No. 26-474

IN THE

Supreme Court of the United States

PETER K. NAVARRO,

Petitioner,

v.

UNITED STATES,

Respondent.

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

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BRIEF OF THE OVERSIGHT PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JEFFREY BOSSERT CLARK, SR.
Counsel of Record
JOSEPH E. SCHMITZ
THE OVERSIGHT PROJECT
211 North Union Street
Alexandria, VA 22314
(202) 279-1396
Jeff@itsyourgov.org

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

The Oversight Project is currently a Section 501(c)(4) nonprofit organization dedicated to holding government accountable to the people through investigation, education, and legal advocacy. Much of that work concerns government weaponization against citizens for political ends—including "Lawfare," the use of criminal and quasi-criminal process to punish political adversaries.

In September 2026, The Oversight Project announced its new in-house law firm (The Oversight Project Law Firm) to defend targets of Lawfare. (Our application for the new in-house law firm to operate under Section 501(c)(3) is underway.) Undersigned Counsel of Record has explained its purpose judged against Anglo-American legal history.[2] The Oversight Project also maintains DocDepot, a public archive of government records and secondary sources, from which this brief draws historical materials to assist the Court.

The Oversight Project has a direct interest in the question presented. The lawyers it employs and the clients it defends—including current and former

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and that no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made such a monetary contribution. Counsel of record for all parties received timely notice of *amicus curiae*'s intent to file this brief. *See* S. Ct. R. 37.2.

[2] *See* J. Clark, *The Right Finally Gets a Law Firm of Its Own*, AMERICAN MIND (Oct. 8, 2026), https://tinyurl.com/3ppcwn72.

Executive Branch officials—must be free to act on good-faith legal judgments about privilege and immunity without fear that an honest mistake will be branded a federal crime. Under the rule applied below, every such judgment is a wager, with a criminal conviction hanging in the balance.

SUMMARY OF ARGUMENT

Dr. Peter Navarro served four months in federal prison for "willfully" defaulting on a subpoena from the House Select Committee to Investigate the January 6th Attack on the United States Capitol. Pet.App.A-16–A-17. He believed that President Trump had invoked executive privilege over the testimony and documents the Committee demanded, as the President had "publicly directed Dr. Navarro to claim executive privilege in response to a prior subpoena" from another House panel. Pet.5. The jury never weighed that belief—because it was not allowed to do so. Pet.App.A-111. Under the D.C. Circuit's 1961 decision in *Licavoli v. United States*, 294 F.2d 207 (D.C. Cir. 1961), all that "willfully" requires is "a deliberate intention to do the act," *id.* at 209, so "a good-faith mistaken belief that executive privilege had been asserted was no defense." Pet.App.A-37.

That rule cannot be squared with Section 192's text, its history, or this Court's precedents. When Congress enacted the statute in 1857, an opponent warned that it would "punish equally the Cabinet officer and the culprit." CONG. GLOBE, 34th Cong., 3d Sess. 429 (1857) (remarks of Rep. Marshall). The word Congress used—"willfully"—is what keeps the two

apart. Yet the stubborn persistence of *Licavoli* has effaced the distinction.

First, *Licavoli* conflicts with this Court's construction of "willfully" in decisions both predating and postdating it. In a criminal statute, the word "generally means an act done with a bad purpose." *United States v. Murdock*, 290 U.S. 389, 394 (1933), *overruled in part by Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964). *Murdock* itself held that a defendant who withheld information from federal officers on a claim of privilege that the law had not yet "definitely settled" against him had a "right to have the question of absence of evil motive submitted to the jury." *Id.* at 396. The modern cases require proof that the defendant "acted with knowledge that his conduct was unlawful." *Bryan v. United States*, 524 U.S. 184, 192 (1998) (cleaned up). Neither *Sinclair* nor *Helen Bryan* holds otherwise (see below).

Second, text, structure, and history confirm the point. Congress placed "willfully" before "default" and withheld it from the companion offense of refusing to answer; *Licavoli* nevertheless treated that choice as meaningless. The 1857 debates reveal a Congress aiming at corruption, not at officers asserting the Executive's claims of right. And the Executive Branch has maintained for seventy years that Section 192 does not reach officials who withhold information on a presidential claim of privilege. *Licavoli* itself arose from a Senate rackets inquiry whose witness refused even to accept the committee's telegram. A rule fashioned for that culprit should not govern the President's advisers.

