***EN BANC* ORAL ARGUMENT SCHEDULED FOR FEBRUARY 23, 2021**
**AND *EN BANC* ORAL ARGUMENT PREVIOUSLY HELD APRIL 28, 2020**

**No. 19-5331**

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**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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COMMITTEE ON THE JUDICIARY OF THE UNITED STATES
HOUSE OF REPRESENTATIVES,

Plaintiff-Appellee

v.

DONALD F. MCGAHN, II,

Defendant-Appellant

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On Appeal from the United States District Court
for the District of Columbia (Judge Ketanji Brown Jackson)

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# BRIEF OF *AMICI CURIAE* THE LUGAR CENTER AND THE LEVIN CENTER AT WAYNE LAW SUPPORTING APPELLEE

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December 21, 2020

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

### LIST OF PARTIES AND AMICUS CURIAE

Except for *amici* The Lugar Center and The Levin Center at Wayne Law and any other *amici* who had not yet entered an appearance in this case as of the filing of Brief for Appellant, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the parties' briefs.

### RULINGS UNDER REVIEW

Reference to the ruling under review appears in the Brief for Appellant.

### RELATED CASES

Reference to any related cases pending before this Court appears in the Brief for Appellant.

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are centers established by former United States senators—one Republican, one Democratic—devoted to advancing bipartisan governance and oversight.

*The Lugar Center* was founded by former Senator Richard Lugar, six-term Indiana Republican who chaired the Senate Committee on Foreign Relations and the Committee on Agriculture, Nutrition, and Forestry. The center's mission is to foster informed debate, enhance bipartisan governance, and bridge ideological divides on important issues.

*The Levin Center at Wayne Law* was founded and is presently chaired by former Senator Carl Levin, six-term Michigan Democrat who chaired the Senate Armed Services Committee and the Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs. The center's

[1] *Amici curiae* certify that all parties received timely notice of their intent to file this brief, and that all parties have consented to the filing of this brief. Additionally, in accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), a*mici curiae* state that their counsel authored this brief in whole; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person—other than *amici curiae*, their members or their counsel—contributed money that was intended to fund preparing or submitting the brief.

primary mission is to strengthen bipartisan, fact-based oversight, particularly in Congress.[2]

The two centers collaborate to foster high-quality oversight, including through bipartisan training programs for House and Senate investigators. Their combined interest in this case is (1) preserving the ability of Congress to conduct informed, fact-based oversight of the executive branch; and (2) defending the Framers' system of checks and balances.

## ARGUMENT

### I. THIS CASE ARISES IN THE CONTEXT OF THE TRUMP ADMINISTRATION'S SUSTAINED ASSAULT ON THE RIGHT OF CONGRESS TO CONDUCT OVERSIGHT.

For nearly four years, the Trump Administration has disputed the right of Congress to conduct oversight of the Executive Branch, initiating a sustained effort to limit the ability of congressional committees to subpoena Executive Branch documents, obtain testimony from Executive Branch personnel, and require Executive Branch reports to be disclosed to either Congress or the public. A few examples follow.

**Fighting All the Subpoenas**. In April 2019, President Trump announced to the media, "We're fighting all the subpoenas," indicating that his Administration

[2] The Levin Center is affiliated with Wayne State University Law School, but this brief does not present the institutional views, if any, of either the university or the law school.

would no longer comply with any subpoena issued by the House of Representatives. *See, e.g.*, Brett Samuels, *Trump says he'll fight 'all the subpoenas*, *The Hill* (Apr. 24, 2019), https://thehill.com/homenews/administration/440409-trump-says-hell-fight-all-the-subpoenas.

**Third-Party Document Subpoenas**. In two cases that it elevated to the Supreme Court, the Trump Administration disputed the right of Congress to subpoena third parties for financial records related to the President. The Supreme Court reaffirmed the right of Congress to compel production of documents related to the President, created a new standard of review, and remanded the cases to the courts of appeal for further proceedings. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020).

