No. 21-932

IN THE

Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

BENNIE G. THOMPSON, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the denial of Petitioner's motion for a preliminary injunction that would bar the United States Archivist from granting access to a specific set of Presidential records to a Select Committee of the House of Representatives investigating the facts and circumstances surrounding the January 6 attack on the Capitol.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

Legislative Materials

Administrative and Executive Materials

Other Authorities

STATEMENT

Based on a straightforward application of this Court's precedents, the court of appeals rejected a challenge by Petitioner, former President Donald J. Trump, to a request for certain Presidential records from the House of Representatives Select Committee to Investigate the January 6th Attack on the United States Capitol. The Select Committee is charged with investigating an unprecedented attack on Congress itself and a disruption of the peaceful transfer of Presidential power. This investigation will lead to specific legislative recommendations designed to prevent any future attacks on the democratic institutions of our Republic.

Although the facts are unprecedented, this case is not a difficult one. Petitioner attempts to overturn the current President's reasonable determination that the Select Committee is entitled to three tranches of Presidential records responsive to its request. The court of appeals correctly applied this Court's precedents to reject Petitioner's challenge under every heightened standard he claimed should apply, relying in part on the fact that Petitioner did not make any particularized objections to production of the specific Presidential records before the court. To the extent any novel questions linger in the background, this case would be a poor vehicle to address them.

This Court's review is unwarranted, and the petition for a writ of certiorari should be denied. Respondents the Select Committee and Chairman Bennie Thompson (collectively, the Congressional Respondents) respectfully reaffirm their request for expedited consideration of the petition for a writ of certiorari, given the urgency of the investigation and consistent

with the expedited consideration afforded by the lower courts.

A. Background

In *Nixon v. Administrator of General Services* ("*GSA*"), 433 U.S. 425 (1977), this Court rejected former President Nixon's challenge to the constitutionality of a statute transferring custody of his Presidential records to the National Archives and prohibiting the destruction of those materials. As relevant here, the Court determined that a former President may be "heard to assert" claims of the Presidential communications privilege over records created during his administration, but made clear that, as with a sitting President, the privilege is qualified and can be overcome by a showing of need. *Id.* at 439, 449.

The Court recognized the "substantial public interest[]" in "facilitating a full airing of the events leading to [Nixon's] resignation, and Congress' need to understand how those political processes had in fact operated in order to gauge the necessity for remedial legislation." 433 U.S. at 453. Those "important objectives" overcame the former President's privilege assertion, which was based on a generalized interest in Executive Branch confidentiality and not supported by the incumbent President. *Id.* at 454. In balancing these interests, the Court emphasized that the incumbent President is "in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly." *Id.* at 449.

Congress subsequently enacted the Presidential Records Act, 44 U.S.C. §§ 2201-09, establishing a comprehensive framework for preservation and disclosure

of Presidential records. Section 2202 makes clear that the United States—not the President—owns all Presidential records, even after a President leaves office. At that time, the Archivist of the United States "assume[s] responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President." *Id.* § 2203(g)(1).

Section 2205(2)(C) makes Presidential records "available … to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof if such records contain information that is needed for the conduct of its business and that is not otherwise available." Section 2204(c)(2) provides that the Act does not "confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President."

Implementing regulations establish procedures for incumbent and former Presidents to assert claims of executive privilege over Presidential records in response to a Congressional request. *See* 36 C.F.R. § 1270.44(d).[1] When Congress requests such records, "either President may assert a claim of constitutionally based privilege against disclosing the record." *Id.* Should the incumbent President assert such a claim, the Archivist will not disclose the records unless a court orders disclosure. *Id.* § 1270.44(e).

If, however, a former President raises a privilege claim, different rules apply: "the Archivist consults

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[1] One provision of the Act (Section 2208) addresses claims of privilege by former and incumbent Presidents, but that provision does not apply to Congressional requests. 44 U.S.C. § 2205. The terms of 36 C.F.R. § 1270.44(d) largely mirror Section 2208.

with the incumbent President … to determine whether [he] will uphold the claim." 36 C.F.R § 1270.44(f)(1). If the incumbent President upholds the privilege claim, the Archivist will not disclose the records unless a court orders disclosure. *Id.* § 1270.44(f)(2). If "the incumbent President does not uphold the claim asserted by the former President," or "fails to decide" within a set time, the Archivist will release the records unless otherwise ordered by a court. *Id.* § 1270.44(f)(3); *see* Exec. Order No. 13489, 74 Fed. Reg. 4669 (Jan. 21, 2009) (imposing a similar structure for resolving executive privilege claims).

B. Facts And Procedural History

1. In April 2020, Petitioner began to make public statements about the potential for widespread election fraud. On April 7, he described mail-in ballots as "corrupt," "fraudulent in many cases," and the work of "cheaters."[2] In his nomination acceptance speech, Petitioner stated that "[t]he only way they can take this election away from us is if this is a rigged election."[3] Asked whether he would "commit to making sure that there is a peaceful transferal [*sic*] of power," he said, "we're going to have to see what happens."[4]

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[2] Press Briefing, Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force (Apr. 7, 2020), https://perma.cc/SU9J-FJZV.

[3] Donald Trump, *President Trump Speaks at 2020 Republican National Convention Vote* at 22:08-22:18, C-SPAN (Aug. 24, 2020), https://perma.cc/LE4R-RJC5.

[4] Press Briefing, Remarks by President Trump (Sept. 23, 2020), https://perma.cc/M6AA-9PW7.

