Nos. 19-715 and 19-760

In the Supreme Court of the United States

DONALD J. TRUMP, ET AL., PETITIONERS

v.

MAZARS USA, LLP, ET AL.

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

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(Additional Caption Listed on Inside Cover)

DONALD J. TRUMP, ET AL., PETITIONERS

v.

DEUTSCHE BANK AG, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

QUESTION PRESENTED

Whether Articles I and II of the United States Constitution allowed three committees of the House of Representatives to issue four subpoenas to third-party custodians for the personal financial records of the sitting President of the United States.

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INTEREST OF THE UNITED STATES

This case involves subpoenas issued by congressional committees to third-party custodians for the personal records of the sitting President of the United States. The United States has a substantial interest in safeguarding the prerogatives of the Office of the President. The United States has participated as amicus curiae in other cases that have presented related issues concerning the President's amenability to suit or compulsory process, including in this Court, *e.g.*, *Clinton* v.

Jones, 520 U.S. 681 (1997); *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), and in these cases in the courts of appeals.

STATEMENT

1. a. On April 15, 2019, the House Committee on Oversight and Reform issued a subpoena to respondent Mazars USA, LLP, the personal accounting firm of President Donald J. Trump, seeking eight years' worth of financial and accounting information about the President and his private business entities. 19-715 Pet. App. 2a-3a; see *id.* at 227a-240a (copy of subpoena). In an earlier letter to Mazars, the committee chair had written that the committee was investigating allegations that the President "changed the estimated value of his assets and liabilities on financial statements prepared by your company." 19-5142 C.A. App. 91.

In an April 12, 2019 memorandum to the committee, the chair gave "notice of [his] intent to issue a subpoena to Mazars," 19-5142 C.A. App. 104, and provided four reasons in support:

> [1] to investigate whether the President may have engaged in illegal conduct before and during his tenure in office, [2] to determine whether he has undisclosed conflicts of interest that may impair his ability to make impartial policy decisions, [3] to assess whether he is complying with the Emoluments Clauses of the Constitution, and [4] to review whether he has accurately reported his finances to the Office of Government Ethics and other federal entities.

Id. at 107. The chair asserted that "[t]he Committee's interest in these matters informs its review of multiple laws and legislative proposals under [its] jurisdiction," but did not identify those laws or proposals. *Ibid.*

b. On April 11, 2019, the House Committee on Financial Services and the Permanent Select Committee on Intelligence issued two identical subpoenas to respondent Deutsche Bank AG. See J.A. 226a. The Financial Services Committee also issued a subpoena to respondent Capital One Financial Corporation. See *ibid.* All three subpoenas seek detailed and extensive financial information about the President, his private business entities, and members of his family. See J.A. 264a-266a. "The time frame for which most of the documents are sought is July 19, 2016, to the present for the Capital One subpoena and January 1, 2010, to the present for the Deutsche Bank subpoenas, but there is no time limit for two categories of documents sought by all three subpoenas," including "documents related to account openings, the names of those with interests in identified accounts, and financial ties between the named individuals and entities and any foreign individual, entity, or government." J.A. 266a; see J.A. 128a-151a, 152a-184a (copies of subpoenas).

The Financial Services Committee stated that it issued the subpoenas as part of its efforts to investigate "the 'implementation, effectiveness, and enforcement of anti-money laundering/counter-financing of terrorism laws and regulations' and the 'risks of money laundering and terrorist financing in the real estate market.'" 19A640 Resp. Br. 5 (quoting H.R. Rep. No. 40, 116th Cong., 1st Sess. 84-85 (2019)). According to that committee, those efforts were triggered by House Resolution 206, which states that the House "supports efforts to close loopholes that allow corruption, terrorism, and money laundering to infiltrate our country's financial system." H.R. Res. 206, 116th Cong., 1st Sess. 5 (2019).

The Intelligence Committee Chair later issued a press release stating that the committee was investigating ties and possible "coordination between the Russian government" and the President and his campaign. See 19A640 Resp. Br. 9 (citation omitted). The chair stated that the "subpoena is 'vital to fully identify the scope of th[e] threat' of foreign financial leverage." *Id.* at 10 (citation omitted).

c. On July 24, 2019, the House passed a resolution stating that it "ratifies and affirms all current and future investigations" and "subpoenas previously issued or to be issued in the future, by any standing or permanent select committee of the House," related to "the President in his personal or official capacity," "his immediate family, business entities, or organizations," and other individuals (including any "current or former" governmental employee) and institutions (including "the White House") related to the President. H.R. Res. 507, 116th Cong., 1st Sess. 2-3 (2019).

2. Petitioners—the President in his personal capacity and other individuals and entities whose financial information the subpoenas sought—filed these suits to prevent the third-party custodians from complying with the subpoenas, including (as relevant here) on the ground that the subpoenas violate the constitutional separation of powers. See J.A. 30a-49a (*Mazars* complaint); J.A. 109a-127a (*Deutsche Bank* complaint).

Both district courts rejected petitioners' claims on the merits. See 19-715 Pet. App. 158a-212a; J.A. 187a-222a. The court in *Deutsche Bank* denied petitioners' motion for a preliminary injunction, J.A. 185a-186a, and the court in *Mazars* treated the parties' briefs on a

preliminary-injunction motion as cross-motions for summary judgment, and entered judgment in favor of respondents, 19-715 Pet. App. 178a, 212a.

3. The courts of appeals affirmed. 19-715 Pet. App. 1a-157a; J.A. 223a-375a.

a. As relevant here, the court of appeals in *Mazars* recognized that a congressional committee may issue a legislative subpoena only if it falls within the House's delegation of investigative power to the committee. See 19-715 Pet. App. 20a. The court further recognized that the committee's investigation must concern a subject matter on which a "constitutional statute may be enacted"; seek only information that is "'calculated to' 'materially aid' the[] investigation[]"; and "'neither usurp the other branches' constitutionally designated functions nor violate individuals' constitutionally protected rights.'" *Id.* at 21a-22a (brackets and citations omitted). The court concluded that the subpoena satisfied those conditions, principally because the committee chair's April 12 memorandum expressed an interest in whether the President had accurately reported his finances, and the House was considering legislation regarding financial disclosures. See *id.* at 30a-31a. The court "reject[ed] the suggestion" that the law-enforcement rationale set forth in that memorandum "spoils the Committee's otherwise valid legislative inquiry." *Id.* at 32a.