**Grand Jury Materials**. In another case pending before the Supreme Court, the Administration disputes the right of Congress to obtain a court order providing access to grand jury materials from an investigation conducted by Special Counsel Robert Mueller. *In re Application of the Comm. on the Judiciary, U.S. House of Rep., for an Order Authorizing the Release of Certain Grand Jury Materials*, Case No. 19-5288 (D.C. Cir. 2019).

**Agency Testimony**. The Trump Administration has also opposed congressional actions to obtain testimony from Executive Branch personnel at

public hearings. In one recent example, the Department of Justice ("DOJ") informed the House Judiciary Committee that three senior DOJ officials, Assistant Attorney General (Civil Rights) Eric Dreiband, Bureau of Prisons Director Michael Carvajal, and U.S. Marshals Service Director Donald Washington, would not appear at an October 1, 2020 oversight hearing, because the Committee had—according to the letter—"squandered its opportunity to conduct a meaningful oversight hearing with the Attorney General" in September. Letter from Stephen Boyd, Assist. Att'y Gen. (Legislative Affairs), Dep't of Justice, to Jerrold Nadler, House Jud. Comm. Chair, U.S. House of Rep. (Sept. 21, 2020), https://int.nyt.com/data/documenttools/doj-letter/ceaede3b0830c34b/full.pdf.

Three days later, the Administration defied a testimonial subpoena issued by the House Foreign Affairs Committee. *See, e.g.*, Karoun Demirjian, *Head of government media agency flouts subpoena, angering Democrats and Republicans*, The Washington Post (Sept. 24, 2020 1:15 PM), https://www.washingtonpost.com/national-security/head-of-government-media-agency-flouts-subpoena-angering-democrats-and-republicans/2020/09/24/d5aa8296-fe76-11ea-b555-4d71a9254f4b_story.html (reporting that, after breaking a commitment to appear voluntarily before the committee, Michael Pack, head of the U.S. Agency for Global Media, an

independent federal agency that supervises Voice of America and other broadcast institutions, refused to comply with a committee subpoena).

**Tax Records**. In a case pending in this Circuit, the Trump Administration opposes the right of the House Committee on Ways and Means to obtain copies of the President's tax returns, despite an explicit statutory requirement for Treasury to produce tax returns to that committee upon request. *Comm. on Ways and Means, U.S. House of Rep. v. U.S. Dep't of the Treasury*, Case No. 19-cv-01974-TNM (D.D.C. 2019); *see also* Steven A. Engel, *Congressional Committee's Request for the President's Tax Returns Under 26 U.S.C. § 6103(f)*, U.S. Dep't of Justice Office of Legal Counsel (June 13, 2019), https://www.justice.gov/olc/file/1173756/download ((justifying Treasury's refusal to produce the tax returns).

**Agency Report**. In yet another case pending in this Circuit, the Trump Administration opposes the right of Congress to compel a federal agency to make a report on automobile tariffs available to the public, despite an explicit statutory requirement to do so. Amicus Brief, *Cause of Action Inst. v. Commerce Dep't*, No. 19-CA-778 (CJN) (D.D.C. Mar. 6, 2020), ECF No. 37; *see also* Steven A. Engel, *Publication of a Report to the President on the Effect of Automobile and Automobile-Part Imports on the National Security*, U.S. Dep't of Justice Office of Legal Counsel (Jan. 17, 2020),

https://www.justice.gov/olc/opinion/file/1236426/download (justifying the Commerce Department's refusal to publish the report).