Third, any doubt must be resolved against the government. The rule of lenity requires as much. So

does the venerable maxim, which Justice Gorsuch recently listed among the "traditional legal presumptions," (see below) that a dubious statute is construed against its drafter—here, a Congress legislating to strengthen its own hand.

Fourth, the question is exceptionally important, and only this Court can answer it. Section 192 now reaches the President's closest advisers, where the separation of powers is at its apex. And this case implicates a question this Court has called "unprecedented": whether a former President's privilege yields to an incumbent's waiver (or possibly even to the incumbent's failure to assert the privilege when it is raised as a shield by a subpoena subject). *Trump v. Thompson*, 595 U.S. 1172, 142 S. Ct. 680, 680 (2022). Justice Kavanaugh explained that it does not, *id.* (Kavanaugh, J., statement respecting denial of application), and his view should be adopted and applied here. Dr. Navarro acted on that same view; *Licavoli* made his belief irrelevant. Such prosecutions will almost invariably arise in the singular D.C. Circuit, and judges on every side of that court's *en banc* divide in *United States v. Bannon* have said that only this Court can resolve *Licavoli*'s validity. The United States, for its part, withdrew from defending the conviction below. Pet.App.A-17. The petition should be granted.

ARGUMENT

I. *Licavoli* Cannot Be Reconciled with This Court's Settled Construction of "Willfully."

Licavoli holds that a witness "willfully makes

default" whenever he "deliberately and intentionally fails to respond to a subpoena," 294 F.2d at 208, and that because "evil motive or purpose" is not an element, advice of counsel does not "immunize that simple intention," *id.* at 209. The panel below held itself bound by that rule. Pet.App.A-38–A-39. But *Licavoli* was out of step with this Court's decisions when it was written, and it has only grown more isolated with every ensuing decade.

A. This Court Has Long Held That a Good-Faith Claim of Legal Right Negates Willfulness.

More than a generation before *Licavoli*, this Court explained that "willfully" often "denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental," but that "when used in a criminal statute, it generally means an act done with a bad purpose." *Murdock*, 290 U.S. at 394 (collecting authority).

Murdock is more than a definition. It is the closest analogue to this case in the United States Reports. Murdock refused to answer a revenue agent's questions, invoking a privilege against self-incrimination that this Court later held unavailable to him, and he was prosecuted for "willfully" failing to "supply such information." *Id.* at 392–93; *see United States v. Murdock*, 284 U.S. 141 (1931), *overruled by Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964). Because it had not been "definitely settled" when he refused that a witness "could not refuse to answer on account of probable incrimination under state law," the trial court could not "properly

tell the jury the defendant's assertion of the privilege was so unreasonable and ill founded as to exhibit bad faith." 290 U.S. at 396. He had a "right to have the question of absence of evil motive submitted to the jury." *Id.* That is the right *Licavoli* denies. And the law governing Dr. Navarro's claim was no more settled when he supposedly defaulted than was, in Murdock's day, the question whether fear of prosecution under state law justified silence before federal officers. This Court has described as "unprecedented" the questions whether and when a former President may protect privileged records from his tenure against an incumbent's waiver. *Thompson*, 142 S. Ct. at 680; *see* Part IV.B, *infra*. The district court declined to "wade into these judicially uncharted constitutional waters," Pet.App.A-45, and the panel "assume[d] without deciding" that testimonial immunity is valid and "can apply when invoked by a former President," Pet.App.A-8.

The cases that followed sharpened the point. This Court read "willfully" to require a bad purpose in criminal tax prosecutions, *Spies v. United States*, 317 U.S. 492, 497–98 (1943); *United States v. Bishop*, 412 U.S. 346, 360 (1973), and held that willfulness means "the 'voluntary, intentional violation of a known legal duty,'" so that a good-faith misunderstanding of the law negates willfulness "whether or not the claimed belief or misunderstanding is objectively reasonable," *Cheek v. United States*, 498 U.S. 192, 201–02 (1991). It required proof that a defendant charged with willful structuring "acted with knowledge that his conduct was unlawful." *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994). "As a general matter, when used in the criminal context, a 'willful' act is one undertaken with

a 'bad purpose,'" which means that "the Government must prove that the defendant acted with knowledge that his conduct was unlawful." *Bryan*, 524 U.S. at 191–92 (quoting *Ratzlaf*, 510 U.S. at 137).

