No. 19A640

IN THE

Supreme Court of the United States

DONALD J. TRUMP; DONALD J. TRUMP, JR.; ERIC TRUMP; IVANKA TRUMP; DONALD J. TRUMP REVOCABLE TRUST; TRUMP ORGANIZATION, INC.; TRUMP ORGANIZATION LLC; DJT HOLDINGS LLC; DJT MANAGING MEMBER LLC; TRUMP ACQUISITION LLC; TRUMP ACQUISITION, CORP.,

Applicants,

v.

DEUTSCHE BANK AG; CAPITAL ONE FINANCIAL CORPORATION; COMMITTEE ON FINANCIAL SERVICES OF THE UNITED STATES HOUSE OF REPRESENTATIVES; PERMANENT SELECT COMMITTEE ON INTELLIGENCE OF THE UNITED STATES HOUSE OF REPRESENTATIVES,

Respondents.

On Application for Recall and Stay
From the United States Court of Appeals for the Second Circuit

OPPOSITION TO EMERGENCY APPLICATION TO RECALL AND STAY THE MANDATE

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OPPOSITION TO APPLICATION TO RECALL AND STAY THE MANDATE

Applicants ask this Court to halt the functions of a coordinate branch of government by restraining valid Congressional inquiries and enjoining compliance with subpoenas issued to private financial institutions for non-privileged information. That request should be denied.

More than one-third of the 116th Congress has elapsed since two Congressional Committees issued document subpoenas to two financial institutions. The Permanent Select Committee on Intelligence and the Committee on Financial Services of the United States House of Representatives both issued subpoenas to Deutsche Bank. The Financial Services Committee also issued a subpoena to Capital One. The subpoenas seek, among other types of documents, non-privileged financial records relating to President Donald J. Trump and certain of his business entities and relatives.

Faithfully applying this Court's precedents addressing Congressional subpoenas, two levels of the federal judiciary have upheld those subpoenas. Each concluded that the Committees issued the subpoenas in furtherance of valid legislative purposes and that the subpoenas seek documents relevant to subjects on which legislation "may be had." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 508 (1975).

Applicants respond with inherently fact-bound arguments. They do *not* question that Congress could enact legislation on the topics the Committees are investigating. Nor do they question that Congress can issue subpoenas—including subpoenas seeking the President's business records from third parties. Such

"factbound determination[s] of the nature and scope of [Congressional] investigation[s]" are unlikely candidates for certiorari. *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers).

Applicants' arguments do not demonstrate that this dispute merits the Court's review. Under this Court's precedents, the *presence* of a valid legislative purpose, not the absence of any other purpose, determines the lawfulness of Congressional subpoenas. *See, e.g.*, *Hutcheson v. United States*, 369 U.S. 599, 616-17 (1962) (opinion of Harlan, J.); *Sinclair v. United States*, 279 U.S. 263, 295 (1929). Nor is this Court's review appropriate just because the subpoenas seek information concerning the President. *See, e.g.*, *Office of President v. Office of Indep. Counsel*, 525 U.S. 996 (1998); *Rubin v. United States*, 525 U.S. 990 (1998), and *Office of President v. Office of Indep. Counsel*, 521 U.S. 1105 (1997) (each denying certiorari in cases in which information concerning the President was ordered to be disclosed).

Moreover, Applicants have not shown that any harm they will suffer if the subpoenas take effect outweighs the severe harm to the Committees and to the public if the House continues to be deprived of information it urgently needs to exercise its constitutional functions. Legislative efforts to secure the financial system from abuse have obvious importance. And nothing is more urgent than efforts to guard against foreign influence in our systems for electing officials, particularly given the upcoming 2020 elections. There is bipartisan agreement that such interference is an imminent threat. As Senate Intelligence Committee Chairman Richard Burr explained, "Russia is waging an information warfare

campaign against the U.S. that didn't start and didn't end with the 2016 election."[1] With the 2020 elections rapidly approaching, Congress needs to determine if legislation is warranted to protect against such threats of foreign interference now, and it needs good information to do so.

This Court should deny a stay. This Court recently stayed enforcement of a Congressional subpoena issued by a different Committee for different legislative purposes in *Trump v. Mazars USA, LLP*, No. 19A545, 2019 WL 6328115 (U.S. Nov. 25, 2019), but, as the judges below recognized, the resolution of that case turned on separate facts. If the Court does grant a stay in this case, the Committees respectfully request that the Court either treat the stay papers here as a certiorari petition or condition any stay on the expeditious filing of such a petition, to ensure that this Court may consider the petition on an expedited basis.

BACKGROUND

1. The Constitution vests "[a]ll legislative Powers" in Congress. U.S. Const. art. I, § 1. But Congress "cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927). It follows, as this Court held long ago, that the power to conduct oversight and investigations—a "power of inquiry[,] with process to enforce it—is an essential and appropriate auxiliary to the

[1] Press Release, U.S. Senate Select Comm. on Intelligence, Chairman Burr Statement on Russia's Use of Social Media (Oct. 8, 2019), https://perma.cc/A6ND-PEUY ("Chairman Burr Press Release").

legislative function." *Id*. at 174. Congress's power to investigate is "broad." *Watkins v. United States*, 354 U.S. 178, 187 (1957).

2. This case concerns three subpoenas: an identical pair of subpoenas issued by the Financial Services Committee and the Intelligence Committee to Deutsche Bank AG ("Deutsche Bank") and a third subpoena issued by the Financial Services Committee to Capital One Financial Corporation ("Capital One").

