No. _____

IN THE

Supreme Court of the United States

DONALD J. TRUMP; 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,

Petitioners,

v.

MAZARS USA, LLP; COMMITTEE ON OVERSIGHT AND REFORM OF THE U.S. HOUSE OF REPRESENTATIVES,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Committee on Oversight and Reform of the U.S. House of Representatives has issued a subpoena to the accountant for President Trump and several of his business entities. The subpoena demands private financial records belonging to the President. The D.C. Circuit upheld the subpoena as having a legitimate legislative purpose and being within the statutory authority of the Committee.

The question presented is:

Whether the Committee has the constitutional and statutory authority to issue this subpoena.

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

The parties to the proceeding below are as follows:

Petitioners are Donald J. Trump, the 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.

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 intervenor-appellee in the court of appeals.

The related proceedings below are:

1. Trump v. Mazars USA, LLP, No. 19-5142 (D.C. Cir.) – Judgment entered October 11, 2019; and

2. Trump, et al. v. Committee on Oversight & Reform of the U.S. House of Representatives, No. 19-cv-01136 (APM) (D.D.C.) – Judgment entered May 20, 2019.

CORPORATE DISCLOSURE STATEMENT

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

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STATUTES AND OTHER AUTHORITIES

Donald J. Trump, the 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 respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the District of Columbia Circuit is reported at 941 F.3d 710 and is reproduced at Appendix 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 App. 158a-212a. The order denying the petition for rehearing is reported at 941 F.3d 1180 and is reproduced at 213a-21a.

JURISDICTION

The D.C. Circuit issued its opinion on October 11, 2019, and it denied rehearing on November 13, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case are: U.S. Const. art. I, §§ 8, 9 cl. 8; U.S. Const. art. II, § 1, cl. 1, 7, §§ 2-3; Rules of the House of Representatives, Rule X, subsections 3(i),

4(c)(2); and House Resolutions 507 and 600. They are reproduced at App. 222a-26a and 241a-52a.

INTRODUCTION

This is a case of firsts. It is the first time that Congress has subpoenaed personal records of a sitting President. It is the first time that Congress has issued a subpoena, under the guise of its legislative powers, to investigate the President for illegal conduct. And, it is the first time a court has upheld any congressional subpoena for any sitting President's records of any kind. Now, under the D.C. Circuit's decision, Congress can subpoena any private records it wishes from the President on the mere assertion that it is considering legislation that might require presidents to disclose that same information. Given the obvious temptation to investigate the personal affairs of political rivals, subpoenas concerning the private lives of presidents will become routine in times of divided government.

It is unsurprising, then, that the one thing the district court, the panel, and the dissenting judges all agreed upon is this case raises important separation-of-powers issues. At its core, this controversy is about whether—and to what degree—Congress can exercise dominion and control over the Office of the President. The Committee on Oversight and Reform of the U.S. House of Representatives takes the view, supported by the D.C. Circuit, that every committee of Congress may subpoena the President's personal records, that the Necessary and Proper Clause allows Congress to investigate the President's wrongdoing so long as it also promises to consider remedial legislation, and

that Congress can statutorily require presidents to disclose their personal finances. These are profoundly serious constitutional questions that the Court should decide.

But not only are these weighty constitutional issues, the D.C. Circuit incorrectly decided them. The Committee's investigation of the President lacks a legitimate legislative purpose. It is a law-enforcement investigation about uncovering whether the President engaged in wrongdoing. Nor can the investigation result in valid legislation. The Constitution—not Congress—created the Office of the President. Congress, accordingly, cannot require the President to disclose his finances or otherwise expand or alter the office's qualifications. Yet the D.C. Circuit never should have reached these issues because the Committee lacks express statutory authorization to subpoena the President. An express statement should be required given the separation-of-powers issues that are raised by unleashing every committee to subpoena every president for his personal records.

This Court traditionally grants certiorari when the President has been subjected to novel legal process and seeks review. The Court has recognized that the President's objections merit "respectful and deliberate consideration." *Clinton v. Jones*, 520 U.S. 681, 689-90 (1997). This approach is not out of concern for any "particular President," but for the sake of "the Presidency itself." *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018). This case should be no exception.

STATEMENT

A. Background

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

The Mazars subpoena arose from a Committee hearing last February that featured the testimony of Michael Cohen. Cohen was then awaiting sentencing following his guilty plea to several dishonesty-based crimes (including lying to Congress). He testified 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 prepared those financial statements.

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

The Committee explained why it was interested in Cohen's testimony. According to the Chairman, "Cohen's testimony raises grave questions about the legality of ... President Donald Trump's conduct." *Id.* 6. Many Committee members agreed. *See, e.g.*, *id.* 107 (Hill: "I ask these questions to help determine whether our very own President committed felony crimes."); *id.* 163-65 (Tlaib: "[O]ur sole purpose[] is exposing the truth…. President Donald J. Trump … commit[ed] multiple felonies, and you covered it up, correct?"); *id.* 37 (Clay: "I would like to talk to you about the President's assets, since by law these must be reported accurately."); *id.* 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.* 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.* 30 (Maloney: lamenting that Cohen is "facing the consequences of going to jail" but the President "is not.").

