

No. 23-1264

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**In the Supreme Court of the United States**

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STEPHEN K. BANNON,  
*Applicant,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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*ON THE EMERGENCY APPLICATION FOR CONTINUED  
RELEASE PENDING APPEAL TO THE U.S. COURT OF  
APPEALS FOR THE D.C. CIRCUIT*

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**BRIEF FOR REPRESENTATIVE BARRY  
LOUDERMILK AS *AMICI CURIAE*  
IN SUPPORT OF APPLICANT**

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## **INTEREST OF *AMICUS CURIAE***

Representative Barry Loudermilk is a Member of the United States House of Representatives. As a Member of Congress, Rep. Loudermilk has an institutional interest in ensuring federal law and congressional rules are properly enforced.

Representative Loudermilk is also the Chairman of the House Administration Subcommittee on Oversight. In that role, he and his subcommittee investigated the failures at the United States Capitol on January 6, 2021. The purpose of his investigations, which continue to this day, is to review and identify the numerous security failures leading up to, and on January 6, 2021, and to review the creation, operation, and results of the Select Committee to Investigate the January 6th Attack on the United States Capitol (“Select Committee”).

Rule X of the House Rules states that the Committee on House Administration (“Committee”) has jurisdiction over “services to the House” which includes the “administration of the House Office Buildings and of the House wing of the Capitol.” Rule X, Rules of the House of Representatives, 118th Congress (Jan. 10, 2023). Federal law provides that the “maintenance of the security systems of the Capitol buildings and grounds” is to be carried out at the direction of the Committee on House Administration. 2 U.S. Code § 1965 (1996); The code states this authority is granted to “the Committee on House Oversight” which, in 1999, was renamed the Committee on House Administration.

When the Select Committee was created in the 117th Congress, its establishing resolution stated that “the records of the Select Committee shall become the records of such committee or committees designated by the Speaker[.]” H.R. Res. 503, 117th Cong. (2021). On December 29, 2022, Speaker Pelosi wrote a letter pursuant to that clause directing Select Committee Chairperson Bennie Thompson to transfer Select Committee records to the Committee at the close of the 117th Congress. Letter from Nancy Pelosi to Bennie Thompson (Dec. 29, 2022). (on file with the Subcommittee). At the start of the 118th Congress, the resolution adopting the Rules of the House further reiterated that “any records obtained” by the Select Committee be transferred to the Committee. H.R. Res. 5, 118th Cong. (2023).

The rules of the Committee grant the Subcommittee jurisdiction over “matters relating to congressional security, accountability of the legislative branch security and safety apparatus, legislative branch operations, and such other matters as may be referred.” Rule XVII, Rules of the Committee on House Administration for the 118th Congress, 118th Congress (2023). The rules of the Committee empower the Subcommittee to gather evidence on matters within its jurisdiction. Rule XIX, Rules of the Committee on House Administration for the 118th Congress, 118th Congress (2023).

### **SUMMARY OF THE ARGUMENT**

The Select Committee violated the House Rules and House Regulations for the Use of Deposition Authority (“House Deposition Regulations”) which governed the Select Committee’s authority and ability to issue subpoenas and conduct depositions of witnesses. The House was not properly informed of this violation when it voted to hold Mr. Bannon in contempt. The Select Committee improperly sought to hold Mr. Bannon in contempt for refusing to appear for a deposition because the Select Committee did not have a Ranking Minority Member and, therefore, failed to comply with House Deposition Regulations and H. Res. 503 which required the Chairman of the Select Committee consult with the minority Ranking Member to conduct depositions in response to subpoenas. The Select Committee did not have a minority ranking member and therefore could not have complied with its mandate prior to eliciting deposition testimony. Thus, the Select Committee improperly asserted to the House that Mr. Bannon refused to appear for a duly executed deposition. The Select Committee’s lack of a Ranking Member meant it could not comply with the requirements of House Rules and Regulations, therefore, any attempt to conduct a deposition was procedurally flawed.

Thus, notwithstanding the applicant’s indictment and sentencing, the Select Committee’s enforcement of the subpoena and the prosecution of Mr. Bannon for

failing to participate in a deposition was factually and procedurally invalid. As such, this Court should conclude that the entire prosecutorial process against the applicant was tainted and must be dismissed as a matter of law.

