Nos. 19-715, 19-760

IN THE
Supreme Court of the United States

DONALD J. TRUMP, et al.,
Petitioners,
v.
MAZARS USA, LLP, et al.,
Respondents.

DONALD J. TRUMP, et al.,
Petitioners,
v.
DEUTSCHE BANK AG, et al.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA AND SECOND CIRCUITS

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether three committees of the House of Representatives had the constitutional and statutory authority to issue subpoenas to third-party custodians for the personal records of the sitting President of the United States.

PARTIES TO THE PROCEEDING

The *Mazars* Petitioners are Donald J. Trump, President of the United States of America; The Trump Organization, Inc.; Trump Organization LLC; The Trump Corporation; DJT Holdings LLC; The Donald J. Trump Revocable Trust; and Trump Old Post Office LLC. They were the plaintiffs in the district court and appellants in the court of appeals.

The *Mazars* Respondents are Mazars USA, LLP and Committee on Oversight and Reform of the U.S. House of Representatives. Mazars was the defendant in the district court and appellee in the court of appeals. The Committee was the intervenor-defendant in the district court and appellee in the court of appeals.

The *Deutsche Bank* Petitioners are Donald J. Trump, President of the United States of America; Donald J. Trump Jr.; Eric Trump; Ivanka Trump; The Donald J. Trump Revocable Trust; The Trump Organization, Inc.; Trump Organization LLC; DJT Holdings LLC; DJT Holdings Managing Member LLC; Trump Acquisition LLC; and Trump Acquisition, Corp. They were plaintiffs in the district court and appellants in the court of appeals.

The *Deutsche Bank* Respondents are Deutsche Bank AG; Capital One Financial Corporation; Committee on Financial Services of the United States House of Representatives; and Permanent Select Committee on Intelligence of the United States House of Representatives. Deutsche Bank and Capital One were defendants in the district court and appellees in the court of appeals. The Committees were intervenor-defendants in the district court and appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Per Supreme Court Rule 29, Petitioners The Trump Organization, Inc., Trump Organization LLC, The Trump Corporation, DJT Holdings LLC, DJT Managing Member LLC, Trump Acquisition LLC, Trump Acquisition, Corp., and Trump Old Post Office LLC state they have no parent companies or publicly-held companies with a 10% or greater ownership interest in them.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iv

TABLE OF CONTENTS v

TABLE OF APPENDICES viii

TABLE OF CITED AUTHORITIES ix

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Background 2

1. The Mazars Subpoena 3

2. The Bank Subpoenas 6

B. Proceedings Below 8

1. The Mazars Litigation 8

2. The Bank Litigation 15

SUMMARY OF ARGUMENT.....19

ARGUMENT 24

I. Legislative subpoenas for the President's private records press the outer limits of Congress's authority 24

A. This Court has held that Congress has implied authority to subpoena documents and testimony in aid of legislation.....24

B. Congress has no history of issuing legislative subpoenas for the private records of the sitting President. 27

C. The lack of historical precedent for these subpoenas casts serious doubt on their validity.....32

II. These subpoenas do not have a legitimate legislative purpose 35

A. The subpoenas were issued for law-enforcement purposes 36

B. These subpoenas could not result in valid legislation.....45

C. The Committees cannot establish a heightened need for the President's personal records 52

III. The Committees lack express authority to issue these subpoenas.....55

A. The Committees are not expressly authorized to subpoena the private records of the President 55

B. Resolution 507 does not provide the clear statement that the Committees would need 61

CONCLUSION 65

TABLE OF APPENDICES

Page

APPENDIX A — U.S. CONST. ART. 1, § 5, CL.2 .....1a

APPENDIX B — 2 U.S.C. § 192.....2a

APPENDIX C — H. RES. 206 .....3a

APPENDIX D — EXCERPTS OF THE RULES OF THE HOUSE OF REPRESENTATIVES, 116TH CONGRESS 9a

The following Constitutional Provisions and House Resolution have been omitted in printing this Appendix because they appear in the appendix of the *Trump v. Mazars* 19-715 Petition for a Writ of Certiorari on the following pages:

APPENDIX D — CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8 .....222a-224a

U.S. Const. art. I, § 9, cl. 8.....224a

U.S. Const. art. II, § 1, cl. 7.....224a-225a

U.S. Const. art. II, § 2.....225a

U.S. Const. art. II, § 3.....226a

APPENDIX F — H. RES. 507.....241a-243a

TABLE OF CITED AUTHORITIES

Pages(s)

Cases:

Alden v. Maine,
527 U.S. 706 (1999).....44

Anderson v. Dunn,
19 U.S. 204 (1821).....32, 33, 53

Armstrong v. Bush,
924 F.2d 282 (D.C. Cir. 1991).....48, 57

Ashland Oil, Inc. v. FTC,
548 F.2d 977 (D.C. Cir. 1976).....62

Ashwander v. Tennessee Valley Auth.,
297 U.S. 288 (1936).....55

Bank Markazi v. Peterson,
136 S. Ct. 1310 (2016).....43

Barenblatt v. United States,
360 U.S. 109 (1959).....36, 41, 43

Bond v. United States,
572 U.S. 844 (2014).....33

Bowsher v. Synar,
478 U.S. 714 (1986)..... 47-48, 58

Campbell v. Davidson,
233 F.3d 1229 (10th Cir. 2000).....49

Cheney v. U.S. Dist. Court for D.C.,
542 U.S. 367 (2004).....36, 53, 54

Clinton v. City of New York,
524 U.S. 417 (1998) 47

Clinton v. Jones,
520 U.S. 681 (1997) 53, 64, 65

Comm. on Judiciary, U.S. House of Representatives v. Miers,
558 F. Supp. 2d 53 (D.D.C. 2008) 32

Eastland v. U.S. Servicemen's Fund,
421 U.S. 491 (1975) ..... *passim*

Ex parte Robinson,
86 U.S. 505 (1873) 46

Exxon Corp. v. FTC,
589 F.2d 582 (D.C. Cir. 1978) 56

Franklin v. Massachusetts,
505 U.S. 788 (1992) 50, 57, 59, 60

Free Enter. Fund v. PCAOB,
561 U.S. 477 (2010) 32, 46, 47

Gordon v. United States,
117 U.S. 697 (1864) 46

Gregory v. Ashcroft,
501 U.S. 452 (1991) 61

Hearst v. Black,
87 F.2d 68 (D.C. Cir. 1936) 52

Hutcheson v. United States,
369 U.S. 599 (1962) 37, 40, 42

In re Beef Indus. Antitrust Litig.,
589 F.2d 786 (5th Cir. 1979) 56

INS v. Chadha,
462 U.S. 919 (1983) 48, 58

INS v. St. Cyr,
533 U.S. 289 (2001) 57

Judicial Watch, Inc. v. U.S. Secret Service,
726 F.3d 208 (D.C. Cir. 2013) 48

Kilbourn v. Thompson,
103 U.S. 168 (1880) ..... *passim*

Kissinger v. Reporters Comm. for Freedom of the Press,
445 U.S. 136 (1980) 56

La. Public Service Comm'n v. FCC,
476 U.S. 355 (1986) 47

Marbury v. Madison,
5 U.S. 137 (1803) 31

Marshall v. Gordon,
243 U.S. 521 (1917) 33

McCulloch v. Maryland,
17 U.S. 316 (1819) 33, 35

McGrain v. Daugherty,
273 U.S. 135 (1927) ..... *passim*

McPhaul v. United States,
364 U.S. 372 (1960) 52

McSurely v. McClellan,
521 F.2d 1024 (D.C. Cir. 1975) 36

Metzenbaum v. FERC,
675 F.2d 1282 (D.C. Cir. 1982) 56

Michigan v. EPA,
268 F.3d 1075 (D.C. Cir. 2001) 47

Mississippi v. Johnson,
71 U.S. 475 (1866) 50

Mistretta v. United States,
488 U.S. 361 (1989) 47

Morrison v. Olson,
487 U.S. 654 (1988) 14, 44, 47, 59

NAMUDNO v. Holder,
557 U.S. 193 (2009) 61

NCTA v. United States,
415 U.S. 336 (1974) 58

NFIB v. Sebelius,
567 U.S. 519 (2012) 32, 33, 51

Nixon v. Adm'r of Gen. Servs.,
433 U.S. 425 (1977) 11

Nixon v. Fitzgerald,
475 U.S. 731 (1982) .....*passim*

NLRB v. Noel Canning,
573 U.S. 513 (2014) 27, 31

NLRB v. SW General, Inc.,
137 S. Ct. 929 (2017) 31

Printz v. United States,
521 U.S. 898 (1997) 24, 31, 33

Quinn v. United States,
349 U.S. 155 (1955) 36, 37, 45

Schaefer v. Townsend,
215 F.3d 1031 (9th Cir. 2000) 49

Senate Select Comm. v. Nixon,
498 F.2d 725 (D.C. Cir. 1974) 30, 40, 53

Sinclair v. United States,
279 U.S. 263 (1929) 42

Tenney v. Brandhove,
341 U.S. 367 (1951) 27

Tobin v. United States,
306 F.2d 270 (D.C. Cir. 1962) 45, 61

U.S. Term Limits, Inc. v. Thornton,
514 U.S. 779 (1995) 48, 49

United States ex rel. Attorney General v. Delaware & Hudson Co.,
213 U.S. 366 (1909) 57

United States v. Ballin,
144 U.S. 1 (1892) 56

United States v. Bass,
404 U.S. 336 (1971) 57

United States v. Burr,
25 F. Cas. 187 (C.C.D. Va. 1807) 53

United States v. Kebodeaux,
570 U.S. 387 (2013) 33, 34, 35

United States v. Nixon,
418 U.S. 683 (1974) 53

United States v. Rumely,
345 U.S. 41 (1953) ..... *passim*

United States v. Welden,
377 U.S. 95 (1964) 43

Watkins v. United States,
354 U.S. 178 (1957) ..... *passim*

Wilkinson v. United States,
365 U.S. 399 (1961) 40

Yellin v. United States,
374 U.S. 109 (1963) 56, 62

Zivotofsky ex rel. Zivotofsky v. Kerry,
135 S. Ct. 2076 (2015) 33

Constitutional Provisions and Statutes:

U.S. Const. art. I, § 5, cl. 2 ..... 2, 25

U.S. Const. art. I, § 8 ..... 2, 46

U.S. Const. art. I, § 8, cl. 18 58

U.S. Const. art. I, § 9 51

U.S. Const. art. I, § 9, cl. 8 ..... 2, 50

U.S. Const. art. II, § 1, cl. 1 2

U.S. Const. art. II, § 1, cl. 7 ..... 2, 50

U.S. Const. art. II, § 2 2

U.S. Const. art. II, § 3 2

2 U.S.C. § 192 ..... 2, 58

5 U.S.C. § 551(1) 59

5 U.S.C. § 701(b)(1) 59

5 U.S.C. § 7342(a) 51

28 U.S.C. § 1254(1) 1, 2

44 U.S.C. § 2203 48

44 U.S.C. § 2203(c) 48

44 U.S.C. § 2203(d) 48

Other Authorities:

6 O.L.C. Op. 156 (1982) 51

23 The Papers of Thomas Jefferson, *March 31, 1792* (Charles T. Cullen, ed. 1990) 28

165 Cong. Rec. H269 38

165 Cong. Rec. H2701 38

CNN, *Rep. Maxine Waters on Trump tax returns: What does he have to hide?* (May 22, 2009) 6

H.R. Rep. No. 100-433 29

H.R. Res. No. 116-206 ..... 7, 8

Hearing Before the H. Comm. on Oversight & Reform, 116th Cong. 13 (2019) 4

House of Representatives Rule X, cl. 1(h) 2

House of Representatives Rule X, cl. 3(i) 2, 56

House of Representatives Rule X, cl. 3(m) 2

House of Representatives Rule X, cl. 4(c)(2) 2

House of Representatives Rule X, cl. 11(a)(1) 2

House of Representatives Rule X, cl. 11(b)(1) 2

House of Representatives Rule X, cl. 11j(1) 2

House of Representatives Rule X, cl. 11j(2) 2

House of Representatives Rule XI cl. 2(m)(1)(B) 2

House of Representatives Rule XI cl. 2(m)(3)(A)(i) 2

Jeffrey Toobin, *Adam Schiff's Plan to Obliterate Trump's Red Line*, The New Yorker (Dec. 14, 2018).....6, 7

Memorandum from Laurence H. Silberman, Deputy Att'y Gen., to Richard T. Burress, Office of the President, *Re: Conflict of Interest Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President Under the Twenty-Fifth Amendment to the Constitution* (Aug. 28, 1974) 46

Press Release, Chairman Schiff Statement on House Intelligence Committee Investigation (Feb. 6, 2019).....38

S. Rep. 104-191 (1995).....30

S. Rep. No. 100-216 (1987).....29

The Federalist No. 33.....33

The Federalist No. 48.....43

The Federalist No. 67.....46

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the District of Columbia Circuit in *Trump v. Mazars USA, LLP* is reported at 940 F.3d 710 and is reproduced in the Appendix to the Petition ("Pet. App.") at 1a-157a. The opinion of the U.S. District Court for the District of Columbia is reported at 380 F. Supp. 3d 76 and is reproduced at Pet. App. 158a-212a. The order denying the rehearing petition is reported at 941 F.3d 1180 and is reproduced at Pet. App. 213a-21a.

