

No. 21-5254

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

DONALD J. TRUMP,
Plaintiff-Appellant,

v.

BENNIE G. THOMPSON, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the
District of Columbia, No. 21-cv-2769 (Hon. Tanya S. Chutkan)

**BRIEF OF FORMER MEMBERS OF CONGRESS
AS *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE**

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**CERTIFICATE OF PARTIES, RULINGS, AND
RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)**

A. Parties and Amici. All parties, intervenors, and amici appearing in this Court are listed in the Brief for Plaintiff-Appellant or have filed notices of intent to file an amicus brief.

B. Ruling Under Review. An accurate reference to the ruling at issue appears in Plaintiff-Appellant's brief.

C. Related Cases. The only related cases of which counsel are aware are identified in Plaintiff-Appellant's brief.

/s/ Samuel F. Callahan
Samuel F. Callahan

**STATEMENT REGARDING CONSENT TO FILE AND
SEPARATE BRIEFING PURSUANT TO CIRCUIT RULE 29**

All parties have consented to the filing of this amicus brief. *Amici* filed their notice of intent to participate in this case on November 19, 2021.

Pursuant to Circuit Rule 29(d), *amici* certify that a separate brief is necessary to provide the perspective of former Members of Congress with decades of legislative experience but no personal political stakes in the present dispute.

/s/ Samuel F. Callahan
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**STATEMENT OF AUTHORSHIP AND FINANCIAL
CONTRIBUTIONS PURSUANT TO RULE 29**

No party's counsel authored this brief in whole or in part. Nor did any party or party's counsel, or any other person other than *amici* or *amici's* counsel, contribute money that was intended to fund preparing or submitting this brief.

/s/ Samuel F. Callahan
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TABLE OF CONTENTS

	Page
CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(A)(1)	i
STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING PURSUANT TO CIRCUIT RULE 29	ii
STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS PURSUANT TO RULE 29.....	iii
INTEREST OF <i>AMICI CURIAE</i>	1
INTRODUCTION.....	2
ARGUMENT	8
I. Congress Can Overcome Any Assertion of Privilege by Mr. Trump.....	8
II. The Public Interest Supports a Prompt Denial of the Request For Injunctive Relief	20
CONCLUSION	22
APPENDIX A—LIST OF <i>AMICI CURIAE</i>	
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>McGrain v. Daugherty</i> , 273 U.S. 135 (1927).....	1
<i>Senate Select Comm. on Presidential Campaign Activities v. Nixon</i> , 498 F.2d 725 (D.C. Cir. 1974) (en banc)	11, 12
<i>Trump v. Mazars USA, LLP</i> , 140 S. Ct. 2019 (2020).....	7, 17, 19
<i>United States v. Dresch</i> , No. 1:21-cr-71-ABJ, ECF No. 25 (D.D.C. May 27, 2021)	18
<i>United States v. Meredith</i> , No. 1:21-cr-159-ABJ, ECF No. 41 (D.D.C. May 26, 2021)	17
<i>United States v. Nixon</i> , 418 U.S. 683 (1974).....	11, 12
<i>United States v. Whitton</i> , No. 1:21-cr-35-EGS, ECF No. 60 (D.D.C. Apr. 20, 2021)	18
<i>Winter v. NRDC</i> , 555 U.S. 7 (2008).....	20, 21
Constitutional Provisions	
U.S. Const. Art. 2, § 1.....	5
Statutes	
2 U.S.C. §§ 1901–82.....	8

3 U.S.C.	
§ 1	8
§ 7	8
§ 15	8, 10
§ 102 note (1989)	8
5 U.S.C.	
§ 2302	8
§§ 3345–3349d	8
§§ 7321–26	8
10 U.S.C.	
§§ 251–54	8
18 U.S.C.	
§ 111	8
§ 115	8
§ 201	8
§ 871	6
§ 1361	8
§ 1385	8
§§ 3056–3056A	8

Legislative Materials

H.R. 1405, 117th Cong. (2021)	13
H.R. 5314 §§ 901–02, 117th Cong. (2021)	13
H.R. Res. 503, 117th Cong. (2021)	5
H. Rep. at 10, 19 (Feb. 2, 2021)	4

Other Authorities

Mike Allen, <i>Exclusive Audio: Trump Defends Threats to “Hang” Pence</i> , Axios (Nov. 12, 2021), https://www.axios.com/trump-hang-mike-pence-january-6-audio-4f147245-becf-4766-ac60-7acece6862be.html	6, 18
--	-------