The "jurisdiction and related functions" of the Committees are established by House Rule X. *See* U.S. Const. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings[.]"). Under House Rule X, the Financial Services Committee's jurisdiction includes, among other things, "[b]anks and banking," "[f]inancial aid to commerce and industry," "[i]nternational finance," and "[i]nternational financial and monetary organizations." House Rule X.1(h)(1), (3), (5)-(6). The Intelligence Committee has jurisdiction over U.S. intelligence agencies and "[i]ntelligence and intelligence-related activities of all other departments and agencies of the Government." House Rule X.11(b)(1). To fulfill their responsibilities, each of the Committees may "require, by subpoena or otherwise, . . . the production of such . . . documents as it considers necessary." House Rule XI.2(m)(1).

The Financial Services Committee's Investigation

3. The Financial Services Committee is reviewing abuses of the financial system, risky lending practices by major financial institutions, and weaknesses in the existing regulatory oversight. H.R. Rep. No. 116-40, at 78-79, 84-85 (2019).

In March 2019, the House adopted a resolution endorsing "efforts to close loopholes that allow corruption, terrorism, and money laundering to infiltrate our country's financial system." H. Res. 206, 116th Cong. (2019). The House recognized that illicit money-laundering schemes often funnel money through legitimate investments, such as high-end real estate, to conceal the source of the funds. *See id.* ("[T]he influx of illicit money, including from Russian oligarchs, has flowed largely unimpeded into the United States through these anonymous shell companies and into U.S. investments, including luxury high-end real estate.").

To study these issues and potential reforms, the Financial Services Committee is specifically investigating, among other issues, 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." H.R. Rep. No. 116-40, at 84-85 (2019). The Financial Services Committee is also investigating whether existing policies and programs at financial institutions are adequate to ensure the safety and soundness of lending practices and the prevention of loan fraud. This includes "examining financial regulators' supervision of the banking, thrift and credit union industries for safety and soundness and compliance with laws and regulations" and "monitor[ing] how enhanced prudential standards are being applied to the largest banks operating in the United States, including foreign-based institutions." *Id*. at 78-79.

As part of those efforts, the Financial Services Committee issued document subpoenas to nine financial institutions in April 2019, including the subpoenas to Deutsche Bank and Capital One.[2] App. 6a n.1, 74a. Those subpoenas demand documents relating to the banks' compliance with the Bank Secrecy Act, the efficacy of the banks' anti-money-laundering and due diligence compliance programs, and the soundness of the banks' lending practices. The subpoena to Deutsche Bank also seeks documents relating to specific accounts, including accounts held by President Trump, his family, and his businesses. *See* CA2 J.A. 37-42. The Capital One subpoena requests documents relating to the accounts, finances, and other affairs of President Trump's businesses, as well as compliance and other records created or received by Capital One in connection with those businesses. *See id.* at 52-53.

Deutsche Bank and Capital One—which each have long provided banking services to President Trump, his family, and his businesses—have paid significant fines in recent years relating to alleged deficiencies in their anti-money-laundering programs.[3] Moreover, President Trump's business affairs have been the subject of many public reports, including reports revealing that several Trump properties were purchased using anonymous shell companies and funded by Russian oligarchs alleged to have previously engaged in money laundering. *See, e.g.*, Oren Dorell,

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[2] Several of the subpoenas seek information about individuals and businesses different from the Applicants here.

[3] Luke Harding, *Deutsche Bank Faces Action Over $20 Bn Russian Money-Laundering Scheme*, Guardian, Apr. 17, 2019, https://perma.cc/ZVT8-L65A; *In re Capital One, N.A. McLean, Va. Capital One Bank (U.S.A.), N.A. Glen Allen, Va.*, Enforcement Action No. 2018-080, 2018 WL 5384428, at *1-2 (O.C.C. Oct. 23, 2018).

Trump's Business Network Reached Alleged Russian Mobsters, USA Today, Mar. 28, 2017, https://perma.cc/7UY2-4VCM.

Committee Chairwoman Waters explained that these concerns are "precisely why the Financial Services Committee is investigating the questionable financing provided to President Trump and The Trump Organization by banks like Deutsche Bank to finance its real estate properties." 165 Cong. Rec. H2698 (daily ed. Mar. 13, 2019). The Financial Services Committee has made clear that it is "not investigating whether [President Trump] has violated any law." App. 66a. Instead, the Committee seeks information to inform pending and future legislative solutions to the serious money-laundering problems that continue to plague U.S. financial institutions and the international banking system and to inform itself about the processes in place at financial institutions to ensure that their lending practices are safe and sound.

The House is currently considering or has passed legislation on these topics, including H.R. 1404, 116th Cong. (2019) (bill to require Executive Branch agencies to submit an assessment to Congress regarding the financial holdings of Russian President Vladimir Putin and top Kremlin-connected oligarchs) (passed by the House March 12, 2019); H.R. 2513, 116th Cong. (2019) (bill to reform corporate beneficial ownership disclosures and increase transparency) (passed by the House October 22, 2019); H.R. 2514, 116th Cong. (2019) (bill to strengthen the Bank Secrecy Act and anti-money-laundering laws, including by improving federal agency oversight of financial institutions) (passed by the House October 28, 2019); and H.R.

1039, 116th Cong. (2019) (bill to streamline requirements for currency transaction reports and suspicious activity reports).

The Intelligence Committee's Investigation

4. The Intelligence Committee is investigating the counterintelligence risks from efforts by Russia and other foreign powers to influence the U.S. political process during and since the 2016 election, including potential leverage that foreign actors may have over President Trump, his family, and his businesses. In connection with that investigation, the Intelligence Committee is evaluating whether the current structure, legal authorities, and resources of the federal agencies tasked with intelligence, counterintelligence, and law enforcement are adequate to combat such threats to national security. *See also* Comms. Br. 15-19, CA2 Doc. No. 65 (providing additional detail on the Intelligence Committee's investigation and the facts surrounding it).

