No. 23A1129

IN THE SUPREME COURT OF THE UNITED STATES

STEPHEN K. BANNON, APPLICANT

v.

UNITED STATES OF AMERICA

RESPONSE IN OPPOSITION TO THE APPLICATION FOR RELEASE PENDING APPEAL

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The Solicitor General respectfully files this response in opposition to the application for the extraordinary relief of release from imprisonment pending further appellate proceedings.

Applicant was convicted of misdemeanor contempt of Congress under 2 U.S.C. 192, which criminalizes, inter alia, "willfully mak[ing] default" on a congressional subpoena. In 2021, a congressional committee issued a subpoena for applicant to testify and produce documents in his custody about certain communications in 2020 and 2021. Applicant, who worked for former President Donald J. Trump for seven months in 2017, had left the White House years before the dates of the requested information. Nevertheless, he asserted that some of the requested information may be protected from disclosure by the executive privilege for presidential communications.

Former President Trump, however, never invoked any privilege before the committee, and President Biden affirmatively waived any applicable privilege. Indeed, the former President's lawyer expressly told applicant's counsel that the former President "d[id]n't believe" that "there is immunity from testimony for your client." C.A. App. 448. Applicant nevertheless responded to the subpoena with total noncompliance: he did not produce any documents and refused to appear for his scheduled deposition.

After a jury found applicant guilty on two counts of "willfully mak[ing] default" on a congressional subpoena, in violation of 2 U.S.C. 192, the district court stayed applicant's sentence pending appeal. But after the court of appeals unanimously affirmed the convictions, the district court lifted the stay. See Appl. App. 9, 11, 13-32.[1] The court of appeals denied applicant's subsequent motion for release pending appeal. Id. at 3-7.

Applicant now asks this Court to grant him release pending disposition of a forthcoming petition for a writ of certiorari. The standard for that extraordinary relief is demanding: among other things, applicant must identify "a substantial question of law or fact likely to result in" a "reversal" of his convictions or a "new trial." 18 U.S.C. 3143(b)(1)(B); see Morison v. United

[1] The appendix to the application is not consecutively paginated. Citations of that appendix in this response thus use the pagination of the 44-page pdf document available on the Court's electronic docket.

States, 486 U.S. 1306, 1306 (1988) (Rehnquist, C.J., in chambers). He cannot make that demanding showing.

Applicant's principal contention is that the lower courts erred in interpreting the mental state of "willfully" in Section 192 to mean the defendant acted deliberately or intentionally, and that the district court thus erroneously precluded him from introducing evidence that he relied in good faith on the advice of his counsel in defying the subpoena. But that contention is not likely to result in reversal or a new trial because this Court has already rejected it. A uniform line of cases from this Court confirms that the mental state for contempt of Congress under Section 192 requires only a deliberate or intentional act, and does not recognize a defense for good-faith reliance on the advice of counsel. For example, in United States v. Helen Bryan, 339 U.S. 323 (1950), this Court recognized that the government had "made out a prima facie case" of willful default simply by showing that "on the day set out in the subpoena [the defendant] intentionally failed to comply," id. at 330, notwithstanding that the defendant claimed she had resisted production of the requested documents "after consulting with counsel," id. at 325.

Applicant insists that "willfully" in the criminal context always permits a good-faith defense, but this Court has repeatedly emphasized that "willfully" is a word of many meanings that must be interpreted in context. E.g., Ratzlaf v. United States, 510 U.S. 135, 141 (1994). And in "many contexts," "'willfully' refers

to consciousness of the act but not to consciousness that the act is unlawful." Cheek v. United States, 498 U.S. 192, 209 (1991) (Scalia, J., concurring in the judgment) (emphasis added). Thus, although in certain contexts a criminal prohibition requiring willfulness might be interpreted to mean that a defendant must have known he was breaking the law, that interpretation is inappropriate in this context, as Helen Bryan and other cases confirm.

Applicant separately and briefly claims that the standard for determining what constitutes a "substantial" question under Section 3143(b) is itself a substantial question warranting his release. But resolution of that question could not itself result in reversal or a new trial, and thus cannot justify release pending appeal under Section 3143(b).

Moreover, because applicant seeks relief from this Court and has exhausted his appeal as of right, showing that his claims are likely to result in reversal necessarily requires showing that this Court would grant certiorari in the first place. But the decision below interpreting "willfully" does not conflict with any decision of this Court or another court of appeals. See Sup. Ct. R. 10. To the contrary, the court of appeals simply followed the interpretation adopted by this Court in Helen Bryan and other cases addressing Section 192. And although applicant asserts that those cases contravene modern modes of interpretation, he has not asked for them to be overruled and could not in any event overcome the high stare decisis threshold for overruling a statutory precedent.

Notwithstanding that a discretionary grant of further review is a necessary prerequisite to reversal or a new trial, applicant asserts (Appl. 16) that he is entitled to the extraordinary relief that he seeks based on a mere showing that if his arguments are accepted, they would likely lead to reversal or a new trial. That contention lacks merit. The natural meaning of "likely to result in reversal" is a likelihood of success on the merits. If applicant's contrary reading were correct, any defendant could satisfy that standard merely by making an argument for reversal of longstanding precedent of this Court, which would -- if accepted -- require well-supported convictions to be set aside. That position is unsound on its face and would undermine the default rule that a convicted and sentenced defendant "shall * * * be detained" pending appeal. 18 U.S.C. 3143(b).

This Court recently denied a similar application for release by another defendant who engaged in complete defiance of a subpoena issued by the same committee that subpoenaed applicant. See Navarro v. United States, 144 S. Ct. 1454 (2024) (No. 23A843). For reasons set forth in more detail below, the same result is warranted here.

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, applicant was convicted on two counts of contempt of Congress, in violation of 2 U.S.C. 192. Appl. App. 34-35. He was sentenced to four months of imprisonment and fined

$6500. Id. at 36-37. The judgment was stayed pending appeal. Id. at 11. The court of appeals affirmed. Id. at 13-32. The district court then lifted the stay, id. at 9, and the court of appeals denied a motion for release pending appeal, id. at 3-7.