- Peter Baker, Maggie Haberman & Annie Karni, *“Pence Reached His Limit With Trump. It Wasn’t Pretty”*. N.Y. Times (Jan. 12, 2021), <https://www.nytimes.com/2021/01/12/us/politics/mike-pence-trump.html> 4
- Devlin Barrett & Josh Dawsey, *“Trump to Acting AG, According to Aide’s Notes: ‘Just Say the Election Was Corrupt + Leave the Rest to Me”*, Washington Post (July 31, 2021), https://www.washingtonpost.com/national-security/trump-rosen-phone-call-notes/2021/07/30/2e9430d6-f14d-11eb-81d2-ffae0f931b8f_story.html..... 4
- Philip Bump, *A Pillow Salesman Apparently Has Some Ideas About Declaring Martial Law*, Wash. Post, Jan. 15, 2021, <https://www.washingtonpost.com/politics/2021/01/15/pillow-salesman-apparently-has-some-ideas-about-declaring-martial-law> 17
- Ashton Carter et al., *Opinion: All 10 Living Former Defense Secretaries: Involving the Military in Election Disputes Would Cross into Dangerous Territory*, Wash. Post (Jan. 3, 2021), https://www.washingtonpost.com/opinions/10-former-defense-secretaries-military-peaceful-transfer-of-power/2021/01/03/2a23d52e-4c4d-11eb-a9f4-0e668b9772ba_story.html..... 4
- Libby Cathey, *Memo from Trump Attorney Outlined How Pence Could Overturn Election, Says New Book*, ABC News (Nov. 14, 2021), <https://abcnews.go.com/Politics/memo-trump-attorney-outlined-pence-overturn-election-book/story?id=81134003> 14
- David Cohen, *Trump on Jan. 6 Insurrection: ‘These Were Great People,’ Politico* (July 11, 2021), <https://www.politico.com/news/2021/07/11/trump-jan-6-insurrection-these-were-great-people-499165>..... 6

Amy Gardner & Paulina Firozi, “ <i>Here’s the Full Transcript and Audio of the Call Between Trump and Raffensberger</i> ,” Washington Post (Jan. 5, 2021), https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html	3
David Graham, <i>The New Lost Cause</i> , The Atlantic (Apr. 16, 2021) https://www.theatlantic.com/ideas/archive/2021/10/donald-trumps-new-lost-cause-centers-january-6/620407/	18
Kathleen Gray, <i>In Michigan, a Dress Rehearsal for the Chaos at the Capitol on Wednesday</i> , N.Y. Times (Jan. 9, 2021), https://www.nytimes.com/2021/01/09/us/politics/michigan-state-capitol.html	3
Jonathan D. Karl, <i>The Man Who Made January 6 Possible</i> , The Atlantic (Nov. 9, 2021), https://www.theatlantic.com/ideas/archive/2021/11/trump-johnny-mcentee-january-6-betrayal/620646/	15
Lisa Lerer & Astead W. Herndon, <i>Menace Enters the Republican Mainstream</i> , N.Y. Times (Nov. 12, 2021)	21
Lexi Lonas, <i>Trump Offers Sympathy for Those Charged with Jan. 6 Offenses</i> , The Hill (Sept. 16, 2021), https://thehill.com/blogs/blog-briefing-room/news/572632-trump-offers-sympathy-for-those-charged-with-jan-6-offenses	18
Press Release, <i>McConnell on Impeachment: “Disgraceful Dereliction” Cannot Lead Senate to “Defy Our Own Constitutional Guardrails</i> ,” (Feb. 13, 2021), https://www.republicanleader.senate.gov/newsroom/remarks/mcconnell-on-impeachment-disgraceful-dereliction-cannot-lead-senate-to-defy-our-own-constitutional-guardrails	6
Letter from Dana Remus, Counsel to the President, to David Ferriero, Archivist of the United States (Oct. 8, 2021), https://www.archives.gov/files/foia/pdf/remus-letter-to-ferriero-re-first-january-6-notification.10.08.2021.pdf	11

- Katie Rogers & Annie Carni, *Home Alone at the White House: A Sour President, With TV His Constant Companion*, N.Y. Times (Apr. 23, 2020), <https://www.nytimes.com/2020/04/23/us/politics/coronavirus-trump.html> 17
- Kathleen Ronayne & Michael Kunzelman, *Trump to Far-Right Extremists: ‘Stand Back and Stand By’*, Associated Press (Sept. 30, 2020), <https://apnews.com/article/election-2020-joe-biden-race-and-ethnicity-donald-trump-chris-wallace-0b32339da25fbc9e8b7c7c7066a1db0f>..... 3
- Linda So & Jason Szep, *Reuters Unmasks Trump Supporters Who Terrified U.S. Election Officials*, Reuters (Nov. 9, 2021), <https://www.reuters.com/investigates/special-report/usa-election-threats/>..... 21
- Felicia Sonmez, *GOP Rep. Fred Upton Receives Death Threats After Voting for Bipartisan Infrastructure Deal*, Wash. Post (Nov. 9, 2021) 21
- Marianna Spring, *“Stop the Steal,” the Deep Roots of Trump’s “Voter Fraud” Strategy*, BBC (Nov. 23, 2020), <https://www.bbc.com/news/blogs-trending-55009950> 3
- Sara Swann, *Reforming One Law Could Prevent Another Election Insurrection, Experts Say*, The Fulcrum, Aug. 31, 2021, <https://thefulcrum.us/electoral-count-act-reform>..... 13
- Eric Tucker, *Trump Urged Justice Officials to Declare Election “Corrupt”*, Associated Press (July 30, 2021), <https://apnews.com/article/trump-urged-justice-department-to-declare-election-corrupt-0edf178869f33ddcf72d4c739bd18a5d>..... 4

INTEREST OF *AMICI CURIAE*

Amici are a bipartisan group of 77 former members of Congress. Their names and dates of service are listed in Appendix A. They submit this brief in support of affirmance to explain why:

- (I) An extensive investigation into the January 6th insurrection and the surrounding assault on the peaceful transfer of power is critical for Congress to be able to “legislate wisely [and] effectively” in order to preserve, protect, and defend our institutions and the peaceful transition of power. *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).
- (II) The public interest favors affirming the district court’s order denying injunctive relief.

INTRODUCTION



Last January, an insurrectionist mob hung a noose from a gallows on the National Mall. It then stormed and ransacked the Capitol chanting “Hang Mike Pence.” It forced the emergency recess of a constitutionally mandated joint session of Congress.