Judge Rao dissented. 19-715 Pet. App. 77a-157a. She stated that "Congress cannot undertake a legislative investigation of an impeachable official if the 'gravamen' of the investigation rests on 'suspicions of criminality.'" *Id.* at 85a (citation omitted). Examining the four purposes set forth in the April 12 memorandum, Judge Rao found that "each of [them] target[s] the

President's alleged wrongdoing and potential violations of statutes and the Constitution." *Id.* at 126a.

The court of appeals denied rehearing en banc. 19-715 Pet. App. 213a-221a. Judges Henderson, Katsas, and Rao would have granted rehearing. *Id.* at 214a n.*. Judge Katsas explained that congressional subpoenas seeking the President's personal records raise "exceptionally important questions regarding the separation of powers," *id.* at 215a, and pose a "far greater" "threat to presidential autonomy and independence" than subpoenas issued in conjunction with judicial proceedings, which are overseen by "neutral judges applying" governing rules, *id.* at 216a-217a.

b. As relevant here, the court of appeals in *Deutsche Bank* recognized that legislative subpoenas issued by congressional committees may not "intru[de] into the authority of the other branches"; pursue "'law enforcement'" goals; "'extend to an area in which Congress is forbidden to legislate'"; or "'inquire into private affairs unrelated to a valid legislative purpose.'" J.A. 267a-268a (citations omitted). Relying on House Resolution 206, the court summarized the interest of the committees in issuing their respective subpoenas as being the "enforcement of anti-money-laundering/counter-financing of terrorism laws, terrorist financing, the movement of illicit funds through the global financial system including the real estate market, the scope of the Russian government's operations to influence the U.S. political process, and whether [the President] was vulnerable to foreign exploitation." *Id.* at 284a. The court concluded that those interests were "related to a legislative purpose." *Ibid.* Although the court recognized that the subpoenas were overly broad in both time and scope, see *id.* at

300a-305a, it found that most of the requested "information, including documents dating back to when accounts were opened, is reasonably related to an investigation about money laundering," *id.* at 297a.

Judge Livingston dissented in relevant part. J.A. 323a-375a. She found 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." J.A. 347a. And she did not find "the proffered rationale" of the committees "consistent with the granular detail that these subpoenas seek." *Ibid.* Judge Livingston would have remanded for a fuller development of the record. See J.A. 368a-371a.

SUMMARY OF ARGUMENT

A. Congress's implicit power to investigate generally is "justified solely as an adjunct to the legislative process." *Watkins* v. *United States*, 354 U.S. 178, 197 (1957). A legislative subpoena must therefore further a legitimate legislative purpose; it cannot be issued for law enforcement or simply to expose wrongdoing. And when a congressional committee issues a subpoena, it must be authorized by a delegation from the full chamber that identifies the legislative purpose with sufficient particularity. Moreover, any information sought must be pertinent to the stated legislative purpose.

Those limitations should be even stricter when a committee aims its investigatory power at the President. "The President occupies a unique position in the constitutional scheme." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 749 (1982). The Constitution vests the entirety of the Executive Power in the President, and it entrusts him with vast and vital public responsibilities. This

Court has long understood that to enable the President to discharge those critical constitutional duties, Article II provides an immunity from any process that would risk impairing the independence of his office or interfering with the performance of its functions. That risk is particularly palpable when the President's political adversaries control one or both chambers of Congress. For that reason, the Framers deliberately sought to insulate the President from congressional interference in particular.

A legislative subpoena must therefore satisfy heightened requirements when it seeks information from the President. At the threshold, the full chamber should unequivocally authorize a subpoena against the President. Moreover, the legislative purpose should be set forth with specificity. Courts should not presume that the purpose is legitimate, but instead should scrutinize it with care. And as with information protected by executive privilege, information sought from the President should be demonstrably critical to the legitimate legislative purpose. A congressional committee cannot evade those heightened requirements merely by directing the subpoenas to third-party custodians, for such agents generally assume the rights and privileges of their principal, as this Court has recognized in analogous contexts.

B. The subpoenas here do not satisfy those heightened standards. The four reasons offered in support of the Mazars subpoena betray an impermissible law-enforcement objective, and the boilerplate statement that the subpoena furthers "multiple laws and legislative proposals" is far too vague to enable, much less withstand, meaningful scrutiny of its legitimacy. Indeed, the stated reasons related to conflicts of interest

and emoluments bear no evident connection to valid legislation, given Congress's limited ability to regulate the President. And in any event, the committee has not explained why the highly detailed information the subpoena seeks is demonstrably critical to any of its stated legislative purposes.

Likewise, the Deutsche Bank and Capital One subpoenas seek information that is not demonstrably critical to any legitimate legislative purpose. One committee's investigation was into closing loopholes in money-laundering laws; the other's into foreign interference in elections. That two committees issued carbon-copy subpoenas for markedly divergent purposes strongly suggests that neither is the true purpose. Moreover, the resolution on which the committees rely does not even mention foreign interference in elections, and there is no reason why investigating potential changes to money-laundering laws should focus on the President in particular.

C. Alternatively, this Court should invalidate the subpoenas on constitutional-avoidance grounds. The authorizing resolution's blank check for all "current and future" subpoenas by any committee issued "directly or indirectly" to the President for any reason whatsoever, H.R. Res. 507, at 2-3, makes plain that the House has not "demonstrated its full awareness of what is at stake," *United States* v. *Rumely*, 345 U.S. 41, 46 (1953). Moreover, the full House never clearly adopted or endorsed the various reasons given by the committees for issuing the subpoenas. As in *Rumely*, this Court could invalidate the subpoenas on those threshold grounds and thereby avoid the need to opine on the merits of this interbranch dispute.