In the instant case, the Trump Administration seeks court validation of one of its most extreme positions—as set forth by the U.S. Department of Justice Office of Legal Counsel—that a former White House counsel is absolutely immune from congressional subpoena. Steven A. Engel, *Testimonial Immunity Before Congress of the Former Counsel to the President*, U.S. Dep't of Justice Office of Legal Counsel (May 20, 2019), https://www.justice.gov/sites/default/files/opinions/attachments/2019/11/04/2019-05-20-test-immun-fmr-whc-2_1.pdf. The Administration asserts the same doctrine of absolute immunity for all current and former senior advisors to the President. *See, e.g.*, Steven A. Engel, *Testimonial Immunity Before Congress of the Assistant to the President and Senior Counselor to the President*, Dep't of Justice Office of Legal Counsel (July 12, 2019), https://www.justice.gov/olc/file/1183271/download (asserting that Kellyanne Conway, Assistant and Senior Counselor to the President, is immune to a testimonial subpoena issued by the House Committee on Oversight and Reform related to compliance with the Hatch Act).

Resolution of the issues in this case should be evaluated in this larger context of an extreme policy of disregard, since this case will help set a key

parameter for ongoing congressional oversight of the Executive Branch and the system of checks and balances envisioned in the Constitution.

## II. THE RIGHT OF CONGRESS TO CONDUCT OVERSIGHT AND COMPEL INFORMATION FROM THE EXECUTIVE BRANCH IS SETTLED LAW.

The Supreme Court recently reaffirmed, over objections from the Trump Administration, that Congress has a constitutional duty to conduct oversight and serve as a check on the Executive Branch, and it may compel information to carry out those duties. In *Mazars*, the Supreme Court cited with approval the following from the *Rumely* case:

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served. *United States v. Rumely*, 345 U.S. 41, 43 (1953).

140 S. Ct. at 2033. The Supreme Court also cited the following passages:

> Without information, Congress would be shooting in the dark, unable to legislate "wisely or effectively." [*McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)]. The congressional power to obtain information is "broad" and "indispensable." *Watkins v. United States*, 354 U.S. 178, 187, 215 (1957). It encompasses inquiries into the administration of existing laws, studies of proposed laws, and "surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them." *Id*., at 187.

*Id.* at 2031.

*Mazars* aligns with nearly 100 years of precedent establishing Congress' right to conduct oversight and compel information. *See, e.g., Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975); *McPhaul v. United States*, 364 U.S. 372 (1960); *Quinn v. United States*, 349 U.S. 155, 160–61 (1955) ("Without the power to investigate—including, of course, the authority to compel testimony . . . Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively."); *McGrain*, 273 U.S. at 174 ("We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.").

This Circuit has been equally decisive in affirming the right of Congress to exercise oversight and compel information. *See, e.g., In re Application of the U.S. Senate Permanent Subcomm. on Investigations (Cammisano)*, 655 F.2d 1232 (D.C. Cir. 1981) (affirming the Senate's use of civil contempt sanctions to obtain subpoenaed information); *Exxon Corp. v. FTC*, 589 F.2d 582 (D.C. Cir. 1978) (sustaining a Senate subpoena seeking documents containing trade secrets); *United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977) (directing the Department of Justice and House to engage in negotiations to resolve a dispute over documents subject to a House subpoena); *Townsend v. United States*, 95 F.2d 352 (D.C. Cir. 1938) (affirming the House's use of criminal contempt sanctions to obtain subpoenaed information); *Bean LLC v. John Doe Bank*, 291 F. Supp. 3d 34 (D.D.C. 2018)

(sustaining a Senate subpoena of bank records related to an investigation into Russian interference with the 2016 elections); *Comm. on Judiciary, U.S. House of Rep. v. Miers*, 558 F. Supp. 2d 53, 56 (D.D.C. 2008) (rejecting a claim that some Executive Branch officials are absolutely immune to congressional subpoenas); *Senate Select Comm. on Ethics v. Packwood*, 845 F. Supp. 17 (D.D.C. 1994) (sustaining a Senate subpoena of a Senator's personal records).

