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.

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 OF FORMER HOUSE GENERAL COUNSELS AND FORMER CONGRESSIONAL STAFF AS *AMICI CURIAE* SUPPORTING RESPONDENT

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INTEREST OF AMICI CURIAE

Amici are former General Counsels of the U.S. House of Representatives who served during the past four decades under both Republican and Democratic Speakers of the House. They are joined by several former Committee staff members who likewise served under Members of Congress of both parties and had extensive experience with congressional oversight. A full listing of the *amici* is set forth in the Appendix.[1]

In their role as counsel to the U.S. House of Representatives and staffers to congressional committees, *amici* advised Members on their constitutional responsibilities and on the constitutional powers and protections designed to enable those Members to execute their responsibilities. Many *amici* advised Members on the House's institutional interests in connection with litigation over congressional subpoenas issued to executive-branch officials and private individuals and entities. Individually and collectively, the *amici* have substantial, practical experience with the scope of Congress's subpoena power—including in litigation surrounding congressional subpoenas—and the importance of that power to advancing legislative functions, including the development of legislation and oversight.

From their decades of collective experience, *amici* understand the need for expeditious resolution of any disputes regarding the validity of congressional subpoenas issued by committees of the House of Representatives.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief or filed letters of nonparticipation in this litigation.

Each House runs for a limited, two-year term; this leaves little time for the House to execute its legislative functions, including gathering and developing facts to be able to formulate, evaluate, and enact legislation or conduct oversight. *Amici* thus recognize that the House has a keen interest in ensuring that congressional subpoenas that advance a facially legitimate legislative function are not effectively nullified through obstructive, time-consuming litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' central argument concerns a series of purportedly "unprecedented" aspects of the congressional subpoenas at issue. The only thing that is unprecedented about these cases is the Petitioners' unprecedented success using judicial processes to delay and obstruct Congress's legitimate authority as the "Grand Inquest of the Nation." Raoul Berger, *Congressional Subpoenas to Executive Officials*, 75 Colum. L. Rev. 865, 872 (1975) ("The Founders … were aware that inquiries by the Grand Inquest of the Nation into executive conduct and files knew no bounds."). The power of the Grand Inquest to inquire is no less important than the judicial power to enforce the laws, particularly given its indispensable role in calling to account high government officials, to whom the laws' faithful execution is entrusted. *Id.*

As with many other aspects of our system of justice, prolonged delay in responding to a congressional subpoena is tantamount to denial because delay fundamentally frustrates the ability of Congress—and particularly the short-lived House—to execute its legislative functions. This Court's precedents squarely establish that challenges to legislative subpoenas should be expeditiously resolved by affording the House a high degree of deference when it is executing a legislative function. *See, e.g., Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 512 (1975). As *Eastland* held, given the two-year limit on

the House term, any challenge to a congressional subpoena should be reviewed and resolved not only expeditiously but under a highly deferential standard of review: namely, whether there is any facially legitimate legislative purpose (development of legislation, oversight, etc.) served by the subpoena.

Consistent with these precedents, the district courts here "worked quickly" and resolved these challenges in the House's favor. Pet. App. 10a; *see* J.A. 187a. But in the eight months' delay since those prompt decisions, these cases have continued to block the House from gathering the information it seeks, undermining an important check and upsetting the balance between the three branches of our constitutional system. The clock is ticking on the House's ability to meaningfully use information obtained from these subpoenas. Under *Eastland*, this Court should immediately order enforcement of the subpoenas during the Court's consideration of these cases; any further delay would cause grievous injury to the House's institutional prerogatives.

ARGUMENT

I. The Sole "Unprecedented" Aspect of This Case Is the Courts' Failure to Expeditiously Permit Congress to Enforce Lawful Subpoenas

For two centuries courts have deferred to Congress's judgments about its need for information to carry out its legislative functions, and recognized the necessity for expeditious enforcement of Congress's lawful demands. Consistent with the breadth of Congress's legislative powers under Article I Sections 7 and 8, and the constitutional immunization of legislative actions and motivations under the Speech or Debate clause, the principles of deference and expedition are integrally woven into the fabric of the Constitution's system of checks and balances. The powers of the United States Congress derive from the basic premise that to keep our republic a republic, Congress must possess "a right to every man's evidence," *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quotation marks omitted), and must be able to obtain such evidence without "protracted delay," *Eastland*, 421 U.S. at 511.

