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April 12, 2024

Jim Jordan, Chairman  
Committee on the Judiciary  
Congress of the United States  
House of Representatives  
2138 Rayburn House Office Building  
Washington, D.C. 20515-6906

**Re: Mark Zwonitzer**

Dear Chairman Jordan:

This firm represents Mark Zwonitzer. On March 22, 2024 Mr. Zwonitzer received a subpoena for documents and information from the House Judiciary Committee. As we detail herein, we have significant concerns about the bases on which the Committee issued the subpoena to our client.

**Mark Zwonitzer, Journalist and Writer**

Before addressing the subpoena, we would like to introduce Mark Zwonitzer. Mark is a serious and well-respected journalist, writer, and nonfiction filmmaker with more than forty years of experience. He is the author of The Statesman and the Storyteller: John Hay, Mark Twain and the Rise of American Imperialism and Will You Miss Me When I'm Gone: The Carter Family & Their Legacy in American Music (with Charles Hirshberg). He has produced, directed, and/or written more than twenty non-fiction films over the past thirty years, including Walt Whitman, Walt Disney, Joe DiMaggio:

The Hero's Life, The Pilgrimage of Jesse Jackson, JFK: Like No Other, Robert E. Lee, The Gilded Age, and a four-part history of the United States Supreme Court.

His work has been recognized with the George Foster Peabody Award, the Writers Guild Award, the International Documentary Association Award for Limited Series, the Japan Foundation Prize, and the American Bar Association's Silver Gavel Award for Media and the Arts. He was a finalist for the National Book Critics Circle Award in the biography/autobiography category in 2002 and has been nominated for the Primetime Emmy for Outstanding Achievement in Non-Fiction Filmmaking and Outstanding Achievement in Writing.

### **Discussion**

On March 22, 2024 the House Judiciary Committee (HJC) issued a subpoena to Mark Zwonitzer requiring him to produce, *inter alia*, "[a]udio recordings" and "[a] transcripts of any interviews or conversations" between Zwonitzer and the President relating to Zwonitzer's work on the President's memoirs.<sup>1</sup> The subpoena is a very broad demand for transcripts and recordings that contain the President's highly personal information. As described in Special Counsel Hur's Report ("Report"), the President had "dozens of hours of recorded conversations with Zwonitzer in 2016 and 2017, when Mr. Biden talked about a vast array of topics,<sup>1</sup> including "the challenges of dealing with profound personal tragedy" involving the death of his son. According to the Report, the conversations also included discussion of a wide range of policy matters that the President addressed near the end of his term as Vice President. We, therefore, view the materials you seek to fall into the category of "personal information" or "personal papers" of the President although in physical possession of Mr. Zwonitzer.

In both your letter of February 14, 2024, and the cover letter accompanying this subpoena, you make broad reference to Special Counsel's Report, his conclusions, and remarks made by President Biden concerning the Report.

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<sup>1</sup> There are a total of six requests for documents and information sought by the subpoena. Request numbers 4 and 5 are for the audio files and transcripts of Mr. Zwonitzer's interviews with Former Vice President Biden. The arguments addressed to requests 4 and 5 apply with equal force to Requests numbers 1, 2, 3 and 6.

As the basis for your subpoena compelling production of the requested documents, you cite the "broad and indispensable" power of Congress to conduct oversight and, more particularly, your committee's jurisdiction to conduct oversight over criminal justice matters in the United States to inform potential legislative reform. However, the only legislative reform that you reference is that the Committee may consider "establishing clear statutory guidelines governing the handling, storage, and disclosure of classified materials, as well as modifying criminal penalties for the unauthorized dissemination and disclosure of classified materials." Subpoena Cover Letter, March 22, 2024, 2. You then state that obtaining the documents in this specific subpoena is "necessary to inform such potential legislation." *Id.*

As you know, Congress' power to conduct oversight is not without limitations and must be "related to, and in furtherance of, a legitimate task of the Congress." *United States v. Watkins*, 354 U.S. 178, at 187 (1957). The Supreme Court in *Trump v. Mazars*, 140 S. Ct. 2019 (2020), noted the "weighty concerns" that specifically relate to congressional subpoenas for the President's personal information, similar to this subpoena. *Id.* In *Mazars*, the Court examined a subpoena that was issued to a third party in possession of the President's personal financial information, and the Court explained that the same protections would hold for a subpoena that seeks from a third party the President's medical records or school transcripts. In other words, the Court contemplated the use of personal, non-public information about the President that is held by a third party. Recordings and transcripts of "dozens of hours of recorded conversations between the President and Zwonitzer" fit comfortably in that category, particularly because the purpose of the conversations was to assist Zwonitzer in writing a book about the President, and the conversations have reportedly involved a range of personal matters, including the death of the President's son.