ARGUMENT

These cases involve the first attempts by congressional committees to demand the personal records of a sitting President of the United States. That use of their limited and implied investigatory powers poses a serious risk of harassing the President and distracting him from his constitutional duties. Article II and the separation of powers protect the Office of the President from such interference. Congressional committees that subpoena the President's information must therefore make a heightened showing, both of a legitimate legislative purpose for the subpoenas and of the need for the information sought. Because the committees here did not make those showings, the subpoenas violate the Constitution.

A. Congressional Committees May Not Subpoena The President's Personal Records Unless The Information Is Demonstrably Critical To A Clearly Identified Legitimate Legislative Purpose

1. Congress's implied investigatory powers are subject to several limitations

"This government is acknowledged by all to be one of enumerated powers." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). The enumerated "legislative Powers" granted by Article I to Congress do not include any express authority to conduct investigations or issue compulsory process. U.S. Const. Art. I, § 1. The enumerated powers that a single House of Congress may exercise on its own are even more circumscribed, generally limited to governing its own Members and internal proceedings. Art. I, § 2, Cl. 5, § 3, Cls. 5-6, and § 5, Cls. 1-4; see *INS* v. *Chadha*, 462 U.S. 919, 955 (1983). Nevertheless, although "neither house is invested with

'general' power to inquire into private affairs and compel disclosures," this Court has held that each has a "limited power of inquiry" as part of its "auxiliary powers as are necessary and appropriate to make the express powers effective." *McGrain* v. *Daugherty*, 273 U.S. 135, 173-174 (1927); see *Watkins* v. *United States*, 354 U.S. 178, 197 (1957) (observing that congressional investigations are "justified solely as an adjunct to the legislative process"). The Court has explained that the implied "power to secure needed information" is "incidental to the legislative function," and "was so regarded in the British Parliament and in the Colonial legislatures before the American Revolution." *McGrain*, 273 U.S. at 161; see *id.* at 161-167 (describing the history of legislative subpoenas).

That implied power is, however, "subject to recognized limitations." *Quinn* v. *United States*, 349 U.S. 155, 161 (1955). Most important, a congressional subpoena may be issued only "in furtherance of[] a legitimate task of the Congress." *Watkins*, 354 U.S. at 187. Accordingly, a congressional subpoena may not be issued for the purpose of "law enforcement," as "those powers are assigned under our Constitution to the Executive and the Judiciary." *Quinn*, 349 U.S. at 161.

Legislation is of course a legitimate congressional task. But a congressional subpoena may not extend to topics "in respect to which no valid legislation could be enacted." *Watkins*, 354 U.S. at 194 (citation omitted); see *Quinn*, 349 U.S. at 161 (congressional inquiry into "an area in which Congress is forbidden to legislate" is invalid). Similarly, although Congress may "inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government," *Watkins*, 354 U.S. at 200 n.33, that informing function must be

tethered to a valid legislative function to support a legislative subpoena. See *id.* at 200; *Hutchinson* v. *Proxmire*, 443 U.S. 111, 133 (1979) (explaining that "the duty of Members to tell the public about their activities * * * is not a part of the legislative function"); see also *Kilbourn* v. *Thompson*, 103 U.S. 168, 195 (1881) (rejecting subpoena that was "simply a fruitless investigation into the personal affairs of individuals"). There is, in short, "no congressional power to expose for the sake of exposure." *Watkins*, 354 U.S. at 200.

Because investigations often are conducted by congressional committees "serving as the representatives of the parent assembly," *Watkins*, 354 U.S. at 200, a committee's "right to exact testimony and to call for the production of documents must be found in th[e] language" of "the controlling charter of the committee's powers"—generally a resolution passed by the full chamber, *United States* v. *Rumely*, 345 U.S. 41, 44 (1953); see *Watkins*, 354 U.S. at 201, 206. Critically, an authorizing resolution must "spell out * * * with sufficient particularity" the legitimate legislative purpose behind any investigative subpoena. *Watkins*, 354 U.S. at 201. Although the subjective "*motives* alleged to have prompted" a congressional subpoena are not relevant, *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 508-509 (1975) (emphasis added), the objective *purpose* is, *McGrain*, 273 U.S. at 178 (inquiring whether "the real object" of a legislative subpoena was "legitimate").

Even when a committee issues a subpoena to further a properly identified and legitimate legislative purpose, the information sought must be "pertinent" to that purpose. *McGrain*, 273 U.S. at 176. Congressional subpoe-

nas are subject to "a jurisdictional concept of pertinency drawn from the nature of a congressional committee's source of authority." *Watkins*, 354 U.S. at 206. For that limit "[t]o be meaningful," Congress must provide "the connective reasoning whereby the precise questions asked relate to" the legitimate legislative purpose. *Id.* at 215. Just as congressional subpoenas may not "be used to inquire into private affairs unrelated to a valid legislative purpose," *Quinn*, 349 U.S. at 161, they may not "radiate outward infinitely to any topic thought to be related in some way" to that purpose, *Watkins*, 354 U.S. at 204. Of particular concern is when congressional "investigators turn their attention to the past to collect minutiae on remote topics." *Ibid.* Those circumstances could indicate that the information sought in the subpoena does not "relate to" a legitimate legislative purpose, *id.* at 215, and may even suggest the impermissible object of exposing illegality for its own sake.