A. Background

On January 6, 2021, Congress convened a joint session to certify the results of the Electoral College vote in the 2020 presidential election. See Staff of Senate Comm. on Homeland Sec. & Gov't Affairs et al., Examining the U.S. Capitol Attack: A Review of the Security, Planning, and Response Failures on January 6, at 2 (2021). "Rioters, attempting to disrupt the Joint Session of Congress, broke into the Capitol building, vandalized and stole property, and ransacked offices." Ibid. At least "seven individuals, including three law enforcement officers, ultimately lost their lives." Ibid.

On June 30, 2021, the House of Representatives established the Select Committee to Investigate the January 6th Attack on the United States Capitol to, among other things, "investigate and report upon the facts, circumstances, and causes" of the January 6 attack. H.R. Res. 503, 117th Cong., 1st Sess. § 3(1) (2021) (House Resolution 503). To that end, House Resolution 503 authorized the Committee to inquire into a range of matters relevant to the events of January 6, including its "influencing factors." § 4(a)(1)(B). House Resolution 503 authorized the Committee, act-

ing through its chair, to compel testimony and the production of documents by subpoena. See § 5(c).

On September 23, 2021, the Committee served applicant with a subpoena for documents and testimony relating to its inquiry. See C.A. App. 782-790 (copy of subpoena). Applicant had briefly served as an advisor to then-President Trump in 2017, but the subpoena sought only information from 2020 and 2021 -- years after applicant had left the White House. Appl. App. 15; see C.A. App. 785-786.

For example, on a podcast the day before the January 6 attacks, applicant had predicted that "'all hell was going to break loose' the next day." Appl. App. 15 (brackets and citation omitted); see C.A. App. 784. Applicant also had participated in many "discussions in late 2020 and early 2021 about efforts to overturn the 2020 election results," Appl. App. 15, including "at the Willard Hotel on January 5, 2021, during an effort to persuade Members of Congress to block the certification of the election the next day, and in relation to other activities on January 6," C.A. App. 784; see, e.g., id. at 785-786 (listing other categories of information from 2020 and 2021, including conversations with private individuals). The Committee also observed that applicant was "described as communicating with then-President Trump on December 30, 2020, and potentially other occasions, urging him to plan for and focus his efforts on January 6." Id. at 784. The subpoena sought "both documents and your deposition testimony regarding

these and multiple other matters that are within the scope of the Select Committee's inquiry." Ibid.

The subpoena required applicant to appear and produce documents to the Committee by October 7, 2021, at 10 a.m. and to appear for a deposition on October 14 at 10 a.m. C.A. App. 782. The instructions accompanying the subpoena stated that if applicant could not fully comply with the subpoena by the deadline, he should comply "to the extent possible by that date" and provide an explanation and date certain for full compliance. Id. at 788. They also instructed applicant that if he withheld any documents, including on privilege grounds, he should provide a log of such materials. Ibid. And the subpoena included a copy of the House Rules governing depositions, which set forth the applicable procedures when a witness "refuse[s] to answer a question" in order to "preserve a privilege." Id. at 791.

Applicant did not appear or produce any documents by the October 7, 2021, deadline. Appl. App. 15; Indictment 5. Nor did he provide an explanation, a log of withheld materials, or a date certain for compliance before the production deadline passed. Indictment 5. Instead, after applicant had defaulted on the production deadline, he sent a letter to the Committee, through his counsel Robert Costello, stating that applicant would not comply with the subpoena. Appl. App. 15-16; see C.A. App. 198-199 (Oct. 7 letter from applicant's counsel).

Applicant stated that he had received a letter from Justin Clark, an attorney for former President Trump, suggesting that the information sought by the subpoena might "potentially" be protected by executive privilege and that applicant should, "where appropriate," invoke privilege and "not produce any documents concerning privileged material" or "provide any testimony concerning privileged material." C.A. App. 198; see id. at 444-445 (Oct. 6 letter from Clark).

"The canonical form of executive privilege" -- the "presidential communications privilege" -- "allows a President to protect from disclosure 'documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential.'" Trump v. Thompson, 20 F.4th 10, 25 (D.C. Cir. 2021) (citation omitted), cert. denied, 142 S. Ct. 1350 (2022). Applicant interpreted Clark's letter to mean that former President Trump had "announced his intention to assert" executive privilege, and applicant asserted to the Committee that he was "legally unable to comply" with the subpoena until issues of "executive and attorney client privileges" were resolved. C.A. App. 198-199.[2]

Responding by letter the next day, the Committee rejected applicant's reliance on the former President's purported "inten-

[2] Although applicant invoked "attorney client privilege[]," C.A. App. 199, applicant is not an attorney. Therefore, the only strand of executive privilege even arguably relevant to this case is the presidential-communications privilege.

tion" to assert executive privilege to excuse applicant's total noncompliance with the subpoena. Appl. App. 16; C.A. App. 435-437 (Oct. 8 letter from Committee). The Committee observed that the former President had not actually asserted executive privilege -- and that even if he had, his instruction to applicant was "limited to requesting that [applicant] not disclose privileged information," when "virtually all the documents and testimony sought by the Subpoena concern [applicant's] actions as a private citizen." C.A. App. 435; see id. at 435-436; Appl. App. 16.

"Regardless of any purported privilege assertion by Mr. Trump," the Committee continued, applicant was therefore still required at least to "provide the Select Committee with a privilege log that 'identifies and describes the material in a manner "sufficient to enable resolution of any privilege claims,"'" and to appear for his scheduled deposition -- where, if he felt it necessary, he could invoke privilege with respect to "specific questions." C.A. App. 436-437 (citation omitted).

Applicant, however, did not produce a privilege log or appear for the deposition. Indictment 6-7. Instead, in a back-and-forth with the Committee, he reiterated his refusal to comply with the subpoena in any respect. Appl. App. 16-17. The Committee gave applicant "until October 18 to submit any additional information that might bear on its contempt deliberations." Id. at 16.

During that period, the former President's counsel repeatedly "warned -- contrary to [applicant's] position -- that an assertion

of executive privilege would not justify [applicant's] total non-compliance" with the subpoena. Appl. App. 17; see C.A. App. 448 (Oct. 14 and Oct. 16 e-mails). Clark specifically "disclaimed that [former] President Trump had directed [applicant] not to produce documents or testify until the issue of executive privilege was resolved." Appl. App. 17. And "Clark repeated that his previous letter 'didn't indicate that we believe there is immunity from testimony for your client. As I indicated to you the other day, we don't believe there is.'" Ibid. (quoting C.A. App. 448).