The opinion of the U.S. Court of Appeals for the Second Circuit in *Trump v. Deutsche Bank AG* is reported at 943 F.3d 627 and is reproduced in the Joint Appendix ("App.") at 223a-375a. The order of the district court is not reported but is available at *Trump v. Deutsche Bank AG*, 2019 WL 2204898 (S.D.N.Y. May 22, 2019), and is reproduced at App. 185a-86a. The district court also incorporated by reference its opinion read into the record during the preliminary-injunction hearing held May 22, 2019. The relevant portion of that transcript is reproduced at App. 187a-222a.

JURISDICTION

The D.C. Circuit issued its *Mazars* opinion on October 11, 2019, and denied rehearing and rehearing en banc on November 13, 2019. The petition for a writ of certiorari was filed on December 4, 2019, and the Court granted it on December 13, 2019. The Court has jurisdiction under 28 U.S.C. §1254(1).

The Second Circuit issued its *Deutsche Bank* opinion on December 3, 2019. On December 13, 2019, the Court granted an application for stay, treated the application for stay as a petition for a writ of certiorari, and granted the petition. The Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved in these consolidated cases are: U.S. Const. art. I, §§8, 9 cl. 8; U.S. Const. art. II, §1, cl. 1, 7, §§2-3 (reproduced at Pet. App. 222a-26a); and U.S. Const. art. I, §5, cl. 2 (reproduced in the appendix to this brief). The statutory provision involved is 2 U.S.C. §192, and it is reproduced in the appendix to this brief at 2a. Rule X, clauses 3(i) and 4(c)(2) of the Rules of the House of Representatives are reproduced at Pet. App. 251a-52a. Rule X clauses 1(h); 3(m); 11(a)(1), (b)(1), j(1)-(2); and Rule XI clauses 2(m)(1)(B) and (m)(3)(A)(i) of the Rules of the House of Representatives are reproduced in the appendix to this brief at 9a-13a. House Resolution 507 is reproduced at Pet. App. 241a-43a. House Resolution 206 is reproduced in the appendix to this brief at 3a-8a.

STATEMENT OF THE CASE

A. Background

In the runup to the 2018 elections, Nancy Pelosi explained that, should her party reclaim a majority of the House of Representatives, the "subpoena power" will be "a great arrow to have in [our] quiver." App.

38a. Upon prevailing, the incoming House majority announced its plans to investigate all aspects of the President's public and private life. As a congressional aide put it, the House was "going to force transparency on this president." *Id*. The leadership was preparing a "subpoena cannon" to fire at President Trump based on a "wish-list" of nearly 100 investigatory topics. App. 39a. The incoming budget chairman said it would be "brutal" for the President: "We're going to have to build an air traffic control tower to keep track of all the subpoenas flying from here to the White House." *Id*. These cases are about the legality of four of those subpoenas.

1. The Mazars Subpoena

On April 15, 2019, the Oversight Committee of the House of Representatives issued a subpoena to Mazars USA, LLP, the accounting firm for President Trump and several Trump entities. The committee's subpoena required Mazars to produce eight years of accounting and other financial information "related to work performed for President Trump and several of his business entities both before and after he took office." Pet. App. 2a.[1]

The Mazars subpoena arose from a Committee hearing last February that featured the testimony of

[1] The New York County District Attorney later copied and served this same subpoena to Mazars as part of a grand jury investigation into President Trump. The only difference is that the District Attorney also demanded tax returns. *See Trump v. Vance*, No. 19-635, Petition for Writ of Certiorari, at 8 (filed Nov. 14, 2019).

Michael Cohen. Cohen was then awaiting sentencing following his guilty plea to several federal crimes (including lying to Congress). Cohen claimed that the President had "inflated" and "deflated" assets on "personal financial statements from 2011, 2012, and 2013" to obtain a bank loan for a deal "to buy the Buffalo Bills" and to "reduce his [state] real estate taxes" and insurance premiums. *Hearing Before the H. Comm. on Oversight & Reform*, 116th Cong. 13 (2019), bit.ly/2IrXTkX. Mazars had prepared the President's financial statements.

The Committee wanted to hear from Cohen because his claims, according to the Chairman, raise "grave questions about the legality of … President Donald Trump's conduct." *Id.* at 6. Many Committee members agreed. *See id.* at 30 (Maloney: lamenting that Cohen is "facing the consequences of going to jail" but the President "is not"); *id.* at 37 (Clay: "I would like to talk to you about the President's assets, since by law these must be reported accurately."); *id.* at 150-52 (Khanna: "[Y]ou have provided … compelling evidence of Federal and State crimes, including financial fraud…. I just want the American public to understand that … the President … may be involved in a criminal conspiracy"); *id.* at 107 (Hill: "I ask these questions to help determine whether our very own President committed felony crimes"); *id.* at 160-61 (Ocasio-Cortez: "[D]id the President ever provide inflated assets to an insurance company? … Do you think we need to review his financial statements … to compare them?"); *id.* at 163-64 (Tlaib: "[O]ur sole purpose[] is exposing the truth…. President Donald J.

Trump … commit[ed] multiple felonies, and you covered it up, correct?").

After the hearing, the Chairman memorialized the Committee's reasons for issuing the subpoena in two documents. The first, a March 20 letter to Mazars, explained that the subpoena would assist in verifying Cohen's testimony that "President Trump changed the estimated value of his assets and liabilities on financial statements prepared by your company—including inflating or deflating the value of assets depending on [his] purpose." DDC Doc. 30 at 5. The letter then identified what the Chairman believed to be inconsistencies between the 2011, 2012, and 2013 financial statements that Cohen had shared with the Committee. The Chairman asked Mazars to "assist" the Committee in its "review of these issues." *Id.* at 6-8.

A formal memorandum from the Chairman to the Committee, dated April 12, once again referenced the desire to verify Cohen's testimony, and set forth four purposes for the Mazars subpoena: determining whether President Trump (1) "may have engaged in illegal conduct before and during his tenure in office"; (2) "has undisclosed conflicts of interest that may impair his ability to make impartial policy decisions"; (3) "is complying with the Emoluments Clauses of the Constitution"; and (4) "has accurately reported his finances to the Office of Government Ethics and other federal entities." *Id.* at 21. "The Committee's interest in these matters," the memorandum added, "informs its review of multiple laws and legislative proposals under [its] jurisdiction." *Id.* It did not elaborate.

2. The Bank Subpoenas

In April 2019, the House Financial Services and Intelligence Committees issued three "extraordinarily broad subpoenas" to Capital One and Deutsche Bank. App. 370a (Livingston, J., concurring in part and dissenting in part). Maxine Waters—Chairwoman of the Financial Services Committee—wanted President Trump to know why: "We're going to find out where your money has come from." App. 120a. After this litigation ensued, the Chairwoman gave an interview in which she confirmed the purpose of the subpoenas: "We want to know about personal and about company finances, we want to know who he owes money to, we want to know whether or not he had the kind of assets that he claimed that he had in order to get money." CNN, *Rep. Maxine Waters on Trump tax returns: What does he have to hide?* 3:30-45 (May 22, 2009), bit.ly/37zLIOo. She continued: "He refuses to turn over the tax returns, what does he have to hide? Has he been compromised in any way? Is there money laundering going on? There is enough that we know about him to have legitimate suspicion and we need to have documentation." *Id*. 5:32-47.

Adam Schiff, the Chairman of the Intelligence Committee, offered a similar explanation for issuing a subpoena: "The one [area] that has always concerned me is the financial issues." Jeffrey Toobin, *Adam Schiff's Plan to Obliterate Trump's Red Line*, The New Yorker (Dec. 14, 2018), bit.ly/30SBdmN. Chairman Schiff added that his committee, among other things, is "going to be looking at the issue of possible money

laundering by the Trump Organization, and Deutsche Bank is one obvious place to start." *Id.*

The Financial Services Committee subpoenaed Capital One for the account records concerning fifteen of the President's business entities, as well the records for any "parent, subsidiary, affiliate" and "principal, including directors, shareholders, or officers." App. 155a-56a. The subpoena further demands information about any account "in which such entities are or were a beneficiary, or beneficial owner, or in which such entities have or have had in any way control over, individually or with others." App. 156a. The only legislative purpose that the Committee asserts for the subpoena is to inform the inquiry referenced in House Resolution 206, which expresses concern over money laundering and other financial crimes. *See* H.R. Res. No. 116-206, at 5 (Mar. 13, 2019). The Committee claims it wants to use "Mr. Trump, his family, and his business … as a useful case study" to learn about "unsafe lending practices" and "money laundering." SDNY Doc. 51 at 24-25. The subpoena's start date is July 19, 2016—the "date on which [President Trump] became the Republican nominee for President." App. 345a n.16 (Livingston, J.).

The second and third subpoenas are identical. Both are to Deutsche Bank—one by the Financial Services Committee and the other by the Intelligence Committee. These subpoenas are even broader than the Capital One subpoena. They demand information about seven business entities, as well as the personal accounts of President Trump, Donald Trump Jr., Eric Trump, and Ivanka Trump. App. 128a-51a.

The Committees also demand the banking records for all of the named individuals' immediate families—*i.e.*, spouses, minor children, and, in the President's case, grandchildren. App. 129a, 149a. The subpoenas also cover any "trustee, settler or grantor, beneficiary, or beneficial owner" of each account, plus "any current or former employee officer, director, shareholder, partner, member, consultant, senior manager, manager, senior associate, staff employee, independent contractor, agent, attorney or other representative." App. 129a, 148a. And they seek these records for a time period of at least ten years (dating back to January 1, 2010); some requests have no time limitation at all. App. 128a, 155a.

The Intelligence Committee has justified the subpoena as part of an investigation into "efforts by Russia and other foreign entities to influence the U.S. political process during and since the 2016 U.S. election." App. 204a. The Committee also claims that the documents will advance its understanding of "the threat of foreign financial leverage, including over the President, his family, and his business." App. 206a. The Financial Services Committee, here too, points to House Resolution 206 in justifying its subpoena to Deutsche Bank. App. 346a n.17.

B. Proceedings Below

1. The Mazars Litigation

On April 22, 2019, Petitioners sued Mazars, the Committee Chairman, and the Committee lawyer who served the subpoena. Petitioners alleged that the subpoena lacked statutory authority and it sought

their private records without a "legitimate legislative purpose." App. 32a. A few days later, the Committee intervened in the place of the individual congressional defendants, and it agreed to stay enforcement of the subpoena until the district court ruled on Petitioners' preliminary-injunction motion. Pet. App. 174a.[2]

The district court treated the preliminary-injunction filings as summary-judgment motions, entered final judgment for the Committee, and denied a stay pending appeal. Pet. App. 178a, 208a-12a. On appeal, the parties agreed to stay enforcement of the subpoena until the D.C. Circuit's mandate issues. CADC Doc. 1811186 at 2-3.

On October 11, 2019, the D.C. Circuit affirmed in a divided opinion. Pet. App. 1a-157a. For the subpoena to be statutorily valid, the majority explained, the House of Representatives needs to have "given the issuing committee … authority" to demand these records. Pet. App. 20a. To be constitutional, the subpoena needs a "legitimate legislative purpose." Pet. App. 68a. This means "a legislative, as opposed to a law-enforcement, objective," it concerns a "'subject on which constitutional legislation 'could be had,'" and it "seeks information sufficiently relevant to the Committee's legislative inquiry." Pet. App. 24a (quoting *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927)).

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[2] Throughout these proceedings, Mazars has taken the position that "the dispute in this action is between Plaintiffs and the Committee," DDC Doc. 23 at 2, and has taken no position on the legal issues.

Taking the issues "in reverse order," Pet. App. 22a, the majority first held that the subpoena is constitutional. In the majority's view, the Committee's investigation of the President was legislative. It relied on the Chairman's memoranda. Notwithstanding the Chairman's stated purpose to investigate whether the President broke the law, the majority deemed it "more important" that the Chairman had made a boilerplate pronouncement of the Committee's "interest in these matters informs [its] review of multiple laws and legislative proposals." Pet. App. 29a. Moreover, "that the House has pending several pieces of legislation related to the Committee's inquiry offers highly probative evidence of the Committee's legislative purpose." Pet. App. 30a. This justification was not, in the majority's view, "an insubstantial, makeweight assertion of remedial purpose." Pet. App. 32a. "Simply put," the majority held, "an interest in past illegality can be wholly consistent with an intent to enact remedial legislation." Pet. App. 32a.

The majority further held that the subpoena sought information about a subject on which Congress "may potentially legislate or appropriate." Pet. App. 41a (citation and quotations omitted). Laws that require presidents to "disclose financial information" are, in its view, a "category of statutes" within the legislative domain since, for example, Congress could pass laws to enforce the Emoluments Clauses of the Constitution. Pet. App. 44a (emphasis omitted). The majority thought such legislation would not "prevent the President from accomplishing his constitutionally assigned functions," add a qualification for office, or otherwise exceed Congress's legislative authority. Pet.

App. 45a (cleaned up). To hold otherwise, according to the majority, "would be a return to an 'archaic view of the separation of powers'" that "is not the law." Pet. App. 49a (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977)). The majority saw "no inherent constitutional flaw in laws requiring Presidents to publicly disclose certain financial information." Pet. App. 51a.