Driving that investigation is the risk that hostile state actors will continue to interfere in the American electoral process and the possible need for legislative reforms to address that risk. As Chairman Schiff has explained, the Intelligence Committee has undertaken to "provide the American people with a comprehensive accounting of" Russian interference in the 2016 election, "and what the United States must do to protect itself from future interference and malign influence operations."[4] And the need for legislation is pressing. As Representative Lofgren

[4] Press Release, U.S. House of Representatives Permanent Select Comm. on Intelligence, Chairman Schiff Statement on House Intelligence Committee

observed, "the 2020 Federal elections are fast-approaching. Public confidence and trust in our elections is of the utmost importance." 165 Cong. Rec. H8410 (daily ed. Oct. 23, 2019). The information gleaned from the Intelligence Committee's investigation will be used to "develop legislation and policy reforms to ensure the U.S. government is better positioned to counter future efforts to undermine our political process and national security."[5]

The Intelligence Committee is investigating, among other issues: (1) "[t]he extent of any links and/or coordination between the Russian government, or related foreign actors, and individuals associated with Donald Trump's campaign, transition, administration, or business interests, in furtherance of the Russian government's interests"; (2) "[w]hether any foreign actor has sought to compromise or holds leverage, financial or otherwise, over Donald Trump, his family, his business, or his associates"; and (3) "[w]hether President Trump, his family, or his associates are or were at any time at heightened risk of, or vulnerable to, foreign exploitation, inducement, manipulation, pressure, or coercion, or have sought to influence U.S. government policy in service of foreign interests." Chairman Schiff Press Release; *see* 165 Cong. Rec. H3482 (daily ed. May 8, 2019).

Investigation (Feb. 6, 2019), https://perma.cc/DTA5-4PNG ("Chairman Schiff Press Release").

[5] Chairman Schiff Press Release; *see* H.R. 4617, 116th Cong. (2019) (bill to establish duty to report election interference from foreign entities and to limit political spending and election interference by foreign entities) (passed by the House on October 23, 2019).

To further these investigations regarding the President's foreign financial ties and the extent of foreign powers' influence over him and our elections, on April 11, 2019, the Intelligence Committee issued a subpoena to Deutsche Bank, seeking the same records sought by the Financial Services Committee's subpoena. As Chairman Schiff has explained, this investigation and the requested financial information concerning President Trump will inform the Committee's consideration of legislative reforms and its oversight of the intelligence community. 165 Cong. Rec. H3482 (daily ed. May 8, 2019). That subpoena is "vital to fully identify the scope of this threat" of foreign financial leverage and "essential to . . . devis[ing] effective legislative changes, policy reforms, and appropriations priorities." 165 Cong. Rec. H3482. The Intelligence Committee's investigation "will inform a wide-range of legislation and appropriations decisions," including, for example, how best to expose "conflicts of interest that arise from financial entanglements of individuals responsible for [the Nation's] foreign policy," to prevent foreign governments from "us[ing] American corporations to secretly funnel donations or engage in money laundering," and to "[s]trengthen legal authorities and capabilities for our intelligence and law enforcement agencies to better track illicit financial flows." *Id.*

As with the Financial Services Committee's subpoenas, the Intelligence Committee's subpoena seeks information related to several pending legislative proposals—for example, requiring federal campaign officials to notify law enforcement if foreign agents offer them assistance and to report all meetings with foreign agents. *See* H.R. 2424, 116th Cong. (2019). Other bills would mandate an

intelligence threat assessment before every federal general election, H.R. 1474, 116th Cong. (2019), and require the Director of National Intelligence to submit to Congress intelligence assessments of Russian intentions relating to North Atlantic Treaty Organization and Western allies, H.R. 1617, 116th Cong. (2019) (passed the House on March 12, 2019). Yet another would improve election security and oversight and provide for national strategy and enforcement to combat foreign election interference. H.R. 1, 116th Cong. (2019) (passed the House on March 8, 2019). With primary campaigns in full swing and the 2020 election cycle approaching, the Intelligence Committee urgently needs the information sought from Deutsche Bank.

5. Before the subpoenas' response date, Applicants President Trump, in his individual capacity, his three oldest children, and certain related business entities filed suit against the banks seeking to enjoin compliance with the subpoenas. App. 6a-7a. Applicants moved for a preliminary injunction, and the Committees intervened. *Id.* at 7a. After expedited briefing, on May 22, 2019, the district court denied Applicants' motion for a preliminary injunction in an opinion delivered from the bench. *Id.*

On December 3, the court of appeals affirmed in substantial part by a 2-1 vote. *See* App. 1a-2a. In a 106-page opinion, the majority concluded that Applicants had not demonstrated a likelihood of success on any of their statutory or constitutional claims. Explaining that Applicants had not asserted any constitutionally based privilege that might protect the banks' records from production, the court

rejected Applicants' argument that the Committees' subpoenas exceeded constitutional limits on Congress's power to investigate. App. 10a, 45a.

The court of appeals first addressed this Court's cases recognizing Congress's "broad" power to obtain information in aid of its legislative authority (App. 47a), stating that a congressional inquiry into private affairs is permissible if it relates to a "valid legislative purpose," *id*. at 49a-50a. The court then confirmed that the subpoenas meet that test. The majority explained that "[t]he Chair of the Intelligence Committee has identified several purposes of that committee's investigation," including protecting the American electoral process from foreign intervention. *See* App. 62a-63a. The court also recognized the Financial Services Committee's purposes of probing and considering legislation relating to financial institutions and international money laundering. *See* App. 61a-62a. The court held that these purposes are sufficiently related to the documents sought by the subpoenas. App. 63a-64a, 74a; *see also* App. 80a ("[T]he high significance of the valid legislative purposes demonstrates that the 'predominant purpose' of the Committees' inquiries cannot be said to be 'only' to invade private rights."); App. 135a (Livingston, J., dissenting in part) (acknowledging link between Intelligence Committee's investigation and "this President's affairs, as a recent candidate"). Those purposes were "significantly different" from the legislative purposes identified by the House Oversight Committee in the *Mazars* case. App. 52a n.46.

