No. 23A1129

IN THE SUPREME COURT OF THE UNITED STATES

STEPHEN K. BANNON,
Applicant,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR CONTINUED RELEASE PENDING APPEAL

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INTRODUCTION

The Application seeks to maintain the status quo pending further appeals. Judge Walker would have granted that relief so Mr. Bannon would not have to serve his entire sentence before his appeals are complete, even though Judge Walker had joined the panel opinion concluding that *Licavoli v. United States*, 294 F.2d 207 (D.C. Cir. 1961), remained binding. As Judge Walker explained, Mr. Bannon has nonetheless demonstrated a "substantial question" regarding *mens rea* in 2 U.S.C. § 192. Ex.A.4 (Walker, J., dissenting).

Unlike in *Navarro*, Mr. Bannon has preserved his *mens rea* arguments. Despite the government's attempt to cast Mr. Bannon's actions as "total noncompliance," Opp.2, his lawyer was in timely contact with the Committee (*the same day as the subpoena return date and a week before his scheduled testimony*) and—in DOJ's own words—engaged in "a back-and-forth with the Committee" over privilege issues. Opp.10.[1] Mr. Bannon's lawyers even stated they could move ahead once the privilege dispute was resolved and offered to have it addressed in a civil lawsuit. But in *Navarro*, the defendant had not "provide[d] an explanation" or "communicate[d] with the Committee." Response in Opp. 7, *Navarro v. United States*, No. 23A843 (Mar. 18, 2024).

[1] As the government ultimately concedes, President Trump *did* invoke executive privilege when Mr. Bannon "first received the subpoena"—a copy of the letter is attached. *See* Ex.G.

As it did in the *McDonnell* case, the Court should grant the Application and maintain the status quo, especially given the serious separation-of-powers concerns with the D.C. Circuit's precedent.

REPLY ARGUMENT

I. The Relevant Standard.

The government claims that 18 U.S.C. § 3143(b)'s phrase "likely to result" in reversal or a new trial requires a likelihood of discretionary review because Mr. Bannon lost at the D.C. Circuit. Opp.4, 16–17. The government cites no decision that has ever adopted that view, however. Instead, it seems to argue that every circuit court was wrong in holding that this statutory prong does *not* require any estimation of the probability of prevailing. *Compare* Opp.35, *with* App.16–17 (collecting sources).

The government seems to suggest that the "likely to result" clause changes meaning once the defendant has lost at the circuit merits stage. But that view is directly at odds with the text of the statute. Section 3143(b)(1) *expressly* includes those who have already lost on the merits at the circuit stage. *See* § 3143(b)(1)(B) (covering movant who has "filed a … petition for a writ of certiorari"). Yet the test remains exactly the same. Mr. Bannon raised this point in his Application, but the government has no response.

The government's attempt to tack on extra requirements—i.e., a likelihood of a certiorari grant and reversal—also contradicts its prior

statement to this Court that § 3143(b) provides the only relevant factors for bail pending appeal. App.17 (quoting SG's filing in *McDonnell*). The government can't have it both ways.

The government's purported authority for those additional requirements are two in-chambers opinions addressing bail, which looked to the likelihood of a certiorari grant. Opp.17. But—as the Application explained, and the government does not dispute—those cases pre-date the Bail Reform Act of 1984, this Court has not cited them in forty years, and they were superseded by the Bail Reform Act itself, as other courts have found, App.17–18 n.4.[2]

The government contends its view must be correct because otherwise an applicant could "merely … mak[e] an argument for reversal of longstanding precedent of this Court" and be entitled to release. Opp.5. The government overlooks, of course, that an applicant must separately satisfy the "substantial question" prong, and an argument based solely on overturning long-established precedent would perhaps not meet that separate requirement. Indeed, the government seems to contend its position is understandable only if the statute's "substantial" requirement "were deleted" from the text. Opp.34.

[2] The government also cites an in-chambers opinion from 1988 issued by Chief Justice Rehnquist denying bail, Opp.3, but the applicant there had numerous different convictions with terms of imprisonment, and he could not show that all of them raised substantial questions that would likely result in a new trial or reversal, which required the denial of bail under settled principles, *see Morison v. United States*, 486 U.S. 1306 (1988). There is no such concern for Mr. Bannon, as both his convictions raise the same substantial question.

