NOS. 19-715, 19-760

In the Supreme Court of the United States

DONALD J. TRUMP, ET AL., *Petitioners*,

v.

MAZARS USA, LLP, ET AL., *Respondents*.

DONALD J. TRUMP, ET AL., *Petitioners*,

v.

DEUTSCHE BANK AG, ET AL., *Respondents*.

On Writs of Certiorari to the United States Courts of Appeals for the District of Columbia Circuit and the Second Circuit

BRIEF OF BOSTON UNIVERSITY SCHOOL OF LAW PROFESSORS SEAN J. KEALY AND JAMES J. WHEATON AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF AMICI CURIAE

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[1] Amici file this brief pursuant to the parties' blanket consents lodged with the Clerk. Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the amici curiae law professors (including through funds available to them as faculty members) made any monetary contribution to the preparation or submission of the brief.

STATEMENT OF THE CASE

Three congressional committees served subpoenas (the subpoenas) on Mazars USA LLP (Mazars), Deutsche Bank, AG and Capital One Financial Corporation (the banks) in April 2019. These subpoenas sought records related to the President as well as to a trust, a foundation, and a small number of LLCs and corporations (together, excluding the President, the "Named Entities").[2] However, the subpoenas also requested documents possessed respectively by Mazars or the banks and relating to hundreds of entities related to the Named Entities (together with the Named Entities, "Covered Entities").[3]

SUMMARY OF ARGUMENT

These cases offer this Court an opportunity to clarify muddled jurisprudence that has evolved since this Court's decision more than a century ago in *Kilbourn v. Thompson*, 103 U.S. 168 (1880). That case,

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[2] In the *Mazars* case, the entity Petitioners include the trust, two corporations and three LLCs. In the banks case, the entity Petitioners are the trust, four LLCs and two corporations.

[3] The DeutscheBank subpoena also included each Named Entity's "parents, subsidiaries, affiliates, branches, divisions, partnerships, properties, groups, special purpose entities, joint ventures, predecessors, successors, or any other entity in which they have or had a controlling interest." Jt. App. 148a. The Capitol One and Mazars subpoenas encompassed "[a]ny parent, subsidiary, affiliate, joint venture, predecessor, or successor." Jt. App. 155a; Pet. App. 2a.

which was improperly decided, mischaracterized the role of Congress as envisioned by the Framers, and ultimately resulted in an unworkable "legitimate legislative purpose" test and other constraints on Congress' ability to perform its constitutional role. Other misunderstandings emanating from *Kilbourn* and its progeny include a presumption likening congressional investigations to the use of "law enforcement powers" and unwarranted concern over whether Congress would improperly expose wrongdoing.

Kilbourn and the cases that follow it should be discarded in favor of a four-part test that would properly balance congressional, executive and judicial power. Applying this four-question test in the cases before the Court will yield the conclusion that the subpoenas represent valid uses of congressional power.

Yet even if the Court concludes that the subpoenas should not be enforced with respect to records of the President possessed by Mazars or the banks, that holding should not extend to the subpoenas as they relate to the Covered Entities.

As these cases have proceeded below, scant attention has been paid to a basic flaw in Petitioner's efforts to prevent the enforcement of the subpoenas. The subpoenas encompass some records that may belong to Petitioner, but most responsive records are the sole property of the business entities to which they relate. They do not belong to the President. He has no right to object to their production, nor does he possess any cognizable legal interest in preventing enforcement of the subpoenas as to those records. And almost none of the Covered Entities are before this Court.

In fact, Petitioners have utilized and asserted the separateness of the Covered Entities and other business entities for years to insulate the President and others from liability, to segregate businesses for bankruptcy purposes, and to garner tax advantages associated with certain business forms and tax elections.

Additionally, nothing in this Court's prior jurisprudence or congressional enactments justifies the extension to the Covered Entities of any rights the President might have as an individual.

Finally, even if this Court applies the legislative purpose test to invalidate the subpoenas as applied to records belonging to the President, that should have no bearing on the enforcement of the subpoenas to the extent they seek records of the Covered Entities. No separation of powers considerations constrain Congress' ability to legislate with regard to those persons. Accordingly, this Court should not insulate the Covered Entities or individuals not the President from the reach of Congress' legislative power.

For the reasons described above and herein, this Court should affirm the courts below in all respects, but if the Court limits the effect of the subpoenas as to records belonging to the President, it should nevertheless leave the rulings below intact as they relate to the Covered Entities.

ARGUMENT

I. THIS COURT SHOULD CLARIFY CONGRESS' POWER TO GATHER INFORMATION AND ENFORCE SUBPOENAS.

Since this Court decided *Kilbourn v Thompson*, 103 U.S. 168 (1880), the power of Congress to gather information and enforce subpoenas has been muddled and unclear. Targets of congressional investigations, including President Trump, have used *Kilbourn* and related cases to resist complying with legitimate efforts by Congress to gather needed information. For example, Petitioners' brief cites *Kilbourn* fourteen times. However, *Kilbourn* was flawed and should be overturned.