Despite those precedents, for more than a year the Trump Administration has used the *McGahn* case not only to assert that presidential senior advisers are absolutely immune to subpoenas issued by Congress, but also to impede Congress's ability to obtain a judicial decision on the scope of its subpoena authority, thereby slowing congressional inquiry into its actions to a glacial pace. This second round of *en banc* review is an opportunity to reaffirm the system of interbranch checks and balances envisioned by the Constitution and eliminate one extreme tactic that the Trump Administration has been using to impede congressional oversight.

## III. CONGRESS HAS A VIABLE CAUSE OF ACTION UNDER BOTH THE CONSTITUTION AND DECLARATORY JUDGMENT ACT.

The Supreme Court's *Mazars* opinion and this Circuit's *en banc McGahn* opinion provide a solid legal foundation for finding that Congress has not only standing, but also a viable cause of action to enforce its subpoenas, either under the

federal courts' equitable authority to remedy unconstitutional conduct or under the Declaratory Judgment Act.

Article III of the Constitution states in relevant part that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made." U.S. Const. art. III, § 2. Congress codified that provision, in part, at 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). Together, those two provisions supply both subject matter jurisdiction and a viable cause of action to enforce a congressional subpoena against a defiant party, since Congress' subpoena authority arises directly from its Article I powers under the Constitution. *See Mazars,* 140 S. Ct. at 2026 ("We have held that the House has authority under the Constitution to issue subpoenas to assist it in carrying out its legislative responsibilities."); *see also United States v. AT&T*, 551 F.2d 384, 389 (D.C. Cir. 1976); *McGrain v. Daugherty*, 273 U.S. 135 (1927).

The Supreme Court has permitted courts to apply equitable remedies to cure constitutional injuries, including in cases involving interbranch disputes. *See, e.g., Mazars*, 140 S. Ct. at 2026, 2031–32, (reaffirming the authority of courts to provide equity-based enforcement remedies when the President seeks to bar congressional subpoenas for information related to the President, causing thereby a

constitutional injury to Congress); *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010) (providing equitable relief to the Executive Branch in a lawsuit challenging congressional limitations on the President's removal authority); *see also AT&T*, 551 F.2d at 389 (exercising the court's equitable authority to require additional negotiations to resolve an interbranch subpoena dispute); *Miers*, 558 F. Supp. 2d at 94 (finding an implied cause of action under the Constitution to enforce a congressional subpoena). These precedents make clear that a federal cause of action exists to remedy constitutional injuries committed against Congress in the same manner that federal courts have, for decades, remedied violations of other constitutional rights.

In addition, courts have determined that the Declaratory Judgment Act ("DJA") entitles parties to obtain a declaration of their legal rights in suits alleging injury to rights derived from the Constitution. The DJA empowers a federal court to declare the "rights" and "legal relations" between litigants provided that the matter presents "a case of actual controversy within its jurisdiction." 28 U.S.C. § 2201(a). This Court has already determined *en banc* that this case presents a "genuine case or controversy" within the jurisdiction of the district court. *Comm. on Judiciary, U.S. House of Rep. v. McGahn*, 968 F.3d 755, 778 (D.C. Cir. 2020). That *en banc* ruling logically supports finding that the House may proceed in this matter under the DJA. *See Skelly Oil Co. v. Phillips Petrol. Co.,* 339 U.S. 667, 671

(1950) (requiring a finding that a suit "'arises under the Constitution, laws or treaties of the United States,' 28 U.S.C. § 1331" in order to "give declaratory relief under the Declaratory Judgment Act"); *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 22–25 (D.D.C. 2013) (finding that the House may proceed under the DJA when seeking to enforce its constitutional right to subpoena the Executive Branch); *Miers*, 558 F. Supp. 2d at 82–88 (finding that the House may proceed under the DJA when seeking to enforce a subpoena against the Executive Branch).

Since the complaint here seeks adjudication of interbranch rights arising under the Constitution, it aligns with the Supreme Court and D.C. Circuit cases establishing the right to proceed under the DJA.

