ORAL ARGUMENT NOT YET SCHEDULED

No. 21-5289

UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

COMMITTEE ON WAYS AND MEANS, UNITED STATES HOUSE OF REPRESENTATIVES,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF THE TREASURY; INTERNAL REVENUE SERVICE; CHARLES PAUL RETTIG, in his official capacity as Commissioner of the Internal Revenue Service; and JANET L. YELLEN, in her official capacity as Secretary of the United States Department of the Treasury,

Defendants-Appellees,

DONALD J. TRUMP; DONALD J. TRUMP REVOCABLE TRUST; DJT HOLDINGS LLC; DJT HOLDINGS MANAGING MEMBER, LLC; DTTM OPERATIONS LLC; DTTM OPERATIONS MANAGING MEMBER CORP.; LFB ACQUISITION LLC; LFB ACQUISITION MEMBER CORP.; LAMINGTON FARM CLUB, LLC,

Intervenors for Defendant – Appellants.

On Appeal from the U.S. District Court for the District of Columbia, No. 1:19-cv-1974-TNM

APPELLANTS' BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS & RELATED CASES

Parties and Amici. The parties, intervenors, and amici in this Court or who appeared before the district court are

- Donald J. Trump
- Donald J. Trump Revocable Trust
- DJT Holdings LLC
- DJT Holdings Managing Member, LLC
- DTTM Operations LLC
- DTTM Operations Managing Member Corp.
- LFB Acquisition LLC
- LFB Acquisition Member Corp.
- Lamington Farm Club, LLC, d/b/a Trump National Golf Club-Bedminster
- Committee on Ways and Means of the U.S. House of Representatives
- United States Department of the Treasury
- Internal Revenue Service
- Charles Paul Rettig, in his official capacity as Commissioner of the Internal Revenue Service
- Steven T. Mnuchin, in his official capacity as Secretary of the United States Department of the Treasury
- Janet L. Yellen, in her official capacity as Secretary of the United States Department of the Treasury
- Constitutional Accountability Center
- Duane Morley Cox
- Geraldine R. Gennet
- Kerry W. Kircher
- Irvin B. Nathan
- William Pittard
- Thomas J. Spulak
- Charles Tiefer
- Lee Bollinger
- Michael Dorf
- Walter Dellinger
- Pamela S. Karlan

- Harold Hongju Koh
- Norm Ornstein
- Leah Litman
- Judith Resnik
- Geoffrey Stone
- David Strauss

Per Circuit Rule 26.1, Appellants DJT Holdings LLC; DJT Holdings Managing Member, LLC; DTTM Operations LLC; DTTM Operations Managing Member Corp.; LFB Acquisition LLC; LFB Acquisition Member Corp.; and Lamington Farm Club, LLC, d/b/a Trump National Golf Club-Bedminster state that they have no parent companies or publicly-held companies with a 10% or greater ownership interest in them.

Ruling Under Review. The ruling at issue is Judge McFadden's opinion resolving the motions to dismiss Intervenors' cross-claims and counterclaims, *Committee on Ways and Means, U.S. House of Representatives v. U.S. Department of the Treasury*, No. 1:19-cv-1974-TNM, 2021 WL 5906031 (D.D.C. Dec. 14), which can be found on pages 219-63 of the joint appendix (JA).

Related Cases. Counsel is aware of no related cases, as defined by Circuit Rule 28(a)(1)(C), currently pending in this Court or any other.

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INTRODUCTION

The House Ways and Means Committee has demanded President Trump's tax returns. It claims that it wants the returns to study the IRS's audit procedures. Not to settle a score with its chief political rival, who declined to disclose his returns during the campaign. Not because it thinks the returns contain information that will damage him politically. Not because the Committee plans to immediately disclose his returns to the public. But to study audit procedures.

"[N]obody believes" this purpose is stated in "good faith." JA146 ¶1. For years, the official position of the United States was that the Committee's stated purpose "blinks reality. It is pretextual. No one could reasonably believe that the Committee seeks six years" of a single President's "tax returns because of a newly discovered interest in legislating on the presidential-audit process." JA63-64. It is instead "the next assay in a longstanding political battle over [President Trump's] tax returns." JA64.

What everyone knows to be true is certainly *plausible*. By nevertheless dismissing Intervenors' claims at the pleading stage, the district court did not just refuse "to see what all others can see and understand." *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2034 (2020) (cleaned up). It refused to even look. This Court should reverse and remand.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §1331 because Intervenors' counterclaims and cross-claims allege violations of federal law. This Court has jurisdiction under 28 U.S.C. §1291 because Intervenors appeal a final judgment that disposed of every claim. The district court entered that judgment on December 14, 2021, and Intervenors filed a notice of appeal the same day. JA266.

ISSUES PRESENTED

I. Whether Intervenors plausibly alleged that the Committee's request for President Trump's tax information is invalid because 26 U.S.C. §6103(f)(1) facially exceeds Congress's constitutional authority.

II. Whether Intervenors plausibly alleged that the Committee's request lacks a legitimate legislative purpose under the appropriate level of heightened scrutiny for requests implicating the separation of powers.

III. Whether Intervenors plausibly alleged that the Committee's request exceeds other constitutional limits—namely, that it lacks a legislative purpose, that it's not pertinent to valid legislation, and that the Government's decision to comply would violate the First Amendment.

STATUTES & REGULATIONS

28 U.S.C. 6103(f)(1):

> Upon written request from the chairman of the Committee on Ways and Means of the House of Representatives ... the Secretary shall furnish such committee with any return or return information specified in such request ….

STATEMENT OF CASE

The Committee invoked §6103(f)(1) to request Intervenors' tax information in April 2019. When the Government concluded that the request was illegal, the Committee sued, and Intervenors joined the lawsuit as defendants. That litigation was stayed until June 2021, when the Biden administration switched sides and forced Intervenors to bring counterclaims against the Committee and cross-claims against the Government. The district court granted motions to dismiss those claims. All this history is summarized below.

I. Factual background

During the 2016 presidential election, then-Candidate Trump declined to disclose his tax returns. JA147 ¶6. Though experts agreed that disclosing returns during ongoing audits was ill-advised, Trump's political opponents assumed that the information in the returns would damage him politically—by proving he hadn't paid enough taxes, wasn't as rich as he claimed, wasn't successful in business, had too much debt,

committed financial improprieties, had ties to Russia and China, and the like. JA148 ¶15. Then-Vice President Biden, for example, accused Trump of playing the American people "for suckers." JA149 ¶15.

After Candidate Trump became President Trump, his tax returns became "Democrats' white whale." JA194 ¶245. California tried to keep him off the ballot unless he disclosed them. JA184 ¶200. New York changed its laws in the hopes of exposing his state tax returns. JA181. Democrats on the Ways and Means Committee, including then–Ranking Member Richard Neal, made several attempts to force Treasury to disclose the returns. JA150-51 ¶25.

House Democrats freely admitted that their aim was to release President Trump's tax returns to the public. The IRS's presidential audit program never came up once. JA150 ¶22. A report drafted by Ranking Member Neal, for example, said that the returns would "provide the clearest picture of … how much he earns, how much tax he pays, his sources of income …, whether he makes charitable contributions, and whether he uses tax shelters, loopholes, or other special-interest provisions." JA154 ¶41. Neal elsewhere stressed that President Trump's "[t]ax returns" would reveal to "the American people" his "income and

charitable giving." JA154 ¶40. Committee-Member Pascrell put it more bluntly: "We must see Trump's tax returns to know just how far and how deep the crimes go." JA154 ¶42.

Before the 2018 midterms, Democrats promised that they would obtain and expose President Trump's tax returns if they won a House majority. Minority Leader Pelosi called it "one of the first things" the Democratic majority would do, and Neal affirmed that Democrats would "force" disclosure, adding that "Democrats ha[d] voted again and again to *release* those documents." JA160 ¶¶75-76 (emphasis added).

Once in the majority, House Democrats began constructing a case for demanding the President's tax information from Treasury. They continued to publicly acknowledge that exposure was their main purpose. For example, Speaker Pelosi said, "I think overwhelmingly the public wants to see the president's tax returns…. They want to know the truth, they want to know the facts and that he has nothing to hide." JA161 ¶81. Speaker Pelosi's spokeswoman later told the press that "all roads le[d] back" to President Trump's tax returns, which would show his "improprieties," "potential tax evasion," and "violations of the Constitution." JA164 ¶96.

Meanwhile, now-Chairman Neal told reporters he was "now in the midst of putting together the case" for obtaining President Trump's records. JA162 ¶87. In February 2019, Chairman Neal confirmed that his staff was working "to figure out what is the most efficient way to make a request." JA163 ¶90. "[T]he idea here," Neal said, was to "make sure that the product stands up under critical analysis." JA162 ¶89. In March, a spokesman for Chairman Neal confirmed that "Chairman Neal has consistently said he intends to seek President Donald Trump's federal tax returns" and that "a strong case is being built." JA163 ¶91. A Committee member familiar with Neal's decision-making process said that the Chairman was "laying a legal foundation," "mak[ing] the justification to use this rarely used authority" in §6103(f)(1). JA163 ¶94.