Further, Petitioners rely on other cases that represent incorrect or unclear limitations on congressional power. First, Petitioners propose that Congress cannot exercise law enforcement powers. Pet. Br. 36-37 (citing *Quinn v. United States*, 349 U.S. 155, 161 (1955); *Watkins v. United States*, 354 U.S. 178, 187 (1957); *Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959)). Second, Petitioners aver that there is no congressional power to "expose for the sake of exposure." Pet. Br. 37 (citing *Watkins*, 354 U.S. at 200). Third, Petitioners insist that Congress may only conduct inquiries that may result in legislation. Pet. Br. 45 (citing *Quinn*, 349 U.S. at 161; *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975); *McGrain v. Daugherty*, 273 U.S. 135, 177 (1925)).

These cases present this Court with not only the opportunity to overturn *Kilbourn*, but to discard confusing standards created since then by establishing a clear standard for congressional investigations.

A. The Investigatory Power is Inherent in Congress' Power.

Petitioners challenge the constitutional source that implies the investigatory power, and question whether an implied power can be used to "undermine the structure of government established by the Constitution." Pet Br. 32-34.

American colonists and the Founders saw their legislatures and Congress as having powers of investigation coextensive with those of Parliament, which was the "general Inquisitors of the realm." E. Coke, 4 Institutes of the Laws of England 11 (1st ed. 1644). In *Howard v. Gosset*, Lord Coleridge found it difficult to define the limits of Parliament's power of inquiry, and concluded that it

> may inquire into every thing which it concerns the public weal for them to know; and they themselves, I think, are entrusted with the determination that falls within that category. Coextensive with the jurisdiction to inquire must be their authority to call for the attendance of witnesses, to enforce it by arrest when disobedience makes that necessary.

10 Q.B. 359, 379-80 (1845).

In 1742, William Pitt dismissed opponents of an inquiry by claiming the House of Commons had the inherent right to conduct investigations: "We are called the Grand Inquest of the nation, and as such it is our duty to inquire into every step of public management, either abroad or at home, in order to see that nothing has been done amiss." Telford Taylor, *Grand Inquest: The Story of Congressional Investigations* 8-9 (1955).

Another legal philosopher well known to American legislators was Montesquieu, who wrote,

> Neither ought the representative body to be chosen for the executive part of government, for which it is not so fit; but for the enacting of laws, or to see whether the laws in being are duly executed, a thing suited to their abilities, and which none indeed but themselves can properly perform . . . the legislative power . . . has a right and ought to have the means of examining in what manner its laws have been executed.

Montesquieu, *Spirit of the Laws*, bk. XI, c. 6, pp. 167-169 (1914 ed. trans. Thomas Nugent).

In fact, American colonial legislatures enjoyed wide-ranging investigatory power. In 1722, over the governor's objection, the Massachusetts House of Representatives summoned military officers to question their activities, stating, it was "not only their Privilege but Duty" to demand this information. Other examples of colonial legislatures exercising similarly broad powers can be found in Pennsylvania, Virginia and North Carolina. *See* Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153 at 166-167 (1926) (citing Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. PA. L. REV. 691 (1926)).

The omission of explicit references to contempt and investigations in the Constitution reflected a general attitude of Americans that these were natural attributes of Congress. In a 1791 lecture, Justice James Wilson said, "The house of representatives . . . form [sic] the grand inquest of the state. They will diligently

inquire into grievances, arising both from men and - things." Telford Taylor at 12-13.

Congressional investigatory powers were sweeping from the earliest days of the Constitution, as shown when Congress investigated and exonerated General St. Clair following a massacre in the Northwest Territory. 3 Ann. Cong. 490-94 (1792). When a representative questioned the House's power to investigate an executive officer, Rep. Williamson stated "that an inquiry into the expenditure of all public money was the indispensable duty of this House." *Landis* at 170-171 (citing 3 Ann. Cong 491 (1792)).

In 1832, the House investigated fraud charges involving the Secretary of War giving a contract to a private citizen. The House committee was empowered to send for persons and papers, and its charge included determining whether President Jackson knew of the fraud. *Landis* at 179 (citing H.R. REP. NO. 502, 22d Cong., 1st Sess. (1832)).

In 1859, the Senate investigated John Brown's raid at Harper's Ferry, and authorized a committee to send for persons and papers, and report on legislation to preserve peace and protect public property. One witness refused to appear, claiming his testimony would not aid the Senate's legislative function. In response, Senator Fessenden argued that "It is not to be presumed that we know everything; and if any body does presume it, it is a very great mistake, as we know by experience." Senator Fessenden's justification for compelling testimony was, "is this a legitimate and proper object, committed to me under the Constitution?" *McGrain*, 273 U.S. at 161-163.

President Wilson wrote in his seminal text on the powers of government that "Quite as important as legislation is vigilant oversight of administration; and even more important than legislation is the instruction and guidance in political affairs which the people might receive from a body which kept all national concerns suffused in a broad daylight of discussion. . . . The informing function of Congress." WOODROW WILSON, CONGRESSIONAL GOVERNMENT 297-303 (1901). Further, "The informing function of Congress should be preferred even to its legislative function." *Id. See also* Nunn, *Congress' Role and Responsibility in the Federal Balance of Power*, 21 GA. L. REV. 17 (1986) (Congress' duty is to inform both itself and the public).

Given the legislative precedents in Great Britain, and the practice in this country before 1880, Congress' investigatory powers are not implied, but inherent. This Court has so affirmed. *Watkins*, 354 U.S. at 187 (power of "Congress to conduct investigations is inherent in the legislative process"). As an inherent power essential to the legislature's proper operation, this Court should only restrict that power when absolutely necessary, and in clearest terms.