This Court interprets the statute as-is, not as the government "imagin[es]" it, with critical text deleted. *Id.*

Even though the D.C. Circuit panel rejected Mr. Bannon's arguments, he still shows a substantial question, as Judge Walker explained below.

II. There Is a Substantial Question Regarding the Meaning of "Willfully" In Section 192.

The government contends there was no need for Congress to include "willfully" in the second prong of § 192, Opp.21, but that entirely fails to explain why Congress *did* put it for the first prong, which is at issue here. Indeed, Congress recognized that the "willfully" requirement in § 192 would itself preclude criminalizing recipients who invoke a good-faith basis. Congress rejected the need for an express "exception" in § 192 for matters like marital or attorney-client privilege because "a party in either of those relations could not willfully make default" by standing on the privilege. Cong. Globe, 34th Cong., 3d Sess., 441 (1857). That fully accords with this Court's interpretation of "willfully" both in general and specifically in § 192, as explained next.

A. This Court's Rule on Willfulness in Criminal Statutes.

The government disputes that this Court has a uniform rule on interpreting "willfully" in the criminal context because some opinions have framed it as a "general" or "typical" interpretation. Opp.22. But those qualifiers merely acknowledge that "[w]here willfulness is a statutory condition of *civil*

liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 & n.9 (2007) (emphasis added). But "[i]t is different in the criminal law. When the term 'willful' or 'willfully' has been used in a criminal statute, *we have regularly read* the modifier as limiting liability to knowing violations." *Id.* (emphasis added).

At best, the government has identified one—just one—case *ever* where this Court construed "willfully" or "willfulness" in a specific criminal statute to mean only "intentionally" or "deliberately." Opp.23 (citing *Browder v. United States*, 312 US. 335 (1941)). Even that case is distinguishable because the relevant statutory requirement—"willfully and knowingly"—is one that the government itself says still "requires knowledge of unlawfulness" in other contexts. Opp.24 n.8. The list of supporting examples the government can muster is so short that it resorts to citing the Model Penal Code. Opp.23.

At the very least, the extraordinary weight of this Court's authority still remains against *Licavoli*. Again, Mr. Bannon need only demonstrate that the issue is "substantial," not that he will absolutely prevail. App.15–17.

B. This Court's Opinions on Section 192 Strongly Undercut *Licavoli*.

The government's theory seems to be that § 192 is the extraordinarily rare statute—perhaps the first ever—where this Court will construe "willfully"

to mean something lower than "with knowledge of unlawfulness." But that approach is foreclosed because this Court has *already* held that "[t]wo distinct offenses are described in the disjunctive [in § 192], and in only one of them is willfulness an element." *United States v. Murdock*, 290 U.S. 389, 397 (1933).[3]

The government tries to avoid *Murdock* by instead invoking the 1929 *Sinclair* decision, which addressed the non-"willfully" provision in § 192, Opp.19–20, but that approach makes little sense because *Sinclair* is the very case that *Murdock* distinguished. The government has abandoned its prior claim that *Murdock*'s narrowing of *Sinclair* was mere dicta (it wasn't), but argues that *Murdock* itself was a tax case. Opp.26. But *Murdock* expressly provided how § 192's "willfully" prong should be interpreted. It could hardly be more on point.

The government contends that this Court's post-*Murdock* cases suggest that "willfully" in § 192 means only an intentional or deliberate default. Opp.26. The government relies heavily on this Court's decision in *United States v. Bryan*, 339 U.S. 323 (1950), but that case did not purport to distinguish, modify, or overrule *Murdock*. Further, as the D.C. Circuit noted below, *Bryan* is primarily about the non-"willfully" provision in § 192. Ex.D.8. To the extent

[3] This Court has also rejected the notion that § 192 is somehow different than other statutes: in § 192 cases, "the courts must accord to the defendants every right which is guaranteed to defendants in all other criminal cases." *Watkins v. United States*, 354 U.S. 178, 207–08 (1957) (addressing § 192).

Bryan addressed the willfully provision at all, it was in passing—and it expressly relied on the fact that the recipient had "refuse[d] to give any reason" to the committee for "fail[ing] to deliver" requested documents, *id.* at 333.

