UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach Division

Case No. _____

DONALD J. TRUMP,
45th President of the United States
1100 S. Ocean Boulevard
Palm Beach, Florida 33480

Plaintiff,

v.

SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL,

U.S. HOUSE OF REPRESENTATIVES,

NANCY PELOSI, in her official capacity as Speaker of the United States House of Representatives,

BENNIE G. THOMPSON, in his official capacity as Chair of the Select Committee to Investigate the January 6th Attack on the United States Capitol,

ELIZABETH CHENEY, in her official capacity as a member of the United States House of Representatives,

ADAM B. SCHIFF, in his official capacity as a member of United States House of Representatives,

JAMIE B. RASKIN, in his official capacity as a member of the United States House of Representatives,

SUSAN E. LOFGREN, in her official capacity as a member of the United States House of Representatives,

ELAINE G. LURIA, in her official capacity as a member of the United States House of Representatives,

PETER R. AGUILAR, in his official capacity as a member of the United States House of Representatives,

STEPHANIE MURPHY, in her official capacity as a member of the United States House of Representative, and

ADAM D. KINZINGER, in his official capacity as a member of the United States House of Representatives.

Defendants.
_____/

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Donald J. Trump, 45th President of the United States, hereby sues the Select Committee to Investigate the January 6th Attack on the United States Capitol, *et al.* (the "Committee"), for declaratory and injunctive relief pursuant to Rule 57 and 28 U.S.C. § 2201 and, in support, states as follows:

PRELIMINARY STATEMENT

1. Donald J. Trump, 45th President of the United States, was issued a subpoena (the "Subpoena") by the Committee to turn over documents and to testify in a closed-door deposition about events that occurred while he was President of the United States. While other Presidents and former Presidents have *voluntarily* agreed to testify or turn over documents in response to a congressional subpoena, no President or former President has ever been *compelled* to do so.

2. To the contrary, for a half-century the Department of Justice has consistently opined that Presidents and former Presidents have absolute immunity from compelled Congressional testimony. *See infra* ¶¶ 82-91 (citing 50 years of OLC opinions and collecting cases and other

authorities). In a formal opinion, Attorney General Janet Reno wrote that this immunity "is absolute and may not be overborne by competing congressional interests." *Assertion of Executive Privilege with Respect to Clemency Decisions*, 23 Op. O.L.C. 1, 5 (Sept. 16, 1999).

3. The Supreme Court has held, "Congress and the President have an ongoing institutional relationship as the 'opposite and rival' political branches established by the Constitution. . . . As a result, congressional subpoenas directed at the President differ markedly from congressional subpoenas we have previously reviewed . . . and they bear little resemblance to criminal subpoenas issued to the President in the course of a specific case." *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2033-34 (2020) (citations omitted).

4. "Without limits on its subpoena powers, Congress could 'exert an imperious control' over the Executive Branch and aggrandize itself at the President's expense, just as the Framers' feared." *Mazars*, 140 S. Ct. at 2034 (quoting The Federalist No. 71, at 484 (A. Hamilton)).

5. The separation of powers concerns raised by congressional aggrandizement at the expense of the Executive Branch do not expire when a President leaves office. As President Truman, a Democrat, wrote in response to a subpoena from the U.S. House of Representatives Committee on Un-American Activities:

> It must be obvious to you that if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, it must be equally applicable to a President after his term of office has expired when he is sought to be examined with respect to any acts occurring while he was President. The doctrine would be shattered, and the President, contrary to our fundamental theory of Constitutional Government, would become a mere arm of the Legislative Branch of the Government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purposes.

Letter from the Honorable Harry S. Truman to the Honorable Harold H. Velde (Nov. 11, 1953), https://www.trumanlibrary.gov/library/research-files/harry-s-truman-harold-h-velde?documentid=NA&pagenumber=2.

6. This long-held view was reiterated in open court by the Department of Justice as recently as September 2022. *See infra.* ¶ 82.

7. The only possible exception to this absolute testimonial immunity—an exception which is itself hotly contested in academic circles—is for testimony in connection with the House of Representatives' impeachment jurisdiction. But the Subpoena issued by the Committee to "President Donald J. Trump" does not arise from an impeachment inquiry. For the reasons explained below, the Committee lacks authority to issue the Subpoena and, in any event, President Trump is not required to comply.

8. As a result of the Committee's self-described "unprecedented" action, President Trump has been put in the untenable position of choosing between preserving his rights and the constitutional prerogatives of the Executive Branch, or risking enforcement of the Subpoena issued to him. Accordingly, Former President Trump turns to the courts to preserve his rights and Executive Branch independence consistently upheld by the courts and endorsed by the Department of Justice.

9. This lawsuit—a matter of first impression arising from unprecedented facts—seeks to declare President Trump's rights and obligations and, through an injunction, to defend them from violation by the Committee's Subpoena.

10. Prior to filing suit, President Trump attempted to resolve this dispute with the Committee through various proposals that would simultaneously have provided the Committee with information it claims it needs while protecting and preserving the interests of the Executive

Branch under our constitutional system of separation of powers. The Committee, however, insists that the Executive, in the person of President Trump, must yield to the demands of the Legislative Branch and comply with its Subpoena.

11. The Committee's Subpoena is invalid because, as explained below, the Committee did not issue the Subpoena to further a valid legislative purpose; the Subpoena is unwarranted because other sources can provide the information the Subpoena seeks; the Subpoena is broader than reasonably necessary; the Subpoena infringes on executive privilege; the Subpoena infringes President Trump's First Amendment rights; the Committee is not duly authorized; and the Committee lacks the authority to issue subpoenas.

12. Accordingly, President Trump turns to the courts to preserve his rights and, in so doing, the separation of powers essential to our constitutional order.

PARTIES

13. Plaintiff, Donald J. Trump, 45th President of the United States, served between January 20, 2017, and January 20, 2021. President Trump remains a prominent figure in the Republican Party and remains eligible to run for president in 2024. He is a resident of Palm Beach County, Florida.

14. Defendant Select Committee to Investigate the January 6th Attack on the United States Capitol ("Committee") was created by House Resolution 503 ("H. Res. 503"), passed by the United States House of Representatives on June 30, 2021.

15. Defendant U.S. House of Representatives is one of two houses of the legislative branch of the Federal Government.

16. Defendant Nancy Pelosi ("Speaker Pelosi") is Speaker of the United States House of Representatives.

17. Defendant Bennie G. Thompson ("Chairman Thompson") is a Democrat member of the United States House of Representatives and Chair of the Committee. The Subpoena challenged herein was issued with his purported authority as Chair.

18. Defendant Elizabeth L. Cheney ("Congresswoman Cheney" or "Rep. Cheney") is a Republican member of the United States House of Representatives and Vice Chair of the Committee. Congresswoman Cheney, an avowed political opponent of President Trump, was placed on the Committee by the fiat of Speaker Pelosi in contravention of the normal practices of the House and over the opposition of its Minority Leader.

19. Defendant Adam B. Schiff ("Congressman Schiff" or "Rep. Schiff") is a Democrat member of the United States House of Representatives and member of the Committee.

20. Defendant Jamie B. Raskin ("Congressman Raskin" or "Rep. Raskin") is a Democrat member of the United States House of Representatives and member of the Committee.

21. Defendant Susan E. Lofgren ("Congresswoman Lofgren" or "Rep. Lofgren") is a Democrat member of the United States House of Representatives and member of the Committee.

