No. 25-453

In the Supreme Court of the United States

STEPHEN K. BANNON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a defendant "willfully makes default" of a congressional subpoena, in violation of 2 U.S.C. 192, if he intentionally refuses to give testimony or produce papers based on a good-faith but incorrect assertion of executive privilege.

2. Whether petitioner is entitled to relief from his contempt-of-Congress convictions based on an argument that the committee that subpoenaed him was unlawfully composed, when he did not raise such an argument to the committee itself.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 101 F.4th 16. The order of the court of appeals denying rehearing (Pet. App. 38a-65a) is available at 2025 WL 1503223. The order of the district court (Pet. App. 25a-30a) is available at 2022 WL 2900620.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 2024. A petition for rehearing was denied on May 27, 2025 (Pet. App. 38a-65a). On August 7, 2025, the Chief Justice extended the time within which to file a petition for a writ of certiorari until September 24, 2025. On September 19, 2025, the Chief Justice further extended the time within which to file a petition for a writ of certiorari until October 10, 2025, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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. Judgment 1. He was sentenced to four months of imprisonment. Judgment 3. The court of appeals affirmed. Pet. App. 1a-24a.

Petitioner served as an advisor to President Trump in 2017. Pet. App. 3a. In September 2021, a putative congressional committee issued a subpoena to petitioner requesting documents and testimony relating to the 2020 presidential election. *Ibid.*; see C.A. App. 782-790 (copy of subpoena). Invoking executive privilege, petitioner refused to comply. See Pet. App. 3a-6a. A federal grand jury charged petitioner with two counts of violating 2 U.S.C. 192, which prohibits "willfully mak[ing] default" on a congressional subpoena. Indictment 8-9. A jury returned a guilty verdict on both counts. Judgment 1.

The court of appeals affirmed the convictions. Pet. App. 1a-24a. The court observed that circuit precedent foreclosed petitioner's argument that a defendant does not act "willfully" under Section 192 if he relies on a good-faith but incorrect assertion of executive privilege. See *id.* at 7a-12a (citing *Licavoli* v. *United States*, 294 F.2d 207 (D.C. Cir.), cert. denied, 366 U.S. 936 (1961)). And the court declined to set aside petitioner's convictions based on his argument that the committee that issued the subpoena was improperly constituted, reasoning that petitioner "did not raise [that argument] before the [committee] and therefore forfeited" it. *Id.* at 18a; see *id.* at 18a-21a. This Court denied a motion for release on bail pending further review, 144 S. Ct. 2704

(No. 23A1129), and petitioner fully served his four-month sentence.

The court of appeals subsequently denied rehearing en banc. Pet. App. 38a-65a. Judge Katsas issued a statement respecting the denial of rehearing, stating that circuit precedent on the willfulness issue was compelled by *United States* v. *Helen Bryan*, 339 U.S. 323 (1950), and thus could not be set aside by the court of appeals itself. Pet. App. 40a-41a. Judge Garcia, joined by Judges Pillard, Wilkins, and Pan, concurred in the denial of rehearing, stating that *Helen Bryan* and circuit precedent were probably correctly decided. *Id.* at 42a-45a. Judge Rao, joined by Judge Henderson and in part by Judge Walker, dissented from the denial of rehearing. *Id.* at 46a-65a. All three would have granted rehearing en banc to overrule circuit precedent on the willfulness issue, and Judges Rao and Henderson also would have granted rehearing en banc to consider whether petitioner's challenge to the committee's composition was forfeitable. *Id.* at 50a-65a.

DISCUSSION

The government has determined in its prosecutorial discretion that dismissal of this criminal case is in the interests of justice. The government has accordingly lodged a motion in the district court under Federal Rule of Criminal Procedure 48(a) to vacate the judgment and dismiss the indictment with prejudice. The government therefore requests that the Court grant the petition, vacate the judgment below, and remand the case to allow the district court to grant the Rule 48(a) motion.

Rule 48(a) provides that "[t]he government may, with leave of court, dismiss an indictment." Fed. R. Crim. P. 48(a). It allows the government to seek dismissal even after a jury finds the defendant guilty and the

district court enters judgment. See *Thompson* v. *United States*, 444 U.S. 248, 250 (1980) (per curiam); *Rinaldi* v. *United States*, 434 U.S. 22, 28-32 (1977) (per curiam).

In several previous cases, including earlier this Term, this Court has granted the Solicitor General's request to grant a petition for a writ of certiorari, vacate the court of appeals' judgment, and remand the case so that the government can pursue dismissal under Rule 48(a). See, *e.g.*, *Full Play Group, S.A.* v. *United States*, No. 25-390 (Jan. 12, 2026); *Lopez* v. *United States*, No. 25-396 (Jan. 12, 2026); *Bronsozian* v. *United States*, 140 S. Ct. 2663 (2020); *Thompson*, 444 U.S. at 250 (collecting cases). The same course is appropriate here.

CONCLUSION

This Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to the district court for further consideration in light of the government's pending motion to dismiss the indictment.

Respectfully submitted.

D. JOHN SAUER
Solicitor General

FEBRUARY 2026