## IV. SECTION 1365 DOES NOT LIMIT THE COURT'S EQUITY OR DECLARATORY AUTHORITY.

28 U.S.C. § 1365, a statute which offers the Senate one option to seek civil enforcement of its subpoenas in this Circuit, does not limit the ability of the House to seek court enforcement of a House subpoena directed to the Executive Branch.

First, the statute, on its face, does not address or limit any House subpoena. Nothing in the plain terms of the statute restricts or repeals any cause of action available to enforce a subpoena from either house of Congress under the Constitution, the Declaratory Judgment Act, or other statute.

The statute's legislative history demonstrates that the Senate never intended, by enacting § 1365, to restrict the House's subpoena authority. Instead, the new statute was intended to expand the authority of the Senate to file suit. As Judge Rogers pointed out in her dissent in this Court's second panel decision in this matter:

> When Congress enacted § 1365 in 1978, § 1331 contained an amount-in-controversy requirement . . . . The Senate had good reason to believe that this requirement would be an obstacle to subpoena-enforcement lawsuits because the district court in *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51 (D.D.C. 1973), had originally dismissed the Senate's lawsuit for failure to meet the requirement, *see id*. at 59–61. Congress addressed this problem in 1978 with the enactment of § 1365, which granted federal courts subject matter jurisdiction over Senate subpoena-enforcement actions without regard to the amount in controversy. The Senate Committee on Governmental Affairs explicitly disclaimed the inference that McGahn now seeks to draw, stating in its report on § 1365 that the provision "is not intended to be a Congressional finding that the Federal courts do not now have the authority to hear a civil action to enforce a subp[o]ena against an officer or employee of the Federal Government." S. REP. NO. 95-170, at 91–92 (1978).

*Comm. on Judiciary, U.S. House of Rep. v. McGahn*, 973 F.3d 121, 130 (D.C. Cir. 2020) (Rogers, J., dissenting); *Miers*, 558 F. Supp. 2d at 86–87 (citing the same 1978 Senate report language as evidence of no legislative intent to use § 1365 to circumscribe the subpoena authority of the House).

Complementing the legislative history from § 1365's enactment in 1978 is the legislative history from the statute's amendment in 1996. The 1996 law amending § 1365 was called the False Statements Accountability Act because its

primary purpose was to clarify a statute prohibiting false statements to Congress. Pub. L. No. 104–292, 110 Stat. 3459 (1996). The 1996 law also amended § 1365 by clarifying the scope of an exemption from judicial civil enforcement for Senate subpoenas involving official actions of executive branch officials, narrowing that exception to officials asserting a "governmental privilege." *Id.*

The panel's majority opinion erroneously maintains that statements made in 1996 by Senator Arlen Specter and Senator Carl Levin, who cosponsored the amendment and acknowledged the Executive Branch exception, established congressional support for excluding all civil interbranch subpoenas from court. But as explained in the Lugar Center/Levin Center *amicus* brief filed in the first *en banc* proceeding, Senator Levin believed in 1996 (and now) that the statutory exception in § 1365 was tolerable, because § 1365 was not the exclusive pathway for the Senate to access the courts. Long-standing precedents had made clear that the judiciary could resolve interbranch disputes over congressional subpoenas. *See, e.g., McGrain*, 273 U.S. 135 (1927) (allowing a Senate appeal of a habeas corpus writ blocking enforcement of a Senate subpoena seeking information about an Executive Branch agency); *AT&T*, 551 F.2d at 389 (allowing an Executive Branch lawsuit under § 1331 seeking to block a House subpoena to obtain Justice Department documents from AT&T); *Ashland Oil, Inc. v. FTC*, 548 F.2d 977 (D.C. Cir. 1976) (per curiam) (dismissing a lawsuit seeking to bar the House from

obtaining a report filed with the Federal Trade Commission); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (accepting a Senate suit requesting enforcement of a Senate subpoena for the Nixon tapes, though ultimately ruling against the request on the merits). All of those cases had been decided decades before the 1996 amendment. In addition, Senator Levin was well aware that, since 1978, the House had never applied § 1365 to itself nor supported the Executive Branch exception in the Senate provision, as demonstrated by the House-passed bill, H.R. 3166 (104th Cong. 2d Sess.), which was the House's precursor to the final 1996 legislation and which conspicuously omitted any mention of § 1365.