The familiar rejoinder—that ignorance of the law is no excuse—misses the point. "The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system." *Cheek*, 498 U.S. at 199. But "willfully" is the word Congress uses to soften that rule. *See id.* at 200. And Dr. Navarro does not claim that he was unaware of Section 192. He claims that he honestly believed the President had invoked a privilege that made his putative default lawful and non-criminal—the same kind of claim of right that *Murdock* held must go to the jury. 290 U.S. at 396.

This Court's recent decisions point the same way. The Court "start[s] from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state." *Ruan v. United States*, 597 U.S. 450, 457–58 (2022) (cleaned up). In *Ruan*, because "a lack of authorization is often what separates wrongfulness from innocence," the government had to prove "that the defendant knowingly or intentionally acted in an unauthorized manner." *Id.* at 457–58, 468. Section 192 has the same structure: the absence of a lawful excuse is what separates contumacy from innocence.

B. Neither *Sinclair* nor *Helen Bryan* Supports *Licavoli*.

Licavoli rested on *Sinclair v. United States*, 279 U.S. 263 (1929), reasoning that "the doctrine laid

down in *Sinclair* applies also to a charge of willfully making default." 294 F.2d at 209. But *Sinclair* involved a flat refusal to answer questions—the offense Congress defined without the word "willfully." There, the Court rejected the defendant's contention that he "acted in good faith on the advice of competent counsel," because "[h]is mistaken view of the law is no defense." 279 U.S. at 299. *Watkins* and *Yellin* likewise involved refusals to answer. *Watkins*'s oft-quoted warning that "[a]n erroneous determination on his part, even if made in the utmost good faith, does not exculpate him" concerned pertinency, an element of the refusal offense. *Watkins v. United States*, 354 U.S. 178, 208 (1957); *see Yellin v. United States*, 374 U.S. 109, 123 (1963) (albeit holding, in protective fashion for the criminal defendant, that the committee had failed to comply with its own rule on executive sessions). That is no coincidence. This Court's statements that a mistake of law is no defense under Section 192—in *Sinclair*, *Watkins*, and *Yellin*—all arose under the separate clause (not at issue as to Dr. Navarro) that omits "willfully." *Licavoli* carried them over to the one clause that contains it, on the theory that "[t]he elements of intent are the same in both cases." 294 F.2d at 209. That is the core error made below distilled to a single sentence. *Sinclair*'s pertinency holding, moreover, did not survive *United States v. Gaudin*, 515 U.S. 506, 520–22 (1995).

Nor does *United States v. Bryan*, 339 U.S. 323 (1950) ("*Helen Bryan*"), support *Licavoli*. The question there was whether the government had to prove that a committee quorum was present, and the Court "discussed willful default only to address the narrow question on which it had granted certiorari." *United*

States v. Bannon, No. 22-3086, 2025 WL 1503223, at *6 (D.C. Cir. May 27, 2025) (Rao, J., dissenting from denial of reh'g en banc) ("*Bannon En Banc Order*"). The *Bryan* Court said that proof of service and an intentional failure to comply "made out a *prima facie* case of wilful default." 339 U.S. at 330. But a *prima facie* case is one the defendant may rebut, and the Court described the witness's words and conduct as "merely evidence from which a jury might infer an intent to default." *Id.* Far from declaring good faith irrelevant, the Court rejected the defense before it because the witness had shown not "even a modicum of good faith in responding to the subpoena." *Id.* at 332. *Helen Bryan* vindicated Congress's power to compel testimony. It did not hold that the word "willfully" protects no one.