2. The President's unique status requires special solicitude from Congress and the Judiciary

Article I's limits on the reach of Congress's implied investigatory powers are supplemented by Article II's protections against incursions that threaten the President's independence and ability to carry out his constitutional duties.

a. "The President occupies a unique position in the constitutional scheme." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 749 (1982). The Constitution vests the legislative power in a plural Congress and the judicial power in a plural Judiciary, but the entirety of the executive power in a single President. U.S. Const. Art. II, § 1. The Constitution entrusts the President with vast and vital public responsibilities, including taking care that the laws are faithfully executed; commanding the Armed Forces;

nominating, appointing, and removing officers; making treaties; recommending, signing, and vetoing bills; sending and receiving ambassadors; and granting pardons and reprieves. Art. I, § 7, Cls. 2-3 and Art. II, §§ 2-3. The Constitution vests the President with unremitting official responsibilities; by contrast, Congress is required to assemble only "once in every Year," Art. I, § 4, Cl. 2, may "adjourn from day to day," Art. I, § 5, Cl. 1, and retains "a Quorum to do Business" even in the absence of up to half its membership, *ibid.* And the President must speak and act not just for a single district or State, but for all the people of the United States. The President is, in short, the "sole indispensable man in government." Philip B. Kurland, *Watergate and the Constitution* 135 (1978).

The Founders understood Article II to protect the "independent functioning" of the President's unique office, "free from risk of control, interference, or intimidation by other branches." *Fitzgerald*, 457 U.S. at 760-761 (Burger, C.J., concurring). For example, John Adams, Thomas Jefferson, and Joseph Story all maintained that the President was immune from any judicial process whatsoever. See *id.* at 750 n.31 (majority opinion). Although this Court has not gone that far, it has accepted "the essence of the constitutional principle," *Clinton* v. *Jones*, 520 U.S. 681, 714 (1997) (Breyer, J., concurring in the judgment), and has relied on those views in concluding that the President enjoys a constitutional immunity from actions of coordinate Branches that would threaten to undermine his independence or interfere with his functions, *Fitzgerald*, 457 U.S. at 750 n.31. The Court has described that immunity as "a func-

tionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Id.* at 749.

For example, the Court has observed that "in no case would a court be required to proceed against the president as against an ordinary individual." *Cheney* v. *United States District Court*, 542 U.S. 367, 382 (2004) (brackets, citation, and ellipsis omitted). It has held that a court may not enjoin the President in "the performance of his official duties." *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867); see *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801 (1992) (refusing to infer that an ambiguous or silent statute regulates the President). It also has recognized the President's "absolute immunity from damages liability predicated on his official acts." *Fitzgerald*, 457 U.S. at 749. It has recognized a qualified presidential privilege protecting the confidentiality of presidential communications, holding that a sitting President may be required to respond to a federal criminal trial subpoena for such communications only where there is a "demonstrated, specific need" for the requested records. *United States* v. *Nixon*, 418 U.S. 683, 713 (1974). And it has recognized that although a sitting President is not absolutely immune from a civil suit in federal court for purely private conduct, "[t]he high respect that is owed to the office of the Chief Executive * * * should inform the conduct of the entire proceeding, including the timing and scope of discovery." *Clinton*, 520 U.S. at 707; see *Cheney*, 542 U.S. at 385-386 (similar). Those immunities do "not place the President 'above the law.'" *Fitzgerald*, 457 U.S. at 758. Rather, the law itself accounts for "the paramount necessity of protecting the Executive Branch"

from acts "that might distract it from the energetic performance of its constitutional duties." *Cheney*, 542 U.S. at 382.

b. The President enjoys those immunities even with respect to his purely personal conduct and papers. As the Framers understood, "[t]he interest of the man" is often "connected with the constitutional rights of the place." *The Federalist* No. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961). Acts taken against an individual as a private person can impair that individual's exercise of a public office. For example, the Arrest Clause protects legislators from civil arrests for private conduct while attending and traveling to and from sessions of Congress. U.S. Const. Art. I, § 6, Cl. 1. Article II similarly protects a sitting President from arrest, indictment, and criminal prosecution for private conduct. *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 247-248 (2000). And this Court has recognized that "the Executive's 'constitutional responsibilities and status are factors counseling judicial deference and restraint' in the conduct of litigation against it," *Cheney*, 542 U.S. at 385 (brackets and citation omitted), including in civil suits against the President in his personal capacity, *Clinton*, 520 U.S. at 707.

Demands for a President's personal records similarly risk interfering with the President's official functions. A subpoena for personal records can be deployed to harass a President in response to his official policies, or have the effect of subjecting a President to unwarranted burdens, diverting his time, energy, and attention from his public duties. That is especially true "[b]ecause the Presidency is tied so tightly to the persona of its occupant," making "the line between official

and personal * * * both elusive and difficult to discern." *In re Lindsey*, 158 F.3d 1263, 1286 (D.C. Cir.) (per curiam) (Tatel, J., concurring in part and dissenting in part), cert. denied, 525 U.S. 996 (1998).

3. Congress must satisfy a heightened showing when it directs its implied investigatory powers at the President

In contrast to legislative demands for information from private persons or subordinate governmental officials, no history or tradition supports legislative subpoenas aimed at the President's personal records. Cf. *McGrain*, 273 U.S. at 161-167. Even assuming Congress's implied investigatory power extends to that domain, but cf. *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477, 505 (2010) (observing that "the lack of historical precedent" for an action intruding on the President's prerogatives is a "telling indication" of unconstitutionality) (citation omitted), the constitutional concerns described above make it all the more important to enforce strict substantive limits on that power.

a. The Founders predicted that Members of Congress would "often appear disposed to exert an imperious controul over the other departments; and as they commonly have the people on their side, they always act with such momentum as to make it very difficult for the other members of the government to maintain the balance of the Constitution." *The Federalist* No. 71, at 484 (Alexander Hamilton). Indeed, the Framers were convinced "that the powers conferred on Congress were the powers to be most carefully circumscribed," *Chadha*, 462 U.S. at 947, and their writings "are replete with expressions of fear that the Legislative Branch * * * will aggrandize itself at the expense of the other two

branches," *Buckley* v. *Valeo*, 424 U.S. 1, 129 (1976) (per curiam). See *The Federalist* No. 48, at 333 (James Madison) ("The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex."); 2 Joseph Story, *Commentaries on the Constitution of the United States* § 532, at 15 (1833).