## **REASONS FOR GRANTING THE EMERGENCY APPLICATION**

### **I. The Select Committee was Invalidly Constituted**

The House of Representatives may not violate legal rights or ignore its own rules in conducting oversight. *See Watkins v. United States*, 354 U.S. 178, 198-99 (1957); *see also Nixon v. United States*, 506 U.S. 224, 238 (1993); *Yellin v. United States*, 374 U.S. 109, 114 (1963); *United States v. Smith*, 286 U.S. 6, 33 (1932). It has been long settled that the rules of Congress and its committees are judicially cognizable and that a legislative committee is held to their observance, just as executive agencies have been. *Yellin*, 374 U.S. at 114 (citations omitted).

#### **a. The Select Committee Failed to Follow its Own Rules**

The Select Committee was fundamentally flawed. H. Res. 503, § 2(a), provides that “the Speaker shall appoint thirteen Members, five of whom shall be appointed after consultation with the minority leader.” In reality, the Select Committee had only nine members because the then-Speaker refused to appoint thirteen members. *See* Olivia Beavers, Heather Caygle, and Nicholas Wu, “Pelosi vetoes Banks, Jordan for Jan. 6 select committee”, POLITICO (July

21, 2021), <https://www.politico.com/news/2021/07/21/pelosi-veto-banks-jordan-for-jan-6-select-committee-500424>. Additionally, H. Res. 503 required vacancies on the Select Committee be filled consistent with the procedures for selecting members for the Select Committee. However, the Speaker refused to fill the numerous vacancies on the Select Committee and it subsequently operated with less members than was required by H. Res. 503.

**b. The Select Committee Lacked a Ranking Minority Member Rendering it Unable to Conduct a Deposition.**

The Select Committee lacked a ranking minority member. Instead, several months after the Select Committee was constituted, and more than a month following its first hearing, the Select Committee named Representative Cheney “Vice Chair.” The position of vice chair is fundamentally distinct and functionally different from that of a ranking minority member, as clearly understood by House Rules, conference and caucus rules, and precedent. Rule XI, Rules of the U.S. House of Representatives, 117th Cong. (2021); Rule XIV, Rules of the House Republican Conference, 118th Congress (2023); Rule 21, Rules of the Democratic Caucus, 118th Congress (2023).

H. Res. 503 articulates some actions that can only be taken by the Chair of the Select Committee, actions that can be taken with a majority of members of the Committee, and importantly, actions that can only be



taken “in consultation with the ranking minority member.” H.R. Res. 503, 117th Cong. § 2 (2021). When House Democrats drafted and passed H. Res. 503, they could have given the Select Committee Chair unilateral authority to issue subpoenas and conduct depositions without consulting with the ranking member of the minority party; however, H. Res. 503 specifies that the Chairman of the Committee must consult with the minority ranking member to coordinate the method of conducting depositions. H. Res. 503 specifically included the requirement that the Select Committee Chair must “consult[e] with the ranking minority member.” H. Res. 503, 117th Cong. § 5 (2021). The lack of a ranking minority member—at the very least—calls into question the authority of the Chair to issue criminally-enforceable subpoenas related to a deposition under this House Resolution. The Select Committee could not conduct this function without violating House Rules.

Because the Select Committee lacked a ranking minority member and the process of conducting a deposition required consultation with the ranking minority member, the Select Committee itself was flawed in its composition and operations and the allegation that the applicant illegally refused to appear for a deposition was invalid.

**c. The Select Committee Failed to Comply with the Regulations for the Use of Deposition Authority as Required by H. Res. 503.**

H. Res. 503 Section 5(6)(B) specifically stated that the Select Committee's deposition authority is "governed by the procedures submitted by the chair of the Committee on Rules for printing in the Congressional Record." H.R. Res. 503, 117th Cong. § 5(6)(B) (2021). Pursuant to the House Committee on Rules' Regulations for the Use of Deposition Authority, the Chairman is required to consult with the ranking minority member prior to conducting a deposition. The Regulations explain that "[c]onsultation with the ranking minority member shall include three days' notice before any deposition is taken." Regulation 2, Regulations for the Use of Deposition Authority, 117th Congress (2021).

