[ORAL ARGUMENT SCHEDULED FOR JANUARY 3, 2020]

No. 19-5331

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

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

Plaintiff-Appellee,

v.

DONALD F. MCGAHN, II,

Defendant-Appellant.

On Appeal from the United States District Court for the District of Columbia (No. 1:19-cv-2379) (Hon. Ketanji Brown Jackson, District Judge)

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

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiff-appellee is the United States House of Representatives Committee on the Judiciary. Defendant-appellant is Donald F. McGahn, II.

James M. Murray has filed a motion for leave to participate as an amicus on appeal. No amici participated in the district court proceedings.

B. Rulings Under Review

The rulings under review are the order and opinion of the district court granting partial summary judgment in favor of the Committee on Judiciary, denying McGahn's motion for summary judgment, declaring that McGahn is not immune from Congressional process, and enjoining McGahn to comply with the Committee's subpoena. *Comm. on Judiciary, U.S. House of Representatives v. McGahn*, __ F. Supp. 3d __, No. 19-cv-2379 (KBJ), 2019 WL 6312011 (D.D.C. Nov. 25, 2019) (Ketanji Brown Jackson, J.). *See* JA847-966 (opinion); JA967-68 (order).[*]

C. Related Cases

This case has not previously been before this Court or any other. Counsel for the Committee is unaware of any other related cases within the meaning of D.C.

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[*] References to the joint appendix appear as JA__.

Circuit Rule 28(a)(1)(C). Some of the same legal issues, however, are presented in *Committee on Ways and Means, U.S. House of Representatives v. Department of Treasury, et al.*, No. 19-cv-1974-TNM (D.D.C.), *Kupperman v. U.S. House of Representatives, et al.*, No. 19-cv-3224-RJL (D.D.C.), and *Committee on Oversight and Reform, U.S. House of Representatives v. Barr, et al.*, No. 19-cv-3557-RDM (D.D.C.).

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GLOSSARY

Committee	Committee on the Judiciary of the U.S. House of Representatives
DOJ	U.S. Department of Justice
FBI	Federal Bureau of Investigation
GSA	General Services Administration
JA	Joint Appendix
McGahn	Donald F. McGahn, II
OLC	Office of Legal Counsel, U.S. Department of Justice

INTRODUCTION

The Committee on the Judiciary (Committee) is investigating grave matters concerning Presidential misconduct and political interference with the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI). To obtain information critical to the House's impeachment proceedings and any trial in the Senate, as well as to assist its consideration of remedial legislation and oversight, the Committee issued a subpoena for testimony to Donald F. McGahn. McGahn is President Trump's former White House Counsel, who—as detailed in the report of Special Counsel Robert Mueller—witnessed multiple acts of obstruction of justice by President Trump.

Notwithstanding McGahn's legal duty to comply with the Committee's subpoena, President Trump directed McGahn not to testify, asserting an unfounded theory of absolute immunity for senior Presidential aides. When the Committee filed suit to enforce its subpoena, DOJ—representing McGahn—argued that the Committee could not sue. DOJ's threshold arguments disregard this Court's holdings in *United States v. Am. Tel. & Tel. Co.* (*AT&T I*), 551 F.2d 384 (D.C. Cir. 1976), that House committees have Article III standing to enforce their subpoenas and that district courts have federal-question jurisdiction to hear such suits. The Committee also has an equitable cause of action because "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015).

DOJ attempts to shoehorn this case into *Raines v. Byrd*, 521 U.S. 811 (1997), which held that *individual Members* lacked standing to assert an *institutional* injury to Congress. But *Raines* has no application here. In this case, the plaintiff Committee has suffered a concrete injury to its own investigations. DOJ also overlooks more than two hundred years of judicial decisions interpreting the validity of subpoenas issued to Executive Branch officials, including the President, and the long history of Executive cooperation with Congressional investigations, including testimony of senior Presidential aides under subpoena.

The district court correctly rejected the Administration's attempts to evade judicial review of its sweeping absolute immunity assertion, holding that DOJ's "contentions about the relative power of the federal courts, congressional committees, and the President distort established separation-of-powers principles beyond all recognition." JA887. On the merits, the court held that "with respect to senior-level presidential aides, absolute immunity from compelled congressional process simply does not exist." JA963.

McGahn has never disputed that the subpoena serves valid purposes. McGahn's testimony is relevant to prove a pattern of Presidential obstruction, to consideration of legislation to prevent future Presidential abuses of power, and to oversight of DOJ and the FBI. The House's "power of inquiry—with process to enforce it," *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927), is essential to its legislative and impeachment functions.

The Administration's attempt to stymie the Committee's exercise of its Article I impeachment, legislative, and oversight powers is unfounded. This Court should affirm the district court's well-reasoned opinion and require McGahn to comply with the Committee's subpoena without delay. If necessary, the Court could issue an immediate order vacating the stay and affirming the decision below, with opinion to follow.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. On November 25, 2019, the district court entered partial summary judgment in favor of the Committee and enjoined McGahn to comply with the subpoena. JA967-68. McGahn filed a timely notice of appeal on November 26, 2019. JA969. This Court has jurisdiction under 28 U.S.C § 1292(a)(1). *See Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 445 (D.C. Cir. 2018).

STATEMENT OF THE ISSUES

I. Whether the district court correctly held that the Committee may seek judicial enforcement of its subpoena because

(A) the Committee has suffered a cognizable injury from McGahn's refusal to testify and thus has Article III standing;

(B) the federal-question statute, 28 U.S.C. § 1331, provides the district court with subject-matter jurisdiction to resolve this suit, which arises under the Constitution; and

(C) the Committee has a cause of action to seek an equitable remedy for the violation of its Article I authorities.

II. Whether the district court correctly held that McGahn does not have absolute testimonial immunity from a Congressional subpoena.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS AND HOUSE RULES

The pertinent constitutional and statutory provisions and House and Committee Rules are set forth in the addendum to this brief.

STATEMENT OF THE CASE

A. Legal Framework

Article I of the Constitution provides that "[t]he House of Representatives … shall have the sole Power of Impeachment." U.S. Const., Art. I, § 2, cl. 5. Article I further states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const., Art. I, § 1.

The Constitution also assigns each House of Congress authority to "determine the Rules of its Proceedings." U.S. Const., Art. I, § 5, cl. 2. House Rule X provides that the legislative jurisdiction of the Committee includes "[c]riminal law enforcement and criminalization"; "[t]he judiciary and judicial proceedings, civil and criminal"; "presidential succession"; and "[s]ubversive activities affecting the internal security of

the United States." House Rule X.1(l).[1] Pursuant to this provision, the Committee exercises jurisdiction over legislation regarding special counsels and criminal statutes and serves as the authorizing committee for DOJ and the FBI.

Like each of the House's standing committees, the Committee has "general oversight responsibilities" over the subjects within its jurisdiction, including the "organization and operation of Federal agencies" it oversees, House Rule X.2(a), (b)(1)(B), and the Committee is charged with reviewing those subjects "on a continuing basis" to determine whether legislative reforms are warranted. House Rule X.2(b)(1). To carry out these functions, the Committee "at any time" may conduct "investigations and studies," House Rule XI.1(b)(1), and may issue subpoenas for testimony and documents, House Rules XI.2(m)(1)(B), (m)(3)(A)(i).

The Committee's jurisdiction also includes impeachment. *Jefferson's Manual* § 605, H. Doc. No. 114-192, at 321 (2017). The Committee voted out Articles of Impeachment against President Trump on December 13, 2019, *see* H. Res. 755, 116th Cong. (2019), and the full House is expected to vote on those Articles soon.

B. The Committee's Investigation And Subpoena To McGahn

1. The Committee is investigating matters concerning the President's interference with DOJ and the FBI arising out of the investigation and report of

[1] Rules of the U.S. House of Representatives, 116th Cong. (House Rules), https://perma.cc/X5ZQ-ZZWD.

Special Counsel Mueller. In March 2019, the Special Counsel completed his report summarizing the findings of a nearly two-year-long investigation.[2] The Special Counsel concluded that the "Russian government interfered in the 2016 presidential election in sweeping and systematic fashion." Mueller Report, Vol. I at 1. He further concluded that the Trump Campaign welcomed Russia's election interference because it "expected it would benefit electorally from information stolen and released through Russian efforts." *Id.*, Vol. I at 1-2, 5. And the Special Counsel explained that President Trump committed "multiple acts … that were capable of exerting undue influence over law enforcement investigations, including" the Special Counsel's own investigation. *Id.*, Vol. II at 157; *see generally id.*, Vol. II.

McGahn was a key witness to many of the most serious instances of Presidential misconduct. McGahn sat for five interviews with the Special Counsel's Office, and the Mueller Report mentions his statements more than 160 times, including in connection with President Trump's many efforts to thwart the investigation, interfere with agency processes, and conceal his obstructive conduct.[3]

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[2] Robert S. Mueller III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election* (2019) (Mueller Report), https://perma.cc/DN3N-9UW8.

[3] *See, e.g.*, Mueller Report, Vol. II at 24-48 (President Trump's firing of National Security Advisor Michael Flynn); *id.*, Vol. II at 52-55, 57-77 (President Trump's efforts to end the FBI's Russia investigation and his termination of FBI Director James Comey); *id.*, Vol. II at 77-78, 80-90, 113-20 (President Trump's directions to McGahn to fire Special Counsel Mueller and subsequent efforts to create a false record).

Following the release of the Mueller Report, President Trump publicly challenged the veracity of McGahn's statements to the Special Counsel. JA857.

2. On March 4, 2019, the Committee opened an investigation into Presidential misconduct. In a letter to McGahn that same day requesting that he provide related documents, Committee Chairman Jerrold Nadler explained both the Committee's "obligation to investigate evidence of abuses of executive power, public corruption, and acts of obstruction" by the President and its role as the "the main oversight authority for the Department of Justice, including its component agencies, its personnel, and its law enforcement activities." JA542.

