Nos. 19-715 and 19-760

In the Supreme Court of the United States

DONALD J. TRUMP, ET AL., PETITIONERS

v.

MAZARS USA, LLP, ET AL.

DONALD J. TRUMP, ET AL., PETITIONERS

v.

DEUTSCHE BANK AG, ET AL.

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

BRIEF FOR FORMER SENIOR DEPARTMENT OF JUSTICE OFFICIALS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[*]

Amici curiae served as senior officials in the United States Department of Justice in administrations of both

[*] Pursuant to Rule 37.6, amici curiae affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief. All parties have provided blanket consent for the filing of amicus briefs or filed letters of nonparticipation in this litigation.

major political parties and have confronted difficult questions of interbranch comity implicating the separation of powers. A complete list of amici and the positions they occupied in the Department of Justice is set forth in an appendix to this brief.

As former officials charged with defending the prerogatives of the Executive Branch while providing candid, independent, and principled legal advice to the President, amici have a strong interest in ensuring that our constitutional system of separation of powers strikes the proper balance between the three branches of government and remains stable across administrations. Amici submit this brief to offer their informed perspective on the scope of the President's responsibility to cooperate with congressional investigations, and to explain why President Trump's and the Solicitor General's arguments in this case threaten the Nation's system of checks and balances.

SUMMARY OF ARGUMENT

I. The subpoenas at issue in this case can be enforced without offending presidential prerogatives.

Congress's broad power of inquiry is "beyond dispute." *Scope of Cong. Oversight and Investigative Power with Respect to the Exec. Branch*, 9 Op. O.L.C. 60, 60 (1985) ("*Scope of Cong. Oversight*"). The Justice Department has repeatedly advised, in memoranda, formal opinions, and briefing by the Solicitor General before this Court, that Congress may conduct oversight of the President as part of its evaluation of current and potential legislation, which necessarily includes the ability to subpoena documents.

At the same time, it is essential that the Executive Branch be able to carry out its official functions without

undue distraction, and that the President's advisors are free to provide candid advice. Executive privilege is an important component of the separation of powers that prevents the disclosure of confidential communications that, if released, "would seriously interfere with or impede the deliberative process of the government" or "the Nation's conduct of its foreign policy." *Assertion of Exec. Privilege in Response to a Cong. Subpoena*, 5 Op. O.L.C. 27, 29 (1981) ("*Assertion of Exec. Privilege*").

But here, the President has not invoked executive privilege. Nor does the information requested by Congress even reside within or relate to the functioning of the Executive Branch. Instead, this case involves a request by Congress for personal information in the possession of private third-party businesses. Accordingly, the Court can resolve this case without confronting the more difficult questions that may arise when Congress demands information directly from the Executive Branch.

II. The historical record regarding legislative requests for information and documents from Executive Branch officials shows that Presidents, across administrations, generally have cooperated with Congress, and that the approach has helped preserve the balance of power between two co-equal branches.

III. The decisions below are consistent with this Court's precedents and the guidance of the Department of Justice across administrations. Where the President alleges a separation-of-powers violation, this Court asks whether the challenged action "necessarily rise[s] to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Clinton* v. *Jones*, 520 U.S. 681, 702 (1997).

Neither President Trump nor the Solicitor General seriously contends that the subpoenas here rise to that level of impairment. Instead, they ask the Court to—at minimum—announce "stricter" and "heightened" tests for legislative subpoenas directed at third parties and implicating the President's personal affairs. U.S. Br. 7-8; Pet. Br. 52-55. Those novel standards, and the President's position of absolute noncompliance with Congress, find no support in the Department of Justice's past positions or the historical cooperation between the elected branches that has properly preserved the separation of powers.