II. Section 192's Text, Structure, and History Confirm That "Willfully" Separates the Cabinet Officer from the Culprit.

A. Congress Placed "Willfully" in the Default Clause Alone, and *Licavoli* Read It Out.

Section 192 defines two offenses. A summoned witness who "willfully makes default" commits one; a witness "who, having appeared, refuses to answer any question pertinent to the question under inquiry" commits the other. 2 U.S.C. § 192. *The adverb attaches to the first offense, not the second.* That contrast is as old as the statute. The 1857 Act punished a witness "who shall wilfully make default, or who, appearing, shall refuse to answer any question pertinent to the matter of inquiry." *In re Chapman*, 166 U.S. 661, 665

n.1 (1897) (quoting Act of Jan. 24, 1857, ch. 19, § 1, 11 Stat. 155). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (cleaned up). The presumption is stronger still when the variation appears within a single sentence.

The contrast is sensible. A refusal to answer happens face to face with the committee, after the witness knows what is demanded; it is, as *Licavoli* put it, "obviously in and of itself a willful act." 294 F.2d at 208. A default "might be due to many causes other than deliberate intention." *Id.* Some of those causes are claims of legal right—including an honest belief that the President has invoked a privilege that forbids compliance. Congress required willfulness for defaults because absence, unlike refusal, does not announce its own culpability.

Licavoli acknowledged the contrast and then drained it of meaning. It treated "willfully" as "a necessary adverb in defining defaults" only to screen out accidents, *id.*, and held that "[t]he elements of intent are the same in both cases," *id.* at 209. That reading turns *Russello* on its head. It also effectively renders as surplusage the statute's most important word. That an injury can be a crime "only when inflicted by intention" is "no provincial or transient notion," *Morissette v. United States*, 342 U.S. 246, 250 (1952); the criminal law excludes accidents without any adverb's help. *Ratzlaf* refused a materially identical invitation, cautioning that judges should hesitate to treat statutory terms as surplusage "in any

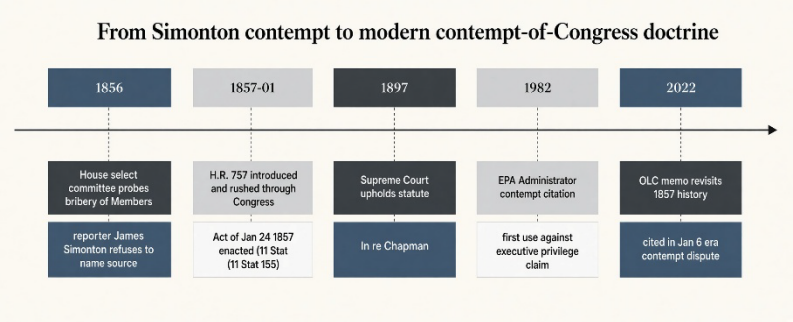
setting," and that such resistance "should be heightened when the words describe an element of a criminal offense." 510 U.S. at 140–41.

Judge Garcia asked why Congress would make it harder to convict a witness who stays away than one who appears and refuses, and concluded that the knowledge reading "encourages less-cooperative conduct." *Bannon En Banc Order*, 2025 WL 1503223 at *3 (Garcia, J., concurring in denial of reh'g en banc). The answer lies in how the two offenses work. "Section 192, like the ordinary federal criminal statute, requires a criminal intent—in this instance, a deliberate, intentional refusal to answer." *Quinn v. United States*, 349 U.S. 155, 165 (1955). And a refusal is punishable only if "the witness is clearly apprised that the committee demands his answer notwithstanding his objections." *Id.* at 166. A witness who refuses therefore does so after the committee has ruled on his claim of right. An absent witness receives no such ruling, which is why Congress demanded more before branding his absence a crime. Nor does a knowledge requirement reward evasion: a witness who stays away risks a jury's disbelief, and Congress retains both the accommodation process and civil enforcement. *See* Cong. Rsch. Serv., R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance* 8–9 (Mar. 27, 2019) ("CRS R45653"). What the requirement forbids is the conviction of a witness whose only error was an honest one.

B. History Confirms That Section 192 Was Aimed at the Culprit, Not the Cabinet Officer.

Section 192 began as an emergency measure. In 1857, a *New York Times* correspondent, James W. Simonton, refused to answer questions put by a House select committee investigating charges that Members had been bribed. *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 129–30 (1984) ("1984 OLC Op."); Cong. Rsch. Serv., RL34097, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure* 18 (May 12, 2017) ("CRS RL34097"). The committee's chairman, Representative Orr, introduced a bill "more effectually to enforce the attendance of witnesses," and it "*was rushed through Congress in less than a week*." 1984 OLC Op. at 130 (emphasis added); *see Chapman*, 166 U.S. at 665.