McGahn did not provide the requested materials. On April 22, 2019, the Committee issued a subpoena to McGahn for the documents and his testimony at a May 21, 2019 hearing. JA618-29.

On the afternoon before McGahn's scheduled appearance, White House Counsel Pat Cipollone informed the Committee that the President had "directed" McGahn not to comply with the subpoena. JA304. Cipollone's letter stated that the Office of Legal Counsel (OLC) had advised that "McGahn is absolutely immune from compelled congressional testimony with respect to matters occurring during his service as a senior advisor to the President." JA303; *see* JA306-20 (enclosing OLC opinion). That evening, McGahn's private counsel informed the Committee that McGahn "finds himself facing contradictory instructions from two co-equal branches of government" and would refuse to testify. JA631-32.

On May 21, 2019, the Committee convened for its scheduled hearing without McGahn. In June 2019, the House passed a resolution authorizing the Committee to use "all necessary authority under Article I of the Constitution" to initiate litigation to enforce the subpoena. H. Res. 430, 116th Cong. (2019); *see* H. Rep. No. 116-108, at 21 (2019). In a July 11, 2019 memorandum, Chairman Nadler stressed that the Committee has "a constitutional duty to investigate credible allegations of misconduct by executive branch officials, including the President of the United States"—a duty that requires the Committee to determine "whether to recommend articles of impeachment," to consider legislative reforms, and to conduct oversight of DOJ. JA529, JA531; *see* H. Rep. No. 116-105, at 13 (2019). The Committee must consider "whether the conduct uncovered [by the Special Counsel] may warrant amending or creating new federal authorities," including legislation "relating to election security, campaign finance, misuse of electronic data, and the types of obstructive conduct that the Mueller Report describes." JA530 (quoting H. Rep. No. 116-105, at 13).

The second Article of Impeachment voted out by the Committee details President Trump's efforts to obstruct Congress's investigation into his "corrupt solicitation of the Government of Ukraine to interfere in the 2020 United States Presidential election." H. Res. 755, at 6. It states that "[t]hese actions were consistent with President Trump's previous efforts to undermine United States Government investigations into foreign interference in United States elections," *id.* at 7—part of a larger pattern about which McGahn has relevant knowledge. The Committee's

investigation "into President Trump's obstruction of the Special Counsel" is ongoing. *Staff of the H. Comm. on the Judiciary, 116th Cong., Rep. on the Impeachment of Donald J. Trump, President of the United States* 167 n.928 (2019) (*Impeachment Report*), https://perma.cc/3S55-3HLG.

McGahn's testimony also relates to pending legislative proposals. H.R. 3380, for example, would impose reporting and transparency requirements on communications between the White House and DOJ relating to ongoing civil and criminal matters. Another bill, H.R. 197, would place limitations on the removal of special counsels. H.R. 1627 is aimed at preventing Presidential abuse of pardons, and H.R. 2424 would require political committees to report to the FBI offers of prohibited contributions from foreign nationals.

The parties ultimately reached an agreement on production of the subpoenaed documents. *See* JA863. Although the Committee repeatedly tried to reach an accommodation with McGahn regarding his testimony, those efforts resulted in an impasse. JA845.

C. Procedural History

On August 7, 2019, the Committee filed suit seeking declaratory and injunctive relief. JA12-65. On November 25, 2019, the district court granted the Committee's motion for partial summary judgment, JA847-966, declared McGahn's refusal to testify unlawful, and enjoined McGahn to appear and testify, JA967-68.

The district court rejected DOJ's threshold arguments. The court held that it had federal-question jurisdiction over the Committee's suit because it "arises under the Constitution" for purposes of 28 U.S.C. § 1331. JA891. The court rejected McGahn's argument that 28 U.S.C. § 1365, which establishes jurisdiction for *Senate* subpoena-enforcement actions, implicitly withdraws jurisdiction under Section 1331 to hear such suits brought by the *House*. JA891-93.

The district court held that this dispute is justiciable. As the court explained, "a subpoena-enforcement dispute is not a 'political' battle at all" but "raise[s] garden-variety legal questions that the federal courts address routinely and are well-equipped to handle." JA895-96. Adjudicating subpoena-enforcement disputes between the political branches is consistent with the Judiciary's constitutional responsibility to say "what the law is." JA909.

The district court held that the Committee has Article III standing because "outright defiance of *any* duly issued subpoena … qualifies as a concrete, particularized, and actual injury for standing purposes." JA918. The court explained that "it is hard to imagine a more significant wound than such alleged interference with Congress' ability to detect and deter abuses of power within the Executive branch." JA921. The court rejected McGahn's reliance on *Raines v. Byrd*, 521 U.S. 811 (1997), explaining that "the possible future 'dilution of institutional legislative power'" asserted by individual legislators in *Raines* "is a completely different type of

injury than the harm to established constitutional investigatory rights" asserted by the Committee. JA924 (quoting *Raines*, 521 U.S. at 826).

The district court held that the Committee can seek equitable relief because "a committee of Congress's right to enforce its subpoenas is *intrinsic* to its constitutional authority to conduct investigations in the first place." JA926. In addition, the court concluded that the "Committee has satisfied the three established elements for seeking a declaration of rights under" the Declaratory Judgment Act. JA928. It stressed that "[w]ithout the power to investigate—including of course the authority to compel testimony, *either through its own processes or through judicial trial*—Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively." JA937 (quotation marks omitted).

On the merits, the court held that "if a duly authorized committee of Congress issues a valid legislative subpoena to a current or former senior-level presidential aide, the law requires the aide to appear as directed, and assert executive privilege as appropriate." JA938. The court explained that "the principle of absolute testimonial immunity for senior-level presidential aides has no foundation in law," JA942, and "appears to be a fiction that has been fastidiously maintained over time through the force of sheer repetition in OLC opinions," JA963. As the court observed, the assertion that "the Executive branch would grind to a halt from the weight of subpoenas" absent absolute testimonial immunity is belied by the routine testimony of high-ranking Executive Branch officials and by Congress's sparing use of its power to

subpoena such officials. Any concerns about Executive Branch confidentiality can be addressed "by asserting an appropriate privilege." JA954-55.

The district court accordingly ordered McGahn to comply with the subpoena. JA965-68. The district court denied McGahn's motion for a stay pending appeal. JA986. On November 27, 2019, this Court ordered an administrative stay of the district court's order pending further order of this Court.

SUMMARY OF THE ARGUMENT

I. The Committee has Article III standing to enforce its subpoena. McGahn's refusal to testify injures the Committee by interfering with its investigations and depriving it of information. Congress's authority to investigate is a necessary element of its Article I power to legislate: effective legislation requires information. The same is true of the House's exercise of its impeachment power. The Supreme Court has long held that a House of Congress may compel responses when it seeks to gather information by subpoena in furtherance of its legitimate purposes. *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975). It follows *a fortiori* that the Committee is injured when its subpoenas are defied.

That this is an interbranch dispute does not divest this Court of Article III jurisdiction. In *AT&T I*, which was also an interbranch dispute over the enforceability of a House subpoena, this Court held that "the House as a whole has standing to assert its investigatory power." 551 F.2d at 391. McGahn relies extensively on the Supreme Court's decision in *Raines*. But that case held that

individual Members of Congress lacked standing to assert an abstract *institutional* injury in the diminution of legislative power because there was a mismatch between the plaintiffs and the injury. Here, by contrast, McGahn has refused to comply with *the Committee's* subpoena and injured *the Committee* in its investigations, and the House has authorized the Committee's suit—there is a match and the injury is concrete and particularized.

The district court had federal-question jurisdiction under 28 U.S.C. § 1331. The enforceability of a House subpoena is a question that "arises under the Constitution of the United States," as this Court held in *AT&T I*. 551 F.2d at 389. That a separate provision, 28 U.S.C. § 1365, provides jurisdiction for *Senate* subpoena enforcement disputes does not divest federal courts of jurisdiction to adjudicate *House* subpoenas. Any overlap between Section 1365's jurisdictional grant for Senate subpoenas and Section 1331 is no different than numerous other redundancies in jurisdictional provisions and does not suggest that Section 1365 impliedly repeals jurisdiction under Section 1331.

The Committee may seek an equitable remedy for the violation of its Article I power. The Supreme Court has repeatedly confirmed that no express statutory cause of action is required in cases like this one because "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity." *Armstrong*, 135 S. Ct. at 1384. The Supreme Court's reluctance to imply causes of action for *damages* against federal officials is animated by concerns not

present in an equitable suit, including exposing the federal government to financial liabilities without Congress's express approval. Those cases do not prevent the Committee from suing here.

II. The Executive Branch's sweeping assertion that current and former Presidential aides enjoy absolute immunity from compelled Congressional testimony has no grounding in the law. In every case where the President has asserted absolute immunity from compelled process, the courts have rejected that defense and applied a qualified privilege. *See, e.g.*, *United States v. Nixon* (*Nixon*), 418 U.S. 683 (1974) (rejecting President Nixon's assertion that Presidential communications with his aides in the Oval Office were absolutely privileged). Although the President is absolutely immune in one context—from civil damages for official acts—the Supreme Court has held that this immunity does not extend to Presidential aides. *Harlow v. Fitzgerald* (*Harlow*), 457 U.S. 800, 808 (1982). And this Court effectively has foreclosed any argument that such immunity could be extended to aides on a national security rationale. *Halperin v. Kissinger*, 807 F.2d 180, 193-94 (D.C. Cir. 1986) (Scalia, Circuit Justice). The separation-of-powers and policy concerns that DOJ raises were considered in prior cases and deemed insufficient to warrant absolute Presidential immunity. These concerns are particularly weak when, as here, they are invoked to shield information concerning Presidential misconduct.