Chairman Neal finally made the request in April 2019. JA169 ¶123. Invoking §6103(f)(1), Chairman Neal requested "income tax returns" and "administrative files" for Donald J. Trump and eight Trump entities, spanning tax years 2013 through 2018. JA46-47; JA169 ¶123. The request specified only one ostensible legislative purpose: studying "the extent to which the IRS audit and enforces the Federal tax laws against a President" under the "mandatory examination" process specified in the

"Internal Revenue Manual." JA169-70 ¶124. No one, including Chairman Neal, had mentioned this program before as a topic of interest or a basis for requesting President Trump's returns. JA171 ¶131.

Chairman Neal openly admitted that this rationale was pretextual. The next day, he admitted he had "constructed" a "case" for obtaining President Trump's tax information. JA170 ¶127. Two days after the request, he confirmed that the Committee's "intent is to test" §6103(f)(1), using the rationale most likely to "stand[] up" in court "under the magnifying glass." JA170 ¶128. Committee-Member Pascrell reiterated that Neal's rationale was "chosen according to counsel" as "the best way" to "make sure we got the tax returns." JA171 ¶130. When private and governmental attorneys challenged Chairman Neal's newly-minted rationale, the Chairman did not dispute that it was pretextual; he merely insisted that no one could "question or second guess the motivations of the Committee." JA173 ¶141.

Despite their counsel's best efforts, Committee Members have repeatedly contradicted Neal's stated purpose. They have continued to describe the purpose of the request in terms of exposing President Trump's tax information to "the public," even though public disclosure is a

separate step under the tax code and has nothing to do with studying IRS procedures. JA173 ¶142. House Democrats even lamented that the information was unlikely to be exposed in time for the 2020 presidential election—a date with political, but not legislative, significance. JA181 ¶187.

To the extent they discussed the IRS's audit process, they did so in law-enforcement terms, expressing their desire to audit President Trump's returns themselves and to uncover evidence of illegal conduct. For example, in a press release issued on the same day as the request, Chairman Neal said that the request would help the Committee determine whether President Trump is "complying with" the tax laws. JA174 ¶143. That same day, Committee-Member Pascrell expressed gratitude that President Trump's "tax records" would "finally" be exposed to "sunlight" and that President Trump would face "accountability." JA175 ¶146. And throughout 2019 and 2020, Pascrell and other Committee Members continued to say that the Committee needed to see Trump's tax information to see "how far his crimes go" and otherwise expose his tax information to the American public. JA175-81 ¶¶147-187.

On May 6, 2019, Treasury informed the Committee it could not comply with the request, citing the lack of a legitimate legislative purpose.

JA188 ¶216. After compiling and reviewing over 40 pages of public statements, Treasury observed that the request asserts a "purpose that is at odds with what you and many others have repeatedly said is the request's intent: to publicly release the President's tax returns." JA188 ¶217. The Committee's request was instead "the culmination of a long-running, well-documented effort to expose the President's tax returns for the sake of exposure," disclosure for mere "political purposes." JA188 ¶217.

Treasury also highlighted the "objective" mismatch between the Committee's audit rationale and "the terms of [its] request." JA188 ¶218. The request "does not inquire about the IRS's procedures for presidential audits," ask for "additional information about those policies," ask "whether [they] have changed over time," or ask about "the extensive protections that ensure such audits are conducted with extreme confidentiality and without improper interference." JA188 ¶218. The request also focuses on one President, even though most of the requested categories of information have "never been publicly released with respect to any President." JA188 ¶218. And it seeks files concerning audits that are still "ongoing," which would not allow the Committee to genuinely assess any audit because the Committee would not know "the outcome." JA188 ¶218.

The Justice Department agreed with Treasury's decision. In a June 2019 memorandum, OLC found that the Committee, "[r]ecognizing that [it] may not pursue exposure for exposure's sake, … has devised an alternative reason for the request." JA189 ¶220. OLC agreed with Treasury that "the Committee's request does not objectively 'fit' [its] stated purpose." JA189 ¶221. "[M]any of the requested documents are barely relevant" to the audit process, including the tax returns themselves, which are filed before that process begins. JA189 ¶221. Instead, OLC found the request "perfectly tailored to accomplish the Committee's long-standing and avowed goal" of exposing the President's tax returns. JA190 ¶222.

After President Biden was sworn in, House Democrats continued their quest to obtain and release Intervenors' tax information. As a report described the prevailing Democratic sentiment, they felt it "important" to "keep pursuing" their pending cases against President Trump—including this one—because "the information they obtain could be relevant politically." JA192 ¶234. The administration also faced substantial and growing pressure from "liberal advocates" and lawmakers" to reverse the Justice Department's position. JA194-95 ¶¶245-47. When asked about the issue, the White House reiterated President Biden's criticisms from

the 2020 campaign trail and said that "the American people deserve transparency" on President Trump's tax returns. JA194 ¶244.

In the face of that pressure, and only six months after taking office, the Biden administration announced that it would reverse course and comply with the Committee's request. JA194 ¶243. In July 2021, with no prior notice to Intervenors, the Government released a new OLC opinion contradicting its opinion from 2019. JA198 ¶¶264-65. The 2021 opinion does not deny House Democrats' long campaign to expose President Trump's tax information or retract the copious evidence of pretext that OLC and Treasury had previously collected. JA198 ¶265. Strangely for OLC, the new opinion adopts reasoning that would *diminish* the executive branch's power vis-à-vis Congress. JA199 ¶266. And it reveals negotiations and communications between the Executive and Congress that Intervenors *still* haven't seen. *E.g.*, JA199 ¶268.

Apparently, the Committee had also written a letter to Treasury in June 2021 as an "accommodation." JA196 ¶253. The letter said that the Committee "continue[s]" to pursue the same request for Intervenors' tax information that "remains in active litigation," but for tax years 2015 through 2020 instead of 2013 through 2018. JA196 ¶253.

House Democrats immediately praised OLC's new position. Thinking this case might be over, they were candid again about their purposes. Speaker Pelosi, for example, did not express relief that the House could now study the presidential audit program, but that "[t]he American people" would now "know the facts" about President Trump. JA200 ¶270.

II. Procedural history

When Treasury initially refused to turn over Intervenors' tax information, the Committee sued it and other defendants. JA26. Intervenors joined the litigation, JA27, and the Committee filed a motion for summary judgment, JA28. The Government and Intervenors moved to dismiss, arguing (among other things) that the Committee lacked Article III standing and a cause of action. *See* Doc. 44 at 28-43, 58-61.

The Government asked the district court to resolve its motion to dismiss before making the parties brief the Committee's motion for summary judgment. Resolving the threshold issues before the merits, the Government explained, might allow the Court to avoid deciding several "serious," "difficult," and "weighty" constitutional questions—including whether the Committee has "a legitimate legislative purpose," whether the executive branch must ignore "the abundant public evidence that the Committee's stated purpose is pretextual," and whether the Committee's

request violates the separation of powers or Intervenors' "individual constitutional rights." Doc. 33 at 6. The district court ultimately stayed the case while this Court considered similar threshold issues in *Committee on Judiciary of United States House of Representatives v. McGahn*, No. 19-5331 (D.C. Cir.). *See* JA34-36.

After the 116th Congress ended and President Biden was sworn in, the district court held a status conference. JA37. At that conference, the Committee represented that its 2019 request was "still there" and "live" because §6103(f)(1) requests, unlike subpoenas, "carry over from one Congress to the next." JA193 ¶238; *see* Doc. 104 at 4-5. The Government, for its part, asked for more time so that the new administration could decide how to handle the Committee's request. Six months later, the Government told Intervenors and the district court that the new administration would be turning over Intervenors' tax information. Doc. 111 at 2-3.

Intervenors quickly filed an answer to the Committee's original complaint, as well as counterclaims against the Committee and cross-claims against the Government. The Committee and Government moved to dismiss, Intervenors amended as of right, and the Committee and

Government moved to dismiss again. JA39-42. Intervenors' amended pleading asserts eight claims:

- **Cross-Claim & Counterclaim I**: The Committee's request lacks a legitimate legislative purpose because its purpose is exposure for the sake of exposure.
- **Cross-Claim & Counterclaim II**: The Committee's request lacks a legitimate legislative purpose because its purpose is law enforcement.
- **Cross-Claim & Counterclaim III**: The Committee's request lacks a legitimate legislative purpose because it is not pertinent to valid legislation.
- **Cross-Claim & Counterclaim IV**: The Committee's request lacks a legitimate legislative purpose under the heightened test for requests that implicate the separation of powers.
- **Cross-Claim V**: The Government cannot comply with the Committee's request because 26 U.S.C. §6103(f)(1) is facially unconstitutional.
- **Cross-Claim VI**: The Government cannot comply with the Committee's request because it would violate the First Amendment.
- **Cross-Claim VII**: The Government cannot comply with the Committee's request because turning over open investigative files would violate the separation of powers.
- **Cross-Claim VIII**: The Government cannot comply with the Committee's request because, given Intervenors' ongoing audits, this congressional interference would violate due process.

JA205-17. Intervenors are not pressing the last two claims on appeal.