Two miles west on Pennsylvania Avenue, as lawmakers and the Vice President ran for their lives, the President cheered the mob from the safety of the White House. For months, Donald Trump had been laying the groundwork to delegitimize the November election. In April 2020, Mr. Trump began declaring that the election was being “rigged” against

him, a charge he would repeat at least seventy times before November.¹ In May, his armed allies even stormed the Michigan State Capitol shortly after Mr. Trump tweeted “Liberate Michigan” in what would be a “dress rehearsal” for January 6th.² (Two of those armed individuals would later be arrested for a failed plot to kidnap Michigan Governor Gretchen Whitmer.) This effort continued through the fall, as Mr. Trump commanded a violent extremist group to “stand back and stand by” weeks before the election.³ After the election was called, Mr. Trump pressured everyone from state election officials (“I just want to find 11,780 votes, which is one more than we have”⁴) to the Vice President (“You can either

¹ Marianna Spring, “*Stop the Steal*,” *The Deep Roots of Trump’s “Voter Fraud” Strategy*, BBC (Nov. 23, 2020), <https://www.bbc.com/news/blogs-trending-55009950> (documenting claims of election “rigging”).

² Kathleen Gray, *In Michigan, a Dress Rehearsal for the Chaos at the Capitol on Wednesday*, N.Y. Times (Jan. 9, 2021), <https://www.nytimes.com/2021/01/09/us/politics/michigan-state-capitol.html>.

³ Kathleen Ronayne & Michael Kunzelman, *Trump to Far-Right Extremists: ‘Stand Back and Stand By’*, Associated Press (Sept. 30, 2020), <https://apnews.com/article/election-2020-joe-biden-race-and-ethnicity-donald-trump-chris-wallace-0b32339da25fbc9e8b7c7c7066a1db0f>.

⁴ Amy Gardner & Paulina Firozi, “*Here’s the Full Transcript and Audio of the Call Between Trump and Raffensberger*,” Washington Post (Jan. 5, 2021), https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html.

go down in history as a patriot, or you can go down in history as a pussy”⁵) to top-level Department of Justice officials (“just say the election was corrupt [and] leave the rest to me”⁶) to override the will of the people to keep him in power.⁷ By January 3rd, the situation was so precarious that every living former Secretary of Defense felt compelled to publicly call for the President to stand down.⁸ Mr. Trump had made his intentions clear, and while Vice President Pence was not prepared to execute, the mob was.

⁵ Peter Baker, Maggie Haberman, and Annie Karni, “*Pence Reached His Limit With Trump. It Wasn’t Pretty.*” N.Y. Times (Jan. 12, 2021), <https://www.nytimes.com/2021/01/12/us/politics/mike-pence-trump.html>.

⁶ Devlin Barrett & Josh Dawsey, “*Trump to Acting AG, According to Aide’s Notes: ‘Just Say the Election Was Corrupt + Leave the Rest to Me,’*” Washington Post (July 31, 2021), https://www.washingtonpost.com/national-security/trump-rosen-phone-call-notes/2021/07/30/2e9430d6-f14d-11eb-81d2-ffae0f931b8f_story.html.

⁷ Trial Memorandum of the U.S. H. Rep. at 10, 19 (Feb. 2, 2021); Eric Tucker, *Trump Urged Justice Officials to Declare Election “Corrupt,”* Associated Press (July 30, 2021), <https://apnews.com/article/trump-urged-justice-department-to-declare-election-corrupt-0edf178869f33ddcf72d4c739bd18a5d>.

⁸ See Ashton Carter et al., *Opinion: All 10 Living Former Defense Secretaries: Involving The Military in Election Disputes Would Cross into Dangerous Territory*, Wash. Post (Jan. 3, 2021), https://www.washingtonpost.com/opinions/10-former-defense-secretaries-military-peaceful-transfer-of-power/2021/01/03/2a23d52e-4c4d-11eb-a9f4-0e668b9772ba_story.html.

Trump and his confederates came far closer to blocking the transfer of power to the winner of the 2020 presidential election and imperiling the lives of Senators, Representatives, and the Vice President than *amici*, with their over 1,023 combined years of congressional service, could have ever imagined.

The January 6th Select Committee has been charged by the House with investigating the “facts, circumstances, and causes” relating to the January 6th attack so that it may issue a report recommending changes in law to better ensure the peaceful transition of power. *See* H.R. Res. 503, 117th Cong. (2021). Such an investigation serves a critical purpose for our Republic. Since George Washington left office in 1797, the peaceful transfer of power has remained the crown jewel of our nation. A losing presidential candidate should never be able to achieve via violence what they could not accomplish at the ballot box.

Yet rather than assist the investigation into the assault on the Constitution that he once pledged to “preserve, protect, and defend,” U.S. Const. Art. 2, § 1, Mr. Trump is now doing everything in his power to obstruct it. Such disregard for the presidential oath is sadly not surprising. After all, as Senator Mitch McConnell has observed, Mr.