ARGUMENT

I. THIS CASE DOES NOT IMPLICATE THE SAME INTERESTS AS A CONGRESSIONAL REQUEST FOR EXECUTIVE BRANCH INFORMATION.

1. "It is beyond dispute that Congress may conduct investigations in order to obtain facts pertinent to possible legislation and in order to evaluate the effectiveness of current laws." *Scope of Cong. Oversight*, 9 Op. O.L.C. at 60. "This power to obtain information has long been viewed as an essential attribute of the power to legislate, and was so treated in the British Parliament and in the colonial legislatures in this country." *Ibid.* As the Solicitor General has previously explained, "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it." U.S. Br., *United States* v. *Rumely*, No. 87, 1952 WL 82580, at *22-23 (Nov. 26, 1952).

Moreover, Congress's power of inquiry is "extremely broad." Mem. from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to John D. Ehrlichman, Assistant to the President for Domestic Affairs, *Power of Cong. Comm. to Compel Appearance or Testimony of 'White House Staff'* at 1 (Feb. 5, 1971) ("Rehnquist Mem."). Just last year, the Office of Legal Counsel advised that legislative inquiries can be "valid . . . even though there is 'no predictable end result' as to where the investigation would lead." *Cong. Comm.'s Request for the President's Tax Returns Under 26 U.S.C. § 6103(f)*, 2019 WL 2563046, at *20 (O.L.C. June 13, 2019) ("*Cong. Request for Tax Returns*") (quoting *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 509 (1975)). Congress's "legitimate interest in obtaining information" "extends beyond information bearing on specific proposals for legislation" and "includes, as well, the congressional 'oversight' function of being informed regarding the manner in which the Executive Branch is executing the laws which Congress has passed." *Assertion of Exec. Privilege*, 5 Op. O.L.C. at 30.

2. But Congress's power is not absolute. Even beyond limitations on Congress's authority, *see, e.g.*, Resp. Br. 45, the Executive Branch has well-established routes for resisting legislative inquiries that would frustrate its constitutional responsibilities. For example, as this Court has held, and as the Justice Department has consistently asserted, executive privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States* v. *Nixon*, 418 U.S. 683, 708 (1974); *see Assertion of Exec. Privilege Over Documents Generated in Response to Cong. Investigation into Operation Fast and Furious*,

2012 WL 2869615, at *2 (O.L.C. June 19, 2012) ("*Exec. Privilege: Operation Fast and Furious*"). Executive privilege is a "necessary corollary of the executive function" that "has been asserted by numerous Presidents from the earliest days of our Nation." *Ibid.* The privilege may apply when disclosure will "caus[e] the Executive Branch officials to modify policy positions they would otherwise espouse," *Assertion of Exec. Privilege*, 5 Op. O.L.C. at 29, or "chill the candor" of discussions among those officials, *Exec. Privilege: Operation Fast and Furious*, 2012 WL 2869615, at *4. Successfully invoking the privilege thus prevents the disclosure of confidential communications that, if released, "would seriously interfere with or impede the deliberative process of the government" or "the Nation's conduct of its foreign policy." *Assertion of Exec. Privilege*, 5 Op. O.L.C. at 29.

3. Some conflicts between the branches implicate these competing interests and thus pose challenging separation-of-powers questions. This case does not. President Trump has not invoked executive privilege in this case. Nor is Congress demanding Executive Branch information. *Cf. Comm. on the Judiciary* v. *McGahn*, No. 19-5331 (D.C. Cir. Feb. 28, 2020). Instead, this case involves a challenge to Congress's efforts to obtain personal information from third parties—and it can therefore be resolved by settled law, without breaking new ground. *See id.*, slip op. at 22 (distinguishing *Mazars* as a "civil suit[] affecting the rights of private parties").