The Framers thus took special effort—beyond the structural separation of powers—to "fortif[y]" the executive, and to constrain the legislature, relative to each other. *The Federalist* No. 51, at 350. For example, they divided the legislature into two Houses with "different modes of election, and different principles of action," *ibid.*; made each House a plural body to "obstruct" "promptitude of decision" and to "promote deliberation and circumspection," *The Federalist* No. 70, at 475 (Alexander Hamilton); imposed quorum requirements before either chamber could act, U.S. Const. Art. I, § 5, Cl. 1; and required bicameralism to enact legislation, Art. I, § 7, Cl. 2.

Conversely, the Framers created a single President to ensure a "vigorous executive," not a "feeble" one. *The Federalist* No. 70, at 471. They also ensured the President's independence from Congress by, for example, forbidding Members of Congress from serving as presidential Electors, guaranteeing the President a salary that Congress could neither increase nor diminish during his term, specifying the presidential oath in the Constitution rather than allowing Congress to enact it by law, and prescribing procedures and standards for impeachment and removal. U.S. Const. Art. I, § 2, Cl. 5 and § 3, Cl. 6, and Art. II, § 1, Cls. 2, 3, 7, and 8. They also granted the President a structural protection from congressional encroachments they could not foresee:

the veto power, Art. I, § 7, Cl. 2, which "serves as a shield to the executive" and provides "a constitutional and effectual power of self defence," *The Federalist* No. 73, at 495 (Alexander Hamilton).

Those and other aspects of presidential independence and autonomy are threatened when Congress uses its implied investigative powers to make onerous demands of the President. Such demands pose the threat that the Legislative Branch may "aggrandize itself at the expense" of the Executive by usurping law-enforcement functions, *Bowsher* v. *Synar*, 478 U.S. 714, 727 (1986) (citation omitted), or may "impair [the Executive] in the performance of its constitutional duties" through intrusive or burdensome inquiries, *Free Enterprise Fund*, 561 U.S. at 500 (citation omitted). See *Watkins*, 354 U.S. at 187, 200 (legislators might improperly use investigative powers for "personal aggrandizement," to "'punish' those investigated," or "to expose for the sake of exposure").

Those are not idle concerns. The President faces a unique risk of harassment in response to his official policies or actions. "In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring). Because the President "must make the most sensitive and far-reaching decisions" on "matters likely to 'arouse the most intense feelings,'" he is "an easily identifiable target" for harassment. *Fitzgerald*, 457 U.S. at 752-753 (citation omitted).

Likewise, the President "occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his un-

divided time and attention to his public duties." *Clinton*, 520 U.S. at 697. "Because of the singular importance of the President's duties, diversion of his energies * * * would raise unique risks to the effective functioning of government." *Fitzgerald*, 457 U.S. at 751. It takes little imagination to foresee that subpoenas seeking sensitive personal information would divert the President's attention from his constitutional duties.

The risks of such harassment and distraction are particularly acute when Congress does the investigating. The President may be a tantalizing target to the "opposite and rival interests" of Congress, *The Federalist* No. 51, at 349, when his political adversaries control one or both chambers. The risk that they will conduct an investigation "solely for the personal aggrandizement of the investigators or to 'punish'" the President is especially palpable in those circumstances. *Watkins*, 354 U.S. at 187. Investigations in judicial proceedings at least are confined to discrete controversies and subject to various protective measures imposed by neutral rules and judges. Congressional investigators, by contrast, may issue successive subpoenas in waves, making far-reaching demands for sensitive personal information—college transcripts, job applications, health records, birth certificates, private emails, cellphone logs, and the like—that harry the President and distract his attention.

Those risks are greater still when a single House of Congress or even, as is typical, a single committee wields the investigative power. Cf. *Chadha*, 462 U.S. at 951, 958 n.23 (observing that "the bicameral requirement" serves "essential constitutional functions," including "opportunity for deliberation and debate").

Consider the contrast with the inspection of presidential records authorized in *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), where the Court emphasized that the President was no longer in office; the materials would remain in the Executive Branch; an Executive Branch official would conduct the inspection; an Act of Congress, signed into law by the President, authorized the inspection; and the statute contained several safeguards against improper disclosure of personal materials. See *id.* at 439-455. An investigation by a single House committee against the sitting President to obtain sensitive personal information with no enforceable limitations on disclosure lacks all of those protective features, and thus amplifies the risks of harassment and distraction.

b. Enforcing the limits on Congress's implied investigatory powers is thus all the more important when congressional investigators target the President. At the threshold, it is particularly important for the chamber issuing the subpoena to have "demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits." *Rumely*, 345 U.S. at 46. That chamber also should satisfy heightened standards in this context.

First, the chamber issuing a legislative subpoena should offer a clear and specific statement setting forth with particularity the legislative purpose behind any investigation of the President and his information. A heightened standard of clarity, specificity, and particularity is appropriate in light of Congress's limited ability to regulate the President. The President is not like private citizens or federal agencies, which are subject to myriad forms of regulation within Congress's legislative sphere. See, *e.g.*, *McGrain*, 273 U.S. at 178;

Eastland, 421 U.S. at 506. Rather, the Constitution establishes the President's office and vests "[t]he executive Power" directly in him, U.S. Const. Art. II, § 1, Cl. 1, and Congress may not use even its express legislative powers—let alone its implied investigative powers—to defeat or curtail the President's constitutional prerogatives. Any legislation regulating the President thus would bear the significant risk that it would unconstitutionally "impair [the President] in the performance of [his] constitutional duties." *Free Enterprise Fund*, 561 U.S. at 500 (citation omitted); cf. *Franklin*, 505 U.S. at 800-801 (requiring an "express statement" "before assuming [Congress] intended" to regulate the President, "[o]ut of respect for the separation of powers and the unique constitutional position of the President"). Accordingly, it would be inappropriate for courts—or Congress's lawyers in litigation—to hypothesize potential legitimate legislative purposes in an effort to supply a "retroactive rationalization." *Watkins*, 354 U.S. at 204; see *Tobin* v. *United States*, 306 F.2d 270, 274 n.7 (D.C. Cir.), cert. denied, 371 U.S. 902 (1962).