Trump “engineer[ed] the campaign of disinformation and rage that” resulted in the storming of the Capitol, which he then “watched . . . happily” on television as “Vice President Pence was in danger.”⁹ And since January 6th, Mr. Trump has continued to defend his supporters’ call to execute the Vice President¹⁰ and has attempted to rewrite history by insisting despite the Confederate battle flags, the bodies of the dead and injured, and the cloudy haze of tear gas, that “love” was somehow “in the air.”¹¹

This Court should reject Mr. Trump’s attempts to use armchair assertions of executive privilege from Mar-a-Lago to elevate his personal self-interest ahead of the Constitution. From just the public reporting on

⁹ Press Release, *McConnell on Impeachment: “Disgraceful Dereliction” Cannot Lead Senate to “Defy Our Own Constitutional Guardrails,”* (Feb. 13, 2021), <https://www.republicanleader.senate.gov/newsroom/remarks/mcconnell-on-impeachment-disgraceful-dereliction-cannot-lead-senate-to-defy-our-own-constitutional-guardrails>.

¹⁰ *Compare* Mike Allen, *Exclusive Audio: Trump Defends Threats to “Hang” Pence*, Axios (Nov. 12, 2021), <https://www.axios.com/trump-hang-mike-pence-january-6-audio-4f147245-becf-4766-ac60-7acece6862be.html>, *with* 18 U.S.C. § 871 (making it a felony to willingly threaten to “inflict bodily harm upon . . . the Vice President).

¹¹ David Cohen, *Trump on Jan. 6 Insurrection: ‘These Were Great People,’* Politico (July 11, 2021), <https://www.politico.com/news/2021/07/11/trump-jan-6-insurrection-these-were-great-people-499165>.

the January 6th insurrection, it is clear that the president and his aides personally orchestrated a multifaceted and unprecedented attempt to subvert the Constitution and the peaceful transition of presidential power. It is equally clear with each new bombshell news report that neither Congress nor the public yet knows the full range of means deployed or considered. And on a matter as important as the peaceful transition of power, Congress should not be left “shooting in the dark, unable to legislate wisely or effectively,” *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (cleaned up), or otherwise dependent on the media to do its investigative work for it. Under these circumstances, no interests of Mr. Trump’s could possibly override the Select Committee’s interest in obtaining the records sought. Accordingly, *amici* urge the Court to promptly affirm the district court so that Congress can do its job.

ARGUMENT

I. Congress can overcome any assertion of privilege by Mr. Trump.

Congress has long legislated to protect elections and ensure the peaceful transition of power.¹² In this tradition, the Select Committee is tasked with recommending legislative reforms to protect against future attacks. But try as it might, Congress cannot protect against

¹² This history includes, but certainly is not limited to, setting the dates for federal elections and tallying and certification of electoral college votes, 3 U.S.C. §§ 1, 7, 15; requiring the General Services Administration to name the winner of the presidential election, and providing the designated winner with funds and access to facilitate a smooth transition, 3 U.S.C. § 102 note (1989); limiting the President's ability to use acting officials to subvert the transition, *see* 5 U.S.C. §§ 3345–3349d; prohibiting officials overseeing the transition from engaging in pernicious political activities, *see* 5 U.S.C. §§ 7321–26; criminalizing any intimidation or other attempts to improperly influence officials who oversee and execute presidential transitions, as well as criminalizing the destruction of government property, *see* 18 U.S.C. §§ 111, 115, 1361; protecting whistleblowers who flag efforts to subvert the transition of power, *see, e.g.*, 5 U.S.C. § 2302; prohibiting the President and others from bribing state electors or state election officials, *see* 18 U.S.C. § 201; providing for the Capitol police and Secret Service, which protect the Capitol complex, legislators, the President, and the President-elect during congressional and presidential transitions, *see* 2 U.S.C. §§ 1901–82; 18 U.S.C. §§ 3056–3056A; empowering the President to quell (but not to incite) an insurrection disrupting the transfer of power between congresses or between presidencies, *see* 10 U.S.C. §§ 251–54; and limiting the President's ability to deploy the military to subvert the transfer of power, *see, e.g.*, 18 U.S.C. § 1385.

institutional weaknesses it does not know about. And unlike familiar modes of corruption, such as improper lobbying, where Congress understands the ways and means deployed, Congress has never confronted anything like January 6th: Mr. Trump's efforts to exploit the weak points in our political and constitutional systems were novel and previously unimaginable.

Who, before last winter, would have imagined that a failed presidential candidate would use conspiracy theories to stoke an extremist mob, urge it to assemble in Washington, D.C., and then point the mob towards the Capitol? Who, before last winter, would have imagined a failed presidential candidate calling the chief elections official of a state that he lost to demand that the state official "find" one more vote than needed for the failed candidate to win the state? Who, before last winter, would have imagined the President contemplating conspiring with the acting head of the Civil Division of the U.S. Department of Justice to try to pressure the Acting Attorney General to send demonstrably false letters to state legislatures in an attempt to leverage a lie to prompt the creation of competing slates of state electors? Who, before last winter, would have imagined the President bullying the Vice

President to unlawfully disregard the “regularly given” electoral votes from particular states, *see* 3 U.S.C. § 15, before gleefully watching on television as a mob he assembled and incited threatened the Vice President’s life after Mr. Pence refused to break the law and ignore his oath of office?

All these questions lead to this: given all the unexpected, unfamiliar, and unpredictable actions that we now know Mr. Trump took in his attempt to cling to power, why would we think that every strategy tried or considered is already a matter of public knowledge? And how can Congress be expected to design adequate legislative safeguards to meet an unfamiliar future threat if it is kept partially in the dark about what the people posing that threat last time were trying to do? What congressional interest could be higher than the one presented here?