Congress's power to inquire carries with it the exclusive power to determine for itself what to investigate. "The very nature of the investigative function—like any research—is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises." *Eastland*, 421 U.S. at 509. Congress's members "must be left at liberty to exercise the powers, which the people by the Constitution ... have entrusted them. They must have a wide discretion, as to the choice of means. ... If the means are within the reach of the power, no other department can inquire into the policy or convenience of the use of them." Joseph Story, *Commentaries on the Constitution of the United States* § 432 at 330 (1905).

When Congress acts "within its prescribed borders" it should be "be free from interference." Learned Hand, *The Bill of Rights* 31 (1962). This is consistent with the

well-recognized principle that "Investigation will be paralyzed if arguments as to materiality or relevance … are to be transferred" to be resolved at the preliminary stage. *In re Edge Ho Holding Corp.*, 176 N.E. 537, 539 (N.Y. 1931) (Cardozo, J.). "[U]nless there be ... a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the [investigatory] authority is not subject to judicial interference." *Marshall v. Gordon*, 243 U.S. 521, 545 (1917).

That Congress must have the power to investigate, quickly and without judicial interference, is a truth as old as the Constitution. This Court has repeatedly emphasized these principles in recognition of the fact that the House of Representatives exists for two years at a time and "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." *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927). The very frequency of House elections makes it at all times the arm of the government closest to the People and most responsive to their will. "Such responsiveness is key to the very concept of self-governance through elected officials." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 227 (2014) (Roberts, C.J.).

The Founders' generation—who won our independence and framed our system of government—were aware of these facts about the House. They were "practical statesmen." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 555 (2012). "The [Constitutional] convention well knew that it was utterly vain and nugatory, to give to congress certain specific powers, without the means of enforcing those powers." *M'Culloch v. Maryland*, 17 U.S. 316, 356 (1819). Congress cannot execute its legislative functions without the power to expeditiously investigate. Failure to defer to Congress's conclusions about the scope of its legislative needs and to expeditiously enforce its

subpoenas would mean "the total annihilation of the power of the House of Representatives" to fulfill its role in our constitutional scheme. *Anderson v. Dunn*, 19 U.S. 204, 228-29 (1821).

A. Time is of the essence in congressional investigations.

In investigations by the House, time is of the essence. The House, "unlike the Senate, is not a continuing body." *Eastland*, 421 U.S. at 512; *see McGrain*, 273 U.S. at 181. The Constitution demands that the House stand for election every two years, meaning that the People's business—including the fact-gathering needed to formulate, evaluate, and enact legislation and inform oversight—must be completed before the two-year clock expires. Anyone who has had the remotest brush with the legislative process can appreciate the urgent need to complete fact gathering to permit sufficient time to actually formulate and then enact laws. *See Coal. for Responsible Regulation, Inc. v. EPA*, 2012 WL 6621785, at *22 (D.C. Cir. 2012) (Kavanaugh, J., dissenting from denial of rehearing en banc) (recognizing the "time and difficulty of enacting new legislation"). Like litigation, the wheels of legislation turn incredibly slowly. Legislation typically must be drafted, sponsored, introduced, considered by a committee, marked up, revised, scored, evaluated, amended, reported, and voted on several times. And that is just to pass one House. Then an identical bill has to pass the other House. Then the President has to sign it. Delay at the threshold—when facts must be gathered and evidence adduced—is often fatal to the entire endeavor.

Accordingly, every day's delay in the enforcement of Congress's subpoenas directly undercuts Congress's ability to carry out its constitutional responsibilities. Courts have long recognized this. *See Exxon Corp. v. FTC*, 589 F.2d 582, 588 (D.C. Cir. 1978) ("[E]nforced delay [of ten days] on the legitimate investigations of Congress …

could seriously impede the vital investigatory powers of Congress and would be of highly questionable constitutionality."); *id.* at 594 (noting "clear public interest in maximizing the effectiveness of the investigatory powers of Congress"); *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 133 n.40 (D.C. Cir. 1977) (noting, in context of congressional subpoena, "there is a plain duty on both the executive and judicial branches to advance any problems for prompt consideration"); *see also Eastland*, 421 U.S. at 511 (recognizing that "protracted delay" resulting from litigation frustrates congressional inquiries); *FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980) ("[T]he judiciary must refrain from slowing or otherwise interfering with the legitimate investigatory functions of Congress."); *FTC v. Anderson*, 631 F.2d 741, 747 (D.C. Cir. 1979) (same).