The Select Committee, however, failed to appoint a ranking minority member and, therefore, it was impossible for the Select Committee to comply with the House Deposition Regulations. Given it was impossible for the Select Committee to comply with this regulation when it issued the subpoena for Mr. Bannon's deposition and on the date specified by the Select Committee for his deposition, there can be no legal recourse imposed on the applicant for not appearing for the deposition.

**d. The Select Committee Failed to Inform the House of Representatives of its Inability to Conduct a Deposition When it Referred Mr. Bannon for Contempt**

The Select Committee failed to properly inform the House of Representatives of this flaw when it issued a report to the House of Representatives recommending that the House hold Mr. Bannon in contempt. H. REPT. 117-152 - RESOLUTION RECOMMENDING THAT THE HOUSE OF REPRESENTATIVES FIND STEPHEN K. BANNON IN CONTEMPT OF CONGRESS FOR REFUSAL TO COMPLY WITH A SUBPOENA DULY ISSUED BY THE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL. The Select Committee specifically asserted that Mr. Bannon improperly and illegally refused to appear for a deposition. However, the Select Committee did not inform the House that it lacked the ability to conduct this deposition because it was impossible for the Chairman to consult the minority ranking member. Therefore, the House voted to hold Mr. Bannon in contempt partially based on misleading assertions by the Select Committee, and without being informed of this significant procedural insufficiency.

Additionally, the contempt resolution approved by the House is factually flawed. H. Res. 730, 117th Cong. (2021), concluded that Mr. Bannon failed to appear for a deposition before the Select Committee. However, this is not factually accurate because the

Select Committee did not comply with House rules to conduct a deposition of Mr. Bannon.

The Department of Justice specifically cited Mr. Bannon's alleged failure to appear for a deposition in its May 25, 2021 indictment. Indictment, *U.S. v. Bannon*, Crim. No. 21-cr- (D.D.C. Nov. 12, 2021), available at <https://www.justice.gov/opa/press-release/file/1447811/dl>. The indictment also specifically references the House's Regulations for the use of Deposition Authority, but failed to reference the section of these Regulations which required the Chairman of the Select Committee to Consult with the minority ranking member. Regulation 2, Regulations for the Use of Deposition Authority, 117th Congress (2021).

Without a ranking member, many of the requirements of H. Res. 503 were simply unrealizable. Because the Select Committee was improperly constituted, its subpoena for a deposition lacks legal force or effect. *Yellin*, 374 U.S. at 122; *Christoffel v. United States*, 338 U.S. at 84, 90 (1949).

## **II. The Appointment of a Republican Vice Chair Did Not Cure the Lack of a Ranking Member**

Vice Chair is a common and well-understood term under House Rules. Rule XI of the Rules of the House for the 117th Congress stated that a "member of the **majority party** on each standing committee or

subcommittee shall be designated by the chair of the full committee as the vice chair.” Rule XI, Rules of the U.S. House of Representatives, 117th Cong. (2021) (emphasis added). This provision goes on to articulate that if the chair of the committee is not present, then the vice chair—who is a member of the same party as the chair—shall preside over the proceeding. *Id.* Additionally, both the Democratic Caucus and Republican Conference use the term vice chair to describe a position junior to the chair to be filled by a Member from the same political party. *See e.g. House Republican Conference Vice Chair Blake Moore*, House GOP, <https://blakemoore.house.gov/about/house-republican-conference-vice-chair> (accessed June 25, 2024).

Chairperson Bennie Thompson selected a Vice Chair of the Select Committee in the same manner that House Rule XI instructs standing committee chairs to select a Vice Chair. Chairperson Thompson initially offered the role of Vice Chair to Representative Jamie Raskin, a fellow Democrat, Robert Draper, et al., *Inside the Jan. 6 Committee*, N.Y. Times, Dec. 23, 2023, but Raskin declined and instead suggested that Representative Liz Cheney be named Vice Chair. *Id.* Representative Raskin recommended Representative Cheney be named Vice Chair to give the impression that the Select Committee was bipartisan. *Id.* Ultimately, Chairperson Thompson announced that he offered Representative Cheney the title of Vice Chair. Annie Grayer et. al., *Liz Cheney named vice chair of the January 6 select committee*, CNN (Sept. 2, 2021). Chairperson Thompson named Representative Cheney Vice Chair of the Select Committee in the

same manner Vice Chairs are named under rule XI. Thus, Representative Cheney fulfilled the traditional Vice Chair role and functioned as a member of the majority party on the Select Committee, and did not satisfy the requirement for consultation with the ranking minority member.