Contrary to the majority opinion's reading of § 1365, this lawsuit and this brief make plain that both the House and Senator Levin continue to assert that civil adjudication is available via multiple options to enforce congressional subpoenas directed to the Executive Branch.

## V. LIMITS ON A CAUSE OF ACTION UNDER ONE STATUTE DO NOT BAR FINDING A CAUSE OF ACTION UNDER ANOTHER STATUTE OR IN EQUITY.

Judge Rogers dissent also notes that "the Supreme Court has cautioned against the implied repeal argument that McGahn advances." *McGahn*, 973 F.3d 121, 131 (D.C. Cir. 2020) (Rogers, J., dissenting). Judge Rogers wrote: "Because '[r]edundancies across statutes are not unusual events in drafting, . . . so long as

there is no 'positive repugnancy' between two laws, a court must give effect to both.' *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (quoting *Wood v. United States*, 41 U.S. (16 Pet.) 342, 363 (1842))." *Id.*

The Supreme Court has handled such redundancies by routinely analyzing multiple options for finding a cause of action and ruling that limitations imposed by one statute do not preclude finding a cause of action under another statute or in equity. In *Free Enterprise Fund*, for example, the Supreme Court ruled that a private party stated a viable cause of action under the Constitution even though that same party had failed to state a cause of action under a statute, § 78y of the Sarbanes-Oxley Act establishing procedures for challenging actions taken by the Public Company Accounting Oversight Board. The Supreme Court wrote: "[t]he Government reads § 78y as an exclusive route to review. But the text does not expressly limit the jurisdiction that other statutes confer on district courts. *See, e.g.,* 28 U. S. C. §§ 1331, 2201." *Free Enter. Fund*, 561 U.S. at 489; *see also Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 383 (2012) (finding a cause of action in federal court under § 1331, despite a federal statute, the Telephone Consumer Protection Act, authorizing causes of action in state court); *Webster v. Doe*, 486 U.S. 592, 603 (1988) (finding a cause of action under the Administrative Procedure Act to contest unconstitutional conduct, even though no cause of action existed under a more specific statute, § 102(c) of the National Security Act,

because "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear"); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (finding that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress"); *Rusk v. Cort,* 369 U.S. 367, 379–80 (1962) (finding a statutory provision establishing a specific procedure for challenging a denial of U.S. citizenship did not preclude a viable cause of action under the Declaratory Judgment Act or Administrative Procedure Act).

The only other ruling on an Executive Branch claim of absolute immunity from congressional subpoenas, outside of the instant case, found that the existence of a statute, § 288d, enabling the Senate legal counsel to bring a civil suit to enforce a Senate subpoena, did not bar even the Senate from also stating a cause of action under the DJA. *Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008). The court wrote:

> Section 288d can simply be viewed as a more specific application of the general relief made available by the DJA. Moreover, the use of the term "enforce" suggests that § 288d(a) may authorize coercive relief beyond the declaratory measures provided by the DJA. Additionally, 28 U.S.C. § 1365 provides jurisdiction for actions that also likely fall within the scope of 28 U.S.C. § 1331—hence, the Senate can likely proceed on either basis where appropriate. Thus, to the extent that they overlap, the possible presence of redundancy between § 288d and the DJA does not imply that the latter cannot be used by the Committee here.

*Id.* at 86–87.