For the Court's aid, we have created the following graphic to show the evolution of Section 192 and disputes about it:



The debate is telling. The bill's sponsor explained that its "object" was, "where there was corruption in either House of Congress, to reach it," and when asked about its use to compel the disclosure of diplomatic secrets, he replied: "I can hardly conceive such a case." 1984 OLC Op. at 130 (quoting CONG. GLOBE, 34th Cong., 3d Sess. 431 (1857) (remarks of Rep. Orr)). An opponent, Representative Marshall, warned that the bill "proposes to punish equally the Cabinet officer and the culprit who may have insulted the dignity of this House by an attempt to corrupt a Representative of the people." *Id.* at 130 n.30 (quoting CONG. GLOBE, 34th Cong., 3d Sess. 429 (1857)). And supporters promised that the bill would remove contempt cases "from the passions and excitement of the Hall—where partisans may frequently, in political questions, carry into the measures of punishment their party hostilities." CRS RL34097, at 19 & n.138 (citing CONG. GLOBE, 34th Cong., 3d Sess. 427 (1857) (statement of Rep. Davis)).

Read as this Court reads it everywhere else, "willfully" answers Representative Marshall's concern. It confines the default offense to the culprit—the witness who knows he has no lawful excuse—and leaves an official who honestly asserts the Executive's privilege to accommodation, the political process, and civil enforcement. *Licavoli*'s reading does the opposite: it punishes equally the Cabinet (or other appointed Executive Branch) officer and the culprit. And it withholds from the jury the one question a jury is best suited to answer—what the accused actually believed.

Consider *Licavoli*'s own provenance. Peter Licavoli was a Detroit witness subpoenaed in 1958 by the Senate Select Committee on Improper Activities in

the Labor or Management Field, then pursuing an "inquiry . . . into racketeer and hoodlum infiltration into legitimate business and union enterprises." S. Rep. No. 85-2268, at 4 (1958). His lawyer told committee staff he doubted Licavoli would appear because he had been served while "awaiting sentence"; Licavoli refused to accept the committee's telegram; and he "failed to communicate in any manner with this committee." *Id.* at 2, 5. That is the culprit. The rule fashioned for him now governs a former Assistant to the President, regularly working mere yards away from the Chief Executive, who believed that the President he advised had invoked executive privilege.

C. The Executive Branch Has Long Read Section 192 Not to Reach Officials Who Withhold on a Presidential Claim of Privilege.

Executive practice points the same way. In 1956, Deputy Attorney General William P. Rogers told a House subcommittee that, where the President claims privilege, the contempt statute is "inapplicable to the executive departments." 1984 OLC Op. at 129 (citation omitted). In 1984, the Office of Legal Counsel concluded that the statute "was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President's claim of executive privilege in this context." *Id.* at 102. Congress itself once understood as much: during the Senate's 1886 confrontation with President Cleveland over documents withheld by his Attorney General, even Senators who insisted on the Senate's right to

the papers recognized that if the President ordered them withheld, "there is no remedy." *Id.* at 131 (quoting 17 CONG. REC. 2800 (1886) (remarks of Sen. Logan)). Indeed, the Department declined to pursue contempt prosecutions of the EPA Administrator Anne Gorsuch in 1982–83, of a former White House Counsel and the White House Chief of Staff in 2008, and of the Attorney General in 2012. CRS R45653, at 6–9.

That position held firm even as Dr. Navarro was prosecuted and imprisoned. On May 16, 2024—while he was serving his sentence—the Office of Legal Counsel advised the Attorney General that "the Executive Branch has long held the position that the criminal contempt of Congress statute, 2 U.S.C. §§ 192, 194, does not apply to Executive Branch officials who do not comply with a congressional subpoena based on a presidential assertion of executive privilege." Memorandum from Christopher Fonzone, Assistant Att'y Gen., Off. of Legal Counsel, to Merrick Garland, Att'y Gen., Re: *The President's Executive Privilege Assertion and the Criminal Contempt of Congress Statute* 1 (May 16, 2024).