The court of appeals recognized that Congress is entitled to a presumption that its stated legislative purposes are genuine. The court, however, saw no "need"

to apply that presumption here. *See* App. 76a-77a. It explained that it could not enjoin compliance with validly predicated subpoenas based on Applicants' suspicion that members of the Committees want to embarrass the President, because courts "do not look to the motives alleged to have prompted" a legislative inquiry. App. 75a (quoting *Eastland*, 421 U.S. at 508). In any event, Applicants have expressly disclaimed "any objection based on inquiry into [the] motive[s]" of particular members. *Id.*

Next, and again conservatively, the court of appeals weighed the Committees' valid legislative purposes against Applicants' privacy interests. *See* App. 66a-68a. While acknowledging that the President's privacy interests "should be accorded more significance than those of an ordinary citizen," App. 103a, the majority reasoned that the public's interest in the Committee's efforts relating to election integrity, national security, money laundering, and foreign blackmail were "of the highest order" and outweighed Applicants' personal interest in "nondisclosure of financial documents concerning their businesses." App. 68a-69a, 103a-104a. The court ordered immediate compliance with most parts of the subpoenas, but directed an extremely limited remand to ensure non-disclosure of sensitive personal information "having no relationship to the Committees' legislative purposes" and to address related concerns in a few specific areas. *See* App. 84a, 86a-87a.

Finally, the court of appeals rejected Applicants' argument that the Committees were engaged in impermissible law enforcement. As the majority explained, "a permissible legislative investigation does not become impermissible

because it might reveal evidence of a crime." App. 77a (quoting Appellants' Br. 22). In addition, the court concluded that the balance of equities favors the Committees, which "have already been delayed in the receipt of the subpoenaed material since April 11 when the subpoenas were issued" and "need the remaining time to analyze the material, hold hearings, and draft bills for possible enactment." App. 102a.[6]

Judge Livingston concurred in part and dissented in part. The "present record," in her view, "does not permit a full assessment" of the merits of the Committee's entitlement to records or of the "balance of hardships with regard to specific disclosures." App. 158a. Judge Livingston would have remanded for the district court to "implement a procedure" in which Applicants could object to the disclosure of "specific portions of the assembled material." App. 115a.

The court of appeals simultaneously issued its mandate and ordered prompt compliance with the subpoenas, subject to a procedure to evaluate objections for the limited categories of documents noted above. But the court provided a seven-day stay to afford Applicants the opportunity to apply to this Court for a stay pending disposition of a petition for certiorari. On December 4, Applicants moved in the court of appeals for a recall and stay of the mandate, CA2 Doc. No. 229-1, which the Committees opposed, CA2 Doc. No. 234. Applicants then filed an emergency application in this Court for a recall and stay of the mandate and an administrative

[6] The majority and the dissent agreed that Applicants' statutory challenges were without merit. *See* App. 24a-44a, 110a. Applicants do not advance their statutory claims as grounds for a stay. *See* Stay App. 8.

stay pending disposition of the application. On December 6, Justice Ginsburg recalled and stayed the court of appeals' mandate until 5 p.m. on December 13.

ARGUMENT

I. A Stay Should Be Denied

An applicant for a stay "must demonstrate (1) a reasonable probability that this Court will grant certiorari, (2) a fair prospect that the Court will then reverse the decision below, and (3) a likelihood that irreparable harm [will] result from the denial of a stay." *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (quotation marks omitted). These conditions "are *necessary* [but] not necessarily *sufficient*" to grant a stay. *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers). Before granting a stay, this Court also must (4) "balance the equities—[by] explor[ing] the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.* at 1305 (quotation marks omitted). "Where there is doubt, it should inure to the benefit of those who oppose grant of the extraordinary relief which a stay represents." *Williams v. Zbaraz*, 442 U.S. 1309, 1316 (1979) (Stevens, J., in chambers).

A. The Second Circuit's opinion is correct, is not in conflict with any decision by another court of appeals, and is unlikely to be reviewed or reversed by this Court.

Congressional subpoenas have "long been held to be a legitimate use by Congress of its power to investigate." *Eastland*, 421 U.S. at 504. That these three subpoenas seek information concerning the President "can scarcely be thought a novelty." *Clinton v. Jones*, 520 U.S. 681, 704 (1997); *see United States v. Burr*, 25 F.

Cas. 30, 34 (No. 14,692d) (C.C.D. Va. 1807) (Marshall, C.J.). These subpoenas offend neither this Court's precedent nor our Nation's history and traditions. They do not seek to compel the President to do anything at all, and the President raises no claim of privilege. This Court should allow the Committees finally to obtain the information needed to proceed with their urgent legislative and oversight responsibilities.

1. None of Applicants' arguments warrants review or is likely to result in reversal.

a. While Applicants treat the stay in *Mazars* as if it were determinative of the stay here, the two cases are not interchangeable. Both the majority and the dissent in the court of appeals recognized that the subpoenas here are "significantly different" from those at issue in *Mazars*. App. 65a (majority opinion), 131a (partial dissenting opinion). As the court of appeals explained, "[t]he subpoena challenged in *Mazars* seeks four categories of documents somewhat different from those sought by the subpoenas challenged on this appeal, and seeks the documents for purposes significantly different from the Committees' purposes [here]." App. 52a n.46.