Congress’s interest in accessing *all* of the information necessary to reveal *all* of the ways in which Mr. Trump, his aides, and his allies considered, attempted, and, in some respects, succeeded in subverting the lawful, peaceful transition of presidential power thus clearly overcomes any interest that Mr. Trump purports to assert.

With such strong congressional interests at stake, Congress should prevail *even if* the Court were to conclude that Mr. Trump can assert executive privilege from Mar-al-Lago, notwithstanding the lack of any political checks on his purported exercise of a supposed constitutional power as well as the actual elected President's determination that "an assertion of executive privilege is not in the best interest of the United States."¹³ And Congress should prevail even if the Court were to apply the (inapplicable) heightened standard for congressional need for a *sitting* President's documents from *U.S. v. Nixon* and *Senate Select Committee v. Nixon*. Given the danger to our democracy demonstrated by the previously unimaginable assault on the peaceful transfer of power, amici's prior congressional service convinces them that a full investigation is so "demonstrably critical to the responsible fulfillment of the Committee's functions," *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc), that the Committee has a sufficient "demonstrated, specific need,"

¹³ Letter from Dana Remus, Counsel to the President, to David Ferriero, Archivist of the United States (Oct. 8, 2021), <https://www.archives.gov/files/foia/pdf/remus-letter-to-ferriero-re-first-january-6-notification.10.08.2021.pdf>.

United States v. Nixon, 418 U.S. 683, 713 (1974), to overcome *any* assertion of executive privilege.

The unprecedented and previously unimaginable nature of the January 6th attack further distinguishes this case from *Senate Select Committee*. The bad behavior at issue in the Watergate investigation (and by extension *Senate Select Committee*)—a bungled burglary, its cover-up, and the strong-arming of federal officials—is almost quaint as compared to the miles-wide, thousands-strong, and, from a conventional perspective, often baffling effort to overturn the 2020 election. And unlike in *Senate Select Committee*, where the Committee sought access to material already in the possession of the House and there was “no indication” that the House’s inquiry into the very same material was “so likely to be inconclusive or long in coming” that the Senate Select Committee “need[ed] immediate access of its own,” *id.* at 733, here, there is no guarantee that, absent the House Select Committee’s investigation, the full efforts to imperil the peaceful transition of power will be known as Congress considers a legislative correction.

Indeed, legislative energy for reform is so high that members of Congress have already started drafting bills to better protect the peaceful

transition of power.¹⁴ But while such legislation reflects what we know so far about the January 6th attack and surrounding events, it does not—it cannot—reflect the many remaining “unknowns,” thereby leaving our democracy unnecessarily vulnerable.

The documents the Select Committee seeks are necessary to ensure that any legislative solution is properly crafted and sufficiently ambitious to respond to previously unimaginable threats. For example:

- The Select Committee requests “[a]ll documents and communications” relating to “remarks made by Donald Trump or any other persons on January 6,” “efforts, plans, or proposals to contest the 2020 Presidential election results,” and “plans, efforts, or discussions regarding the electoral count.” Decl. of

¹⁴ See, e.g., Sara Swann, *Reforming One Law Could Prevent Another Election Insurrection, Experts Say*, The Fulcrum, Aug. 31, 2021, <https://thefulcrum.us/electoral-count-act-reform> (discussing active efforts to draft legislation to reform the Electoral Count Act, drawing on information that has already been made public about efforts by Mr. Trump and his consiglieres to subvert the statutory and constitutional processes for Electoral College certificate counting in 2020); H.R. 5314 §§ 901–02, 117th Cong. (2021) (bill to reform the President’s statutorily-created powers to fill temporarily vacant offices after Mr. Trump abused those authorities to interfere with the peaceful transfer of power); H.R. 1405, 117th Cong. (2021) (bill to enforce the Fourteenth Amendment against insurrectionists).

Jesse R. Binnall Ex. 1 at 2, 5 (Oct. 19, 2021), ECF No. 5-2. The Select Committee needs those records to uncover the avenues to overturn the election that Mr. Trump and his confederates (including U.S. Government employees paid from the public fisc¹⁵) considered, and whether and to what extent Congress needs to amend campaign finance, political corruption, and election administration laws to prevent the methods deployed (or considered and discarded) from being successful in future elections.

- The Select Committee requests “all documents and communications referring or relating to the 2020 election results between White House officials and officials of State Governments” from November 3, 2020, through January 20, 2021. *Id.* at 5. The Committee needs those records to learn the extent and means by which state electors were improperly pressured into refusing to certify or decertifying the election

¹⁵ See Libby Cathey, *Memo from Trump Attorney Outlined How Pence Could Overturn Election, Says New Book*, ABC News (Nov. 14, 2021), <https://abcnews.go.com/Politics/memo-trump-attorney-outlined-pence-overturn-election-book/story?id=81134003> (suggesting White House Chief of Staff’s participation).

results, and whether and to what extent Congress should update federal prohibitions on bribery and pernicious political activity.

- The Select Committee seeks “[a]ll documents and communications relating to allegations of election fraud or to challenging, overturning, or questioning the validity of the 2020 Presidential election, and involving personnel of the Department of Justice.” *Id.* at 6. The Committee needs those records to understand which statutory and regulatory frameworks led some officials at the Department of Justice to refuse to go along with Mr. Trump’s most egregious election subversion ideas, while others were pliable. It also needs these documents to understand how the Presidential Personnel Office may have helped facilitate the assault on the peaceful transfer of power.¹⁶ That way Congress can make an informed judgment about whether to strengthen laws governing appointments, vacancies, law enforcement, and the civil service in order to prevent corruption and promote fidelity to the rule of law.