B. *Kilbourn* Was Improperly Decided and Should Be Overturned.

Many currently recognized limitations to congressional power have their roots in *Kilbourn*. That improperly decided case should now be overturned.

In *Kilbourn*, the House investigated investments made by the Secretary of the Navy into a real estate pool, which failed and caused the loss of federal funds. Kilbourn was subpoenaed, but refused to answer the

committee's questions and was arrested for contempt. 103 U.S. at 193-194, 200.

Using selective and, in some instances, obscure cases, this Court distinguished Congress from Parliament in that Congress lacked judicial powers, and therefore did not have the same powers to summon and punish witnesses for contempt. *Id.* at 189. This Court found that the House was "in no sense a court," and applied an excessively narrow view of congressional contempt powers: limiting them to punishing members for disorderly behavior or violating a standing rule, compelling attendance of absent members, and the impeachment process. *Id.* This Court also held that neither chamber of Congress possesses a general power to inquire "into the private affairs of the citizen," which would be an assumption of judicial powers. *Id.* at 190.

The subject of the congressional investigation, this Court reasoned, was already before a federal court, which alone could provide redress, and was therefore outside the House's powers. The House had also exceeded its power by investigating an individual's personal affairs, which "could result in no valid legislation on the subject to which the inquiry referred." *Id.* at 195.

This Court saw the investigation as a congressional effort to secure priority as a bankruptcy creditor; an improper assumption of "judicial power." *Landis* at 216. This was a bizarre characterization of Congress' actions. The committee was investigating the disposition of public monies and the possibility of further maladministration. *Id.* at 217. The Bankruptcy Clause also grants Congress express constitutional authority to legislate on bankruptcy, so the House certainly could inquire into a bankruptcy that affected public

funds in order to consider new legislation. *See* U.S. CONST. ART. I, § 4.

This Court mischaracterized Parliamentary law and previous American practice, and ignored the "large mass of legislative precedents" on legislative power stretching back to Parliament. *Landis* at 220. Because this decision so sharply contradicted long-standing congressional practice, *Kilbourn* could not be "the basis for a new standard" since congressional investigations are necessary to make government responsible to the electorate. *Id.*

This Court soon began to distance itself from *Kilbourn.* In *McGrain*, this Court stated that *Kilbourn* had been cited by courts to mean that neither the House nor the Senate had power to make inquiries or gather evidence. While admitting that *Kilbourn* could be so read, this Court declared as *dicta* these limitations on congressional powers. 273 U.S. at 171.

Despite the case's flaws as precedent, witnesses seeking to evade congressional investigations continue to rely heavily on *Kilbourn*; it is time to overturn this faulty decision.

C. The "Legitimate Legislative Purpose" Standard Is Vague And Unworkable.

Over the years, this Court has built upon *Kilbourn* to further limit congressional inquiry to "legitimate legislative purposes," which often requires a nexus between the information gained and legislation. In fact, Petitioners argue that the subpoenas lacked a "legitimate legislative purpose" because they were issued for "law enforcement purposes." They argue that the subpoenas could not result in valid legislation,

and so have the purpose of exposing potential crimes like money laundering and banking violations. Pet. Br. 38. These asserted limitations on congressional investigations spring from *Kilbourn* and from a series of cases decided during the McCarthy era.

From 1953-1954, Senator McCarthy chaired an investigatory committee that sought to root out Communists in the federal government. McCarthy's tenure was a dark time in congressional history; he alleged witnesses were disloyal, bullied them, and subjected many innocent people to anguish. Nunn at 23. This Court recognized that these hearings involved a "broad-scale intrusion into the lives and affairs of private citizens." *Watkins*, 354 U.S. at 195. Some Senators criticized McCarthy's actions as reckless and irresponsible "character assassination," and ultimately the Senate voted his formal censure. Nunn at 23. The McCarthy hearings, however, provided this Court an opportunity to define further Congress' investigative power. Unfortunately, as enunciated in the resulting cases, some of these limitations are vague and give little guidance to Congress or witnesses.

1. What Is a "Legitimate Legislative Purpose?"

Kilbourn held that the House exceeded its power by investigating the personal affairs of an individual, which "could result in no valid legislation on the subject to which the inquiry referred." 103 U.S. at 190. This formulation appears in nearly all subsequent decisions. *See McGrain*, 273 U.S. at 178 ("only legitimate object the Senate could have in ordering the investigation was to aid it in legislating"); *Quinn*, 349 U.S. at 160 (Congress has power "to investigate

matters and conditions relating to contemplated legislation"); *Watkins,* 354 U.S. at 187 (inquiries must be "related to, and in furtherance of, a legitimate task of the Congress"); *Barenblatt*, 360 U.S. at 111 (Congress may only investigate areas in which it may "potentially legislate or appropriate"); *Eastland,* 421 U.S. at 506.

The *Watkins* Court could not determine how the Committee's questions were pertinent, calling into question the legitimacy of the investigation. 354 U.S. at 215. In dissent, Justice Clark called this Court's curbing of Congress' informing function "both unnecessary and unworkable," and warned that this Court should not become "the grand inquisitor and supervisor of congressional investigations." *Id.* at 218 (Clark, J., dissenting).