Applicant's attorney Costello accordingly warned applicant to "[b]eware" that Clark's position "puts [applicant] in a dangerous position." C.A. App. 442. And while Costello asked Clark to "confirm to the Committee that [former] President Trump has invoked executive and attorney-client privileges" in order to "eliminate all doubt in the Committee's mind," id. at 447, neither Clark nor the former President did so.[3] Furthermore, the White House informed applicant that "[t]o the extent any privileges could apply to [applicant's] conversations with the former President or White House staff after the conclusion of his tenure, President Biden has already determined" not to invoke any applicable executive privilege with respect to documents or testimony "shedding light

[3] On July 9, 2022, more than nine months after applicant had defaulted on the subpoena, the former President sent applicant a letter stating that he had "invoked Executive Privilege" when applicant "first received the Subpoena" but would "waive Executive Privilege" if applicant "reach[ed] an agreement on a time and place for [his] testimony." C.A. App. 4781.

on events within the White House on and about January 6, 2021" and "concerning the former President's efforts to use the Department of Justice to advance a false narrative that the 2020 election was tainted by widespread fraud." C.A. App. 766.

Nonetheless, applicant still refused to produce any documents (or even a privilege log) or appear for a deposition, or to "comply with the subpoena in any respect" -- including the procedures that the subpoena specified for invoking privileges. Appl. App. 17. The House voted to hold applicant in contempt. See H.R. Res. 730, 117th Cong., 1st Sess. (2021).

B. Proceedings Below

1. A federal grand jury in the District of Columbia returned an indictment charging applicant with two counts of contempt of Congress, in violation of 2 U.S.C. 192, based on applicant's willful refusal to comply with the subpoena's request for testimony (Count 1) and documents (Count 2). Indictment 8-9. Applicant did not raise executive privilege as a defense to the prosecution. See Appl. App. 22.

The government moved in limine to preclude applicant from advancing a trial defense based on a claim of good-faith reliance on Costello's advice that he engage in total noncompliance. See C.A. App. 313-320. Section 192 requires proof that the defendant "willfully ma[de] default" with respect to a congressional summons. 2 U.S.C. 192. Citing Licavoli v. United States, 294 F.2d 207 (D.C. Cir.), cert. denied, 366 U.S. 936 (1961), the government

explained that while the statutory requirement of "willfully mak[ing] default" requires proof of "a deliberate and intentional failure to appear or produce records," a "[d]efendant's erroneous belief[]" or "his purported reliance on his counsel's erroneous advice" is "no defense to the crime charged." C.A. App. 315. The district court granted the government's motion in limine, 2022 WL 2900620, and also "denied [applicant's] motion to dismiss the indictment based on his asserted good-faith reliance on his counsel's advice," Appl. App. 18-19.

The case proceeded to trial and the jury found applicant guilty on both counts. Appl. App. 34. After denying applicant's motion for a new trial, the district court sentenced applicant to concurrent terms of four months of imprisonment on each count. Id. at 36.

2. The district court stayed the sentence pending appeal under 18 U.S.C. 3143(b). Appl. App. 11. That statute provides that a defendant "shall * * * be detained" following conviction and sentencing unless he can show, among other things, that his appeal "raises a substantial question of law or fact likely to result in" a "reversal" or "new trial." 18 U.S.C. 3143(b). In the court's view, there was at that time "a substantial question regarding what it should mean for a defendant to willfully make default under [Section 192] and what evidence a defendant should be permitted to introduce on that question." C.A. App. 4763.

The court of appeals subsequently affirmed applicant's convictions. Appl. App. 13-32. In doing so, the court rejected applicant's argument "that 'willfully' making default in violation of 2 U.S.C. § 192 requires bad faith -- that the defendant must know that his conduct violated the law." Id. at 18. The court observed that its prior "decision in Licavoli directly rejects [applicant's] challenge," and that applicant had not shown that Licavoli had been "overturned -- or its rationale 'eviscerated' -- by a subsequent decision of the Supreme Court." Id. at 19 (citation omitted). The court also observed that "as a practical matter, requiring evidence of bad faith would undermine the statute's function." Id. at 20; see id. at 20-21. Thus, while in some "other criminal statutes," "'willful' conduct requires that the defendant act with * * * 'knowledge that his conduct was unlawful,'" the court recognized that "'willful' 'is a "word of many meanings"'" that takes its meaning from "'"context,"'" and it does not have that specialized meaning in the context of Section 192. Id. at 21 (citations omitted).

3. Following affirmance of applicant's convictions on appeal, the district court lifted its previously entered stay of the sentence pending appeal. Appl. App. 9. It explained that because the court of appeals' decision had definitively reaffirmed that "Licavoli's rule is correct," it "d[id] not believe that the original basis for [its] stay of [applicant's] sentence exists any longer." 6/6/24 Tr. 30-31.

The court of appeals then denied applicant's subsequent motion for release pending further appellate review, observing that its "unanimous panel opinion explains why" applicant had not satisfied the requirements in Section 3143(b). Appl. App. 3; see id. at 3-7. Judge Walker dissented, based on his view that "Licavoli's interpretation of 'willfully' is a close question." Id. at 7; see id. at 6-7.

ARGUMENT

Applicant asks this Court for the extraordinary relief of release pending certiorari. But he cannot make the demanding showing necessary to override the normal requirement that a convicted defendant begin serving his sentence. "The statutory standard for determining whether a convicted defendant is entitled to be released pending a certiorari petition is clearly set out in 18 U.S.C. § 3143(b)." Morison v. United States, 486 U.S. 1306, 1306 (1988) (Rehnquist, C.J., in chambers).