STANDARD OF REVIEW

This Court "review[s] the district court's grant of summary judgment de novo." *Am. Soc'y for Testing & Materials*, 896 F.3d at 445.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE COMMITTEE MAY SEEK JUDICIAL ENFORCEMENT OF ITS SUBPOENA

A. The Committee Has Standing

McGahn's refusal to comply with the Committee's subpoena injures the Committee. McGahn is a crucial fact witness regarding the Committee's ongoing investigations into obstruction and other Presidential misconduct, and his testimony is critical to the Committee's exercise of its legislative and oversight functions. McGahn is obstructing the Committee's investigation and depriving it of information to which it is constitutionally entitled. That is an Article III injury.

1. As the district court held, "the Judiciary Committee has alleged an actual and concrete injury to its right to compel information (like any other similarly situated subpoena-issuing plaintiff)." JA923-24.

"The investigative authority of the [House] Judiciary Committee with respect to presidential conduct has an express constitutional source." *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974). The Constitution assigns the House the "sole Power of Impeachment." U.S. Const., Art. I, § 2, cl. 5. Article I also vests Congress with "[a]ll legislative Powers," U.S. Const.,

Art. I, § 1, and endows each House of Congress with investigative power that it may delegate to committees, *see, e.g.*, *Eastland*, 421 U.S. at 505.

The House has delegated to the Committee authority to conduct investigations and issue subpoenas. House Rule XI.1(b)(1); XI.2(m)(1)(B). The Committee's investigative authority encompasses whether the President has committed impeachable offenses, *see Jefferson's Manual* §§ 605, 730; "inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes"; and "probes into departments of the Federal Government to expose corruption, inefficiency or waste," *Trump v. Mazars USA, LLP*, 940 F.3d 710, 723 (D.C. Cir. 2019) (quotation marks omitted), *cert. granted*, No. 19-715, 2019 WL 6797734 (Dec. 13, 2019).

Exercising this authority, the Committee is investigating whether the President committed impeachable misconduct based in part on events described in the Mueller Report. *See Impeachment Report* at 132-34, 167-68 & n.928 (describing President Trump's efforts to obstruct the Special Counsel's investigation and explaining that "the pattern of misconduct they represent[] sheds light on the particular conduct set forth in th[e] [Second] Article as sufficient grounds for the impeachment of President Trump"). The Committee is also investigating whether to amend existing or create new federal laws, and whether DOJ and the FBI are properly discharging their duties with the requisite independence. JA12-15; *see also* JA532-33.

McGahn's refusal to comply with the Committee's subpoena impedes these investigations. As the district court noted, "no federal judge has ever held that defiance of a valid subpoena does not amount to a concrete and particularized injury in fact; indeed, it appears that no court has ever even *considered* this proposition." JA917. And while "the *nature* of the injury" is similar where a private litigant's subpoenas are defied, "the Supreme Court has suggested that the *degree* of harm is an order of magnitude different" when a Congressional subpoena is defied. JA918-19. Congressional subpoenas are issued to aid the Legislative Branch in exercising its constitutional functions, and there is no "more significant wound than … interference with Congress' ability to detect and deter abuses of power within the Executive branch for the protection of the People of the United States." JA921.

The courts—including this Court—have, therefore, uniformly concluded that the House and its committees have standing to vindicate their rights to information sought by subpoena. In *AT&T I*, this Court rejected a non-justiciability challenge to a dispute between the Legislative and Executive Branches over a Congressional subpoena. 551 F.2d at 391. That case involved a House subcommittee's subpoena to AT&T for documents related to wiretaps undertaken at the FBI's request. *See id.* at 385. When AT&T indicated that it would comply, the United States filed suit to prohibit it from doing so, and the chairman of the House subcommittee intervened as a defendant. *Id.* As this Court explained, "[a]lthough this suit was brought in the name of the United States against AT&T, AT&T has no interest in this case, except to

determine its legal duty." *Id.* at 388-89. The case was instead "correctly treated … as a clash of the powers of the legislative and executive branches of the United States," where "the executive branch is seeking to enjoin the legislative branch." *Id.* at 389.

With that understanding of the dispute, this Court explained that the House had authorized the chairman of the relevant House subcommittee to intervene and held that "[i]t is clear that the House as a whole has standing to assert its investigatory power." *Id.* at 391; *see United States v. Am. Tel. & Tel. Co.* (*AT&T II*), 567 F.2d 121, 134 (D.C. Cir. 1977) (affirming that the House has "threshold legal standing"). This Court noted that it had reached the merits of a similar dispute in *Senate Select Committee* without suggesting any justiciability problems. *AT&T I*, 551 F.2d at 390. It construed *Senate Select Committee* to "establish[], at a minimum, that the mere fact that there is a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution of the conflict." *Id.*

Similarly, in recent suits filed by President Trump in his individual capacity to challenge House subpoenas issued to third parties, neither President Trump nor the courts have questioned the House committees' standing to intervene to defend their subpoenas. *Trump v. Comm. on Oversight & Reform of U.S. House of Representatives*, 380 F. Supp. 3d 76, 88 (D.D.C. 2019) (noting that "Plaintiffs consented to the Committee's intervention as a defendant in this matter"), *aff'd sub nom. Mazars*, 940 F.3d 710; *see also Trump v. Deutsche Bank AG*, — F.3d —, 2019 WL 6482561, at *2 (2d Cir. Dec. 3, 2019), *cert. granted*, No. 19-760, 2019 WL 6797733 (Dec. 13, 2019). As this Court

stressed in *Mazars*, adjudication of the validity of a Congressional subpoena is a "familiar tale." 940 F.3d at 747.

District courts have followed *AT&T I*, uniformly holding that the House and its committees have standing to challenge a subpoena recipient's refusal to provide information. *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 70 (D.D.C. 2008) (as in *AT&T I*, "[t]he injury to the House was evident: the validity and efficacy of that particular subpoena was in jeopardy, as was the utility of the subcommittee's investigation"); *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 20 (D.D.C. 2013) (similar); *see also U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 86 (D.D.C. 1998) (three-judge district court) (House injured by "[t]he inability to receive information").

OLC also has observed that "Congress has a legitimate and powerful interest in obtaining any unprivileged documents necessary to assist it in its lawmaking function." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 137 (1984). As OLC noted, "[a] civil suit to enforce the subpoena would be aimed at the congressional objective of obtaining the documents" and, through such a suit, "Congress would be able to vindicate a legitimate desire to obtain documents." *Id.* OLC found "little doubt" that "Congress may authorize civil enforcement of its subpoenas and grant jurisdiction to the courts to entertain such cases." *Id.* at 137 n.36; *see also Response to*

Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act, 10 Op. O.L.C. 68, 83, 87-88 (1986).

2. McGahn's standing arguments are meritless. Although *AT&T I* is binding precedent, McGahn addresses it only briefly (Br. 33) to point out that the House intervened after the district court quashed the subpoena. But the timing of the House's intervention was not relevant to the Court's conclusion that the House "has standing to assert its investigatory power." *AT&T I*, 551 F.2d at 391. To the extent McGahn is arguing that the Committee would suffer an Article III injury from a judicial decision holding its subpoena invalid, but not from an Executive Branch decision refusing compliance with the subpoena, that argument is groundless.

McGahn relies principally (Br. 15-17, 20-24) on the Supreme Court's decision in *Raines*. But as the district court explained, *Raines* is "entirely inapposite to the claims that the Judiciary Committee brings today." JA924. *Raines* rested on the fact that it was *individual legislators*—neither the House nor the Senate as a whole, nor any of their authorized committees—seeking to advance an *institutional* interest that neither body of Congress had endorsed (and which both opposed). 521 U.S. at 829. *Raines* does not address a situation where an authorized committee of the House seeks to vindicate its entitlements to information in the exercise of its Article I authorities. H. Res. 430, 116th Cong. (2019) (authorizing this suit).

The Supreme Court has emphasized that *Raines* held "specifically and only" that "six *individual Members* of Congress lacked standing to challenge the Line Item

Veto Act." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664 (2015); *see Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 n.4 (2019) ("*Raines* held that individual Members of Congress lacked standing"). As *Raines* explained, the Members were not the proper parties to claim that the Act impaired Congress's institutional role in lawmaking because that interest belonged to Congress as a whole. Such an injury was not personal to individual lawmakers but "widely dispersed." 521 U.S. at 829; *see Arizona State Legislature*, 135 S. Ct. at 2664 (in *Raines*, the alleged injury "necessarily impacted all Members of Congress and both Houses … equally"); *see also Campbell v. Clinton*, 203 F.3d 19, 20-21 (D.C. Cir. 2000) (relying on *Raines* to hold that *individual Members* lacked standing to challenge certain of the President's military decisions). As the district court here observed, "the possible future 'dilution of institutional legislative power'" at issue in *Raines* "is a completely different type of injury than the harm to established constitutional investigatory rights." JA924.

The Supreme Court's decision in *Arizona State Legislature* puts to rest any notion that a legislative body (as distinct from individual members) lacks standing to redress an injury to its rights and powers. *Arizona State Legislature* held that a state legislature had standing to challenge the constitutionality of a state initiative that displaced its role in the Congressional redistricting process. In contrast to the individual legislators in *Raines*, the legislature was "an institutional plaintiff asserting an institutional injury"

that the federal courts were competent to hear. *Arizona State Legislature*, 135 S. Ct. at 2664. Here, too, the injury has been incurred by the institutional body that filed suit.

Bethune-Hill further supports the Committee's standing. There, the Supreme Court held that "a single House of a bicameral [state] legislature lacks capacity to assert interests belonging to the legislature *as a whole*"—the interest in sustaining the constitutionality of its redistricting plan. 139 S. Ct. at 1953-54 (emphasis added). This case, by contrast, involves an injury to interests held by each body of Congress (including its respective committees) *separately*—the constitutional power to investigate. And the House has delegated the relevant investigatory authority to the Committee. *See* House Rules X.1(l), X.2(a), (b)(1), XI.1(b)(1), XI.2(m)(1)(B). This case also involves an interest held by the House alone: the "sole Power of Impeachment." U.S. Const., Art. I, § 2, cl. 5. Unlike in *Bethune-Hill* and *Raines*, there is no "mismatch between the body seeking to litigate and the body to which the relevant constitutional provision allegedly assign[s] … authority." *Bethune-Hill*, 139 S. Ct. at 1953.