Both cases present issues about the validity of Congressional subpoenas, but the answers turn largely on the particular legislative purposes being pursued by each Committee and other facts specific to each subpoena. In *Mazars,* the petitioners challenge Congress's authority to enact *any* legislation on the topics of the Oversight Committee's investigation. *See* Pet. 25-31, *Mazars*, No. 19-715 (filed Dec. 4, 2019). Here, by contrast, Applicants do not and cannot dispute that

Congress can constitutionally pass legislation concerning, among other topics, securing elections from foreign influence and combatting money laundering, *see* App. 60a-64a. Because Congress's power to investigate "is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution," no one disputes that the Committees in this case could constitutionally issue subpoenas in these areas too. *Barenblatt v. United States*, 360 U.S. 109, 111 (1959); *see also Quinn v. United States*, 349 U.S. 155, 160 (1955).

Instead, Applicants press fact-bound disputes about the particular purposes underlying these subpoenas. Stay App. 15-17. According to Applicants, the purpose here must be law enforcement, not legislation, because the subpoenas "look nothing like a legislative inquiry." *Id.* at 15. Both courts below correctly rejected that argument. In doing so, the court of appeals independently evaluated the "evidence [of] valid legislative purposes," finding no need to rely on the "'presumption' that the stated legislative purposes are the 'real object' of the Committees' investigation." App. 76a-77a (quoting *McGrain*, 273 U.S. at 178). It then conducted a thorough review of the record to "[i]dentify[] the Committees' legislative purpose[s]" and whether those purposes justified the need for the disclosures required by the subpoenas. *See* App. 58a-69a, 73a-75a. It concluded that the "legislative inquiry" here was "in fact [] related to [] legislative purpose[s]." App. 64a. The majority likewise rejected claims that the President was improperly "targeted." *Id.* at 73a-74a. It reasoned that in the circumstances here—a borrower obtaining more than $130 million in loans from a bank "fined in connection with a $10 billion money

laundering scheme" when no other bank would lend to him—it is "appropriate" to investigate "how well banking regulators are discharging their responsibilities and whether new legislation is needed." *Id.* at 73a n.67.

Applicants provide no reason to suggest that this Court would disagree with the court of appeals' thorough evaluation of the House's substantial legislative activity and the Committees' own statements of purpose. Indeed, the *dissent* in the court of appeals agreed that the "House Intelligence Committee [] has an oversight function to which its subpoena could conceivably relate." App. 135a n.20. Although the dissent would have remanded for more granular recitation of the Committee's legislative purposes and so that Applicants could lodge objections "to specific portions of the assembled material," *id.* at 115a, such "factbound determination[s] of the nature and scope of [Congressional] investigation[s]" are not worthy of this Court's review, or likely to be reversed if this Court does grant review. *Packwood*, 510 U.S. at 1320 (Rehnquist, C.J., in chambers) (denying Senator's request for stay of Congressional subpoena pending certiorari).

Applicants advocate the contrary conclusion only by mischaracterizing and selectively quoting the record. Quoting one sentence from an Intelligence Committee press release, Applicants assert that the Committee's investigation was nothing more than "law enforcement." Stay App. 16. But that same press release explains that the investigation seeks to "provide the American people with a comprehensive accounting of what happened, and what the United States must do to protect itself from future interference and malign influence operations." Chairman Schiff Press

Release, *quoted at* Stay App. 16. Moreover, Applicants fail to acknowledge that the same press release makes clear that the investigation would assist the Intelligence Committee in "plans to develop legislation and policy reforms to ensure the U.S. government is better positioned to counter future efforts to undermine our political process and national security." *Id.*

Applicants similarly mischaracterize the purposes of the investigation by the Financial Services Committee. Applicants misquote one of 23 "whereas" clauses[7] and one of five "resolved" clauses from H. Res. 206. The other 22 whereas clauses dispel the notion that the investigation was "all law enforcement" (Stay App. 16) by highlighting "substantial room for improvement" and "significant gaps in [the existing anti-money laundering/countering the financing of terrorism] framework." H. Res. 206 at 2. The remainder of the operative portion of the resolution explains that the House "supports efforts to close loopholes that allow corruption, terrorism, and money laundering to infiltrate our country's financial system." *Id.* at 5. These

[7] Selectively quoting from that single whereas clause, Appellants leave the impression that H. Res. 206 was referencing the President when it "lament[ed] 'financial institutions and individuals' are not 'facing convictions and sentences.'" Stay App. 16 (quoting H. Res. 206 at 4). The full text of that clause dispels any such notion and makes plain that Congress was criticizing the practice of deferred prosecution and non-prosecution agreements for corporations, not the President: "Whereas there are financial institutions and individuals employed therein which continue to engage in egregious violations of the Bank Secrecy Act and enter into deferred prosecution agreements and non-prosecution agreements rather than facing convictions and sentences corresponding to the severity of their violations." H. Res. 206 at 4; *see also* App. 132a n.17 (Livingston, J., dissenting in part) (correctly noting that H. Res. 206 does not "reference the President and his family").

efforts to fill gaps in the financial institution regulatory framework are quintessentially legislative.

To be sure, the Committees' investigations may uncover violations of law. *See* Stay App. 16. But this Court "long ago rejected" the argument that a legislative investigation is invalid because "it might possibly disclose crime or wrongdoing on an executive branch official's part." App. 78a (alteration marks omitted) (discussing *McGrain*, 273 U.S. at 179-80 and *Sinclair*, 279 U.S. at 295). What is more, this Court has consistently recognized that subpoenas can serve multiple purposes simultaneously and that it is the *presence* of a valid legislative purpose, not the absence of any other purpose, that determines their lawfulness. *See, e.g.*, *Hutcheson*, 369 U.S. at 617 (opinion of Harlan, J.) (holding subpoena valid even though the "Committee's concern . . . was to discover whether . . . [union] funds . . . had been used . . . to bribe a state prosecutor"); *Sinclair*, 279 U.S. at 290 (holding subpoena valid even though a committee member had said that, "[i]f we do not examine Mr. Sinclair about th[e] matters [for which he was being prosecuted], there is not anything else to examine him about").