On November 3, 2020, Joseph Biden was elected President. Pet. App. 5a. Petitioner nonetheless refused to concede, claiming that the election was "rigged" and alleging "tremendous voter fraud and irregularities." *Id.* In the following weeks, Petitioner and his allies filed numerous lawsuits challenging the election results. *Id.* at 6a. No court upheld Petitioner's claims of voter fraud. *Id.* As one court put it: "[C]alling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here." *Donald J. Trump for President, Inc. v. Sec'y of Pennsylvania*, 830 F. App'x 377, 381 (3d Cir. 2020). This Court denied relief in numerous cases aimed at overturning the election results. *See, e.g.*, *Trump v. Biden*, No. 20-882; *Donald J. Trump for President, Inc. v. Degraffenreid*, No. 20-845; *Trump v. Wisconsin Elections Comm'n*, No. 20-883; *Gohmert v. Pence*, No. 20A115; *Wood v. Raffensperger*, No. 20-799; *In re Pearson*, No. 20-816; *King v. Whitmer*, No. 20-815; *Kelly v. Pennsylvania*, No. 20A98; *Texas v. Pennsylvania*, No. 22O155.

In December 2020, Petitioner began encouraging his supporters to gather in Washington on January 6, 2021, the date Congress would convene in a Joint Session to count the electoral votes, as required by the Constitution. "Statistically impossible to have lost the 2020 Election," he tweeted. "Big protest in D.C. on January 6th. Be there, will be wild!"[5] *See* Pet. App. 6a.

2. Just before noon on January 6, Petitioner took the stage at a rally near the White House. Pet. App.

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[5] Donald Trump (@realDonaldTrump), Twitter (Dec. 19, 2020, 1:42AM).

6a. He spoke for over an hour, reiterating his claim that the election was "stolen" and "rigged."[6] He urged then-Vice President Pence, who was to preside over the electoral count, to "do the right thing" by rejecting States' electoral votes and refusing to finalize the election.[7] And he told the crowd that "you'll never take back our country with weakness."[8]

Toward the end of his speech, Petitioner declared, "We fight like Hell and if you don't fight like Hell, you're not going to have a country anymore."[9] He then encouraged his supporters to march to the Capitol, where the Joint Session was about to begin: "[W]e're going to walk down Pennsylvania Avenue … to the Capitol and … we're going to try and give our Republicans … the kind of pride and boldness that they need to take back our country."[10]

Shortly after the speech, a large crowd of Petitioner's supporters marched to the Capitol and overwhelmed law enforcement officers guarding the building. The rioters scaled walls, smashed through barricades, and shattered windows, eventually streaming into the building. They attacked police officers with chemical agents, flag poles, and frozen water bottles—

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[6] Pet. App. 6a (quoting Donald Trump, *Rally on Electoral College Vote Certification* at 3:33:05–3:33:10, 3:33:32–3:33:54, C-SPAN (Jan. 6, 2021), https://perma.cc/7XKB-3EV2 ("Rally Speech")).

[7] *Id.* at 6a-7a (quoting Rally Speech, at 3:37:19–3:37:29).

[8] *Id.* at 7a (quoting Rally Speech, at 3:47:20–3:47:42).

[9] *Id.* (quoting Rally Speech, at 4:41:17–4:41:33).

[10] *Id.* (quoting Rally Speech, at 4:42:00-4:42:32).

in some instances crushing officers between doors. Pet. App. 7a.

The Joint Session of Congress was disrupted. Lawmakers in the House and Senate Chambers, as well as Vice President Pence, were forced to evacuate. Soon after, the Senate Chamber was overrun by rioters. The crowd searched for Vice President Pence and House Speaker Nancy Pelosi. Members of the mob built a makeshift gallows on the Capitol lawn, and rioters called for the Vice President's execution. Pet. App. 8a.

The attack marked the most significant assault on the Capitol since the War of 1812. For hours, law enforcement was unable to regain control of the building. Several people died, and 140 law enforcement officers were injured. Portions of the Capitol's historic architecture were damaged or destroyed. Pet. App. 8a-9a.

In the evening, the Joint Session of Congress was able to reconvene, and at 3:42am Congress completed its constitutional responsibility to count the electoral votes. *See* Pet. App. 8a.

On January 20, Petitioner departed the White House and President Biden assumed the Presidency.

3. In response to this assault on the Capitol, the House of Representatives adopted House Resolution 503, which established the Select Committee. H. Res. 503, 117th Cong. (2021). The resolution authorizes the Select Committee to (1) "investigate the facts, circumstances, and causes" of the January 6 attack as well as the "influencing factors that contributed to" it; (2) "identify, review, and evaluate the causes of and the lessons learned from" the attack; and (3) "issue a final report to the House" containing "findings, conclusions,

and recommendations for corrective measures." *Id.* § 4(a).

Such corrective measures may include "changes in law, policy, procedures, rules, or regulations" designed to prevent future acts of violence "including acts targeted at American democratic institutions"; "improve the security posture of the United States Capitol Complex"; and "strengthen the security and resilience of the United States and American democratic institutions." H. Res. 503 § 4(c). In addition, the resolution authorizes the Select Committee to publish interim reports, including "legislative recommendations." *Id.* § 4(b)(1).

On August 25, the Select Committee issued a document request to the National Archives under the Presidential Records Act, seeking certain records from the Executive Office of the President and the Office of the Vice President. Pet. App. 11a. Specifically, the Select Committee requested documents, written communications, calendar entries, videos, photographs, or other media relating to Petitioner's January 6 speech, the rally and march, the violence at the Capitol, and the White House response. *Id.* For specified periods, the Select Committee requested records relating to planning by the White House and others regarding the electoral count, preparations leading up to January 6, and information Petitioner received about the election outcome and the election system. *Id.* Further, for a specified period surrounding the 2020 election, the Select Committee sought documents and communications of Petitioner and certain advisers relating to the transfer of power and obligation to follow the rule of law, including with respect to changes in personnel at

certain Executive Branch agencies. *Id.* "Given the urgent nature of the request," the Select Committee asked the Archivist to "expedite its consultation and processing times pursuant to … 36 C.F.R. § 1270.44(g)." *Id.* (cleaned up).

On August 30, the Archivist notified Petitioner that he had identified a first tranche of 136 pages of responsive records. Pet. App. 12a. Following notification to President Biden, the Archivist withdrew seven pages as non-responsive. *Id.* On October 8, White House Counsel Dana Remus wrote to the Archivist that "President Biden has determined that an assertion of executive privilege is not in the best interests of the United States, and therefore is not justified as to any of the Documents" in that tranche. C.A. App. 107. The letter explained that "Congress has a compelling need in service of its legislative functions to understand the circumstances that led to these horrific events," and "[t]he Documents shed light on events within the White House on and about January 6 and bear on the Select Committee's need to understand the facts underlying the most serious attack on the operations of the Federal Government since the Civil War." Pet. App. 88a.