22. Defendant Elaine G. Luria ("Congresswoman Luria" or "Rep. Luria") is a Democrat member of the United States House of Representatives and member of the Committee.

23. Defendant Peter R. Aguilar ("Congressman Aguilar" or "Rep. Aguilar") is a Democrat member of the United States House of Representatives and member of the Committee.

24. Defendant Stephanie Murphy ("Congresswoman Murphy" or "Rep. Murphy") is a Democrat member of the United States House of Representatives and member of the Committee.

25. Defendant Adam D. Kinzinger ("Congressman Kinzinger" or "Rep. Kinzinger") is a Republican member of the United States House of Representatives and member of the Committee. Congressman Kinzinger, an avowed political opponent of President Trump, was

placed on the Committee by the fiat of Speaker Pelosi in contravention of the normal practices of the House and over the opposition of its Minority Leader.

JURISDICTION AND VENUE

26. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question). This Court has federal question jurisdiction to resolve disputes under either federal law or the Constitution. See 28 U.S.C. § 2201.

27. Venue is proper under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to this claim, including the fact that President Trump—whose testimony and records the Subpoena demands—resides in the Southern District of Florida within the West Palm Beach Division, the official office of the 45th President of the United States pursuant to the Former President's Act, 3 U.S.C. § 102, is located within this District and Division, and service of the Subpoena upon President Trump occurred in the District and Division.

RELEVANT FACTS

28. On January 20, 2017, President Trump was sworn in as the 45th President of the United States. President Trump served as President until January 20, 2021.

29. Pursuant to the Constitution of the United States, "[t]he executive power shall be vested in a President of the United States." U.S. Const. art. II, § 1, cl.1.

30. "The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states when called into the actual service of the United States." U.S. Const. art. II, § 2, cl. 1.

31. The President "may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices." U.S. Const. art. II, § 2, cl. 1.

32. On January 6, 2021, a large group of people in Washington, D.C, entered the United States Capitol and breached security, disrupted and delayed the counting of electoral college votes. The United States Department of Justice has charged more than 900 individuals in connection with events that occurred on January 6, 2021.

33. Following the events of January 6, 2021, President Trump was impeached by the House of Representatives and acquitted by the Senate. President Trump was not issued a subpoena in connection with the January 2021 impeachment inquiry or the February 2021 Senate trial.

A. Formation, Composition, and Authority of the Committee

34. After a failed attempt to establish a bipartisan commission, on June 28, 2021, Speaker Pelosi introduced H. Res. 503, "Establishing the Select Committee to Investigate the January 6th Attack on the United States Capitol." Two days later, the House passed H. Res. 503 on a near party-line vote of 222 yeas and 190 nays. Only two Republicans, Reps. Cheney and Kinzinger, voted in favor of H. Res. 503.

35. H. Res. 503 establishes three "functions" of the Committee: (1) to "investigate the facts, circumstances, and causes relating to the domestic terrorist attack on the Capitol"; (2) to "identify, review, and evaluate the causes of and the lessons learned from the domestic terrorist attack on the Capitol"; and (3) to "issue a final report to the House containing such findings, conclusions, and recommendations for corrective measures described in subsection (c) as it may deem necessary."

36. Subsection (c) of Section 4 describes three categories of "corrective measures": "changes in law, policy, procedures, rules, or regulations that could be taken" (1) "to prevent future acts of violence, domestic terrorism, and domestic violent extremism, including acts targeted at

American democratic institutions"; (2) "to improve the security posture of the United States Capitol Complex while preserving accessibility of the Capitol Complex for all Americans"; and (3) "to strengthen the security and resilience of the United States and American democratic institutions against violence, domestic terrorism, and domestic violent extremism."

37. H. Res. 503 provides that "[t]he Select Committee may not hold a markup of legislation."

38. H. Res. 503 provides that "[t]he chair of the Select Committee, upon consultation with the ranking minority member, may order the taking of depositions, including pursuant to Subpoena, by a Member or counsel of the Select Committee, in the same manner as a standing committee pursuant to section 3(b)(1) of House Resolution 8, One Hundred Seventeenth Congress." Section 3(b)(1) of H. Res. 8 provides that, "[d]uring the One Hundred Seventeenth Congress, the chair of a standing committee . . . , upon consultation with the ranking minority member of such committee, may order the taking of depositions, including pursuant to subpoena, by a member or counsel of such committee."

39. H. Res. 503 instructs the Speaker to appoint thirteen members to the Committee, only five of which "shall be appointed after consultation with the minority leader."

40. Speaker Pelosi appointed Chairman Thompson to serve as chair of the Committee and appointed six additional Democrat members: Reps. Lofgren, Schiff, Aguilar, Murphy (FL), Raskin, and Luria. She also appointed Republican Rep. Cheney without any designation of position. 167 Cong. Rec. H3597 (2021).

41. House Minority Leader Kevin McCarthy recommended five Republican members to serve on the Committee, consistent with H. Res. 503: Rep. Jim Banks of Indiana to serve as

Ranking Member and Reps. Rodney Davis of Illinois, Jim Jordan of Ohio, Kelly Armstrong of North Dakota, and Troy Nehls of Texas to serve as additional minority members.

42. Speaker Pelosi did not appoint Rep. Banks to serve as Ranking Member, nor did she appoint any of Minority Leader McCarthy's other recommended minority members. In a public statement, she acknowledged that her refusal to appoint the members recommended by the Minority Leader was an "unprecedented decision." Press Release, Nancy Pelosi, Speaker, U.S. House of Representatives, Pelosi Statement on Republican Recommendations to Serve on the Select Committee to Investigate the January 6th Attack on the U.S. Capitol (July 21, 2021), https://www.speaker.gov/newsroom/72121-2.

43. Instead, Speaker Pelosi appointed Rep. Kinzinger—the only other Republican other than Rep. Cheney who voted in favor of H. Res. 503—and left four vacancies. See 167 Cong. Rec. H3885 (2021).

44. The result is that the Committee effectively lacks minority party representation.

45. House Rule XI(2)(d) instructs that a committee chair shall designate "[a] member of the majority party . . . as vice chair of the committee." On September 2, 2021, Chairman Thompson announced in a press release that "he has named Representative Liz Cheney (R-WY) to serve as the Vice Chair of the Select Committee." See Press Release, Bennie Thompson, Chairman, Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol, Chairman Thompson Announces Representative Cheney as Select Committee Vice Chair (Sept. 2, 2021), https://january6th.house.gov/news/pressreleases/chairman-thompson-announces-representative-cheney-select-committee-vice-chair. Rep. Cheney is a member of the Republican Conference of the House of Representatives, and thus not a member of the current majority party.

46. H. Res. 503 provides: "The chair of the Select Committee, upon consultation with the ranking minority member, may order the taking of depositions."

47. Neither H. Res. 503 nor the House Rules define the term "ranking minority member." That term, by custom and practice of the House, is defined by the parties themselves in their respective Conference and Caucus Rules. Under Rule 14 of the Republican Conference Rules of the 117th Congress, a member's designation as the ranking Republican member of a Committee comes only through nomination by the Steering Committee and election by the Conference. Rule 13 provides that, for a Select Committee, such nominations shall be made by the minority leader. No ranking minority member was ever designated in accordance with the Republican Conference Rules for the Committee. Therefore, the Committee has no ranking minority member.