Section 3143(b), enacted in the Bail Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. I, 98 Stat. 1976, imposes stringent restrictions on the availability of release pending appellate review. See Stephen M. Shapiro et al., Supreme Court Practice §§ 17.15-17.17, at 17-47 to 17-54 (11th ed. 2019). As relevant here, a convicted defendant who has been sentenced to imprisonment "shall * * * be detained" pending appeal and certiorari unless he identifies "a substantial question of law or fact likely to

result in" "reversal" of his convictions or a "new trial." 18 U.S.C. 3143(b)(1)(B).[4]

Because applicant seeks relief from this Court, demonstrating a "likel[ihood]" of reversal or a new trial, 18 U.S.C. 3143(b), necessarily requires showing a likelihood both that this Court would grant certiorari and that it would reverse the judgment below affirming applicant's convictions. Cf. Does 1-3 v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief); cf. also Supreme Court Practice § 19.4, at 19-28 n.34 (when a case becomes moot, this Court will vacate the judgment below only if the case otherwise would have warranted certiorari).[5] Congress has thus "plac[ed] on the defendant the burden of showing * * * that he or she is likely to prevail * * * on the petition to the Supreme Court for a writ of certiorari." Supreme Court Practice § 17.15, at 17-49.[6] Ap-

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[4] The defendant additionally must establish by clear and convincing evidence that he is not likely to flee or pose a danger if released, and that his appeal is not for the purpose of delay. 18 U.S.C. 3143(b)(1). Those prerequisites are not at issue here. In addition, a defendant may argue that his appeal raises a question likely to result in a sufficiently reduced sentence, see 18 U.S.C. 3143(b)(1)(B)(iii) and (iv), but applicant does not make any such argument here.

[5] To the extent applicant requests release pending an as-yet unfiled petition for rehearing below, that request is misdirected here. The court of appeals was in a much better position to assess the likelihood that such discretionary review would be granted, and it has already denied the request for extraordinary relief that applicant now renews in this Court.

[6] The factors that govern an application for a stay in other contexts require an analogous showing: An applicant must demon-

plicant's contrary contention (Appl. 2, 6, 15-16) lacks merit. See Part III, infra.

As Justices of this Court explained even before enactment of the Bail Reform Act, "[a]pplications for bail to this Court are granted only in extraordinary circumstances, especially where, as here, 'the lower court refused to stay its order pending appeal.'" Julian v. United States, 463 U.S. 1308, 1309 (1983) (Rehnquist, J., in chambers) (quoting Graves v. Barnes, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers)); accord McGee v. Alaska, 463 U.S. 1339 (1983) (Rehnquist, J., in chambers). Applicant falls short of meeting the "extraordinary" standard for obtaining release pending appellate proceedings, Julian, 463 U.S. at 1309, because he cannot establish that the Court would be likely to grant a writ of certiorari, let alone reverse the court of appeals' judgment affirming his convictions or order a new trial.[7]

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strate, among other things, "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari" and "a fair prospect that a majority of the Court will vote to reverse the judgment below." Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam).

[7] Section 3143(b) requires the applicant to identify "a substantial question of law or fact." 18 U.S.C. 3143(b)(1)(B). Most lower courts have explained that "a substantial question is 'a "close" question or one that very well could be decided the other way.'" United States v. Perholtz, 836 F.2d 554, 555 (D.C. Cir. 1988) (per curiam) (citation omitted); see id. at 555 n.1 (collecting cases). This Court need not resolve what is required to establish substantiality because the identified question also must be "likely to result" in reversal or a new trial, 18 U.S.C. 3143(b)(1)(B), which itself is a demanding standard that applicant has not satisfied. See Part I, infra; cf. Part III, infra.

I. APPLICANT HAS NOT RAISED ANY QUESTION LIKELY TO RESULT IN REVERSAL OR A NEW TRIAL

A. The Mental State For Contempt Of Congress Does Not Present A Question Likely To Result In Reversal Or A New Trial

Applicant's principal contention (Appl. 18-34) is that he is likely to obtain reversal of his convictions or an order for a new trial from this Court because the lower courts misinterpreted the mental state required to convict him of the charged offenses under Section 192. That contention lacks merit.

1. The court of appeals correctly recognized that a defendant has the requisite mental state under Section 192 if he deliberately and intentionally refuses to comply with a congressional subpoena. Appl. App. 18-23; see Licavoli v. United States, 294 F.2d 207 (D.C. Cir.), cert. denied, 366 U.S. 936 (1961). As a result, proof that a defendant knew that his conduct was unlawful is not required for a conviction, and reliance on the advice of counsel is not a defense. See Appl. App. 20. Uniform precedent from this Court supports the decision below.

In United States v. Helen Bryan, 339 U.S. 323 (1950), for example, this Court affirmed the defendant's conviction for having "willfully ma[de] default" based on her failure to produce records in response to a congressional subpoena, explaining that the government had "made out a prima facie case" of willful default simply by showing that "on the day set out in the subpoena she intentionally failed to comply." Id. at 326 n.3, 330. The Court reached

that result even though the defendant claimed that she had resisted production "after consulting with counsel" and coming "to the conclusion that the subpoena was invalid." Id. at 325. The Court explained that a willful default is established by "an intentional failure to testify or produce papers, however the contumacy is manifested." Id. at 329.

Applicant attempts (Appl. 23 n.6) to dismiss the significance of Helen Bryan on the theory that the defendant there did not specify to the requesting committee her reasons for not complying with the subpoena. But he cannot explain why that aspect of the defendant's conduct would affect the definition of the mens rea element. If, as applicant asserts, the term "willfully" in Section 192 requires proof of a defendant's "knowledge that his conduct was unlawful," Appl. 19 (citation omitted), then it would not matter whether the lack of knowledge was private or public. And in any event, applicant here -- like the defendant in Helen Bryan -- allowed the subpoena deadline to pass without any response to Congress, attempting to excuse his noncompliance only thereafter. See Appl. App. 15.

Helen Bryan, moreover, is of a piece with cases involving a witness's refusal to answer questions at an appearance before Congress. In Sinclair v. United States, 279 U.S. 263 (1929), this Court explained that contempt of Congress does not involve "moral turpitude" and that an "[i]ntentional violation is sufficient to constitute guilt." Id. at 299. The Court observed that the

exclusion of evidence that the defendant refused to answer "in good faith on the advice of competent counsel" did not entitle him to a new trial because a defendant's "mistaken view of the law is no defense." Ibid. Other cases reflect the same understanding of the mental state required to violate Section 192. See, e.g., Watkins v. United States, 354 U.S. 178, 208 (1957) ("An erroneous determination on [the witness's] part, even if made in the utmost good faith, does not exculpate him."); Quinn v. United States, 349 U.S. 155, 165 (1955) ("deliberate, intentional refusal to answer"); see also, e.g., United States v. Fleischman, 339 U.S. 349, 360, 364 (1950).