As to statutory authority, the majority would not "interpret the House Rules narrowly to deny the Committee the authority it claims" even though the House Rules do not expressly authorize it to subpoena the President. Pet. App. 63a. First, the majority rejected application of the clear-statement rule because "the House Rules have no effect whatsoever on 'the balance *between* Congress and the President.'" Pet. App. 68a. In the majority's view, since "Congress already possesses—in fact, has previously exercised—the authority to subpoena Presidents and their information, nothing in the House Rules could in any way 'alter the balance between' the two political branches of government." Pet. App. 69a (citations omitted).

Second, the majority held that the avoidance canon was inapplicable. It recognized the Committee's authority under the House Rules must be narrowly interpreted if there are any serious "'doubts'" as to the subpoena's "'constitutionality.'" Pet. App. 69a (quoting *United States v. Rumely*, 345 U.S. 41, 46 (1953)). According to the majority, though, "the constitutional questions raised here are neither grave nor serious and difficult." Pet. App. 70a (cleaned up).

Finally, the majority held that the prospect of every congressional committee issuing subpoenas to the President did not create any separation-of-powers concerns that would justify a narrowing construction. Pet. App. 71a-72a. It reasoned that this subpoena "directed at Mazars" presented no occasion to address whether a flurry of subpoenas would interfere with the President's official duties, and, regardless, the majority saw no reason why this particular subpoena "risks unconstitutionally burdening the President's core duties." Pet. App. 75a.

Judge Rao dissented. Pet. App. 77a-157a. She viewed the dispute as raising "serious separation of powers concerns about how a House committee may investigate a sitting president." Pet. App. 77a. In her view, "Congress cannot undertake a legislative investigation" of the President "if the 'gravamen' of the investigation rests on 'suspicions of criminality.'" Pet. App. 85a (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 193, 195 (1880)). Rather, Judge Rao explained, "allegations of illegal conduct against the President cannot be investigated by Congress except through impeachment." Pet. App. 83a. Thus, whether the subpoena has "a legislative purpose presents a serious conflict between Congress and the President." Pet. App. 88a-89a.

Judge Rao concluded that this subpoena was not exercising "legislative power" since the Committee "explicitly" expressed "a purpose of investigating illegal conduct of the President, including specific violations of ethics laws and the Constitution." Pet. App. 77a-78a. In fact, "the Committee has emphasized

repeatedly and candidly its interest in investigating allegations of illegal conduct by the President." Pet. App. 120a-21a. The subpoena therefore is "not about administration of the laws generally or the President's incidental involvement in or knowledge of any alleged unlawful activity within the executive branch." Pet. App. 122a. The subpoena's "topics … exclusively focus on the President's possible engagement in 'illegal conduct.'" *Id.*

Judge Rao recognized that the Committee also professes a legislative purpose. Pet. App. 126a. But "the mere statement of a legislative purpose is not 'more important' when a committee also plainly states its intent to investigate such conduct." Pet. App. 127a. The "gravamen … is the President's wrongdoing. The Committee has 'affirmatively and definitely avowed,' *McGrain*, 273 U.S. at 180, its suspicions of criminality against the President." Pet. App. 135a. At bottom, "questions of illegal conduct and interest in reconstructing specific financial transactions of the President are too attenuated and too tangential to" any "legislative purposes" for the Mazars subpoena to be legitimate. Pet. App. 133a (citations and quotations omitted).

Because she would invalidate the subpoena on law-enforcement grounds, Judge Rao had no need to reach the parties' other disputes. But she did express concern with the majority's statutory analysis. In particular, Judge Rao rejected the notion that separation- of-powers concerns are not implicated because the subpoena was issued to a third-party custodian. Pet. App. 86a-88a. She also outlined why

laws regulating the President are "rife with constitutional concerns." Pet. App. 142a.

On November 13, 2019, the D.C. Circuit denied rehearing. Pet. App. 213a-21a. Judge Katsas, joined by Judge Henderson, dissented. He explained that "this case presents exceptionally important questions regarding the separation of powers among Congress, the Executive Branch, and the Judiciary." Pet. App. 215a (Katsas, J., dissenting from denial of rehearing en banc). This is only "the second time in American history [that] an Article III court has undertaken to enforce a congressional subpoena for the records of a sitting President," and it is the first time one had been upheld in court. *Id*.

By upholding such a subpoena for the first time, the ruling "creates an open season on the President's personal records." Pet. App. 216a. Now, "whenever Congress conceivably could pass legislation regarding the President, it also may compel the President to disclose personal records that might inform the legislation." *Id*. "With regard to the threat to the Presidency, this wolf comes as a wolf.'" Pet. App. 217a (quoting *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting)).

Judge Rao, joined by Judge Henderson, also dissented because "[t]he exceptionally important constitutional questions raised by this case justify further review by our court." Pet. App. 218a-19a (Rao, J., dissenting from denial of rehearing en banc). "The panel's analysis of these issues misapprehends the gravamen of the Committee's subpoena and glosses

over the difficult questions it raises for the separation of powers." Pet. App. 218a. The fallout from upholding this "unprecedented" subpoena will be serious because "the panel opinion has shifted the balance of power between Congress and the President and allowed a congressional committee to circumvent the careful process of impeachment." *Id*. "This question is one of exceptional importance," Judge Rao concluded, "both for this case as well as for the recurring disputes between Congress and the Executive Branch." Pet. App. 221.

On November 25, 2019, the Court stayed the mandate pending the disposition of a petition for writ of certiorari. The Court granted a petition for writ of certiorari on December 13, 2019.

2. The Bank Litigation

Petitioners challenged the subpoenas by filing suit against the banks on April 29, 2019. They sought a preliminary injunction a few days later. Petitioners claimed that the subpoenas exceed the Committees' constitutional and statutory authority. *See* App. 109a-27a. The Committees intervened as defendants and opposed the preliminary-injunction motion.[3]

On May 22, the parties appeared before the district court for a hearing. *See* App. 186a. The court questioned Petitioners and the Committees for more than an hour. The court then took a short recess and,

[3] Like Mazars, Deutsche Bank and Capital One have not taken a position in this case, viewing it as a dispute between the Committees and the President. *See* CA2 Docs. 66, 71.

upon returning to the bench, read aloud a prepared order, the transcript of which is the only record of the ruling below. *See* App. 187a-222a. It declined to grant a preliminary injunction. App. 222a.

Petitioners appealed. On appeal, the parties agreed to stay enforcement of the subpoenas until the Second Circuit's mandate issues.

On December 3, 2019, a divided panel of the Second Circuit affirmed. The majority held, *inter alia*, that the bank subpoenas had legitimate legislative purposes, were not an exercise of executive power, and were not attempts to expose Petitioners' records for the sake of exposure. App. 278a-89a, 297a-300a. The majority agreed with the Financial Services Committee that the President and his family would be a "useful 'case study'" as the House considers making legislative reforms. App. 293a n.67.

Furthermore, it rejected any requirement that the Committees make a heightened showing of need or have express statutory authority to demand the records because, in the majority's view, the case "does not concern separation of powers." App. 307a-15a. For the bulk of the subpoenaed documents,[4] the majority affirmed the district court's denial of a preliminary

[4] The majority expressed concern that these subpoenas "might include some documents warranting exclusion," App. 304a, since they "might reveal sensitive personal details having no relationship to the Committees' legislative purposes," App. 303a. For this subset of records, the majority ordered a "limited" and expedited remand so that Petitioners could raise specific challenges. App. 305a-06a.

injunction, ordered the bank records to "be promptly transmitted to the Committees in daily batches as they are assembled, beginning seven days from the date of th[e] opinion," and issued the mandate. App. 306a, 322a.

Judge Livingston concurred in part and dissented in part. She agreed with the majority that this "appeal raises an important issue regarding the investigative authority of two committees of the United States House of Representatives." App. 326a. And she agreed with the majority's rejection of certain statutory claims Petitioners do not press here. *Id.* The agreement ended there. Judge Livingston otherwise rejected the majority's analysis and disposition of the appeal. She would have remanded the entire dispute "to permit the district court and the parties the opportunity to provide this Court with an adequate record regarding the legislative purpose, pertinence, privacy and separation of powers issues in this case." App. 374a-75a.

In Judge Livingston's view, this dispute raises serious separation-of-powers issues. As she explained: "the parties are unaware of any Congress before this one in which a standing or permanent select committee of the House has issued a third-party subpoena for documents targeting a President's personal information solely on the rationale that this information is 'in aid of legislation.'" App. 326a (citation omitted). Judge Livingston thus found these "dragnet" subpoenas to be "deeply troubling." App. 324a & n.2, 333a n.7. "Contrary to the majority's suggestion, it is not at all difficult to conceive how

standing committees exercising the authority to issue third-party subpoenas in aid of legislation might significantly burden presidents with myriad inquiries into their business, personal, and family affairs." App. 341a. The court therefore had the "sensitive task of ensuring that Congress, in seeking the President's personal information in aid of legislation, has employed 'procedures which prevent the separation of power from responsibility.'" App. 343a (quoting *Watkins v. United States*, 354 U.S. 178, 215 (1957)).

Judge Livingston doubted if the Committees could meet that burden. There was no "clear reason why a congressional investigation aimed generally at closing regulatory loopholes in the banking system need focus on over a decade of financial information regarding this President, his family, and his business affairs." App. 347a. Nor was it clear "how the broad purposes pursued by the Committee are consistent with the granular detail that these subpoenas seek." *Id.* Judge Livingston also thought that the subpoenas, which seek "personal information about the President, his family, and his businesses," trigger "a serious question" as to the Committees' statutory authority. App. 356a.

On December 13, 2019, the Court granted Petitioners' application to stay the mandate, treated the application as a petition for writ of certiorari, and granted the petition.

SUMMARY OF ARGUMENT

To call these subpoenas unprecedented would be an understatement. This is the first time that Congress has subpoenaed private records of a sitting President, and these companion decisions are the first time that courts have upheld congressional subpoenas for any sitting President's records of any kind. Under the D.C. Circuit's decision, Congress can subpoena any private records that it wishes from the sitting President on the mere assertion that it is considering legislation that might require presidents to disclose that information. And, in the Second Circuit's view, Congress may subpoena private records of the sitting President as a "case study" into any legislative issue it might be investigating.

The lack of historical precedent for any of these subpoenas should be a strong signal that something is amiss. Congress's authority to issue subpoenas in aid of its lawmaking function is implied—not express. The Court has held that implied powers may not be used to alter the structure of the government or otherwise invoke authority that is so fundamental that it would be found in the Constitution's text if it existed. There is nothing auxiliary, subordinate, or incidental about a legislative demand for the personal documents of the sitting President. There is every reason to doubt, then, that this is an implied power that Congress may rely on to defend these subpoenas.

This serious concern ought to frame the Court's inquiry into whether the subpoenas have a legitimate legislative purpose. Legislative subpoenas may not be used to engage in law enforcement, to investigate into areas where Congress may not validly legislate, and to probe into issues that are not pertinent. These four subpoenas flunk this test under the Court's decisions resolving disputes over ordinary legislative subpoenas about routine congressional topics. But the subpoenas under review here are anything but ordinary, and the congressional investigations that produced them are certainly not routine. Against this troubling backdrop, there is no basis for affirmance.

These Committees are not legislating; they are avowedly engaging in law enforcement. All of them—to one degree or another—have acknowledged that the purpose of the investigations is to determine whether the President engaged in wrongdoing. The events that led to the subpoenas' issuance, the public statements surrounding these investigations, the nature of these demands themselves, and other evidence confirm that the Committees' purpose is to find out if the President broke the law.

The Committees' evident objective to expose the President's personal finances is equally problematic. Exposing private details about individuals is not a power Congress holds. Publicly releasing information about individuals is a form of punishment. Yet that has been the goal here from the start. It is difficult to imagine a more blatant effort to expose for the sake of exposure than misusing the President and his family as a congressional "case study."

To be sure, the Committees have professed an interest in legislating if their investigations uncover wrongdoing. That was enough for the lower courts. But it should not have been. Claiming—as the Committees have—that the fruits of an investigation might lead Congress to amend existing law cannot transform a law enforcement effort into a legislative agenda. If it could, Congress's implied investigative powers would be truly limitless. Whether a subpoena is legislative must turn on its primary purpose—not on magic words. The primary purpose of these four subpoenas is law enforcement.

These subpoenas also probe into areas where Congress lacks the power to legislate. The Oversight Committee asserts that Congress can extend federal conflict-of-interest restrictions to the President and impose additional financial-disclosure requirements. But the office of the President (like the Supreme Court and unlike executive departments and lower courts) is created by the Constitution—not Congress. Therefore, Congress lacks the legislative power to dictate to the President on these matters, expand or alter the office's qualifications, or otherwise interfere with his ability to exercise of his official duties.

The defects in the bank investigation are even more plain. As the D.C. Circuit recognized, subpoenas to the President can only be legitimate, at most, if they are in pursuit of legislation specific to the President. The Capital One and Deutsche Bank subpoenas don't even profess to have this kind of purpose. The attempt of the Financial Services and Intelligence Committees to obtain the private records of the President so they

may broadly consider banking and money laundering legislation should be rejected. These subpoenas are no more valid than would be demands for the President's medical records so Congress may consider healthcare reform.

Finally, the subpoenas are illegitimate because they make a sweeping demand for records that are, at best, tangentially related to the Committees' claimed legislative purposes. Ordinarily, the Court will uphold a congressional subpoena against a pertinency attack if it is reasonably related to the matter that Congress is pursuing. These subpoenas should be invalidated under that standard. But more than mere relevance should be required. The Court has always demanded a heightened demonstration of need when it comes to subpoenas for the President's records. That same rule should apply here. These subpoenas are all expansive, burdensome, and unfocused fishing expeditions. They are inappropriate and should be invalidated.