II. THE HISTORY OF INTERBRANCH INTERACTION OVER LEGISLATIVE AFFAIRS REFLECTS A TRADITION OF COOPERATION.

Presidents have respected the legislative power of inquiry—subject to appropriate limitations—since the Founding Era. History teaches that the familiar tussle between Congress and the President on the scope of legislative inquiries "is not simply an exchange of concessions or a test of political strength." *Assertion of Exec. Privilege*, 5 Op. O.L.C. at 31. Rather, "[i]t is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch." *Ibid.*

1. Congress first asserted its investigational powers "shortly after the adoption of the Constitution." *Scope of Cong. Oversight*, 9 Op. O.L.C. at 60. In 1792, a House committee asked for documents in connection with an investigation into General St. Clair's failed military expedition in the Northwest Territory. *Cong. Requests for Confidential Exec. Branch Information*, 13 Op. O.L.C. 153, 155 (1989). President George Washington huddled with his Cabinet and told them "that he could conceive that there might be papers of so secret a nature that they ought not to be given up." *Ibid.* Nonetheless, "[t]he President and his Cabinet concluded 'that the Executive ought to communicate *such papers as the public good would permit*, and ought to refuse those, *the disclosure of which would injure the public*.'" *Ibid.* (emphasis in original). In so concluding, President Washington began a tradition of respectful cooperation that has lasted more than two centuries.

2. Presidential practice across recent Administrations has remained faithful to that tradition. In 1973,

President Richard Nixon permitted the production of his tax returns to Congress's Joint Committee on Internal Revenue Taxation, which was investigating his claims to certain deductions and possible underpayment of taxes. *See Impeachment Investigation by House Comm.—Statutory Provisions on Disclosure of Tax Return Information*, 42 Op. Att'y Gen. 485, 489-90 n.4 (1974). The "central finding" of the Joint Committee's report in 1974 was that the President "owed the government $476,431 in unpaid taxes and accrued interest." Joseph J. Thorndike, *JCT Investigation of Nixon's Tax Returns* 10 (February 2016), https://perma.cc/A9R2-J2JZ. That finding was significant given President Nixon's promise that if "the committee determines [that] the items were incorrectly reported, [he would] pay whatever tax may be due." *Id.* at 7.

Presidents have adopted a similar approach in different contexts, as well. In 1980, a Senate committee was investigating whether President Jimmy Carter played a role in his brother Billy Carter's contacts with and business ventures in Libya. *See generally* S. Rep. No. 1015, 96th Cong., 2d Sess. (1980). The committee examined certain real estate holdings of the President and his family, and obtained through the investigation Billy Carter's tax and bank records. The Treasury Department made available the tax information "under statutory restrictions which preclude its public use or disclosure" but nonetheless allowed Congress to investigate the alleged wrongdoing. *Id.* at 84.

In 1981, a House committee began investigating the execution of a reciprocity provision in the Mineral Lands Leasing Act, and as part of the investigation subpoenaed

documents from President Ronald Reagan's Interior Secretary, James G. Watt. Attorney General William French Smith urged President Reagan to withhold responsive documents only where "necessary and fundamental to the deliberative process presently ongoing in the Executive Branch or relate to sensitive foreign policy considerations." *See Assertion of Exec. Privilege,* 5 Op. O.L.C. at 28. Congress's "legitimate interest in obtaining information," Attorney General Smith continued, "extends beyond information bearing on specific proposals for legislation" and "includes, as well, the congressional 'oversight' function of being informed regarding the manner in which the Executive Branch is executing the laws which Congress has passed." *Id.* at 30. In the end, President Reagan claimed executive privilege over, and resisted producing, only a small subset of the documents demanded by subpoena, and allowed the disclosure of the others. *See generally ibid.*

President Bill Clinton's administration faced congressional requests for all manner of official and personal information and documents. As part of Congress's investigation into the Whitewater Development Corporation, the Senate heard testimony from the Clinton family's personal accountant, examined the Clinton family's telephone records, and probed decades' worth of the Clinton family's tax returns. S. Rep. No. 280, 104th Cong., 2d Sess., at 46, 319, 487 (1996). While some of this information was subpoenaed, much of it was provided voluntarily. For example, in 1994, the White House voluntarily disclosed and made public the Clintons' tax returns. Stephen Labaton, *Clinton Taxes Laid Bare, Line by Line*, N.Y. Times (April 16, 1994), https://nyti.ms/2x6hLrJ.