Applicant errs in suggesting (Appl. 22-23) that those decisions are inapposite because the "willfully" adverb in Section 192 directly modifies only the makes-default clause, not the refuses-to-answer clause. See 2 U.S.C. 192 (penalizing one who "willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry"). As Helen Bryan indicates, see 339 U.S. at 327-330, and as the court of appeals has long recognized, see Licavoli, 294 F.2d at 208, the mental state required for contempt of Congress does not differ depending on whether the defendant commits a total default or simply refuses to answer questions after appearing. Although Section 192 describes "[t]wo distinct offenses" and "in only one of them is willfulness an element," United States v. Murdock, 290 U.S. 389, 397 (1933), the second clause does not need the "willfully" modi-

fier because willfulness is inherent in the particular conduct that it regulates.

A witness's "refusal to answer -- the witness having appeared, being present and conscious of what is going on, understanding the question, and being advised of its pertinency -- is obviously in and of itself a willful act." Licavoli, 294 F.2d at 208. A failure to respond to a subpoena, in contrast, "might be due to many causes other than deliberate intention," including "illness, travel trouble, misunderstanding, etc." Ibid. Accordingly, while "willfully" is "a necessary adverb in defining defaults which are subject to penalties, * * * that modifying word was unnecessary as a matter of legal definition in respect to refusals to answer questions." Ibid. Thus, although it is a truism that differences in language are presumed to convey differences in meaning, see Russello v. United States, 464 U.S. 16, 23 (1983), here the difference between the two clauses of Section 192 simply reflects that adding "willfully" to the "refuses to answer" clause would have been superfluous because the language of that clause already covers only willful acts.

Applicant claims (Appl. 20-21) that the D.C. Circuit's decision in Licavoli is inconsistent with this Court's jurisprudence, but Licavoli expressly relied on this Court's decisions in Helen Bryan and other cases, explaining that those precedents "established" that "he who deliberately and intentionally fails to respond to a subpoena 'willfully makes default'" within the meaning

of the statute. 294 F.2d at 208 (citation omitted). Applicant criticizes (Appl. 21) Licavoli's reasoning as "notably thin," but he does not actually engage with that reasoning or demonstrate any defect in it. As the court of appeals' merits decision in this case observed, "[applicant] offers no challenge to [Licavoli's] rationale." Appl. App. 20. Indeed, as the court noted, "every case that addresses the mental state required for a contempt of Congress conviction firmly supports Licavoli's holding." Id. at 19.

2. Applicant contends that "this Court has uniformly interpreted 'willfully' in the criminal context to require a showing that the defendant acted with knowledge his conduct was unlawful." Appl. 19 (capitalization omitted); see Appl. 19-20. That contention is incorrect. Although in general, "in the criminal context, a 'willful' act is one undertaken with a 'bad purpose,'" this Court has repeatedly made clear that "'willfully'" is "'a word of many meanings' whose construction is often dependent on the context in which it appears." Sillasse Bryan v. United States, 524 U.S. 184, 191 (1998) (citations omitted); see Ratzlaf v. United States, 510 U.S. 135, 141 (1994); Murdock, 290 U.S. at 395; Spies v. United States, 317 U.S. 492, 497 (1943). This Court's decisions in Helen Bryan and other contempt-of-Congress cases make clear that in the specific context of a willful default of a congressional subpoena, "an intentional failure to testify or produce papers" is sufficient. Helen Bryan, 339 U.S. at 329.

Nor is that the only criminal context in which this Court has interpreted "willfully" to mean no more than a deliberate or intentional act. For example, in Browder v. United States, 312 U.S. 335 (1941), this Court interpreted the phrase "willfully and knowingly," in the context of a statute criminalizing the use of a passport obtained by false statements, to mean "deliberately and with knowledge and not something which is merely careless or negligent or inadvertent." Id. at 341. The Court emphasized that "the word 'willful' often denotes an intentional as distinguished from an accidental act," and that "[o]nce the basic wrong under this passport statute is completed, that is the securing of a passport by a false statement, any intentional use of that passport in travel is punishable." Browder, 312 U.S. at 342.

Helen Bryan and Browder are not outliers. As Justice Scalia once observed, "[o]ne may say, as the law does in many contexts, that 'willfully' refers to consciousness of the act but not to consciousness that the act is unlawful." Cheek v. United States, 498 U.S. 192, 208-209 (1991) (Scalia, J., concurring in the judgment) (emphasis added). And as Judge Learned Hand explained, "[t]he word 'willful,' even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law." American Surety Co. v. Sullivan, 7 F.2d 605, 606 (2d Cir. 1925). The Model Penal Code likewise defines "willfully" generally to mean that the defendant "acts knowingly with

respect to the material elements of the offense." Model Penal Code § 2.02(8) (1985). And in perhaps the most analogous context to contempt of Congress, many lower courts have held that willfulness for criminal contempt of court requires only that the contemnor consciously violate a court order; good-faith reliance on the advice of counsel is not a defense. See, e.g., United States v. Hendrickson, 822 F.3d 812, 821-822 (6th Cir.) (collecting cases), cert. denied, 580 U.S. 934 (2016).[8]

3. Applicant's remaining arguments lack merit.

a. Focusing on the court of appeals' observation that "as a practical matter, requiring evidence of bad faith would undermine [Section 192]'s function," Appl. App. 20, applicant argues (Appl. 24-25) that allowing a defense of good-faith reliance on advice of counsel would not present any practical difficulty in litigation. But the point is that permitting such a defense would undermine the statute's function of supporting Congress's ability to investigate, which is essential to its constitutional authority to legislate. See Appl. App. 20-21; see also Trump v. Mazars USA, LLP,

[8] The government has acknowledged that the phrase "knowingly and willfully" requires knowledge of unlawfulness in the context of 18 U.S.C. 1001 and 1035, each of which prohibits certain false statements. See Russell v. United States, 572 U.S. 1056 (2014); Ajoku v. United States, 572 U.S. 1056 (2014). But that does not imply that "willfully" carries that meaning in the context of Section 192, where it is not paired with "knowingly," applies to a particularized form of conduct that suggests a different interpretation, and where that different interpretation is supported by longstanding precedent that Congress has not disturbed, see, e.g., Helen Bryan, 339 U.S. at 327-330.