Nor, as Applicants have conceded, do the motives of any particular Members bear on the subpoenas' validity. *See* App. 75a. This Court's precedents make plain that motives do "not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served." *Id.* at 50a (emphasis omitted) (quoting *Watkins*, 354 U.S. at 200); *see, e.g.*, *id.* at 50a n.45 (collecting similar cases); *id.* at 75a ("[I]n determining the lawfulness of a

congressional inquiry, courts 'do not look to the motives alleged to have prompted it.'") (quoting *Eastland*, 421 U.S. at 508).

Applicants' argument that these subpoenas improperly target the President likewise misses the mark. This Court has "unequivocally and emphatically endorsed" the view that "a subpoena *duces tecum* could be directed to the President." *Jones*, 520 U.S. at 703-04 (citing *United States v. Nixon*, 418 U.S. 683 (1974)). Given that here the subpoenas were issued for legislative purposes by a coordinate branch of government (not a private litigant) and directed to third-party financial institutions (not the President personally), there is no basis to claim they are invalid. Nor does the fact that the President (albeit "solely in his capacity as a private citizen," App. 10a) is among the Applicants here make this case worthy of Supreme Court review. *See* Br. in Opp. 11-12, *Trump v. Mazars USA, LLP*, No. 19-715 (filed Dec. 11, 2019).

Applicants argue that the "fact that the Committees claim to be using the President, his businesses, and his family as a 'case study' confirms they lack a legitimate legislative purpose." Stay App. 17. Again, Applicants misstate both the record and the law. The use of a case study to inform potential legislation does not render a subpoena invalid. Examining concrete examples is a tried-and-true manner of identifying gaps in existing laws and developing new legislation to address those potential weaknesses. *See, e.g.*, S. Res. 120, 104th Cong. (1995) (establishing Special Committee to Investigate Whitewater Development Corporation to investigate (with subpoena power) and make recommendations for new laws

or regulations); *Oversight of Nonprofit Organizations: A Case Study on the Clinton Foundation, Hearing Before H. Comm. on Oversight & Gov't Reform*, 115th Cong. (2018). Here, it is not surprising that the Financial Services Committee is evaluating whether current laws adequately address concerns about bank safety and money laundering by seeking documents from an international financial institution with a history of such violations and connections to a President with an unprecedented web of complex financial arrangements. And the Financial Services Committee has also subpoenaed information from several other financial institutions about individuals and businesses separate from the Applicants here. *See* App. 74a.

Applicants attempt to muddy the facts by talking about the "Committees" generally, but the record could not be clearer that Applicants' case study objection is leveled *only* against "the subpoenas issued by the Committee on Financial Services." App. 131a (Livingston, J., dissenting in part); *see also id*. at 131a-133a (repeatedly noting that the use of any such case study was limited to the Financial Services Committee). Tellingly, Applicants say virtually nothing about the subpoena the House Intelligence Committee issued "seek[ing] identical records" from Deutsche Bank, App. 4a. The pressing "public need" to pursue investigations concerning "national security and the integrity of elections," the court below correctly held, is ample justification, and Applicants offer no answer because they have none. App. 68a-69a; *see* App. 135a n.20 (Livingston, J., dissenting in part)

(acknowledging that the Intelligence Committee had identified a valid "oversight function to which its subpoena could conceivably relate").

b. Applicants argue that these subpoenas "fall far short of what is required to subpoena the President." Stay App. 17. Applicants say the court of appeals incorrectly "treat[ed] these subpoenas as if they were issued 'to any private individual.'" *Id.* at 14 (quoting App. 10a). That badly mischaracterizes both the facts of this litigation and the opinion below.

The court of appeals drew a clear line between arguments that might be available to the President when acting in his official capacity, like executive privilege, and the general claim of invalidity that the President presses in his individual capacity in this case. App. 10a. Unlike executive privilege, a claim that the subpoenas exceeded the "constitutional authority of the Committees" is "a protection that, if validly asserted, would be available to any private individual." *Id.* Even so, far from treating the case as one brought by any ordinary citizen, the court of appeals employed a "more exacting" review *precisely because* the subpoenas "concern[] the President" and because of the "'high respect that is owed to the office of the Chief Executive.'" *Id.* at 11a (quoting *Cheney v. U.S. District Court*, 542 U.S. 367, 385 (2004)). The fact that the court of appeals issued more than 160 pages of opinions analyzing this Court's precedents, the record, and each of Applicants' arguments only further highlights the exacting and careful review performed.

More fundamentally, Applicants offer no support for the notion that courts should, or may, apply an especially hard look in these circumstances. Unlike *Nixon*,

this case involves no privilege assertion; indeed, in his individual capacity, the President may be subjected to compulsory process by even a civil litigant seeking to vindicate private rights. *See Jones*, 520 U.S. at 691-92, 705-06. Applicants' only other case, *Cheney*, involved a suit (1) by a private litigant; (2) under a statute that created no private right of action; (3) in which the plaintiff sought to compel the Vice President to disclose open-meetings information *via mandamus*; and (4) in which the district court ordered broad discovery from the Vice President to determine whether the statute applied in the first place. 542 U.S. at 373-75, 386-87. The *Cheney* Court distinguished *Nixon*, where non-disclosure would have frustrated the "essential functions of [another] branch," from the case before it, in which, at most, it "would be more difficult for private complainants to vindicate Congress' policy objectives under [the open-records statute]." *Id.* at 384-85.