Second, the stated legislative purpose should be subject to heightened scrutiny of its legitimacy. As explained above, the President is a particularly attractive target for his political foes, and congressional investigators may face irresistible temptation to improperly "turn their attention to the past to collect minutiae on remote topics," *Watkins*, 354 U.S. at 204, on the pretext of investigating hypothetical future legislation. Although courts should not speculate about legislators' subjective motives, they must ascertain the subpoena's "real object" in light of objective circumstances, *McGrain*, 273 U.S. at 178, without "shut[ting] [thei]r minds" to what "[a]ll others can see and understand,"

Child Labor Tax Case, 259 U.S. 20, 37 (1922) (Taft, C.J.); see *Rumely*, 345 U.S. at 43-44 (invoking that principle in the legislative-subpoena context). As Justice Field, riding circuit, observed in evaluating an analogous claim of legislative pretext, "[w]hen we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men." *Ho Ah Kow* v. *Nunan*, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879).

That sort of searching scrutiny is all the more critical when a legislative subpoena targets the President. When a House of Congress invokes its implied investigatory powers with respect to governmental agencies or private citizens, courts often rely on "the particular subject-matter" of a congressional inquiry to "presum[e]" that the "real object" of the inquiry is valid legislation. *McGrain*, 273 U.S. at 178. But that course is inappropriate when congressional investigators take aim at the President, given Congress's limited power to regulate the President and his attractiveness as a target of harassment. If anything, those circumstances would support the opposite presumption. At a minimum, however, there should be no presumption either way. Cf. *Morrison* v. *Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (observing that when the "political branches are * * * in disagreement, neither can be presumed correct").

Third, any information sought in a congressional subpoena directed at the President's information must be not just reasonably related, but "demonstrably critical," to the asserted legislative purpose. *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc).

That heightened standard, which the D.C. Circuit applied to a legislative subpoena seeking information protected by executive privilege, see *ibid.*, is appropriate because the President's personal information, like privileged information, should be subject to congressional process only as a last resort. At a minimum, therefore, congressional investigators should exhaust other potential sources before demanding the President's personal information. Cf. *Cheney*, 542 U.S. at 389-390. Even when a committee demands information from private parties, each "particular inquiry [must be] justified by a specific legislative need." *Watkins*, 354 U.S. at 205. When a congressional inquiry reaches the President, the risk of its having "radiate[d] outward infinitely to any topic thought to be related in some way" to a legislative need is all the more likely. *Id.* at 204. The President's "provision for defence" must "be made commensurate to the danger of attack." *The Federalist* No. 51, at 349. A heightened standard of pertinence is thus imperative.

c. Congressional investigators cannot avoid those heightened requirements simply by directing subpoenas to the President's agents, rather than to the President himself. "The general rule of the law is, that what one does through another's agency is to be regarded as done by himself." *Ford* v. *United States*, 273 U.S. 593, 623 (1927) (citation omitted). A person who holds records "in a representative capacity as custodian" thus usually "'assume[s] the rights, duties and privileges'" of his principal with respect to those records. *Bellis* v. *United States*, 417 U.S. 85, 89-90 (1974) (citation omitted). Indeed, this Court has held that "a Member [of Congress] and his aide are to be 'treated as one'" for purposes of determining whether a grand jury subpoena

directed to a congressional aide violates the Speech or Debate Clause. *Gravel* v. *United States*, 408 U.S. 606, 616 (1972) (citation omitted). So too, the D.C. Circuit has explained that interpreting the Freedom of Information Act, 5 U.S.C. 552, to cover requests for records of visitors to the White House would raise "serious separation-of-powers concerns," irrespective of whether the requester seeks the records from the President himself or attempts an "end run[]" by directing the request to the federal agency that is the custodian of the records. *Judicial Watch, Inc.* v. *United States Secret Service*, 726 F.3d 208, 216, 225 (2013).

The same reasoning applies here. The risks that subpoenas could harass the President and divert his attention from his official duties are just as real when the subpoenas are directed to the President's agents as when they are directed to the President himself. That is especially so when, as here, the President necessarily must rely on expert third parties to oversee, manage, and report on his financial holdings. Indeed, even if he were the personal recipient of the subpoenas, he would not personally compile the requested documents; instead, he would rely on third-party agents like the ones here. As a practical matter, therefore, the subpoenas are indistinguishable from ones directed to the President, and should be treated as such for separation-of-powers purposes. "The Constitution deals with substance, not shadows." *Salazar* v. *Buono*, 559 U.S. 700, 723 (2010) (Roberts, C.J., concurring) (citation omitted).

B. The Congressional Subpoenas Here Do Not Satisfy The Constitutional Requirements

The four subpoenas here do not satisfy the standards set forth above, because neither the House nor the com-

mittees clearly identified a specific legitimate legislative purpose behind each subpoena or clearly explained how the information sought in each subpoena was demonstrably critical to those respective purposes.

1. Mazars

The Oversight Committee Chair's April 12, 2019 memorandum set forth four putative legislative purposes behind the Mazars subpoena. 19-5142 C.A. App. 104-107. None is adequate. Most important, all of them betray a law-enforcement purpose, which is flatly impermissible. *Quinn*, 349 U.S. at 161. Indeed, the very first reason is "to investigate whether the President may have engaged in illegal conduct before and during his tenure in office." 19-5142 C.A. App. 107. The other reasons likewise demonstrate that the subpoena's real object was law enforcement, not legislation: "to determine whether [the President] has undisclosed conflicts of interest that may impair his ability to make impartial policy decisions"; "to assess whether [the President] is complying with the Emoluments Clauses of the Constitution"; and "to review whether [the President] has accurately reported his finances to the Office of Government Ethics and other federal entities." *Ibid.* The memorandum also confirms that the committee's investigation arose out of allegations that the President fraudulently "altered the estimated value of his assets and liabilities on financial statements" long before he was a Presidential candidate. *Id.* at 104. Those circumstances provide "strong reason to doubt," *Watkins*, 354 U.S. at 213, that the subpoena's "real object" was legislation, *McGrain*, 273 U.S. at 178.