III. Decision below

The district court granted the motions to dismiss in full. It rejected Intervenors' claim that the statute authorizing the Committee's request,

§6103(f)(1), is unconstitutional because it doesn't require a legitimate legislative purpose. Maybe so, the district court reasoned, but the statute is not "facially" unconstitutional because it is valid whenever the Committee does, in fact, have a legitimate legislative purpose. JA255-58.

As for the facts of this case, the court rejected Intervenors' claims alleging that the Committee's request lacks a legitimate legislative purpose. It noted that "all parties agree" that the request raises at least "some separation-of-powers concerns," so the court had to apply a test that "sit[s] above the low threshold set for congressional [requests] to private parties." JA250. The district court agreed with the Committee that it should apply the balancing test from *Nixon v. GSA*, since the request "implicates a *former* President" and "Congress and the current President stand united." JA250. Applying that test, the district court found that this type of request could "disrupt the Executive Branch" because Congress could use it to "threaten a sitting President." JA252. But the court found that disruption outweighed by what it concluded were the request's legitimate legislative purposes. *See* JA254-55.

For similar reasons, the district court rejected Intervenors' other legitimate-legislative-purpose claims. After reviewing several precedents

that predate *Mazars*, the district court concluded that the legitimate-legislative-purpose test is a "low bar" for the Committee, a "formidable bar" for Intervenors, and a "narrow" inquiry for courts. JA237; JA228-32; JA238. Though it found Intervenors' allegations of impermissible purposes "troubling," it concluded that the Committee "need only state a valid legislative purpose." JA238. Courts must accept any legislative purpose that is served by the request, no matter how "impressive" the evidence of "pretext." JA238.

The district court did not accept the Committee's primary asserted purpose for the request—codifying the presidential audit program—because legislation to that effect would likely be unconstitutional. JA233. But it held that the Committee could pursue other legislation that did not "*require* the IRS" to audit Presidents, such as laws dictating "how many staff the IRS may assign to the audit of a sitting President" or ensuring "adequate funding for presidential audits if the IRS undertakes them." JA233. The court did not explain how the Committee's request was pertinent to those laws. But it said that the request would allow the IRS to determine what happened in President Trump's audits. JA239-42;

JA254-55. It "wonder[ed]," though, "how much the returns of one President can say about [a] Program" that has been in place since 1977. JA240.

Finally, the district court cited this "previous analysis" as a reason to reject Intervenors' First Amendment claim. JA259. Because it had rejected Intervenors' legitimate-legislative-purpose claims, whether the Government retaliated or discriminated against President Trump based on his protected speech or association was illegally irrelevant. Section 6103(f)(1) *requires* the Government to turn over documents when a request has a legitimate legislative purpose, so any retaliation or discrimination could not be "'the but-for cause'" of Intervenors' harms. JA260.

SUMMARY OF ARGUMENT

This case is not the first time that the House has requested sensitive financial information from President Trump and his businesses. But to Intervenors' knowledge, it is the first time that a request's legality was resolved on a motion to dismiss. In deciding this case at the earliest possible stage, the district court misapplied not only the pleading standard but also the standards for facial challenges and for assessing whether Congress has a legitimate legislative purpose. Its decision should be reversed.

I. The only legal basis for the Committee's request is 26 U.S.C. §6103(f)(1), but that statute is facially unconstitutional. Congress has no power to demand information without a legitimate legislative purpose. Yet the statute does not contain this crucial limitation. Though there are cases where Congress will happen to have a legitimate legislative purpose, that coincidence has nothing to do with the statute. Section 6103(f)(1) is unconstitutional because, in every application, it states an invalid rule of law. In holding otherwise, the district court did not appreciate the distinctions between different types of facial challenges—a distinction that this Court outlined in *Gordon v. Holder*, 721 F.3d 638 (D.C. Cir. 2013).

II. As the Supreme Court held in *Mazars*, congressional demands that implicate the separation of powers must satisfy heightened scrutiny. Everyone in this case agrees that the Committee's request implicates the separation of powers and must satisfy heightened scrutiny, but they disagree about the extent and the standard. Because the Committee issued its request while President Trump was in office, is pursuing it only because he was President, and claims to be studying President-specific legislation, the district court should have applied *Mazars* as is. It at least

should have applied *Mazars* "lite," which would account for any diminished separation-of-powers concerns without importing a wholly irrelevant standard from *Nixon v. GSA*. But under any of these tests, Intervenors plausibly alleged that the Committee's request fails heightened scrutiny—particularly after the district court found that the Committee's main legislative proposal would likely be unconstitutional.

III. Intervenors also plausibly alleged other constitutional violations. They alleged what used to be the official position of the United States Government: that the Committee's request pursues an impermissible nonlegislative purpose, not a permissible legislative one. The Committee's request is only arguably pertinent to reforms that would require the IRS to audit Presidents, moreover, but those laws are unconstitutional under Article II and the Qualifications Clause. And the district court applied a flawed causation analysis when assessing Intervenors' claim under the First Amendment.

This Court should reverse and remand.

ARGUMENT

The district court dismissed Intervenors' claims for failure to state a claim, a question that this Court reviews de novo. *Bank of N.Y. Mellon Tr. Co. N.A. v. Henderson*, 862 F.3d 29, 33 (D.C. Cir. 2017). In its review,

the Court must assume that Intervenors' factual allegations are true, draw any reasonable inferences from those allegations in Intervenors' favor, and assume that any general allegations contain whatever specific facts are needed. *LaRoque v. Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011). It also must construe Intervenors' pleading "'liberally.'" *Zukerman v. U.S. Postal Serv.*, 961 F.3d 431, 441 (D.C. Cir. 2020). After all that construing, the question is whether Intervenors' claims are "'plausible.'" *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015). Plausible does not mean probable, or even most plausible. *Id.* This case must proceed even if "'there are two alternative explanations,'" one supporting liability and the other defeating it, "'both of which are plausible." *Id.*

Intervenors' pleading easily provided "fair notice of what [each] claim is and the grounds upon which it rests"—the whole purpose of Rule 12. *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (cleaned up). Count V explains why the Committee's request is invalid because the statute that authorizes it is unconstitutional. Count IV explains why the request, which concededly implicates the separation of powers, lacks a legitimate legislative purpose under heightened scrutiny. And Counts I-III and VI explain why the request violates other constitutional limits, under both

Article I and the First Amendment. The district court's dismissal of these well-pleaded claims should be reversed.

I. 26 U.S.C. §6103(f)(1) is facially unconstitutional.

If §6103(f)(1) is unconstitutional, then the Committee's request is invalid. That statute is the only authority for the Committee's request. Though the Committee once backed up its request with a subpoena, that subpoena expired at the end of the 116th Congress, and the 117th Congress took no action to maintain, revive, or defend it. JA211 ¶319. Without §6103(f)(1), moreover, the "general rule" in §6103(a) would control. *EPIC v. IRS*, 910 F.3d 1232, 1236 (D.C. Cir. 2018). Treasury would be required to keep Intervenors' tax information "confidential." 26 U.S.C. §6103(a); *see* JA211 ¶320.

Section 6103(f)(1) is unconstitutional because, on its face, it exceeds Congress's legislative authority. The statute can be sustained only as an exercise of Congress's "power to obtain information." *Mazars*, 140 S. Ct. at 2031. That implied power is justified only as an "'auxiliary'" to Congress's express legislative powers. *Id.* at 2031. All congressional demands for information thus "must serve a 'valid legislative purpose.'" *Id.* But that crucial limitation appears nowhere in §6103(f)(1). And given the statute's unambiguity, a court could not read this requirement into it as

a matter of constitutional avoidance or severability. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2207, 2211 (2020). Treasury "shall furnish" tax information upon a "written request"—the only precondition in the statute. *See Murphy v. Smith*, 138 S. Ct. 784, 787 (2018) ("[T]he word 'shall' usually creates a mandate, not a liberty."). Other parts of §6103 require requests to be made for certain purposes, *e.g.*, §§6103(d)(1), (h)(1), (h)(2), (h)(3)(B), so the omission of any purpose requirement in §6103(f)(1) must have been intentional, *Collins v. Yellen*, 141 S. Ct. 1761, 1782 (2021).

The district court agreed that the Constitution requires §6103(f)(1) requests to have a legitimate legislative purpose, but it thought this missing element did not make the statute *facially* unconstitutional. JA255-58. A facial challenge requires the plaintiff to show that the statute can be constitutionally applied in "'no set of circumstances'" or that the statute lacks a "'plainly legitimate sweep.'" JA258 n.17 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)). That standard is not met, according to the district court, because §6103(f)(1) is constitutional in cases where the request happens to have a legitimate legislative purpose. JA256.