McGahn dismisses the Committee's investigatory authority as merely an "'auxiliary' power" insufficient to support Article III injury. Br. 23-24. But the power of investigation is necessary to the exercise of Article I impeachment and legislative authority. "There is not in the whole of [the Constitution], a grant of powers which does not draw after it others, not expressed, but vital to their exercise." *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 225-26 (1821). So too with Congress's "power of

inquiry—with process to enforce it," which "is an *essential* and appropriate auxiliary to the legislative function." *McGrain*, 273 U.S. at 174 (emphasis added).

McGahn's argument that this case is not justiciable because it involves an interbranch conflict is also wrong, as the district court held. *See* JA909. As this Court stressed in *AT&T II*, "[t]he simple fact of a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution." 567 F.2d at 126. Perhaps for this reason, McGahn has never asserted that this case presents a non-justiciable political question. *See Baker v. Carr*, 369 U.S. 186, 217 (1962); JA932. Nor could he. Courts routinely resolve questions involving the separation of powers: "the federal courts have adjudicated disputes that impact the divergent interests of the other branches of government for centuries." JA908; *see, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Bowsher v. Synar*, 478 U.S. 714 (1986); *AT&T II*, 567 F.2d at 126 n.13 (collecting cases).

Contrary to McGahn's suggestion (Br. 24-28), the fact that a case may implicate separation-of-powers questions does not render it nonjusticiable. "[T]he Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196-97 (2012) (reversing dismissal on political-question grounds of interbranch dispute). The issues presented here are equally within the competence of an Article III court to decide, as this Court concluded in *Senate Select Committee* and *AT&T*. As issue here is McGahn's failure to

comply with his "unremitting obligation" to respond to the Committee's subpoena. *Watkins v. United States*, 354 U.S. 178, 187 (1957).

Although McGahn relies on history (Br. 17-20), the relevant history undermines his argument. For more than two hundred years, courts have adjudicated the Executive's legal obligations to respond to subpoenas, including subpoenas issued to the President. *See United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (Marshall, C.J.) (resolving privilege questions raised by subpoena to the President); *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997) (deciding White House's claims of executive privilege in suit brought by Office of the Independent Counsel to compel compliance with grand jury subpoena served on White House Counsel).

The Supreme Court's decision in *Nixon* demonstrates this point. The Court resolved executive-privilege objections to a subpoena for President Nixon's Oval Office tapes, rejecting the President's characterization of the dispute as a nonjusticiable political question and emphasizing that, "[w]hatever the correct answer [to the privilege questions] on the merits, these issues are 'of a type which are traditionally justiciable.'" 418 U.S. at 697.

As this Court recently emphasized, legislative investigations of the President "stretch far back in time and broadly across subject matters." *Mazars*, 940 F.3d at 721. In *Senate Select Committee*, "perhaps the most high-profile congressional investigation into a President," this Court considered whether "President Nixon had 'a legal duty to comply with' a subpoena issued by the Senate Watergate Committee."

Id. at 722. "President Nixon, apparently taking no issue with the general power of congressional committees to subpoena sitting Presidents, instead asserted executive privilege over the individual tapes requested." *Id.* This Court reached the merits of the dispute notwithstanding the "conflict between the legislative and executive branches over a congressional subpoena." *AT&T I*, 551 F.2d at 390.

3. A civil enforcement action like this one is more practical and desirable than the alternatives, but action by the Houses of Congress to vindicate their inherent powers is nearly as old as the Republic. In 1795, the House exercised its power of contempt to arrest, detain, and try individuals accused of offering bribes to Representatives; the Senate followed shortly thereafter.[4] That contempt power was quickly exercised to secure compliance with Congressional subpoenas, including subpoenas directed to Executive Branch officials.[5] And the Supreme Court has long recognized Congress's power to vindicate its authority by arresting contemnors. *See Anderson*, 19 U.S. at 225-26.

There is no merit to McGahn's claim (Br. 25) that the Committee should be limited to the use of "political tools" if it is "dissatisfied with the Executive Branch's

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[4] *See generally* Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* 172-73 (2017); Todd Garvey, Cong. Research Serv., RL34097, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure* 4-6 (2017).

[5] Chafetz, *supra* note 4, at 174-79. In 1879, "the House of Representatives actually had its sergeant arrest an executive-branch officer for contempt" for refusing to produce records. *Id.* at 176. The House again arrested an Executive Branch official in 1916. *See id.* at 177-78.

response to a congressional investigation." The tools McGahn suggests are not feasible or effective at obtaining subpoenaed information. Use of the appropriations process to grind the government to a halt over a subpoena dispute is extraordinary and impractical; legislation, which requires presentment, cannot extract information from a recalcitrant Executive Branch; appealing to the public in the next election does not aid this Committee in its urgent impeachment and legislative inquiries; and the House can impeach but it cannot "remove officials itself" (Br. 25)—that is a power of the Senate alone, U.S. Const., Art. I, § 3, cl. 6-7.

The absence of Congressional suits to enforce subpoenas before the mid-1970s (Br. 16-19) may have a simple explanation unrelated to justiciability. As discussed below, until 1980, the federal-question statute contained a $10,000 amount-in-controversy requirement that would have been a significant obstacle to a Congressional subpoena-enforcement suit. *See Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51, 61 (D.D.C. 1973) (committee failed to satisfy the requirement); *AT&T I*, 551 F.2d at 389 (considering requirement but finding it satisfied). Rather than McGahn's sweeping separation-of-powers theory, this jurisdictional explanation—combined with Executive Branch compliance with Congressional requests for information, as discussed below—may well explain the historical scarcity of Congressional subpoena enforcement suits.

Finally, under McGahn's standing theory, the specific statute that Congress enacted to provide jurisdiction over certain Senate subpoena enforcement actions, 28

U.S.C. § 1365, would be a nullity because neither the Senate nor its Committees would have standing to invoke the district courts' jurisdiction. This underscores the error in McGahn's constrained view of Congressional standing.

B. The District Court Had Subject-Matter Jurisdiction Under 28 U.S.C. § 1331

McGahn does not dispute that the Committee's suit satisfies the plain language of Section 1331: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The Committee's "subpoena-enforcement claim … arises under the Constitution for the purpose of section 1331." JA891. McGahn instead argues that a different jurisdictional provision, 28 U.S.C. § 1365, which relates only to Senate subpoenas, impliedly divests the district court of federal-question jurisdiction. This argument misconstrues Sections 1331 and 1365 and the relevant caselaw.

1. More than forty years ago, this Court in *AT&T I* considered whether Section 1331 provides jurisdiction over a suit concerning the enforcement of a House subcommittee's subpoena. The Court found "subject matter jurisdiction under 28 U.S.C. § 1331" because the action "arises under the Constitution of the United States." *AT&T I*, 551 F.2d at 388-89; *see also* JA897.

That holding is dispositive here. Although the parties' positions are reversed—a former Executive Branch official is the defendant and a House committee is the plaintiff—that fact makes no difference, for a controversy between two parties "arises

under" federal law regardless of which party is plaintiff or defendant. *See Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011); *Response to Congressional Requests for Information*, 10 Op. O.L.C. at 88 (*AT&T I*'s reasoning on subject-matter jurisdiction "would appear to apply equally to suits filed by a House of Congress seeking enforcement of its subpoena").

This Court in *Mazars* accordingly addressed the merits of a challenge to a House committee's subpoena without questioning President Trump's assertion of jurisdiction under Section 1331. And district court judges in this Circuit have uniformly construed *AT&T I* to find subject-matter jurisdiction under Section 1331 over enforceability of House subpoenas. JA893; *Holder*, 979 F. Supp. 2d at 17; *Miers*, 558 F. Supp. 2d at 64-65.

2. McGahn argues (Br. 33-41) that Section 1365, a provision titled "*Senate* actions" that governs "any civil action brought by *the Senate* or any authorized committee or subcommittee of *the Senate*" to enforce a subpoena, 28 U.S.C. § 1365(a) (emphases added), implicitly repeals jurisdiction under Section 1331 over suits to enforce House subpoenas. That argument is meritless, as every court to consider it has concluded.

Implied repeals of this kind are strongly disfavored and, "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari*, 417 U.S. 535, 550 (1974); *see Mims v. Arrow Fin. Servs., LLC*, 565 U.S.

368, 383 (2012) ("[J]urisdiction conferred by 28 U.S.C. § 1331 should hold firm against 'mere implication flowing from subsequent legislation.'"). By its terms, Section 1365 does not apply to House subpoenas, and its history—alongside the history of Section 1331—confirms that it does not apply here.

In 1976, Section 1331 was amended to remove the amount-in-controversy requirement for actions "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." Pub. L. No. 94-574, § 2, 90 Stat. 2721 (1976); *see AT&T I*, 551 F.2d at 389 n.7. But a jurisdictional gap remained: under the then-existing Section 1331, the amount-in-controversy requirement applied for actions against private parties and officials acting in their individual capacity. Accordingly, Congress still needed to satisfy the amount-in-controversy requirement in those subpoena-enforcement suits. The Senate was particularly concerned about this issue because of its "[then-]recent experience" of having a district court hold in *Senate Select Committee* that a Senate committee had not satisfied that requirement. S. Rep. No. 95-170, at 20-21, 91 (1977); JA892.

Congress resolved the Senate's concern in 1978, by enacting Section 1365. Pub. L. No. 95-521, Title VII, § 705(f)(1), 92 Stat. 1879 (1978) (originally codified at 28 U.S.C. § 1364). Section 1365 eliminated the amount-in-controversy requirement for the enforcement of Senate subpoenas against private parties. In 1980, two years after Section 1365 was enacted, Congress removed Section 1331's amount-in-controversy requirement entirely. Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (1980).