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 help verify 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 saw as

inconsistencies between the 2011, 2012, and 2013 statements that Cohen had shared with the Committee. The Chairman asked Mazars to "assist" in the Committee's "review of these issues." *Id.* 6-8.

The second, an April 12 memorandum to the Committee, once again referenced the desire to verify Cohen's testimony, and set forth four purposes for the subpoena: whether the President (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 memo added, "informs its review of multiple laws and legislative proposals under [its] jurisdiction." *Id.* It did not elaborate.

B. Proceedings Below

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." *See* App. 241a. 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. 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. 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. 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. App. 20a. For it to be constitutional, the subpoena needs a "legitimate legislative purpose." App. 68a. This means the Committee is "pursuing a legislative, as opposed to a law-enforcement, objective" and "is investigating a subject on which constitutional legislation 'could be had.'" App. 24a. (quoting *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927)).

Taking the issues "in reverse order," App. 22a, the majority upheld the subpoena as constitutional. In the majority's view, the Committee's investigation of the President was legislative. In so ruling, it relied on the Chairman's memoranda. Notwithstanding the

[2] Throughout the 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.

Chairman's stated purpose to investigate whether the President broke the law, the majority considered "more important" the Chairman's promise that the Committee's "interest in these matters informs [its] review of multiple laws and legislative proposals." 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." App. 30a. This legislative justification was not, in the majority's view, "an insubstantial, makeweight assertion of remedial purpose." App. 32a. "Simply put," the majority held, "an interest in past illegality can be wholly consistent with an intent to enact remedial legislation." App 32a.

The majority further held that the subpoena sought information about a subject on which Congress "may potentially legislate or appropriate." 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. App. 44a. The majority thought such legislation would not "prevent the President from accomplishing his constitutionally assigned functions" under Article II, add a qualification for office, or otherwise exceed Congress's Article I legislative authority. App. 45a. To conclude otherwise, according to the majority, "would be a return to an 'archaic view of the separation of powers'" that "is not the law." App. 49a (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977)). In all, the majority saw "no inherent constitutional flaw in laws requiring Presidents to

publicly disclose certain financial information." 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. 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.'" 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." App. 69a.

Second, the majority held that the avoidance canon was inapplicable. It recognized the Committee's statutory authority must be narrowly interpreted if there are any serious "'doubts'" as to the subpoena's "'constitutionality.'" 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." App. 70a.

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. App. 71a-72a. It reasoned that a 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 could identify no argument that this one "risks unconstitutionally burdening the President's core duties." App. 75a.

Judge Rao dissented. App 77a-158a. She viewed the dispute as raising "serious separation of powers concerns about how a House committee may investigate a sitting president." App. 77a. "Congress cannot undertake a legislative investigation" of the President "if the 'gravamen' of the investigation rests on 'suspicions of criminality.'" App. 85a (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 193, 195 (1880)). Rather, "allegations of illegal conduct against the President cannot be investigated by Congress except through impeachment." App. 83a. Therefore, whether the subpoena has "a legislative purpose presents a serious conflict between Congress and the President." App. 88a-89a.

In Judge Rao's view, this was not an exercise of "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." App. 77a-78a. Indeed, "the Committee has emphasized repeatedly and candidly its interest in investigating allegations of illegal conduct by the President." App. 120a-21a. The subpoena 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." App. 122a. Rather, "the topics ... exclusively focus on the President's possible engagement in 'illegal conduct.'" App. 122a.

Judge Rao recognized that the Committee also professes a legislative purpose. 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." 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." App. 135a. In sum, "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 subpoena to be legitimate. 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. Judge Rao, in particular, rejected the notion that separation-of-powers concerns are not implicated because the subpoena was issued to a third-party custodian. App. 86a-88a. She also outlined why laws regulating the President are "rife with constitutional concerns." App. 142a.

On November 13, 2019, the D.C. Circuit denied rehearing. 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." 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." App. 215a. In upholding such a subpoena for the first time, the ruling unfortunately "creates an open season on the President's personal records." 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." App. 216a. "With regard to the threat to the Presidency," then, "'this wolf comes as a wolf.'" 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." 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." App. 218a. The fallout from upholding this "unprecedented" subpoena, Judge Rao added, 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." App. 218a. "This question is one of exceptional importance," she concluded, "both for this case as well as for the

recurring disputes between Congress and the Executive Branch." App. 221.[3]

REASONS FOR GRANTING THE PETITION

Review is warranted because the D.C. Circuit "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. Rule 10(c). This case raises important separation-of-powers questions concerning Congress's authority to subpoena the personal records of a sitting President for legislative purposes. This unprecedented subpoena should have been invalidated, and the D.C. Circuit's decision upholding it was mistaken.