But the lower courts should have never reached these serious constitutional issues because, under the House Rules, the Committees lack express authority to issue these subpoenas. Express delegation from the full House to subpoena the President's private records is needed for three related reasons. First, the Court demands a clear statement when Congress seeks to encumber the President. Second, a clear statement is needed when Congress presses the outer limits of its constitutional authority. Third, the avoidance canon requires the same. These tools of interpretation—both separately and collectively—should have led the lower courts to invalidate these subpoenas for lacking the

express statement that all agree was missing when the Committees issued them.

The D.C. Circuit and the Second Circuit held that no express statement is required here principally on the ground that the cases do not raise the kind of serious separation-of-power problems that would trigger it. That is wrong. It is hard to imagine cases with *more* separation-of-powers issues. Whether Congress is empowered to subpoena the President's personal records—at all—in aid of legislation and, if it is, whether these subpoenas exceed that authority are exactly the kind of interbranch disputes the Court should avoid resolving until Congress has made clear that it understands the stakes and is prepared for judicial resolution. The weighty constitutional issues presented by this dispute should not be resolved until Congress does so.

The Committees believe that the House issued a clear statement via Resolution 507. But there is a reason why the D.C. Circuit declined to rely on this argument. The resolution does not purport to amend the House Rules, does not acknowledge any expansion of committee authority, and is retroactive in violation of controlling precedent. Moreover, the idea that *every* House committee may issue *any* legislative subpoena for the records of the President and his family for *any* reason it wants just raises another constitutional issue. Whatever powers Congress holds, it may not deploy them in a way that keeps the President from fulfilling the obligations of his office. Unleashing each and every House committee to torment the President with legislative subpoena after legislative subpoena is

a recipe for constitutional crisis. An incautious House resolution passed to bolster the Committees' litigating position should not be allowed to trigger it.

ARGUMENT

I. Legislative subpoenas for the President's private records press the outer limits of Congress's authority.

The D.C. Circuit correctly observed that it was "necessary to place" the congressional subpoenas at issue here "in historical context." Pet. App. 11a. It just got the history wrong. Though Congress has a history of issuing legislative subpoenas, there is no "historical precedent" for issuing legislative subpoenas for the President's private records. App. 339a-40a & n.11, 341a n.13, 348a (Livingston, J.). "And this paucity of historical practice alone is reason for courts to pause in assessing this dispute between a President and … House committees." App. 339a-40a (Livingston, J.). That "earlier Congresses avoided use of this highly attractive power" is a strong signal "that the power was thought not to exist." *Printz v. United States*, 521 U.S. 898, 905 (1997).

A. This Court has held that Congress has implied authority to subpoena documents and testimony in aid of legislation.

The authority of Congress to issue subpoenas, enforceable through contempt, has been controversial from the beginning. "The powers of Congress … are dependent solely on the Constitution," and this power

is not "found in that instrument." *Kilbourn*, 103 U.S. at 182; Pet. App. 90a (Rao, J., dissenting).

But the issue was not joined for more than a century. "There was very little use of the power of compulsory process in early years to enable the Congress to obtain facts pertinent to the enactment of new statutes or the administration of existing laws." *Watkins*, 354 U.S. at 192-93. In those days, Congress employed compulsory process mostly to investigate its own members, *see id.* at 192, a power that it expressly holds, *see* U.S. Const. art. I, §5, cl. 2. "It is not surprising," then, that the "Nation was almost one hundred years old before the first case reached this Court to challenge the use of compulsory process as a legislative device, rather than in inquiries concerning the elections or privileges of Congressmen." *Watkins*, 354 U.S. at 193-94.

That case was *Kilbourn*. Congress had asserted "unlimited" power to issue and enforce subpoenas—a power it claimed "must be presumed" to have been "rightfully exercised." 103 U.S. at 181-82. In pressing this view, Congress offered two arguments: first, "the House of Commons of England" held this power; and second, it was a "necessity … to enable the two Houses of Congress to perform the duties and exercise the powers which the Constitution has conferred on them." *Id.* at 183.

The Court rejected the first argument. Unlike Congress, "the assembled Parliament exercised … the judicial authority of the king in his Court of Parliament." *Id.* The "powers and privileges of the House of Commons of England," in other words, "rest

on principles which have no application to … the House of Representatives of the United States—a body which is in no sense a court, which exercises no functions derived from its once having been a part of the highest court of the realm, and whose functions, so far as they partake in any degree of that character, are limited to punishing its own members and determining their election." *Id.* at 189.

The Court then determined that it did not need to pass on "the existence or nonexistence of such a power in aid of the legislative function." *Id.* Another constitutional error rendered that issue immaterial: the "power" that the House exercised in *Kilbourn* was "judicial and not legislative," which violated the fundamental maxim that "the powers confided by the Constitution to one of [the] departments cannot be exercised by another." *Id.* at 191-93. As a consequence, the Court could assume that Congress had an implied subpoena power, since the House's investigation was unconstitutional in any event. *See id.* at 195-96.

It was not until 1927 that the Court finally answered "whether this power is so far incidental to the legislative function as to be implied." *McGrain*, 273 U.S. at 161. It ruled in favor of Congress, holding that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *Id.* at 174. But, at the same time, the Court was emphatic that the Constitution does not give Congress a "'general power of making inquiry into the private affairs of the citizen'"; Congress may not seize "a power which could only be properly exercised by another branch of the government'";

Congress must be pursuing a "matter" for which "valid legislation could be had"; and the information being sought must be "pertinent to the [legislative] inquiry." *Id*. at 170-71 (quoting *Kilbourn*, 103 U.S. at 189-90, 192-93).

The Court has hewed to these lines ever since. It has not permitted Congress to be "the final judge of its own power and privileges," *Kilbourn*, 103 U.S. at 199, and it "has not hesitated" to invalidate subpoenas when "Congress was acting outside its legislative role," *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). Congressional subpoenas "must be related to, and in furtherance of, a legitimate task of the Congress" to withstand judicial review. *Watkins*, 354 U.S. at 187. That is, they need a "legitimate legislative purpose." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 n.14 (1975).

B. Congress has no history of issuing legislative subpoenas for the private records of the sitting President.

The Court traditionally "put[s] significant weight upon historical practice" when the controversy turns on the "allocation of power between two elected branches of Government." *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014). No court or party has identified "*any* Congress before this one in which a standing or permanent select committee of the House has issued a third-party subpoena for documents targeting a President's personal information solely on the rationale that this information is in aid of legislation." App. 326a (Livingston, J.) (citation omitted); *see* Pet.

App. 99a-119a (Rao, J., dissenting); Pet. App. 215a (Katsas, J.).

The congressional investigations referenced by the D.C. Circuit do not provide historical precedent for these subpoenas. For example, it first references the 1792 investigation into the failed expedition under General St. Clair. Pet. App. 12a-13a. There, the House passed a resolution authorizing a committee to call for "persons, papers, and records, as may be necessary to assist their inquiries." 3 Annals of Cong. 493. Under that authority, the committee wrote to Secretary of War Henry Knox, demanding papers related to the incident. *See* 23 The Papers of Thomas Jefferson, *March 31, 1792*, at 261-62 (Charles T. Cullen, ed. 1990) (recounting the events). Even though the documents were sought from the Secretary of War, and the House never sought presidential records—let alone personal records of the President, Pet. App. 102a-03a (Rao, J., dissenting)—President Washington was quick to state the limits of the House's authority, 23 The Papers of Thomas Jefferson, *March 31, 1792* and *April 2, 1792*, at 261-62.

Responding via his cabinet (which included Jefferson and Hamilton), the President informed the House that if it wanted the papers, it should address him—not the "head of a department, who and whose papers were under the [President] alone." *Id.* at 262. That way, he could "exercise a discretion" "to refuse … the disclosure" of records. *Id.* The House, in response, acquiesced by passing a new resolution *requesting*—not demanding or using any language associated with a subpoena—that the President "cause the proper

officers" to disclose only "papers of a public nature." 3 Annals of Cong. 536. No congressional subpoena ever issued to the President.

The court also pointed to an 1832 investigation into an alleged fraudulent transfer of money from the Secretary of War to Representative Samuel Houston. Pet. App. 17a-18a. Again, however, attempts to identify any congressional subpoena for presidential records—let alone a subpoena for President Jackson's personal papers—come up empty. Pet. App. 105a-06a n.8 (Rao, J., dissenting).

The D.C. Circuit does not offer another example of a "legislative investigation" of a President between 1832 and the investigation into the events that led to the attack on Pearl Harbor. Pet. App. 17a, 18a. But that congressional investigation is likewise "of limited value." Pet. App. 113a n.13 (Rao, J., dissenting). By the time Congress began investigating Pearl Harbor, President Roosevelt had died, President Truman was not subpoenaed, and no subpoena sought the sitting President's personal documents.

The D.C. Circuit's citation to the Iran-Contra investigation is equally misplaced. Pet. App. 18a. Congress established select committees to investigate "arms sales to Iran, the possible diversion of funds to aid the Contras, violations of Federal law, and the involvement of the NSC staff in the conduct of foreign policy." H.R. Rep. No. 100-433, S. Rep. No. 100-216, at xv (1987). That broad investigation included review of "the role of the President" in this controversy. *Id.* at 21. But the committees never subpoenaed President

Reagan's personal records. "The Committees obtained over one million pages of documents, in part through subpoenas, but only accessed the President's personal papers through his voluntary cooperation." Pet. App. 117a (Rao, J., dissenting).

The closest the D.C. Circuit comes to relevant examples are the congressional investigations into the Watergate and Whitewater scandals. *See* Pet. App. 18a-20a. In 1973, the Senate Select Committee sought tape recordings of President Nixon's discussions with aides. Pet. App. 19a. And, in 1995, the Special Senate Committee subpoenaed the notes of a White House lawyer concerning a meeting attended by government lawyers and President Clinton's private counsel. Pet. App. 18a-19a; S. Rep. 104-191, at 3, 6-7 (1995). But neither of these investigations provide a foundation for the subpoenas at issue here.

It is doubtful whether either subpoena involved a demand for the sitting President's *personal* papers, as the communications sought in both Watergate and Whitewater included Executive Branch officials. Legislative subpoenas for official records may raise different issues than those for the sitting President's personal records. *See* Pet. App. 215a-16a (Katsas, J.). Furthermore, neither subpoena was upheld in court. The D.C. Circuit invalidated the Watergate subpoena, *see Senate Select Comm. v. Nixon*, 498 F.2d 725, 731-33 (D.C. Cir. 1974) (en banc), while the Whitewater subpoena was never litigated, *see* S. Rep. 104-204, at 20 (1996).

But even if these subpoenas do resemble those issued during Watergate and Whitewater, it would not mean that Congress has a fair claim to history. "Long settled and established practice," as the Court has explained, "'is a consideration of great weight in a proper interpretation of constitutional provisions regulating the relationship between Congress and the President." *Noel Canning*, 573 U.S. at 524 (citation omitted). It "can inform" the court's "determination of 'what the law is.'" *Id.* (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). "The voluminous historical record" was informative in *Noel Canning*, therefore, because it "dated back to 'the beginning of the Republic,' and included 'thousands of intra-session recess appointments.'" *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 943 (2017) (quoting *Noel Canning*, 573 U.S. at 526, 529).

This case is a "sharp contrast" to *Noel Canning*. *Id.* Legislative subpoenas that are from "the past few decades" are "of such recent vintage that they are no more probative" than these subpoenas are themselves "of a constitutional tradition that lends meaning to the text." *Printz*, 521 U.S. at 917-18. Whatever the "persuasive force" of the Watergate and Whitewater subpoenas may be, it is "far outweighed by almost two centuries of apparent congressional avoidance of the practice." *Id.*

C. The lack of historical precedent for these subpoenas casts serious doubt on their validity.

Whether Congress's implied authority to issue legislative subpoenas includes the power to demand the President's personal records is an issue the Court has never confronted. But sometimes "'the most telling indication of [a] severe constitutional problem … is the lack of historical precedent' for Congress's action." *NFIB v. Sebelius*, 567 U.S. 519, 549 (2012) (Opinion of Roberts, C.J.) (quoting *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 505 (2010)). That is the situation here. Given the lack of historical support, there are serious doubts as to whether Congress has an implied power to subpoena the President's private records in aid of legislation.

Precisely where this implied power to issue legislative subpoenas comes from has never quite been settled. Some courts have read *McGrain* to locate it in the Necessary and Proper Clause. *See, e.g.*, *Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 84 (D.D.C. 2008); Pet. App. 90a, 151a (Rao, J., dissenting). The Court, though, has often described this authority as simply "part of lawmaking" and therefore "justified … as an adjunct to the legislative process." *Watkins*, 354 U.S. at 197. What matters is that, however it is conceptualized, such authority "must be derived from implication." *Anderson v. Dunn*, 19 U.S. 204, 225 (1821).

That matters because no implied power may be deployed to "undermine the structure of government

established by the Constitution." *NFIB*, 567 U.S. at 559 (Roberts, C.J.); *see also Printz*, 521 U.S. at 923-25; *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2104-07 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part); *Bond v. United States*, 572 U.S. 844, 879 (2014) (Scalia, J., concurring in the judgment). That is certainly how the Court understands the Necessary and Proper Clause. *See United States v. Kebodeaux*, 570 U.S. 387, 402 (2013) (Roberts, C.J., concurring in the judgment). Indeed, "Chief Justice Marshall was emphatic that no 'great substantive and independent power' can be 'implied as incidental to other powers, or used as a means of executing them.'" *Id.* (quoting *McCulloch v. Maryland*, 17 U.S. 316, 411 (1819)); *see* The Federalist No. 33, at 197-201 (A. Hamilton) (Clinton Rossiter ed. 1961).