The government does not seem to dispute that *Bryan*'s willfulness analysis relied on the fact that the defendant had failed to give any reasons for non-compliance. Opp.19. Instead, the government questions "why that aspect" would matter. *Id.* But this Court explained why in *McPhaul v. United States*, 364 U.S. 372 (1960), which held there was a "*prima facie*" showing by the government of willful default *only* where the recipient had made no attempt to "state his reasons for noncompliance," *id.* at 379. In other words, the failure to provide any explanation suggested the defendant had none—but at most, that was a *prima facie* case.

Thus, even under the facts in *Bryan* and *McPhaul*, the defendant was still entitled to "present some evidence to explain or justify his refusal" for "resolution by the jury." *Id.* The government claims *McPhaul*'s promise of the chance to make a defense is illusory because it would not apply to evidence of good-faith reliance on counsel, Opp.27, but *McPhaul* nowhere made that distinction, nor does the government explain why a defendant would be precluded from offering that specific evidence but could provide evidence of other reasons why he had not complied.

The government does not dispute that Mr. Bannon's then-attorney did provide reasons to the Select Committee for why Mr. Bannon could not comply *until* the executive privilege issue was resolved, as had been done repeatedly in the past—yet the Committee blew past that established practice and rushed to have Mr. Bannon held in contempt and then indicted, all in the span of a few weeks. The government claims Mr. Bannon's lawyer's explanations were provided too late, Opp.19, but they were in fact timely provided. The government's repeated references to statements by President Trump's lawyer are also a red herring. What matters is that Mr. Bannon relied on *his own attorney's* advice. Under *McPhaul* and *Bryan*, Mr. Bannon should have been allowed to present a jury with his defense. But *Licavoli* prevented that.

C. The Government's Purposivism Fails.

The government suggests it would be illogical for Congress to impose a higher *mens rea* for default (the first clause of § 192) than for someone who appears but refuses to answer questions (the second clause of § 192). Opp.26.

But § 192 was carefully crafted. It pertains to matters of particular interest and knowledge to members of Congress, and the meaning of "willfully" in criminal statutes at that time was the same as it is now. *See Felton v. United States*, 96 U.S. 699, 702 (1877). It would be extraordinary to disregard that plain meaning, least of all in this context.

In any event, this Court's opinions explain why the statute was written this way. Subpoena negotiations occur in advance of any in-person hearing. Even if those negotiations break down over good-faith legal disputes, the Committee could "tak[e] other appropriate steps to obtain the records" in the meantime. *McPhaul*, 364 U.S. at 379 (cleaned up). That concern was especially acute at the time § 192 was enacted, as there was disagreement among members about whether "either House of Congress has any authority at all to proceed against a defaulting witness." Cong. Globe, 34th Cong., 3d Sess., 405 (1857). Congress wanted default to be a crime only when the subpoena recipient lacked even a good-faith basis.

By contrast, when a person has shown up to testify in person, he has arguably submitted himself to the Committee's authority, and a sudden refusal to answer questions posed *face-to-face* by members of Congress not only demonstrates a lack of "decent respect for the House of Representatives" that is not present in the context of pre-hearing negotiations, *Bryan*, 339 U.S. at 332–33, but it also lets recipients sandbag by raising objections for the first time, preventing the Committee from taking "other appropriate steps to obtain the records," *McPhaul*, 364 U.S. at 379. In those circumstances, Congress wanted to make conviction easier, so it required only intentional action.

* * *

The back-and-forth between the parties makes one thing clear: the *mens rea* issue raises a substantial question. Ex.A.4–5 (Walker, J., dissenting).[4]

III. There Are Good Reasons to Believe This Court Would Grant Review.

The government claims there is no circuit split, Opp.32, but almost every § 192 case arises in Washington, D.C. That makes the issue even *more* important to address, as now everyone will have to live under *Licavoli*.

There are several other reasons this Court would strongly consider granting review, assuming Mr. Bannon must make such a showing.

A. *Licavoli* Is Inconsistent with OLC's Interpretations.

DOJ argues that the OLC opinions regarding executive officers are not in conflict with *Licavoli*'s *mens rea* holding because the opinions speak only to whether it would be *unconstitutional* to apply § 192 in the context of assertions of executive privilege by the President. Opp.30.