While the district court correctly identified the standard for facial invalidity, it failed to appreciate that "not all facial challenges are alike." Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 Am. U. L. Rev. 359, 385 (1998). Many facial challenges argue that the statute is invalid because, in practice, it is unconstitutional in all (or nearly all) of its applications. *Id.* at 365-71. Outside the First Amendment context, these overbreadth-style facial challenges usually fail because the court can imagine applications that would be constitutional. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

But there's another type of facial challenge—one that contests whether the statute states a valid rule in the first place. In these "'valid rule facial challenges,'" the alleged "constitutional violation inheres in the terms of the statute." *Ezell v. City of Chicago*, 651 F.3d 684, 698 (7th Cir. 2011) (quoting Isserles 387). That a court can "'conjure up … a hypothetical situation'" where the statute might not violate the Constitution is irrelevant to these challenges. *United States v. Supreme Ct. of N.M.*, 839 F.3d 888, 917 (10th Cir. 2016). Because the statute "'state[s] an invalid rule of law,'" it cannot be "constitutionally applied to anyone—and thus there is 'no set of circumstances' in which the statute would be

valid." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1127 (10th Cir. 2012) (quoting Isserles 364); *accord Bruni v. City of Pittsburgh*, 824 F.3d 353, 363 (3d Cir. 2016). This distinction has been recognized not only by other circuits and influential scholars, but also by the Supreme Court. *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 768 n.21 (1982) (citing Monaghan, *Overbreadth*, 1981 S. Ct. Rev. 1, 10-14).

This Court has recognized this distinction too. In *Gordon*, the plaintiff argued that the PACT Act violated due process because it required sellers to collect taxes for other jurisdictions, without first requiring that the seller have "minimum contacts" with that jurisdiction. *See* 721 F.3d at 645. Citing *Washington State Grange* and *Salerno*, the Government argued "that any facial challenge to the PACT Act must fail" because the statute would be constitutional every time a seller had minimum contacts with the jurisdiction. *Id.* at 654. This Court disagreed. A litigant can bring a facial challenge, it explained, when statutes "omit constitutionally-required jurisdictional elements," even though those statutes are constitutional whenever the missing element is satisfied. *Id.* (citing, *e.g.*, *United States v. Lopez*, 514 U.S. 549, 551 (1995); *United States v. Morrison*, 529 U.S. 598, 613 (2000)). Because the key limitation is missing from

the text, "any legitimate application is pure happenstance" and cannot defeat a facial challenge. *Id.*

In the same way, §6103(f)(1) is facially unconstitutional. By requiring no legitimate legislative purpose, the statute "erases the boundaries" between permissible and impermissible exercises of Congress's authority to demand information. *Id.* The text "contains 'no jurisdictional element which would ensure'" that each request has a legitimate legislative purpose. *Id.* Though some requests will have a legitimate legislative purpose, that fact will be "pure happenstance." *Id.* Nothing in *the statute* requires it. The statute "permits" requests that are both "legitimate" and illegitimate, and it requires Treasury to comply either way. *Id.* The district court thus should have let Intervenors' facial challenge proceed.

II. Intervenors plausibly alleged that the Committee's request fails heightened scrutiny.

The district court agreed that the Committee's request implicates the separation of powers. JA250. That conclusion should have led it to apply *Mazars*, the test for congressional requests that implicate the separation of powers. It should not have applied *Nixon v. GSA*, the generic test for when a statute violates the President's constitutional authority. In any event, all agree that the district court should have applied a level

of scrutiny that is more stringent than the test for ordinary congressional demands. Intervenors plausibly alleged that the Committee's request fails any version of heightened scrutiny.

A. The district court should have applied *Mazars*.

The Supreme Court's decision in *Mazars* explains how to evaluate whether a congressional demand is "'related to, and in furtherance of, a legitimate task of the Congress'" when the demand implicates "the separation of powers." 140 S. Ct. at 2035. Specifically, courts must consider at least four "special considerations": whether the request warrants the "significant step" of involving the President, is "no broader than reasonably necessary," is supported by sufficient "evidence," and imposes excessive "burdens." *Id.* at 2035-36. That framework applies here for two independent reasons.

Mazars applies because, even after President Trump left office, the Committee's request raises serious separation-of-powers concerns. When *Mazars* was decided, one of the plaintiffs was, of course, the sitting President. But the Supreme Court did not impose the *Mazars* standard because the request targeted a sitting President per se. It imposed the *Mazars* standard because the request *implicated the separation of powers*. *See id.* at 2035 (announcing the test because it "takes adequate

account of the separation of powers principles at stake"); *id.* (articulating the test because it "accounts for these concerns" regarding "the separation of powers"). If a legislative request implicated the separation of powers in other ways, the *Mazars* standard would govern it too. *E.g.*, *McLaughlin v. Mont. State Legislature*, 493 P.3d 980, 988 (Mont. 2021) (explaining that *Mazars* "extends logically to subpoenas to the judicial branch").

Congressional demands for a former President's information still implicate the separation of powers. "[H]ardly … an ordinary private citizen," a former President "retains aspects of his former role." *Pub. Citizen, Inc. v. DOJ*, 111 F.3d 168, 170 (D.C. Cir. 1997). Congressional requests directed at "a former President should be scrutinized with a sharper eye and held to a higher standard than one to an ordinary citizen." *United States v. Poindexter*, 732 F. Supp. 142, 147 (D.D.C. 1990). The protection that a President—and, in turn, "'the Republic'"—needs from intrusive demands for private information "'cannot be measured by the few months or years between the submission of the [request] and the end of the President's tenure.'" *Nixon v. GSA*, 433 U.S. 425, 449 (1977). If former Presidents lacked *Mazars*-level protection from these demands, then Congress

could use the threat of these requests to influence Presidents while they are in office. Congress could also affect who can *be* President, exposing sensitive information to limit who can run or punish a recent rival who could run again. JA192 ¶234; JA214 ¶332. This threat is not theoretical, as President Trump is currently the target of at least four congressional demands for reams of his sensitive financial information. JA185 ¶¶204-05.

While these separation-of-powers concerns are "subject to erosion over time," *Nixon v. GSA*, 433 U.S. at 451, no erosion has occurred here. The Committee's request was made while President Trump was in office, when all agree that the *Mazars* test would have applied. And it has been continuously pursued, without break, ever since. According to the Committee, the purpose of the request has not changed, it made the request solely because President Trump was President, and its goal is to study legislation that would restrict the Presidency. JA87-93. Although the Biden administration has agreed to comply, the Trump administration found the request illegal; this Court has no basis to defer to one incumbent executive over another. *See Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991). In these unique circumstances, the separation-of-

powers concerns that accompany a request to a sitting President have not diminished at all. The *Mazars* test should apply with full force.

Independently, *Mazars* applies here because, like other congressional demands for information, requests under §6103(f)(1) must be valid "upon objection." *Watkins v. United States*, 354 U.S. 178, 214-15 (1957); *accord United States v. Rumely*, 345 U.S. 41, 48 (1953) ("as of the time of [the] refusal"); *Shelton v. United States* (*Shelton I*), 327 F.2d 601, 607 (D.C. Cir. 1963) ("when the [request] was issued"). When the Committee made its request in 2019, President Trump was in office. If the request was illegal then because it would have failed *Mazars*, then it is illegal now.

The Committee cannot get around this rule by arguing that it issued a brand-new request in 2021. While Judge Mehta accepted a similar argument on remand in *Mazars*, he was dealing with a "subpoena" that supposedly "expired" at the end of the 116th Congress and that the 117th Congress was "required" to reissue under "the House reissuance process." *Trump v. Mazars USA ,LLP* (*Mazars IV*), 2021 WL 3602683, at *8 (D.D.C. Aug. 11, 2021); *see Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008). But requests under

§6103(f)(1) are different, according to the House's general counsel. They do not expire with Congress's adjournment, but "carry over from one Congress to the next." JA193 ¶238; JA210 ¶315; *see* Doc. 104 at 4 (grounding this understanding in "history"). That understanding is reflected in Chairman Neal's June 2021 letter, which describes itself not as a new request but as an "accommodation" to support the Committee's "continue[d]" request—the same request that "remains in active litigation." JA195-96 ¶253. The Committee was free to voluntarily narrow its first request. But it cannot deny that Intervenors have plausibly alleged, based largely on the Committee's own representations about how its requests work, that the 2019 request was narrowed in 2021, not reissued.

Contra the district court, the rule that congressional requests must be valid ab initio cannot be ignored because it was first articulated in criminal cases. JA227. As the Government put it in *Mazars*, the "concerns" behind this rule are "no less important when congressional [requests] threaten the separation of powers than when they threaten due process." Gov't-*Mazars*-Br. 17, Doc. #1860386, *Trump v. Mazars USA, LLP*, No. 19-5142 (D.C. Cir. Sept. 8, 2020). Even in civil cases seeking prospective relief, separation-of-powers concerns sometimes prompt

courts to look backward and judge the legality of governmental action at the time it occurred. *E.g.*, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) (*Chenery* doctrine). Congressional demands that implicate the separation of powers should be treated the same way.

Mazars—a civil case involving prospective relief—should remove any doubt. There the Supreme Court cited *Watkins* (a criminal case) for the proposition that Congress must "adequately identif[y] its aims and explain[] why the President's information will advance its consideration of the possible legislation." 140 S. Ct. at 2036 (citing *Watkins*, 354 U.S. at 201, 205-06, 214-15). The cited portions of *Watkins* explain that "[o]nly the legislative assembly *initiating* an investigation can assay the relative necessity of specific disclosures." 354 U.S. at 205-06 (emphasis added). And the "time" when Congress "must describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it" is "upon objection" by the target. *Id.* at 214-15.