The memorandum's conclusory statement that "[t]he Committee's interest in these matters informs its review of multiple laws and legislative proposals," 19-5142

C.A. App. 107, is insufficient to satisfy the requirement of a clearly stated and particular legitimate legislative purpose. An "express avowal" of a precise legislative purpose may not always be required, *McGrain*, 273 U.S. at 178; but when a subpoena seeks such detailed information about the President's past conduct, a boilerplate reference to "multiple laws and legislative proposals" is far too vague to enable any assessment of whether the subpoena is sufficiently "related to, and in furtherance of, a legitimate task of the Congress," *Watkins*, 354 U.S. at 187.

Even apart from the obvious law-enforcement objectives, none of the stated reasons for the subpoena is sufficiently related to legitimate legislation. The declared interest in the President's potential "conflicts of interest," 19-5142 C.A. App. 107, bears no evident connection to any legitimate legislation; after all, Congress cannot impose qualifications on the Presidency beyond those set forth in the Constitution, so it could not legislate to disable persons with conflicts of interest from serving as President. See Letter from Laurence H. Silberman, Acting Attorney General, to Hon. Howard W. Cannon, Chairman, Committee on Rules and Administration (Sept. 20, 1974); cf. *Powell* v. *McCormack*, 395 U.S. 486, 522 (1969). Likewise for the stated interest in the President's "compl[iance] with the Emoluments Clauses of the Constitution." 19-5142 C.A. App. 107. Although Congress may consent to otherwise-prohibited foreign emoluments, the memorandum does not suggest that the committee is investigating the President with a view to that goal. To the contrary, the committee's stated interest in determining whether the President "may have engaged in illegal conduct," *ibid.*, belies any such

object. And at all events, the committee never explained how the information sought in the subpoena would be "demonstrably critical" to any legislation concerning conflicts or emoluments. *Senate Select Committee*, 498 F.2d at 731.

Nor does it matter whether the committee's interest in "accurate[] report[ing]" of the President's finances could in theory result in valid legislation amending the financial-disclosure laws. 19-5142 C.A. App. 107; see 19-715 Pet. App. 59a-62a. The committee has not explained why detailed information about the President's personal finances, including for several years before he became a presidential candidate, would be relevant, much less "demonstrably critical," to any investigation related to such hypothetical legislation. *Senate Select Committee*, 498 F.2d at 731. Legislative judgments "normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events." *Id.* at 732; see *Watkins*, 354 U.S. at 204. The Mazars subpoena on its face seeks the latter, suggesting that its "real object" is to expose personal wrongdoing, not amend the disclosure laws. *McGrain*, 273 U.S. at 178; cf. *Rumely*, 345 U.S. at 44 (courts must not be "blind" to what "all others can see and understand") (brackets and citation omitted).

2. Deutsche Bank and Capital One

In concluding that the Financial Services and Intelligence Committees' subpoenas served a valid legislative purpose, the court of appeals relied on House Resolution 206, which states that the House "supports efforts to close loopholes that allow corruption, terrorism, and money laundering to infiltrate our country's finan-

cial system." J.A. 280a (citation omitted). Although legislation designed to close such regulatory loopholes is undoubtedly within Congress's constitutional competence, House Resolution 206 does not connect those general matters to the President's personal finances in particular. See H.R. Res. 206, at 1-5.

Indeed, there is no discernible reason why a congressional investigation into the general problem of money laundering should focus on the President in particular. Countless persons have engaged in the sorts of financial transactions that could implicate existing statutory or regulatory loopholes. A bona fide legislative inquiry into the subjects of "corruption, terrorism, and money laundering," H.R. Res. 206, at 5, would cast a wide net rather than employ a harpoon. And to the extent the Intelligence Committee Chair expressed concerns with foreign interference in the U.S. political process, see 165 Cong. Rec. H3481 (daily ed. May 8, 2019), House Resolution 206 does not appear to encompass or adopt that purpose at all, much less as a basis to issue the subpoenas here. It bears mention that the two committees issued identical subpoenas to Deutsche Bank—one purportedly to investigate foreign interference in our elections; the other purportedly to investigate money-laundering. As with the nearly identical subpoenas to Mazars issued by the Oversight Committee and the New York District Attorney, that carbon-copy subpoenas are claimed to serve two markedly divergent purposes strongly suggests that neither is the real object.

Providing an even "strong[er] reason to doubt" the subpoenas' stated object, *Watkins* 354 U.S. at 213, is the sweeping breadth of the information demanded. As with the Mazars subpoena, the Deutsche Bank and Cap-

ital One subpoenas seek "minutiae" about the President's personal finances, *id.* at 204, in an apparent attempt to create a "precise reconstruction of past events," *Senate Select Committee*, 498 F.2d at 732. The Deutsche Bank subpoenas request a universe of financial documents that spans a decade, from 2010 to present, relating to the President, members of his family, and his private business entities. See J.A. 128a-140a. The Capital One subpoena is somewhat narrower in its temporal reach, but it too seeks a wide range of financial documents regarding the President and his businesses over that period. See J.A. 152a-158a. Together, those documents encompass a constellation of transactions that would permit the committees to reconstruct in detail the President's financial history with those institutions—including fund transfers, deposits, withdrawals, investments, loans, mortgages, and lines of credits.

Congressional investigators may not seek such details merely because they might be "thought to be related in some way" to a legislative purpose. *Watkins*, 354 U.S. at 204. Yet the committees provided no explanation why that trove of personal information is even reasonably related—much less "demonstrably critical," *Senate Select Committee*, 498 F.2d at 731—to the anti-money-laundering purposes set forth in House Resolution 206. Indeed, the July 19, 2016, starting date for the Capital One subpoena—the precise date on which the President became the Republican Party nominee—has no evident connection to money laundering whatsoever. See *Watkins*, 354 U.S. at 204 ("Remoteness of subject can be aggravated by a probe for a depth of detail even farther removed from any basis of legislative action.").