B. Appropriate deference to legislative powers requires expeditious resolution of objections to congressional subpoenas under a highly deferential standard of review.

This Court's recognition of the need for speed in congressional investigations, and its understanding that judicial interference undermines Congress's role in the separation of powers, is precisely why it decided *Eastland* as it did. *Eastland* should have been the end of this case, and the petitioners' suits should have been dismissed within a week.

In *Eastland*, challengers sought to prevent Congress from enforcing a subpoena against a bank that had the challengers' records in its possession. *Eastland*, 421 U.S. at 495-96. That is precisely the situation here. This Court, applying precedent dating back to the Founding era, held that courts have no power to prevent Congress from enforcing its lawful subpoenas. *Id.* at 496-501. The Court held that it could not prevent Congress from enforcing its lawful subpoena "by contempt of Congress or other

means," *id.* at 496, because the actions of the Senate and its members are "*immune* from judicial interference" under the capacious protections of the Speech or Debate Clause, *id.* at 501 (emphasis added). "It is impossible by any glossary, or argument, to make the words more perspicuous, more conclusive, than by a bare recital." *Ware v. Hylton*, 3 U.S. 199, 281 (1796) (Wilson, J.). *Eastland* squarely states that the Constitution "prevent[s]" the judiciary from "'questioning'" legislative purposes and "forbid[s] invocation of judicial power to challenge the wisdom of Congress' use of its investigative authority." 421 U.S. at 511; *accord United States v. Helstoski*, 442 U.S. 477, 491 (1979) (explaining that the Speech or Debate Clause aims "to preserve the constitutional structure of separate, coequal, and independent branches of government"). *Eastland* holds that "in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it," *id.* at 508, because "[i]n times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed," *id.* at 509.

This Court could not have been more emphatic in *Eastland* that courts are *forbidden* from balancing competing interests or weighing competing concerns when addressing a challenge to a lawful subpoena: "Where we are presented with an attempt to interfere with an ongoing activity by Congress, and that activity is found to be within the legitimate legislative sphere, balancing plays no part." "Collateral harm which may occur in the course of a legitimate legislative inquiry does not allow us to force the inquiry to 'grind to a halt.'" 421 U.S. at 509 n.16. As Courts repeatedly recognized following *Eastland*, courts must "refrain from interfering with or delaying the investigatory functions of Congress." *Exxon Corp.,* 589 F.2d at 588-89; *see Owens-Corning*, 626 F.2d at 970; *Anderson*, 631 F.2d at 747 (D.C. Cir. 1979). The appropriate final

result, under *Eastland*, was the prompt dismissal of these actions that the district courts delivered.

Eastland's holding—that courts should not interfere with the enforcement of congressional subpoenas—should have decided this case below and must decide it here. *Eastland* held that "once it is determined that Members are acting within the 'legitimate legislative sphere,'" there is "an absolute bar" to any challenge to a congressional subpoena. *Id.* at 503. Congress's investigations are "not open to judicial veto." *Id.* at 509. The district courts' expeditious rejection of petitioner's challenge, based on the finding that the subpoenas are well "within the legitimate legislative sphere," should have been the end of these cases. Reversal would signal that congressional subpoenas are ripe for judicial interference and would accordingly invite a torrent of frivolous challenges to stall such investigations, fundamentally interfering with Congress's core Article I functions and powers under the Constitution.

II. Every Feature of the Subpoenas at Issue Is Well-Rooted in Historical Practice

The "unprecedented" feature of this case (Pet. Br. 19) is petitioners' broad-based, unjustified attack on the House's power to issue these subpoenas and the courts' failure to expeditiously dismiss that attack as meritless. What is *not* unprecedented about this case is the subpoenas themselves, every aspect of which is supported by historical congressional practice, and many of which are supported by this Court's precedents. Petitioners' approach to historical practice here is not just factually wrong; if accepted, it would subject congressional investigations to freewheeling judicial scrutiny and would cast grave doubt on the enforceability of every congressional subpoena issued to a party with the means and inclination to litigate and delay.