As a result of these weighty concerns, the Court established a specific four-part test to help courts determine "whether a subpoena directed at the President's personal information" meets the *Watkins* test of being in furtherance of a legitimate legislative purpose. *Id.* at 2035. First, the Court explained that "Congress may not rely on the President's information if other sources could reasonably provide Congress information it needs in light of its particular legislative objective." *Id.* Second, the congressional subpoena should be "no broader than reasonably necessary to support Congress's legislative objective." *Id.* Third, the Court expressed a preference for Congress providing "detailed and substantial" evidence that the subpoena advances its legislative purpose. *Id.* And fourth, the courts should consider any burdens the subpoena imposes on the

President's time and attention, explaining that the burden stems "from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage." *Id.*

While it is not our intention in this letter to debate the Committee's current purpose in its "investigation," your letters and communications do not make it at all clear how the materials you seek from Mr. Zwonitzer would further the purpose of your stated legislative reform. Furthermore, your letters and communications fall far short of meeting the higher burden established by *Mazars* for a congressional subpoena seeking the personal records of a President. You have provided only a short, vague explanation of your legislative purpose with an unclear connection to the documents you seek. You have issued an extremely broad subpoena that seeks the private personal information of your political opponent, and your stated legislative purpose could be accomplished through numerous other means and by seeking information unrelated to the President's personal records.

In the February 14, 2024 letter, rather than specifying particular information that you believe exists within the materials you seek, you quote Special Counsel Hur's opinions about the President's age and memory. After referencing statements in the Hur Report regarding classified information, you then go on to declare that subsequent statements made by the President about this issue were falsely made. Therefore, it is difficult to see how the materials sought relate to some justifiable legislative purpose or whether they relate to some other agenda.

Furthermore, to the extent that Mr. Zwonitzer provided materials or documents to Special Counsel, as you reference in your letters, we suggest that the production of the materials you now seek from Mr. Zwonitzer, is a matter to be resolved between the Committees and the Department of Justice.

Zwonitzer also raises a First Amendment challenge on the ground that the subpoena violates his own rights as an author and journalist. The D.C. Circuit has recognized a fairly robust "reporter's privilege" in the context of civil litigation, and Zwonitzer would have strong grounds for invalidating the subpoena if it were reviewed under that framework.

The D.C. Circuit, consistent with most federal courts, recognizes a qualified first amendment privilege. *See, Lee v. Department of Justice*, 413 F. 3d 53 (D.C. Cir. 1981). With respect to the identification of confidential sources, the Circuit provides wide protection.

District court opinions have applied the privilege not only to the identity of confidential sources but also to the "information obtained from the sources". *Estate of Klieman v. Palestinian Authority*, 293 F.R.D. 235, 241 (D.D.C. 2013). Further, many district courts confronted with the issue have held that even nonconfidential information obtained by journalists in the course of news gathering and writing activities is subject to the privilege.

Mr. Zwonitzer is a writer and a journalist. He, therefore, enjoys a qualified First Amendment privilege. This is particularly significant' here as a journalist may be compelled to testify only if: (1) "the information sought goes to the heart of the matter" and (2) the party seeking the information has "exhausted" "every reasonable alternative source of information." *Lee*, 413 F.3d at 57. The information sought by the Committee does not go to the heart of the matter, i.e. legislative reform, nor has the Committee exhausted all reasonable sources of information, i.e., Department of Justice. This privilege applies equally to confidential sources of information as well as non-confidential sources of information.

An additional argument necessitating a reluctance to comply with the subpoena's request for documents can be found in statements made by various Committee members, including the Chairman, as well as comments made by Congressman Comer, Chair of the Oversight Committee and Speaker Johnson regarding the criminal liability of Mr. Zwonitzer for actions regarding audio recordings, as reported in Special Counsel Hur's Report. All of the comments either directly or indirectly suggest that Mr. Zwonitzer should have been, should be or will be (under a different administration) prosecuted for his actions. Most particularly, Congressman Gaetz during his questioning of Special Counsel Hur commented, at 1:21:14 of the recorded proceeding, "What does somebody have to do to get charged with obstruction of justice by you? If deleting the evidence of crimes doesn't count, what would meet the standard?" and at 1:21:34, "Oh so if you destroy some evidence but not other evidence, that somehow absolves you of the evidence you destroy? Here's what I see. Zwonitzer should have been charged..." Chairman Jordan's comments, while less verbose, were the same in tenor, Congressman Jordan stated at 59:50 "Tried to destroy the evidence, didn't he?" Chairman Comer and Speaker Johnson seem to have suggested that under a different (Republican) administration, Mr. Zwonitzer could or would be charged with a crime. These comments clearly implicate Mr. Zwonitzer's core legal interests.

## Conclusion

The material sought by the subpoena does not relate to any legislative interest as set out by the committee. The materials, as referenced in Special Counsel's Report, and cited in the Committee's letters, are almost all, if not all, personal in nature, and could not possibly assist in formulating future legislation. For that reason alone the information sought does not go to the heart of the matter. All other avenues to obtain the information sought have not been exhausted. For the reasons set forth herein, we express our substantial concerns about the bases for the subpoena issued to our client.

Respectfully submitted,

/s/

Louis M. Freeman

Lee Ginsberg