591 U.S. 848, 862 (2020) ("This 'power of inquiry -- with process to enforce it -- is an essential and appropriate auxiliary to the legislative function.'") (citation omitted).

When, as here, Congress issues a subpoena that is objectively related to a valid legislative purpose, see Appl. App. 27, and the witness raises no applicable constitutional defenses before Congress, see id. at 20, 23, the witness "unquestionably" has an "unremitting obligation to respond to [the] subpoena[], to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation," Watkins, 354 U.S. at 187-188.

By ensuring that witnesses are held liable for deliberate noncompliance, the Helen Bryan standard discourages witnesses from sabotaging congressional investigations simply by manufacturing a claim of reliance on advice of counsel. Applicant offers no sound reason why that concern is illusory. In this case, for example, his noncompliance based on an asserted good-faith invocation of executive privilege -- despite the repeated warnings by the Committee and the former President that executive privilege could not excuse his total default -- deprived the Committee of information it deemed necessary to its investigation. And his failure to respond at all before the subpoena deadline -- let alone to follow the procedures for invoking a privilege claim -- denied the Committee the opportunity to understand and evaluate whatever specific objections he might have had.

That Section 192 prosecutions might be "exceedingly rare" (Appl. 25) does not lessen those concerns attendant to applicant's interpretation of Section 192. Without the Helen Bryan standard, witnesses could be emboldened to defy subpoenas and thus to stymie future congressional investigations. Applicant appears to agree (cf. Appl. 22-23) that a deliberate refusal to answer questions violates Section 192 even if the witness relies on the advice of counsel. Yet he offers no sound reason why Congress would have permitted a witness to engage in even more contumacious behavior -- namely, wholesale default -- by invoking that same excuse.

b. Applicant's reliance (Appl. 22-23) on Murdock v. United States, supra, and McPhaul v. United States, 364 U.S. 372 (1960), is misplaced. Applicant contends that Murdock "distinguished and narrowed Sinclair" by recognizing that Section 192 describes "'[t]wo distinct offenses'" and that Sinclair involved only the second ("refuses to answer") offense. Appl. 22 (citation omitted). But as noted, Helen Bryan makes clear that an intentional refusal to comply suffices under the first ("willfully makes default") offense as well. 339 U.S. at 329. Moreover, Murdock involved a tax statute, and the Court there principally distinguished Sinclair on the ground that it "construed an altogether different statutory provision." 290 U.S. at 396-397. Murdock recognized that the meaning of willfully depends on "context," and that in the tax context, "Congress did not intend" to criminalize a taxpayer's "bona fide misunderstanding" of his tax liability. Id. at

395-396. No similar rationale applies to the different and limited contempt-of-Congress conduct regulated by Section 192.

While McPhaul did involve contempt of Congress, it likewise does not support applicant's proposed definition of "willfully." There, a defendant convicted for failing to produce documents claimed, for the first time in this Court, that there was no evidence that the requested records existed or were within his possession and control. 364 U.S. at 378. The Court faulted him for failing to raise any such objection before the subcommittee that had subpoenaed him, explaining that evidence of the subcommittee's reasonable basis for believing the defendant had the records, coupled with his failure to suggest otherwise, "established a prima facie case of willful failure to comply with the subpoena." Id. at 379.

Applicant would read McPhaul to hold that "even when the defendant failed to provide any reasons whatsoever for noncompliance, he was still entitled to 'present some evidence to explain or justify his refusal,' so it could be 'resol[ved] by the jury.'" Appl. 23 (brackets in original; citation omitted). That reading is incorrect. As demonstrated by the sentences following the one quoted by applicant, the only "evidence" that the Court was contemplating was evidence of the defendant's physical inability to comply. The Court observed that the defendant had "elected not to present any evidence," and that "[i]n these circumstances, there was no factual issue, respecting the existence of the records or

his ability to produce them, for resolution by the jury." McPhaul, 364 U.S. at 379 (emphasis added).

The Court in McPhaul was thus addressing the defendant's belated factual claim that he might have been physically unable to produce the records in response to the subpoena (which, if established, would have been a valid defense, see McPhaul, 364 U.S. at 378) -- not an advice-of-counsel or other good-faith defense. Indeed, far from supporting applicant, the Court's finding of a prima facie case of willfulness based simply on McPhaul's apparent possession of the documents and his failure to suggest the impossibility of producing them accords with Helen Bryan and this Court's other contempt-of-Congress cases requiring only a deliberate or intentional refusal to comply.

c. To the extent applicant suggests (e.g., Appl. 3, 10, 23) that the government was required to obtain a judicial order conclusively resolving privilege claims before he was obliged to respond to the subpoena, the suggestion lacks merit. Applicant cites no authority for that theory, and it would undermine the separation of powers to require judicial preclearance before Congress could pursue a line of investigation or the Executive Branch could initiate a prosecution.

Moreover, the subpoena itself specified the procedures for asserting privilege claims -- namely, production of a privilege log and assertion of privilege in response to specific questions. See C.A. App. 788, 791. If applicant believed in good faith that

he had viable privilege claims, he was obligated to follow those procedures for asserting and resolving them, and not simply to refuse to comply with the subpoena at all. Cf. Fleischman, 339 U.S. at 365 ("A subpoena is a sterile document if its orders may be flouted with impunity.").

d. Applicant's attempt (Appl. 25, 36) to compare his situation to that of the Department of Justice (DOJ) attorneys subpoenaed to provide documents relating to Hunter Biden is misplaced. Applicant observes (Appl. 36) that "DOJ instructed its Tax Division lawyers to refuse to comply" with a congressional request. But there is an important difference between government attorneys' noncompliance with congressional subpoenas because they have been ordered not to comply, see United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951); see also 28 C.F.R. 16.26, and a private individual's unilateral decision to entirely disregard a subpoena based on a not-yet-formally-asserted claim of executive privilege.[9] Applicant's total noncompliance, even though he had been told by the former President's counsel that he was not immune from testifying and could not simply disregard the subpoena, is not analogous

[9] It is the Executive Branch's usual practice to make a formal assertion of privilege before the relevant congressional committee or House of Congress has even voted on whether to hold a witness in contempt. See, e.g., Assertion of Executive Privilege Over Deliberative Materials Regarding Inclusion of Citizenship Question on 2020 Census Questionnaire, 43 Op. O.L.C. __, slip op. at 1, 5 & n.4 (June 11, 2019) (Barr, Att'y Gen.), www.justice.gov/olc/file/1350186/dl. Applicant cites no authority to the contrary.

to internal instructions to current government employees about providing testimony regarding their official responsibilities.