It may be impossible for anyone—including members of Congress—to state in advance the ends of an investigation, so it will always be exceedingly difficult for a court to decide whether a committee is performing a "legitimate task." Investigations are not "a matter for abstract speculation" but "to be determined only after an exhaustive examination of the problem." Landis at 217. Dean Landis wrote, "Neither Congress nor the Court can predict, prior to the event, the result of investigation." *Id.* Regardless of the investigation's outcome, be it legislation, a no-action recommendation, a referral to the executive branch, or simply informing the legislature and the public, "[n]o investigation is fruitless; no such investigation is made in pursuance of other than legislative functions." *Id.* at 218.

For example, in 1963, a Senate subcommittee, in nationally televised hearings, exposed the structure of La Cosa Nostra (LCN). The subcommittee questioned Joseph Valachi, a low-level organized crime figure.

Valachi told Senators about LCN's operations, code of ethics, induction ceremonies, and the role of its ruling body, the "Commission". *Nunn* at 30.

Attorney General Robert Kennedy used this information to pursue criminal actions against union corruption and LCN, created a strike force, and required greater information sharing between Treasury and Department of Justice (DOJ) agents.

The actual legislation resulting from the Valachi hearings did not come until much later: the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, and the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922. The 1970 Act criminalized the RICO form of conspiracy that was tailored to LCN's structure. Nunn at 32-33. What was the purpose of the Valachi hearings? At the time, they seemed like made-for-TV exposure of the underworld with no legitimate legislative purpose. It took seven years to develop and pass the law that led to RICO, and several more years before the first convictions applying that form of conspiracy. By 1986, however, federal authorities had convicted 19 bosses, 13 underbosses and four consigliere from 20 LCN families. *Organized Crime: 25 Years After Valachi*, *Hearings Before S. Perm. Subcomm. on Investigations*, 100th Cong. 15 (1988) (testimony of William S. Sessions).

Congress should be free to gather the information it desires without being second-guessed by the executive or judiciary as to the "legitimacy" of the investigation.

2. Congress Cannot Exercise "Law Enforcement Powers."

Two prominent 1950s cases built upon *Kilbourn's* ruling that Congress may not exercise judicial or executive powers. In *Quinn* and *Watkins*, this Court stated Congress cannot exercise "any of the powers of law enforcement." *Quinn*, 349 U.S. at 161; *Watkins*, 354 U.S. at 187. Given that *Kilbourn* was more concerned with congressional encroachment on the judiciary, this broad law enforcement limitation was novel. Congress does not sit as a trial court, and only rarely assembles facts specifically to build criminal cases against individuals.

Congress' ethics committees may refer cases to federal or state authorities for possible legal violations discovered during investigations. *See* House Rule XI.3.a.3.

Failure to comply with a congressional subpoena is a misdemeanor, and DOJ is required to present the charge to a grand jury. *See* 2 U.S.C. § 192, § 194. Further, House and Senate contempt citations are sent to the appropriate U.S. attorney, who has a duty to bring them before a grand jury. *Id.* Congress may also refer perjury cases to DOJ. Despite these required actions, DOJ has asserted that it retains the discretion to determine whether to present criminal contempt to the grand jury. *See* CRS Reports & Analysis Legal Sidebar, *Prosecution of Criminal Offenses Against Congress*," (July 26, 2016).

In these cases, Congress has not exercised law enforcement powers in the investigations represented by the subpoenas. Further, it is not a valid objection to an investigation that Congress may uncover crimes

or wrongdoing in the process. *McGrain*, 273 U.S. at 179-180.

The law enforcement argument for refusing to comply with a valid subpoena is not a meaningful restriction on Congress and should be discarded.

3. Congress Cannot "Expose for Exposure's Sake."

The notion that Congress can neither "expose for exposure's sake," nor use investigations "to punish those investigated," *Watkins*, 354 U.S. at 187, may be closely related to the "law enforcement" limitation.

In *Watkins*, petitioner argued that the subcommittee's inquiry did not serve a "public purpose," but was meant to inflict public scorn due to his past beliefs, expressions and associations. *Id.* at 199. This Court stated, "We have no doubt that there is no congressional power to expose for the sake of exposure," and held that Congress did not have general power to expose where the predominant result can only be an invasion of individuals' private rights. *Id.* at 200.

This "exposure" limitation, which Justice Clark called a "catch phrase" in his dissent, was *dicta. Watkins*, 354 U.S. at 229 (Clark, J., dissenting). It also constitutes another vague and unworkable limitation on Congress. Shortly after *Watkins*, this Court examined congressional hearings into Communist activity and declined to apply the exposure limitation, because "So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power." *Barenblatt*, 360 U.S. at 132-133.

In fact, exposure is one of the greatest tools at Congress' disposal. In the words of Louis Brandeis, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Brandeis, *Other People's Money—and How the Bankers Use It,* HARPER'S WKLY. (Dec. 20, 1913). A congressional committee may hold hearings, compel testimony, expose wrongdoing, marshal public opinion, and take appropriate action. Often, this process does not focus on the possibility of legislation. In extreme cases, the House may choose to impeach a President. Usually, exposure alone is enough to remedy the situation.