The Supreme Court's decision to incorporate the timing rules from *Watkins* was deliberate. Throughout its opinion in *Mazars*, the Court stressed the importance of keeping these disputes out of court by fostering accommodation and compromise. *E.g.*, 140 S. Ct. at 2029-31, 2034,

2035. Evaluating these demands as of the time they are made helps do that by forcing Congress to build its case and narrow its requests before it makes them. As the Government put it in *Mazars*, the "requirement for [committees] to support [informational demands] when they issue is one of the basic 'procedures which prevent the separation of power from responsibility.'" Gov't- *Mazars*-Br. 16 (quoting *Watkins*, 354 U.S. at 215). Allowing a committee to justify its request later would widen "the 'gulf between the responsibility for the use of investigative power and the actual exercise of that power.'" *Id.* at 16-17 (quoting *Watkins*, 354 U.S. at 204-05; citing *Rumely*, 345 U.S. at 46).

This rule also makes sense. The key question in cases like the one is whether the request has a legitimate legislative *purpose*. Unlike "need," *cf. Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 727 (D.C. Cir. 1974) (en banc), purpose is judged at the outset. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1696-97 (2017); *United States v. Claes*, 747 F.2d 491, 495 (8th Cir. 1984). Purpose does not reset whenever a document is reissued. *See United States v. Grainger*, 346 U.S. 235, 248 (1953); *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 873-74 (2005). And the Committee concedes that the purpose

behind its request has never changed. So even if the June 2021 request were technically new, it would be "'entirely correct to say that the new [request] should be construed as a continuation of the old.'" *Oneida Cty. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 246 n.18 (1985). All the reasons why the 2019 request had to satisfy *Mazars* therefore still apply.

B. The district court should not have applied the balancing test from *Nixon v. GSA*.

As the district court noted, the parties agreed that the Committee's request implicated the separation of powers, but they disagreed about what version of heightened scrutiny to apply. "Intervenors say the Court should apply *Mazars*, the Executive Branch seems to agree, and the House says the Court must apply *Nixon v. GSA*." JA244. The district court sided with the Committee, rather than the current or former executive. It applied the balancing test from *Nixon v. GSA* because it found the separation-of-powers concerns to be "lessen[ed]" here, where the Committee's request targets a "*former* President" and where the current President does not object. JA250. This reasoning was flawed.

The district court arrived at this conclusion by conflating two different parts of *Nixon v. GSA*, neither of which has much to do with this case. There, former President Nixon raised several challenges to a

statute that regulated his papers. In section IV.B of the opinion, the Supreme Court considered whether the statute violated executive privilege. Nixon argued that it did because the statute allowed the current executive branch to screen his official papers. 433 U.S. at 446. The Court rejected this claim under the test for executive privilege, noting along the way that the claim was being raised by a former President. *See id.* at 446-55. Nixon was claiming executive privilege vis-à-vis the incumbent executive. But in dicta in a recent case, this Court suggested that the privilege analysis from section IV.B might also govern a former President's claim of privilege vis-à-vis Congress. *See Trump v. Thompson*, 20 F.4th 10, 41 (D.C. Cir. 2021).

But neither executive privilege nor section IV.B of *Nixon v. GSA* has any bearing here. Intervenors have not raised a claim of executive privilege; this case involves personal information, not official communications. The Government agrees that *Nixon v. GSA* has no application to non-official papers. Doc. 146 at 44-46. And in *Mazars*, the House convinced the Supreme Court that executive-privilege cases cannot be transposed to this context. *See* 140 S. Ct. at 2032-33. If they could be, then the

Committee's request would have to satisfy a test even more rigorous than *Mazars*. *See id.*

Instead of section IV.B, the district court drew its "balancing test" from section IV.A of *Nixon v. GSA*. JA246. In section IV.A, the Supreme Court considered whether the statute violated the separation of powers. Nixon's argument was that Congress lacks any power to regulate how the executive branch disposes of presidential materials. 433 U.S. at 441. The Court rejected this claim because mere screening "within the Executive Branch itself" was not "unduly disruptive." *Id.* at 444-45. Drawing on Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Court explained that separation-of-powers claims turn on a balancing test—one that asks whether the statute's potential disruption of the executive branch is "justified by an overriding need" of Congress. 433 U.S. at 443.

Section IV.A of *Nixon v. GSA* has even less to do with this case than section IV.B. Nixon was arguing that the statute violated the separation of powers because it limited the *current* executive's authority. His claim did not turn on his status as a former President (which is why the Court never discussed that fact in this part of the opinion). Nixon was raising a

claim that any ordinary citizen could raise: a statute that injured him was unconstitutional because it violates the separation of powers. *See Bond v. United States*, 564 U.S. 211, 222-23 (2011). The Court thus analyzed Nixon's claim by applying the test that it would apply to any argument that a statute violates Article II. Its balancing approach was no different than the approach it took in, say, *Zivotofsky* or *Morrison v. Olson*. *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 28-29 (2015) (citing *Nixon v. GSA*, 433 U.S. at 443); *Morrison v. Olson*, 487 U.S. 654, 695 (1988) (citing same).

Intervenors are not challenging the constitutionality of a statute under Article II; they are challenging the constitutionality of a congressional demand for information. Courts analyze this kind of claim (absent an assertion of privilege) by asking whether the demand has a legitimate legislative purpose. *Mazars* asked that same question, though it upped the test's rigor because the request implicated the separation of powers. Because those separation-of-powers concerns have not meaningfully eroded in this case, *supra* II.A, this Court should apply *Mazars* as is.

Even if the district court were right that the separation-of-powers concerns are lower here, that conclusion shouldn't have led it to abandon

Mazars or the legitimate-legislative-purpose test. It should have simply lowered the rigor of that test—like the "*Mazars* lite" approach that Judge Mehta applied on remand in that case. As he explained there, the Committee's application of *Nixon v. GSA* ends up looking like *Mazars* anyway. *Mazars IV*, 2021 WL 3602683, at *13. Except the Committee would needlessly "eschew" two requirements from *Mazars*: that requests be "'reasonably necessary,'" and that Congress demonstrate its purpose with specific "'evidence.'" *Id.* But those requirements are important. They help avoid "'constitutional confrontation'" and ensure that judicial review isn't "'impossible.'" 140 S. Ct. at 2035-36. Targeting a former President's information with coercive process remains, after all, a "significant step." *Id.* at 2035.

If this Court agrees that *Mazars* or *Mazars* lite applies, then it should reverse. The Committee's request cannot satisfy even the lower scrutiny that the district court applied, *infra* II.C, so it cannot satisfy these higher standards either. And because the district court's choice of the lower standard "decide[d]" its analysis, JA255, it likely would have reached a different conclusion under a different test. At a minimum, this Court should remand for the district court to apply the correct test. *E.g.*,

Liberty Prop. Tr. v. Republic Props. Corp., 577 F.3d 335, 341 (D.C. Cir. 2009) ("[T]his court's 'normal rule' is to avoid" resolving "questions of law that were ... no[t] passed upon by the District Court.").

C. Intervenors plausibly alleged that the Committee's request fails any version of heightened scrutiny.

After identifying the correct test, the question is whether Intervenors *plausibly alleged* that the Committee's request fails heightened scrutiny. The Court must answer that question assuming all of Intervenors' factual allegations are true, drawing all reasonable inferences for them, and construing all statements and evidence in their favor. This Court thus cannot lightly follow decisions like *Mazars* and *Thompson*, which were decided at later stages of litigation. *E.g.*, *Mazars IV*, 2021 WL 3602683, at *1 (summary judgment); *Thompson*, 20 F.4th at 16 (preliminary injunction).

The Committee's request fails even the test that governs ordinary congressional requests, as the Government concluded in 2019. JA48. And here, all agree that the Court must apply a level of scrutiny "above" that test. JA250. The Committee's request easily fails any meaningful form of heightened scrutiny as well.

Burdens: Congressional demands for information should not impose excessive "burdens" on the Executive. *Mazars*, 140 S. Ct. at 2036; *see also Nixon v. GSA*, 433 U.S. at 443 (weighing "potential for disruption"). The Committee's request, however, does just that in multiple ways.

The first and most obvious burden is the public exposure of several years of Intervenors' sensitive, private tax information. *See DOJ v. Reps. Comm. for Freedom of Press*, 489 U.S. 749, 763 n.15 (1989) (noting the "invasion of privacy" from the public exposure of "income tax returns"). The tax code makes the unauthorized disclosure of someone's tax returns a felony. 26 U.S.C. §7213(a)(1). For good reason, given "'the private nature of the sensitive information contained therein.'" *HIRECounsel D.C., LLC v. Thuemmler*, 2007 WL 9770642, at *4 (D.D.C. Dec. 27).

The burden of disclosure is magnified here because, for several of the tax years that the Committee requested, Intervenors are still under audit. JA188 ¶218; JA204-05 ¶288. Congressional interference with ongoing adjudications can prejudice the outcome and deny Intervenors due process. *See Pillsbury Co. v. FTC*, 354 F.2d 952, 964 (5th Cir. 1966); *Koniag, Inc. v. Andrus*, 580 F.2d 601, 610 (D.C. Cir. 1978); *D.C. Fed'n of*

Civic Assocs. v. Volpe, 459 F.2d 1231, 1246 (D.C. Cir. 1971). It also hinders the executive branch by preventing it from conducting investigation efficiently and without undue influence. *See* 40 Op. Att'y Gen. 45, 46 (1941); 10 Op. O.L.C. 68, 76 (1986).