Congress also reviewed information concerning allegations about the funding of President Clinton's presidential library and his family's receipt of gifts and furniture at the end of his second term, H. R. Rep. No. 454, 107th Cong., 2d Sess., at 4-8, 136-144 (2002), as well as Chinese investments in the Presidential Legal Expense Trust, *see generally* S. Rep. No. 167, 105th Cong., 2d Sess. (1998).

So too with the Administration of President George W. Bush. In a memorandum to President Bush concerning congressional inquiries regarding the leak of the identity of a confidential CIA operative, Attorney General Michael J. Mukasey advised that any withholding of information based on executive privilege should be narrow and occur only after the Executive had "made substantial efforts to accommodate the Committee's oversight interests." *Assertion of Exec. Privilege Concerning the Special Counsel's Interviews of the Vice President and Senior White House Staff*, 2008 WL 5458939, at *1 (O.L.C. July 15, 2008). Consequently, the Administration's assertions of executive privilege were confined to materials that, if released, "would significantly impair the [Justice] Department's ability to conduct future law enforcement investigations that would benefit from full White House cooperation." *Id.* at *4.

Finally, President Barack Obama's Administration likewise recognized its obligation to cooperate with proper oversight. In 2011, during Congress's investigation into "Operation Fast and Furious," and on the advice of Attorney General Eric Holder, the Executive Branch produced "a significant amount of information" to the House Committee on Oversight and Government Reform "to accommodate the Committee's legitimate oversight

interests." *Exec. Privilege: Operation Fast and Furious*, 2012 WL 2869615, at *1. Attorney General Holder recommended asserting executive privilege over only a limited category of documents that were prepared in response to congressional and media inquiries because disclosing them "would raise 'significant separation of powers concerns,' by 'significantly impair[ing]' the Executive Branch's ability to respond independently and effectively to matters under congressional review." *See id.* at *3 (internal citations omitted).

3. Critically, in all of the examples above involving congressional requests for personal information from third parties—such as Billy Carter's bank records or the Clinton family's telephone and tax records—amici are unaware of any challenge by a President to Congress's investigative authority. More broadly, across all of these legislative requests for information or documents that could implicate the President, his advisers, or his family in wrongdoing or illegality, the Justice Department did not advocate for the heightened legal standard that the Solicitor General now asks this Court to adopt.

III. THE SUBPOENAS AT ISSUE SHOULD BE UPHELD IN ACCORDANCE WITH THIS COURT'S PRECEDENTS AND THE CONSISTENT GUIDANCE OF THE DEPARTMENT OF JUSTICE.

This case should be resolved in the House's favor because the legislative subpoenas at issue are a valid exercise of Congress's power of inquiry, and the President has neither invoked executive privilege nor provided any explanation of how compliance would impair the Executive Branch in any substantial way.

A. The Subpoenas Are Enforceable Under A Straightforward Application Of Controlling Law.

A congressional subpoena passes constitutional muster if it is "intended to inform Congress in an area where legislation may be had." *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 506 (1975). As the House has explained (Br. 41-58), these subpoenas meet that test. The fact that the subpoenas in this case implicate the President's personal records and conduct "adds a twist, but not a surprising one." 19-715 Pet. App. at 75a.

Respect for the President's "unique position in the constitutional scheme" does not require departing from the well-established standard in *Eastland*. U.S. Br. 7 (quoting *Nixon* v. *Fitzgerald*, 457 U.S. 731, 749 (1982)). Where the President alleges a violation of the separation-of-powers doctrine, "the proper inquiry focuses on the extent to which [the challenged action] prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977) (citing *United States* v. *Nixon*, 418 U.S. 683, 711-12 (1974)); *see also Clinton* v. *Jones*, 520 U.S. 681, 702 (1997).