Due to the findings of congressional committees, President Nixon resigned. The Valachi hearings exposed the behavior of numerous members of organized crime. *Nunn* at 30. During the Great Depression, the Senate Committee on Banking and Currency subpoenaed records of brokerage houses and published names of 350 investors who sold stocks short and contributed to market volatility. 1 *Congress Investigates: A Critical and Documentary History* 505 (2011). The resulting Pecora Commission revealed the ways banks manipulated markets and gained Wall Street and government influence. The Committee also revealed that one of the wealthiest financiers in America, J.P. Morgan, Jr., paid no income takes in 1931 and 1932. *Id.* at 510.

Other investigations have exposed behavior at all levels of government and changed future behavior without the need for new legislation. For example, after Hurricane Katrina, a House investigative committee criticized the preparation and actions of local, state

and federal officials, including Congress itself for inadequate oversight. *A Failure of Initiative: Final Report of the Select Bipartisan Committee to investigate the Preparation and Response to Hurricane Katrina*, H. Rep. No. 109-377C (2006). A Senate committee also made findings and recommendations, few of which included amending or creating new laws. *Hurricane Katrina: A Nation Still Unprepared, Special Report of Senate Committee on Homeland Security and Governmental Affairs*, S. Rep. No. 109-322 (2006). In that case, Congress was exposing behavior at the federal level (where it could legislate), and at the state and local levels (over which it has no direct control).

Ultimately, the "legitimate legislative purpose," "exercise of law enforcement powers," and "exposure for exposure's sake" limitations that have accreted over time serve just to allow potential witnesses, such as President Trump, to thwart valid congressional efforts to gather information. These limitations should be replaced with a more readily understandable and applied test.

II. THIS COURT SHOULD ADOPT A NEW FOUR PART TEST TO DETERMINE WHEN CONGRESS HAS POWER TO ISSUE AND ENFORCE SUBPOENAS.

Given the inherent nature of a legislature's investigatory power, combined with the Speech or Debate Clause, U.S. CONST. Art. I, § 6, one could argue that Congress is the "general inquisitors of the Republic" and should be permitted to subpoena and hold in contempt those who refuse to comply free of judicial interference.

Still, Congress' power to investigate is not unlimited. First, the "legislative power" is divided between

Congress and state legislatures. U.S. CONST. Art.I, § 8; *id.* U.S. CONST. ART. I, § 4; *id.* amend. X. Second, Congress has long entrusted investigations to committees created for an inquiry, or to standing committees, all with different mandates. Third, witnesses enjoy constitutional protection from being compelled to testify against themselves. *Id.* U.S. CONST. AMEND. V. Thus, the investigatory power is not unlimited and courts can be a meaningful check.

The limits of congressional power to investigate and gather information should be clear and easily understood. This Court should adopt a four-part test to determine the legitimacy of a congressional subpoena or effort to hold a witness in contempt: (1) Is the investigation within Congress' constitutional powers?; (2) Is the subpoena authorized by a valid congressional rule or resolution?; (3) Is the information sought broadly relevant to the congressional investigation?; and, in cases of contempt, (4) will the information sought involve a violation of the Fifth Amendment because the statements or production of documents belonging to or in the witness' possession would incriminate the witness?

(1) *Is the Investigation Within Congress' Constitutional Powers?*

Several post-*Kilbourn* cases improperly narrowed congressional investigatory power by limiting investigations to subjects "on which legislation could be had." *Eastland*, 421 U.S. at 504 n.15; *Quinn*, 349 U.S. at 161; *McGrain*, 273 U.S. at 177. However, Congress' inherent power to conduct investigations must be far broader than whether the information sought necessarily would or could lead to legislation.

Under *Watkins*, Congress has power to inquire into the administration of existing laws; the need for proposed statutes; defects of the social, economic, or political systems; and the administration and operations of federal government departments to expose corruption, inefficiency, or waste. 354 U.S. at 187. Congress has inherent power to monitor members of the judicial and executive branches to ensure that no official is abusing his or her office, but if so, to use the tools at Congress' disposal, including public exposure; appropriation; statutory change; and in extreme cases, impeachment.

The Constitution places several restrictions on a President, including three relatively obscure provisions: a President may not grant a title of nobility (U.S. CONST. art.I, § 9, cl.8); accept a present, emolument, office, or title from a foreign state without the permission of Congress (*id.* (the Emoluments Clause)); or impose a religious test for an officer of the United States (*id.* ART. VI, § 3).

Should a President violate these or other constitutional prohibitions, only the other branches possess the ability to preserve constitutional order. Using the judicial process requires identifying a party with both standing and the resources to challenge a President's actions, and even then the process may take years. For example, in *In re Trump*, 928 F.3d 360 (4th Cir. 2019), the Fourth Circuit held that the attorneys general of Maryland and the District of Columbia lacked standing to sue President Trump concerning a violation of the Emoluments Clause. Only Congress can address these matters in a timely and effective manner, and it should be permitted to seek the information needed to do so.

(2) *Is the Subpoena Authorized By a Valid Congressional Rule or Resolution?*

Committees are creations of the chamber they serve. The committee conducting the investigation, therefore, must be duly authorized to issue and enforce subpoenas. This Court has narrowly construed the authority of congressional committees. *United States v. Rumely*, 345 U.S. 41, 44 (1953) (creating resolution is "the controlling charter of the committee's powers"). This grant of authority changes over time. In the Senate, the Permanent Subcommittee on Investigations has been the primary committee to issue subpoenas; in the House it has been the Committee on Oversight and Reform. At various times, select committees such as those concerning the 2001 terrorist attacks, Iran-Contra and Watergate have been granted subpoena powers. The courts should ensure that committee subpoenas have been properly issued and that committees act within their granted powers.