Petitioner immediately responded, asserting executive privilege over 46 pages of documents. Pet. App. 12a. His letter stated that the enumerated "records contain information subject to executive privilege, including the presidential communications and deliberative process privileges." C.A. App. 110. Petitioner did not explain why any specific documents were privileged or why withholding them would serve the public interest.

The documents in the first tranche over which Petitioner asserted privilege consist of daily Presidential diaries, schedules, visitor logs, activity logs, call logs, specifically for or including January 6; drafts of speeches, remarks, and correspondence concerning the events of that day; and handwritten notes from the files of the Chief of Staff concerning the events of that day. Pet. App. 12a.

White House Counsel Remus responded that "President Biden has considered the former President's assertion," but, for the same reasons previously given, "does not uphold the former President's assertion of privilege." C.A. App. 113. Accordingly, given "the urgency of the Select Committee's need for the information," the President instructed the Archivist to provide the Select Committee the pages in question 30 days after notifying Petitioner. Pet. App. 16a.

In September, the Archivist notified Petitioner and the President of two additional tranches of responsive documents. Petitioner again claimed generalized privilege over certain documents, and the President again advised that he was not upholding the privilege assertions. The contested documents in the these tranches consist of Press Secretary talking points and related documents regarding allegations of voter fraud, election security, and other 2020 election topics; Presidential activity calendars and a related handwritten note for January 6 and for January 2021 generally; draft text of a speech for the January 6 rally; a handwritten note from the Chief of Staff's files regarding various election issues, including the January 6 electoral count; a draft executive order regarding election integrity; a draft proclamation honoring the U.S. Capitol Police and two officers who died in the wake of

the attack, and related emails; and various records from a Deputy White House Counsel regarding election-related issues. The President instructed the Archivist to provide the contested pages to the Select Committee, and noted that in the course of accommodation the Select Committee had deferred its request for 50 pages of responsive records. Pet. App. 14a-16a.

The accommodation process is ongoing. The Select Committee has agreed to defer its request as to additional documents, and has agreed that it does not need documents that "appear to have no content that might be material to the Select Committee's investigation."[11]

4. On October 18, Petitioner filed this action against Respondents the Select Committee, Chairman Thompson, the Archivist, and the National Archives and Records Administration. Proceeding in his "official capacity as a former President," he sought, *inter alia*, a declaratory judgment that the Select Committee's requests are invalid and unenforceable, an injunction against the Congressional Respondents' enforcement of the requests or use of any information thus obtained, and an injunction against the production of the requested information. C.A. App. 30-31. Petitioner moved for a preliminary injunction prohibiting Respondents "from enforcing or complying with" the Select Committee's request. D. Ct. Dkt. No. 5, at 3.

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[11] Letter from Jonathan Su, Deputy Counsel to the President, to Kristin Amerling, Deputy Staff Dir. and Chief Counsel for the Select Committee (Dec. 16, 2021), https://perma.cc/FR5G-XEP2.

The district court denied the requested injunction. Pet. App. 78a-126a. The court concluded that Petitioner's assertion of executive privilege was "outweighed by President Biden's decision not to uphold the privilege," and rejected Petitioner's invitation to "second guess that decision by undertaking a document-by-document review." *Id.* at 102a. The court further determined that the Select Committee acted within its authority, rejecting Petitioner's argument that the breadth of the request exceeded the Select Committee's need. *Id.* at 113a, 116a. The court likewise rejected Petitioner's argument that the Select Committee's request failed to satisfy the test announced by this Court in *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020). *Id.* at 121a-122a.

The district court additionally concluded that Petitioner could not demonstrate irreparable harm, and that the balance of the equities and the public interest favored Respondents. Pet. App. 122a-125a. The court denied Petitioner's request for an injunction pending appeal.

5. Petitioner appealed. The court of appeals granted an administrative injunction and set the case for highly expedited briefing and argument. Pet. App. 19a.

The court of appeals affirmed. Pet. App. 1a-77a. The court first explained that Petitioner's appeal was limited to the question whether his assertion of executive privilege as to only "a subset of documents in the Archivist's first three tranches" requires that those documents be withheld from the Select Committee. *Id.* at 20a. As to those documents, the court held that

Petitioner had provided no basis to upset the accommodation reached between the Legislative and Executive Branches. *Id.* at 4a, 20a.

Applying this Court's decision in *GSA*, the court of appeals recognized that Petitioner, as a former President, could be "heard to assert" a claim of executive privilege. Pet. App. 38a. But the privilege is a "qualified one" that—even when asserted by a sitting President—can be "overcome by a sufficient showing of need." *Id.* at 39a. The court noted that it "need not conclusively resolve whether and to what extent a court could second guess the sitting President's judgment that it is not in the interests of the United States to invoke privilege." *Id.* at 40a. The court held that "[u]nder any of the tests" Petitioner advocated, "the profound interests in disclosure" of the records at issue "far exceed" Petitioner's "generalized concerns for Executive Branch confidentiality." *Id.*

In so holding, the court of appeals relied on the settled standard governing executive privilege claims: "whether a sufficient showing of need for disclosure has been made so that the claim of presidential privilege 'must yield.'" Pet. App. 39a (quoting *GSA*, 433 U.S. at 454). The court outlined the "formidable alignment of factors" supporting the disclosure of the documents at issue. *Id.* at 40a. *First*, the court explained that President Biden's "careful and cabined assessment … carries immense weight"—not only because "[u]nder our Constitution, we have one President at a time," but also because the President "has identified weighty reasons for declining to assert privilege here." *Id.* at 41a, 43a. *Second*, the court emphasized that Congress has a "uniquely weighty interest in investigating the causes and circumstances of the January

6th attack" and that it established "a sound factual predicate for requesting these presidential documents specifically." *Id.* at 46a, 47a. *Third,* the court stressed that "blocking disclosure would derail an ongoing process of accommodation and negotiation between the President and Congress, and instigate an interbranch dispute." *Id.* at 49a-50a. Accordingly, the court concluded that the "accumulation of forces favoring disclosure is at least equal to, if not greater than, what has supported the disclosure of the privileged materials of even a sitting President." *Id.* at 51a.