This history cannot reasonably be interpreted to have stripped courts of jurisdiction to enforce House subpoenas. To the contrary, Section 1365 was enacted against the backdrop of this Court's holding in *AT&T I* that Section 1331 *granted* jurisdiction over enforcement of House subpoenas. It is inconceivable that Congress sought to overrule *AT&T I*'s holding regarding House subpoenas by enacting a provision that says nothing about House subpoenas. Indeed, during the legislative process, reference to House subpoenas was removed from Section 1365 because the House committees had not had an opportunity to review the issues. H. Rep. No. 95-1756, at 80 (1978). Congress did not *sub silentio* eliminate the House's ability to seek judicial enforcement of its subpoenas when it enacted a statute that the House did not have an adequate opportunity to consider.

3. McGahn's contrary arguments are wrong for several reasons.

First, McGahn places significant weight (Br. 39-40) on an amendment to Section 1365 enacted in 1996, which clarified that Section 1365 applies in a suit against a federal official "if the refusal to comply is based on the assertion of a personal privilege or objection." Pub. L. No. 104-292, § 4, 110 Stat. 3460 (1996). McGahn posits that if Section 1331 already conferred jurisdiction for all Congressional suits seeking to enforce subpoenas, then the 1996 amendment to Section 1365 was superfluous. But McGahn points to nothing to indicate that Congress considered Section 1331 in enacting this amendment.

If McGahn were correct about the effect of amending Section 1365 after the amount-in-controversy requirement was removed from Section 1331, Congress could not expand the specific jurisdictional grant for Senate subpoenas without implicitly repealing jurisdiction over House subpoena-enforcement actions under Section 1331. But Congress is not put to the choice of abandoning the detailed procedural and remedial requirements for Senate enforcement actions in Section 1365, *see* 28 U.S.C. § 1365(b), (d), or implicitly repealing jurisdiction over House subpoenas. Instead, Congress can legislate within the existing Section 1365 framework for Senate subpoenas without affecting House subpoena-enforcement actions.

Section 1365 is not unusual in its overlap with Section 1331. When Congress removed the amount-in-controversy requirement from Section 1331, it rendered redundant several other provisions, including 28 U.S.C. § 1337 (commerce and antitrust cases), § 1338 (patent and trademark cases), § 1339 (postal service cases), and § 1343 (civil rights cases). Congress was not required to repeal those provisions to eliminate redundancies. *Winstead v. J.C. Penney Co.*, 933 F.2d 576, 580 (7th Cir. 1991) ("[T]he elimination of the minimum amount in controversy from section 1331 made of the numerous special federal jurisdictional statutes that required no minimum amount in controversy … so many beached whales, yet no one thought to repeal those now-redundant statutes."). In fact, Congress amended Section 1338 in 2011, after the 1980 amendments removed the Section 1331 amount-in-controversy requirement. Pub. L. 112-29, § 19(a), 125 Stat. 331 (2011).

Second, the Supreme Court in *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002), rejected an argument like the one McGahn presses here. The *Verizon Maryland* plaintiffs claimed that the determination of a state public service commission violated federal law—a claim that presented a federal question under Section 1331. *See id.* at 640. The court of appeals held that a separate statute—a provision of the Telecommunications Act of 1996—"strip[ped] this jurisdiction" by "mak[ing] *some other* actions by state commissions reviewable in federal court." *Id.* at 642-43.

The Supreme Court reversed, explaining that "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others." *Id.* at 643. The Court reviewed the Telecommunications Act and observed that "none of [the Act's] other provisions … evince[d] any intent to preclude federal review of a commission determination." *Id.* at 644. To the contrary, the Court explained, these other provisions "reinforce the conclusion that [the statute's] silence on the subject leaves the jurisdictional grant of § 1331 untouched," because "where otherwise applicable jurisdiction was meant to be excluded, it was excluded expressly." *Id.*

The same is true here. The Committee's claim presents a federal question and nothing in Section 1365—which "merely makes *some other* [subpoena enforcement] actions … reviewable in federal court," *id.* at 643—"displays any intent to withdraw federal jurisdiction under § 1331," *id.* at 644. Other provisions of the jurisdictional

scheme "reinforce the conclusion that [Section 1365's] silence on the subject leaves the jurisdictional grant of § 1331 untouched." *Id.*; *see* 28 U.S.C. § 1366 (expressly excluding challenges to certain laws from Section 1331). This Court should "not presume that [Section 1365] means what it neither says nor fairly implies." *Verizon Maryland*, 535 U.S. at 644.

Third, McGahn erroneously relies (Br. 36-37) on Section 1365's exclusion of Senate actions to enforce subpoenas against officials asserting governmental privileges. The accompanying Senate report disavowed this argument, explaining that "[t]his exception in the statute 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 subpoena against an officer or employee of the Federal Government." S. Rep. No. 95-170, at 91-92 (1977); *see* JA892-93. And to the extent the Senate opted to limit federal-court jurisdiction over suits to enforce its own subpoenas, the House declined to similarly limit itself. *See* H. Rep. No. 95-1756, at 80. Nothing about that provision, or any other part of Section 1365, applies to House subpoenas or strips the courts of jurisdiction under Section 1331 to adjudicate enforcement of House subpoenas.

For the same reasons, McGahn errs in invoking (Br. 37-38) the canon that a specific statute controls a more general one. As this Court has explained, "[t]he canon is impotent … unless the compared statutes are 'irreconcilably conflicting,'" and "[a]bsent clearly expressed congressional intent to the contrary, it is [the courts'] duty to harmonize the provisions and render each effective." *Adirondack Med. Ctr. v.*

Sebelius, 740 F.3d 692, 698-99 (D.C. Cir. 2014). There is no "positive repugnancy" between Section 1331 and Section 1365 as to enforcement of House subpoenas. *United States v. Borden Co.*, 308 U.S. 188, 198-99 (1939) (quotation marks omitted).

McGahn also fails to explain when, under his theory, Section 1365 repealed Section 1331 jurisdiction for House subpoenas. If Section 1365 repealed Section 1331 when it was amended in 1996, then McGahn's specific-controls-the-general argument does not bear weight because that contention does not turn on the amendment. There is also no merit to McGahn's constitutional-avoidance argument (Br. 41) because this Court resolved the question of subject-matter jurisdiction over House subpoenas more than forty years ago in *AT&T I*.

C. The Committee Has A Cause Of Action To Enforce Its Subpoena

The district court correctly held that the Committee is entitled under Article I to seek equitable relief to enforce a subpoena that the Committee "issued in furtherance of its constitutional power of inquiry." JA925. The Supreme Court has long confirmed the power of courts in equity to enjoin unconstitutional actions by Executive Branch officials, as well as Congress's power to enforce its Article I authorities in court. McGahn's observation that courts have been reluctant to imply non-statutory causes of action against federal officials for *damages liability* is irrelevant to the Committee's right to seek an equitable remedy here.

1. The Supreme Court has made clear that "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of

equity, and reflects a long history of judicial review of illegal executive action." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). As the Court stressed in *Armstrong*, "in a proper case, relief may be given in a court of equity … to prevent an injurious act by a public officer." *Id.* (quotation marks omitted).

The Supreme Court's decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), is a prime example of the Court's exercise of its equitable authority to grant relief in a case asserting a constitutional claim without a statutory cause of action. There, the Supreme Court rejected DOJ's argument for dismissal on the ground that the plaintiff lacked "an implied private right of action directly under the Constitution to challenge governmental action under … separation-of-powers principles." *Id.* at 491 n.2. The Court "found no support for the argument" that a challenge to governmental action under separation-of-powers principles "should be treated 'differently than every other constitutional claim' for which 'equitable relief has long been recognized as the proper means for preventing entities from acting unconstitutionally.'" *Armstrong*, 135 S. Ct. at 1391 (some quotation marks omitted) (quoting *Free Enter. Fund*, 561 U.S. at 491 n.2); *see also Ex Parte Young*, 209 U.S. 123, 149, 165, 167 (1908).

This case presents just such a constitutional claim for equitable relief. In recognizing Congress's right to use compulsory process to vindicate its Article I investigatory powers, the Supreme Court emphasized that all citizens have an "unremitting obligation" to respond to a valid subpoena. *Watkins*, 354 U.S. at 187.

Here, the Committee alleges that McGahn has unlawfully failed to comply with a subpoena issued in aid of the Committee's legitimate impeachment, legislative, and oversight activities, and the Committee seeks only declaratory and injunctive relief. *See* JA41-49, JA59-64 (Compl. ¶¶ 57-68, 96-114, Prayer for Relief). The Committee has the right to seek, and the courts have the power to grant, such relief.

2. McGahn relies heavily on *Reed v. County Commissioners of Delaware County, PA*, 277 U.S. 376 (1928), but he misunderstands that case. In *Reed*, a Senate committee sued to enforce a subpoena for ballot boxes. The question presented was not whether the committee had a cause of action in equity, but whether the federal courts had subject-matter jurisdiction to hear the case under 28 U.S.C. § 41(1).

Section 41(a) granted district courts jurisdiction over "all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof *authorized by law to sue*." *Reed*, 277 U.S. at 386 (emphasis added). Subject-matter jurisdiction therefore turned on whether "the committee or its members were authorized to sue by" Senate resolution. *Id.* at 388. The Court held that subject-matter jurisdiction was lacking because Senate resolutions authorizing the committee "to do such other acts as may be necessary in the matter of said investigation," *id.*, did not authorize the Committee "to sue" on behalf of "the United States" within the meaning of Section 41(1), *id.* at 389. The Court did not discuss or question whether the Committee would have had a cause of action in equity in a case where subject-matter jurisdiction existed. In fact, one day after *Reed* was decided, the Senate passed

a resolution authorizing the committee to file suit. S. Res. 262, 70th Cong. (1928). Because the Senate only authorized the committee to sue, thus confirming subject-matter jurisdiction pursuant to Section 41(1) under *Reed*'s reasoning, the Senate plainly understood the committee already to have a cause of action.