¹⁶ See Jonathan D. Karl, *The Man Who Made January 6 Possible*, *The Atlantic* (Nov. 9, 2021), <https://www.theatlantic.com/ideas/archive/2021/11/trump-johnny-mcentee-january-6-betrayal/620646/>.

- The Select Committee requests “[a]ll documents and communications relating to planned protests, marches, public assemblies, rallies, or speeches in Washington, D.C., on November 14, 2020, December 12, 2020, January 5, 2021, and January 6, 2021.” *Id.* at 7. The Committee needs those records to learn how Mr. Trump mobilized his supporters who unlawfully disrupted the peaceful transition of power, and whether and how Congress could prevent the online mobilization of a failed candidate’s supporters to violence while remaining protective of First Amendment rights.
- The Select Committee requests “all documents and communications relating to challenging the validity of the 2020 election, to, from, or mentioning Mike Lindell” from April 1, 2020, through January 20, 2021. *Id.* at 9. The Select Committee requires those records to understand the significance of reports that the chief executive of a pillow company, who had been a campaign surrogate and presidential confidante since at least

April 2020,¹⁷ entered the White House, with notes urging the President to declare martial law and appoint Kash Patel as Acting Central Intelligence Agency Director,¹⁸ and whether and to what extent Congress must take action to address our government's vulnerability to improper influence.

Thus, Mr. Trump's vague assertions of potential overbreadth are clearly unavailing. That leaves only his contention that his documents cannot be used "as a 'case study' for general legislation." Plaintiff-Appellant's Br. at 31 (quoting *Mazars*, 140 S. Ct. at 2036).

That argument fails too. Because Mr. Trump is the only president in American history to try to subvert the peaceful transfer of power, the actions taken in the lead up to that day are singularly and critically instructive on the misconduct to which legislation must be addressed.¹⁹

¹⁷ Katie Rogers & Annie Carni, *Home Alone at the White House: A Sour President, With TV His Constant Companion*, N.Y. Times (Apr. 23, 2020), <https://www.nytimes.com/2020/04/23/us/politics/coronavirus-trump.html>.

¹⁸ *E.g.*, Philip Bump, *A Pillow Salesman Apparently Has Some Ideas About Declaring Martial Law*, Wash. Post, Jan. 15, 2021, <https://www.washingtonpost.com/politics/2021/01/15/pillow-salesman-apparently-has-some-ideas-about-declaring-martial-law/>.

¹⁹ *See, e.g.*, Mem. Op., *United States v. Meredith*, No. 1:21-cr-159-ABJ, ECF No. 41, at 24 (D.D.C. May 26, 2021) (Judge Amy Berman Jackson

And that is all the more true given that since January 6th, Mr. Trump and his supporters have continued to embrace the violent attempt to overthrow the election, by, among other things, excusing those who called for a hanging of the Vice President,²⁰ insisting that those facing criminal charges for the mob attack are being “persecuted so unfairly,”²¹ and holding a rally where attendees pledged allegiance to a flag carried by Mr. Trump’s supporters on January 6th.²² In short, they have

denying a January 6th defendant bond and identifying the “the near-daily fulminations of the former President” as a reason the defendant posed a continuing danger to commit violent acts); Order, *United States v. Dresch*, No. 1:21-cr-71-ABJ, ECF No. 25, at 18 (D.D.C. May 27, 2021) (Judge Amy Berman Jackson noting that defendant’s “promise to take action in the future cannot be dismissed as an unlikely occurrence given that his singular source of information [Trump] . . . continues to propagate the lie that inspired the attack on a near daily basis”); Mem. Op., *United States v. Whitton*, No. 1:21-cr-35-EGS, ECF No. 60, at 36–37 (D.D.C. Apr. 20, 2021) (Judge Emmett Sullivan with similar assessments).

²⁰ Mike Allen, *Exclusive Audio: Trump Defends Threats to “Hang” Pence*, Axios (Nov. 12, 2021), <https://www.axios.com/trump-hang-mike-pence-january-6-audio-4f147245-becf-4766-ac60-7acece6862be.html>.

²¹ Lexi Lonas, *Trump Offers Sympathy for Those Charged With Jan. 6 Offenses*, The Hill (Sept. 16, 2021), <https://thehill.com/blogs/blog-briefing-room/news/572632-trump-offers-sympathy-for-those-charged-with-jan-6-offenses>.

²² David Graham, *The New Lost Cause*, The Atlantic (Apr. 16, 2021) <https://www.theatlantic.com/ideas/archive/2021/10/donald-trumps-new-lost-cause-centers-january-6/620407/>.

celebrated—even sanctified—the sacking of the Capitol and disruption of the transfer of power, making its repeat an even graver threat. So this is not a “case study” of the type the Supreme Court contemplated in *Mazars*, one in which the President’s taxes are sought to justify generalized tax reform or where “other sources could provide Congress the information it needs.” 140 S. Ct. at 2036. Instead, Congress is asking for documents from one of a small handful of people likely to have the key information for crafting legislation, a person without whose documents it would be impossible for Congress to be satisfied that they had protected the country from the full threat posed by future insurrections.