That tells only part of the story. OLC's opinions also state that, *even setting aside constitutional concerns*, § 192's "willfully" element "was not

[4] It also confirms lenity's role, *see* App.26–27, as "any fair reader of this statute would be left with a reasonable doubt about whether it covers the defendant's charged conduct," Slip Op. 21, *Snyder v. United States*, No. 23-666 (U.S. June 26, 2024) (Gorsuch, J., concurring).

intended to apply" in a variety of circumstances, including when the defendant relied on executive privilege.[5]

As OLC stated in 1984 in an opinion just recently re-adopted: "There is some doubt whether obeying the President's direct order to assert his constitutional claim of executive privilege would amount to a 'willful' violation of the statute. Moreover, reliance on an explicit opinion of the Attorney General may negate the required *mens rea* even in the case of a statute without a willfulness requirement." 8 Op. O.L.C. at 135 n.34.

That OLC view of how to interpret "willfully" is impossible to reconcile with *Licavoli*. OLC speaks for the entire Department of Justice, but DOJ prosecutors are invoking an interpretation of § 192's *mens rea* element that is incompatible with OLC's own views. This internal inconsistency confirms the importance of addressing and resolving *Licavoli*'s anomalous holding.[6]

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[5] *Executive Privilege Assertion for Audio Recordings* at 4, Christopher Fonzone, Ass't Att'y Gen. to Merrick Garland, Att'y Gen., May 15, 2024, https://tinyurl.com/r5tmyk85 (quoting *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 102 (1984)).

[6] The government also suggests an incumbent President can make a blanket waiver of executive privilege on a former president's communications, but "[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." *Trump v. Thompson*, 142 S. Ct. 680, 680 (2022) (Kavanaugh, J., respecting denial of application). The government is also incorrect to contend that Mr. Bannon "did not attempt to raise any constitutional defense to his prosecution based on a purported testimonial immunity." Opp.30. Those issues were forcefully raised at numerous junctures, including in a motion to dismiss the indictment filed on April 19, 2022. *See* JA1629 *et seq.*

B. *McDonnell* Is On Point.

The government claims this Court's grant of relief in *McDonnell* was different because that case raised "a difficult question" and was a prime candidate for a subsequent grant of certiorari. Opp.3.

Just one problem: the government repeatedly told this Court the exact opposite in *McDonnell* itself, insisting the case did "not warrant this Court's review" because Gov. McDonnell was "quite wrong" about the scope of the lower court's interpretation, and his "claim of a circuit split is equally unfounded," a point the government asserted nearly half a dozen times. Gov't BIO at 21, 23, 28, 31, 32, *McDonnell v. United States*, 15-474 (Dec. 8, 2015). Again the government tries to have it both ways.

McDonnell provides a blueprint for maintaining the status quo in this kind of case.

C. *Navarro* Is Easily Distinguishable.

The government invokes *Navarro*, Opp.33, but that case is easily distinguishable on several grounds. Most importantly, Mr. Bannon's *mens rea* arguments are fully preserved—the government never claims otherwise.[7]

[7] The government states in passing that Mr. Bannon "did not raise executive privilege as a defense," Opp.12, but that is a red herring. It is undisputed that Mr. Bannon has argued at every stage of this case that his conduct was not "willful"—and the reason *why* it was not willful is because he relied on advice of counsel, who instructed Mr. Bannon that he could not comply with the subpoena until the executive-privilege issue was first resolved.

Also unlike in *Navarro*, Mr. Bannon's then-lawyer was in contact with the Select Committee and provided an explanation for their position on the return date for the subpoena, even offering to have the matter submitted to court for resolution via civil litigation. Mr. Navarro, by contrast, failed to do this. *See* Response in Opp. 7, *Navarro v. United States*, No. 23A843 (Mar. 18, 2024).

D. The *Mens Rea* Error Was Not Harmless.

Incredibly, the government claims that the preclusion of advice-of-counsel evidence and a grievously erroneous *mens rea* instruction were harmless. Opp.38. That position is meritless, which presumably is why the government *never* raised it during Mr. Bannon's direct appeal. *See generally* Br. for Appellee, No. 22-3086 (D.C. Cir. June 2, 2023). Nor did the D.C. Circuit order denying release adopt that extraordinary position.