McGahn relies on *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999), to argue that the court may not exercise its equitable powers here because the relief the Committee requests was not "traditionally accorded by courts of equity." This ignores that the equitable relief ordered by the district court in *Grupo Mexicano*—a preliminary injunction preventing the transfer of assets in an action for money damages before judgment had been entered—had been "specifically disclaimed by longstanding judicial precedent." *Id.* at 322. Here, by contrast, federal courts of equity have traditionally accorded declaratory and injunctive relief when Executive officials act contrary to federal law, and the relief the Committee seeks is thus consistent with historical practice. *See, e.g.*, *Armstrong*, 135 S. Ct. at 1384-85; *Carroll v. Safford*, 44 U.S. (3 How.) 441, 463 (1845) ("[W]e entertain no doubt, that, in a proper case, relief may be given in a court of equity … to prevent an injurious act by a public officer, for which the law might give no adequate redress.").

McGahn's invocation of *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017), is misplaced. *Abbasi* considered whether to recognize an implied *damages* remedy for violations of the plaintiffs' constitutional rights. Courts hesitate to imply damages causes of action because they "often create substantial costs, in the form of defense

and indemnification," and it is not the courts but Congress that "has a substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government." *Id.* at 1856. No such concerns are present here. Moreover, *Abbasi* recognizes that courts possess traditional equitable powers to enforce the Constitution. The Court noted that, "[w]hen determining whether traditional equitable powers suffice to give necessary constitutional protection—*or whether, in addition*, a damages remedy is necessary—there are a number of economic and governmental concerns to consider." *Id.* (emphasis added).

McGahn equally errs in contending (Br. 43-44) that *McGrain*'s recognition that Congress must have the power to enforce its investigatory demands extends only to Congress's contempt authority and not its subpoena authority. This Court has relied on *McGrain* and its progeny to determine the validity of legislative subpoenas enforced through court action. *See Mazars*, 940 F.3d at 722.

Finally, cases addressing whether private parties have a statutory cause of action to enforce federal statutes have no application here. When a private plaintiff seeks to enforce a statutory right in court, the court must decide whether Congress intended to create private rights and to allow private individuals to enforce such rights. A key factor in the latter analysis is whether Congress chose to protect the rights through other means, such as agency enforcement. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 286-90 (2001); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287-89 (2002). Those decisions

shed no light on whether the Houses of Congress have a cause of action to enforce their constitutional rights to compel testimony and documents.

3. The district court correctly held that the Committee has satisfied the requirements for a declaration under the Declaratory Judgment Act, 28 U.S.C. § 2201(a). JA928. The Act thus also supplies the Committee with a basis to seek judicial relief.

Although the Act does not create substantive rights, it does provide a mechanism for plaintiffs to seek a declaration vindicating rights guaranteed elsewhere—here, in Article I. A court may declare parties' "rights" and "legal relations" in a case involving an "actual controversy" and within the court's jurisdiction, "whether or not further relief is or could be sought." 28 U.S.C. § 2201(a); *see, e.g.*, *Shelby Cty. v. Lynch*, 799 F.3d 1173, 1183 (D.C. Cir. 2015).

The Supreme Court has not expressed doubt that a party meeting the Act's requirements is entitled to seek relief. The Court has instead emphasized only two limitations. First, the Act does not provide an independent source of jurisdiction. *See Schilling v. Rogers*, 363 U.S. 666, 677 (1960). Second, the Act may be invoked only when there is an actual, immediate controversy. *Coffman v. Breeze Corp.*, 323 U.S. 316, 324 (1945). Here, there is jurisdiction under Section 1331 and an actual controversy. And the Supreme Court has acknowledged that the Act may provide a basis for a plaintiff's entry into court. *See, e.g.*, *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191 (2014).

McGahn relies (Br. 45-46) on this Court's decisions suggesting that the Act does not provide a "cause of action." But those cases—understood in context—simply reaffirm that the Act is not a source of substantive rights and may not be used to circumvent other limits on district courts' authority. *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011) (stating that the Act does not provide a "cause of action," after rejecting plaintiffs' claims pertaining to each of the substantive rights asserted). *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950), similarly holds only that the Act does not expand courts' jurisdiction. Those decisions do not undermine the long-settled understanding that the Act provides a mechanism for the courts to resolve the legal rights and obligations of parties that are established elsewhere.

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Accepting McGahn's threshold arguments would damage the power of factfinding that is integral to Congress's exercise of its constitutional functions. McGahn's position has sweeping consequences far beyond this case. Not only would it preclude Congressional enforcement of subpoenas directed to Executive Branch officials, but it also would preclude Congressional enforcement of subpoenas directed to private individuals and entities. That would encourage refusals to comply with Congressional subpoenas and drastically undermine Congress's power to investigate.

II. MCGAHN IS NOT ABSOLUTELY IMMUNE FROM THE COMMITTEE'S SUBPOENA

President Trump has directed McGahn—a former White House Counsel—to defy the Committee's subpoena in an investigation into the President's own misconduct. The district court correctly rejected the claim of absolute immunity for senior aides, which "has no foundation in law" and "conflicts with key tenets of our constitutional order." JA942. The President's assertion of absolute immunity has never been accepted by any court, conflicts with the Supreme Court's and this Court's precedent rejecting comparable claims, and cannot be reconciled with the long history of Congressional testimony by Presidents and their senior aides. The confidentiality interests that DOJ invokes can be adequately protected by a case-specific application of executive privilege, as they have been since the Founding.

1. McGahn's theory of absolute immunity is an invention of the Executive Branch and "rests upon an archaic view of the separation of powers as requiring three airtight departments of government." *Nixon v. Adm'r of Gen. Servs.* (*Nixon v. GSA*), 433 U.S. 425, 443 (1977) (quotation marks omitted). In separation-of-powers cases, the Supreme Court has long recognized that "our constitutional system imposes upon the Branches a degree of overlapping responsibility." *Mistretta v. United States*, 488 U.S. 361, 381 (1989). Within this framework, courts have consistently rejected analogous claims of Presidential immunity, holding instead that a case-specific application of qualified privilege sufficiently protects the Executive Branch's asserted interests.

In 1807, Chief Justice Marshall rejected President Jefferson's claim that the President could not be compelled to respond to a subpoena in a criminal matter. *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (Marshall, J., sitting as a circuit justice). As Chief Justice Marshall explained, it was "not controverted" "[t]hat the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession." *Id.* at 191. *Burr* acknowledged that "the occasion for demanding" sensitive information from the President must be "very strong." *Id.* at 192. But that warranted a case-by-case application of privilege, not absolute immunity. The "clear implication" of *Burr* is that, at least where the President himself is the subject of a subpoena, "the President's special interests may warrant a careful judicial screening of subpoenas after the President interposes an objection, but that some subpoenas will nevertheless be properly sustained by judicial orders of compliance." *Nixon v. Sirica*, 487 F.2d 700, 710 (D.C. Cir. 1973) (en banc).

During the criminal investigation of Watergate, the Supreme Court rejected President Nixon's contention that Presidential communications with his aides in the Oval Office were absolutely privileged. In *Nixon*, the Court unanimously held that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." 418 U.S. at 706. The Court explained that the President's "broad, undifferentiated claim of public interest in the confidentiality of [Presidential] conversations" conflicts with

separation-of-powers principles, and that "the legitimate needs of the judicial process may outweigh Presidential privilege." *Id.* 706-07. Although presidential communications are "presumptively privileged," *id.* at 709, that presumption "must yield to the demonstrated, specific need for evidence in a pending criminal trial." *Id.* at 713.

In *Nixon v. GSA*, the Supreme Court reiterated that the Presidential privilege "is a qualified one." 433 U.S. at 446. That case involved a challenge to the Presidential Records and Materials Preservation Act, which directed the GSA to take custody of President Nixon's papers and recordings. With respect to the Presidential privilege claim, the Supreme Court made clear that "there has never been an expectation that the confidences of the Executive Office are absolute and unyielding." *Id.* at 450. The Court explained that Congress sought to "facilitat[e] a full airing" of the Watergate scandal, in part "to gauge the necessity for remedial legislation." *Id.* at 453. Preservation was consistent with Congress's "broad investigative power," *id.* (citing *Eastland*, 421 U.S. 491), and "claims of Presidential privilege clearly must yield to the important congressional purposes of preserving [Presidential] materials and maintaining access to them for lawful governmental and historical purposes," *id.* at 454.

Like the Supreme Court, this Court has consistently denied claims to absolute Presidential immunity. In *Nixon v. Sirica*, this Court rejected President Nixon's absolute privilege challenge to the district court's order enforcing a grand jury

subpoena. This Court acknowledged that "wholesale public access to Executive deliberations" would impair the functioning of the Executive Branch. 487 F.2d at 715. "But this [wa]s an argument for recognizing Executive privilege and for according it great weight, not for making the Executive the judge of its own privilege." *Id.* This Court also emphasized that recognizing an absolute privilege would permit the President to "deny access to all documents in all the Executive departments to all citizens and their representatives, *including Congress*." *Id.* (emphasis added).

This Court next held that a balancing of interests—not absolute privilege—applied in a case involving a Congressional subpoena to the President. *Senate Select Comm.*, 498 F.2d at 730. The Court explained that balancing was sufficient to protect Presidential interests: "So long as the presumption that the public interest favors confidentiality can be defeated only by a strong showing of need by another institution of government … the effective functioning of the presidential office will not be impaired." *Id.*

In addition to rejecting absolute privilege claims in criminal and Congressional investigations, this Court has held that Presidential communications are not absolutely privileged even in civil litigation. In *Dellums v. Powell*, 561 F.2d 242 (D.C. Cir. 1977), a civil damages suit involving a subpoena for certain White House recordings, this Court rejected the assertion that Presidential privilege "works an absolute bar to discovery of presidential conversations in civil litigation." *Id.* at 245-46. The

"privilege rooted in confidential communications with the President is constitutionally based, and entitled to great weight, but it has been consistently viewed as presumptive only." *Id.* at 246 (citation omitted); *see also Sun Oil Co. v. United States*, 514 F.2d 1020, 1024 (Ct. Cl. 1975) (rejecting President Nixon's absolute privilege claim in response to civil discovery motion); *cf. Clinton v. Jones*, 520 U.S. 681 (1997) (sitting President not absolutely immune from civil action arising from private conduct).