That limiting principle is at least as important (if not more so) if this implied authority is instead rooted in lawmaking itself, given the absence of the structural protections bicameralism and presentment provide in the context of the Necessary and Proper Clause. As the Court explained in a case concerning Congress's contempt power: "the genius and spirit of our institutions are hostile to the exercise of implied powers." *Anderson*, 19 U.S. at 225. Implied powers in this area cannot be "substantive and independent," but are "auxiliary and subordinate." *Id.* at 225-26. As a result, it must be confined to "'*the least possible power adequate to the end proposed*.'" *Id.* at 230-31. The congressional act must be "necessary to preserve legislative authority." *Marshall v. Gordon*, 243 U.S. 521, 538 (1917).

It is doubtful, then, that "the Framers intended to confer" on Congress sweeping power to subpoena the President's personal records in aid of legislation "by implication rather than expression." *Kebodeaux*, 570 U.S. at 402-03 (Roberts, C.J., concurring in the judgment). There is nothing auxiliary, subordinate, or necessary about demanding the President's papers—under threat of contempt—because a congressional committee thinks they "might be helpful" to its work. Pet. App. 60a (citation omitted). This is a substantive power.

Granting Congress that kind of authority over the President, accordingly, would fundamentally alter the balance between the legislature and the Executive. In the Committees' view, Congress can demand these papers anytime they might assist in considering *any* kind of legislation. According to the Committees, then, Congress "probably" could not lawfully subpoena "the President's blood" or "the President's diary from when he was … 12 years old" (again, "probably"). DDC Doc. No. 33 at 49-50. But that's it.

The lower courts' theory of Congress's power is only slightly less expansive. In the D.C. Circuit's view, Congress need only profess an interest in legislation regarding the President to trigger the sweeping power to subpoena any of his personal records that might inform the investigation. Pet. App. 216a (Katsas, J.). This would grant Congress easy access to, among other things, the President's financial, legal, medical, and educational records. A congressional committee merely needs to say that it is considering legislation requiring presidents to disclose information of this

type. Given the temptation to investigate the personal lives of political rivals, legislative subpoenas targeting the private affairs of presidents will become routine in times of divided government.

The Second Circuit's rule is at least as broad. The President need only be deemed a "useful 'case study'" on any topic that Congress might investigate before his private papers may be subject to a sweeping legislative subpoena. App. 293a n.67. This is the kind of non-falsifiable argument that could authorize any presidential investigation by Congress. "Some case study rationale … will always be present." App. 348a (Livingston, J.).

It is doubtful that the Framers would have seen the nearly unfettered ability to demand all kinds of private papers from the Chief Executive of the United States as the kind of "incidental" power that Congress holds by implication. *McCulloch*, 17 U.S. at 411. It is far more likely that a congressional "power of that magnitude," *Kebodeaux*, 570 U.S. at 402-03 (Roberts, C.J., concurring in the judgment), would be found in the text if it existed. There is every reason to doubt whether subpoenaing the personal documents of the President is a necessary incident of lawmaking under the Constitution.

II. These subpoenas do not have a legitimate legislative purpose.

Three legal rules demark the line between a subpoena with a legitimate legislative purpose and one exceeding Congress's lawmaking function under Article I of the Constitution. These subpoenas violate

all of them. First, the purpose of these investigations is to uncover and expose wrongdoing. Second, these Committees' legislative aims are all unconstitutional. Third, these subpoenas are not pertinent to any of the investigations at issue here.

That would all be true if the Court treated this as an ordinary challenge to a congressional subpoena. But the President is no "ordinary" litigant, *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381 (2004), and this is no ordinary dispute. That "the historical precedent for the congressional subpoenas here … is sparse at best, and perhaps nonexistent" should frame every step of the inquiry into whether the Committees can establish a legitimate legislative purpose. App. 339a (Livingston, J.). The subpoenas cannot be upheld under any form of rigorous review.

A. The subpoenas were issued for law-enforcement purposes.

Congress cannot exercise "any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary." *Quinn v. United States*, 349 U.S. 155, 161 (1955); *accord Watkins*, 354 U.S. at 187. "Lacking the judicial power given to the Judiciary" or the executive power given to "the Executive," Congress "cannot inquire into matters which are within the exclusive province of one of the other branches," *Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959), or otherwise "trench upon Executive or judicial prerogatives," *McSurely v. McClellan*, 521 F.2d 1024, 1038 (D.C. Cir. 1975), *on reh'g*, 553 F.2d 1277 (D.C. Cir. 1976).

Congress is not "a law enforcement or trial agency." *Watkins*, 354 U.S. at 187.

Relatedly, "the power to investigate … cannot be used to inquire into private affairs unrelated to a valid legislative purpose." *Quinn*, 349 U.S. at 161; *accord Eastland*, 421 U.S. at 504 n.15. That is because "there is no congressional power to expose for the sake of exposure." *Watkins*, 354 U.S. at 200. "Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated" are unconstitutional. *Id.* at 187. An investigation by Congress to "expos[e]" individual wrongdoing is a form of law enforcement. *Hutcheson v. United States*, 369 U.S. 599, 624 (1962).

Here, the Committees have "affirmatively and definitely avowed" that these subpoenas have a law-enforcement purpose. *McGrain*, 273 U.S. at 180. At the Cohen hearing, the Chairman, as well as several members of the Oversight Committee, admitted that the purpose of the Mazars subpoena was to probe "the legality of … President Donald Trump's conduct." *Supra* 4. The first request to Mazars stated that the Committee wanted to investigate the accuracy of the President's financial statements to see if he broke the law. And, in the formal memorandum justifying the subpoena, the Chairman's chief basis for taking this step was "to investigate whether the President may have engaged in illegal conduct before and during his tenure in office." Pet. App. 32a. The Committee thus "explicitly" stated "a purpose of investigating illegal conduct of the President, including specific violations

of ethics laws and the Constitution." Pet. App. 77a-78a (Rao, J., dissenting).

The bank subpoenas are similarly part of an avowed law-enforcement investigation into "money laundering and other financial crimes." App. 201a. Per its Chairwoman, the Financial Service Committee issued its two subpoenas to investigate whether the President's businesses took "millions from suspect Russians or individuals from former Soviet states through cash transactions, some well above market value and many through shell companies." 165 Cong. Rec. H2697-98 (daily ed. Mar. 13, 2019); *id*. at H2701 (accusing the "Trump family and its companies" of "corruption"). Chairman Schiff agreed, adding that the Intelligence Committee would likewise look "at the issue of possible money laundering by the Trump Organization, and Deutsche Bank is one obvious place to start." *Supra* 6-7. In his opinion, the committee "has a duty to expose foreign interference, hold Russia to account, ensure that U.S. officials—including the President—are serving the national interest and, if not, are held accountable." Press Release, Chairman Schiff Statement on House Intelligence Committee Investigation (Feb. 6, 2019), bit.ly/38HVKgp. The "purpose" of the subpoena, in sum, is to determine whether "past transactions between Deutsche Bank and the President in his pre-presidential business life may have violated banking regulations … ." App. 346a (Livingston, J.).

The Committees' desire to publicly expose the President's finances underscores the law-enforcement purpose. The use of the President and his family as a

case study is precisely the kind of "'ruthless exposure of private lives' … that is unrelated and unhelpful to the performance of legislative tasks." App. 334a (Livingston, J.) (quoting *Watkins*, 354 U.S. at 205). That the Capital One subpoena sets the start date at July 19, 2016—the day that the President became the Republican nominee—makes obvious what's going on. It is "an unusual date, to be sure, for specifying the precise moment at which his banking records became a useful point of inquiry into the possibility of tightening up the regulation of lending practices with potentially 'broad effects on the national economy.'" App. 345a-46a n.16 (Livingston, J.). The Oversight Committee also expressed a desire to publicly expose the President's personal finances. *See supra* 3-5.

This relentless effort to expose the President's personal finances is a political dispute. *See supra* 3-8, 20-21. According to the House General Counsel, "one of the reasons why this [subpoena] is the way it is is because, as everyone knows, Mr. Trump has refused to do what so many others in his position do, which is disclose." CA2 Doc. 37 at 105. He similarly told the D.C. Circuit: "remember, this President has done something that has not been done before because he has said I am not disclosing things." CADC OA at 1:28:43-1:28:52, bit.ly/3138tYw. "The American people," in the view of Chairman Schiff, "have a right to know that their President is working on their behalf, not his family's interests." *Toobin*, s*upra* 6. The Committees are entitled to their position. But they cannot then argue in court that these subpoenas are genuinely about legislating. This effort here to

"punish" the President "by publicity … exceeds the congressional power." *Hutcheson*, 369 U.S. at 624.

Yet the Committees' admissions are not needed to see that these are law-enforcement subpoenas. The "dragnet" nature, *Wilkinson v. United States*, 365 U.S. 399, 412 (1961), together with the focus on "certain named individuals" and the "precise reconstruction of past events," *Senate Select Comm.*, 498 F.2d at 732, show that the subpoenas have the hallmarks of law-enforcement investigations—not legislative inquiries. It thus should be unsurprising, as Judge Livingston recounted, that, "at oral argument, the Committees' lawyer appeared explicitly to equate these subpoenas to those issued in connection with federal criminal investigations." App. 350a n.20 (Livingston, J.). Nor should it be a surprise that the District Attorney for the County of New York used it as a model for a grand jury subpoena. *See supra* 3 n.1.

The lower courts did not seriously dispute that these subpoenas are meant to uncover "whether and how illegal conduct has occurred." Pet. App. 34a; App. 286a, 297a-98a (same). However, they found it to be "more important" that the Committees also expressed a "legislative purpose" for the subpoenas because an "interest in past illegality can be wholly consistent with an intent to enact remedial legislation." Pet. App. 29a, 32a; App. 293a n.67, 297a-98a (same). As the D.C. Circuit put it: an avowed law-enforcement purpose won't "spoil[]" an "otherwise valid legislative inquiry" if the explanation is not an "insubstantial, makeweight assertion of remedial purpose." Pet. App. 32a. All three congressional subpoenas were upheld

under this forgiving standard. Pet. App. 29a-32a; App. 278a-84a, 297a-98a.

This is mistaken on every level. As an initial matter, the explanations for issuing these subpoenas *are* in fact makeweight. The letter that the Oversight Chairman first sent to Mazars did not identify *any* legislative agenda; and, his memorandum identified four law-enforcement purposes and, at the end, added boilerplate language professing a generic legislative purpose. *See supra* 5. The legislative purpose for the bank subpoenas is insubstantial too. The "case study" rationale, to put it mildly, is not "easy to square" with any "legislative purpose" or "with the extraordinary breadth" of these subpoenas. App. 349a n.20 (Livingston, J.). Congress's subpoena authority is limitless if this is what counts as "indicia of legislative purpose." Pet. App. 31a.

But even accepting these rationales as genuine, the Court still must determine whether they are the "real object," "primary purpose[]," and "gravamen" of the subpoenas. *McGrain*, 273 U.S. at 178; *Barenblatt*, 360 U.S. at 133; *Kilbourn*, 103 U.S. at 195. The Court has never refused to "see what all others can see and understand" when it comes to Congress's "power of investigation." *Rumely*, 345 U.S. at 44 (cleaned up). The "gravamen" of these subpoenas is "the President's wrongdoing." Pet. App. 135a (Rao, J., dissenting). The fundamental purpose of all of them is "to investigate illegal conduct of the President by reconstructing past actions" taken by him, his family, and his businesses. Pet. App. 120a (Rao, J., dissenting).

The D.C. Circuit misunderstood *Hutcheson* and *Sinclair v. United States*, 279 U.S. 263 (1929), to hold otherwise. Pet. App. 33a-34a. The objection did not falter in *Sinclair* because Congress may engage in law enforcement so long as it also professes a legislative purpose; it failed because the "contention that the investigation was avowedly not in aid of legislation" lacked proof. *Sinclair*, 279 U.S. at 295. "The record" demonstrated that the investigation's gravamen was legislative in nature; its legitimacy was not defeated "because the information sought to be elicited may also be of use" to prosecutors. *Id*.

The *Hutcheson* challenge likewise did not fail because the committee merely professed a legislative purpose. Instead, the "episodes" presented as evidence of a "departure from … legitimate congressional concerns" fell "far short of sustaining what [was] sought to be made of them." *Hutcheson,* 369 U.S. at 619. The plurality reiterated that a "committee which is engaged in a legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding." *Id.* at 618. Justice Brennan agreed. His decisive concurrence confirmed that the Court "will give the closest scrutiny to assure that indeed a legislative purpose was being pursued and that the inquiry was not aimed at aiding the criminal prosecution." *Id*. at 625.

Accordingly, while a legislative investigation is not illegitimate because it might incidentally expose illegal conduct, a law-enforcement subpoena does not become legitimate just because it might incidentally

inspire remedial legislation. Allowing mere recitation of a legislative purpose to inoculate a congressional subpoena from challenge turns the line between a legitimate legislative pursuit and an illegitimate law-enforcement investigation into a magic-words test. That is why the "primary purpose[]" or "gravamen" of the subpoena is what does—and must—count under this Court's precedent. *Barenblatt*, 360 U.S. at 133; *Kilbourn*, 103 U.S. at 195.