Accordingly, the district court’s decision should be affirmed. Congress has broad legislative powers to protect the peaceful transfer of power, and the breadth of the Committee’s power to obtain the information it seeks should be commensurate with the unfamiliarity of the problem at hand and the extreme danger of not addressing it legislatively based on a comprehensive record. Should a failed presidential candidate ever again prompt an attack on the Capitol, dozens of Senators and Representatives may well lie dead, and our democracy might never recover. Thus, Congress has a sufficient interest

to acquire the information it seeks *even if* the Court were to entertain Mr. Trump's armchair executive privilege assertion and apply a heightened standard for access.

II. The public interest supports a prompt denial of the request for injunctive relief.

When considering whether to issue equitable relief, courts “should pay particular regard for the public consequences.” *Winter v. NRDC*, 555 U.S. 7, 24 (2008). Here, the district court properly determined that public interest favors denying injunctive relief because the legislative branch should be permitted to study and consider legislation to prevent attacks on the peaceful transfer of power. JA214—215.

The public interest provides an independent basis to promptly affirm the district court. With violent threats escalating against

Members of Congress,²³ elections officials,²⁴ and political opponents,²⁵ and with future elections that could serve as another spark for election disinformation and violence quickly approaching, it is vital that the Select Committee have access now to the files that it seeks. That way the Committee will have time to formulate its legislative recommendations for Congress, and Congress will have time to consider enacting those reforms before the next election certification crisis—which could be as soon as next year—spirals into violence. So just like *Winter* where “the proper determination of where the public interest lies” was not “a close question” in light of a presidential determination that a particular naval exercise was critical to fleet readiness and the plaintiffs’ comparatively weak explanation of harms, 555 U.S. at 26, here too the

²³ See, e.g., Felicia Sonmez, *GOP Rep. Fred Upton Receives Death Threats After Voting for Bipartisan Infrastructure Deal*, Wash. Post (Nov. 9, 2021), https://www.washingtonpost.com/politics/gop-rep-fred-upton-receives-death-threats-after-voting-for-bipartisan-infrastructure-deal/2021/11/09/78fe5ac8-4195-11ec-9ea7-3eb2406a2e24_story.html.

²⁴ See, e.g., Linda So and Jason Szep, *Reuters Unmasks Trump Supporters Who Terrified U.S. Election Officials*, Reuters (Nov. 9, 2021), <https://www.reuters.com/investigates/special-report/usa-election-threats/>.

²⁵ Lisa Lerer & Astead W. Herndon, *Menace Enters the Republican Mainstream*, N.Y. Times (Nov. 12, 2021), <https://www.nytimes.com/2021/11/12/us/politics/republican-violent-rhetoric.html>.

plaintiff is unable to persuasively articulate any harm to the public from denying the injunction, and President Joe Biden, the sitting president, has concluded the relief sought would be contrary to the public interest, *see* JA212–14. Accordingly, this Court should affirm the district court, and do so with dispatch so that Mr. Trump is not allowed to use delay tactics to frustrate a legitimate and necessary bipartisan investigation into the worst attack on the peaceful transfer of power since at least the Civil War.

CONCLUSION

Amici respectfully urge the Court to promptly affirm the district court.

Dated: November 22, 2021

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APPENDIX A—LIST OF *AMICI CURIAE*

- Alan Steelman, U.S. Representative (D-Texas), 1973-1977
- Allyson Y. Schwartz, U.S. Representative (D-Pennsylvania), 2005-2015
- Barney Frank, U.S. Representative (D-Massachusetts), 1981-2013; Chairman of the House Financial Services Committee, 2008-2011
- Bart Stupak, U.S. Representative (D-Michigan), 1993-2011
- Bill Sarpalius, U.S. Representative (D-Texas), 1989-1995
- Bob Inglis, U.S. Representative (R-South Carolina), 1993-1999, 2005-2011
- Brad Miller, U.S. Representative (D-North Carolina), 2003-2013
- Brian Baird, U.S. Representative (D-Washington), 1999-2011
- Bruce Braley, U.S. Representative (D-Iowa), 2007-2015
- Byron Dorgan, U.S. Senator (D-North Dakota), 1992-2011
- Carlos Curbelo, U.S. Representative (R-Florida), 2015-2019
- Charles Boustany, U.S. Representative (R-Louisiana), 2005-2017
- Charles K. Djou, U.S. Representative (R-Hawaii), 2010-2011
- Chet Edwards, U.S. Representative (D-Texas), 1991-2011
- Chris Shays, U.S. Representative (R-Connecticut), 1987-2009
- Claudine Schneider, U.S. Representative (R-Rhode Island), 1981-1991
- Colleen Hanabusa, U.S. Representative (D-Hawaii), 2011-2015, 2016-2019
- Connie Morella, U.S. Representative (R-Maryland), 1987-2003; U.S. Ambassador to the Organization for Economic Co-operation and Development, 2003-2007
- Dave Durenberger, U.S. Senator (R-Minnesota), 1978-1995
- David Emery, U.S. Representative (R-Maine), 1975-1983; House Republican Chief Deputy Whip, 1981-1983