I. The validity of the Committee's subpoena is an important issue of federal law that the Court should settle.

The district court, before issuing a 41-page opinion, cautioned that "[t]he issues … are serious" and that "[n]o judge would make a hasty decision involving such important issues." DDC Doc. 33 at 4-5. The Executive Branch, in its amicus brief below, explained that the case "raises significant separation-of-powers issues" and urged the D.C. Circuit to invalidate the subpoena. CADC Doc. 1800932 at 6-8. The D.C. Circuit's 66-page opinion characterized the stakes as "weighty," App. 76a, and the issues as "far" from "unimportant." App. 70a. Judge Rao likewise emphasized the case's importance in her dissents.

[3] On November 25, the Court granted Petitioners' motion to stay the mandate. *See* Order, *Trump v. Mazars USA, LLP*, No. 19A545 (Nov. 25, 2019).

App. 77a. Thus, it should be common ground that "this case presents exceptionally important questions regarding the separation of powers among Congress, the Executive Branch, and the Judiciary." App. 215a (Katsas, J., dissenting from denial of rehearing en banc).

There also can be no reasonable assertion that resolution of these important legal issues turns on the routine application of settled law. This Court has not decided whether a congressional subpoena is valid if, notwithstanding Congress's claim that the records are being demanded for legislative reasons, the committee also has "affirmatively and definitely avowed" a law-enforcement reason that is the "'primary purpose[]'" for issuing the subpoena. *McGrain*, 273 U.S. at 180; *Barenblatt v. United States*, 360 U.S. 109, 133 (1959). To be sure, the parties have a serious dispute over how to apply decades-old, if not century-old, precedent to a congressional demand for a President's personal records. Indeed, it took the panel over 130 pages to decide that issue. But contrary to the Committee's argument in opposing a stay, the need for the Court's guidance is a reason to grant certiorari—not to deny it.

The Court likewise has never decided whether Congress may legislatively require the President to disclose his finances. This also is a serious issue. "The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power." *Kendall v. U.S. ex rel. Stokes*, 37

U.S. 524, 610 (1838). "Out of respect for the separation of powers and the unique constitutional position of the President," the Court traditionally gives close review to legislative efforts to regulate the office. *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992).

Relatedly, when the Chief Executive argues, as here, that novel legal process directed at him will lead to "diversion of his energies," the Court traditionally grants review given "the singular importance of the President's duties." *Nixon v. Fitzgerald*, 457 U.S. 731, 751 (1982). The Court has "long recognized the 'unique position in the constitutional scheme'" that the Presidency occupies. *Clinton*, 520 U.S. at 698 (quoting *Fitzgerald*, 457 U.S. at 749). Whether the Committee's statutory authority should be narrowly construed to avoid the separation-of-powers problems that this case raises—including the serious concerns triggered by unleashing every congressional committee to subpoena the President for his personal records—is an important issue warranting the Court's review as well.

That this case raises so many serious issues is not happenstance. Everything about this dispute is "unprecedented." App. 218a (Rao, J., dissenting from denial of rehearing en banc). It is the first time Congress has ever subpoenaed the personal records of a sitting President, and it is the first time a congressional demand for *any* presidential records has been upheld. App. 215a (Katsas, J., dissenting from denial of rehearing en banc). Furthermore, it is the first time a court has upheld "a targeted investigation of the President's alleged unlawful conduct under the

legislative power." App. 120a (Rao, J., dissenting). The subpoena, accordingly, "represents an unprecedented assertion of legislative power." App. 120a (Rao, J., dissenting).

The fact that the President is a petitioner here heightens the need for review. The President is not an "ordinary" litigant. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381-82 (2004). The Court gives the President "special solicitude," *Fitzgerald*, 457 U.S. at 743, and "'high respect,'" *Cheney*, 542 U.S. at 385. When the President seeks review, this Court grants certiorari because of the case's "importance" without regard for whether it is a "one-of-a-kind" case or whether there is "any conflict among the Courts of Appeals." *Clinton*, 520 U.S. at 689. The Court has been especially receptive when, as here, the President's concerns are shared by the Executive Branch. *Id.* at 689-90. Again, the Court's deferential approach is not out of concern for any "particular President," but out of respect for "the Presidency itself." *Hawaii*, 138 S. Ct. at 2418.

The Court should adhere to that approach and grant the petition. Indeed, review is warranted for the same reasons that it was granted in *United States v. Nixon*, 418 U.S. 683 (1974)—the most famous case involving a presidential subpoena. As here, a "third-party subpoena duces tecum" for presidential records raised questions of "public importance" that justified review. *Id.* at 686-87. Only, here, the Committee has a *less* pressing need for the records than the parties had in *Nixon*, *see infra* 37-38, and this subpoena raises *more* serious legal issues than those raised by the

narrowly framed demand in *Nixon*, *see Cheney*, 542 U.S. at 387. This is the kind of important dispute, in sum, that the Court has traditionally felt an institutional responsibility to hear.