Upholding a legislative subpoena just because a congressional committee "professed that it seeks to investigate remedial legislation," Pet. App. 34a, also cannot be reconciled with first principles. The ban on congressional law enforcement is not prophylactic. As explained, it keeps Congress from deploying implied power to usurp functions that belong to the Executive and Judiciary; Congress may not "overstep the just boundaries of [its] own department, and enter upon the domain of one of the others." *Kilbourn*, 103 U.S. at 192. Hollowing out the legitimate-legislative-purpose test "reduces [Article I] to a mere 'parchment barrier against the encroaching spirit' of legislative power." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1336 (2016) (Roberts, C.J., dissenting) (quoting The Federalist No. 48, at 308 (J. Madison)) (alterations omitted). It would alter "the balance of power between Congress and the President," Pet. App. 218 (Rao, J., dissenting from denial of rehearing en banc), by allowing Congress to seize a law-enforcement power that the Constitution has "entrusted" to the Executive Branch instead, *United States v. Welden*, 377 U.S. 95, 117 (1964).

Yet even if Congress is entitled to deference in other settings, the Court should more rigorously apply the legitimate-legislative-purpose test in light of the serious separation-of-powers concerns raised by this case. Normally, where the "political branches are … in disagreement, neither can be presumed correct." *Morrison*, 487 U.S. at 705 (Scalia J., dissenting). But for at least two reasons, Congress should shoulder the burden of proving that it is not misusing legislative subpoenas for prohibited purposes.

According to the lower courts, it is sometimes necessary to investigate to see if remedial legislation is needed. Pet. App. 32a-34a; App. 297a-98a. That *might* ordinarily justify affording Congress additional latitude since "Article I, §8, grants Congress broad power to enact legislation in several enumerated areas of national concern." *Alden v. Maine*, 527 U.S. 706, 731 (1999). But because Congress's constitutional power to legislatively respond to claims of *presidential* illegality is limited at best, *see infra* 45-52, subpoenas investigating a President's alleged wrongdoing should be met with skepticism.

Relatedly, as Judge Rao has explained, some investigations "that incidentally uncover unlawful action by private citizens" have been upheld "in part because private individuals cannot be punished by Congress." Pet. App. 131a. Because "the Constitution provides a wholly separate mechanism for Congress to impeach, to try, and, if convicted, to remove the President from office," however, an "investigation [that] turns toward the wrongdoing of the President or any impeachable official … has never been treated

as merely incidental to a legislative purpose." *Id*. That is precisely what happened here. *See* Pet. App. 136a (Rao, J., dissenting).

In the end, the separation-of-powers concerns these subpoenas raise should require the Committees to dispel the inference that these are law-enforcement investigations masquerading as legislative inquiries. They cannot meet that test. The claimed "legislative purposes" of these subpoenas are "too attenuated and too tangential" to uphold them as having a legitimate basis. Pet. App. 133a (Rao, J., dissenting) (citations and quotations omitted).

B. These subpoenas could not result in valid legislation.

An investigation cannot "extend to an area in which Congress is forbidden to legislate." *Quinn*, 349 U.S. at 161. "The subject of any inquiry always must be one 'on which legislation could be had.'" *Eastland*, 421 U.S. at 504 n.15 (quoting *McGrain*, 273 U.S. at 177). Legislation, by definition, cannot be had if that statute would be unconstitutional. *See Tobin v. United States*, 306 F.2d 270, 275-76 (D.C. Cir. 1962); Pet. App. 22a. That is the case here.

None of these subpoenas cover a "subject" upon "which legislation could be had." *McGrain*, 273 U.S. at 177. The Oversight Committee claims that the Mazars subpoena could lead to two species of valid legislation. The Committee argues, first, that the Mazars records might inform Congress's decision to extend conflict-of-interest laws to the President, and, second, that they might lead Congress to require the President to make

new financial disclosures. Pet. App. 185a-91a. Neither avenue is constitutionally viable.

The D.C. Circuit wisely declined to defend the idea of extending conflict-of-interest laws to cover the President. Pet. App. 43a-44a. "Statutes mandating divestment from financial interests or recusal from conflicted matters might impermissibly 'disempower [Presidents] from performing some of the functions prescribed [by] the Constitution or … establish a qualification for … serving as President … beyond those contained in the Constitution.'" *Id.* (quoting Memorandum from Laurence H. Silberman, Deputy Att'y Gen., to Richard T. Burress, Office of the President, *Re: Conflict of Interest Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President Under the Twenty-Fifth Amendment to the Constitution* 5 (Aug. 28, 1974)).

The D.C. Circuit instead relied on statutes that would require presidents to disclose personal financial information as the valid basis for this investigation. Pet. App. 46a-47a. That was error. Like the Supreme Court, the office of the President "derives its existence and powers from the Constitution," not from an Act of Congress. *Ex parte Robinson*, 86 U.S. 505, 510 (1873); *see Gordon v. United States*, 117 U.S. 697, 699 (1864); *accord* The Federalist No. 67, at 407 (A. Hamilton). In contrast, Congress is empowered to create Executive Branch offices and inferior federal courts. U.S. Const. art. I, §8; *id*. art. II, §2. "Congress has plenary control over the salary, duties, and even existence of executive offices." *Free Enter. Fund*, 561 U.S. at 500.

They have "no constitutional or common law existence or authority, but only those authorities conferred upon [them] by Congress." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001); *see La. Public Service Comm'n v. FCC*, 476 U.S. 355, 374-75 (1986). But Congress has no such control over the President. The Constitution thus does not confer on Congress power to pass legislation requiring the President disclose his personal finances.

The D.C. Circuit misunderstood Petitioners to advance an "'archaic view of the separation of powers'" that, contrary to controlling precedent, would require "three airtight departments of government." Pet. App. 49a (citation and quotations omitted). True, the Court has at times employed a more "flexible understanding of separation of powers," *Mistretta v. United States*, 488 U.S. 361, 381 (1989), under which laws eroding presidential control have been upheld if Congress is not trying "to increase its own powers at the expense of the Executive Branch," *Morrison*, 487 U.S. at 694. This flexible model, in other words, applies to statutes interfering with the President's "power of appointing, overseeing, and controlling those who execute the laws." *Free Enter. Fund*, 561 U.S. at 492.

But this is not a tug-of-war between Congress and the President about controlling Executive Branch subordinates. The question here is more fundamental: it is whether Congress can exercise dominion and control over the Office of the President. The Court has not been flexible when a law seeks to alter the basic structure of the Federal government. *See Clinton v. City of New York*, 524 U.S. 417, 449 (1998); *Bowsher*

v. Synar, 478 U.S. 714, 721-26 (1986); *INS v. Chadha*, 462 U.S. 919, 954-95 (1983). A law that requires the President to disclose his personal finances falls into the category of cases that strictly enforce structural principles.[5]

The D.C. Circuit also rejected the assertion that a statute like this one would change or expand the qualifications for serving as President. Pet. App. 50a-51a. There is no dispute that the Constitution fixes those qualifications. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 827 (1995); *id.* at 861-62 (Thomas, J., dissenting). But in the D.C. Circuit's view, a financial-disclosure requirement does not alter them because it

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[5] In the D.C. Circuit's view, "history of past Presidents' financial disclosures" buttresses the constitutionality of this kind of legislation. Pet. App. 47a. But that relatively recent practice does not offer guidance. *See supra* 39-40. And, as the D.C. Circuit conceded, "compliance is not the measure of constitutionality." Pet. App. 48a (citation and quotations omitted). Reliance on the Foreign Gifts and Decorations Act and the STOCK Act—neither of which have been tested in court—is unavailing for similar reasons. Pet. App. 46a. The Presidential Records Act ("PRA") also offers no insight into whether requiring the sitting President to disclose his personal finances would be constitutional. Pet. App. 46a-47a. The PRA applies to official records, it allows the President to dispose of them as he sees fit, and it does not command him to disclose *anything* while in office. 44 U.S.C. §2203. At most, "the President must submit the disposal schedules to the appropriate congressional committees and wait sixty days before destroying the records." *Armstrong v. Bush*, 924 F.2d 282, 286 (D.C. Cir. 1991) (citing 44 U.S.C. §2203(c)-(d)). The PRA "avoid[s] the very separation of powers concerns" this legislation triggers. *Judicial Watch, Inc. v. U.S. Secret Service*, 726 F.3d 208, 227-28, (D.C. Cir. 2013) (citation and quotation omitted).

"exclude[s] precisely zero individuals from running for or serving as President; regardless of their financial holdings, all constitutionally eligible candidates may apply." Pet. App. 51a. That would also be true, though, of the conflict-of-interest laws the D.C. Circuit rightly explains present "difficult constitutional questions" on qualifications grounds. Pet. App. 43a.

The truth is that both sets of law would impose impermissible qualifications. This Court has rejected a crabbed view of the Qualifications Clause that turns on whether the requirement imposes a prior restraint on candidates for office. As the Court has explained, "constitutional rights would be of little value if they could be indirectly denied." *Thornton*, 514 U.S. at 829 (cleaned up). The Constitution thus outlaws not only absolute bars on certain individuals serving in office, but also those requirements with "the likely effect of handicapping a class of candidates" in running for office. *Id*. at 836; *see Campbell v. Davidson*, 233 F.3d 1229, 1236 (10th Cir. 2000); *Schaefer v. Townsend*, 215 F.3d 1031, 1039 (9th Cir. 2000).

But if the D.C. Circuit is correct that financial disclosure requirements do not impose a qualification, it passes understanding how Congress would enforce this statutory command. An injunction requiring the President to comply with the disclosure law would be impermissible. *See Mississippi v. Johnson*, 71 U.S. 475, 499 (1866). Nor could the President be fined or prosecuted—remedies that are available under current law. *See Nixon v. Fitzgerald*, 475 U.S. 731, 749 (1982). The lack of any remedy against the President is a strong signal that there is no right to require him

to disclose his finances in the first place. *Johnson*, 71 U.S. at 501. It should have at least "raised judicial eyebrows." *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992) (plurality op.).

Any suggestion that the Emoluments Clauses offer Congress an independent legislative foundation for making presidents disclose their finances is wrong. The Domestic Emoluments Clause prohibits "the President from receiving 'any … Emolument' from the federal or state governments other than fixed 'Compensation' 'for his Services.'" Pet. App. 45a (quoting U.S. Const. art. II, §1, cl. 7). The Foreign Emoluments Clause bars "any federal official 'holding any Office of Profit or Trust' … from 'accept[ing] … any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State' without 'the Consent of the Congress.'" Pet. App. 46a (quoting U.S. Const. art. I, §9, cl. 8). "If the President may accept no domestic emoluments and must seek Congress's permission before accepting any foreign emoluments," the D.C. Circuit posited, "a statute facilitating the disclosure of such payments lies within constitutional limits." Pet. App. 46a.

But such statues do not avoid the separation-of-powers problem that arises when Congress seeks to directly control the President. In fact, relying on the Emoluments Clauses raises additional constitutional doubts. The D.C. Circuit does not explain how the Domestic Emoluments Clause—a provision in Article II that states what "[t]he President … shall not" do, U.S. Const. art. II, §1, cl. 7—is an affirmative grant of power for Congress to enact legislation. The court

assumed that the Foreign Emoluments Clause applies to the President, Pet. App. 143a (Rao, J., dissenting), and ignored that it *does* apply to millions of federal workers who clearly hold an "Office of Profit or Trust under [the United States]." U.S. Const. art. I, §9; *see* 5 U.S.C. §7342(a); 6 O.L.C. Op. 156, 156-59 (1982). Under the D.C. Circuit's logic, Congress could obtain the personal financial records for any—or every single one—of these individuals to study whether they have accepted foreign emoluments without approval. This cannot be a legitimate legislative purpose if we are to be "a government of limited powers." *NFIB*, 567 U.S. at 552 (Roberts, C.J.).

Finally, the Committees lack a valid statutory outlet for the banks investigation. As the D.C. Circuit acknowledged, a "subpoena that seeks a sitting President's financial information" would not be legitimate "except to facilitate an investigation into presidential finances." Pet. App. 42a-43a. Therefore, "to determine whether the records of pre-Candidate, Candidate, and President Trump provide 'information about a subject on which legislation may be had,'" the Court "must train [its] attention on laws that apply to Presidents (and presidential hopefuls)." Pet. App. 43a. The Second Circuit wrongly ignored this admonition, and upheld subpoenas that are "not in connection with the consideration of legislation involving the Chief Executive." App. 345a (Livingston, J.).

That "is not enough to state a valid legislative purpose." App. 344a. Legislative subpoenas for the President's private records in order to broadly study finance and intelligence issues are no more legitimate

than subpoenas for "the President's high school transcripts in service of an investigation into K-12 education," or for "his medical records as part of an investigation into public health" would be. Pet. App. 43a. The legislative rationale for the bank subpoenas fails for this reason alone.

C. The Committees cannot establish a heightened need for the President's personal records.

The subpoenaed documents must be "pertinent to [the congressional] inquiry." *McPhaul v. United States*, 364 U.S. 372, 380 (1960). Usually, that means "Congress may subpoena only that information which is reasonably relevant to its legitimate investigation." Pet. App. 58a (citations and quotations omitted); *Hearst v. Black*, 87 F.2d 68, 71 (D.C. Cir. 1936). The requirement ensures that the subpoena is "coping with a problem that falls within its legislative sphere." *Watkins*, 354 U.S. at 206. The legislative purpose must be "materially aided by the information which the investigation was calculated to elicit." *McGrain*, 273 U.S. at 177.

