ORAL ARGUMENT SCHEDULED FOR NOVEMBER 30, 2021

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

**No. 21-5254**

DONALD J. TRUMP,

*Plaintiff-Appellant*,

v.

BENNIE G. THOMPSON, *et al.*,

*Defendants-Appellees*.

On Appeal from the United States District Court for the District of Columbia (No. 21-cv-2769-TSC)

# AMENDED BRIEF OF *AMICI CURIAE* CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON AND FORMER WHITE HOUSE ATTORNEYS IN SUPPORT OF APPELLEES

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

### A. Parties and *Amici*

Except for *amici* Citizens for Responsibility and Ethics in Washington, Virginia Canter, Richard Painter, and any other *amici* who had not yet entered an appearance in this case as of the filing of Appellant's Brief, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in Appellant's Brief.

### B. Rulings Under Review

Reference to the ruling under review appears in Appellant's Brief.

### C. Related Cases

No related cases are referenced in Appellant's Brief, and counsel for *amici* are aware of no related cases.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, *amicus* Citizens for Responsibility and Ethics in Washington certifies that it has no parent company, and no publicly held corporation has a 10% or greater ownership interest in it.

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## GLOSSARY

| | |
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| CREW | Citizens for Responsibility and Ethics in Washington |
| FOIA | Freedom of Information Act |
| JA | Joint Appendix |
| NARA | National Archives and Records Administration |
| PRA | Presidential Records Act |

## INTERESTS OF *AMICI CURIAE*

*Amici* Virginia Canter and Richard Painter are former White House attorneys who, between them, have served under Presidents of both major political parties.[1] They have extensive experience providing counsel to Presidents and their immediate staff, and have dealt firsthand with complex questions of executive privilege, both from within and outside the White House.

*Amicus* CREW is a nonprofit, nonpartisan organization dedicated to promoting government integrity, transparency, and accountability. Through a combined approach of research, advocacy, and legal action, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. CREW has particular interests in the preservation of and access to Presidential records—including those currently being sought by the January 6 Select Committee—and has repeatedly pursued litigation to vindicate those interests. *E.g.*, *Nat'l Security Archive v. Trump*, No. 20-cv-3500 (D.D.C., filed Dec. 1, 2020); *CREW v. Trump*, No. 19-cv-1333 (D.D.C., filed May 5, 2019); *CREW v. Trump*, No. 17-cv-1228 (D.D.C., filed June 22, 2017). Because CREW intends to request Trump White House

[1] Ms. Canter served as Associate White House Counsel for ethics to Presidents Barack Obama and Bill Clinton. Mr. Painter served as Associate White House Counsel to President George W. Bush.

Presidential records once they are available for public access under the PRA and FOIA, it will be impacted by the decision in this case.

## RULE 29 STATEMENT

No counsel for a party authored this brief in whole or in part, no party or counsel for a party contributed money that was intended to fund preparing or submitting this brief, and no person other than *amici* or their counsel contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(e).

All parties have consented to the filing of this brief. *See* Cir. R. 29(b).

Pursuant to Circuit Rule 29(d), counsel for *amici* certify that a separate brief is necessary to provide the perspective of former White House attorneys regarding the appropriate level of judicial deference owed to an incumbent President where, as here, there is a direct and substantial conflict with a former President's assertion of executive privilege. The brief draws on *amici*'s practical experience to address this significant legal point, which has not been adequately elaborated upon by the parties or other *amici*. The brief also provides the unique perspective of CREW, a frequent requester of Presidential records with deep expertise on the PRA and a concrete stake in the resolution of the former President's executive privilege claim.