Turning to Petitioner's side of the ledger, the court explained that he "has not identified any specific countervailing need for confidentiality tied to the documents at issue, beyond their being presidential communications." Pet. App. 52a. The court further determined that Petitioner's request for *in camera* review of the documents at issue was baseless given his inability to "articulat[e] some compelling explanation for nondisclosure." *Id.* at 57a.

Next, the court of appeals held that the Select Committee had established a legitimate legislative purpose for its request. The court expressed "significant doubt" that the tests for legislative need proposed by Petitioner applied in the context of a challenge by a former President where there was no interbranch dispute. Pet. App. 58a. In any event, the court concluded that the legislative interest at stake satisfied any of the tests pressed by Petitioner—including *Mazars* and the standard applicable to a privilege assertion by a *sitting* President. *Id.* at 58a-59a.

The court of appeals then rejected Petitioner's argument that the Presidential Records Act is unconsti-

tutional to the extent it is "construed to give the incumbent President 'unfettered discretion to waive former Presidents' executive privilege.'" Pet. App. 68a (quoting Pet. C.A. Br. 47). The court reasoned that the Act "gives the incumbent President no more power than the Constitution already does," and the Constitution does not give the incumbent "unfettered discretion." *Id.* at 69a. As the court explained, Petitioner simply "fail[ed] to make any relevant showing of a supervening interest in confidentiality" capable of overcoming "President Biden's considered and weighty judgment that Congress's imperative need warrants the disclosure of these documents." *Id.*

Finally, the court determined that Petitioner did not satisfy any of the remaining preliminary injunction factors. Because "the only relevant injury would be one to the present and future interests of the Executive Branch itself," Petitioner did not establish that disclosure would yield irreparable harm considering President Biden's determination that disclosure advances the national interest. Pet. App. 71a-72a. The court also concluded that "the public interest and the balance of hardships decidedly disfavor issuance of a preliminary injunction." *Id.* at 74a.

REASONS FOR DENYING THE PETITION

Having engaged in an accommodation process, the Legislative and Executive Branches each have determined that the documents at issue should be released. The courts below agreed, issuing opinions that faithfully apply this Court's precedents and do not conflict with the opinions of this Court or any other court. And because the court of appeals evaluated the request under multiple standards—including ones applicable to

a sitting President—this case is an inappropriate vehicle for review.

The "rare and formidable alignment of factors" in this case, Pet. App. 40a, counsels strongly against this Court's involvement. Such involvement would needlessly disrupt the delicate balance struck between the branches, delay a co-equal branch's urgent investigation into an unprecedented assault on Congress itself, and require this Court to wade into factual determinations that do not warrant its review and that are eminently correct in any event.

I. This Court's Review Is Not Warranted

The court of appeals' conclusion that the Select Committee is entitled to the Presidential records at issue in this case does not warrant this Court's review.

A. The decision below does not conflict with a decision of this Court or any other court of appeals. Rather, the court of appeals' conclusion rests on a straightforward application of this Court's precedents. Pet. App. 38a-51a, 54a-55a. In particular, in *GSA*, the Court reaffirmed that executive privilege can be overcome by a sufficient showing of legislative need, and held that the incumbent President's lack of support for the former President's privilege claim "detracts from the weight of" that claim. *GSA*, 433 U.S. at 449. The court of appeals' fact-bound weighing of interests under this Court's settled precedent does not warrant the Court's attention.

Petitioner nonetheless claims (Pet. 12-14) that this case presents important and novel questions about when a former President's executive privilege claim can overcome the incumbent's contrary determi-

nation, and what standard should apply when a former President challenges Congress's legislative purpose. But this case would be a poor vehicle for addressing those questions. As the court of appeals concluded, the "accumulation of forces favoring disclosure is at least equal to, if not greater than, what has supported the disclosure of the privileged materials of even a *sitting* President." Pet. App. 51a (emphasis added). Likewise, the court of appeals and the district court analyzed Congress's purpose under the heightened standard in *Mazars*, and the even more demanding test applicable to executive privilege claims by a sitting President, *see United States v. Nixon*, 418 U.S. 683 (1974). Pet. App. 58a. Both courts held that, on this record, the Select Committee satisfied those standards too. Pet. App. 5a n.2, 57a-67a. Accordingly, a decision about which test applies would make no difference to the outcome of this case.

Petitioner's real complaint is that he disagrees with how the court of appeals applied this Court's precedents. But that claim is insufficient to create any question worthy of this Court's review.

B. The fact that the Legislative and Executive Branches have agreed to the production of the documents at issue and are engaged in an ongoing accommodation process further counsels against judicial intervention. Pet. App. 49a-50a. Congressional requests directed to the Executive Branch are frequently resolved "without the involvement of this Court" through the interbranch accommodation process, which rests on a "tradition of negotiation and compromise." *Mazars*, 140 S. Ct. at 2031. Throughout history, "congressional demands for presidential documents" most often have been "hashed out in the 'hurly-

burly, the give-and-take of the political process between the legislative and the executive.'" *Id.* at 2029 (quoting Hr'gs. on S. 2170 before the Subcomm. on Intergovernmental Relations of the S. Comm. on Gov't Ops., 94th Cong., 1st Sess., 87 (1975) (A. Scalia, Assistant Attorney General, Office of Legal Counsel)). Accordingly, this Court has only warily interceded "in cases concerning the allocation of power between the two elected branches of Government," doing so only where such cases present an intractable "clash between rival branches." *Mazars*, 140 S. Ct. at 2031, 2034 (cleaned up).