Here, that requires a greater showing of need than mere relevance. Whether Congress's exercise of implied subpoena authority is legitimate cannot be decided in a vacuum. Again, Congress must use "'*the least possible power adequate to the end proposed*.'" *Anderson*, 19 U.S. at 231. In the main, congressional committees may undertake investigations even if they will lead up "'blind alleys' and into nonproductive enterprises." Pet. App. 62a (quoting *Eastland*, 421

U.S. at 509). But that will not do when Congress seeks the President's records. The Committees must show, at a bare minimum, that they have a "demonstrated, specific need" for subpoenaing the President's private records in aid of legislation. *United States v. Nixon*, 418 U.S. 683, 713 (1974).

As the Court has often explained, "'in no case of this kind would a court be required to proceed against the president as against an ordinary individual.'" *Id.* at 708 (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (Marshall, C.J.)). Presidents are "'easily identifiable targets' of legal process." App. 349a (Livingston, J.) (quoting *Fitzgerald*, 457 U.S. at 752-53). "Special considerations control" when records are demanded from the President. *Cheney*, 542 U.S. at 385. Indeed, "'the high respect that is owed to the office of the Chief Executive is a matter that should inform the conduct of the entire proceeding.'" *Id.* (cleaned up) (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)). The Committees, therefore, must have a "demonstrably critical" need for these records. *Senate Select Comm.*, 498 F.2d at 731. It is not enough that the documents "may possibly have some arguable relevance to the subjects" that the Committees have "investigated and to the areas in which [they] may propose legislation." *Id.* at 733. It is appropriate for the Court to "take comparable considerations into account" here. Pet. App. 217a (Katsas, J.).

The subpoenas should be invalidated under the ordinary pertinence test. But these "extraordinarily broad subpoenas" are plainly inappropriate under any form of heightened review. App. 370a (Livingston, J.).

The Mazars subpoena seeks all records since 2011, all engagement letters, and "all communications" that raised "concerns" over accounting practices. *See supra* 3-4. The bank subpoenas similarly demand documents reaching back more than a decade and seek nearly every financial detail that the institutions might have about Petitioners' (and their families') private affairs. That these subpoenas demand "everything under the sky," *Cheney*, 542 U.S. at 387, is a red flag that they are "anything but appropriate," *id.* at 388.

The subpoenas also are, at most, "tangentially connected to any legislative purpose." App. 336a (Livingston, J.); Pet. App. 133a (Rao, J., dissenting) (same). There is no "clear reason why a congressional investigation aimed generally at closing regulatory loopholes in the banking system need focus on over a decade of financial information regarding this President, his family, and his business affairs." App. 347a (Livingston, J.). The Intelligence Committee's broad investigation into election interference likewise is not "easy to square with the extraordinary breadth of the Deutsche Bank subpoenas." App. 349 n.20. The notion that different congressional committees—with different legislatives mandates—need the same exact records from Deutsche Bank is untenable. And while the D.C. Circuit concluded that it "might be helpful" for the Oversight Committee to have access to the President's accounting records, Pet. App. 60a, it could not explain why the Committee *needs* them in order to consider legislation.

In the district court's view, the bank subpoenas would not be considered "reasonable" if this were "civil

litigation." CA2 Doc. 37 at 97. That is equally true of the Mazars subpoena. As Judge Livingston noted, the President should not have "*less* protection from the unreasonable disclosure of his personal and business affairs than would be afforded any litigant in a civil case." App. 330a-31a (Livingston, J.). The President should have more protection.

III. The Committees lack express authority to issue these subpoenas.

While the courts below took the "questions in reverse order," Pet. App. 22a, whether there was authority under the House Rules "must first be settled before [the Court] may consider whether Congress had the power to confer upon the committee the authority which it claimed." *Rumely*, 345 U.S. at 43; *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."). Congress has not authorized these Committees to issue legislative subpoenas for a sitting President's personal records.

A. The Committees are not expressly authorized to subpoena the private records of the President.

"Congressional committees are themselves the offspring of Congress; they have only those powers authorized by law; they do not have an unlimited roving commission merely by virtue of their creation and existence to ferret out evil or to uncover inequity."

In re Beef Indus. Antitrust Litig., 589 F.2d 786, 787-88 (5th Cir. 1979). Hence, congressional committees "must conform strictly to the resolution establishing [their] investigatory powers" for these subpoenas to be statutorily "valid." *Exxon Corp. v. FTC*, 589 F.2d 582, 592 (D.C. Cir. 1978); *see also Watkins*, 354 U.S. at 201. Moreover, judicial review is available where, as here, "rights of persons other than members of Congress are jeopardized by Congressional failure to follow its own procedures." *Metzenbaum v. FERC*, 675 F.2d 1282, 1287 (D.C. Cir. 1982); *see also Yellin v. United States*, 374 U.S. 109 (1963); *United States v. Ballin*, 144 U.S. 1, 5 (1892).

The House Rules authorize the Committees to issue subpoenas in aid of their respective legislative functions. Pet. App. 63a-66a; App. 278a-80a. But no rule expressly permits the Committees to subpoena the President's private records. The closest they come is empowering the Oversight Committee to subpoena the "Executive Office of the President." House Rule X, cl. 3(i). But "the 'Executive Office of the President' … does not include the Office of the President"—let alone the President himself. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980). There is thus no reason why House Rules "making no reference to the President should be read to encompass the President." Pet. App. 141a n.19 (Rao, J., dissenting).

In all events, absence of an express statement should be decisive. "Out of respect for the separation of powers and the unique constitutional position of the President," the House Rules should not be interpreted

to authorize subpoenas for the President's personal records absent "an express statement by Congress." *Franklin*, 505 U.S. at 801; *see also United States v. Bass*, 404 U.S. 336, 349 (1971). "Although the 'clear statement' rule was originally articulated to guide interpretation of statutes that significantly alter the federal-state balance, there are similar compelling reasons to apply the rule to statutes that significantly alter the balance between Congress and the President." *Armstrong*, 924 F.2d at 289. Legislative subpoenas for the sitting President's personal records raise the kind of "'serious' practical, political, and constitutional questions" that obligate Congress to "make its intent clear." *Id.* (quoting *Bass*, 404 U.S. at 350). "One might say Congress does not hide presidents in mouseholes." Pet. App. 140a-41a (Rao, J., dissenting).

Application here of the "plain statement rule draws additional reinforcement from other canons of statutory construction." *INS v. St. Cyr*, 533 U.S. 289, 299 (2001). First, "when a particular interpretation of a statute invokes the outer limits of Congress' power," a "clear indication that Congress intended that result" is required. *Id.* (citation omitted). And, second, "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation … is fairly possible," the Court is "obligated to construe the statute to avoid such problems." *Id.* at 299-300 (citations omitted); *see United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). Both canons apply to congressional subpoenas, *Rumely*, 345 U.S. at 46-48, and they both confirm the Committees' lack of

authority under the House Rules. The Court should "narrowly" interpret the Rules "to avoid" these significant "constitutional problems." *NCTA v. United States*, 415 U.S. 336, 342 (1974).[6]

The lower courts' reasons for rejecting a clear-statement requirement are unpersuasive. First, they held that these constitutional issues are not serious. Pet. App. 67a-69a; App. 307a. But as the dissents of Judges Rao and Livingston demonstrate, that is an indefensible position. The constitutional issues these subpoenas raise are grave.

Second, the lower courts resist application of a clear-statement requirement because the Committees have broad subpoena power and the "Rules nowhere disclose an intent to carve out the President." Pet. App. 65a. But this gets the inquiry backwards. Because they seek the President's records, the Committees shoulder the burden of establishing authority under the House Rules. If broad language were enough, the office of the President would be an "agency" under the Administrative Procedure Act.

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[6] If Congress's authority to issue legislative subpoenas depends on the Necessary and Proper Clause, it has additional constitutional issues. The Necessary and Proper Clause allows Congress "[t]o make ... *laws* …." U.S. Const. art. I, §8, cl. 18 (emphasis added). There is a law empowering the House to issue subpoenas, but it likewise does not expressly reference the President. *See* 2 U.S.C. §192. That defect, moreover, could not be fixed by amending the House Rules or passing a resolution. *See infra* 62-66. Congress may take action "legislative [in] character … in only one way; bicameral passage followed by presentment to the President." *Chadha*, 462 U.S. at 954-55; *see id*. at 955 n.21; *Bowsher*, 478 U.S. at 726.

That law broadly "defines 'agency' as 'each authority of the Government of the United States'" and excludes "'Congress'" and "'courts of the United States'" from the definition. *See Franklin*, 505 U.S. at 800 (quoting 5 U.S.C. §§701(b)(1), 551(1)). "The President," in other words, "is not explicitly excluded from the APA's purview, but he is not explicitly included, either." *Id.* Given the significant constitutional problems that subjecting the President to the APA would trigger, the Court construed the statute to exclude him. The Court should follow the same course here.

Third, and last, the lower courts offered a more fundamental objection: this dispute does not involve the kind of fundamental separation-of-powers issues that would justify a clear-statement rule. Indeed, the Second Circuit boldly declared that "this case does not concern separation of powers." App. 307a. The court misunderstood the stakes here. "These subpoenas," as explained, "are deeply problematic when considered against the backdrop of these separation-of-powers concerns." App. 343 (Livingston, J.). "With regard to the threat to the Presidency, 'this wolf comes as a wolf.'" Pet. App. 217a (Katsas, J.) (quoting *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting)).[7]

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[7] At times, the lower courts suggested that separation-of-powers concerns are not squarely implicated since the subpoenas were issued to third-party custodians and because the President filed these suits in his private capacity. Pet. App. 27a; App. 230a, 309a-10a & n.76. But neither court questioned Petitioners' "standing … to challenge the lawfulness of the Committees' subpoenas" in federal court. App. 231a; Pet. App. 86a-87a (Rao, J., dissenting) (noting the majority did not "question President Trump's standing"). These subpoenas are subject to challenge as

The D.C. Circuit's position was more nuanced—but still misplaced. In it view, decisions like *Franklin* are inapposite because "the House Rules have no effect whatsoever on 'the balance *between* Congress and the President.'" Pet. App. 68a (citation omitted). But "allocation of authority *within* the legislative branch," Pet. App. 68a, to subpoena the President's papers *does* raise serious separation-of-powers issues separate and apart from whether Congress or the full House may issue subpoenas of this kind. *Infra* 61-65. "Requiring a clear statement" in the House Rules also "creates an important form of accountability by giving notice to the executive branch," Pet. App. 139a (Rao, J., dissenting), and ensures "that 'the House or Senate shall have instructed the committee members on what they are to do with the power delegated to them.'" App. 351a (Livingston, J.) (quoting *Watkins*, 354 U.S. at 200-01). As the Second Circuit acknowledged, it is doubtful the House can satisfy this obligation without a clear statement "where the subpoena seeks papers of the President." App. 272a.

Finally, the D.C. Circuit acknowledged that its position regarding the clear-statement rule depends on the idea that "Congress already possesses—in fact, has previously exercised—the authority to subpoena Presidents and their information." Pet. App. 69a (citation omitted). But, again, that assumption is not

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beyond the Committees' authority to issue as if they were issued to the President himself. *See Eastland*, 421 U.S. at 501 n.1. This Court has also held that separation-of-powers concerns do not dissipate if the lawsuit is not brought in the President's official capacity. App. 333a n.7 (Livingston, J.); *id.* 336a-337a n.8.

trustworthy. Pet. App. 141a n.19 (Rao, J., dissenting). Had Congress intended for any of these Committees "to conduct such a novel investigation it would have spelled out this intention in words more explicit than the general terms found in the authorizing resolutions under consideration." *Tobin*, 306 F.2d at 275.

* * *

Congress must take "responsibility for pushing up against constitutional limitations." Pet. App. 141a (Rao, J., dissenting). The Court "will not shrink from [its] duty as the bulwark of a limited constitution against legislative encroachments." *NAMUDNO v. Holder*, 557 U.S. 193, 205 (2009) (cleaned up). But in "'traditionally sensitive areas, … the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). That institutional principle applies with special force to congressional subpoenas. It ensures the "outer reaches of Congress's investigative power are to be identified reluctantly, and only after [it] 'has demonstrated full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits.'" App. 375a (Livingston, J.) (quoting *Rumely*, 345 U.S. at 46). The limits of these subpoenas are dubious at best.

B. Resolution 507 does not provide the clear statement that the Committees would need.

Resolution 507 does not—and cannot—provide the express statement the Committees need. First, by

its terms, the resolution "purports neither to enlarge the [Committees'] jurisdiction nor to amend the House Rules." Pet. App. 73a; App. 273a-75a (same). That should be decisive. Each Committee's "instructions are embodied in the authorizing resolution." *Watkins*, 354 U.S. at 201. The House Rules are the "charter" for the Committees. *Id*. The Rules—not Resolution 507—thus define their legislative jurisdiction. *See Yellin*, 374 U.S. at 114.