II. The Committee's subpoena is invalid.

As explained, the decision to grant certiorari in a case like this turns on the Court's "appraisal of its importance" instead of a "judgment concerning the merits of the case." *Clinton*, 520 U.S. at 689. But even if the ultimate merit of the President's claims matters, certiorari is warranted just the same. The subpoena is unconstitutional.

A. The Committee's subpoena lacks a legitimate legislative purpose.

"The powers of Congress ... are dependent solely on the Constitution," and the subpoena power is not "found in that instrument." *Kilbourn*, 103 U.S. at 182. The Court has held that it is "implied" through the Necessary and Proper Clause. *McGrain*, 273 U.S. at 161. But Congress is not "the final judge of its own power and privileges." *Kilbourn*, 103 U.S. at 199. The Court "has not hesitated" to invalidate a subpoena where "Congress was acting outside its legislative role," *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951)—*i.e.*, acting without a "legitimate legislative purpose," *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 n.14 (1975). Whether the Committee had a legitimate legislative purpose here turns on two issues.

First, 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 v. United States*, 354 U.S. 178, 187 (1957). As a result, Congress "cannot inquire into matters which are within the exclusive province of one of the other branches," *Barenblatt*, 360 U.S. at 111-12, or otherwise "'trench upon Executive or judicial prerogatives,'" App. 180a.

Second, a congressional 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. Thus, "[i]f no constitutional statute may be enacted on a subject matter, then that subject is off-limits to congressional investigators." App. 22a.

This subpoena violates both principles. It was issued for a law-enforcement—not a legislative—purpose. And, the subject of the inquiry—legislatively requiring presidents to disclose their finances—would not be valid legislation as it would exceed Congress's authority under Article I.

1. This subpoena is part of an attempted law-enforcement investigation by the Committee.

Congress is not "a law enforcement or trial agency. These are functions of the executive and judicial departments of government." *Watkins*, 354 U.S. at 187. This subpoena is part of an investigation into whether the President violated the law—a non-legislative task. App. 120a-36a (Rao, J., dissenting). Therefore, this subpoena lacks a legitimate legislative purpose.

That the Committee is investigating whether the President broke the law is not seriously contested. At the Cohen hearing (the impetus for this subpoena), the Chairman and several Committee members admitted that their purpose was to assess "the legality of … President Donald Trump's conduct." *Supra* 5. The Committee's first request to Mazars stated that it wanted to investigate the accuracy of the President's financial statements to see if he broke the law. And, in his formal memo, the Chairman's very first stated basis for the subpoena was "to investigate whether the President may have engaged in illegal conduct before and during his tenure in office." App. 32a. In short, the Committee "'affirmatively and definitely avowed'" an "'unlawful'" law-enforcement purpose. App. 134a (Rao, J., dissenting) (quoting *McGrain*, 273 U.S. at 180)).[4]

[4] The Committee also was investigating whether the President "is complying with the Emoluments Clauses of the Constitution." DDC Doc. 30 at 21. But this is law enforcement as

But the Court would not need the Committee's admission to recognize that this is a law-enforcement subpoena. Its "dragnet" nature, *Wilkinson v. United States*, 365 U.S. 399, 412 (1961), together with its focus on "certain named individuals" and the "precise reconstruction of past events," *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974), show that the subpoena has all the hallmarks of grand-jury and prosecutorial investigations—not legislative inquiries. That DOJ, "the Nation's chief law enforcement" agency, *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985), thinks this looks like law enforcement, *see* CADC Doc. 1800932 at 17-18, corroborates what is plain from the face of the subpoena itself.

It is no surprise, then, that the D.C. Circuit agreed that the subpoena is meant to uncover "whether and how illegal conduct has occurred." App. 34a. That court nonetheless upheld the subpoena because it is "more important" that the Committee also expressed a "legislative purpose" for issuing the subpoena—and an "interest in past illegality can be wholly consistent with an intent to enact remedial legislation." App. 29a, 32a. In the D.C. Circuit's view, an avowed law-enforcement purpose did not "spoil" an

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well. It matters not that the Committee wants to know whether the President is complying with a constitutional provision instead of a federal statute; "the Constitution and valid federal statutes" are both "the supreme law." *Alden v. Maine*, 527 U.S. 706, 757 (1999). An investigation into whether the President has a accepted emoluments is an effort to uncover wrongdoing.

"otherwise valid legislative inquiry" because the Committee's explanation did not amount to an "insubstantial, makeweight assertion of remedial purpose." App. 32a. This logic fails on every level.