A. Congress has a long, bipartisan history of issuing subpoenas for presidential records as part of its duties to investigate in support of its legislative functions.

1. That Congress has broad investigative powers is beyond debate. "[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *McGrain*, 273 U.S. at 174. The power "was so regarded and employed in American Legislatures before the Constitution was framed and ratified," *id.*, and before that by the English Parliament, *see May's Treatise On The Law, Privileges, Proceedings and Usage Of Parliament*, 141-42 (17th ed. 1964). The time-honored means for the legislature to employ that "essential … auxiliary" is a subpoena, enforceable through the contempt power. The House of Commons in 1742, for example, imprisoned the Solicitor of the Treasury for refusing "to answer the questions put to him by [a] committee." 12 *Cobbett's Parliamentary History of England* 626 (1812). In that tradition, Congress has long been understood to have the power to punish contempt by causing the Sergeant at Arms to seize the offender and jail him. *See McGrain*, 273 U.S. at 177.

Equally well-established is the principle that sitting presidents are not beyond the reach of subpoenas. Defending against charges of treason in the early 1800s, Aaron Burr viewed as critical to his defense private communications between General James Wilkinson and President Jefferson. *See* Louis Fisher, *Jefferson and the Burr Conspiracy: Executive Power Against the Law*, 45 Pres. Studs. Q., no. 1, pp. 158-59 (Mar. 2015). Chief Justice Marshall, who presided over the trial, issued a subpoena ordering Jefferson to produce the letter and other documents, and then wrote a now-famous opinion explaining why the subpoena was proper. *See United States v. Burr*,

25 F. Cas. 30, 34 (C.C.D. Va. 1807). And while Chief Justice Marshall recognized potential limits on the judicial subpoena power—for example, that the President could invoke privileges or could refuse compliance if "his duties as chief magistrate demand his whole time for national objects"—he expressly rejected the notion of any categorical bar to subpoenas against sitting presidents. *Id.* "The propriety of introducing any paper into a case, as testimony," Marshall explained, "must depend on the character of the paper, not on the character of the person who holds it." *Id.*

Jefferson "in public accepted the amenability of the presidency to judicial process and did all that he could to obey Marshall's subpoena," even though privately he was galled by the decision and espoused a "narrow vision of judicial review" over executive withholdings of information. John C. Yoo, *The First Claim: The Burr Trial, United States v. Nixon, and Presidential Power*, 83 Minn. L. Rev. 1435, 1453 (1999). Jefferson indeed produced portions of the letter to the court, and neither Jefferson nor the prosecutor representing his interests in Burr's trial "argued that the President was immune from judicial process." *Id.* at 1448.

2. Congress, too, has long understood its broad investigative powers to extend to sitting presidents—including specifically through subpoenas to a third party "who himself has custody of [the President's] documents," *Hearings Before Subcomm. on U.S. Gov't Info. Policies & Practices—The Pentagon Papers of the H. Comm. on Gov't Operations*, 92nd Cong., 1st Sess. pt. 2, at 385 (1971) (W. Rehnquist). The House as early as 1832, for example, granted a committee the power to investigate whether Secretary of War John Eaton had attempted to fraudulently award a contract. The authorized scope of that investigation included whether President Andrew Jackson "had any knowledge of such attempted fraud, and

whether he disapproved or approved of the same." H.R. Rep. No. 22-502, at 1 (1832). There is no indication in the historical record that Jackson questioned—let alone formally challenged—the scope of that congressional investigation, even though witnesses under subpoena produced private correspondence with the President. H.R. Rep. No. 22-502 at 4, 31-32, 64.

And as the House explains, this is merely the tip of the historical iceberg; for centuries the House has conducted oversight of the Executive Branch—and particularly of the President—in furtherance of its key Article I functions. *See* Resp. Br. 9-10 (chronicling additional examples from the Buchanan, Johnson, and Garfield administrations). Indeed, this Court's seminal case reaffirming the broad limits of Congress's investigative powers involved a probing inquiry into a corruption scandal that implicated officials at the highest levels of the Harding Administration. *See McGrain*, 273 U.S. at 175 (subpoena of Attorney General's brother); Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 Am. Crim. L. Rev. 213, 227 (1984) ("The Attorney General was President Harding's crony, the corrupt Harry M. Daugherty of Teapot Dome fame….").