Here, President Trump has not argued that complying with the subpoenas would substantially impair his abilities to carry out his constitutional mandate. *See* 19-715 Pet. App. at 52a. For his part, the Solicitor General says only in passing that congressional demands "*pose the threat* that the Legislative Branch . . . *may* impair the Executive in the performance of its constitutional duties." Br. 19 (emphasis added, brackets and citation omitted). It would distort the balance between the branches to allow the President to block third parties from responding to congressional requests for personal information based

solely on speculative or hypothetical harm. As then-Assistant Attorney General Rehnquist explained, "the furnishing of a document to a congressional committee involves little, if any, inconvenience to the Executive Branch or to the President and his advisers." Rehnquist Mem. at 4. That is all the more true where, as here, the documents do not even reside within the Executive Branch.

B. The Court Should Reject the President's and Solicitor General's New 'Heightened' Standards for Legal and Practical Reasons.

Unable or unwilling to make the traditional showing of impairment under this Court's established test, or to invoke executive privilege, the President and Solicitor General advance unprecedented and unsupportable standards that would dramatically alter the separation of powers.

1. To begin, the President briefly references (Br. 52) Judge Rao's dissent to argue that "allegations of illegal conduct against the President cannot be investigated by Congress except through impeachment." The Solicitor General does not endorse this theory, and for good reason. It lacks support in this Court's precedents and the consistent guidance of the Department of Justice, and contravenes the historical record. It also makes little practical sense. Requiring Congress to stop legislating "whenever . . . crime or wrongdoing is disclosed"—let alone the mere potential for such a disclosure—would improperly "grind [the legislative process] to a halt." *Hutcheson* v. *United States*, 369 U.S. 599, 618 (1962). Further, forcing Congress to convene an impeachment inquiry of Executive Branch officials in every such circumstance—and subjecting those officials to impeachment—imposes a

needless and unwarranted burden on both branches.

2. The Solicitor General instead advocates (Br. 17) for novel tests that would shift the burden to Congress to demonstrate a "heightened need" when a legislative subpoena implicates the President. These tests should be rejected for similar reasons.

a. At the outset, the Solicitor General's position is inconsistent with advice provided less than a year ago by the Office of Legal Counsel (OLC). In providing an opinion on whether the House Ways and Means Committee had lawfully requested President Trump's personal tax returns—some of the documents at issue in these cases—OLC concluded that the congressional request was invalid "[i]n the absence of a legitimate legislative purpose." *Cong. Comm.'s Request for the President's Tax Returns Under 26 U.S.C. § 6103(f)*, 2019 WL 2563046, at *3. In that memorandum, OLC suggested that the Executive Branch may be able to decline to comply with legislative inquiries directed at it in the first instance based on concerns similar to those espoused by the Solicitor General. But importantly, OLC expressly noted that a similar approach may not apply to the Judicial Branch, because "courts have declined to engage in searching inquiries about congressional motivation[.]" *Ibid.* In other words, OLC declined to endorse the very standard that the Solicitor General now asks this Court to apply in the different context of a subpoena upon a third party. And not for lack of opportunity—the OLC opinion explicitly referenced the *Mazars* case. *See id.* at 24-25 n.29.

b. In any event, none of the justifications offered for the heightened tests withstand scrutiny.

First, the Solicitor General's argument that Congress must offer a "clear and specific statement" setting forth

its purpose because of the "significant *risk*" of impairing the Executive Branch would improperly skew the balance of powers towards one branch. *See* Br. 21-22 (emphasis added). It might be one thing for the President to express concerns about compliance with a request for Executive Branch information because of specific risks to, or impairments of, his constitutional duties. But there is no basis for permitting the President to force third parties not to comply with a legislative inquiry for personal information based purely on speculative harms. Checks and balances are called that for a reason, and the President's rule would eliminate them entirely.