Applicant similarly errs in contending (Appl. 32) that under the longstanding interpretation of the statute, a current Executive Branch official who refuses to comply with a congressional demand for testimony necessarily violates Section 192. The Office of Legal Counsel has explained that advisers to an incumbent President generally enjoy absolute immunity from compelled congressional testimony. E.g., Immunity of the Director of the Office of Political Strategy and Outreach from Congressional Subpoena, 38 Op. O.L.C. 5 (2014). That rule, rooted in the separation of powers, would provide a constitutional defense to any potential Section 192 prosecution. Applicant has not identified any authority endorsing absolute testimonial immunity for former advisers of former Presidents; and in any event, he did not attempt to raise any constitutional defense to his prosecution based on a purported testimonial immunity.

e. Applicant's reliance (Appl. 26-27) on the rule of lenity -- which he raises for the first time in this Court -- is misplaced. Lenity "applies if 'at the end of the process of construing what Congress has expressed,' there is '"a grievous ambiguity or uncertainty in the statute."'" Shaw v. United States, 580 U.S. 63, 71 (2016) (citations omitted). No such grievous ambiguity exists here; this Court has adhered to its clear and definitive interpretation of "willfully" in Section 192 since at least its 1950

decision in Helen Bryan -- if not its 1929 decision in Sinclair -- and applicant does not claim that he lacked notice of that interpretation, cf. United States v. Davis, 588 U.S. 445, 464 (2019) (explaining that lenity is "founded" on a concern for providing "fair notice of the law").

B. The Standard For Substantiality Under The Bail Reform Act Does Not Present A Question Likely To Result In Reversal Or A New Trial

Applicant briefly asserts (Appl. 34-35) that the definition of "substantial question" in 18 U.S.C. 3143(b)(1)(B) is itself a substantial question warranting his release, on the ground that the circuits have used somewhat different phraseology in defining that term. But even if applicant's preferred interpretation of "substantial question" were adopted, that would not itself be "likely to result in" reversal or a new trial, as the statute requires. 18 U.S.C. 3143(b)(1)(B). At most, resolution of that issue in applicant's favor would make it more likely that the other question he raises (about the meaning of "willfully" in Section 192) is a "substantial question." And because the standard under the Bail Reform Act itself cannot result in reversal or a new trial, it is not a valid basis on which to grant release pending a request for discretionary review.

II. THIS COURT WOULD NOT LIKELY GRANT CERTIORARI

Because applicant seeks relief from this Court, a showing that his appeal is likely to result in reversal or a new trial necessarily requires showing that the Court likely would grant

certiorari to address the questions he has raised. See pp. 16-17 & n.6, supra; Part III, infra. Applicant cannot make that showing with respect to either of the questions he raises.

A. Most important, the court of appeals' decision interpreting "willfully" in Section 192 does not conflict with any decision of this Court or another court of appeals. Indeed, the decision below simply follows the interpretation of that term embraced by this Court's decision in Helen Bryan. And as the court of appeals observed, "every case that addresses the mental state required for a contempt of Congress conviction firmly supports" its precedent and holding here. Appl. App. 19.

Applicant suggests (Appl. 28-29) that because this Court heard 19 cases involving contempt of Congress in the 1950s and 1960s, it is likely to grant review in his case. But this Court's docket six or seven decades ago has no bearing on the likelihood of certiorari in applicant's case today. And while applicant asserts (Appl. 30) that this Court granted release pending certiorari "[u]nder nearly identical procedural circumstances" in McDonnell v. United States, 576 U.S. 1091 (2015) (No. 15A218), virtually all motions for release pending certiorari will, by necessity, arise in nearly identical procedural circumstances. Substance, not procedure, determines whether release pending certiorari is warranted, and for the reasons discussed above and below, it is not warranted here.

McDonnell, moreover, differed substantially from this case. The question there involved the meaning of "official act" under the federal honest-services fraud and bribery statutes, 18 U.S.C. 201, 1343, 1349, a difficult question on which this Court had not previously opined. See McDonnell v. United States, 579 U.S. 550, 562, 566 (2016). The question here, in contrast, is what it means to "wilfully make[] default" under 2 U.S.C. 192 -- a question that Helen Bryan, among other cases, already answered long ago. Applicant has not asked this Court to overrule Helen Bryan or those other cases; and even if he had, he could not surmount the high stare decisis threshold for overruling a statutory precedent, see Kimble v. Marvel Entertainment, LLC, 576 U.S. 446, 456 (2015).

A more relevant comparison is to Navarro v. United States, 144 S. Ct. 1454 (2024). There, the Court denied an application for release pending appellate proceedings filed by a defendant who, like applicant, was convicted under Section 192 for completely refusing to comply with a subpoena for documents and testimony from the same congressional committee that subpoenaed applicant. Applicant attempts to draw significance from the Chief Justice's issuing an in-chambers opinion in Navarro instead of denying the application "without explanation, as frequently occurs." Appl. 33; see Navarro v. United States, 144 S. Ct. 771 (2024) (Roberts, C.J., in chambers). But applicant overlooks that the full Court did in fact deny Navarro's renewed application "without explana-

tion." See Navarro, 144 S. Ct. at 1454. The Court should likewise deny the application here.