All these burdens matter. The more painful the request that Congress can make to a former President, the more "potential for disruption" that Congress has over a sitting President. *Nixon v. GSA*, 433 U.S. at 433. And the "greater the leverage, the greater the improper 'institutional advantage' Congress would possess." *Mazars IV*, 2021 WL 3602683, at *17.

This Court also must consider the precedent that approving the Committee's request would set in terms of Congress's "ongoing relationship with the President" and "incentives" to gain an "institutional advantage." *Mazars*, 140 S. Ct. at 2036. It is "not difficult to imagine the incentives a Congress would have to threaten or influence a sitting President" with similarly invasive requests "after he leaves office, in order to 'aggrandize itself at the President's expense.'" *Mazars IV*, 2021 WL 3602683, at *17. In fact, the House is using similar tactics in *Mazars* to

justify a sweeping request for virtually all of President Trump's financial information over an eight-year period.

Evidence: Courts should consider "the nature" and quality of "the evidence" showing that a request "advances a valid legislative purpose." *Mazars*, 140 S. Ct. at 2036; *accord Nixon v. GSA*, 433 U.S. at 443 (requiring burdens to be "justified by an overriding need" of Congress). The only arguably concrete proposal that the Committee identified was a statute that would codify the IRS's mandatory audit process for Presidents. But, as the district court recognized, that law would likely be unconstitutional. JA233. The district court instead sustained the Committee's request based on laws that would *help* the IRS audit Presidents without *requiring* it to do so—such as law that would increase funding or staffing. JA233. But the Committee did not identify those laws, let alone "identif[y]" them with "detailed and substantial … evidence" and "explain[] why the President's information will advance its consideration." *Mazars*, 140 S. Ct. at 2036.

The Committee's empty assertion that it "is considering legislative proposals and conducting oversight related to our Federal tax laws," JA46, is precisely the sort of "'vague' and 'loosely worded' evidence" that

cannot satisfy heightened scrutiny, *Mazars*, 140 S. Ct. at 2036. The district court concluded that the Committee didn't have to identify the legislation it's considering. *See* JA234. But its failure makes it "'impossible'" to determine if the request satisfies heightened scrutiny, especially given the "sensitive constitutional issues" that arise whenever Congress considers "legislation concerning the Presidency." *Mazars*, 140 S. Ct. at 2036.

Need: Heightened scrutiny requires Congress to show that its legislative goals warrant the "significant step" of involving a President, especially where "other sources could reasonably provide Congress the information it needs." *Id.* at 2035-36. The district court thought the Committee needed Intervenors' tax returns and audit files to see "how IRS auditors use [their] discretion" when auditing Presidents. JA254. It did not explain why that mattered, given its prior conclusion that Congress likely has no power to *alter* that discretion. JA233. And the Committee does not need to comb through Intervenors' detailed files to make the "predictive policy judgments" associated with the generic funding and staffing laws that the district court identified. *Mazars*, 140 S. Ct. at 2036.

The Committee does not need "every scrap of potentially relevant evidence" to legislate, *id.*, and Intervenors' information would provide

little useful. The reforms the Committee says it's considering would govern "*future* President-taxpayers." JA92 (emphasis added). Yet its request focuses on just one former President, who the Committee claims is an extreme outlier. The Committee also requests files for audits that are still *open*. JA187 ¶214. While open audit files reveal information about the taxpayer, they cannot reveal information about the fairness of *the audit*, since the audit isn't over yet. And the Committee's request for open audit files is itself a form of interference that corrupts the data and makes its study impossible. JA204-05 ¶288.

Other sources would provide the Committee whatever information it needs. The Committee already has a great deal of information about the presidential audit program, including extensive documentation and a briefing provided by senior IRS officials. *See* Docs. 44-3, 44-4; JA62 n.25. The Committee has not asked the IRS for more or explained why the answers to date are insufficient. JA204 ¶286. The district court admitted that "the IRS could tell the Committee" what it needs to know, but reasoned that "the Committee need not accept the agency's assurances." JA254. But the notion that the IRS would lie is fanciful: After the change in administration, Treasury is *eager* to disclose whatever

information the Committee needs, especially if it would help the Committee increase its funding or staffing. And the Committee could use compulsory process to deter any falsehoods. This remote concern cannot be enough under heightened scrutiny. *See Mazars*, 140 S. Ct. at 2036.

If the Committee needed actual tax returns and audit files, it could turn to many other taxpayers. *Anyone* can be a future President, so the Committee could look at the returns of other individuals with complex finances. *Mazars IV*, 2021 WL 3602683, at *16. Other than being mandatory, audits of Presidents are conducted the same way as audits of private citizens. JA204 ¶287. The Committee could also look at other Presidents (assuming they did not object), presidential candidates, or members of Congress who have comparable leverage over the IRS. JA201-02 ¶¶278-81. That President Trump "criticized the IRS' and "controlled dozens of business entities" hardly makes him unique. *See* JA197-98 ¶¶257-62.

Overbreadth: Heightened scrutiny also requires Congress's requests to be reasonably tailored to its legislative goals. *See Mazars*, 140 S. Ct. at 2036. Yet the Committee's request is "broader than reasonably necessary" in several ways. *Id.*

The Committee requested far more information than it reasonably needs to consider broad, optional reforms to the presidential audit program. If the Committee wants to know what procedures the IRS uses, how it stands up to pressure, and the like, it could look at *one* year's worth of information. 2020, for example, is the only year the Committee contends that President Trump criticized the IRS from the White House. JA92; *but see* JA196 ¶256 (explaining that the criticism was not directed at the presidential-audit program). And the audit files alone would tell the Committee what it needs to know about the IRS's processes and resiliency. The tax returns themselves would add little to the Committee's legislative goals (though they add a lot to the Committee's invalid, non-legislative goals). JA209 ¶310.

The Committee also should have limited itself to returns and audit files that are actually part of the presidential audit program. Yet it asked for one year before President Trump took office and one year after. While the IRS sometimes looks at returns from other years, the assumption that it did so here is premature speculation. JA203 ¶¶282-83. And President Trump's businesses are not subject to the presidential audit

program at all. *See* Internal Rev. Manual §4.2.1.15(1). Their returns and audit files would say nothing about the IRS's procedures.

Finally, the Committee's request is broader and more burdensome than reasonably necessary because it promises no confidentiality. The Committee does not deny that, if it receives a favorable ruling in this case, it will quickly publish Intervenors' information. But the Supreme Court rejects "the proposition that in order to perform its legislative function Congress not only must at times consider and use actionable material but also must be free to disseminate it to the public at large." *Doe v. McMillan*, 412 U.S. 306, 316 (1973). The Committee can intelligently craft and study reforms to the IRS's audit process without exposing Intervenors' tax information to the entire world. Study is not meaningfully hindered by confidentiality; only invalid, nonlegislative goals are.

This Court should thus decline to enforce the Committee's request until it guarantees Intervenors protection from public disclosure. The district court asserted that confidentiality is not required, JA263, but this requirement is supported by precedent and history. *Mazars* holds that Congress cannot demand a President's information unless its request is "reasonably necessary" and not overly "burden[some]." 140 S. Ct. at 2036.

It also cited an accommodation between the President and Congress where "documents were made available, but only for one day with no photocopying, minimal notetaking, and no participation by non-Members." *Id.* at 2030. Section 6103(f) likewise requires committees to review tax information while they are in a "closed executive session." And Congress guaranteed confidentiality the only other time it issued compulsory process against a former President—when it sought the testimony of former Presidents Tyler and Adams concerning the possible impeachment of Daniel Webster. *See* H. Rep. No. 29- 684, at 4 (1846). The Court should take a "'considerable impression'" from this "'practice of the government'" and require the same protection here. *Mazars*, 140 S. Ct. at 2035.

III. Intervenors plausibly alleged that the Committee's request violates other constitutional limits.

While requests that implicate the separation of powers must satisfy heightened scrutiny, *Mazars* confirms that these requests are still subject to the rules that govern all congressional demands. *See id.* at 2031-32. Intervenors plausibly alleged that the Committee's request fails several of those rules. The request pursues impermissible, nonlegislative purposes—as the executive branch found in 2019. The only legislation it's arguably designed to study would be unconstitutional. And the Govern-

ment's decision to comply with it was unlawful retaliation and discrimination under the First Amendment. In concluding otherwise, the district court made several legal errors.

A. Intervenors plausibly alleged that the request's primary purpose is not legislative.

Congress has "no general power to inquire into private affairs and compel disclosures"; its implied power to request information, with exceptions not relevant here, derives "'solely'" from its power to legislate. *Id.* at 2031-32 (cleaned up). Every congressional demand for information thus needs a "'valid *legislative* purpose.'" *Id.* at 2031 (emphasis added).

Congress cannot make demands to "expose for the sake of exposure," for "the personal aggrandizement of the investigators," for "the purpose of law enforcement," or to "punish those investigated." *Id.* at 2032 (cleaned up). The Committee cannot request Intervenors' tax information for the nonlegislative purpose of exposing it to the public. *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 531 (9th Cir. 1983). And the Committee cannot request Intervenors' tax information for executive or judicial purposes, such as conducting its own audit or investigating whether Intervenors somehow violated state or federal law. *Quinn v. United States*, 349 U.S. 155, 161 (1955).