Nor does the privilege that position protects lapse when an Administration leaves office. It survives the individual President's tenure. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977) ("*Nixon v. GSA*"); *accord* Pet.App.A-6. Yet Dr. Navarro was prosecuted by a successor Administration that had refused to support the privilege he asserted on his former President's behalf. Pet.App.A-12. Whether a successor may override his predecessor's privilege is the serious question this Court reserved in *Thompson*. *See* Part IV.B, *infra*.

The line between a lawful withholding and a federal crime depends on legal questions—whether a privilege was invoked, by whom, with what reach, and whether a successor may override it—on which the political branches and the courts have long disagreed. A witness who honestly believes he stands on the lawful side of that line lacks the "bad purpose" that "willfully" requires. Nevertheless, under *Licavoli*, his belief is irrelevant even if it tracks the Justice Department's own published opinions. The *Bannon* trial judge saw the problem, remarking that "[i]f this were a matter of first impression, the Court might be inclined to agree with defendant and allow this evidence in." Order at 3, *United States v. Bannon*, No. 1:21-cr-00670 (D.D.C. Apr. 6, 2022), ECF No. 49 (quoting hearing transcript). *Licavoli* left him no choice.

III. Any Doubt Must Be Resolved Against the Government—and Against the Lawmaker.

If text, structure, and history left any doubt that "willfully makes default" requires knowledge of unlawfulness, the rule of lenity would resolve it in Dr. Navarro's favor. *Cleveland v. United States*, 531 U.S. 12, 25 (2000); *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). *Licavoli* resolved every doubt against the accused—the opposite of what lenity commands.

An older maxim points the same way. Congress wrote Section 192, in part, to strengthen its own hand: the 1857 Act was a select committee's measure, "enacted as an expedient to aid a specific investigation." 1984 OLC Op. at 130. Today the

statute is wielded chiefly in Congress's disputes with the Executive Branch. When a lawmaker drafts a penal statute in its own cause, its doubtful words (or doubtful constructions thereof) should be construed against the drafter. In *United States v. Heth*, 7 U.S. (3 Cranch) 399 (1806), Justice Johnson invoked "two well known rules of construction": a court's choice between competing readings "ought to be consistent with the suggestions of natural justice, and . . . the words should be taken most strongly 'contra proferentem.'" *Id.* at 409 (opinion of Johnson, J.). Justice Paterson agreed that "the words of a statute, if dubious," ought to be taken "against the law makers." *Id.* at 413 (opinion of Paterson, J.).

The maxim is not a relic. Justice Gorsuch recently listed it, alongside lenity and *nemo iudex*, among the "traditional legal presumptions and interpretive principles" with which *Chevron* deference sat in "tension." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 435 n.5 (2024) (Gorsuch, J., concurring).[3] The 1857 Congress itself honored *nemo iudex* by providing that contempt cases could be tried in the courts rather than inside its own chambers. *Licavoli* honors neither principle. It construes the lawmaker's statute in the lawmaker's favor, and then forbids the jury to ask whether the accused knew he was breaking it.

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[3] The Founders likewise treated guarding against overreach as a rule of construction: the Bill of Rights was proposed "in order to prevent *misconstruction* or abuse of [the Constitution's] powers." Preamble to the Bill of Rights (1789) (emphasis added); *see* J. Schmitz, *The Forgotten Preamble: Introduction to the Bill of Rights Gives More Meaning to the Tenth Amendment*, FYI, American Legislative Exchange Council (Apr. 24, 1996).

At a minimum, constitutional avoidance forecloses *Licavoli*'s reading where, as here, it would criminalize an official's good-faith effort to honor a presidential claim of privilege. When one plausible reading of a statute raises serious constitutional doubts and another does not, the Court adopts the latter. *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005). Punishing an adviser who honestly believes the President has invoked privilege, without regard to that belief, would burden the President's ability to claim privilege at all—the concern that led the Executive Branch to conclude that the statute "could not constitutionally be applied" in that setting. 1984 OLC Op. at 102. The doubts deepen when a former President's claim meets an incumbent's waiver—the scenario that raises the "serious and substantial concerns" this Court identified in *Thompson*, 142 S. Ct. at 680. A knowledge-of-unlawfulness requirement avoids the collision.