B. Nor can applicant show a likelihood that this Court would grant certiorari to address the meaning of "substantial question" in Section 3143(b). This Court previously has declined to review that issue, notwithstanding asserted variances in the language employed by the circuits. See Fisher v. United States, 562 U.S. 831 (2010) (No. 09-1383). Moreover, this case is a poor vehicle in which to address the meaning of "substantial question" because, as explained above, applicant's question about the meaning of "willfully" in Section 192 is not likely to result in reversal or a new trial irrespective of whether it is "substantial."

III. APPLICANT'S ATTEMPT TO LOWER THE STANDARD FOR RELEASE PENDING CERTIORARI SHOULD BE REJECTED

A. Applicant asserts (Appl. 15-17) that he can establish a "substantial question of law or fact likely to result" in "reversal" or a "new trial," 18 U.S.C. 3143(b)(1)(B), merely by presenting a "substantial" question that would be "likely" to result in reversal or a new trial if answered in his favor. But the extraordinary relief of release pending appeal -- especially when the defendant has only discretionary review remaining to him -- does not incorporate an assumption that the defendant's arguments will prevail.

The untenability of applicant's position is easily shown by imagining that the adjective "substantial" were deleted from the

statute. Under applicant's reading, a defendant would then have to show only that his arguments, if accepted, would likely result in reversal or a new trial. That is no standard at all; any defendant could easily satisfy it simply by arguing that all adverse precedent (including on harmless error) should be overruled. That cannot be right; the default rule that a convicted and sentenced defendant "shall * * * be detained," 18 U.S.C. 3143(b), should not so easily be circumvented.

Instead, the plain meaning of a hypothetical statute requiring a defendant to raise a "question likely to result in reversal or a new trial" obviously would require the defendant to show a likelihood of success on the merits. Congress's addition of the adjective "substantial" -- clearly meant to increase the defendant's burden -- could not possibly relieve the defendant of making that showing. If "likely to result in reversal" means a likelihood of success on the merits in the hypothetical statute, it must mean the same thing in Section 3143(b).

Applicant objects that requiring a defendant to make that showing would require courts to act as "bookmakers who trade on the probability of ultimate outcome." Appl. 16 (citation omitted). But federal courts routinely evaluate a litigant's future likelihood of success on the merits when addressing requests for stays or preliminary equitable relief. See Nken v. Holder, 556 U.S. 418, 434 (2009); Munaf v. Geren, 553 U.S. 674, 690 (2008). Applicant provides no sound basis to read the unexceptional language

of the Bail Reform Act ("likely to result in") as so sharply deviating from the longstanding principle that extraordinary relief of the sort that applicant seeks requires showing a likelihood of success on the merits.

Applicant also errs in contending (Appl. 15-16) that he need not show a likelihood that this Court will grant certiorari to review the court of appeals' decision affirming his convictions. When the only remaining direct review available to a defendant is discretionary, demonstrating that a thus-far-unsuccessful appeal is "likely to result in" reversal or a new trial, 18 U.S.C. 3143(b)(1)(B), necessarily and logically requires showing that a court will exercise its discretion to grant further review in the first place. Cf. Labrador v. Poe, 144 S. Ct. 921, 931 (2024) (Kavanaugh, J., concurring in the grant of stay); Does 1-3, 142 S. Ct. at 18 (Barrett, J., concurring in the denial of application for injunctive relief). Applicant's reliance (Appl. 15-16) on lower-court cases that do not discuss that requirement is misplaced because those cases involved appeals as of right.

Applicant is additionally mistaken in suggesting (Appl. 17) that "[t]he Solicitor General has previously agreed" with his reading of the statute. Applicant cites the government's response to the stay application in McDonnell, supra, which observed that an application for release pending certiorari "should be evaluated using the standard prescribed in Section 3143(b), rather than under the stay factors that the Court applies when Congress has not

established the governing criteria." Gov't Opp. at 15, McDonnell, supra (No. 15A218). But the government went on to observe that Section 3143(b) itself "plac[es] on the defendant the burden of showing that he is likely to prevail on the petition to the Supreme Court for a writ of certiorari." Id. at 16 (citation and ellipses omitted). And the government made clear that the Section 3143(b) standard was "analogous" to the "standard governing an application for a stay in other contexts" not only in that respect, but also in requiring an applicant to show "'a fair prospect that a majority of the Court will vote to reverse the judgment below.'" Id. at 16 n.3 (quoting Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam)).

Finally, applicant is wrong to suggest (Appl. 31, 37) that the release standard should depend on the short duration of his sentence or that he would serve his sentence in the months preceding a presidential election. The latter is not a relevant factor at all under the Bail Reform Act, and the former is not relevant when, as here, the defendant does not raise a sentencing claim, cf. 18 U.S.C. 3143(b)(1)(B)(iv).

B. In any event, even if applicant were entitled to assume both a grant of certiorari and acceptance of his construction of Section 192, he still has not shown a likelihood of reversal or a new trial. Instead, any evidentiary or instructional error his appeal has identified, even if accepted, would be harmless, such that reversal or a new trial would not be warranted.

Applicant contends (Appl. 25-26) that because he could not present evidence of his asserted good-faith reliance on his counsel's advice, and because the jury was not instructed that such reliance would be a defense to liability, he was "unable to respond" to the government's arguments that he acted willfully in defying the subpoena. But if that were error, overwhelming evidence in the record makes clear that it would be harmless. Specifically: (a) the former President did not formally invoke any privilege before the Committee or at any time prior to applicant's total default, contempt, and indictment; (b) as the Committee repeatedly reminded applicant, most of the topics covered by the subpoena had nothing to do with any communications with the former President, and indeed concerned events long postdating applicant's service in the Executive Branch; (c) as the former President's own counsel made clear, even if the presidential-communications privilege might protect some of the information sought by the subpoena, the former President had neither authorized nor directed applicant's complete noncompliance, and applicant was not immune from testifying; (d) applicant disregarded the procedures for invoking any available privilege claims set forth in the subpoena itself; and (e) applicant's own counsel recognized that applicant was in a "dangerous position" given the above, C.A. App. 442.

CONCLUSION

The application should be denied.[10]

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

JUNE 2024

[10] In a footnote, applicant invites (Appl. 38 n.15) the Court to treat his emergency application as a petition for a writ of certiorari. Certiorari is unwarranted for the reasons set forth in Part II, supra.