## INTRODUCTION AND SUMMARY OF ARGUMENT

For the first time in our nation's history, Congress is investigating a former President's efforts to overturn a democratic election and an ensuing deadly assault on the U.S. Capitol carried out by his supporters. Citing these "unique and extraordinary circumstances," President Biden exercised his constitutional discretion not to assert executive privilege to block critical information from the House Select Committee investigating the January 6 attack and its causes. The President emphatically rejected his predecessor's privilege claim, declaring that

> the insurrection that took place on January 6, and the extraordinary events surrounding it, must be subject to a full accounting to ensure nothing similar ever happens again. Congress has a compelling need in service of its legislative functions to understand the circumstances that led to these horrific events. The available evidence to date establishes a sufficient factual predicate for the Select Committee's investigation: an unprecedented effort to obstruct the peaceful transfer of power, threatening not only the safety of Congress and others present at the Capitol, but also the principles of democracy enshrined in our history and our Constitution. The [requested d]ocuments shed light on events within the White House on and about January 6 and bear on the Select Committee's need to understand the facts underlying the most serious attack on the operations of the Federal Government since the Civil War.
>
> These are unique and extraordinary circumstances. Congress is examining an assault on our Constitution and democratic institutions provoked and fanned by those sworn to protect them, and the conduct under investigation extends far beyond typical deliberations concerning the proper discharge of the President's constitutional responsibilities. The constitutional protections of executive privilege should not be used to shield, from Congress or the public, information that reflects a clear and apparent effort to subvert the Constitution itself.

This determination by the incumbent President—who alone is vested with all "executive Power" conferred by the Constitution, *see Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020)—warrants great weight by the judiciary. While prior incumbents have declined to support a predecessor's executive privilege claims in litigation, never before has an incumbent so vehemently declared a former President's claim contrary to the public interest, let alone indicated the constitutionally-based privilege was being improperly asserted to cover up an "effort to subvert the Constitution itself." More than the mere lack of support seen in prior cases, the incumbent President here has expressed an affirmative Article II judgment, supported by reasoning that echoes his sworn duty to "preserve, protect and defend the Constitution of the United States." U.S. Const. art. II, § 1, cl. 8.

When a court is presented with this type of direct and substantial conflict between an incumbent and former President on a claim of executive privilege, the incumbent's views must be accorded far greater weight. A contrary rule would diminish the incumbent President's exclusive Article II authority and aggrandize a former President, upon whom the Constitution confers no power, and who is accountable to no electorate. "Such diffusion of authority 'would greatly diminish the intended and necessary responsibility of the chief magistrate himself.'" *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 514 (2010) (quoting *The Federalist No. 70*, at 478 (A. Hamilton) (J. Cooke ed. 1961)).

For these reasons and those set forth by the district court, the denial of former President Trump's motion for a preliminary injunction should be affirmed.

## ARGUMENT

### I. Executive Privilege is Derived from Constitutional Power Vested Solely in the Incumbent President

"Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" *Seila Law*, 140 S. Ct. at 2191 (quoting U.S. Const. art. II, § 1, cl. 1; *id.* § 3). This is unique in our government's structure, for "the President is the only person who alone composes a branch of government." *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2034 (2020). "[T]he Framers thought it necessary to secure the authority of the Executive so that he could carry out his unique responsibilities." *Seila Law*, 140 S. Ct. at 2203. "As Madison put it, while 'the weight of the legislative authority requires that it should be . . . divided, the weakness of the executive may require, on the other hand, that it should be fortified.'" *Id.* (quoting *The Federalist No. 51*, at 350 (J. Cooke ed. 1961)). The resulting "constitutional strategy" was "straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections." *Id.* at 2203-04.

Executive privilege is derived from the incumbent President's Article II authority. It is "'inextricably rooted in the separation of powers under the Constitution,' and also 'flow[s] from the nature of enumerated powers' of the President." *In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997) (quoting *United States v. Nixon*, 418 U.S. 683, 705 & n.16 (1974)). The privilege fulfills the "President's 'need for confidentiality in the communications of his office,' in order to effectively and faithfully carry out his Article II duties and 'to protect the effectiveness of the executive decision-making process.'" *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1115 (D.C. Cir. 2004) (quoting *Nixon*, 418 U.S. at 712-13, and *In re Sealed Case*, 121 F.3d at 742). It is accordingly "limited to communications in performance of [a President's] responsibilities of his office and made in the process of shaping policies and making decisions." *In re Sealed Case*, 121 F.3d at 744 (quoting *Nixon v. GSA*, 433 U.S. 425, 449 (1977)). Because "the privilege is qualified, not absolute, [it] can be overcome by an adequate showing of need." *Id.* at 745.