As Intervenors thoroughly and plausibly alleged, the purpose behind the Committee's request is not legislative. Treasury and OLC reached the same conclusion in 2019. JA188-90 ¶¶216-22. As did Members of Congress with first-hand knowledge. JA146 ¶1; JA172 ¶¶137-38; JA190 ¶225; JA200-01 ¶¶275-76. Many reasonable observers did as well. *E.g.*, JA171-72 ¶¶133-36; JA173 ¶¶139-40. Over and over, Committee members openly described their purpose as exposure with no connection to legislation. *E.g.*, JA148 ¶11; JA150 ¶24; JA151 ¶26; JA 151-52 ¶¶28-29; JA153-54 ¶¶35-41; JA155 ¶45; JA155 ¶47; JA157 ¶58; JA157-58 ¶¶60-61; JA158 ¶64; JA158-59 ¶¶67-70; JA165 ¶102; JA166 ¶109; JA167-68 ¶116; JA174 ¶145; JA175 ¶147; JA176 ¶156; JA177 ¶160; JA177 ¶163; JA178 ¶¶167-72; JA179 ¶¶174-76; JA179 ¶178; JA193 ¶241; JA200 ¶270. If it wasn't exposure, Committee members said they wanted Intervenors' tax information to determine whether President Trump committed fraud, illegally underpaid taxes, or committed state and local crimes that fall well outside the Committee's jurisdiction. *E.g.*, JA154 ¶42; JA155 ¶46; JA157 ¶59; JA164-65 ¶¶99-102; JA166 ¶¶106-08; JA175 ¶147; JA176 ¶¶153-54; JA179 ¶177; JA180 ¶181; JA186-87 ¶212; JA193 ¶240; JA200 ¶272.

When the Committee finally articulated a formal legislative purpose, its stated rationale came out of nowhere: No members had mentioned the presidential audit process before, and the members abandoned it as soon as this litigation stalled. JA152 ¶32; JA171 ¶131; JA151 ¶26; JA173-74 ¶142. Chairman Neal admitted that the rationale was a pretext created by attorneys. JA162-63 ¶¶86-94; JA170-71 ¶¶126-31. And the scope of his request is wildly inconsistent with that rationale. JA201 ¶277; JA189 ¶221.

These voluminous allegations do not suggest that the Committee had "mixed motives." *Cf.* JA237. Intervenors alleged that the nonlegislative purposes were the request's *real* aim, and that the stated legislative purposes were "artificial pretexts." *Trump v. Deutsche Bank AG*, 943 F.3d 627, 664 (2d Cir. 2019), *vacated and remanded sub nom. by Mazars*, 140 S. Ct. 2019.

The district court did not deny that Intervenors' allegations were well-pleaded. It acknowledged that Intervenors' allegations "show a years-long obsession of congressional Democrats to expose President Trump." JA234. Chairman Neal confessed that the presidential-audit rationale was "constructed" for litigation, it noted, and many of his

statements "undermine [that] alleged purpose." JA236-37. The court also credited similar statements by Speaker Pelosi, which it deemed relevant "because Intervenors allege that Chairman Neal needed her approval for the request." JA236. While the district court did not credit statements from other Members, JA136, it missed that Intervenors similarly alleged their relevance: These Members had first-hand knowledge of Chairman Neal's purposes because they were parties to, and had input on, the request. *E.g.*, JA160 ¶80; JA162 ¶86; JA163 ¶94; JA167 ¶113; JA185 ¶203; JA152 ¶31; JA153 ¶¶34-35; JA150 ¶23.

Instead of disputing the sufficiency of Intervenors' allegations, the district court denied their legal relevance. All Congress must do, the district court opined, is "state" a legitimate legislative purpose. JA238. A court cannot question that stated purpose, or credit countervailing statements showing an illegitimate purpose, because the only question is whether the information that Congress requested could in fact shed light on valid legislation. *See* JA237-38. Any greater scrutiny would impermissibly question Congress's "motives." JA238. The district court drew these conclusions based on *McGrain*, *Tenney*, *Watkins*, *Barenblatt*, and *Eastland*, JA228-31—Supreme Court precedents "concerning investiga-

tions that did not target the President's papers," *Mazars*, 140 S. Ct. at 2033.

The district court misstated the judiciary's role. Courts must determine whether a congressional request serves a "'valid legislative *purpose*.'" *Id.* at 2031 (emphasis added). They should not psychoanalyze legislators' hidden motives. *See Jewish War Veterans of USA, Inc. v. Gates*, 506 F. Supp. 2d 30, 60 (D.D.C. 2007) (distinguishing purpose from motive); *Bauchman ex rel. Bauchman v. W. High Sch.*, 132 F.3d 542, 560 (10th Cir. 1997) (similar). But they must determine a request's purpose by consulting all objective evidence, including resolutions and reports, statements of committee members, and other "things said and done by [the committee's] chairman, counsel, and members." *Shelton v. United States* (*Shelton II*), 404 F.2d 1292, 1297 (D.C. Cir. 1968); *United States v. Cross*, 170 F. Supp. 303, 308-09 (D.D.C 1959). In short, "'the District Court must take evidence and determine for itself whether or not [the challenged action] was within the 'legitimate legislative needs of Congress.'" *Doe v. McMillan*, 566 F.2d 713, 717 (D.C. Cir. 1977).

Relatedly, courts do not automatically accept a committee's formal statement of purpose, where that statement is contradicted by the other

objective evidence. As the Supreme Court has stressed from the beginning, "'The house of representatives is not the final judge of its own power'"; "'the legality of its action may be examined and determined by this court.'" *Kilbourn v. Thompson*, 103 U.S. 168, 199 (1880). And as the Supreme Court reiterated in *Mazars*, courts cannot refuse "to see what all others can see and understand" about why Congress is demanding certain information. 140 S. Ct. at 2034 (cleaned up; quoting *Rumely*, 345 U.S. at 44).

The legitimate-legislative-purpose test is not a paperwork requirement; it's the essential check that ensures Congress stays "limited to the exercise of the powers appropriate to its own department and no other." *Kilbourn*, 103 U.S. at 191. If courts "simply assume[d] … that every congressional investigation is justified," then they would "abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon" individual rights. *Watkins*, 354 U.S. at 198. The legality of congressional demands must be "judged in the concrete, not on the basis of abstractions." *Barenblatt v. United States*, 360 U.S. 109, 112 (1959). Courts cannot simply ask

whether "there is any legislative purpose which might have been furthered" by the request. *Watkins*, 354 U.S. at 204.

The relevant precedents all engage in this record-based review, no matter whether they affirm or reject the congressional demand. In *Kilbourn*, the Court determined that a congressional investigation was pursuing law enforcement, not legislation, after reviewing "the *gravamen* of the whole proceeding." 103 U.S. at 195. While the Court found in *Barenblatt* that "'the primary purposes of the inquiry'" were "'legislative,'" it did so only after it had "scrutinized the record," including the opening "statement" of the committee chair, the hearing "testimony," and "the Committee's report." 360 U.S. at 130-33 & n.33. Similarly, in *McGrain v. Daugherty*, the Court found insufficient evidence that legislation was not the Senate's "real object," but it noted that the answer would have been different "if an inadmissible or unlawful object were affirmatively and definitely avowed." 273 U.S. 135, 178-80 (1927).

Here, Intervenors have alleged that the "primary purpose," "gravamen," and "real object" of the Committee's request is non-legislative. The district court concluded otherwise only after applying a level of deference that the law does not permit.

Even assuming the district court was right that its test governs ordinary congressional demands, the Committee's demand is anything but ordinary. All agree that, at a minimum, the Committee's request targets a former President and implicates the separation of powers. JA250. Yet the district court did not *use* that fact in its analysis. Citing precedents that did not involve a President's information, the district court assumed that it had to accept the Committee's stated purpose at face value, no matter how compelling the other evidence of purpose. *See* JA228-32; JA237-38.

The district court was mistaken. Its approach was even more lenient than this Court's approach in *Mazars II*—a decision that itself "did not take adequate account" of the separation of powers, *Mazars*, 130 S. Ct. at 2036. That decision assumed that Congress received "no deference" because its request targeted a President and, thus, "separation-of-powers concerns still linger in the air." *Trump v. Mazars USA, LLP* (*Mazars II*), 940 F.3d 710, 726 (D.C. Cir. 2019), *vacated and remanded*, 140 S. Ct. 2019. Separation-of-powers concerns do more than linger here; the parties *concede* they are present. Deferential presumptions thus have no place. *Morrison v. Olson*, 487 U.S. at 704-05 (Scalia, J., dissenting).

Stripping those presumptions away, Intervenors plausibly alleged an improper purpose. If their allegations do not state a legitimate-legislative-purpose claim, it's hard to imagine what would. The district court should not have dismissed this claim—one that once enjoyed the support of the United States Government.