In these cases, House Rules X.11.d and XI.2.m clearly grant the various House committees that issued the subpoenas the power to subpoena the requested information. Further, the House passed Resolution 507 to clarify that the committees were empowered to obtain records related to President Trump and the Covered Entities. H.R. Res. 507, 116th Cong. (as passed by House Jul. 23, 2019). Petitioners claim that this resolution empowers every House committee to issue subpoenas and term the sweep of the delegation "staggering." Pet. Br. 63. The scope of the power it grants committees, however, is a decision for the House and not a President.

(3) *Is the Information Sought Broadly Relevant to the Congressional Investigation*?

This Court has previously held that documents subpoenaed by Congress must be pertinent to the inquiry. *McPhaul v. United States*, 364 US at 380; *Barenblatt*, 360 U.S. at 123; *Watkins*, 354 U.S. at 214-15.

Still, it is hard at the outset to determine what will be precisely relevant to a congressional investigation. Unlike a judicial proceeding with a clear case in controversy, congressional investigations may be wide-ranging, with information leading to further questions and one witness' testimony leading to additional inquiry. Further, courts should presume that Congress has a legitimate object to its inquiry. *In re Chapman*, 166 U.S. 661, 671 (1897). Therefore, the judiciary should give Congress wide latitude.

Petitioners claim that during this litigation, committee attorneys asserted an expansive view of its subpoena power. Pressed by the district court, the Committee attorneys admitted they "probably" could not subpoena President Trump's blood or his childhood diary. Pet. Br. 34. These are examples where a committee would be hard pressed to establish relevance, but that assessment must be made case-by-case. Courts should not interfere until it becomes clear that Congress is abusing its investigatory authority.

(4) *In Contempt Actions, Will the Information Sought Involve a Violation of Fifth Amendment?*

This Court has held that Congress may not curtail specific individual rights, such as the right against self-incrimination. *Quinn*, 349 U.S. at 162. This Court has also made attempts to limit Congress' powers with respect to the First and Fourth Amendments, holding that the judiciary should ensure that Congress

does not "unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly." *Watkins*, 354 U.S. at 198-199.

Clearly, witnesses should not be compelled by Congress to incriminate themselves. "Unjustifiable" encroachments into privacy and other rights become more difficult to enforce. Yet Congress does not need to declare what it will do with the information sought, and courts cannot assume Congress is making the inquiry without a legitimate object. *Chapman*, 166 U.S. at 671.

This Court has expressed the notion that congressional inquiries may bring public stigma and scorn not only to witnesses, but to anyone associated with them. *Watkins*, 354 U.S. at 196-198. Still, if this Court did not protect the First Amendment rights of witnesses in *Barenblatt* or *Eastland*, it is almost impossible to predict a situation where it will.

It is extremely unlikely that any Fifth Amendment issue will be presented by the subpoenas to Mazars and the banks, because those subpoenas have been directed to third parties, and primarily involve the production of records belonging to the Covered Entities.

III. MOST RECORDS SUBJECT TO THE CONGRESSIONAL SUBPOENAS ARE NOT THE PRESIDENT'S RECORDS AT ALL.

Even though the subpoenas seek records of numerous business entities, Petitioner's brief falsely characterizes the business entity records (and tax returns) subject to the subpoenas numerous times as "his records," "personal records," "his private records" or some variant thereof.

Each year during his Presidency, Petitioner has filed Form 278e with the Office of Government Ethics. The most recent form was filed effective May 16, 2019 and lists more than 500[4] separate legal entities, most of which are corporations and LLCs. *See Trump, Donald J. 2019 Annual 278.pdf*, oge.app.box.com/s/e32qrrfvyxk9cgrvteo7diicwd11pac4. The form details the ownership of each entity in a way that results in the conclusion that these legal entities–as well as entities that no longer exist or that are not included in Petitioner's filed 2019 form, but as to which Mazars may have responsive records–constitute an equivalent number of Covered Entities for the purposes of the subpoena.

In these consolidated cases President Trump is the primary Petitioner. The only Covered Entities that are Petitioners in these cases are the Named Entities: of the more than 500 other Covered Entities, none are parties, or have objected to the subpoenas.[5] This failure, coupled with the indisputable fact that Petitioner has no ownership or other legally cognizable interest in any Covered Entity records held by Mazars or the banks that may be responsive to the subpoenas, means that even if this Court declines to permit the enforcement of the subpoenas as to Petitioner as an

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[4] This number must be significantly fewer than the total number of Covered Entities. *See* Br. of Amici Curiae Profs. Wheaton & Kealy 5 n.2.

[5] No party appears to have raised standing below, but this failure may implicate standing and therefore jurisdiction issues as to the subpoena dispute with respect to every Covered Entity other than the Named Entities. *See Maricopa-Stanfield Irrigation & Drainage Dist. v. United States*, 158 F.3d 428, 433 (9th Cir. 1998), *cert. denied*, 526 U.S. 1130 (1999).

individual, there is no legal basis for rejecting the subpoenas' enforcement as to any other legal person within their ambit.