The legislative explanation for the Committee's subpoena *is* makeweight. The Chairman's first memo did not identify a legislative agenda that led him to issue the subpoena—the D.C. Circuit and House counsel did so on the Committee's behalf. App. 30a-31a. The memo identified four law-enforcement objectives and, at the end, dropped in a boilerplate profession of legislative purpose. The Chairman's second memo was more of the same. That the House has passed or is proceeding with legislation allegedly "related to the Committee's inquiry" without access to the records demanded by the subpoena only further undermines the notion that the professed "legislative purpose" is substantial. App. 30a. Congress's power of investigation is limitless if this is what counts as "indicia of legislative purpose." App. 31a.

But even accepting the Committee's legislative explanation as genuine, the reviewing court still must determine whether it is the subpoena's "real object," "primary purpose[]," and "gravamen." *McGrain*, 273 U.S. at 178; *Barenblatt*, 360 U.S. at 133; *Kilbourn*, 103 U.S. at 195. The Court does not refuse to "see what all others can see and understand" when it comes to the "congressional power of investigation." *Rumely*, 345 U.S. at 44 (cleaned up). The subpoena's "gravamen" is "the President's wrongdoing." App. 135a (Rao, dissenting). It "seeks to investigate illegal conduct of the President by reconstructing past actions in

connection with alleged violations of ethics laws and the Emoluments Clauses." App. 120a (Rao, J., dissenting). Upholding this subpoena as being primarily legislative would allow the tail to wag the dog.

The D.C. Circuit's conclusion that a legislative subpoena is always valid—no matter what—so long as Congress has "professed that it seeks to investigate remedial legislation," App. 34a, cannot be reconciled with first principles or precedent. The ban on congressional law enforcement is not prophylactic. It keeps Congress from deploying implied authority rooted in the Necessary and Proper Clause to usurp functions that belong to the Executive and Judiciary. It ensures, in other words, that Congress does 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 permits the Necessary and Proper Clause "to undermine the structure of government established by the Constitution." *NFIB v. Sebelius*, 567 U.S. 519, 559 (2012) (opinion of Roberts, C.J.).

Accordingly, while a legislative investigation is not illegitimate because it might incidentally expose illegal conduct, App. 24a, 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 subpoena from challenge turns the constitutional line between a legitimate legislative pursuit and an illegitimate law-enforcement investigation into a

magic-words test. The subpoena's primary purpose or gravamen is what has to count.

The D.C. Circuit understood *Sinclair v. United States*, 279 U.S. 263 (1929), and *Hutchinson v. United States*, 369 U.S. 599 (1962), to hold otherwise. App. 33a-34a. But the claim did not fail 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. 279 U.S. at 295 (emphasis added). "The record" demonstrated that the investigation's gravamen was legislative in nature; its legitimacy, accordingly, was not defeated "because the information sought to be elicited may also be of use" to prosecutors. *Id.*

Hutchinson is the same. As in *Sinclair*, the challenge to the investigation 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." *Id.* at 619. The plurality opinion thus 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." 369 U.S. at 618. Justice Brennan agreed. His controlling concurrence explained 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 (Brennan, J., concurring)

(emphasis added). But the fact that "the conduct under inquiry may have some relevance to the subject matter of a pending state indictment cannot absolutely foreclose congressional inquiry." *Id*. at 624.

At base, the D.C. Circuit so thoroughly gutted the test for evaluating legitimate legislative purpose that only a committee engaged in self-sabotage could flunk it. Perhaps "a congressional committee could not subpoena the President's high school transcripts in service of an investigation into K-12 education." App. 43a. But it could surely subpoena an ordinary citizen's transcripts for that purpose. If a professed interest in passing remedial legislation is all the Constitution requires, then there is no limit to the law-enforcement investigations upon which Congress can embark. The D.C. Circuit has left the Executive—to whom "law enforcement ... power is entrusted," *United States v. Welden*, 377 U.S. 95, 117 (1964)—unarmed in his clash with "'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 (James Madison) (Rossiter ed., 1961)).

Usurpation of the Executive's law-enforcement prerogative is bad enough. But the issue is even more perilous when the subpoena targets the President. *See* U.S. Amicus Brief, No. 19-635, *Trump v. Vance*, at 21 n* (filed Nov. 22, 2019). This Court has "upheld some congressional investigations that incidentally uncover unlawful action by private citizens," but investigating alleged "wrongdoing of the President or any impeachable official [] has never been treated as

merely incidental to a legislative purpose." App. 131a (Rao, J., dissenting). Under the D.C. Circuit's approach, however, nothing would stop Congress from demanding any records of the President—including his high school transcripts. Congress just needs to profess an interest in legislation that would make presidents disclose the information contained in those personal records. App. 216a (Katsas, J., dissenting from denial of rehearing en banc). That approach cannot be reconciled with the heightened showing of need the Court requires before approving subpoenas that demand presidential and White House records. *See Nixon*, 418 U.S. at 713; *Cheney*, 542 U.S. at 385.

But the Mazars subpoena would be invalid even if the President were not the target. It "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. Instead the topics of investigation exclusively focus on the President's possible engagement in 'illegal conduct.'" App. 122a (Rao, J., dissenting). That is paradigmatic law enforcement.