As *amici* former White House attorneys can attest, disputes with Congress over access to Executive Branch information often involve a careful balancing of legal, institutional, and resource considerations that the incumbent President and his staff are uniquely positioned to address. *See Mazars*, 140 S. Ct. at 2031. The incumbent President has the necessary "information and attendant duty of

executing the laws in the light of current facts and circumstances," *Dellums v. Powell*, 561 F.2d 242, 247 (D.C. Cir. 1977), and serves as final decisionmaker for the Executive Branch in its "hurly-burly,[] give-and-take" with Congress, *Mazars*, 140 S. Ct. at 2029.

## II. A Former President's Residual Right to Assert Executive Privilege is Limited and Entitled to Lesser Weight than that of the Incumbent President

### A. *Nixon v. GSA*

"The Constitution makes no provision for former Presidents. It vests them with no powers, titles, or role whatsoever; it does not even provide them a pension." Laurent Sacharoff, *Former Presidents and Executive Privilege*, 88 Tex. L. Rev. 301, 302 (2009). Nevertheless, the Supreme Court held in *Nixon v. GSA* that "a former President could assert [executive] privilege on his own," *In re Sealed Case*, 121 F.3d at 744, in light of the need "to provide the confidentiality required for the President's conduct of office," *Nixon v. GSA*, 433 U.S. at 448.

At the same time, the Court identified several limitations on a former President's residual right to assert privilege. First, the claim is "given less weight than that of an incumbent President," *In re Sealed Case*, 121 F.3d at 744, since "[o]nly the incumbent is charged with performance of the executive duty under the Constitution," and a former president has "less need" to "shield . . . against burdensome requests for information which might interfere with the proper

performance of [his] duties," *Nixon v. GSA*, 433 U.S. at 448; *see also Dellums*, 561 F.2d at 247 (any privilege claim by former President is "not as forceful as" and "carries much less weight than a claim asserted by the incumbent"). Second, "the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic," and thus can be invoked only with respect to matters involving the "discharge of [the former President's] duties." *Nixon v. GSA*, 433 U.S. at 448-49. Third, any confidentiality interest is "subject to erosion over time after an administration leaves office." *Id.* at 451. Finally, if the incumbent President does not support the former President's privilege claim, this "detracts from the weight" of the claim. *Id.* at 449.

### B. The Presidential Records Act

Following *Nixon v. GSA*, Congress passed and President Carter signed into law the Presidential Records Act of 1978. The PRA formally changed legal ownership of Presidential records from private to public, 44 U.S.C. § 2202, and created procedures for the preservation of and access to a former President's official records, *id.* § 2203. It also established a process for handling "constitutionally-based privilege" claims by former Presidents. *Id.* § 2208. The process requires consultation with the incumbent President regarding any assertion of privilege. *Id.* § 2208(c). If, as here, the incumbent President "determines not to uphold the claim of privilege asserted by the former President," the PRA

authorizes the former President to bring suit to assert the privilege claim. *Id.* §§ 2208(c)(2)(C), 2204(e).

The PRA makes clear that "[n]othing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President." *Id.* § 2204(c)(2). Thus, the substantive law governing a former President's claim of executive privilege remains rooted in the Constitution, with the PRA merely providing the procedural framework for the claim to be considered and, if necessary, litigated.[2]

This is the first case since the PRA's enactment in which a former President has brought suit seeking to override the incumbent's judgment not to assert executive privilege. *See* JA 188.