Modern precedent bears out this understanding. The Senate Watergate Committee was given the power to investigate "illegal, improper, or unethical activities engaged in by *any* persons." S. Res. 60, 119 Cong. Rec. 3255, 93rd Cong. § 1(a) (1973) (emphasis added). Pursuant to that broad power, the Committee subpoenaed President Nixon's tapes of conversations with his attorney. The tapes included recordings of the President's private conversations unrelated to the execution of his presidential powers. *See Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 733 (D.C. Cir. 1974) (en banc). Nevertheless, Nixon did not challenge

the Senate's subpoena authority; he instead claimed executive privilege over the specific tapes requested. *Id.* at 727.

Just over a decade later, a House committee was given authority to investigate "the role of the President" as part of a broader inquiry into the Iran-Contra affair. H.R. Rep. No. 100-433, at 21 (1987). Although President Reagan resisted a *judicial* subpoena for his diaries during the criminal trial of former national security adviser John Poindexter, *see* David Johnston, *Reagan Asks Court to Kill Subpoena*, N.Y. Times (Dec. 7, 1989), https://nyti.ms/2Vex5fP, Reagan voluntarily provided *Congress* access to those diaries, and moreover supplied "some 250,000 White House documents … to investigators." Michael Wines, *President Apologizes for Iran-Contra Role*, L.A. Times (Aug. 13, 1987), https://lat.ms/2VqZNdN; *see also* Morton Rosenberg, CRS, *Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments* 14 (Aug. 21, 2008).

One historical precedent in particular forecloses petitioners' claim that Congress has never previously "subpoenaed private records of a sitting President." Pet. Br. 19. In the 1990s, the House and Senate Banking Committees began investigating President Clinton's and Hillary Clinton's involvement in the Whitewater Development Corporation while President Clinton was an Arkansas state official. The Senate in May 1995 established a special investigative committee to examine the Development as well as a host of other potentially "improper conduct" by Clinton Administration officials. S. Res. 120, 104th Cong. (1995). The Senate explained that the investigation would further its oversight function and would support its "recommendations for legislative … actions." *Id.* § 1(b)(5).

The Whitewater Committee issued a host of subpoenas to obtain access to a wide-ranging set of presidential

records no less "personal" than those sought here. The Committee subpoenaed, among other materials, White House phone records from the telephone company and the First Lady's attorney billing records from when she was in private practice; it also deposed bank officials about loans provided to the Clintons and obtained through those depositions the Clintons' personal financial statements. S. Rep. No. 104-280, at 11, 14-16, 46, 49-50, 155, 237 (1996); S. Hrg. No. 104-869, vol. XIII, at 2817-901.

Even so, the Administration did not challenge these inquiries as beyond Congress's constitutional powers. To be sure, the White House objected to one subpoena—that seeking notes taken by attorney William H. Kennedy, III detailing a meeting between the President and his personal lawyers—on grounds of attorney-client privilege and work-product doctrine. S. Rep. No. 104-280, at 9. But even with that challenge, the White House changed course and withdrew the assertion of privilege when faced with an impending civil suit. *See* S. Rep. No. 104-280 at 151. And Congress's power to issue other subpoenas evidently went unchallenged.

In short, there is nothing to petitioners' claim of unprecedentedness, let alone to its charge that the decision below "got the history wrong." Pet. Br. 24. Congress has investigated the President. It has issued subpoenas for both official records and, as here, personal records of the President; and it has indeed issued subpoenas for the personal records of a President to investigate purported financial wrongdoing. The subpoenas here are in fact less intrusive than many of the historical examples because they seek records from third parties who have not objected and because no privileges have been asserted. Accepting petitioners' arguments would thus break with precedent.

B. Presidents have generally complied with congressional subpoenas absent a particularized claim of privilege.

Nor can petitioners claim the *controversy* surrounding these subpoenas as "unprecedented." Presidents have usually acceded to congressional subpoenas; historically, presidential challenges to congressional subpoenas have been targeted to discrete claims of privilege over particular documents. The Nixon and Clinton administrations, for example, both refused to respond to certain committee subpoenas on grounds of attorney-client privilege (though the Clinton Administration ultimately withdrew that assertion in order to avoid litigation). *See* Susan Schmidt, *White House Rejects Subpoena*, Wash. Post (Dec. 13, 1995), https://wapo.st/38TFv0b; S. Rep. No. 104-204, at 16-17 (1996); *see also Senate Select Comm.*, 498 F.2d at 726-27.