IV. The Question Is Exceptionally Important, and Only This Court Can Answer It.

A. Section 192 Now Reaches the President's Closest Advisers, Where the Separation of Powers Is at Its Apex.

For 125 years, Congress never invoked the statute against a presidential assertion of privilege. 1984 OLC Op. at 131; *see also* graphical timeline above. That era has ended. The Select Committee's referrals led to the convictions of two former advisers to President Trump. *See United States v. Bannon*, 101 F.4th 16 (D.C. Cir. 2024), *vacated and remanded*, 146 S. Ct. 2155 (2026); Pet.App.A-2–A-41 (affirming Dr.

Navarro's conviction). And there is no guarantee that the next referrals will be confined to one party. Every Administration's advisers receive subpoenas, and every one of them must decide whether the President has invoked a privilege and what it covers.

Those decisions arise at the volatile intersection of Congress's investigative authority and the Executive's confidentiality interests. This Court has called the presidential communications privilege "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Trump v. United States*, 603 U.S. 593, 613 (2024) (quoting *United States v. Nixon*, 418 U.S. 683, 708 (1974)). It has held that an Act of Congress "may not criminalize the President's actions within his exclusive constitutional power," and that "[n]either may the courts adjudicate a criminal prosecution that examines such Presidential actions." *Id.* at 609. Yet a Section 192 prosecution of a presidential adviser requires a court and jury to examine what the President did, and did not, decide.

In the wake of the monumental immunity decision in *Trump v. United States*, surely a ripe occasion for this Court to construe Section 192 anew arises, in which this Court can consider whether *Licavoli* was ever correct—or, even if it once was, whether it remains so.

This case is a prime example of why the action we call for presents a crying need for certiorari. The panel rejected Dr. Navarro's separation-of-powers objection because "[n]o such clash occurred here": the district court "did not clearly err in finding as a matter of fact that neither President Trump nor a designee invoked executive privilege." Pet.App.A-21. Whether the

President invoked privilege thus became the decisive fact—and under *Licavoli*, Dr. Navarro's understanding of that fact was cast aside as legally irrelevant. As the Office of Legal Counsel warned, if one House "could make it a crime simply to assert the President's presumptively valid claim, even if a court subsequently were to agree that the privilege claim were valid, the exercise of the privilege would be so burdened as to be nullified." 1984 OLC Op. at 102. *Licavoli* goes further still: it makes the honesty of the assertion irrelevant. That strict liability rule applied to legal mistakes threatens to chill the legitimate assertion of privilege by every Executive Branch official, regardless of the President he serves.

B. This Case Implicates the Serious Constitutional Question Reserved in *Trump v. Thompson*, Which Justice Kavanaugh Answered Correctly.

This prosecution also rests atop a constitutional question this Court has already flagged. Three weeks before the Select Committee subpoenaed Dr. Navarro, this Court declared that "[t]he questions whether and in what circumstances a former President may obtain a court order preventing disclosure of privileged records from his tenure in office, in the face of a determination by the incumbent President to waive the privilege, are unprecedented and raise serious and substantial concerns." *Thompson*, 142 S. Ct. at 680. The Court instructed that the D.C. Circuit's "discussion . . . concerning President Trump's status as a former President must . . . be regarded as nonbinding dicta." *Id.*

Justice Kavanaugh explained why the question is so serious—and how it should be answered. "A former President must be able to successfully invoke the Presidential communications privilege for communications that occurred during his Presidency, even if the current President does not support the privilege claim. Concluding otherwise would *eviscerate* the executive privilege for Presidential communications." *Id.* (Kavanaugh, J., statement respecting denial of application) (emphasis added). The privilege "cannot fulfill its critical constitutional function unless Presidents and their advisers can be confident in the present and future confidentiality of their advice." *Id.* at 681 (cleaned up). Were it "subject to the absolute control of a subsequent President who could be a political opponent of a former President," "the consequences for the Presidency would be severe." *Id.*

Justice Kavanaugh is right, and his view should be followed. It flows from this Court's holding that a former President "may also be heard to assert" the privilege, *Nixon v. GSA*, 433 U.S. at 439, which exists "for the benefit of the Republic," *id.* at 449 (citation omitted). An incumbent's views may bear on the weight of his predecessor's claim. *Id.* But a privilege whose weight a successor may influence is not one he may extinguish—least of all by prosecuting the advisers who honor it.