48. The Committee held its first hearing on July 27, 2021. *See* Press Release, Select Committee, Select Committee to Investigate the January 6th Attack on the United States Capitol to Hold First Hearing July 27th (Jul. 20, 2021), https://january6th.house.gov/news/press-releases/select-committee-investigate-january-6th-attack-united-states-capitol-hold-first

49. After the hearing, Chairman Thompson reportedly "told reporters the select committee could have another hearing in August while the House is scheduled to be in a seven-week recess." Melissa Macaya *et al.*, *Capitol Riot Committee Holds First Hearing*, CNN (Jul. 27, 2021), https://www.cnn.com/politics/live-news/jan-6-house-select-committee-hearing-07-27-21/h_f000be289ea8ac4e1fb4b992b3d0b80e.

50. But the Committee did not have another hearing in August 2021; nor did it have another hearing for the remainder of 2021.

51. Instead, the Committee waited almost a year to hold a second hearing, holding it on June 9, 2022, right at or before the majority of the 2022 midterm primary and primary runoff

elections. *See* Select Committee, *Past Hearings*, https://january6th.house.gov/legislation/hearings/06092022-select-committee-hearing (last visited Nov. 10, 2022).

52. The Committee subsequently held seven additional hearings during the summer of 2022: on June 13, 2022, June 16, 2022, June 21, 2022, June 23, 2022, June 28, 2022, July 12, 2022, and July 21, 2022. Select Committee, *Past Hearings*, https://january6th.house.gov/legislation/hearings (last visited Nov. 10, 2022).

53. At no time during more than a year of hearings did the Committee formally request that President Trump voluntarily testify or provide documents.

54. On September 19, 2022, Committee members Congresswoman Lofgren and Congresswoman Cheney introduced House Resolution 8873, Presidential Election Reform Act ("H.R. 8873"), to amend the Electoral Count Act.

55. Representatives Lofgren and Cheney made clear that H.R. 8873 is an outgrowth of the Committee's work, stating in the *Wall Street Journal* that "[t]he committee will have more to say in the months to come about the full extent of Mr. Trump's plans to overturn the 2020 election, but we also have an obligation to recommend legislation to make sure such an attack never happens again. . . . To address this prospect, this week we will propose reforms to the Electoral Count Act to protect the rule of law and ensure that future efforts to attack the integrity of presidential elections can't succeed." Liz Cheney and Zoe Lofgren, *We Have a Bill to Help Prevent Another Jan. 6 Attack*, Wall. St. J. (Sept. 18, 2022), https://www.wsj.com/articles/we-have-a-bill-to-prevent-another-jan-6-attack-cheney-committee-electoral-count-president-11663535092?mod=opinion_lead_pos5.

56. On September 21, 2022, Congresswoman Cheney, speaking on the floor of the House, stated "[t]his bill [H.R. 8873] is a very important and crucial bill to ensure that what

happened on January 6th never happens again." *See* Press Release, Liz Cheney, Cheney Delivers Closing Remarks Prior to House Vote on Presidential Election Reform Act (Sept. 21, 2022), https://cheney.house.gov/2022/09/21/cheney-delivers-closing-remarks-prior-to-house-vote-on-presidential-election-reform-act/.

57. On September 21, 2022, H.R. 8873 passed the House of Representatives.

B. The Decision to Subpoena President Trump

58. After holding no hearings for two and a half months and after two members of the Committee drafted and introduced a bill to "to ensure that what happened on January 6th never happens again," which passed the House of Representatives, the Committee decided to hold one more hearing on October 13, 2022—less than one month before the 2022 midterm elections.

59. At the October 13, 2022, hearing of the Committee, Chairman Thompson explained the purported need to subpoena President Trump as follows:

> [T]he need for this committee to hear from Donald Trump goes beyond our fact finding. This is a question about accountability to the American people. He must be accountable. He is required to answer for his actions. He's required to answer to those police officers who put their lives and bodies on the line to defend our democracy.
>
> He's required to answer to those millions of Americans whose votes he wanted to throw out as part of his scheme to remain in power. And whatever is underway to ensure this accountability under the law, this committee will demand a full accounting to every American person of the events of January 6th. So, it's our obligation to seek Donald Trump's testimony.

60. Chairman Thompson also stated, "I've served in Congress a long time I can tell you it's tough for any Congressional investigation to obtain evidence like what we've received, least of all such a detailed view into a president's inner circle."

61. At that same hearing, Congresswoman Cheney stated, "[o]ur committee now has sufficient information to answer many of the critical questions posed by Congress at the outset.

We have sufficient information to consider criminal referrals for multiple individuals and to recommend a range of legislative proposals to guard against another January 6th, but a key task remains. We must seek the testimony of January 6th's central player."

62. Congresswoman Cheney further noted, "[o]ur committee may ultimately decide to make a series of criminal referrals to the Department of Justice, but we recognize it is not our role to make decisions regarding prosecutions."

63. Congresswoman Cheney also stated: "We've already proposed and the House has now passed a bill to amend the Electoral Count Act to help ensure that no future plots to overturn an election can succeed."

64. During the October 21, 2022, hearing, Congressman Kinzinger specifically referenced his policy disagreements with President Trump's orders pursuant to his authority as commander in chief of the armed forces, stating "President Trump issued an order for large-scale US troop withdrawals. He disregarded concerns about the consequences for fragile governments on the front lines of the fight against ISIS and Al-Qaeda terrorists."

65. Congressman Kinzinger further referenced conversations between the President and his subordinates, including General Keith Kellogg, National Security Advisor to the Vice President, and General Mark Milley, Chairman, Joint Chiefs of Staff.

C. The Subpoena to President Trump

66. The Subpoena issued to President Trump (attached as Exhibit A) leaves no doubt that its focus is on President Trump's action *as President*.

67. The Subpoena is addressed to President Trump in his capacity as the "45th President of the United States." Ex. A.

68. The Subpoena refers to President Trump's "obligation *as President* to ensure that the laws of our nation are faithfully executed." Ex. A (emphasis added).

69. The Subpoena alleges that President Trump was "at the center of the first and only effort *by any U.S. President* to overturn an election." Ex. A (emphasis added).

70. The Subpoena claims that the Committee is "considering multiple legislative recommendations intended to provide further assurances that *no future President* could succeed at anything even remotely similar to the unlawful steps you took to overturn the election." Ex. A (emphasis added).

71. "Historically, disputes over congressional demands for presidential documents have not ended up in court. Instead, they have been hashed out in the 'hurly-burly, the give-and-take of the political process between the legislative and the executive.'" *Mazars*, 140 S. Ct. at 2029 (quoting Hearings on S. 2170 et al. before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 94th Cong., 1st Sess., 87 (1974) (A. Scalia, Assistant Attorney General, Office of Legal Counsel)).

72. President Trump has sought to resolve disputes regarding the Committee's demands through the "political process" and through negotiation with the Committee.

73. To that end, President Trump's legal team reached out to the Committee to discuss its "demands" and, on November 1, 2022, discussed the Subpoena on a phone call with Select Committee staff.

74. President Trump followed up on this call on November 2, 2022, by sending a letter to Select Committee staff (attached as Exhibit B) reiterating some of his concerns and seeking clarification on the scope of the Committee's "demands."