[2] Misconstruing the statute, Mr. Trump insists the PRA is "unconstitutional" if it is "read to allow an incumbent President unfettered discretion to waive former Presidents' executive privilege." Appellant's Br. at 47. But the PRA explicitly does not limit any constitutionally-based privileges available to Mr. Trump; to the contrary, the statute enabled him to assert privilege and bring this suit.

## III. Former President Trump's Privilege Claim is Outweighed by the President's Determination that "Unique and Extraordinary Circumstances" Make Asserting Privilege Contrary to the Public Interest

The case law is clear that a mere lack of support by the incumbent is enough to "diminish" a former President's assertion of executive privilege. *See Nixon v. GSA*, 433 U.S. at 449 ("fact that neither President Ford nor President Carter support[ed] [former President Nixon's] claim detract[ed] from [its] weight," because "it must be presumed that the incumbent President is vitally concerned with and in the best position to assess the present and future needs of the Executive Branch"); *Dellums*, 561 F.2d at 247 & n.13 (deeming it "of cardinal significance" that "privilege [was] being urged solely by . . . former president [Nixon]" and there was "no assertion of privilege by [the] incumbent president," who had moved to quash the subpoena at issue but did not invoke privilege).

This case presents a much starker conflict: the incumbent President has not only declined to support the former President's privilege claim, but declared that "unique and extraordinary circumstances" make an assertion of privilege contrary to the public interest. The President's emphatic determination reflects the gravity of former President Trump's efforts to overturn the results of the 2020 election, the January 6 attack on the Capitol, and the Select Committee's investigation. As the White House Counsel explained:

> President Biden has determined that an assertion of executive privilege is not in the best interests of the United States, and therefore is not justified as to any of the Documents [requested by the Select Committee]. . . .
>
> As President Biden has stated, the insurrection that took place on January 6, and the extraordinary events surrounding it, must be subject to a full accounting to ensure nothing similar ever happens again. Congress has a compelling need in service of its legislative functions to understand the circumstances that led to these horrific events. The available evidence to date establishes a sufficient factual predicate for the Select Committee's investigation: an unprecedented effort to obstruct the peaceful transfer of power, threatening not only the safety of Congress and others present at the Capitol, but also the principles of democracy enshrined in our history and our Constitution. The Documents shed light on events within the White House on and about January 6 and bear on the Select Committee's need to understand the facts underlying the most serious attack on the operations of the Federal Government since the Civil War.
>
> These are unique and extraordinary circumstances. Congress is examining an assault on our Constitution and democratic institutions provoked and fanned by those sworn to protect them, and the conduct under investigation extends far beyond typical deliberations concerning the proper discharge of the President's constitutional responsibilities. The constitutional protections of executive privilege should not be used to shield, from Congress or the public, information that reflects a clear and apparent effort to subvert the Constitution itself.

JA 157; *see also* JA 160.

More than just an "[a]bsence of support" for a former President's privilege claim, *Dellums*, 561 F.2d at 247, President Biden's determination is an express assertion of Article II judgment. Specifically, his reasoning for why executive privilege simply does not apply to the requested documents—because the "conduct

under investigation extends far beyond typical deliberations concerning the proper discharge of the President's constitutional responsibilities," and "[t]he constitutional protections of executive privilege should not be used to shield, from Congress or the public, information that reflects a clear and apparent effort to subvert the Constitution itself," JA 157—reflects an exercise of Article II power, since the privilege is constitutionally based. The President's reasoning also echoes his duties to "preserve, protect and defend the Constitution of the United States," U.S. Const. art. II, § 1, cl. 8, and to "take Care that the Laws be faithfully executed," *id.* § 3. Indeed, he expressly sought to fulfill "the Select Committee's need to understand the facts underlying the most serious attack on the operations of the Federal Government since the Civil War," which he deemed an "assault on our Constitution and democratic institutions." JA 157. And he stressed the need for a "full accounting" of this "unprecedented effort to obstruct the peaceful transfer of power" as required by federal law not just for retrospective purposes, but "to ensure nothing similar ever happens again." *Id.*; *cf.* Presidential Proc. No. 3645, 30 Fed. Reg. 3739 (1965) (referencing President's authority to prevent "domestic violence obstructing the execution and enforcement of the laws").