It is well established that "eliminat[ing] the prosecutor's burden of proving *mens rea*" is "a serious constitutional error." *United States v. Sheehan*, 512 F.3d 621, 631 (D.C. Cir. 2008). "Error cannot be harmless where it prevents the defendant from providing an evidentiary basis for his defense." *Id.* at 633. That is exactly what happened here, as even the D.C. Circuit majority opinion recognized: the District Court "precluded Bannon from presenting such a defense at trial, and instructed the jury consistent with those rulings." Ex.D.7.

The government points to "the record," Opp.38—but the only "record" the jury heard was that Mr. Bannon had disregarded the subpoena and was barred from invoking good-faith reliance on counsel. If Mr. Bannon prevails on his *mens rea* argument, he will get a new trial.

E. This Case Is Important, As the Recent House of Representatives Leadership Vote Confirms.

There is a bi-partisan list of current and former executive-branch officials who have been held in contempt of Congress over the years, all of whom would be deemed to have violated § 192 under the D.C. Circuit's precedent and barred even from presenting the justifications for their actions to a jury. The D.C. Circuit's broad view of "willfully" in this context—now re-confirmed by the panel below—threatens to escalate relatively routine inter-branch subpoena disputes into criminal indictments, with accompanying damage to the separation of powers. A subsequent grant of review in this case provides the ideal vehicle to nip this in the bud before it spreads further.

Political winds change, but the requirements for criminal prosecution should not. Indeed, concerns about the lack of authority supporting the subpoena issued to Mr. Bannon led the House's Bipartisan Legal Advisory Group—which determines when the House of Representatives itself will submit briefs in ongoing litigation—to vote yesterday to withdraw the brief the House had previously submitted against Mr. Bannon in his trial court

proceedings in 2022. *See* Speaker Mike Johnson, *Statement on Bipartisan Legal Advisory Group Vote*, https://x.com/SpeakerJohnson/status/1805932790782828711 (June 26, 2024). The new House brief will be filed during Mr. Bannon's forthcoming *en banc* proceedings. *Id.* This confirms that his appeals raise a substantial question.

* * *

As Judge Walker concluded: "Bannon should not go to prison before the Supreme Court considers his forthcoming petition for certiorari." Ex.A.5 (Walker, J., dissenting).

CONCLUSION

The Court should grant the Application and, if necessary, an administrative stay to allow for sufficient time to consider this matter. *See McDonnell v. United States*, 136 S. Ct. 1 (2015) (Roberts, C.J., in chambers).

June 26, 2024

Respectfully submitted,

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Ex. G

Letter from Pres. Trump Confirming Executive Privilege Was Asserted

DONALD J. TRUMP

July 9, 2022

Stephen K. Bannon
c/o Robert J. Costello, Esquire
Davidoff Hutcher & Citron LLP
605 Third Avenue
New York, New York 10158

Dear Steve,

I write about the Subpoena that you received in September 2021 from the illegally constituted Unselect Committee, the same group of people who created the Russia Russia Russia scam, Impeachment hoax #1, Impeachment hoax #2, the Mueller Witch-Hunt (which ended in no "Collusion"), and other fake and never-ending yarns and tales.

When you first received the Subpoena to testify and provide documents, I invoked Executive Privilege. However, I watched how unfairly you and others have been treated, having to spend vast amounts of money on legal fees, and all of the trauma you must be going through for the love of your Country, and out of respect for the Office of the President.

Therefore, if you reach an agreement on a time and place for your testimony, I will waive Executive Privilege for you, which allows for you to go in and testify truthfully and fairly, as per the request of the Unselect Committee of political Thugs and Hacks, who have allowed no Due Process, no Cross-Examination, and no real Republican members or witnesses to be present or interviewed. It is a partisan Kangaroo Court.

Why should these evil, sinister, and unpatriotic people be allowed to hurt and destroy the lives of so many, and cause such great harm to our Country?

It has been, from the time I came down the escalator at Trump Tower, a political hit job against the overwhelming majority of Americans who support the concept and policy of Making America Great Again and putting America First.

Good luck in all of your future endeavors.

Sincerely,