75. On November 4, 2022, the Committee responded by letter (attached as Exhibit C) requesting that President Trump initially focus on two document requests—requests number 1 and 19—which the Committee narrowed, and that he respond to those requests by November 9, 2022. The Committee did not disclaim or withdraw its other sweeping document requests or substantively answer any of President Trump's concerns regarding the scope and authority for the Subpoena.

76. President Trump responded via letter (attached as Exhibit D). Without waiving any objections, President Trump voluntarily responded to requests 1 and 19—as described in and narrowed by the Committee's November 4, 2022, letter—stating in response to each "as a sign of good faith and as a courtesy to the Committee, President Trump has voluntarily directed a reasonable search for documents in his possession. The search found no documents responsive to this request."

77. Consistent with the constitutional separation of powers and the learned opinion of the Department of Justice, as stated for the past fifty years and reiterated just this past September, President Trump asserted his absolute immunity from compelled testimony before Congress regarding his actions while serving as President.

78. President Trump also further stated his concerns and objections regarding the remainder of the Committee's vague and sweeping document requests.

79. Finally, President Trump offered to consider responding in writing to specific written questions submitted to him by the Committee.

80. The Committee has not replied to President Trump's letter other than to acknowledge receiving it. Nor has the Committee submitted written questions to President Trump. Pursuant to the terms of the Subpoena, President Trump's deposition is scheduled for Monday,

November 14, three calendar days from the date this Complaint was filed, and the Committee has not withdrawn its demand that he appear.

THE SUBPOENA TO PRESIDENT TRUMP IS INVALID

A. The President has Absolute Testimonial Immunity from Compelled Appearances Before Congress

81. "The President is the only person who alone composes a branch of government." *Mazars*, 140 S. Ct. at 2034.

82. The Department of Justice made clear in September 2022 that a subpoena seeking to compel the testimony of "a former president . . . presents an appearance issue of the dignity of the Office of the President" in a way that a subpoena to a president's former aides does not. *See* Transcript of In-Person Motions Hearing Before the Honorable Carl J. Nichols, *Meadows v. Pelosi*, Civil Action No. 1:21-cv-03217 (Sept. 7, 2022).

83. This is consistent with the Department of Justice's longstanding view that Presidents and former Presidents are absolutely immune from compelled testimony before Congress. To wit, "[s]ince the 1970s, [the Office of Legal Counsel in the Department of Justice] has consistently advised that 'the President . . . [is] absolutely immune from testimonial compulsion by a Congressional committee' on matters related to their official duties." *Testimonial Immunity Before Congress of the Former Counsel to the President*, 2019 WL 2315338 at *2 (O.L.C. May 20, 2019) ("*Testimonial Immunity Before Congress*") (quoting Memorandum for All Heads of Offices, Divisions, Bureaus and Boards of the Department of Justice, from John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Executive Privilege* at 5 (May 23, 1977) ("Harmon Memorandum")).

84. The Office of Legal Counsel "has endorsed that legal principle on more than a dozen occasions, over the course of the last eight presidential administrations" prior to the Biden

Administration. *Id*. (citing *Immunity of the Assistant to the President*, 38 Op. O.L.C. at *1; Letter for Fred F. Fielding, Counsel to the President, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel at 1–2 (Aug. 1, 2007); *Immunity of the Former Counsel*, 31 Op. O.L.C. at 191; Reno Opinion, 23 Op. O.L.C. at 4; *Immunity of the Counsel to the President from Compelled Congressional Testimony*, 20 Op. O.L.C. 308, 308 (1996) ("Immunity of the Counsel to the President "); Letter for Jack Brooks, Chairman, Committee on the Judiciary, U.S. House of Representatives, from Nicholas E. Calio, Assistant to the President for Legislative Affairs at 1 (June 16, 1992); Memorandum for Edward C. Schmults, Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel at 2 (July 29, 1982); Memorandum for Rudolph W. Giuliani, Associate Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Congressional Demand for Deposition of Counsel to the President Fred F. Fielding* at 2 (July 23, 1982); Memorandum for Fred F. Fielding, Counsel to the President, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Congressional Testimony by Presidential Assistants* at 1 (Apr. 14, 1981); Memorandum for Margaret McKenna, Deputy Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Dual-Purpose Presidential Advisers* at 5 (Aug. 11, 1977); Harmon Memorandum at 5; Letter to Phillip E. Areeda, Counsel to the President, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel (Sept. 25, 1974); Memorandum for John W. Dean III, Counsel to the President, from Roger C. Cramton, Assistant Attorney General, Office of Legal Counsel, *Re: Availability of Executive Privilege Where Congressional Committee Seeks Testimony of Former White House Official on Advice Given President on Official Matters* at 6 (Dec. 21, 1972); Memorandum for John W. Dean III, Counsel to the President, from Ralph E. Erickson, Assistant Attorney General,

Office of Legal Counsel, *Re: Appearance of Presidential Assistant Peter M. Flanigan Before a Congressional Committee* at 1 (Mar. 15, 1972); Memorandum for John D. Ehrlichman, Assistant to the President for Domestic Affairs, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Power of Congressional Committee to Compel Appearance or Testimony of 'White House Staff'* at 7 (Feb. 5, 1971) ("The President . . . should be deemed absolutely immune from testimonial compulsion by a congressional committee.")).

85. As Attorney General Janet Reno stated, "requiring the President himself to appear before Congress on matters relating to the performance of his constitutionally assigned executive functions . . . would, in my view, violate the constitutionally mandated separation of powers principles." *Assertion of Executive Privilege with Respect to Clemency Decisions*, 23 Op. O.L.C. 1, 5 (Sept. 16, 1999) (opinion of Attorney General Janet Reno).

86. Thus, "[t]he rationale for the immunity is plain. The President is the head of one of the independent Branches of the federal Government. If a congressional committee could force the President's appearance, fundamental separation of powers principles—including the President's independence and autonomy from Congress—would be threatened." *Immunity of Former Counsel to the President from Compelled Congressional Testimony*, 31 U.S. Op. O.L.C. 191, 2007 WL 5038035 at * 2 (Jul. 10, 2007) ("*Immunity of Former Counsel*"). Put differently, "[t]he President is a separate branch of government. He may not compel congressmen to appear before him. As a matter of separation of powers, Congress may not compel him to appear before it." Memorandum for Edward C. Schmults, Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel at 2 (Jul. 29, 1982).

87. "[A]llowing Congress to subpoena the President to appear and testify would 'promote a perception that the President is subordinate to Congress, contrary to the Constitution's

separation of governmental powers into equal and coordinate branches.'" *Testimonial Immunity Before Congress* at *3 (quoting *Immunity of the Assistant to the President*, 38 Op. O.L.C. at *2).

88. Moreover, as a practical matter, "[t]here are dozens of congressional committees and subcommittees with the authority to conduct hearings and subpoena witnesses." *Testimonial Immunity Before Congress* at *3. The ability of any one of them—or worse, all of them—to compel the President of the United States to appear and testify "would allow congressional committees to 'wield their compulsory power to attempt to supervise the President's actions, or to harass those advisers in an effort to influence their conduct, retaliate for actions the committee disliked, or embarrass and weaken the President for partisan gain.'" *Id*. (quoting *Immunity of Assistant to the President*, Op. O.L.C. at *3).