The President's lack of ownership or any other cognizable interest in the records of the Covered Entities is analyzed in detail in the separate brief filed by the authors of this brief in the companion case, *Trump v. Vance*, No. 19-635. *See* Br. of Amici Curiae Profs. Wheaton & Kealy 4-24. The arguments made in that brief demonstrate that the President does not own the records of the Covered Entities subject to the subpoenas.

Over the years, according to financial disclosures filed by the President himself, at least hundreds of business entities have been created to operate or hold ownership interests in various business enterprises with which he is or has been affiliated. Under the state laws that govern those entities, the respective entities themselves, but not the President or any other owner, own the financial, tax and other business records of those entities. Only the entities possess the ability to object to subpoenas for their records. However, most are not even parties to this litigation. Moreover, there is no alternative basis for finding that the President is somehow a "person in interest" and therefore entitled to ignore the separate entity status of the Covered Entities.

In fact, the President has utilized and asserted the separateness of the Covered Entities and other business entities over the years to insulate himself and others from liability, to segregate the businesses for bankruptcy purposes, and to garner tax advantages associated with certain business forms and tax elections. The entities have served the precise

separateness purpose for which they were formed. That separateness may not be ignored now just because the fact of their separate legal status is legally inconvenient.

Nothing in this Court's prior jurisprudence or congressional enactments justifies the extension to the Covered Entities of any rights the President might have as an individual. These cases are unlike *Hobby Lobby*, which turned on a unique statutory expansion of constitutional rights. Instead, this proceeding is more akin to cases finding that business entities, because of their separateness, do not possess constitutional protections that may be available to their individual owners. Additionally, Congress has shown its intention to exclude most business entities (and therefore all or virtually all of the Covered Entities) from statutory privacy protections.

Moreover, the President has consistently defended the separateness of himself from the Covered Entities in other litigation, and has garnered substantial benefits from their separateness through litigation, in bankruptcy proceedings, and from the tax system. Finally, the discussion of the separateness issues in the companion brief notes that neither this Court's jurisprudence in the areas of privacy and constitutional rights for business entities, nor Congress' approach to privacy rights for business entities, justify a departure by this Court from the basic principle that owners of business entities are distinct from the entities themselves.

IV. ANY LIMITATION ON CONGRESSIONAL POWER TO LEGISLATE WOULD NOT EXTEND TO THE COVERED ENTITIES.

The President and the United States declare in their briefs that the House subpoenas must be invalid because they cannot possibly have a legislative purpose. Pet. Br. at 21; SG Br. at 27. This argument rests upon a separation of powers argument: that Congress is powerless to legislate in a manner that would effectively impose requirements on any President if the legislation would amount to conditions of holding the office of the Presidency beyond the Constitution's explicit requirements.

Left unaddressed by these arguments, however, is a much simpler question: may Congress legislate in a way that restricts or imposes requirements that may affect business entities of which the President is a direct or indirect beneficial owner, or that may involve other individuals associated with those business entities?

The President is not those other persons, and so the answer must be yes. As to those third parties, Congress should be unconstrained in its consideration of legislation that it may deem appropriate for policy reasons, even if it could not impose similar requirements upon a President.

A. Congress May Legislate With Respect to Legal Persons That or Who are Not the President.

The President's arguments, if accepted, would mean that even existing laws that impose ethics-related disclosure requirements upon the President, such as the Ethics in Government Act of 1978, 5app U.S.C.

§§ 101-505, do not actually require a President's compliance. Under this theory, the compliance by the current President and his predecessors with that statute has heretofore been wholly voluntary.

Assuming *arguendo* the validity of this position, nothing in the Constitution would permit its extension to legal persons other than the President. Thus, for example, even if Congress could not pass legislation forbidding federal government entities from leasing government-owned real estate to the President, Congress could certainly pass legislation that prohibits those transactions between a governmental entity and an entity of which the President is the sole or even a minority beneficial owner. Likewise, Congress could prohibit that kind of transaction with members of the President's family, and even with non-family members who might be the President's business partners. Those separate legal persons–entities and individuals–might give rise to what Congress considers to be conflict of interest concerns similar to those that could apply to the President. Nonetheless, there would be no constitutional basis, as a matter of separation of powers or otherwise, to forbid Congress to take action if it perceived those conflicts as serious enough to justify legislation.

The list of potential areas in which Congress could so legislate is extensive, and could also include, as additional examples, financial disclosure requirements applicable to entities and family members but not the President, restrictions on the ability of entities and family members to do business with government entities, disclosure and restrictions relating to foreign business or foreign government dealings, banking disclosure requirements to ensure that third parties are

not receiving debt forgiveness or other financial benefits from regulated financial institutions by reason of affiliation with the President, requirements that tax returns of companies owned by a President or Presidential candidates be disclosed,[6] and provisions giving effect to the Emoluments Clause by prohibiting business entities from making distributions to a person (including a President or entity associated with a President) in a manner that would violate constitutional restrictions. Congress could even amend the Ethics in Government Act to require separate similar filings by the Covered Entities. Congress might wish to do so because this Court or another court declares the President's compliance with that statute to be optional, but also because it might fear that a future President would refuse to comply as an individual.