This case shows the danger. Dr. Navarro told the Committee in writing that "President Trump has invoked Executive Privilege in this matter; and it is neither my privilege to waive or Joseph Biden's privilege to waive." Pet.App.A-114. On February 28, 2022, the Deputy White House Counsel informed him

that President Biden had "decided not to assert executive privilege." Pet.App.A-12. The panel then found no interbranch conflict because Congress and the incumbent Executive were "entirely in accord." Pet.App.A-25. That treats the successor's view as the only Executive view that counts—the premise Justice Kavanaugh rightly rejected.

Licavoli turns that open question into a criminal trap. A former adviser who honors his former President's claim over a successor's objection must answer, at his peril, a question this Court has called "unprecedented"—and the successor's Justice Department decides whether to prosecute him if he guesses wrong. His belief that the privilege survived the change of Administrations is "not a defense," Pet.App.A-111, though it tracks the view of a Member of this Court. That is the "absolute control of a subsequent President" that Justice Kavanaugh warned against, achieved through the criminal law. It will chill the very "full and frank deliberations" the privilege exists to protect. *Thompson*, 142 S. Ct. at 681 (Kavanaugh, J.). The Court need not resolve the *Thompson* question to grant review. But it should not let *Licavoli* answer that question by default.

C. The D.C. Circuit Has Said, from Every Side, That Only This Court Can Fix *Licavoli*.

The question will not percolate. Section 192 prosecutions of Executive Branch officials most often arise in the District of Columbia, which is "why a circuit split is unlikely to occur." Pet.24. *Licavoli* binds every panel of the D.C. Circuit, and it dictated the

result below: the panel held that "adhering to that binding precedent was not error." Pet.App.A-39.

Judges on every side of that court's *en banc* divide agree that the answer must come from this judicial body alone. Judge Katsas acknowledged that this Court's willfulness decisions "cast significant doubt on *Licavoli*," that the issue raises "*questions that are troubling, important, and likely to recur*," and that "any problematic overbreadth is something that only the Supreme Court can fix." *Bannon En Banc Order*, at *1 (Katsas, J., statement respecting denial of reh'g en banc) (emphasis added). Judge Garcia, joined by three colleagues, defended *Licavoli* but agreed that "if there are any doubts about the proper interpretation of 'willful' in this statute, they are for the Supreme Court to resolve." *Id.* at *2 (Garcia, J., concurring in denial of reh'g en banc). And Judge Rao, joined on this point by Judges Henderson and Walker, concluded that "*Licavoli* cannot be reconciled with the text or structure of section 192." *Id.* at *7 (Rao, J., dissenting). When a precedent's defenders and critics all agree that only this Court can settle it, the case for review is compelling.

This case is the right vehicle. This Court's disposition of the *Bannon* petition—granting, vacating, and remanding "for further consideration in light of the pending motion to dismiss the indictment"—did not decide the question. *Bannon v. United States*, 146 S. Ct. 2155 (2026); *see* Pet.4. Here, by contrast, the question was preserved and decided: the courts below held that "a good-faith mistaken belief that executive privilege had been asserted was no defense," Pet.App.A-37, and the panel affirmed on the strength of *Licavoli*, Pet.App.A-38–A-39. It did so

although the government had moved to strike its own brief because it was "no longer taking the same position as the prior administration in this case." Pet.App.A-17. A conviction that no party defended below should not rest on a precedent that only this Court can reconsider.

* * *

In 1857, Congress was warned that its new statute would "punish equally the Cabinet officer and the culprit." Congress enacted the sovereign's answer in a single word—"willfully." Give that word its settled meaning. Return to the jury the question Congress properly and wisely left for it—whether the accused knew he had no lawful excuse. And retire a rule fashioned for a non-governmental culprit witness, who would not even accept a Senate committee's telegram, before it is turned against the next President's advisers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JEFFREY BOSSERT CLARK, SR.
Counsel of Record
JOSEPH E. SCHMITZ
THE OVERSIGHT PROJECT
211 North Union Street
Alexandria, VA 22314
(202) 279-1396
Jeff@itsyourgov.org

Counsel for Amicus Curiae
The Oversight Project

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