B. Intervenors plausibly alleged that the request is not pertinent to valid legislation.

Congressional demands "must concern a subject on which legislation could be had"—*i.e.*, legislation that would be constitutional. *Mazars*, 140 S. Ct. at 2031 (cleaned up). Courts must "consider whether Congress could constitutionally enact" the statutes it claims to be considering, *Mazars II*, 940 F.3d at 732, because Congress's power to request information comes from its power to legislate—a power that is itself "defined, and limited," *Marbury v. Madison*, 5 U.S. 137, 176 (1803). Judicial scrutiny is "particularly" important when Congress is considering "legislation that raises sensitive constitutional issues, such as legislation concerning the Presidency." *Mazars*, 140 S. Ct. at 2036.

But identifying constitutional legislation is not enough. Requests must also be "'related to, and in furtherance of,'" that legislation. *Id.* at 2031. This "pertinency" requirement is "jurisdictional" for committees.

Watkins, 354 U.S. at 206. If a committee could demand "information irrelevant to its legislative purpose, then the Constitution would in practice impose no real limit on congressional investigations." *Mazars II*, 940 F.3d at 739-40. The court's task, then, is to identify a "statutory litmus test": to "define the universe of possible legislation that the [request] provides information about and then consider whether Congress could constitutionally enact any of those potential statutes." *Id.* at 732 (cleaned up).

The district court ruled out the Committee's primary legislative rationale. A statute *forcing* the IRS to audit a President would "likely commandeer the Executive's investigatory powers," JA233, and impose impermissible qualifications on the office, *Griffin v. Padilla*, 408 F. Supp. 3d 1169, 1177-81 (E.D. Cal. 2019), *vacated due to subsequent mootness*. While the court identified other reforms that would not "*require* the IRS" to audit Presidents, JA233, it never asked whether the Committee's request was pertinent to those reforms. Its pertinency discussion focused on whether the request would help the Committee see how the IRS audited President Trump—not whether it would help the Committee determine whether the IRS needs more money or staff. *See* JA240-42.

The Committee's request is not reasonably relevant to studying the generic, optional reforms to the IRS that the district court deemed constitutional. As this Court explained in *Mazars II*, requests for a President's financial information "would produce no relevant information about laws that apply to ordinary Executive Branch employees." 940 F.3d at 732-33 (cleaned up). A request for one President's finances is only pertinent to "laws that *apply* to Presidents"—meaning laws that "*require* the President" to do something. *Id.* at 733 (emphases added). The district court's contrary approach has no limit: Congress could always say it wants a President's papers, but avoid the fact that its "constitutional authority to regulate the President's conduct is significantly more circumscribed" by saying it's merely regulating "other federal employees" or considering nonbinding measures concerning the Presidency. *Id.*

The district court's logic is the "mere assertion of a need to consider 'remedial legislation'" that cannot "alone justify an investigation accompanied with compulsory process." *Shelton II*, 404 F.2d at 1297. The Committee did not assert this purpose or support it with "references to specific problems which in the past have been or which in the future could be the subjects of appropriate legislation." *Id.* If the Committee had, it would

be immediately apparent that the Committee's request for Intervenors' specific tax information has virtually nothing to do with whether the IRS needs more money or staff. The Committee understood that its request was only arguably pertinent to legislation that *required* the IRS to audit Presidents. Because that legislation is unconstitutional, the request lacks a legitimate legislative purpose.

C. Intervenors plausibly alleged a violation of the First Amendment.

The First Amendment forbids the government from discriminating or retaliating based on someone's political party or speech. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990); *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1949 (2018). The government violates these principles when speech or politics motivated its action "at least in part." *Cruise-Gulyas v. Minard*, 918 F.3d 494, 497 (6th Cir. 2019). These First Amendment protections "reach and limit congressional investigations," just as they do "all forms of governmental action." *Barenblatt*, 360 U.S. at 126; *Watkins*, 354 U.S. at 188; *accord Mazars*, 140 S. Ct. at 2032 (reiterating that targets of congressional investigations "retain their constitutional rights throughout").

When assessing this kind of claim, "the government's reason for [acting] is what counts." *Heffernan v. City of Paterson*, 578 U.S. 266, 273 (2016). It does not matter that the government could legitimately take the same action "for any number of reasons"; constitutionally protected speech and association are simply "reasons upon which the government may not rely." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). As the Supreme Court has stressed, it would be "unprecedented" to hold that, "regardless of improper intent," the government is not liable whenever its "conduct is 'objectively valid.'" *Crawford-El v. Britton*, 523 U.S. 574, 592-94 (1998). That the Government had a lawful basis for acting is not a defense unless it can carry its burden of proving that it "would have reached the same decision … even in the absence of the protected conduct." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). The Government carries the burden on that question of fact, and this Court cannot resolve it against Intervenors at the pleading stage. *Hall v. Ford*, 856 F.2d 255, 258 (D.C. Cir. 1988).

Intervenors plausibly alleged that the Government's decision to reverse course and turn over Intervenors' tax information was based on this improper intent. Following the election of President Biden—President

Trump's opponent in the 2020 election and his chief political rival today—the Government agreed to comply with the Committee's request on flimsy legal grounds, without disputing its prior factual determination about the request's true purpose. JA189-90 ¶¶219-25; JA213-15 ¶¶331-37. Intervenors also allege numerous statements by the head of the executive branch supporting an inference of improper political motives. JA194-95 ¶¶244-52; JA198-200 ¶¶266-68. That the Government switched positions shortly after President Biden took office, and thus gained the power to disclose Intervenors' information under §6103, is sufficient to raise a plausible inference. *Singletary v. D.C.*, 351 F.3d 519, 525 (D.C. Cir. 2005). So is the request's gerrymandered focus on only one President, and the fact that the Government reversed position in this very case following consultations with the Committee and other political allies, as well as public pressure to disclose Intervenors' tax information. *See Smith v. De Novo Legal, LLC*, 905 F. Supp. 2d 99, 104 (D.D.C. 2012).

The district court did not suggest that Intervenors failed to plead retaliatory or discriminatory intent; it dismissed Intervenors' claim based solely on causation. Citing its "previous analysis," the court noted that it had already dismissed Intervenors' claim that the request lacks a

legitimate legislative purpose. JA259. And if the request has a legitimate legislative purpose, the district court reasoned, then §6103(f)(1) *compels* the Government to divulge Intervenors' tax information. In other words, the fact that the Government was disclosing Intervenors' tax information out of retaliation or discrimination is irrelevant because §6103(f)(1) would require the Government to disclose that information anyway. *See* JA259-60.

The district court's reasoning is path dependent. If Intervenors plausibly alleged that the Committee's request lacks a legitimate legislative purpose, then the district court's reasoning fails on its own terms. And Intervenors did plausibly allege that, as explained above. *Supra* II, III.A-B. If the Court reverses or remands on one of Intervenors' legitimate-legislative-purpose claims, then it should reverse or remand on Intervenors' First Amendment claim too.

The district court's reasoning is also flawed. It assumes that because the court held that Intervenors failed to plead a legitimate-legislative-purpose claim, the executive branch was legally required to comply with the Committee's §6103(f)(1) request. But that's not true.

Whatever limits may exist on courts, the executive branch could conclude that the Committee's request violates the First Amendment's bans on retaliation and discrimination (or other constitutional constraints). That conclusion would not only be correct, but it would be lawful because the Executive's duty to follow the Constitution trumps any statutory duties under §6103(f)(1). *See* U.S. Const. art. II, §1, cl. 8; art. VI, cl. 2. The separation of powers also leads the executive branch to "routinely, and correctly," deny "congressional access to [open investigative] files" like many of the files requested here. Doc. 143 at 31; *see* JA75-76 (citing Internal Rev. Manual §11.3.4.4(13)).

The executive branch could also conclude that the Committee's request lacks a legitimate legislative purpose—the very conclusion it *did* draw in this case from 2019 to 2021. The district court's decision does not mean that the Executive's contrary conclusion would be unlawful. The court did not hold that the Committee necessarily had a legitimate legislative purpose; it held that the judiciary has little power to examine that question and dismissed Intervenors' counterclaims and cross-claims. *See* JA138. Even if §6103(f)(1) compels disclosure when the Committee's request has a legitimate legislative purpose, nothing requires the executive

branch to analyze that question with the same presumptions and deference that a court would use. *See* JA71-73 (OLC explaining this distinction). No court has decided *that* question, and no court would even have the power to decide it. *See Comm. on Judiciary of U.S. House of Representatives v. McGahn*, 973 F.3d 121 (D.C. Cir. 2020), *vacated en banc due to subsequent mootness*. And no court could say in that scenario that "Congress and the current President stand united"—a key factor that led the district court to apply *Nixon v. GSA* here. JA250.

In short, Intervenors plausibly alleged that the Government had an impermissible intent. The Government is free to argue that its decision was really based on the statute, rather than retaliation or discrimination, but that defense will have to be resolved at a later stage. The notion that the Government had no choice but to disclose Intervenors' tax information is contradicted by Intervenors' pleading and the Government's own actions in this very case.

CONCLUSION

This Court should reverse the district court's opinion and order and remand for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 12,540 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Century Schoolbook font.

Dated: January 10, 2022 *s/ Cameron T. Norris*

CERTIFICATE OF SERVICE

I filed this brief with the Court via ECF, which will email everyone requiring service.

Dated: January 10, 2022 *s/ Cameron T. Norris*