89. As Attorney General Reno recognized, this immunity "is absolute and may not be overborne by competing congressional interests." *Assertion of Executive Privilege with Respect to Clemency Decisions*, 23 Op. O.L.C. at 5; *see also Immunity of Former Counsel to the President from Compelled Congressional Testimony*, 2007 WL 5038035 at * 1.

90. Moreover, testimonial immunity continues to apply after a President has left office. As President Truman wrote in response to a subpoena from the U.S. House of Representatives Committee on Un-American Activities:

> It must be obvious to you that if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, it must be equally applicable to a President after his term of office has expired when he is sought to be examined with respect to any acts occurring while he was President. The doctrine would be shattered, and the President, contrary to our fundamental theory of Constitutional Government, would become a mere arm of the Legislative Branch of the Government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purposes.

Letter from the Honorable Harry S. Truman to the Honorable Harold H. Velde (Nov. 11, 1953), https://www.trumanlibrary.gov/library/research-files/harry-s-truman-harold-h-

velde?documentid=NA&pagenumber=2. Importantly, former President Truman's letter was no academic exercise; it was his explanation for his absolute refusal to appear to testify in response to a subpoena issued by the House Committee on Un-American Activities. In refusing Congress's demand that he appear to testify, President Truman noted:

> I am carrying out the provisions of the Constitution of the United States; and am following a long line of precedents commencing with George Washington himself in 1796. Since his day, Presidents Jefferson, Monroe, Jackson, Tyler, Polk, Fillmore, Buchanan, Lincoln, Grant, Hayes, Cleveland, Theodore Roosevelt, Coolidge, Hoover and Franklin D. Roosevelt have declined to respond to subpoenas or demands for information of various kinds by Congress.

Id. at 1. In justifying his decision to the American public, President Truman further explained it "is just as important to the independence of the Executive that the actions of the President should not be subjected to questioning by the Congress after he has completed his term of office as that his actions should not be questioned while he is serving as President." *Text of Address by Truman Explaining to Nation His Actions in the White Case*, N.Y. Times at 26 (Nov. 17, 1953).

91. Consistent with President Truman's words and deeds, the Department of Justice has consistently advised that testimonial immunity applies to former Presidents and their senior advisors. *See Testimonial Immunity Before Congress* at *10 ("[the Department of Justice] ha[s] recognized that testimonial immunity continues after the tenure of a particular Counsel to the President"); *Immunity of Former Counsel* at *2 ("Separation of powers principles dictate that former Presidents and former senior presidential advisers remain immune from compelled congressional testimony about official matters that occurred during their times as President or senior presidential advisers."); *see also United States v. Johnson*, 383 U.S. 169 (1966) (applying the speech and debate clause to a former member of Congress).

92. The Committee has purported to subpoena President Trump to appear at a deposition and testify regarding his actions as President of the United States. As a co-equal branch

of government, Congress—and particularly a partisan committee thereof—lacks authority under the Constitution to do so. President Trump therefore has what Attorney General Reno characterized as "absolute" testimonial immunity. The Subpoena's demand for compelled testimony is thus invalid.

B. The Committee Did Not Issue the Subpoena to Further a Valid Legislative Purpose

93. Even if President Trump did not have absolute testimonial immunity, the Subpoena would be invalid for other reasons. Congress has no freestanding power to investigate and issue subpoenas. Instead, its investigative powers are ancillary to its legislative authority. *Mazars*, 140 S. Ct. at 2031. Because of this tie between the investigative and legislative powers, Congress may only issue subpoenas that serve a valid legislative purpose.

94. The legislative purpose inquiry analyzes whether a particular subpoena serves a valid purpose, not whether an investigation as a whole serves a valid purpose. *See id*. at 2031.

95. Particularly where a subpoena involves the President, "courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose. The more detailed and substantial the evidence of Congress's legislative purpose, the better. . . . That is particularly true when Congress contemplates legislation that raises sensitive constitutional issues, such as legislation concerning the presidency." *Mazars*, 140 S.Ct. at 2036.

96. In cases involving legislation concerning the presidency, "it is 'impossible' to conclude that a subpoena is designed to advance a valid legislative purpose unless Congress adequately identifies its aims and explains why the President's information will advance its consideration of the possible legislation." *Id*. (citations omitted). "Vague" or "loosely worded"

evidence of Congressional purpose is insufficient. *Id.* (quoting *Watkins v. United States*, 354 U.S. 178, 201, 205 (1957)).

97. The Committee's purported legislative purpose for subpoenaing President Trump is to "consider[] multiple legislative recommendations intended to provide further assurance that *no future President* could succeed at anything remotely similar to the unlawful steps you took to overturn the election." *See* Ex. A (emphasis added).

98. This is a vague and loosely worded purpose.

99. To the extent a purported legislative purpose is discernable, the claimed purpose is to directly regulate future Presidents.

100. At no point does the Committee describe how the testimony of President Trump is necessary to further this purported purpose.

101. As described above, the Committee held eight hearings in June and July 2022.

102. Following those hearings, two members of the Committee introduced legislation with the stated goal of preventing another incident like the one that occurred on January 6, 2021.

103. That legislation passed the U.S. House of Representatives.

104. To the extent that it had one, the Committee has fulfilled its legislative purpose.

105. The Committee has provided no (nor could it provide any) specific information regarding what additional legislative proposals necessitate documents or testimony from President Trump.

106. Instead, the Committee provides ample evidence that its purported legislative purpose is pretextual, and that its true purpose is non-legislative.

107. The Subpoena itself highlights that the requested deposition "will be lead [*sic*.] by the professional staff of the Select Committee—*including multiple former federal prosecutors*—as well as Members." *See* Ex. A (emphasis added).

108. The Committee makes no effort to identify why former prosecutors are relevant or necessary to elicit information for legislative drafting. Their potential value for eliciting information for punitive purposes, including potential criminal referrals, is obvious.

109. At the October 13, 2022, hearing where the Committee voted to authorize the Subpoena to President Trump, Chairman Thompson described the purpose of issuing the Subpoena as "a question about accountability to the American people" and stated that President Trump "must be accountable" and "is required to answer for his actions."

110. This continues a long history of public statements by Speaker Pelosi and members of the Committee suggesting, if not outright stating, that their purpose is partisan, not legislative—to punish President Trump, and to score political points.

111. In an interview on December 29, 2021, Rep. Kinzinger stated, "We'll be able to have out on the public record anything Justice Department needs maybe in . . . pursuit of [a potential criminal prosecution of former President Trump]." Zachary Cohen & Annie Grayer, *January 6 committee says it would make criminal referrals if 'appropriate,' but that could be a long way off*, CNN (Dec. 21, 2021), https://www.cnn.com/2021/12/21/politics/january-6-committee-criminal-referrals/index.

112. Chairman Thompson noted on October 24, 2021, "obviously we are pursuing evidence" leading to "former President Trump or anyone else." Transcript: Rep. Bennie Thompson on "Face the Nation", CBS News (Oct. 24, 2021), https://www.cbsnews.com/news/transcript-repbennie-thompson-on-face-the-nation-october-24-2021/. Chairman Thompson also tweeted on

January 6, 2022, "We have been working diligently to bring justice to [those responsible for Jan. 6]." Bennie Thompson (@BennieGThompson), Twitter, (Jan. 6, 2022 8:31 AM), https://twitter.com/BennieGThompson/status/1479083311163232258.