Congress has always had multiple avenues into court to adjudicate disputes over its right to compel information, including through a criminal contempt statute (2 U.S.C. § 192), two civil contempt statutes (2 U.S.C. §§ 288b(b) and 288d(a)), a civil enforcement statute (28 U.S.C. § 1365), criminal prohibitions on false statements, perjury, and obstruction (18 U.S.C. §§ 1001, 1505, and 1621), the DJA (28 U.S. Code § 2201), and equitable relief under the Constitution (28 U.S.C. § 1331). It is contrary to precedent to interpret enactment of a new cause of action or amendment of an existing cause of action as barring Congress' use of another, independent cause of action under such statutes as 28 U.S.C. § 1331 and § 2201(a), absent a clear expression of congressional intent to bar use of those alternatives.

## VI. THE COURT SHOULD USE THIS *EN BANC* OPPORTUNITY TO MAKE CLEAR THAT SENIOR PRESIDENTIAL ADVISORS ARE NOT ABSOLUTELY IMMUNE TO CONGRESSIONAL SUBPOENAS.

No federal court has ever held that an executive branch official is absolutely immune to a congressional subpoena. To the contrary, the one lower court, other than the district court in this case, to rule squarely on the issue held in a detailed, persuasive opinion, that no such absolute immunity exists. *Miers*, 558 F. Supp. 2d at 99–108. The Trump Administration has resolutely ignored that precedent for the entirety of its time in office and continues to assert that absolute immunity protects both former and sitting senior presidential advisors from all testimonial subpoenas issued by Congress.

Earlier this year, the Supreme Court paved the way for a ruling on the merits of this case by rejecting President Trump's claim that, while in office, he was absolutely immune to subpoena. *Trump v. Vance*¸ 140 S. Ct. 2412 (2020) (holding President Trump could not bar a grand jury subpoena issued by a local prosecutor to third parties to obtain his financial and tax records); *Mazars*, 140 S. Ct. at 2026 (holding President Trump could not block congressional subpoenas to third parties to obtain his financial and tax records). Rejecting the doctrine of absolute immunity for the President is a compelling precedent for rejecting the same doctrine when applied to presidential advisors.

The instant case, in its *en banc* posture, provides an appropriate setting to put to rest the Executive Branch's longstanding and ongoing claim that former and current presidential advisors are absolutely immune to all congressional testimonial subpoenas. In the appellate panel, two of the judges expressed opposition to the claim of absolute immunity. *See Comm. on Judiciary v. McGahn*, 951 F.3d 510, 531–32 (2020) (Henderson, J., concurring); *McGahn*, 973 F.3d at 131–32 (Rogers, J., dissenting). The district court has also issued a detailed opinion debunking that claim. *Comm. on the Judiciary, U.S. House of Rep. v. McGahn*, 415 F. Supp. 3d 148 (D.D.C. 2019).

The district court opinion should be affirmed. *See also Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 446, 450 (1977) ("there has never been an expectation

that the confidences of the Executive Office are absolute and unyielding”); *Dellums v. Powell*, 561 F.2d 242, 245–46 (D.C. Cir. 1977) (executive privilege is not absolute, but qualified when asserted in civil litigation); *Nixon*, 498 F.2d at 729–31 (D.C. Cir. 1974) (rather than apply an absolute privilege, the proper analysis is to weigh Congress' “public need” against the President's general interest in confidentiality). Once courts have invalidated Executive Branch claims of absolute immunity, attention can finally turn to evaluating any specific assertions of executive privilege that Mr. McGahn may raise during his testimony.

## VII. CONGRESSIONAL ADJOURNMENT WILL NOT MOOT THIS MATTER.

Although the 116th Congress will have adjourned *sine die* before this case is fully adjudicated, this case is not moot. The Committee has asserted an ongoing interest in obtaining Mr. McGahn's testimony which means the controversy itself is “actual and imminent.” *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Separate from the Committee's present enforcement action, the Trump Administration's challenge also falls within the established exception to mootness for disputes “‘capable of repetition’ while ‘evading review.’” *See Turner v. Rogers*, 564 U.S. 431, 439–40 (2011).