Second, and relatedly, this claimed ratification fails because the resolution does not acknowledge that there had been "a violation of the House Rules" when the President's personal documents were subpoenaed. *Ashland Oil, Inc. v. FTC*, 548 F.2d 977, 991 (D.C. Cir. 1976) (MacKinnon, J., dissenting). In other words, a ratification—"even if that could be done"—requires the House to identify and fix a problem after the fact. *Id*. But the House is unwilling to admit that there was anything to fix. "Instead, the Resolution" purportedly "clarifies the authority that the Committee[s] had on the day [they] issued the subpoena[s]." Pet. App. 73a. Resolution 507 is essentially a statement of support for the House's litigating position.

Third, Resolution 507 cannot cure the lack of authority for these subpoenas under the House Rules even if it is a ratification. Because "the delegation of power to the committee must be clearly revealed in its charter," *Watkins*, 354 U.S. at 198, the "scope" of its authority must "be ascertained as of th[e] time" that the Committee issued the subpoena, *Rumely*, 345 U.S. at 48. The Committees' subpoenas, then, "cannot be enlarged by subsequent action of Congress." *Id.*; *see*

Pet. App. 219a-20a (Rao, dissenting from denial of rehearing en banc); App. 352a-56a (Livingston, J.).

Finally, whether the House can deputize every standing committee to subpoena the personal records of the President—assuming Congress possesses such authority—raises an additional constitutional issue. Resolution 507 empowers *every* House committee to issue legislative subpoenas (directly, indirectly, and via third parties) to this and all future presidents in their "personal or official capacity" and to "immediate family, business entities, or organizations" concerning *any* subject within their purview. *See supra* 23-24. The sweep of this delegation is staggering.

The Court has cautioned that civil process can "distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Fitzgerald*, 457 U.S. at 753. That triggers a serious separation-of-powers concern. "The essential purpose of the separation of powers," after all, "is to allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches." *Id.* at 760-61 (Burger, C.J., concurring).

It is of course "not at all difficult to conceive how standing committees exercising the authority to issue third-party subpoenas in aid of legislation might significantly burden presidents with myriad inquiries into their business, personal, and family affairs." App. 341a (Livingston, J.). The subpoenas targeting the

President when Congress is held by the opposing party will be endless; "future Presidents will be *routinely* subject" to this kind of "distraction." App. 348a (Livingston, J.). Unleashing every committee to issue third-party subpoenas for the President's private papers is a significant "threat to presidential autonomy and independence." Pet. App. 216a (Katsas, J.).

The D.C. Circuit characterized these concerns as hypothetical "because the only subpoena" at issue "is the one directed at Mazars," and no argument has been made that "compliance with *that* subpoena risks unconstitutionally burdening the President's core duties." Pet. App. 75a. Similarly, the Second Circuit said that "there is no claim of any diversion of any time from official duties" because of these subpoenas. App. 309a. But both courts misunderstood Petitioners' concern. Pet. App. 152a-56a (Rao, J., dissenting); App. 341a-42a (Livingston, J.).

The issue is not only whether these committee subpoenas will distract the President from his official duties. Since the Court takes a categorical approach to issues of this sort, *Fitzgerald*, 457 U.S. at 751-53, the question instead is whether these subpoenas—"*as well as the potential additional [subpoenas] that an affirmance of the Court of Appeals judgment might spawn*—may impose an unacceptable burden on the … office," *Jones*, 520 U.S. at 701-02 (emphasis added). As explained, it would distract the President from his official duties if every standing committee of Congress had the power to "compel" him "to disclose personal records that might inform the legislation" it is

considering. Pet. App. 216a (Katsas, J.). And that is especially true under the inappropriately deferential standard the lower courts applied to conclude that these subpoenas have a legitimate legislative purpose. *See supra* 40-45.

The lower courts' rejection of these concerns is emblematic of a misguided approach to separation-of powers questions. To be certain, "separation of powers does not mean that the branches 'ought to have no partial agency in, or no controul over, the acts of each other.'" Pet. App. 50a (quoting *Clinton*, 520 U.S. at 702-03) (emphasis omitted). But the Court vigilantly shields the President from "interfere[nce] with the … discharge of his public duties" in light of "Article II's vesting of the entire 'executive Power' in a single individual, implemented through the Constitution's structural separation of powers, and revealed both by history and case precedent." *Jones*, 520 U.S. at 710-11 (Breyer, J., concurring). There is thus every reason to worry about the flood of presidential subpoenas that affirming the decisions would inevitably trigger. "In such a context, 'experience admonishes us to tread warily.'" App. 327a (Livingston, J.) (quoting *Rumely*, 345 U.S. at 46).

CONCLUSION

The Court should reverse the judgments of the D.C. Circuit and Second Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A— U.S. Const. art. 1, § 5, cl.2

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

APPENDIX B — 2 U.S.C. § 192

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

APPENDIX C — H. Res. 206

In the House of Representatives, U. S.,
March 13, 2019.

Whereas money laundering and other financial crimes are serious threats to our national and economic security;

Whereas the United Nations Office on Drugs and Crime has reported "The estimated amount of money laundered globally in one year is 2 — 5% of global GDP, or $800 billion — $2 trillion in current US dollars";

Whereas the scale, efficiency, and complexity of the U.S. financial system make it a prime target for those who seek to conceal, launder, and move the proceeds of illicit activity;

Whereas money launderers, terrorist financiers, corrupt individuals and organizations, and their facilitators have proven to adapt quickly in order to avoid detection;

Whereas given the global nature of money laundering and terrorist financing, and the increasing interrelatedness within the financial system, a secure national and multilateral framework is essential to the integrity of the U.S. financial system;

Whereas extensive collaboration among financial regulators, the Department of the Treasury, law enforcement, and the private sector is required to

curtail the illicit flow of money throughout the United States;

Whereas despite how extensive and effective these efforts are in the United States, there is still substantial room for improvement;

Whereas financial compliance, reporting, investigation, and collaboration, as well as courageous whistleblowers and investigative reporting have had significant impact in shining sunlight on the people and institutions behind dark money and markets;

Whereas in 2016, the Financial Action Task Force (FATF), the international standards setting body, evaluated the United States' anti-money laundering/combating the financing of terrorism measures and determined the United States has significant gaps in its framework;

Whereas in 2016, the FATF found that in the United States, "Minimal measures are imposed on designated non-financial businesses and professions (DNFBPs), other than casinos and dealers in precious metals and stones";

Whereas in 2016, the FATF recommended, "The U.S. should conduct a vulnerability analysis of the minimally covered DNFBP sectors to address the higher risks to which these sectors are exposed, and consider what measures could be introduced to address them";

Appendix C

Whereas dealers in arts and antiquities are not, by definition, covered "financial institutions" required to comply with the Bank Secrecy Act;

Whereas Federal authorities have cautioned that art collectors and dealers to be particularly careful trading Near Eastern antiquities, warning that artifacts plundered by terrorist organizations such as the Islamic State of Iraq and the Levant are entering the marketplace;

Whereas, according to the Antiquities Coalition, "because the United States is the largest destination for archaeological and ethnological objects from around the world, the discovery of recently looted and trafficked artifacts in our country not only makes Americans and our institutions accessories to crimes, but also threatens our relations with other countries";

Whereas the real-estate industry, both commercial and residential, is exempt from having to develop and implement a four-pillar anti-money laundering program pursuant to the Bank Secrecy Act;

Whereas it was asserted in a 2018 Conference Report by the Terrorism, Transnational Crime and Corruption Center at the Schar School of Policy and Government of George Mason University, money laundering in real estate (MLRE) has damaging effects on local economies by negatively impacting property prices and dislocating residents;

Appendix C

Whereas in 2017, in response to evidence about significant money laundering through real estate in the United States, the Financial Crimes Enforcement Network (FinCEN) issued Geographic Targeting Orders (GTOs) requiring limited beneficial ownership disclosure in certain transactions involving high-end luxury real estate and "found that about 30 percent of the transactions covered by the GTOs involve a beneficial owner or purchaser representative that is also the subject of a previous suspicious activity report";

Whereas the influx of illicit money, including from Russian oligarchs, has flowed largely unimpeded into the United States through these anonymous shell companies and into U.S. investments, including luxury high-end real estate;

Whereas the United States has not fulfilled the recommended steps to address the money-laundering loopholes that the FATF has identified with DNFBP sectors;

Whereas high-profile enforcement actions against some of the largest and most sophisticated financial institutions raise troubling questions about the effectiveness of U.S. domestic anti-money laundering and counterterrorism financing regulatory, compliance, and enforcement efforts;

Whereas there are financial institutions and individuals employed therein which continue to engage in egregious violations of the Bank Secrecy Act and

enter into deferred prosecution agreements and non-prosecution agreements rather than facing convictions and sentences corresponding to the severity of their violations;

Whereas effective anti-money laundering programs must emphasize sound corporate governance, including business-line accountability and clear lines of legal responsibility for individuals; and

Whereas anti-money laundering examinations in recent years at times failed to recognize the cumulative effect of the violations they cited, instead narrowly focusing their attention on individual banking units, thus permitting national banks to avoid and delay correcting problems, which allowed massive problems to occur before serious enforcement actions were taken: Now, therefore, be it

Resolved, That the House of Representatives—

(1) acknowledges that the lack of sunlight and transparency in financial transactions poses a threat to our national security and our economy's security;

(2) supports efforts to close loopholes that allow corruption, terrorism, and money laundering to infiltrate our country's financial system;

(3) encourages transparency to detect, deter, and interdict individuals, entities, and networks engaged in money laundering and other financial crimes;

(4) urges financial institutions to comply with the Bank Secrecy Act and anti-money laundering laws and regulations; and

(5) affirms that financial institutions and individuals should be held accountable for money laundering and terror financing crimes and violations.

Attest:

Clerk.

APPENDIX D — EXCERPTS OF THE RULES OF THE HOUSE OF REPRESENTATIVES, 116TH CONGRESS

Rule X

Committees and their legislative jurisdictions

1. There shall be in the House the following standing committees, each of which shall have the jurisdiction and related functions assigned by this clause and clauses 2, 3, and 4.

***

(h) Committee on Financial Services.

(1) Banks and banking, including deposit insurance and Federal monetary policy.

(2) Economic stabilization, defense production, renegotiation, and control of the price of commodities, rents, and services.

(3) Financial aid to commerce and industry (other than transportation).

(4) Insurance generally.

(5) International finance.

(6) International financial and monetary organizations.

Appendix D

(7) Money and credit, including currency and the issuance of notes and redemption thereof; gold and silver, including the coinage thereof; valuation and revaluation of the dollar.

(8) Public and private housing.

(9) Securities and exchanges.

(10) Urban development.

***

3(m) The Permanent Select Committee on Intelligence shall review and study on a continuing basis laws, programs, and activities of the intelligence community and shall review and study on an exclusive basis the sources and methods of entities described in clause 11(b)(1)(A).

***

11(a)(1) There is established a Permanent Select Committee on Intelligence (hereafter in this clause referred to as the "select committee").

***

(b)(1) There shall be referred to the select committee proposed legislation, messages, petitions, memorials, and other matters relating to the following:

(A) The Central Intelligence Agency, the Director of National Intelligence, and the National Intelligence

Program as defined in section 3(6) of the National Security Act of 1947.

(B) Intelligence and intelligence-related activities of all other departments and agencies of the Government, including the tactical intelligence and intelligence-related activities of the Department of Defense.

(C) The organization or reorganization of a department or agency of the Government to the extent that the organization or reorganization relates to a function or activity involving intelligence or intelligence-related activities.

(D) Authorizations for appropriations, both direct and indirect, for the following:

(i) The Central Intelligence Agency, the Director of National Intelligence, and the National Intelligence Program as defined in section 3(6) of the National Security Act of 1947.

(ii) Intelligence and intelligence-related activities of all other departments and agencies of the Government, including the tactical intelligence and intelligence-related activities of the Department of Defense.

(iii) A department, agency, subdivision, or program that is a successor to an agency or program named or referred to in (i) or (ii).

***

(j)(1) In this clause the term "intelligence and intelligence-related activities" includes—

(A) the collection, analysis, production, dissemination, or use of information that relates to a foreign country, or a government, political group, party, military force, movement, or other association in a foreign country, and that relates to the defense, foreign policy, national security, or related policies of the United States and other activity in support of the collection, analysis, production, dissemination, or use of such information;

(B) activities taken to counter similar activities directed against the United States;

(C) covert or clandestine activities affecting the relations of the United States with a foreign government, political group, party, military force, movement, or other association;

(D) the collection, analysis, production, dissemination, or use of information about activities of persons within the United States, its territories and possessions, or nationals of the United States abroad whose political and related activities pose, or may be considered by a department, agency, bureau, office, division, instrumentality, or employee of the United States to pose, a threat to the internal security of the United States; and

(E) covert or clandestine activities directed against persons described in subdivision (D).

(2) In this clause the term "department or agency" includes any organization, committee, council, establishment, or office within the Federal Government.

***

Rule XI

2(m)(1)(B) For the purpose of carrying out any of its functions and duties under this rule and rule X (including any matters referred to it under clause 2 of rule XII), a committee or subcommittee is authorized (subject to subparagraph (3)(A)) … to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary.

***

2(m)(3)(A)(i) Except as provided in subdivision (A)(ii), a subpoena may be authorized and issued by a committee or subcommittee under subparagraph (1)(B) in the conduct of an investigation or series of investigations or activities only when authorized by a committee or subcommittee, a majority being present. The power to authorize and issue subpoenas under subparagraph (1)(B) may be delegated to the chair of the committee under such rules and under such limitations as the committee may prescribe. Authorized subpoenas shall be signed by the chair of the committee or by a member designated by the committee.