petitioner had established none of the factors required for preliminary injunctive relief. Pet. App. 18a-19a. Petitioner appealed, and the court of appeals granted his request for an administrative injunction while it considered the merits of his appeal on a highly expedited basis. *Id.* at 19a. On December 9, the court of appeals unanimously affirmed the district court’s ruling. The court concluded that, “[u]nder any of the tests” advocated by Petitioner—including the demanding standard applicable to an executive privilege claim by a sitting President—the interests in disclosure of the requested documents “far exceed” Petitioner’s generalized concerns for Executive Branch confidentiality. *Id.* at 40a. The court noted that Petitioner “has not identified any specific countervailing need for confidentiality tied to the documents at issue, beyond their being presidential communications.” *Id.* at 52a. The court of appeals likewise held that Petitioner had not established irreparable harm, and that the public interest and balance of the equities weighed against Petitioner. *Id.* at 71a-75a.

The court of appeals ordered that its administrative injunction would dissolve in 14 days unless Petitioner filed a motion for an injunction pending review with this Court, in which event the administrative injunction would dissolve upon the Court’s disposition of that motion. Pet. App. 77a n.20.

Today, Petitioner filed his petition for a writ of certiorari and application for a stay of the mandate and an injunction pending consideration of that petition.

ARGUMENT

The Congressional Respondents recognize that the Court may prefer to consider Petitioner's certiorari petition at the same time it considers his application for an injunction pending further review. If the Court wishes to do so, it should expedite consideration of the petition for a writ of certiorari in order to allow prompt consideration of both requests. In the ordinary course, the Court would not consider the petition for a writ of certiorari until at least its February 18, 2022 conference. *See* S. Ct. R. 15.3-15.5. Delaying consideration of the application for an injunction until that time would inequitably leave in place the court of appeals' limited administrative injunction for many weeks, even though both lower courts resolved the case expeditiously and held that Petitioner's claims are legally flawed and do not warrant permanent injunctive relief.

To facilitate expedited consideration, the Congressional Respondents and the Executive Branch Respondents intend to file both their briefs in opposition to the petition for a writ of certiorari and their responses in opposition to the application for an injunction pending review on December 30, 2021. At that point, Petitioner's application will be ready for decision, and the petition for a writ of certiorari would be ready for distribution, but for the 14-day waiting period under Rule 15.5. If the Court wishes to consider the application and the petition together, the Congressional Respondents request that the Court avoid unnecessary delay in that joint consideration by distributing the petition for a writ of certiorari for consideration at its January 14, 2022 conference.

Such expedition, consistent with the lower courts' expedited treatment of this case, is warranted because of the indisputable importance and urgency of the Select Committee's investigation. The Select Committee is investigating a deadly assault on the United States Capitol, the Speaker of the House, the Vice President, and both Chambers of Congress, and a dangerous interruption of Congress's constitutional duty and the peaceful transfer of power. The Executive Branch has agreed that the Select Committee needs the governmental records at issue here so that the Committee may properly fulfill its essential legislative mandate and prevent future violent attacks on the Federal Government. *See* Pet. App. 12a-16a, 40a-46a.

Delay would inflict a serious injury on the Select Committee and the public by interfering with this mandate. The Select Committee needs the requested documents *now* to help shape the direction of the investigation and allow the Select Committee to timely recommend remedial legislation. The public has a significant interest in the expeditious consideration of remedial measures aimed at securing the safety and soundness of our democratic processes and institutions. Under the direction of President Biden, the Executive Branch has recognized the Select Committee's interest in obtaining prompt access to the identified materials.

Recognizing the urgency of this matter, both the district court and the court of appeals significantly expedited their consideration of Petitioner's request for a preliminary injunction. *See* p. 4, *supra*. Both courts then concluded, among other things, that Petitioner had identified no persuasive reason for overriding the judgments of the sitting President that complying with the Select Committee's

request for access to the documents would be in the national interest and that assertion of privilege by the Executive Branch was not warranted. Pet. App. 18a, 37a-70a. Those courts further determined that delay in disclosure would cause substantial harm to the Select Committee and the public. *Id.* at 18a-19a, 74a-76a.

Because of the administrative injunction entered by the court of appeals, however, the Executive Branch cannot grant the Select Committee access to the documents at issue until this Court has resolved Petitioner's application for an injunction pending review. *See* Pet. App. 77a n.20. Prompt resolution of that application—and, if the Court deems it appropriate, the petition for a writ of certiorari itself—is therefore imperative.

CONCLUSION

For the reasons stated, the Congressional Respondents respectfully request that the Court expedite consideration of the petition for a writ of certiorari and distribute the petition for consideration by the Court at its conference on January 14, 2022.

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Respectfully submitted,

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