2. <u>The Committee investigation that led to this subpoena could not result in constitutional legislation.</u>

Even though the Committee argued that there were several legislative areas to which the subpoena could pertain, the D.C. Circuit was only willing to rely on *one* of them as potentially valid: laws that require presidents to disclose personal financial information.

App. 42a-50a.[5] But no "valid legislation could be had," *McGrain*, 273 U.S. at 171, because such laws would be unconstitutional.

The office of the President is created by the Constitution—not an Act of Congress. By vesting in him "[t]he executive Power," U.S. Const. art. II, § 1, cl.1, the Constitution has "entrusted" the President "with supervisory and policy responsibilities of utmost discretion and sensitivity," *Fitzgerald*, 457 U.S. at 750. "It is *his* responsibility to take care that the laws be faithfully executed." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 493 (2010). Congress might have greater control over other executive-branch officials, but its legislative power to directly control the President is constrained. *See* Memorandum from Laurence H. Silberman, Deputy Attorney General, to Richard T. Burress, Office of the President, *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* at 5 (Aug. 28, 1974), bit.ly/31k3rql.

The D.C. Circuit misunderstood this position as resting on an "'archaic view of the separation of

[5] The Committee asked the court "to consider whether any law 'concerning government ethics and conflicts of interest affecting Executive Branch officials' could pass constitutional muster." App. 42a. But Congress may not subpoena a president's "financial information except to facilitate an investigation into *presidential* finances." App. 43a (citation omitted). As applied to the President, moreover, statutes "mandating divestment from financial interests or recusal from conflicted matters" would "raise difficult constitutional questions." App. 43a.

powers'" that would, contrary to Supreme Court precedent, require "'three airtight departments of government.'" App. 49a. The Court has employed, at times, 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 so long as they do not "involve an attempt by Congress to increase its own powers at the expense of the Executive Branch," *Morrison*, 487 U.S. at 694. Still, the Court has been firm when there is a "serious threat" to the constitutional balance. *PCAOB*, 561 U.S. at 502. A law requiring the President to disclose his personal finances falls into the latter category.

The separation-of-powers concern here is not over diffusing presidential responsibility for oversight of Executive Branch functions. The concern is instead over Congress's attempt to exercise control over the President himself through legislation. That difference makes this case uncharted territory. The D.C. Circuit pointed to the Presidential Records Act as analogous. App. 46a-47. But the PRA left "custody of the materials in officials of the Executive Branch" and "screening of the materials" for preservation was tasked to "the Executive Branch itself" rather than "have Congress or some outside agency perform the screening function." *GSA*, 433 U.S. at 443-44. Given that it left "implementation ... in the President's hands," *Armstrong v. Bush*, 924 F.2d 282, 290 (D.C. Cir. 1991), the PRA did not "trigger separation of powers analysis," *Duplantier v. United States*, 606 F.2d 654, 667 n.27 (5th Cir. 1979). Imposing financial

disclosure requirements on the President intrudes into an area that the Constitution fences off.[6]

Such legislation also would change or expand the enumerated qualifications for serving a President. Just as Congress lacks the authority "to add to or alter the qualifications of its Members," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 787 (1995), it cannot add or alter the presidency's qualifications, *id.* at 803; *see also id.* at 861-62 (Thomas, J., dissenting). Because Congress cannot adjust "the standing qualifications prescribed in the Constitution," *Powell v. McCormack*, 395 U.S. 486, 550 (1969), requiring the President to disclose his personal finances as a condition of holding office is unconstitutional.

The D.C. Circuit disagreed because, in its view, such requirements "exclude precisely zero individuals from running for or serving as President; regardless of their financial holdings, all constitutionally eligible candidates may apply." App. 51a. But this Court has rejected that theory of the Qualifications Clause. In *Thornton*, Arkansas defended its term-limits rule by arguing that its law barred no one from running for office or serving in Congress; it just barred long-term

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[6] The D.C. Circuit also pointed to the obligations that The Foreign Gifts and Decorations Act and the STOCK Act impose on the President. App. 46a. But neither of those laws has been tested in court. The D.C. Circuit's reliance on the history of presidential compliance is no stronger. This history is quite recent, and, regardless, "the separation of powers does not depend on the views of individual Presidents, nor on whether the encroached-upon branch approves the encroachment." *PCAOB*, 561 U.S. at 497 (cleaned up).

incumbents from appearing on the ballot. As Arkansas put it: "[t]hey may run as write-in candidates and, if elected, they may serve." 514 U.S. at 828. The Court responded that because "constitutional rights would be of little value if they could be indirectly denied," the Qualifications Clause prohibits "indirect attempt[s] to accomplish what the Constitution prohibits [parties] from accomplishing directly." *Id*. at 829 (cleaned up). For that reason, the Constitution proscribes not only absolute bars on certain individuals from running for or serving in office, but also laws with "the likely effect of handicapping a class of candidates" in running for office. *Id*. at 836.