113. During a meeting of the Committee, Rep. Schiff explained that "exposing all the malefactors and bloodshed that went on here is really important." Mary Clare Jalonick, *Capitol riot committee has interviewed 250 people so far*, Associated Press (Dec. 2, 2021), https://apnews.com/article/steve-bannon-donald-trump-elections-capitol-siege36b68bd9e0c701fea8e6b11f00292604.

114. Rep. Schiff also tweeted on November 12, 2021, "We will expose those responsible for Jan 6. No one is above the law." Adam Schiff (@RepAdamSchiff), Twitter (Nov. 12, 2021, 4:54 PM), https://twitter.com/RepAdamSchiff/status/1459278425118625794.

115. Rep. Raskin has also implied a law enforcement purpose of the investigation when he stated on multiple occasions that no privilege (neither attorney-client nor executive) "operate[s] to shield participants in a crime from an investigation into a crime." Hugo Lowell, *Capitol panel to investigate Trump call to Willard hotel in hours before attack*, Guardian (Dec. 27, 2021), https://www.theguardian.com/us-news/2021/dec/27/capitol-attack-panel-investigate-trump-callwillard-hotel-before-assault. *See also* Jamie Raskin (@RepRaskin), Twitter (Dec. 2, 2021, 5:40PM), https://twitter.com/RepRaskin/status/1466537815185891329 ("Exec. privilege doesn't cover criminal misconduct, like insurrections or coups . . . .").

116. At the October 21, 2022, hearing Congresswoman Cheney raised the prospect of criminal referrals to the Department of Justice multiple times and noted "[w]e have sufficient information to consider criminal referrals for multiple individuals and to recommend a range of legislative proposals to guard against another January 6th." In fact, Rep. Cheney doubled down on

the prosecutorial purpose behind the Committee's request of President Trump. When specifically asked about this Subpoena and its requests to President Trump regarding document production and testimony, Rep. Cheney admitted that the Committee was "already considering" criminal referrals. November 11, 2022 C-Span Interview with Representative Liz Cheney https://www.c-span.org/video/?c5040513/rep-cheney-jan-6-committee (last visited Nov. 11, 2022).

117. The Supreme Court has clearly stated "there is no congressional power to expose for the sake of exposure." *Watkins*, 354 U.S. at 200.

118. Holding President Trump "accountable" is not a legislative purpose.

119. Holding an individual "accountable" as the Committee describes it is a facially punitive purpose and exposure for the sake of exposure.

120. "Congress may not issue a subpoena for the purpose of 'law enforcement,' because 'those powers are assigned under our Constitution to the Executive and the Judiciary.'" *Mazars*, 140 S. Ct. at 2032 (quoting *Quinn v. United States*, 349 U.S. 155, 161 (1955)).

121. Conducting federal investigations to facilitate referrals for prosecution to the Department of Justice is not a proper legislative purpose.

122. The Subpoena to President Trump lacks a basic valid legislative purpose, let alone a legislative purpose sufficiently detailed to justify an unprecedented intrusion on the Presidency by Congressmen hand-selected by the Speaker of the House, who is also a leading member of the opposing party. Accordingly, it is invalid.

C. The Subpoena's Request for a President's Testimony and Documents is Unwarranted Because There Are Other Sources for the Requested Information

123. Even if the Court finds that the President does not have immunity and/or finds that Congress has a valid legislative purpose, the Court should still declare the Committee's Subpoena

for the President's testimony and/or his documents invalid because Congress has other sources who can provide this information.

124. Even when Congress has a valid legislative purpose (which it does not), "courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers." *Mazars*, 140 S. Ct. at 2035. "While we certainly recognize Congress's important interests in obtaining information through appropriate inquiries, those interests are not sufficiently powerful to justify access to the President's personal papers when other sources could provide Congress the information it needs." *Id*. at 2036. Therefore, "Congress may not rely on the President's information if other sources could reasonably provide Congress the information it needs in light of its particularly legislative objectives." *Id*. at 2035-36.

125. By its own admission, other sources can and have provided the Committee with the information it needs to pursue its purported legislative purpose.

126. According to the Subpoena, the Committee has "interviewed more than a thousand witnesses, reviewed over a million documents, conducted public hearings, and vindicated [its] rights in court." The Subpoena further states, "[a]s demonstrated in our hearings, we have assembled overwhelming evidence, including from dozens of your former staff, that you personally orchestrated and oversaw a multi-part effort to overturn the 2020 presidential election and to obstruct the peaceful transfer of power."

127. At the October 13, 2022, hearing, Chairman Thompson attested "I've served in Congress a long time. I can tell you it's tough for any Congressional investigation to obtain evidence like what we've received, least of all such a detailed view into a president's inner circle."

128. At that same hearing, Congresswoman Cheney stated "[o]ur committee now has sufficient information to answer many of the critical questions posed by Congress at the outset."

129. Moreover, two committee members already proposed, and the House already passed, legislation directed at fixing the issue at the center of the Committee's purported legislative purpose, H.R. 8873.

130. According to Congresswoman Cheney, H.R. 8873 would "help ensure that no future plots to overturn an election can succeed."

131. By the Committee's own admission, it has nearly unprecedented levels of information and insight into the President's inner circle that is sufficient to "to answer many of the critical questions posed by Congress at the outset" and influence the drafting and passage of legislation.

132. The Committee has provided no justification or explanation (because it cannot) for how *the President's* testimony and documents are necessary for the Committee's claimed legislative purpose above and beyond the information already received from "thousands" of other witnesses and "over a million documents," including extensive government records.

133. Moreover, President Trump has proposed an alternative means for the Committee to request and receive information. President Trump offered to consider responding in writing to specific questions submitted by the Committee. The January 6th Committee has not submitted such questions or even responded to the proposal.

134. Even if the Committee has a valid legislative purpose in issuing its Subpoena, it plainly fails to satisfy the requirement in *Mazars* that the President and his papers only be subpoenaed when Congress cannot obtain the relevant information from other sources. The Subpoena is thus invalid.

D. The Subpoena is Broader than Reasonably Necessary

135. "[T]o narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective." *Mazars*, 140 S. Ct. at 2036. "The President's unique constitutional position means that Congress may not look to him as a 'case study' for general legislation." *Id*. Yet the breadth of information requested makes clear that Congress is seeking to do precisely that.

136. The Subpoena for testimony is nearly unlimited, concerning all issues "touching matters of inquiry committed to said committee."

137. The Committee has made clear that it takes a broad view of issues "touching matters of inquiry committed to said committee." To wit, Congressman Kinzinger's statements show that the Committee views decisions concerning the deployment of U.S. armed forces, a quintessential exercise of the unreviewable Article II authority of the President as Commander in Chief of the U.S. armed forces, as touching matters of inquiry committed to the Committee. The Committee has also sought to inquire into Presidential appointments, a matter constitutionally committed to the President and the Senate, not a partisan committee of the House of Representatives.

138. There is nothing in the Subpoena limiting the inquiry to matters related to the Committee's legislative purposes.

139. Similarly, the Subpoena's request for documents is incredibly broad, seeking nearly all communications from November 3, 2020 through January 6, 2021, concerning the 2020 election, including conversations with President Trump's legal team, government officials, and members of Congress.

140. Incredibly, request number 14 demands production of *all* communications with 13 people, including attorneys, for more than two and a half months, regardless of the subject matter.