Notably absent in this case are any such claims of privilege, or any effort to tailor those claims to particular items responsive to the subpoena. Petitioners instead assert broad, categorical legal arguments about the scope of Congress's investigative powers. Past presidents have not contested "the general power of congressional committees to subpoena sitting Presidents." Pet. App. 19a-20a. Indeed, anyone familiar with the historical practice knows of the "hundreds of instances since 1789 when a chief executive has willingly responded to requests for records in the custody of the Executive Branch." Stephen W. Stathis, *Executive Cooperation: Presidential Recognition of the Investigative Authority of Congress and the Courts*, 3 J. L. & Pol. 183, 188 (1986); *see also, e.g.*, 5 Annals of Cong. 400-01, 759-60 (1796) (President Washington recognizing that production of some papers "could be required of him by either House of Congress as a right").

Prior presidents' acceptance of Congress's general power to subpoena presidential records is a crucial, relevant feature of the historical "course of practice." *NLRB v. Noel Canning*, 574 U.S. 513, 525 (2014). This Court in its separation of powers cases looks not just to whether there is precedent for one branch's *assertion* of a claimed power, but also to how the other branches of government *responded* to those assertions. *See, e.g.*, *id.* at 529 (observing that, in impeaching President Johnson, Congress did not accuse him "of violating the Constitution by making intra-session recess appointments").

Thus, to the extent that historical practice informs this case, the practice is not just that Congress in the past has issued similar subpoenas targeting presidents and their records. *Supra* pp. 11-14. Historical practice is also that the President has accepted Congress's general power in this sphere and at most has invoked privilege to seek to shield certain information—and often has entirely acceded to Congress's demands. *Supra* pp. 12-14. "[A] court would be foolish to ignore" this "prior pattern of conflict" and "cooperation." Pet. App. 48a.

To be sure, many prior investigations involving sitting presidents have also prompted accusations—often fervent ones—that Congress was acting with partisan or otherwise improver motivation. During the Whitewater Committee's thirteen-month run, Democrats in Congress "claimed that the president and first lady had been victimized by a modern-day witch hunt," David Maraniss, *The Hearings End Much as They Began*, Wash. Post (June 19, 1996), https://wapo.st/32txugh. The White House specifically criticized the Committee's subpoenas as "a last-ditch attempt to generate headlines for [its] flagging hearings." Susan Schmidt, *Senate Whitewater Panel Votes 49 Subpoenas for White House, Others*, Wash. Post (Oct. 27, 1995), https://wapo.st/2vWyw87. The Clintons' attorney

described the committee's report as "the politically preordained verdict of a partisan kangaroo court," and accused the committee as having taken the "Alice in Wonderland" approach of "Sentence First, evidence afterwards." Stephen Labaton, *Mrs. Clinton Again Denies Knowledge of Law Files*, N.Y. Times (June 18, 1996). But they complied and cooperated.

Not surprisingly, many Presidents have chafed (publicly and privately) at receiving congressional subpoenas for their official and personal records. In this regard, they are like everyone else who has ever received or been the subject of a subpoena—no one likes it. But everyone, including Presidents, must respond because, as President Theodore Roosevelt said, "no man is above the law." *Third Annual Message to Congress* (Dec. 7, 1903). *See also* Politico, *Full Transcript: Donald Trump Speaks in Michigan* (Aug. 19, 2016), https://politi.co/38ltfo7 ("No one will be above the law in a Trump Administration.").

Petitioners' unhappiness about the subpoenas and their protests about Congress's purpose—including their insistence that respondents are seeking "exposure for the sake of exposure" (Pet. Br. 20)—are nothing new. What is new is their molding of those protests into a proposed categorical rule that would obstruct Congress's investigative and lawmaking functions to the extreme detriment of the Nation.