Courts applying *Thornton* thus have held that the ability to comply with the obligation or hold office is immaterial. *Campbell v. Davidson*, for example, invalidated a state law making candidates for federal office register to vote in order to run for office. 233 F.3d 1229, 1236 (10th Cir. 2000). *Schaefer v. Townsend* similarly invalidated a state law that required candidates to be residents of the State when filing nomination papers. 215 F.3d 1031, 1039 (9th Cir. 2000). In both of these cases, the state argued that the statute did not bar anyone from running for office. The argument was rejected both times. *Campbell*, 233 F.3d at 1234; *Schaefer*, 215 F.3d at 1037. On that understanding, a court recently held that a California law similar to the one Congress is pursuing likely "imposes an additional substantive qualification beyond the exclusive confines of the Qualifications Clause and is likely invalid." *Griffin v. Padilla*, 2019 WL 4863447, at **6-7 (E.D. Cal. Oct. 2, 2019).

Finally, any suggestion that the Emoluments Clauses provide a foundation for legislation requiring presidents to disclose their finances is erroneous. The Domestic Emoluments Clause bars "the President from receiving 'any ... Emolument' from the federal or state governments other than a fixed "'Compensation'" "for his Services.'" App. 45a (quoting U.S. Const. art. II, § 1, cl. 7). The Foreign Emoluments Clause "prohibits 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.'" 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." App. 46a.

But such laws would 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. It bypassed whether the Foreign Emoluments Clause even applies to the President. App. 143a (Rao, J., dissenting). And, the D.C. Circuit ignored that the Foreign Emoluments Clause applies to *millions* of federal workers who 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 logic of the D.C. Circuit, Congress could obtain the personal records of all these workers to see if they have accepted foreign emoluments without approval. This cannot be a legitimate legislative purpose if we are to remain "a government of limited powers." *NFIB*, 567 U.S. at 552 (Roberts, C.J.).

B. The Committee lacks the statutory authority to issue a subpoena to the President.

The D.C. Circuit should not have decided these constitutional issues. The Committee's statutory jurisdiction must "first be settled," *Rumely*, 345 U.S. at 43, and the House Rules did not authorize the Committee to issue this subpoena.

"Congressional committees are themselves the offspring of Congress; they have only those powers authorized by law." *In re Beef Industry Antitrust Litig.*, 589 F.2d 786, 787-88 (5th Cir. 1979). "To issue a valid subpoena," then, a committee "must conform strictly to the resolution establishing its investigatory powers." *Exxon Corp. v. FTC*, 589 F.2d 582, 592 (D.C. Cir. 1978); *see Yellin v. United States*, 374 U.S. 109, 114 (1963). The Committee's "instructions are embodied in the authorizing resolution. That document is the committee's charter." *Watkins*, 354 U.S. at 201. The House Rules, which were adopted on January 9, 2019, thus establish the Committee's jurisdiction and define its investigative powers.

The House Rules do not expressly authorize the Committee to subpoena the President—let alone for personal records. App. 67a. That should have decided the case.[7] For at least two reasons, the D.C. Circuit should have interpreted "the House Rules narrowly to deny the Committee the authority it claims." App. 63a.

First, "'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided,'" the Court's "'duty is to adopt the latter.'" *Jones v. United States*, 529 U.S. 848, 857 (2000). That rule applies with equal force to the House Rules. *See Rumely*, 345 U.S. at 46-48. The D.C. Circuit held that this case does not raise any constitutional issues weighty enough to invoke it. App. 69a-70a. That is indefensible given the serious "threat to presidential autonomy and independence" the subpoena poses, App. 216a (Katsas, J., dissenting from denial of rehearing en banc), and the "difficult

[7] Resolution 507, which the House approved while this case was on appeal, purports to "affirm[] the validity" of the subpoena. App. 73a. But 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 statutory authority must "be ascertained as of th[e] time" of the request and "cannot be enlarged by subsequent action of Congress," *Rumely*, 345 U.S. at 48. The D.C. Circuit did not reach this issue because it rejected a narrowing construction and held that the "text of the House Rules" already "authorizes the subpoena." App. 74a. But if Petitioners are right that the Committee needs express authority to subpoena the President, Resolution 507 does not solve the issue. It "purports neither to enlarge the Committee's jurisdiction nor to amend the House Rules." App. 73a.

questions it raises for the separation of powers," App. 218a (Rao, J., dissenting from denial of rehearing en banc). As explained above, whether this subpoena has a legitimate legislative purpose raises grave constitutional issues the court should have been reluctant to decide. That is especially true "where, as here, they concern the relative powers of coordinate branches of government." *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 466 (1989).