141. Accordingly, the Subpoena is overly broad and invalid. *See also* Ex. D (detailing specific concerns with each document request).

E. The Subpoena Violates the Separation of Powers by Infringing Upon Executive Privilege

142. Executive privilege allows a President to protect "documents or other materials that reflect presidential decision-making and deliberations and that the President believes should remain confidential" from disclosure. *In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997). Such privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974). "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Id*.

143. The Subpoena seeks to depose President Trump about events that occurred while he was President, and in his capacity as President. It expressly seeks information from President Trump about conversations and deliberations that occurred while he was President, and concerning his exercise of Article II authority.

144. The Subpoena seeks documents that plainly reflect Presidential decision making and deliberations including, but not limited to, discussions with subordinate officials in the Department of Justice concerning the 2020 election and conversations with members of Congress regarding pending governmental business.

145. As even the Committee's cover letter acknowledges, the Supreme Court has held that "[f]ormer Presidents retain the limited ability to assert executive privilege[.]" *See* Ex. A.

146. Through its broad request for documents and unbounded request for testimony, the Subpoena seeks information that is protected by the executive privilege and is invalid with respect to such information.

F. The Subpoena Infringes Upon President Trump's First Amendment Rights to Speech and Association

147. "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

148. "When it comes to 'a person's beliefs and associations,' '[b]road and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution." *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2385 (2021) (quoting *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) (plurality opinion)).

149. The Supreme Court has held that a citizen's duty to cooperate with a Congressional subpoena "within the province of proper investigation . . . of course, assumes that the constitutional rights of witnesses will be respected by the Congress as they are in a court of justice. The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged." *Watkins v. United States*, 354 U.S. 178, 187–88 (1957).

150. Thus, "the provisions of the First Amendment . . . of course reach and limit congressional investigations." *Barenblatt v. United States*, 360 U.S. 109, 126 (1959).

151. While there are special separation of powers concerns relating to President Trump's role as head of the executive branch that counsel against disclosure of presidential records of a co-

equal branch of government, President Trump is also an American citizen. He did not check his constitutional rights to speech and association at the Oval Office door.

152. The broad scope of the Subpoena's request for documents and testimony threatens to force President Trump to reveal the inner workings of his Presidential campaign, including his political beliefs, strategy, and fundraising.

153. The Committee's quasi-criminal inquest into matters beyond violence during the Capitol riot infringe upon his First Amendment rights to hold whatever political views he would like, to express those views—especially including criticism of government actions like the conduct of elections—and to associate with whomever he chooses.

154. To the extent it seeks information beyond that directly related to violent actions on January 6, 2021, the Subpoena infringes upon President Trump's First Amendment rights and is invalid.

G. The Committee is Not a Duly Authorized Committee and Thus Lacks the Authority to Issue the Subpoena

155. The composition of the Committee is governed by Section 2 of H. Res. 503. Section 2(a) states "Appointment Of Members.—The Speaker shall appoint 13 Members to the Select Committee, 5 of whom shall be appointed after consultation with the minority leader." H. Res. 503 117th Cong. (2021).

156. Speaker Pelosi has appointed only nine members to the Committee: seven Democrats and two Republicans. None of these members was appointed from the selection of five GOP congressmen put forth by Minority Leader Kevin McCarthy.

157. While the Court has determined authorized congressional committees have certain subpoena authority implied by Article I of the Constitution, *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927), the Committee is not an authorized congressional committee.

158. The Committee fails to comport with its own authorizing resolution, H. Res. 503.

159. Congress' failure to act in accordance with its own rules is judicially cognizable. *Yellin v. United States*, 374 U.S. 109, 114 (1963). This is particularly significant where a person's fundamental rights are involved.

160. Speaker Pelosi failed to appoint members consistent with the authorizing resolution of the Committee. Speaker Pelosi has appointed only nine members of Congress to serve on the Committee; whereas the authorizing resolution instructs that the Speaker "shall" appoint thirteen members. H. Res. 503 § 2(a), 117th Cong. (2021).

161. Thus, the Committee as it currently stands—and stood at the time it issued the Subpoena in question—has no authority to conduct business because it is not a duly constituted Select Committee. Chairman Thompson's purported Subpoena is invalid and unenforceable.

H. The Committee Lacks Authority to Conduct Compelled Depositions

162. The taking of depositions by the Committee is governed by Section 5(c)(6) of H. Res. 503, which states:

> (A) The chair of the Select Committee, upon consultation with the ranking member, may order the taking of depositions, including pursuant to subpoena, by a Member or counsel of the Select Committee, in the same manner as a standing committee pursuant to section 3(b)(1) of House Resolution 8, One Hundred Seventeenth Congress.
>
> (B) Depositions taken under the authority prescribed in this paragraph shall be governed by procedures submitted by the chair of the Committee on Rules for printing in the Congressional Record on January 4, 2021.

163. Section 3(b)(1) of House Resolution 8 (H. Res. 8), concerning the adoption of rules of the 117th Congress, provides "[d]uring the One Hundred Seventeenth Congress, the chair of a standing committee (other than the Committee on Rules), and the chair of the Permanent Select Committee on Intelligence, upon consultation with the ranking minority member of such

committee, may order the taking of depositions, including pursuant to a subpoena, by a member or counsel of such committee."

164. The Procedures for the Use of Deposition Authority submitted by the Chair of the Committee on Rules for printing in the Congressional Record on January 4, 2021, provide in part:

> 2. Consultations with the ranking minority member shall include three days' notice before any deposition is taken;
> . . . .
>
> 5. A deposition shall be conducted by any member or committee counsel designed by the chair or ranking member of the Committee that noticed the deposition. When depositions are conducted by committee counsel, there shall be no more than two committee counsel permitted to question a witness per round. One of the committee counsel shall be designated by the chair and the other by the ranking minority member per round.
> . . . .
>
> 6. Deposition questions shall be propounded in rounds. The length of each round shall not exceed 60 minutes per side, and shall provide equal time to the majority and the minority. In each round, the member(s) or committee counsel designated by the chair shall ask questions first, and the member(s) or committee counsel designed by the ranking minority member shall ask questions second.
>
> 10. The chair and the ranking minority member shall consult regarding the release of deposition testimony, transcripts, or recordings, and portions thereof. If either objects in writing to a proposed releases of a deposition testimony, transcript, or recording, or a portion thereof, the matter shall be promptly referred to the committee for resolution.

165. Under the Rule 13 of the House Republican Conference Rules for the 117th Congress, the highest-ranking Republican official in the House "shall recommend to the House all Republican Members of such joint, select, and ad hoc committees as shall be created by the House, in accordance with law." Conference Rules of the 117th Congress, https://www.gop.gov/conference-rules-of-the-117th-congress/. Except as provided in Rule 13, the Republican Steering Committee nominates the highest-ranking Republican on each Committee,

and the Republican Conference votes to approve the nomination. *Id*. at Rule 14. That did not happen with respect to the Committee.

166. There is no—nor given Speaker Pelosi's exclusion of members selected by the Minority Leader could there be any—"ranking minority member" on the Committee. *See* Select Committee, *Membership*, https://january6th.house.gov/about/membership (last visited Oct. 27, 2022).

167. To wit, both on the Subpoena and at the October 21, 2022, hearing, Congresswoman Cheney was referred to as the "Vice Chair"—not the ranking member.