The Committees here are a far cry from the *Cheney* plaintiffs; they are exercising an "essential and appropriate auxiliary" of Congress's core legislative function. *McGrain*, 273 U.S. at 174. In connection with that legislative effort, this Court has recognized that Congress must be permitted to investigate broadly even if some inquiries "take[] the searchers up some 'blind alleys,'" and occasionally with no "predictable end result." *Eastland*, 421 U.S. at 509.

c. Finally, Applicants' argument that the House Rules "do not authorize" the subpoena (Stay App. 19) was not raised by Applicants below and therefore is forfeited. *See* App. 53a n.47 ("Appellants have not made that 'clear statement' argu-

ment in their briefs in this case."). Further, the argument lacks merit, is not important enough for this Court's review, and is no longer even relevant to this case.

The President (again, acting in his individual capacity) and several of his business entities have repeatedly conceded that the House Rules "literally read" do "permit" the issuance of other Congressional subpoenas. *See Trump v. Mazars USA, LLP*, 940 F.3d 710, 742-43 (D.C. Cir. 2019) (citing Oral Arg. Tr. 38-39). That should end the matter given that the interpretation in question concerns Congress's prerogative to "determine the Rules of its Proceedings," not a statute. U.S. Const. art. I, § 5, cl. 2.

The issue also lacks continuing significance. The 116th House has resolved that the Rules it adopted delegate to the Committee "power to conduct oversight into and to investigate . . . the President" and that Applicants' contrary reading is "plainly incorrect." H. Res. 507, 116th Cong. (2019). The full House then "ratifie[d]" and "affirm[ed]" the three subpoenas at issue here. *Id*. Far from having "insulate[d]" itself from committee investigations, *Watkins*, 354 U.S. at 205, "Congress has demonstrated its full awareness of what is at stake," *United States v. Rumely*, 345 U.S. 41, 46 (1953).

2. It is not a sufficient reason for review that Applicants make separation-of-powers arguments.

a. This case is not one of open inter-branch conflict. The Committees have not requested any documents pertaining to the official functions of the Executive branch. *Cf. Nixon*, 418 U.S. at 686; *Cheney*, 542 U.S. at 372. Nor have they sought

to require the President, his family, or any member of the Executive branch to take any action. *Cf. Jones*, 520 U.S. at 707-08; *Cheney*, 542 U.S. at 372. Instead, they issued subpoenas to financial institutions seeking non-privileged records maintained in the ordinary course of business.

b. "The fact that the subpoena[s] in this case seek[] information that concerns the President of the United States adds a twist, but not a surprising one: disputes between Congress and the President are a recurring plot in our national story." *Mazars*, 940 F.3d at 747. There is a long history of Congressional subpoenas for testimony and documents concerning the President, including subpoenas to third parties. Responding to a request regarding the Jay Treaty, President Washington recognized that production of some papers "could be required of him by either House of Congress as a right." 5 Annals of Cong. 400-01, 759-60 (1796); *see also* 3 Annals of Cong. 536 (1792) (resolving "[t]hat the President of the United States" cause production of papers). Half a century later, President John Tyler partially complied with a Congressional document request. *See* 3 Asher C. Hinds, Hinds' Precedents of the House of Representatives § 1885 (1907). Though he asserted "discretion" to withhold some material, he never contested Congress's power to make the demand. *See id.*

In 1846, select Congressional committees subpoenaed and took deposition testimony from former Presidents Tyler and John Quincy Adams, as part of an investigation into the misappropriation of government funds "placed under the special direction of the President." H.R. Rep. No. 29-686, at 9, 22-25, 27-29 (1846);

H.R. Rep. No. 29-684, at 8-11 (1846). Though the committees determined that no further action needed to be taken, incumbent President Polk was unable to forestall a thorough inquiry. *See* Ronald D. Rotunda, *Presidents and Ex-Presidents As Witnesses*, 1975 U. Ill. L.F. 1, 7-8.

In the modern era, a Senate committee subpoenaed President Nixon for the tapes of his conversations with his former counsel John Dean. *See Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (en banc). More recently, the Senate Whitewater Committee issued third-party subpoenas to Sprint for White House call records, S. Rep. No. 104-280, at 49-50 (1996), and to the Rose Law Firm for billing records from the First Lady's time in private practice, *id.* at 11, 155; it also subpoenaed a White House lawyer's notes of a meeting with the President's personal lawyers, *id.* at 237, all as part of its mission to conduct oversight and make "recommendations for legislative . . . actions." S. Res. 120, 104th Cong. § 1(b)(5) (1995).

This historical practice is consistent with the founding-era understanding that the President does not "stand exempt from the general provisions of the constitution" that require everyone to comply with subpoenas. *Burr*, 25 F. Cas. at 34. James Monroe's Attorney General furnished the same opinion, driving President Monroe's decision to provide testimony and written discovery in a court martial. *See Nixon v. Sirica*, 487 F.2d 700, 710 n.42 (D.C. Cir. 1973) (en banc) (a subpoena could "properly be awarded to the President of the United States" (quoting Letter of William Wirt to John Quincy Adams, Jan. 13, 1818)); Rotunda,

supra, at 6 n.23 ("Wirt's Opinion Letter is important evidence of the law because it was issued in the early days of the Republic.").

That long history of legislative oversight cuts against a stay that would further restrict the House's ability to fulfill its constitutional duties to investigate and legislate in the public interest. *Cf. New York Tr. Co. v. Eisner*, 256 U.S. 345, 349 (1921) ("[A] page of history is worth a volume of logic.").

B. The irreparable harm that a stay would cause Congress and the public outweighs whatever harm enforcement of the subpoena would cause Applicants.