To be sure, congressional committees ordinarily have considerable latitude about which private transactions and events to examine. But committees investigating far-reaching public problems, such as money laundering, do not properly exercise that discretion by making the President the primary target of their inquiries. Even if the committees believed that the President may have engaged in transactions that implicate the regulatory loopholes discussed in House Resolution 206, the House has not "assay[ed] the relative necessity" of seeking records from *the President* rather than from someone—anyone—else. *Watkins*, 354 U.S. at 206. Likewise, although an interest in foreign influence on federal elections may have a connection to recent political candidates for federal office, the committees have not explained why the President's personal finances should be the primary target to examine in that respect. Instead, the committees seemed deliberately to target the President "as a useful case study." 19-1540 C.A. App. 133. That is precisely the sort of danger that constitutional separation-of-powers principles are intended to avoid.

C. Constitutional Avoidance Also Counsels Reversal

Alternatively, this Court could avoid opining on the limits of Congress's implied investigatory powers with respect to the President, and instead invalidate the subpoenas on the independent ground that the full House has not authorized them with the requisite clarity and particularity. House Resolution 507 provided a blanket authorization not only for these subpoenas, but for all "current and future" subpoenas by any committee issued "directly or indirectly" to the President "in his personal or official capacity," without regard to the purpose or scope of the subpoenas. H.R. Res. 507, at 2-3. Even

assuming that retroactive authorization suffices, but cf. *Watkins*, 354 U.S. at 204 (disapproving "retroactive rationalization"), the House's blessing of all existing and future investigations into the President, for whatever purpose, calls into question whether that chamber has truly "demonstrated its full awareness" of the serious constitutional issues implicated by that blank-check approach. *Rumely*, 345 U.S. at 46. Indeed, the House's indiscriminate approach renders the "excessively broad" resolution too "vague" and "nebulous" to permit meaningful judicial review of these (or any other) subpoenas issued under its auspices. *Watkins*, 354 U.S. at 201, 205; see *Rumely*, 345 U.S. at 46.

Compounding the resolution's vagueness is the failure of the *full* House to set forth in clear terms a legitimate legislative purpose for each of the subpoenas and how each piece of information sought in the subpoenas is demonstrably critical to achieving those purposes. The attempts to satisfy those requirements were undertaken solely by the respective committee chairs in statements of various formality, ranging from a memorandum on committee letterhead to a press release. As explained above, those attempts are insufficient to satisfy the constitutional requirements with respect to the subpoenas here. Regardless, the full House's failure to expressly validate and adopt as its own those statements by the respective committee chairs is sufficient to render the subpoenas invalid. See *Rumely*, 345 U.S. at 46. "A measure of added care on the part of the House" in this regard "is a small price to pay if it serves to uphold the principles of limited, constitutional government." *Watkins*, 354 U.S. at 215-216.

The court of appeals in *Mazars* thought the full House's validation unnecessary because that "deal[s]

exclusively with the allocation of authority *within* the legislative branch," and thus does not "'alter the balance between' the two political branches." 19-715 Pet. App. 68a-69a (citation omitted). But it obviously alters the interbranch balance when a single Member exercises the full House's power without first convincing 217 colleagues to agree; a full House vote ensures adequate deliberation and is part of the system of checks and balances. Cf. *Chadha*, 462 U.S. at 958 & n.23; *The Federalist* No. 70, at 475 (explaining that "deliberation and circumspection" in a plural legislature "serve to check excesses"). As this Court observed in *Watkins*, allowing a single committee or committee chair to wield the House's extraordinary investigatory power "insulates the House" from accountability and creates "a wide gulf between the responsibility for the use of investigative power and the actual exercise of that power." 354 U.S. at 205. The Court recognized such accountability as "an especially vital consideration in assuring respect for constitutional liberties." *Ibid.* It is no less vital in assuring respect for constitutional separation of powers.

This Court and other courts have invalidated congressional subpoenas on similar threshold grounds to avoid opining on the constitutional limits of Congress's implied investigatory authority. *E.g.*, *Rumely*, 345 U.S. at 45-46; *Tobin*, 306 F.2d at 275-277. Such constitutional avoidance is especially appropriate in disputes between Congress and the President. See *Public Citizen* v. *United States Department of Justice*, 491 U.S. 440, 466 (1989) ("Our reluctance to decide constitutional issues is especially great where * * * they concern the relative powers of coordinate branches of govern-

ment."). Because "'constitutional confrontation[s] between the two branches' should be avoided whenever possible," courts should consider "the choices available" and "explore other avenues" before ruling on such a confrontation. *Cheney*, 542 U.S. at 389-390 (citation omitted).

For example, *Rumely* affirmed the reversal of a conviction for refusing to comply with a congressional subpoena by construing language in the authorizing resolution narrowly, so that the requested information was not pertinent to the thus-narrowed legislative purpose. See 345 U.S. at 47-48. The Court forthrightly acknowledged its "strained" reading of the language, *id.* at 47, but justified that approach because "[g]rave constitutional questions are matters properly to be decided by this Court but only when they inescapably come before us for adjudication," *id.* at 48. "Until then," the Court explained, "it is our duty to abstain from marking the boundaries of congressional power." *Ibid.*

As in *Rumely*, the Court could refuse to enforce the subpoenas here on the threshold grounds set forth above. That would render it unnecessary to opine on the merits of a difficult and sensitive interbranch conflict. *Rumely* explained that when such conflicts arise, "[e]xperience admonishes us to tread warily in this domain" and "strongly counsel[s] abstention from adjudication unless no choice is left." 345 U.S. at 46. As in *Rumely*, "[c]hoice is left." *Id.* at 47.

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

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