This case presents no such clash. The Select Committee requires the requested records to investigate the events leading up to and on January 6 and to recommend remedial legislation and other measures to prevent a similar attack in the future. *See* pp. 21-23, 24-29, *infra*. President Biden agrees that the Select Committee "has a compelling need" for the documents "in service of its legislative functions." C.A. App. 107; *see Mazars*, 140 S. Ct. at 2034 ("The President is the only person who alone composes a branch of government."). Through a process of negotiation and accommodation, the Select Committee and the Executive Branch have agreed on which documents in the first three tranches should be released immediately.

Contrary to Petitioner's suggestion, this arrangement is not the result of politically motivated capitulation by the Executive Branch; instead, it is the product of compromise between the branches. The Executive Branch has determined not to assert executive privilege over the records at issue in this case, and the Select Committee has agreed to defer its requests for

certain pages of responsive documents that the Executive Branch tentatively believes should be withheld or do not contain information material to the investigation. *See* Pet. App. 50a; pp. 9-11, *supra*. This give-and-take process is ongoing as to additional tranches of documents that the Archivist continues to process on a rolling basis. Pet. App. 49a-51a. This Court therefore should decline to "needlessly disturb the compromises and working arrangements" that the Legislative and Executive Branches "themselves have reached," *Mazars*, 140 S. Ct. at 2031 (cleaned up), and refuse Petitioner's invitation "to start an interbranch conflict that the President and Congress have averted," Pet. App. 40a.

C. Further, this case involves a discrete set of documents over which Petitioner failed to make specific and particularized arguments in the courts below. Pet. App. 52a. This case is therefore an especially poor vehicle for this Court to address any weighty constitutional issues that may surface in future disputes. And, to the extent Petitioner raises a facial challenge to the validity of the Select Committee's entire request, that argument has been waived. As the court of appeals noted, at oral argument Petitioner disclaimed any such freestanding challenge, stating that all his arguments pertained to the documents over which Petitioner had claimed executive privilege. Pet. App. 70a n.17; *see* C.A. Oral Arg. 13:25-13:51 (stating that Petitioner is only requesting an injunction as to "the subset" of documents he has "designated as being restricted or privileged"). Petitioner cannot revive that argument in seeking this Court's review. *See Pennsylvania Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212-13 (1998).

II. The Decision Below Is Correct

Review is also unwarranted because the court of appeals' decision is correct. The court rightly concluded that Petitioner's generalized interest in confidentiality must yield to the Select Committee's overwhelming need for the records at issue; that the Select Committee has demonstrated a legitimate legislative purpose; that the request satisfies all the tests urged by Petitioner; and that the absence of irreparable harm, as well as the balance of the equities and the public interest, weigh heavily against preliminary injunctive relief.

A. Executive Privilege Does Not Bar Release Of The Records

Faithfully applying this Court's opinion in *GSA*, the court of appeals correctly held that Petitioner's assertion of privilege does not shield the requested records from disclosure. *GSA* made clear that a former President "may … be heard to assert" executive privilege over Presidential communications. 433 U.S. at 439. As with executive privilege claims asserted by incumbent Presidents, however, "the privilege is a qualified one" and "must yield" to a sufficient showing of need for disclosure. *Id.* at 446, 454.

In the decision below, the court of appeals correctly applied this framework to hold that the Select Committee's compelling and urgent need for the Presidential records at issue in this case—together with the President's determination that disclosure is in the best interests of the Nation—far outweighs Petitioner's generalized assertion that the records should be withheld for confidentiality reasons.

1. As the court of appeals correctly concluded on the record before it, the Select Committee has a compelling, specific interest in the Presidential records at issue. Pet. App. 46a-49a. In addition to endangering the lives of House Members, Senators, Congressional staff, and law enforcement officers, the January 6 attack on the Capitol was an unprecedented attempt to overturn the Presidential election by preventing Congress from fulfilling its duty to count the electoral votes. Congress has a strong interest in investigating the causes of this attack, adopting measures to prevent future attacks on Congressional proceedings, and protecting the peaceful transfer of power. As explained in detail below, *see* pp. 24-29, *infra*, the Select Committee needs the requested Presidential records to understand the extraordinary events of January 6—as well as Petitioner's extensive efforts to undermine the election before and after Election Day—given the connection between Petitioner's actions and rhetoric and the events that unfolded that day.

2. Under *GSA*, President Biden's reasoned decision that disclosure of the records is in the best interests of the Nation and the Executive Branch tilts the balance even further in the Select Committee's favor. This Court has instructed that the incumbent President—as opposed to a former President—is "in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly." *GSA*, 433 U.S. at 449. "[O]nly the incumbent is charged with performance of the executive duty under the Constitution." *Id.* at 448; *see also Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020) ("Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must

'take Care that the Laws be faithfully executed.'" (quoting U.S. Const., Art. II, §§ 1, 3)). The incumbent President therefore has a superior institutional perspective and access to better information than a former President about whether invoking executive privilege would be "for the benefit of the Republic," weighing all the competing needs and interests of the Executive Branch and the Nation. *GSA*, 433 U.S. at 449.

If anything, President Biden's determination not to invoke executive privilege is entitled to even greater weight than the incumbent President's position in *GSA*. In *GSA*, which involved a facial challenge to a statute, there was no Executive Branch review of the records at issue; the incumbent simply declined to support the privilege claim. Here, however—after White House review of each document at issue—the President has determined that "Congress has a compelling need in service of its legislative functions to understand the circumstances that led to these horrific events." C.A. App. 107. The President issued a "thoroughgoing analysis," Pet. App. 44a, concluding that "[t]he Documents shed light on events within the White House on and about January 6 and bear on the Select Committee's need to understand the facts underlying" the attack, C.A. App. 107.

Although Petitioner claims (Pet. 25-26) that President Biden's decision not to invoke executive privilege is motivated by partisanship, he offers no factual support for that contention, which the lower courts rejected. The President's explanation for declining to assert privilege, *see* C.A. App. 107-08, 133; the Select Committee's compelling need for the information to investigate an unprecedented attack on our Nation's democracy; and the fact that the President has declined

to release certain requested records disprove Petitioner's contentions.