Congress has certainly legislated to restrict Presidential family members in the past. In 1966, for example, Congress passed and President Johnson signed into law a bill that included a new code section, 5 U.S.C. § 3110, which addressed government nepotism by forbidding the appointment and pay of relatives of certain public officials, including a President. It is commonly understood that this legislation related to the appointment as Attorney General of a President's brother, and the statutory language clearly evidenced a congressional response preventing a recurrence of that kind of appointment.

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[6] Congress has inherent legislative power to require or forbid disclosure of tax returns. Existing law skews toward protection from release of that information by the government, but that was not always the case, and Congress remains free to legislate differently.

B. Extending Separation of Powers to Exempt the Covered Entities from Legislation Would Unduly Restrict Congress' Legitimate Legislative Power.

The President's ultimate position is that having chosen not to divest his economic interests in the Covered Entities, and having chosen not to put those companies into a blind trust or other mechanism where he cannot influence them, they remain so closely tied to him that the subpoenas must be invalid.

In its brief, the United States avers that opening the door to tax and financial records might breed even more demands, for college transcripts and the like. SG Br. 20. Yet the critical issue presented here is not whether an unhinged prosecutor may launch a complete fishing expedition into aspects of a President's life that might be characterized as harassment. Instead, the question before the Court is whether a President can extend his claimed aura of immunity from disclosure to an unlimited number of other persons. If the only issue is embarrassment, then the Court could certainly invoke a process ensuring the protection of sensitive private information, such as medical records, in the way crafted by the Second Circuit in one of cases before the Court here. *See Trump v. Deutsche Bank AG*, 943 F.3d 627, 667-668 (2d Cir. 2019).

Nor would allowing the subpoenas to be enforced necessarily impair a President's ability to perform his executive functions, even if they proceed to the point where they involve information from Covered Entity records that happen to include federal or state tax return information overlapping with the President's personal tax returns. The President is not being asked to produce a single record, of his own or of any of the

Covered Entities, so production and review time by him is unnecessary. The President need not consult with any Covered Entity, because before assuming office, he publicly resigned from all positions of authority with the Covered Entities. *See* DJT-Resignation-Signature-Page-With-Exhibit-a.pdf, assets.documentcloud.org/documents/3404759/DJT-Resignation-Signature-Page-With-Exhibit-a.pdf. The President has offered only the naked assertion that the public availability of this kind of information would distract him from his duties, but that flies in the face of common knowledge that every President of recent generations has managed to perform his executive duties even after making full public release of personal tax returns. *Trump v. Vance*, 941 F.3d 631, 641 n.12. Moreover, every recent President, including President Trump, has complied or attempted to comply with the Ethics in Government Act. Even this President makes substantial disclosure about his financial affairs through his annual filing under that law, with no apparent disruption to his performance as President, *see Trump v. Mazars USA, LLP*, 940 F.3d 710, 734-735 (D.C. Cir. 2019).

The President argues that impeachment, conviction and subsequent prosecution is the proper alternative to the subpoenas, *see* Pet. Br. at 12, 44, but that shallow analysis ignores that none of the Covered Entities, and none of their affiliated persons other than the President, are subject to impeachment.

By finding the subpoenas invalid even as to persons other than the President, this Court would be imposing a lengthy moratorium, perhaps even until January 2025, on Congress' ability to consider whether patterns of behavior would be revealed by the subpoenaed documents that merit legislative drafting, debate,

and enactment. Instead of protecting separation of powers, that result would neuter the power of a co-equal branch of government acting legitimately within the legislative sphere.

Indeed, just a cursory look at the types of documents subject to the subpoenas demonstrates that permitting the production under subpoena of those documents owned solely by the Covered Entities or the subpoenaed banks and accounting firms would be likely to provide information probative to the legislative purposes used as examples above. For example, partnership and LLC tax returns on Form 1165 would include line items that show the existence of foreign-source gross income, bank accounts and partners, and the use of depreciation deductions. *See* IRS Form 1065, www.irs.gov/pub/irs-pdf/f1065.pdf, line 16a; Sched. B, lines 14, 18; and Sched K, line 16. Corporate returns on Form 1120 would include similar data points. *See* IRS Form 1120-S, www.irs.gov/pub/irs-pdf/f1120s.pdf, line 14; Sched. K, lines 14, 15a; and Sched L, line 10. The ability to review these documents over an extended period of years would reveal possible revenue growth, or growth in foreign source income, coinciding with time periods most likely to involve conflicts of interest. Similarly, examining bank loan records over time could show the existence of unduly favorable loan terms or debt forgiveness arrangements. Examining the subpoenaed records could also result in Congress making a legislative judgment about the appropriateness of borrowers using differing asset valuations for different purposes: tax depreciation rules, real estate tax valuation and as loan collateral, for instance.

Congress may legislate in all of these areas, after examining records that do not even belong to the Pres-

ident, even if this Court concludes that Congress cannot legislatively restrict a President. Petitioners have tied their entire argument about the limitations of congressional power to a faulty assumption that the President may include more than 500 Covered Entities and their other associated individuals under what he posits to be an extraordinarily large separation of powers umbrella. That umbrella cannot be made so big, and the Court must refuse to enlarge it, even if that means ultimately that the President gets a little wet because of his affiliation with those within the legitimate scope of the subpoenas.

CONCLUSION

For the foregoing reasons, the judgments below should be affirmed.

Respectfully submitted,

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