Second, there is no support for requiring courts to engage in "searching scrutiny" of the subjective motivations of legislators because the President is a "particularly attractive target for his political foes." U.S. Br. at 22-23. As OLC observed less than a year ago, "courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province." *Cong. Comm.'s Request for the President's Tax Returns Under 26 U.S.C. § 6103(f)*, 2019 WL 2563046, at *24 (quoting *Tenney* v. *Brandhove*, 341 U.S. 367, 378 (1951)). "Separated from the democratic process, the federal courts are not well equipped to second-guess the action of the political branches by close scrutiny of their motivations." *Id.* at 25; *see Tenney*, 341 U.S. at 378 ("Courts are not the place for such controversies."). Indeed, the Department of Justice recently recommended that this Court avoid scrutiny of the President's motives for similar reasons. *See* U.S. Br. at 61-64, *Trump* v. *Hawaii*, No. 17-965 (Feb. 21, 2018) (arguing courts should not "look behind" the Executive Branch's stated rationale). Evaluating Congress's motives is even more problematic because "[t]here is no

basis either in law or in reality for th[e] naive belief" that "what is said by a single person in a floor debate or by a committee report represents the view of Congress as a whole." *Zedner* v. *United States*, 547 U.S. 489, 510 (2006) (Scalia, J., concurring).

Third, the President's worry that "legislative subpoenas targeting the private affairs of presidents will become routine" (Br. 35) is similarly unfounded. As noted above, Presidents often have faced oversight inquiries from hostile Congresses, and history has reflected productive mutual efforts by both branches to resolve conflicts amicably. In more than 230 years of the Nation's history, neither the President nor the Solicitor General has identified instances where the democratic process has failed to such a degree that excessive legislative inquires directed at the President's "private affairs" have rendered him unable to carry out his constitutional responsibilities.

Fourth, the Solicitor General's borrowing of the "demonstrably critical" standard (Br. 23) from the law of executive privilege is inappropriate. The President has chosen not to try to invoke the privilege here. And it makes little sense to extend aspects of the doctrine of executive privilege to subpoenas seeking personal information from third parties outside the Executive Branch. In this very different context, none of the rationales that justify executive privilege—such as the need to protect candid advice to the President, the deliberative process, or "military, diplomatic, or sensitive national security secrets"—apply. *McGahn*, slip op. at 16 (Henderson, J., concurring). Nor has the Solicitor General tried to show otherwise, beyond raising purely theoretical concerns. Permitting the President to preclude disclosure here

would come vanishingly close to bestowing upon the President unwarranted absolute immunity from legislative process. *See, e.g.*, *id.* at 48-50 (Henderson, J., concurring) ("I believe McGahn's claimed immunity rests on somewhat shaky legal ground."); *id.* at 88 (Rogers, J., dissenting) ("[T]he analysis of *United States* v. *Nixon* . . . would appear to foreclose McGahn's [absolute immunity] argument on the merits.").

* * * * *

The President's and Solicitor General's requests that this Court invalidate third-party subpoenas regarding "purely personal conduct and papers," U.S. Br. 16, *see also* Pet. Br. 22, threaten to destabilize the system of checks and balances that are the foundation of the Nation's constitutional scheme. Those requests should be rejected—"not in derogation of the separation of powers, but to maintain their proper balance." *Nixon*, 457 U.S. at 754.

CONCLUSION

The judgments of the Courts of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX: LIST OF AMICI CURIAE

Chiraag Bains served as Senior Counsel to the Assistant Attorney General in the Civil Rights Division between 2014 and 2017.

Jonathan S. Feld served as Associate Deputy Attorney General between 1990 and 1992.

Stuart M. Gerson served as Assistant Attorney General between 1989 and 1993, and as Acting Attorney General in 1993.

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Neal Katyal served as Principal Deputy Solicitor General between 2009 and 2011, and as Acting Solicitor General between 2010 and 2011. He presently serves as the Paul and Patricia Saunders Professor at Georgetown University.

Karen A. Lash served as Acting Senior Counselor and Deputy Director for the Office for Access to Justice between 2010 and 2017, and as Executive Director of the White House Legal Aid Interagency Roundtable between 2015 and 2017.

Molly Moran served as Deputy Chief of Staff and Counselor to the Attorney General between 2010 and 2014, and as Acting Assistant Attorney General in the Civil Rights Division in 2014.

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