Moreover, as this Court recognized in *GSA*, strong institutional checks prevent the "political abuse" (Pet. 26) that Petitioner hypothesizes will follow. 433 U.S. at 448. As this Court emphasized, the President is likely to proceed cautiously before "disclosing confidences of a predecessor" given the risk that disclosure may "discourage candid presentation of views by his contemporary advisers." *Id.* at 448. And, as the court of appeals explained, the fact that every President will someday be a former President provides an incentive to ensure that the privilege is not eroded or abused. Pet. App. 54a-55a.

3. Against these compelling interests in disclosure, Petitioner offers only generalized and unsupported assertions that maintaining confidentiality of the records is in the best interests of the Executive Branch. As the court of appeals explained, Petitioner "has not identified any specific countervailing need for confidentiality tied to the documents at issue, beyond their being presidential communications"; he has not "presented arguments that grapple with the substance of President Biden's and Congress's weighty judgments"; and he has not "made even a preliminary showing that the content of any particular document lacks relevance to the Committee's investigation." Pet. App. 52a. Before this Court, Petitioner again relies (Pet. 23) solely on the broad assertion that confidentiality of Presidential communications is necessary to protect the President's ability to receive full and frank advice from his aides.

This Court has already made clear that a mere "generalized interest in confidentiality" can be overcome by a sufficient showing of need. *See Nixon*, 418 U.S. at 711. Petitioner's bare assertion—which contradicts the reasoned judgment of the incumbent President—is insufficient given the Select Committee's need for the records. Indeed, Petitioner's fear that disclosing these records will chill Presidential aides from providing candid advice is especially misguided because, as the White House explained, "the conduct under investigation extends far beyond typical deliberations concerning the proper discharge of the President's constitutional responsibilities." Pet. App. 43a. Accordingly, any risk that disclosure would chill legitimate Presidential decision-making is negligible. The court of appeals therefore correctly concluded that Petitioner's asserted generalized confidentiality interest is not "sufficient for a court to cast aside the [Select] Committee's exercise of core legislative functions." *Id.* at 53a.

B. The Request Serves A Valid Legislative Purpose

The court of appeals correctly determined that the Select Committee's request manifestly serves a "valid legislative purpose." *Mazars*, 140 S. Ct. at 2031. Congress's broad power of investigation is firmly established. The "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *Id.* (citation omitted). This "broad" and "indispensable" power "encompasses inquiries into the administration of existing laws, studies of pro-

posed laws, and surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them." *Id.* (cleaned up).

Congress's power to investigate nevertheless has limits: The Select Committee's inquiry must be "one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit." *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927). Thus, Congress "may not issue a subpoena for the purpose of law enforcement," nor is there "congressional power to expose for the sake of exposure." *Mazars*, 140 S. Ct. at 2032 (cleaned up).

This investigation easily meets these standards. Petitioner cannot and does not dispute that legislation "could be had" on the subjects of the Select Committee's inquiry. And the arguments that Petitioner does make are unavailing.

1. Petitioner asserts (Pet. 19-20) that the Select Committee "fails to identify anything" in the records "that would advance or inform a valid legislative purpose or specific legislation" regarding the events of January 6. But the Select Committee cannot "identify anything" in communications it has yet to see. In any event, the records could inform numerous pieces of potential legislation. For example, the investigation may yield recommendations about how Congress should: (1) reform and amend the Electoral Count Act of 1887; (2) enhance the legal consequences for a refusal by the Executive Branch to timely and appropriately respond to attacks on Congressional proceedings; (3) enact additional laws or enhance existing laws to prevent Executive Branch officials from enlisting the Department of Justice, or other federal resources, to

support false claims about an election; or (4) revise federal law to deter Executive Branch officials from pressuring state officials to engage in election fraud. *See* 167 Cong. Rec. E1151 (Oct. 27, 2021) (remarks by Vice Chair Liz Cheney adopted by Chairman Thompson); *see also* Pet. App. 60a (listing other potential legislation).

2. Petitioner further contends (Pet. 20) that the Select Committee's request is improper because "an investigation into alleged claims of wrong-doing is a quintessential law enforcement task." As this Court's cases recognize, however, Congress often legislates by probing past illegality to determine why it occurred, how it could be prevented, whether more resources should be allocated to prevention, and whether and how existing laws should be changed. *See, e.g.*, *Sinclair v. United States*, 279 U.S. 263, 294-95 (1929); *Hutcheson v. United States*, 369 U.S. 599, 617-22 (1962); *McGrain*, 273 U.S. at 176-77. For example, numerous statutes emerged from Congress's investigation of Presidential wrongdoing in Watergate, including the Ethics in Government Act. *See* Michael A. Fitts, *The Legalization of the Presidency: A Twenty-Five Year Watergate Retrospective*, 43 St. Louis U. L.J. 725, 730 (1999). And Congress's investigation into the Teapot Dome scandal spurred passage of several reforms, including the Federal Corrupt Practices Act of 1925. *See* James Sample, *The Last Rites of Public Campaign Financing?*, 92 Neb. L. Rev. 349, 363 (2013).

Petitioner nevertheless attempts (Pet. 17, Pet. Supp. Br. 1-2) to impugn the Select Committee's motives by citing public comments by certain of its Members. But this Court has long recognized that "[s]o

long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power." *Barenblatt v. United States*, 360 U.S. 109, 132 (1959); *see also Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 508 (1975); *Watkins v. United States*, 354 U.S. 178 (1957); *Wilkinson v. United States*, 365 U.S. 399, 412 (1961). The cited comments do not detract from the fact that the Select Committee is pursuing legislative recommendations that could be informed by the records at issue.