The former President seeks to override the incumbent President's judgment, on the mistaken assumption that they are on equal constitutional footing. But the Supreme Court has repeatedly rebuked efforts to diffuse the incumbent's Article II

power by, for example, restricting the President's removal authority, *e.g.*, *Seila Law*, 140 S. Ct. at 2183; *Free Enter. Fund*, 561 U.S. at 477, or vesting executive power in officials outside of the Executive Branch, *e.g.*, *Bowsher v. Synar*, 478 U.S. 714 (1986). Underlying these decisions is the view that "Article II 'makes a single President responsible for the actions of the Executive Branch.'" *Seila Law*, 140 S. Ct. at 2203 (quoting *Free Enter. Fund*, 561 U.S. at 496-97). As the Court has explained, the Framers "gave the Executive the '[d]ecision, activity, secrecy, and dispatch' that 'characterise the proceedings of one man'" and specifically "check[ed] that authority" by making "the President the most democratic and politically accountable official in Government." *Id.* (quoting *The Federalist No. 70*, at 472, 479 (A. Hamilton) (J. Cooke ed. 1961)).

Here, a former President—outside of *any* branch of government and accountable to *no* electorate—seeks to wield executive privilege to deny Congress access to critical public records over the forceful objection of the "single President" vested with "all" of the "executive Power." *Seila Law*, 140 S. Ct. at 2191, 2203-04. It is one thing for a former President to assert, as in *Nixon v. GSA* and *Dellums*, a privilege claim without the incumbent's support; it is quite another for a former President to seek a court order *overriding* the incumbent's constitutionally-imbued determination that asserting privilege is contrary to the public interest. When a court is presented with this type of direct and substantial

conflict between an incumbent and former President on a claim of executive privilege, the incumbent's views are entitled to far greater weight. *See Nixon v. GSA*, 433 U.S. at 448-49 ("Only the incumbent is charged with performance of the executive duty under the Constitution," and "it must be presumed that the incumbent President is vitally concerned with and in the best position to assess the present and future needs of the Executive Branch.").

This does not mean that the incumbent President has "[c]arte [b]lanche [a]uthority" or "unfettered discretion" to waive a former President's assertion of executive privilege. Appellant's Br. at 47. Far from it, Supreme Court precedent and the PRA allow former Presidents to assert executive privilege and have their privilege claims adjudicated by the courts. In evaluating such claims, however, courts must carefully consider the nature of any objection raised by the incumbent President. If the incumbent's position lacks any connection to enumerated Article II powers or duties, or if it is a marked departure from historical practice, its weight may be correspondingly diminished. By contrast, when the President finds Congress has a "compelling need" to examine a "horrific . . . assault on our Constitution and democratic institutions," and determines the "constitutional protections of executive privilege should not be used to shield, from Congress or the public, information that reflects a clear and apparent effort to subvert the Constitution itself," JA 157, considerable deference is warranted.

## CONCLUSION

Mr. Trump is no longer the President of the United States, and his executive privilege claim must yield to the incumbent President's constitutional judgement not to assert privilege in these "unique and extraordinary circumstances." The denial of his motion for a preliminary injunction should be affirmed.

Dated: November 22, 2021

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this brief complies the type-volume limitations of Federal Rules of Appellate Procedure 29(a) and 32(a) because this brief contains 3,401 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

*/s/ Nikhel S. Sus*
Nikhel S. Sus
*Counsel for Amici Curiae*

**CERTIFICATE OF SERVICE**

Pursuant to Circuit Rule 25(c), I hereby certify that on November 22, 2021, I electronically filed the foregoing with the Court using the CM/ECF system. All parties have been served through the CM/ECF system.

*/s/ Nikhel S. Sus*
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