House Democrats incorrectly asserted that Representative Cheney was the ranking minority member of the Select Committee. A ranking minority member is not just a member of the minority party but is a member of the minority party selected by the minority party to serve as a ranking minority member. Although Representative Cheney was a member of the Republican party, she was not chosen by the minority as the Select Committee ranking minority member. Former Speaker Pelosi appointed Representative Cheney to the Select Committee as one of the eight selections specifically allocated by H. Res. 503 for the Democrat majority.

The term ranking minority member is clearly understood under House Rules. According to House Rule X Clause 5, the standing committee members shall be elected “from nomination submitted by the respective party caucus or conference.” Rule X, Rules of the U.S. House of Representatives, 118th Cong. (2023). In the same manner that minority committee members are selected by the respective caucus, respective minority parties also select ranking minority members to serve on standing committees. Both the Democratic Caucus Rules and Republican Conference have procedures for appointing ranking members to committees, with their respective Steering Committees first nominating members for

the role and then the conference or caucus voting on those recommendations. Rule 21, Rules of the Democratic Caucus, 118th Cong. (2023); Rule 14, Rules of the House Republican Conference, 118th Cong. (2023). Both use similar language to select members for chair and ranking member, and neither gives the opposing party's leadership the power to select their ranking members. *Id.* Based on House Rules and precedent, a ranking minority member is understood to be the minority party member selected by the minority party.

Former White House Chief of Staff Mark Meadows filed a lawsuit challenging the validity of a Select Committee subpoena for numerous reasons, including the H. Res. 503 requirement that the Chair of the Select Committee consult with the Ranking Member to order a deposition under subpoena. Luke Broadwater, *Meadows Sues Pelosi in Bid to Block Jan. 6 Committee Subpoena* N.Y. TIMES (Dec. 8, 2021); Complaint, at 28, *Meadows v. Pelosi*, 1:21-cv-3217-CJN (D.D.C.). In a Motion for Summary Judgment, House Democrats argued that Representative Cheney “by virtue of being the first minority party Member appointment to the Select Committee, is, by definition, the senior ranking minority member of the Select Committee.” Def. Mot. For Summ. J., at 25, *Meadows v. Pelosi*, 1:21-cv-3217-CJN (D.D.C.). The filing also incorrectly asserted that this interpretation of the term ranking minority member is “consistent with House practice and precedent,” as noted above. *Id.* Both of these assertions are incorrect.

In the Motion for Summary Judgment, House Democrats cited H. Res. 10 as justification for this

interpretation of the term ranking minority member. *Id.* H. Res. 10 appointed ranking minority members to standing committees in the 117th Congress. H.R. Res. 10, 117th Cong. (2021). However, House Democrats failed to acknowledge that while ranking minority members are the first minority members appointed to standing committees, ranking minority members are first selected by the minority, according to conference rules, and not blocked by the majority. H. Res. 10 dictates and confirms the House practice that the ranking minority member is selected by the minority conference, not simply the first minority members named to a committee.

House Democrats made yet another unprecedented decision when they chose to exempt the Select Committee from clause 5(c)(1) in House Rule XI, which requires all committees to adopt internal committee rules to govern committee operations. H.R. Res. 503, 117th Cong. § 5 (c)(1) (2021). Rule XI requires that committee rules provide for equal time for majority and minority members to ask alternating questions. Rule XI, Rules of the U.S. House of Representatives, 118th Cong. (2023). Under Rule XI, committees “may adopt a rule” that allots more than five minutes for each member to ask witness questions, but that time must be “equal for the majority party and the minority party.” *Id.* This rule, and the concept of minority voice, is longstanding precedent of the House. Instead of adopting clear committee rules, the Select Committee relied on H. Res. 503 as their quasi-rules which gave Chairperson Bennie Thompson an unprecedented level of power over every action of the Select



Committee, allowing the majority unfettered autonomy over the Select Committee in ways other House committees could not, however, it did not permit Thompson to conduct a deposition without consulting the ranking member and therefore the allegation that the applicant illegally refused to appear for a deposition is impossible.

### CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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