3. Petitioner's contention that the request does not satisfy the requirements of the Presidential Records Act (Pet. 16) is likewise misguided. The records at issue plainly "contain information that is needed for the conduct of [the Select Committee's] business." 44 U.S.C. § 2205(2)(C). To properly investigate the events of January 6, the Select Committee requires Petitioner's records. Petitioner led a months-long effort to overturn the Presidential election, following extensive efforts to undermine it. Ultimately, he tried to enlist the Vice President to improperly reject States' electoral votes; summoned supporters to Washington, D.C., for a "wild" event on January 6; and delivered a speech immediately preceding the attack that encouraged the crowd to march to the Capitol, insisting he could remain President and using rhetoric such as "We fight like Hell" and "you'll never take back our country with weakness." Pet. App. 7a. Under such circumstances, any inquiry that did not insist on examining Petitioner's documents and communications would be grossly insufficient.

Further, the information contained in the requested records is not "otherwise available." 44 U.S.C.

§ 2205(2)(C). As the court of appeals explained, Petitioner has made "no showing that the [Select] Committee already has access to information about what administration officials knew about the January 6th attack, when they knew it, what actions they took in response, and how their actions might have affected the events of that day." Pet. App. 62a. Petitioner's proposed requirement that the Select Committee "tr[y] and fail[]" to obtain the information from other sources (Pet. 16) finds no support in the language of the Presidential Records Act, and there is no other viable source available to the Select Committee. The set of White House documents at issue is exclusively in the custody of the Archivist. 44 U.S.C. §§ 2201(2), 2202.

4. Petitioner's allegation (Pet. 7, 22) that H. Res. 503 "never discusses the authority to investigate the Executive Office of the President" is flatly wrong. The Resolution incorporates by reference House Rule XI, which expressly authorizes the Select Committee to obtain documents from the President. *See* House Rule XI.2(m)(3)(D).

5. Petitioner argues (Pet. 18) that the Select Committee's request is "divorced" from its legislative function. But as the court of appeals correctly observed, Petitioner has made "no claim that *the documents at issue in this appeal* are not relevant to the Committee's purpose or that a request capturing those documents is overbroad." Pet. App. 63a (emphasis added). Nor can he: "All of the documents currently at issue pertain to presidential activities on or around January 6th, or surrounding the election and its aftermath." *Id.* Moreover, the Executive Branch, to which the request is made, and whose records (not Petitioner's) are sought, agrees.

To the extent Petitioner contends that requested documents not currently at issue could be irrelevant to the Select Committee's legislative purpose, his claim is not ripe, and may never ripen. *See* Pet. App. 63a-64a. In any event, any such future claim is likely to fail. It is reasonable for the Select Committee to reach back to April 2020, when Petitioner began to allege that the election would be fatally marred by voter fraud. *See* p. 4, *supra*. The Select Committee needs information relating to various individuals involved in the messaging during that period to determine when and how the seeds for the January 6 attack on our democracy were planted, which may aid Congress's consideration of remedial legislation.

Likewise, contrary to Petitioner's argument (Pet. 18), the Select Committee reasonably seeks documents and communications within the White House on January 6 relating to Petitioner, other individuals, and government agencies. That request is specific to the date of the attack. Moreover, the listed individuals and agencies each had a reported connection to the January 6 attackers, were involved in "Stop the Steal" messaging as January 6 approached, were serving in Legislative Branch positions the day it was attacked, were present in the White House on or before January 6 and were likely to have engaged with Petitioner and other senior leaders who reacted to the attack, or had security-related roles related to the attack. The scope of the Select Committee's inquiry simply reflects the unprecedented nature of the attack on Congress, and the need not to lodge an underinclusive request.

C. The Request Satisfies All Of Petitioner's Proposed Separation-Of-Powers Tests

Petitioner contends that the Select Committee's request fails various heightened standards, most prominently the test announced by this Court in *Mazars*. But the tests Petitioner presses do not govern here, and in any event the Select Committee satisfies them.

1. In *Mazars*, this Court established a four-factor test for analyzing a Congressional subpoena for a sitting President's personal information. The Court held that such a request raises "significant separation of powers issues" because "Congress and the President have an ongoing institutional relationship as the opposite and rival political branches established by the Constitution." 140 S. Ct. at 2033-34, 2036 (cleaned up). That relationship "necessarily inform[ed]" the analysis of the subpoena. *Id.* at 2026. And the Court emphasized that the subpoenas at issue sought a sitting President's private papers, which the Court thought could pose a "heightened risk" of impermissible purpose because of their "personal nature" and "less evident connection to a legislative task." *Id.* at 2035.

This case could hardly be more different. Here, the "clash between rival branches of government"—and the accompanying "significant" separation-of-powers concerns—are absent. The request was made after Petitioner left office and seeks official records relating to Petitioner's communications and actions while President, which are in the complete "ownership, possession, and control" of the United States. 44

U.S.C. §§ 2201(2), 2202. Petitioner cannot "transplant[]" the *Mazars* standard "root and branch" to the Select Committee's distinct request for a former President's official documents. 140 S. Ct. at 2033.

To the extent Petitioner suggests in passing (Pet. 5) that the request must satisfy *United States v. Nixon*, 418 U.S. 683 (1974), that test does not apply either. *Nixon* involved a privilege claim by a sitting President, and the Court evaluated whether Congress had a "demonstrated, specific need" for the requested records. *Id.* at 713. Because Petitioner is no longer President, the analysis in *GSA* controls.

2. In any event, as the district court and the court of appeals held, all the tests on which Petitioner relies are satisfied here.

All four of the "special considerations" identified by this Court in *Mazars* weigh in favor of the Select Committee. *First*, Congress's legislative purpose here "warrants" the involvement of the President's papers. *Mazars*, 140 S. Ct. at 2035. As explained above, the Select Committee seeks to identify and examine the causes of the January 6 attack—and the disruption of Congress's constitutional duty to count the electoral college votes—to enact legislation relating to, for example, the Presidential election process and to ensure future peaceful transfers of power. *See* pp. 21-23, 24-29, *supra*. To do so, the Select Committee needs to know what Petitioner, his advisers, and others close to him knew relating to the disruption of the peaceful transfer of power, when they knew it, what actions they took (or did not take) in response, and how their actions influenced the attack. The Select Committee has not been able to fully obtain that information from any other source. *See* pp. 27-28, *supra*.