First, the Chairman of the House Committee on the Judiciary, Representative Jerrold Nadler, has already indicated his intent to pursue this matter in the next Congress. Memorandum from Jerrold Nadler, Chairman, U.S House of

Rep., to Members of the Committee on the Judiciary Committee (Dec. 16, 2020), https://judiciary.house.gov/uploadedfiles/123456.pdf ("I expect to promptly reissue the Committee subpoena to Mr. McGahn."). As such, the issues presented by the Committee's subpoena remain live, and the Judiciary Committee—even in a newly constituted 117th Congress—will retain a legally cognizable interest in enforcement of its subpoena against Mr. McGahn.

Even if that were not the case—if, for example, the Republicans had regained the House majority in November's general election—this matter would fall under the "capable of repetition while evading review" exception to mootness. The fleeting nature of each Congress' two-year term, the assertion in the past by presidents from both major political parties that senior aides are absolutely immune to congressional subpoenas, and the rise of protracted litigation over House subpoena enforcement represented by the current case as well as the *Meirs* case, present a textbook basis for application of this exception. Without a judicial determination here, the same issue is plainly "capable of repetition" during the 117th Congress or a future Congress.

In *FEC v. Wisconsin Right to Life, Inc. ("WRTL"),* the Supreme Court wrote that the "'capable of repetition' exception requires a 'reasonable expectation' or a 'demonstrated probability' that 'the same controversy will recur involving the same complaining party." 551 U.S. 449, 463 (2007). That standard is easily met

by the history of congressional subpoenas which, on occasion, have been subjected to Executive Branch claims of absolute immunity. *See, e.g.,* Steven A. Engel, *Testimonial Immunity Before Congress of the Assistant to the President and Senior Counselor to the President*, Dep't of Justice Office of Legal Counsel (July 12, 2019), at 2, https://www.justice.gov/olc/file/1183271/download (noting "the Executive Branch has invoked this immunity for nearly 50 years"); Karl R. Thompson, *Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach From Congressional Subpoena*, Dep't of Justice Office of Legal Counsel (July 15, 2014), at 1, https://www.justice.gov/file/30896/download ("The Executive Branch's longstanding position, reaffirmed by numerous Administrations of both political parties, is that the President's immediate advisers are absolutely immune from congressional testimonial process."). Given this history, it is reasonable to expect future Administrations to make the same claim. Ending this case now by ruling that the Committee's claims are moot would simply compel the same parties—the House and Executive Branch—to repeat the same course of litigation in the future, extending uncertainty over the functioning of the Constitution's checks and balances while consuming still more judicial time and resources.

In sum, a finding that this matter has been mooted by the adjournment of the 116th Congress would subvert the rationale for the mootness doctrine and render

meaningless the already substantial investment of time and resources in this adjudication of Congress's subpoena power. Indeed, binding precedent from this Court that the mootness doctrine applied could forestall the House from ever enforcing a subpoena against any litigant willing and able to pursue federal litigation past the end of a particular congressional session.

**CONCLUSION**

Congressional oversight of the Executive Branch is fundamental to the Framers' system of checks and balances. Failing to reject the majority opinion in this case would impose such costs on congressional oversight that our nation's precious system of checks and balances would be severely damaged. Continuing, instead, judicial resolution of this interbranch subpoena dispute, in particular invalidating Executive Branch claims of absolute immunity, would respect the Supreme Court's recent reaffirmation of Congress' right to information while also advancing the rule of law, orderly resolution of disputes, and effective government.

December 21, 2020

Respectfully submitted,

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December 21, 2020

/s/ *Andrew D. Herman*
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I hereby certify that on December 21, 2020, I electronically filed the foregoing **BRIEF OF *AMICI CURIAE* THE LUGAR CENTER AND THE LEVIN CENTER AT WAYNE LAW SUPPORTING APPELLEE** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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