168. Chairman Thompson has not complied—and could not comply—with the requirement of Section 5(c)(6)(A) of H. Res. 503 to consult with the ranking minority member prior to ordering the taking of a deposition.

169. Chairman Thompson has not complied—and could not comply—with the requirement of Section 3(b)(1) of H. Res. 8, to consult with the ranking minority member prior to ordering the taking of a deposition.

170. Chairman Thompson has not complied—and could not comply—with the requirement of Section 2 of the Procedures for the Use of Deposition Authority submitted by the Chair of the Committee on Rules for printing in the Congressional Record on January 4, 2021, to consult with the ranking minority member prior to ordering the taking of a deposition.

171. Chairman Thompson could not comply with the requirement of Section 6 of the Procedures for the Use of Deposition Authority submitted by the Chair of the Committee on Rules for printing in the Congressional Record on January 4, 2021 because as there is no ranking minority member, there is no committee counsel designated by a ranking minority member to ask questions in the second half of each round of questions.

172. Chairman Thompson and the Committee *only* have authority to order a deposition *after* consulting with the ranking minority member of the committee. There is no ranking minority member of the Committee. Thus, Chairman Thompson and the Committee do not have authority under the House Rules to order a deposition nor can it conduct any such deposition according to its own rules.

COUNT I
DECLARATORY RELIEF
(28 U.S.C. § 2201(a))

173. Plaintiff repeats and incorporates by reference the foregoing paragraphs as if fully set forth herein.

174. This matter presents an actual controversy between the parties within the Court's jurisdiction and therefore, pursuant to 28 U.S.C. § 2201(a), the Court may declare the rights and other legal relations of any interested party seeking such declaration. There are several reasons the Committee's Subpoena is invalid and President may not be compelled to testify or otherwise comply with its demands.

175. President Trump, as a former President of the United States, has absolute immunity from being compelled to testify before Congress regarding his actions while in office.

176. The Committee's Subpoena is explicitly addressed to President Trump in his capacity as a former President, seeking information about his actions while President, and for the purpose of regulating future Presidents and is therefore invalid.

177. The Committee did not issue the Subpoena to President Trump to further a valid legislative purpose. The apparent purposes of the Committee are political and punitive, not legislative. The Committee seeks to embarrass President Trump and to damage his political prospects. That is, the Subpoena seeks exposure for the sake of exposure and is therefore invalid.

178. The Subpoena's request for testimony and documents from President Trump is an unwarranted intrusion upon the institution of the Presidency because there are other sources of the requested information, including the thousand-plus witnesses the Committee has contacted and one million documents that the Committee has collected. The Committee also may obtain abundant government records relevant to its inquiry. Because of this obvious availability to obtain testimony and documents from other readily available sources, the Subpoena is invalid.

179. The Subpoena is "broader than reasonably necessary to support Congress's legislative objective," *Mazars*, 140 S. Ct. at 2036, and Congress is impermissibly "look[ing] to him as a 'case study' for general legislation," *id*.

180. The Subpoena's requests are not limited to matters related to the Committee's legislative purposes. The Subpoena seeks nearly all President Trump's communications from November 3, 2020 through January 6, 2021, concerning the 2020 election, including conversations with his legal team, government officials, and members of Congress. Indeed, Request 14 demands production of *all* communications with 13 people, including attorneys, for more than two and a half months, regardless of the subject matter. As a result, the Subpoena is invalid.

181. Executive privilege protects from disclosure a President's "documents or other materials that reflect presidential decision-making and deliberations and that the President believes should remain confidential" from disclosure. *In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997). This privilege extends to a President's communications with others so they are free to candidly consider and make policies. *Id*.

182. The Subpoena seeks to depose President Trump about events that occurred while he was President, and in his capacity as President. It expressly seeks information from President Trump about conversations and deliberations with others in his administration, including

communications concerning his exercise of Article II authority. It also seeks documents that reflect decision making and deliberations including, but not limited to, discussions with subordinate officials in the Department of Justice concerning the 2020 election and conversations with members of Congress regarding pending governmental business. This intrusion violates Executive Privilege and renders the Subpoena invalid.

183. "[T]he provisions of the First Amendment . . . of course reach and limit congressional investigations." *Barenblatt v. United States*, 360 U.S. 109, 126 (1959).

184. The broad scope of the Subpoena's request for documents and testimony threatens to force President Trump to reveal the inner workings of his Presidential campaign, including his political beliefs, strategy, and fundraising. President Trump did not check his constitutional rights at the Oval Office door. Because the Committee's Subpoena to President Trump infringes upon his First Amendment rights it is invalid.

185. Further, Congress' failure to act in accordance with its own rules is judicially cognizable, *Yellin v. United States*, 374 U.S. 109, 114 (1963), particularly where a person's fundamental rights are involved.

186. Speaker Pelosi has appointed only nine members of Congress to serve on the Committee; whereas the authorizing resolution mandates that the Speaker "shall" appoint thirteen members. H. Res. 503 § 2(a), 117th Cong. (2021). Thus, the Committee has had no authority to conduct business, including issuing subpoenas.

187. Section 3(b)(1) of H. Res. 8 requires the Committee's Chair to consult with the "ranking minority member" of the Committee to issue a subpoena ordering a deposition. Because the Committee has no ranking member, the Committee cannot issue deposition subpoenas, nor can

it conduct its proposed depositions in a manner consistent with its own Rules. Therefore, this Court should declare that the Committee's Subpoena to President Trump is invalid.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Donald J. Trump asks this Court to enter Judgment in his favor and against Defendants and to order the following relief:

a. A declaratory judgment that the Subpoena and any subpoena similar in form and content to the Subpoena is invalid, unlawful, and unenforceable because President Trump, as a former President of the United States, has absolute immunity from being compelled to testify before Congress or a committee thereof regarding his actions as head of a co-equal branch of government;

b. A declaratory judgment that the Subpoena and any subpoena similar in form and content to the Subpoena issued to President Trump is invalid, unlawful, and unenforceable because it does not further a valid legislative purpose;

c. A declaratory judgment that the Subpoena and any subpoena similar in form and content to the Subpoena issued to President Trump is invalid, unlawful, and unenforceable as an unwarranted intrusion into the Executive Branch;

d. A declaratory judgment that the Subpoena and any subpoena similar in form and content to the Subpoena issued to President Trump is invalid, unlawful, and unenforceable as broader than reasonably necessary;

e. A declaratory judgment that the Subpoena, and any subpoena similar in form and content to the Subpoena issued to President Trump is invalid, unlawful, and unenforceable because it seeks documents and testimony protected from disclosure by Executive Privilege;

f. A declaratory judgment that the Subpoena and any subpoena similar in form and content to the Subpoena issued to President Trump is invalid, unlawful, and unenforceable because it violates President Trump's First Amendment rights;

g. A declaratory judgment that the Subpoena and any subpoena similar in form and content to the Subpoena is invalid, unlawful, and unenforceable because Congress failed to comply with resolutions regarding the creation of the Committee and the issuance of subpoenas;

h. An injunction prohibiting the enforcement or the imposition of sanctions for noncompliance with the Subpoena and any subpoena similar in form and content to the Subpoena.

i. An award in favor of President Trump for his reasonable expenses, including attorney's fees and costs incurred as a result of the Subpoena; and

j. Any and all other relief that the Court deems just and proper.

Dated: November 11, 2022

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