Second, the Select Committee's request is tailored to what is "reasonably necessary" to serve its legislative purpose. *Mazars*, 140 S. Ct. at 2036. The requests are expressly connected to the events of January 6, and the information Petitioner and those surrounding him knew about the election outcome and the transfer of power. *See* C.A. App. 33-34. And Petitioner's contention (Pet. 21) that the request is too broad is wrong. *See* pp. 24-29, *supra*. In any event, all the documents in the tranches currently at issue pertain to the events of January 6, the post-election events leading up to January 6, and the Presidential communications and activities related to those events. Petitioner does not, and could not reasonably, claim that those documents are irrelevant to the Select Committee's purpose.

Third, the Select Committee has "adequately" supported its request with "detailed and substantial" evidence of its legislative objectives. 140 S. Ct. at 2036. These objectives are plainly articulated in the authorizing resolution, its letter to the Archivist requesting the documents at issue, and various public statements. *See* pp. 7-9, 24-29, *supra*.

Fourth, Petitioner cannot plausibly claim that the Archivist's compliance with the Select Committee's request will unduly "burden[]" the Office of the President. *Mazars*, 140 S. Ct. at 2036. Petitioner contends (Pet. 22) that the request will burden *him* "in reviewing all responsive documents," but he fails to explain why such a burden matters in the separation-of-powers analysis. It does not.

Further, the court of appeals correctly determined that the Select Committee has satisfied even the demanding standard applicable to a privilege assertion by a sitting President: The Select Committee has a

"demonstrated, specific need" for the Presidential records at issue. *Nixon*, 418 U.S. at 713. It cannot obtain this information through other means. *See* pp. 27-28, *supra*. If the Select Committee does not receive the requested records, Congress will be hamstrung in its ability to legislate effectively to prevent a similar future assault on American democracy.

Unsatisfied with the standards this Court has already set forth, Petitioner now proposes (Pet. 27) a new test for challenges like this one, in which a court weighs the incumbent's determination, the breadth of the requests, the time the former President has been out of office, and whether the documents will remain confidential. Petitioner never asked the court of appeals to adopt such a test; as the court observed, for example, Petitioner never meaningfully argued that the timing of the request weighed against its validity. Pet. App. 69a-70a. In any event, the Select Committee's request would satisfy even Petitioner's latest proposed test: Petitioner's interest in confidentiality—even if somehow heightened by the timing of the request—is easily overcome by the Select Committee's urgent need for documents bearing on the attack on Congress at the end of Petitioner's Presidency.

3. Accepting Petitioner's arguments would result in a remarkable expansion of a former President's interests—at the expense of the incumbent President's Article II authority—contravening not only *GSA*, but also the Constitution. The Constitution's text and structure reflect the Founders' rejection of monarchy and perpetual power. As Alexander Hamilton explained, because the President "is to be elected for *four* years … there is a total dissimilitude be-

tween *him* and a king of Great-Britain, who is an *hereditary* monarch, possessing the crown as a patrimony descendible to his heirs forever." The Federalist No. 69, at 414 (Alexander Hamilton) (C. Rossiter ed., 1961); *see also* The Federalist No. 37, at 227 (James Madison). This original understanding is reflected in an early circuit decision by Chief Justice Marshall, in which he distinguished the President from the British monarch by explaining that it is an "essentia[l] ... difference" in our system that the President "is elected from the mass of the people, and, on the expiration of the time for which he is elected, returns to the mass of the people again." *United States* v. *Burr*, 25 F. Cas. 30, 34 (No. 14,692d) (C.C.D. Va. 1807).

Petitioner's separation-of-powers arguments would flout the historical understanding of the Presidency, and the court of appeals correctly rejected them.

D. The Court Of Appeals Correctly Held That The Equitable Factors Weigh Against Petitioner

Petitioner also contends that the court of appeals erred when exercising its equitable discretion, but such exercise receives highly deferential review. *See Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018). The court of appeals correctly exercised its discretion in concluding that Petitioner has not shown "that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 1944 (citation omitted).

1. Petitioner notes that disclosure cannot be undone. But he cannot show that disclosure would cause

irreparable *harm to the Presidency*, which is what matters in a separation of powers dispute. *See Rubin v. United States*, 524 U.S. 1301, 1301-02 (1998) (Rehnquist, J., in chambers). His contention (Pet. 30) that disclosure will forever "shatter" executive privilege is undercut by the fact that the privilege has always been qualified. And his unsupported claim that disclosure will cause irreparable harm to the Executive Branch is belied by the determination of the President—the person best suited to make that determination—that it will not.

2. Petitioner argues (Pet. 32) that "the public interest is served by injunctive relief because the Republic itself has a strong interest in the effective operation of the Executive Branch without the President's political interests interfering in that operation." As discussed, *see* pp. 22-23, *supra*, Petitioner's allegations of improper political motives are unsupported. At any rate, the Constitution itself entrusts Executive Branch decision-making to a President elected through the political process. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010).

Weighing against Petitioner's claim of harm is the judgment of the Legislative and Executive Branches, each of which has independently determined that disclosure of these documents is in the best interests of the United States. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978). Further, the court of appeals correctly found "[t]hat public interest is heightened when, as here, the legislature is proceeding with urgency to prevent violent attacks on the federal government and disruptions to the peaceful transfer of power." Pet. App. 74a.

III. At A Minimum, This Court Should Hear The Case On An Expedited Basis

If this Court nonetheless believes that the decision below warrants its review, the Congressional Respondents respectfully request that the case be resolved expeditiously. The Select Committee urgently needs the documents at issue to inform its forthcoming hearings and reports. The Select Committee's authorization will expire on January 3, 2023, and each passing day handicaps the Select Committee's investigation, forcing it to proceed without the benefit of documents to which it is entitled. For these reasons and the reasons set forth in the motion for expedited consideration of the petition, if this Court grants certiorari, the Congressional Respondents respectfully request that the case be heard as early as the Court's February sitting.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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