Second, the clear-statement rule also requires a narrowing interpretation. "'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 is particularly important when the political branches clash. *See Franklin*, 505 U.S. at 800-01; *Fitzgerald*, 457 U.S. at 748 n.27. Thus, laws must be "'construed not to include the President unless there is a specific indication that Congress intended to cover the Chief Executive.'" 19 O.L.C. Op. 350, 351-52 (1995) (quoting Memorandum of William H. Rehnquist to Egil Krogh (Apr. 1, 1969)).

In the D.C. Circuit's view, no clear statement is needed here because "the House Rules have no effect whatsoever on the balance *between* Congress and the President." App. 68a. That is incorrect. "Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits." *Rumely*, 345

U.S. at 46. Forcing Congress to be fully aware of the consequences of giving every committee the unrestricted power to subpoena the President, and to unequivocally approve it, vindicates important separation-of-powers principles. App. 139a-40a (Rao, J., dissenting).

The D.C. Circuit confused two distinct issues in assuming that just because the House, as a *statutory* matter, "could have either issued the challenged subpoena by a vote of the full chamber or, via express statement, authorized the Committee to issue the subpoena on its behalf," App. 68a, it could take that step without creating a serious *constitutional* issue. The majority bypassed the constitutional issue because, in its view, "Congress already possesses—in fact, has previously exercised—the authority to subpoena Presidents and their information." App. 69a (citation omitted). But there is every reason to doubt that Congress's power to issue subpoenas in aid of legislation extends to the President. History, in fact, points clearly in the opposite direction. App. 99a-119a (Rao, J., dissenting).

But even if the full House could subpoena the President under its legislative powers, that does not mean that authorizing every committee to do so would be constitutional. Investigative demands like this one 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; *see id.* at 760-61 (Burger, C.J., concurring) ("The essential purpose of the separation of powers 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."). The full House should have to expressly delegate authority to its standing committees before they are unleashed to "issue successive subpoenas in waves, making far-reaching demands that harry the President and distract his attention." U.S. Amicus Br., CADC Doc. 1800932 at 11.

The D.C. Circuit concluded that these concerns are 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." App. 75a. But that misunderstood Petitioners' argument and the legal framework upon which it is built. App. 152a-56a (Rao, J., dissenting). This Court takes a categorical approach to issues of this sort. *See Fitzgerald*, 457 U.S. at 751-53. The issue is whether "this particular [subpoena]—*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." *Clinton*, 520 U.S. at 701-02 (emphasis added). It would clearly 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. App. 216a (Katsas, J., dissenting from denial of rehearing en banc).

The D.C. Circuit's 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.'" App. 50a (quoting *Clinton*, 520 U.S. at 702-03). The Court vigilantly shields the President, however, 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." *Clinton*, 520 U.S. at 710-11 (Breyer, J., concurring). There is thus every reason to be wary of the D.C. Circuit's decision and the flood of presidential subpoenas it will inevitably trigger. "With regard to the threat to the Presidency, 'this wolf comes as a wolf.'" App. 217a (Katsas, J., dissenting from denial of rehearing en banc) (quoting *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting)).

III. There are no vehicle issues.

In opposing a stay, the Committee made three arguments why review should be denied apart from its defense of the decision below. None of them justify denying certiorari.

First, the Committee incorrectly pointed to the ongoing impeachment as a reason to deny review. But the Committee concedes it "has relied consistently and exclusively on the legislative power to justify this subpoena." App. 219a (Rao, J., dissenting from denial of rehearing en banc). Nor does the Committee dispute that transitioning to an impeachment-based defense would raise retroactivity problems, since it is doubtful

that "a defective subpoena can be revived by after-the-fact approval." App. 220a; *see supra* 32 n.7. Instead, the House claims that it might issue a new subpoena if certiorari is granted. If the Committee took that step, however, the petition would need to be granted, and the decision below would need to be vacated. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). The Court should reject any attempt by the Committee to avoid review while preserving the D.C. Circuit's decision as precedent. Congress should not be allowed to benefit from such gamesmanship.

Second, the Committee argues that this case is a poor vehicle to decide whether Congress may validly require the President to disclose his personal finances. But the Committee fails to see that its concession—*i.e.*, deciding "broad questions of civil law" through a subpoena dispute is "not the most practical method of inducing courts to answer broad questions broadly," *Tobin v. United States*, 306 F.2d 270, 274 (D.C. Cir. 1962)—cuts against it. The concern should have led the D.C. Circuit to narrowly interpret the Committee's statutory authority. But it crossed the Rubicon and became the first court to hold that such regulations are constitutional. Whether it was correct to do so is, in and of itself, an important issue that warrants this Court's review.

Finally, the Committee argued that its pressing need for these documents counsels against the delay that review would entail. The argument is meritless. The Committee has voluntarily stayed enforcement of the subpoena for more than six months, and it cannot identify any potential or pending legislation to which

the records are relevant—let alone urgently needed. Regardless, the Committee's stay opposition notified the Court that any harm will be mitigated by deciding the case by the end the Term. To that end, Petitioners are prepared to proceed on any schedule the Court deems appropriate should it grant certiorari and hear this important case.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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