C. Congress has long lawfully delegated Congress's power to issue subpoenas to committees under the Rules of the House.

Petitioners cannot evade these historical precedents by inventing a novel standard for judicial review of the House's delegated subpoena authority. Under petitioners' proposed rule—which is carefully engineered to the facts of this case, but unrooted in the Constitution or any

applicable precedent—the House's prerogative to delegate broad subpoena authority to its committees applies *unless* the legislative investigation involves "a sitting President's personal records" (Pet. Br. 55), in which case the full House must involve itself in the issuance of specific subpoenas.

Not surprisingly, petitioners do not and cannot cite anything in the Constitution to support such a rule. Rather, the Constitution vests Congress with the broad, inherent power to conduct investigations in support of its constitutional responsibility to make the laws. *See Eastland*, 421 U.S. at 504. The Constitution's Rulemaking Clause further authorizes each House to "determine the Rules of its Proceedings." *Id.*, Art. I, § 5. The House of the 116th Congress exercised this authority by adopting the relevant House Rules shortly after it was convened in January 2019. *See* H. Res. 6, 116th Cong. (2019).

The House has long organized itself by committee, including in the context of legislative investigations and subpoena issuance. *See Eastland*, 421 U.S. at 505 ("It also has been held that the subpoena power may be exercised by a committee acting, as here, on behalf of one of the Houses."). Such investigative power is critical to the committee's ability to carry out its designated lawmaking functions. Indeed, "[w]ithout such power the Subcommittee may not be able to do the task assigned to it by Congress." *Id.*

Petitioners' proposed rule not only lacks any basis in the law, but it would vastly and impermissibly constrict the committees' role in investigations the House has properly delegated under its Rules. It would also needlessly and impermissibly involve the courts in determinations as to the internal affairs of Congress and how it has organized itself. Such inquiries are invasive and inconsistent with this Court's precedents concerning the appro-

priate level of deference to congressional activities described above. *See also McGrain*, 273 U.S. at 178 ("We are bound to presume that the action of the legislative body was with a legitimate object, if it is capable of being so construed, and we have no right to assume that the contrary was intended." (quoting *People v. Keeler*, 99 N.Y. 463, 487 (1885)); *Keeler*, 99 N.Y. at 487 ("The same principle which renders it the duty of the courts to hold legislative action illegal when it unduly encroaches upon the province of the judiciary, forbids interference by the latter with the action of legislative bodies, or the exercise of their discretion in matters within the range of their constitutional powers.").

There is no dispute that the House of the 116th Congress delegated authority to its committees under validly enacted House Rules. Nor is there a dispute regarding the nature of the delegated authority, which "authorize[s] the Committees to issue subpoenas in aid of their respective legislative functions." Pet. Br. 56. In particular:

- The House Rules establish the relevant standing and select committees: the Financial Services Committee, the Committee on Oversight and Reform, and the Permanent Select Committee on Intelligence. *See* H. Rules X(1)(h), X(1)(n), X(11).
- House Rule X vests these committees with jurisdiction in the applicable legislative areas. *See* H. Rules X(2)(a), X(2)(b)(1) (general oversight); X(1)(n), X(3)(i), X(4)(c) (Committee on Oversight and Reform); X(1)(h) (Financial Services Committee); X(3)(m), X(11)(b), X(11)(j) (Permanent Select Committee on Intelligence).
- In addition, House Rule X delegates to all of the standing committees "general oversight responsibilities . . . to assist the House in its analysis, appraisal, and evaluation of (A) the application, ad-

ministration, execution, and effectiveness of Federal laws; and (B) conditions and circumstances that may indicate the necessity or desirability of enacting new or additional legislation." H. Rule X(2)(a)(1).

- Rule XI(1)(b)(1) permits "[e]ach committee [to] conduct at any time such investigations and studies as it considers necessary or appropriate in the exercise of its responsibilities under rule X."
- And Rule XI(2)(m)(1)(B) authorizes the committees "to require, by subpoena or otherwise, . . . the production of such books, records, correspondence, memoranda, papers, and documents as [they] consider[] necessary" "[f]or the purpose of carrying out any of [their] functions and duties under . . . rule X."

The above provisions are substantially similar to the provisions used in previous congresses for the House of Representatives to delegate authority to its committees. These are clear authorizing provisions which speak for themselves. Nowhere do the Rules exclude records that pertain to a sitting president (or any other executive-branch official) from the reach of an otherwise valid legislative subpoena. Likewise, the Rules do not establish any special requirements for the issuance of subpoenas based on the identities of the persons who fall within their scope—whether recipients, custodians, or others whose interests may be affected by compliance. To the knowledge of *amici*, Congress has never required such measures or limited itself in such a manner.