- David Skaggs, U.S. Representative (D-Colorado), 1987-1999; Chair of the Board of Directors of the U.S. Office of Congressional Ethics, 2019-2021
- David Trott, U.S. Representative (R-Michigan), 2015-2019
- David Wu, U.S. Representative (D-Oregon), 1999-2011
- Deborah Halvorson, U.S. Representative (D-Illinois), 2009-2011
- Donna F. Edwards, U.S. Representative (D-Maryland), 2008-2017
- Doug Bereuter, U.S. Representative (R-Nebraska), 1979-2004
- Edward Scott Rigell, U.S. Representative (R-Virginia), 2011-2017
- Earl Pomeroy, U.S. Representative (D-North Dakota), 1993-2011
- Ed Weber, U.S. Representative (R-Ohio), 1981-1983
- Elizabeth Holtzman, U.S. Representative (D-New York), 1973-1981
- Gary Ackerman, U.S. Representative (D-New York), 1983-2013
- Gary Hart, U.S. Senator (D-Colorado), 1975-1987; Vice Chair of the Homeland Security Advisory Council, 2009-2011
- Henry A. Waxman, U.S. Representative (D-California), 1975-2015; Chair of Energy & Commerce Committee, 2009-2010; Chair of Committee on Oversight & Government Reform, 2007-2008
- Howard Berman, U.S. Representative (D-California), 1983-2013
- James Bacchus, U.S. Representative (D-Florida), 1991-1995
- James McDermott, U.S. Representative (D-Washington), 1989-2017
- Jim Greenwood, U.S. Representative (R-Pennsylvania), 1993-2005
- Jim Kolbe, U.S. Representative (R-Arizona), 1985-2007
- Jim Leach, U.S. Representative (R-Iowa), 1977-2007; Chair of the House Banking and Financial Services Committee, 1995-2001
- Jim Turner, U.S. Representative (D-Texas), 1997-2005
- Jim Walsh, U.S. Representative (R-New York), 1989-2009
- Joe Crowley, U.S. Representative (D-New York), 1999-2019; Chair of the House Democratic Caucus, 2017-2019
- John Barrow, U.S. Representative (D-Georgia), 2005-2015
- John Bryant, U.S. Representative (D-Texas), 1983-1997

- John LeBoutillier, U.S. Representative (R-New York), 1981-1983
- Larry LaRocco, U.S. Representative (D-Idaho), 1991-1995
- Lois Capps, U.S. Representative (D-California), 1998-2017
- Martin Frost, U.S. Representative (D-Texas), 1979-2005
- Martin Lancaster, U.S. Representative (D-North Carolina), 1987-1995; Assistant Secretary to the U.S. Army for Civil Works, 1996-1997
- Mary Jo Kilroy, U.S. Representative (D-Ohio), 2009-2011
- Matt McHugh, U.S. Representative (D-New York), 1975-1993
- Max Sandlin, U.S. Representative (D-Texas), 1997-2005
- Mel Levine, U.S. Representative (D-California), 1983-1993
- Mickey Edwards, U.S. Representative (R-Oklahoma), 1977-1993; Chair, House Republican Policy Committee, 1989-1993
- Mike Kopetski, U.S. Representative (D-Oregon), 1991-1995
- Mike Parker, U.S. Representative (D-Mississippi), 1989-1995; U.S. Representative (R-Mississippi), 1995-1999; Assistant Secretary for the Army of Civil Works, 2001-2002
- Paul Hodes, U.S. Representative (D-New Hampshire), 2007-2011
- Paul “Pete” McCloskey, Jr., U.S. Representative (R-California), 1967-1983
- Peter Smith, U.S. Representative (R-Vermont), 1989-1991
- Reid Ribble, U.S. Representative (R-Wisconsin), 2011-2017
- Richard Gephardt, U.S. Representative (D-Missouri), 1977-2005; Chair of the House Democratic Caucus, 1985-1989; House Majority Leader, 1989-1995; Leader of the House Democratic Caucus, 1995-2003
- Robert Bauman, U.S. Representative (R-Maryland), 1973-1981
- Robert Carr, U.S. Representative (D-Michigan), 1975-1981, 1983-1995
- Rod Chandler, U.S. Representative (R-Washington), 1983-1993
- Ron Klein, U.S. Representative (D-Florida), 2007-2011
- Russ Carnahan, U.S. Representative (D-Missouri), 2005-2013
- Sander Levin, U.S. Representative (D-Michigan), 1983-2019

- Steve Driehaus, U.S. Representative (D-Ohio), 2009-2011
- Steve Israel, U.S. Representative (D-New York), 2001-2017; Chair of the Democratic Congressional Campaign Committee, 2011-2015; Chair of the House Democratic Policy and Communications Committee, 2015-2017
- Steve Kagen, M.D., U.S. Representative (D-Wisconsin), 2007-2011
- Tim Petri, U.S. Representative (R-Wisconsin), 1979-2015
- Tim Wirth, U.S. Representative (D-Colorado), 1975-1987; Counselor of the Department of State, 1993-1994; Under Secretary of State for Democracy and Global Affairs, 1994-1997
- Tom Andrews, U.S. Representative (D-Maine), 1991-1995
- Tom Coleman, U.S. Representative (R-Missouri), 1976-1993
- Tom Perriello, U.S. Representative (D-Virginia), 2009-2011
- Vic Fazio, U.S. Representative (D-California), 1979-1999; Chair of the House Democratic Caucus, 1995-1999
- Wayne T. Gilchrest, U.S. Representative (R-Maryland), 1991-2009

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 3,992 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Cir. R. 32(e)(1). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Century Schoolbook font using Microsoft Word.

Dated: November 22, 2021

Respectfully submitted,

/s/ Samuel F. Callahan

Samuel F. Callahan

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2021, pursuant to Fed. R. App. P. 25(d) and Cir. R. 25, I caused the foregoing Brief to be filed electronically with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Dated: November 22, 2021

/s/ Samuel F. Callahan

Samuel F. Callahan