The Supreme Court and this Court have thus repeatedly rejected Presidents' claims that their communications are absolutely privileged, even where the communications are of the utmost sensitivity—including recorded conversations of the President and his senior staff in the Oval Office. As the district court found, "DOJ's absolute testimonial immunity argument is all but foreclosed by the binding case law … coupled with the logical flaws in DOJ's legal analysis." JA942. Courts have rejected absolute privilege claims in the context of Congressional subpoenas, criminal subpoenas, and civil subpoenas. And they have rejected these claims when the subpoena was directed to the President himself.

McGahn's argument (Br. 47-56) that he is absolutely immune from compelled testimony before the Committee cannot be squared with those decisions. They establish that the President cannot reserve the right to be the arbiter of his own privilege, even where his own misconduct is at issue. Indeed, McGahn's arguments most closely resemble the dissents. *See, e.g.*, *Nixon v. GSA*, 433 U.S. at 509-25 (Burger,

C.J., dissenting); *Sirica*, 487 F.2d at 729-99 (MacKinnon, J., concurring in part and dissenting in part, and Wilkey, J., dissenting).

Given that the President could not invoke absolute immunity in those cases, it would be a radical departure from established law if he could do so here to block the testimony of a former aide, where the Committee is investigating Presidential misconduct pursuant to its legislative authority and its constitutional impeachment power. *See Impeachment Report* at 167 n.928. It is inconceivable that the same Constitution that authorizes the House to impeach the President would allow the President to thwart the House's ability to obtain information necessary to inform this most critical judgment. This Court should reject McGahn's extraordinary view of Executive power, which "would upset the constitutional balance of 'a workable government' and gravely impair the" functions of a coequal branch of government. *Nixon*, 418 U.S. at 707.

2. The long history of Executive Branch compliance with Congressional requests for testimony—including by three sitting Presidents and scores of top White House advisors—supports what precedent makes clear: Presidents and their advisors enjoy no absolute immunity from Congressional process. *See NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (history informs consideration of separation-of-powers claim). Past Presidents have understood that Congress has the power to seek information from the Executive Branch and have complied, respecting the constitutional separation of powers.

Presidents Abraham Lincoln, Woodrow Wilson, and Gerald Ford voluntarily testified before Congress while in office.[6] President Ford testified to explain his decision-making process in exercising the pardon power, an authority assigned solely to the President in Article II of the Constitution, U.S. Const., Art. II, § 2, cl. 1.[7]

Many close Presidential advisors, including sitting and former White House Counsels, have testified before Congress regarding Presidential misconduct. For example, former White House Counsel Chuck Colson testified multiple times during Watergate.[8] In 1980, then-White House Counsel Lloyd Cutler testified regarding alleged misconduct by President Carter's brother.[9] In 1994, Cutler again testified about Whitewater,[10] as did former White House Counsel Bernard Nussbaum in 1995.[11] In 1997, then-White House Counsel Charles Ruff testified about alleged

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[6] See *U.S. Senate, Sitting Presidents & Vice Presidents Who Have Testified Before Congressional Committees* (2017), https://perma.cc/J2HH-X5WG.

[7] *Pardon of Richard M. Nixon, and Related Matters: Hearing Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 93d Cong. 90 (1974).

[8] *Inquiry into the Alleged Involvement of the Central Intelligence Agency in the Watergate and Ellsberg Matters: Hearing Before the Special Subcomm. on Intelligence of the H. Comm. on Armed Servs.*, 93d Cong. 581-660 (1973).

[9] *Inquiry into the Matter of Billy Carter and Libya, Vol. II: Hearing Before the S. Comm. on the Judiciary*, 96th Cong. 1195-258 (1981).

[10] *White House Contacts with Treasury/RTC Officials About "Whitewater"-Related Matters—Part 1: Hearing Before the H. Comm. on Banking, Fin., and Urban Affairs*, 103d Cong. 12-107 (1994).

[11] *Investigation of Whitewater Development Corporation and Related Matters, Vol. II: Hearing Before the S. Special Comm. to Investigate Whitewater Dev. Corp. and Related Matters*, 104th Cong. 1201-304, 1326-96 (1997).

campaign-finance violations.[12] And in 2001, former White House Counsel Jack Quinn testified regarding President Clinton's use of his pardon power.[13]

In addition, some Presidential advisors, including White House Counsels and national security officials, have testified specifically pursuant to Congressional subpoenas: former White House Counsel John Dean, former Chief of Staff H.R. Haldeman, and former Chief Advisor to the President for Domestic Affairs John Ehrlichman about Watergate;[14] former National Security Advisor Oliver North and former Assistant to the President for National Security Affairs John Poindexter about Iran-Contra;[15] and former White House Counsel Beth Nolan and former Chief of Staff John Podesta about President Clinton's pardon of Marc Rich.[16]

The force of this history is not undermined by the fact that some appearances were voluntary, which shows that past Presidents were reluctant to be seen

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[12] *White House Compliance with Committee Subpoenas: Hearing Before the H. Comm. on Gov't Reform and Oversight*, 105th Cong. 44 (1998).

[13] *Controversial Pardon of International Fugitive Marc Rich: Hearing Before H. Comm. on Gov't Reform*, 107th Cong. 43-87 (2001).

[14] *Inquiry into the Alleged Involvement of the Central Intelligence Agency in the Watergate and Ellsberg Matters: Hearing Before the Special Subcomm. on Intelligence of the H. Comm. on Armed Servs.*, 93d Cong. 875-81 (1973); *Presidential Campaign Activities of 1972: Hearing Before the S. Select Comm. on Presidential Campaign Activities*, 93d Cong. 2509-87 (1973).

[15] *Iran-Contra Investigation: Joint Hearings Before the H. Select Comm. to Investigate Covert Arms Transactions with Iran and the S. Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition*, 100th Cong. 1-404 (1987).

[16] *Controversial Pardon of International Fugitive Marc Rich: Hearing Before the H. Comm. on Gov't Reform*, 107th Cong. 316-437 (2001).

obstructing Congressional investigations into their own misconduct.[17] In addition, the purported risks that the Executive Branch cites to support its absolute immunity theory (Br. 50-53) are equally present when the testimony is voluntary and—regardless—have not materialized.

Executive Branch officials frequently testify before Congress in oversight matters and often are called upon to explain or justify Executive Branch actions without harming institutional interests. Far from an encroachment on the Executive, such transparency is a display of the "autonomy but reciprocity" among the branches that the Constitution envisions. *Mistretta*, 488 U.S. at 381 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). Nor does the exercise of Congress's constitutional functions foster a perception of Executive subordination to Congress (Br. 52); instead, it reflects the checks and balances the Framers intended in adopting a system of separated powers. *Jones*, 520 U.S. at 703 ("As Madison explained, separation of powers does not mean that the branch 'ought to have no *partial agency* in, or no *controul* over the acts of each other.'" (quoting The Federalist No. 47, at 325 (J. Cooke ed., 1961)). Indeed, the President's order that McGahn ignore the Committee's subpoena creates a more harmful perception: that the President is above the law and can prevent Congress from acquiring facts about

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[17] *See Impeachment of Richard M. Nixon, President of the United States*, H. Rep. No. 93-1305, at 119 (1974) (Haldeman advised President Nixon that assertion of executive privilege over testimony would look like an "active step you've taken to cover up [] Watergate").

his own misconduct. Although McGahn suggests (Br. 52, 55, 59) that Congressional subpoenas could be used to harass the Executive Branch, he does not contend that his subpoena was issued for that purpose or offer any support for his more general speculation. And, as the Supreme Court has made clear, any Executive Branch confidentiality interests can be adequately addressed through a case-by-case qualified privilege.

3. McGahn does not advance his position by relying (Br. 51-56) on OLC memoranda such as the one issued to justify his defiance of the Committee's subpoena. These OLC documents cite no judicial decisions recognizing absolute immunity from compelled Congressional testimony for Presidential advisors because there are none. *See* JA945-47. Rather, they cite other OLC opinions. In the first memo on this topic—which is the foundation for OLC's subsequent absolute immunity opinions—then-Assistant Attorney General William Rehnquist conceded his conclusions on absolute testimonial immunity were "tentative and sketchy." JA947 (cleaned up) (quoting *Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff"* (OLC Feb. 5, 1971), https://www.justice.gov/olc/page/file/1225961/download).

McGahn's reliance on inapposite cases is equally unavailing. In *Nixon v. Fitzgerald* (*Fitzgerald*), 457 U.S. 731 (1982), the Supreme Court held that *the President* is immune from *civil damages liability* arising from his official actions during his tenure in office. As the Court explained, "[b]ecause of the singular importance of the

President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751. Accordingly, "[t]he President's unique status under the Constitution distinguishes him from other executive officials." *Id.* at 750; *see Jones*, 520 U.S. 704 (explaining that "[s]itting Presidents have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive Branches can scarcely be thought a novelty"); JA940-41.

For this reason, the President's immunity from civil damages liability for official actions "does not extend indiscriminately to the President's personal aides." *Forrester v. White*, 484 U.S. 219, 225 (1988). On the same day the Supreme Court decided *Fitzgerald*, it decided *Harlow v. Fitzgerald* (*Harlow*), 457 U.S. 800 (1982), and rejected the claim that certain senior Presidential aides—one of whom "worked from an office immediately adjacent to the oval office" and "had almost daily contact with the President," *id.* at 805 n.6—"are entitled to a blanket protection of absolute immunity," *id.* at 808. The Court in *Harlow* distinguished *Fitzgerald* because "the recognition of absolute immunity for all of a President's acts in office derives in principal part from factors unique to his constitutional responsibilities and station." *Id.* at 811 n.17. By contrast, "[s]uits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself." *Id.*; JA940.