Petitioners' attempt to import the "clear statement" rule from an inapposite context falls flat. As petitioners concede, that rule was crafted to address statutes that significantly alter the federal-state balance (Pet. Br. 57), not committee subpoenas issued in line with historical prac-

tice. Even if the rule extends to "statutes that significantly alter the balance between *Congress and the President*," Pet. Br. 57 (emphasis added), it would not reach the circumstances here.

Quite the contrary. The historical precedents reflect not only that Congress has sought a sitting president's records in the past—including over the president's objection and in circumstances that prompted accusations of partisanship—but has done so via broad delegations of authority to its committees. The Senate Watergate Committee, for example, was authorized to investigate "illegal, improper, or unethical activities engaged in by *any* persons." S. Res. 60, 119 Cong. Rec. 3255, 93rd Cong. § 1(a) (1973) (emphasis added). Relying on that broad authority, the Committee subpoenaed President Nixon's tapes of conversations with his attorney. Nixon claimed executive privilege over specific tapes, but he did not challenge the committee's delegated subpoena authority. *See Senate Select Comm.*, 498 F.2d at 727 (en banc). Petitioners' purported interest is even weaker here, where the sitting president has sued in his individual capacity to prohibit a third party from producing responsive records.

Finally, because petitioners concede that "[t]he House Rules are the 'charter' for the Committees" and that Resolution 507 does not purport to enlarge the committees' jurisdiction or amend the House Rules (Pet. Br. 62), it is not necessary for this Court to consider petitioners' arguments regarding ratification and timing. As the House Rules and historical practice confirm, the committees possessed the requisite authority when they issued the subpoenas. In Resolution 507, the full House simply confirmed this fact.

D. If endorsed, petitioners' approach could grind legitimate legislative investigations to a halt.

More broadly, *amici* are deeply troubled by petitioners' use of the courts to delay compliance with these subpoenas. Again, when it comes to Congress's investigative powers, time is of the essence. *Supra* pp. 6-7. And yet petitioners here have harnessed a variety of mechanisms of judicial review, including appellate review, stays, and a petition for certiorari in this Court, to deflect the subpoenaed parties' obligation to respond for nearly a year. The upshot is that less than ten months remain for the current Congress to secure compliance with the subpoenas, gather the necessary facts, draft and debate any legislation, and vote on proposed laws—*despite the fact that petitioners have yet to prevail in any court.*

Petitioners' critical threshold question is whether the subpoenas fall too close to "the outer limits of Congress's authority" (Pet. Br. 24), or fit within a category of investigation that Congress has heretofore "avoid[ed]" (Pet. Br. 31). But those are not the proper questions under *Eastland*, and the House cannot efficiently gather the facts needed to legislate and exercise effective oversight if its subpoenas are to be mired in multiple layers of time-consuming judicial review applying petitioners' proposed hazy and fact-intensive standards. *Supra* pp. 7-9. The deference mandated by *Eastland* is necessary to avoid treading on Congress's core constitutional prerogatives. Indeed, as this case demonstrates, even a congressional investigation with manifest historical precedent can generate sharp disagreement (and lengthy opinions) over just how close a given subpoena gets to history's "limits." *Compare* Pet. App. 12a-20a, *with* Pet. App. 99a-119a, *and* J.A. 338a-340a. Lengthy judicial review may frustrate Congress's ability to act even if the courts ultimately rule in its favor.

This Court has repeatedly recognized that the use of amorphous, searching standards to scrutinize congressional subpoena is antithetical to Congress's vigorous exercise of its legislative and oversight powers. That is why the standard is simply whether Congress's subpoena has a facially legitimate legislative purpose and whether the subpoena is pertinent to that purpose. Pet. App. 58a-59a. A faithful application of those standards here resolves this case; a failure to apply them will create a template for targets of legitimate congressional investigations to run out the clock. *Supra* pp. 6-9.

CONCLUSION

The decisions below should be affirmed. Moreover, this Court should immediately order enforcement of the subpoenas during the Court's consideration.

Respectfully submitted,

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