"Before issuing a stay, it is ultimately necessary to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (quotation and alteration marks omitted). Contrary to Applicants' suggestion (Stay App. 10), the Court considers the balance of equities in *all* cases, not just in the subset of cases thought to be "close" ones. *See id.*; *Barnes*, 501 U.S. at 1304-05; *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (balance of equities must be considered "[i]n each case" before awarding the "extraordinary remedy" of a preliminary injunction).

Here, each day of delay harms the Committees by depriving them of important information they need to carry out their constitutional responsibilities. That harm outweighs any harm Applicants will suffer from the banks' compliance with the subpoenas.

1. Applicants insist that the Committees' need for this information is "not urgent in any meaningful sense." Stay App. 22. According to Applicants, the Com-

mittees' "*only* possible need" for this information is for use in "general legislation" related to "broader problems like global money laundering and the supervision of the banking, thrift, and credit union industries." *Id*. But Applicants nowhere explain how efforts to protect the integrity of the U.S. financial system and undermine international money laundering cannot be urgent matters in their own right.

Even more obviously time sensitive—and barely addressed by Applicants—is the Intelligence Committee's ongoing investigation of foreign influence in the U.S. political process during and since 2016. That effort could not be more urgent. As Senate Intelligence Committee Chairman Burr has explained, "Russia is waging an information warfare campaign against the U.S. that didn't start and didn't end with the 2016 election. Their goal is broader: to sow social discord and erode public confidence in the machinery of government." Chairman Burr Press Release. The window for passage and implementation of legislative reforms to counter that effort and protect the upcoming 2020 elections "from the threat of foreign influence" (App. 64a (quoting Comms. Br. 18)) is rapidly closing.

Further delay also limits the House's ability to fulfill its constitutional duties more generally. These subpoenas have already been pending for one-third of the 116th Congress. "[T]he House, unlike the Senate, is not a continuing body[.]" *Eastland*, 421 U.S. at 512. The time for the Committees "to consider and act upon the material disclosed pursuant to their subpoenas . . . will expire at the end of the 116th Congress," on January 3, 2021. App. 102a. And, although there is no requirement that the Committees identify specific proposals to justify their

subpoenas, *In re Chapman*, 166 U.S. 661, 670 (1897), their need for the subpoenaed information is all the more pressing because there are already "numerous legislative proposals" related to the Committees' investigations, *see* App. 63a, 62a n.55, 64a n.59. Congress "cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." *McGrain*, 273 U.S. at 175. Legislation cannot be enacted overnight; the opportunity for the Committees to receive the information sought by the subpoenas, evaluate its relevance, incorporate that information into a bill or bills, and usher that legislation through the bicameral process diminishes by the day and may be lost well before January 3, 2021. Applicants are correct that getting legislation across the finish line is an arduous process, Stay App. 22-23, but that fact cuts against additional delay, not in its favor.

For substantially similar reasons, "the interests of the public at large," *Barnes*, 501 U.S. at 1305, are furthered, not harmed, by an informed Congress.

2. Applicants do not articulate any valid reason why any harm they would suffer without a stay would outweigh the harms to the House and the public if a stay were granted. *See id.*

Their primary argument is that, without a stay, they may be deprived of the opportunity for this Court's review. Stay App. 20-24. But the President has no right to this Court's review of every case in which he seeks it. *See*, *e.g.*, *Office of President v. Office of Indep. Counsel*, 525 U.S. 996; *Rubin*, 525 U.S. 990; *Office of President v. Office of Indep. Counsel*, 521 U.S. 1105.

This Court also should reject Applicants' argument that they are entitled to a stay pending certiorari: it cannot be the case that the President has the right to stall any Congressional subpoena to which he objects through the months or years that it takes for a challenge to work its way through the lower courts and for this Court then to grant or deny certiorari. If that were true, the House—which has only a two-year term—would be severely constrained in its ability to conduct oversight or to collect information relating to the Executive Branch. *Cf. Office of President v. Office of Indep. Counsel*, No. A-108, 1998 WL 438524, at *1 (U.S. Aug. 4, 1998) (Rehnquist, C.J., in chambers) (denying stay pending certiorari in case concerning information about the President); *Rubin v. United States*, 524 U.S. 1301, 1302 (1998) (Rehnquist, C.J., in chambers) (same); *Packwood*, 510 U.S. 1319 (Rehnquist, C.J., in chambers).

For these reasons, the "likelihood that denying the stay will permit irreparable harm to the applicant [does] not clearly exceed the likelihood that granting it will cause irreparable harm to others." *Barnes*, 501 U.S. at 1305. Any harm Applicants will suffer would be "vastly less severe," *id.*, than the harm in depriving the peoples' representatives of information they need to secure the nation's 2020 elections from foreign influence and otherwise exercise their constitutional responsibilities wisely before their time for doing so expires. Accordingly, the stay request should be denied.

II. If The Court Nevertheless Grants A Stay, It Should Expedite Consideration Of Certiorari

If the Court grants the stay, the Committees request that the Court expedite consideration of certiorari in this case. The House Oversight Committee will file today an opposition to the petition for certiorari in *Mazars*. The Court should condition any stay here on the filing of a certiorari petition at the earliest practicable date, *see*, *e.g.*, *Int'l Refugee Assistance Project*, 137 S. Ct. at 2085, or, alternatively, could treat the stay application itself as a petition for certiorari, *see*, *e.g.*, *Nken v. Mukasey*, 555 U.S. 1042 (2008); *Purcell v. Gonzalez*, 549 U.S. 1, 2 (2006) (per curiam). Any stay of this case would cause the House serious injury, but "expeditious treatment," *Eastland*, 421 U.S. at 511 n.17, would lessen that injury to some extent.

CONCLUSION

For the foregoing reasons, the application for a stay should be denied.

Respectfully submitted,

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