McGahn argues that the interests here are "fundamentally different" (Br. 58) from *Harlow* because this is not a private suit for damages for established constitutional or statutory violations. But these points cut against McGahn. The concerns unique to federal officers' liability for damages are not at issue here; the only question is whether McGahn must provide testimony. And the fact that a committee of Congress rather than a private party is the plaintiff underscores that blanket immunity is inappropriate—the Committee has weighty interests in exercising its Article I authorities, which are not present in private civil-damages suits.

McGahn also cites (Br. 54) *Harlow*'s equivocal language about whether absolute immunity for civil damages liability "might well be justified" for "aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy." 457 U.S. at 812. But McGahn was not performing sensitive national security or foreign affairs functions when he was witnessing the President's attempted obstruction of the Russia investigation. And the Supreme Court later clarified that "performance of national security functions" did not entitle even the Attorney General to absolute immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 521-24 (1985). Relying on *Forsyth*, this Court rejected absolute immunity for the National Security Advisor, explaining that, "[i]f performance of a national security *function* does not entitle the Attorney General to absolute immunity, then the fact that the National Security Advisor's *entire* function is defined by the interrelated concepts of national security and foreign policy[] can hardly justify the conferral of absolute immunity upon that

office as such." *Halperin v. Kissinger*, 807 F.2d 180, 193-94 (D.C. Cir. 1986) (Scalia, Circuit Justice) (citation and quotation marks omitted; emphasis in original).

McGahn's analogy (Br. 54) to *Gravel v. United States*, 408 U.S. 606 (1972) is similarly misplaced. There, the Supreme Court held that because Members of Congress are absolutely immune from certain criminal subpoenas, so too are their staff. But the Constitution's Speech or Debate Clause expressly grants Members of Congress such immunity. U.S. Const., Art. I, § 6, cl. 1. The President, by contrast, does not enjoy express constitutional immunity and—with a limited exception—is not absolutely immune, as discussed above. *See Harlow*, 457 U.S. at 810-811 (concluding the Executive's analogy to *Gravel* "sweeps too far").

CONCLUSION

The Court should vacate its administrative stay and affirm the district court's order without delay, such as by immediately vacating the stay and issuing the Court's order, with an opinion to follow in due course.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,841 words excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Professional Plus 2016 in 14-point Garamond type.

/s/ Douglas N. Letter
Douglas N. Letter

CERTIFICATE OF SERVICE

I certify that on December 16, 2019, I filed the foregoing document via the CM/ECF system of the United States Court of Appeals for the District of Columbia Circuit, which I understand caused service on all registered parties.

/s/ Douglas N. Letter
Douglas N. Letter

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UNITED STATES CONSTITUTION

Article I

Section 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2, Clause 5

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 5, Clause 2

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

STATUTES

28 USC § 1331 Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 USC § 1365 Senate actions

(a) The United States District Court for the District of Columbia shall have original jurisdiction, without regard to the amount in controversy, over any civil action brought by the Senate or any authorized committee or subcommittee of the Senate to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal or failure to comply with, any subpena or order issued by the Senate or committee or subcommittee of the Senate to any entity acting or purporting to act under color or authority of State law or to any natural person to secure the production of documents or other materials of any kind or the answering of any deposition or interrogatory or to secure testimony or any combination thereof. This section shall not apply to an action to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal to comply with, any subpena or order issued to an officer or employee of the executive branch of the Federal Government acting within his or her official capacity, except that this section shall apply if the refusal to comply is based on the assertion of a personal privilege or objection and is not based on a governmental privilege or objection the assertion of which has been authorized by the executive branch of the Federal Government.

(b) Upon application by the Senate or any authorized committee or subcommittee of the Senate, the district court shall issue an order to an entity or person refusing, or failing to comply with, or threatening to refuse or not to comply with, a subpena or order of the Senate or committee or subcommittee of the Senate requiring such entity or person to comply forthwith. Any refusal or failure to obey a lawful order of the district court issued pursuant to this section may be held by such court to be a contempt thereof. A contempt proceeding shall be commenced by an order to show cause before the court why the entity or person refusing or failing to obey the court order should not be held in contempt of court. Such contempt proceeding shall be tried by the court and shall be summary in manner. The purpose of sanctions imposed as a result of such contempt proceeding shall be to compel obedience to the order of the court. Process in any such action or

contempt proceeding may be served in any judicial district wherein the entity or party refusing, or failing to comply, or threatening to refuse or not to comply, resides, transacts business, or may be found, and subpenas for witnesses who are required to attend such proceeding may run into any other district. Nothing in this section shall confer upon such court jurisdiction to affect by injunction or otherwise the issuance or effect of any subpena or order of the Senate or any committee or subcommittee of the Senate or to review, modify, suspend, terminate, or set aside any such subpena or order. An action, contempt proceeding, or sanction brought or imposed pursuant to this section shall not abate upon adjournment sine die by the Senate at the end of a Congress if the Senate or the committee or subcommittee of the Senate which issued the subpena or order certifies to the court that it maintains its interest in securing the documents, answers, or testimony during such adjournment.

[(c) Repealed. Pub.L. 98-620, Title IV, § 402(29)(D), Nov. 8, 1984, 98 Stat. 3359.]

(d) The Senate or any committee or subcommittee of the Senate commencing and prosecuting a civil action or contempt proceeding under this section may be represented in such action by such attorneys as the Senate may designate.

(e) A civil action commenced or prosecuted under this section, may not be authorized pursuant to the Standing Order of the Senate "authorizing suits by Senate Committees" (S. Jour. 572, May 28, 1928).

(f) For the purposes of this section the term "committee" includes standing, select, or special committees of the Senate established by law or resolution.

RULES OF THE U.S. HOUSE OF REPRESENTATIVES, ONE HUNDRED SIXTEENTH CONGRESS

Rule X (excerpts)
ORGANIZATION OF COMMITTEES

Committees and their legislative jurisdictions

1. There shall be in the House the following standing committees, each of which shall have the jurisdiction and related functions assigned by this clause and clauses 2, 3, and 4. All bills, resolutions, and other matters relating to subjects within the jurisdiction of the standing committees listed in this clause shall be referred to those committees, in accordance with clause 2 of rule XII, as follows:

* * *

(l) **Committee on the Judiciary.**

(1) The judiciary and judicial proceedings, civil and criminal.

(2) Administrative practice and procedure.

(3) Apportionment of Representatives.

(4) Bankruptcy, mutiny, espionage, and counterfeiting.

(5) Civil liberties.

(6) Constitutional amendments.

(7) Criminal law enforcement and criminalization.

(8) Federal courts and judges, and local courts in the Territories and possessions.

(9) Immigration policy and nonborder enforcement.

(10) Interstate compacts generally.

(11) Claims against the United States.

(12) Meetings of Congress; attendance of Members, Delegates, and the Resident Commissioner; and their acceptance of incompatible offices.

(13) National penitentiaries.

(14) Patents, the Patent and Trademark Office, copyrights, and trademarks.

(15) Presidential succession.

(16) Protection of trade and commerce against unlawful restraints and monopolies.

(17) Revision and codification of the Statutes of the United States.

(18) State and territorial boundary lines.

(19) Subversive activities affecting the internal security of the United States.

* * *

General Oversight Responsibilities

2. (a) The various standing committees shall have general oversight responsibilities as provided in paragraph (b) in order to assist the House in—

(1) its analysis, appraisal, and evaluation of—

(A) the application, administration, execution, and effectiveness of Federal laws; and

(B) conditions and circumstances that may indicate the necessity or desirability of enacting new or additional legislation; and

(2) its formulation, consideration, and enactment of changes in Federal laws, and of such additional legislation as may be necessary or appropriate.

(b)(1) In order to determine whether laws and programs addressing subjects within the jurisdiction of a committee are being implemented and carried out in accordance with the intent of Congress and whether they should be continued, curtailed, or eliminated, each standing committee (other than the Committee on Appropriations) shall review and study on a continuing basis—

(A) the application, administration, execution, and effectiveness of laws and programs addressing subjects within its jurisdiction;

(B) the organization and operation of Federal agencies and entities having responsibilities for the administration and execution of laws and programs addressing subjects within its jurisdiction;

(C) any conditions or circumstances that may indicate the necessity or desirability of enacting new or additional legislation addressing subjects within its jurisdiction (whether or not a bill or resolution has been introduced with respect thereto); and

(D) future research and forecasting on subjects within its jurisdiction.

Rule XI (excerpts)

PROCEDURES OF COMMITTEES AND UNFINISHED BUSINESS

In general

1. (b)(1) Each committee may conduct at any time such investigations and studies as it considers necessary or appropriate in the exercise of its responsibilities under rule X. Subject to the adoption of expense resolutions as required by clause 6 of rule X, each committee may incur expenses, including travel expenses, in connection with such investigations and studies.

* * *

Power to sit and act; subpoena power

2. (m)(1)(B) Each committee may conduct at any time such investigations and studies as it considers necessary or appropriate in the exercise of its responsibilities under rule X. Subject to the adoption of expense resolutions as required by clause 6 of rule X, each committee may incur expenses, including travel expenses, in connection with such investigations and studies.

   * * *

   (m)(3)(A)(i) Except as provided in subdivision (A)(ii), a subpoena may be authorized and issued by a committee or subcommittee under subparagraph (1)(B) in the conduct of an investigation or series of investigations or activities only when

authorized by the committee or subcommittee, a majority being present. The power to authorize and issue subpoenas under subparagraph (1)(B) may be delegated to the chair of the committee under such rules and under such limitations as the committee may prescribe. Authorized subpoenas shall be signed by the chair of the committee or by a member designated by the committee.