members on what they are to do with the power delegated to them." *Id.* at 201. Absent that instruction, such subpoenas defy judicial review, the *Watkins* Court understood, because "it is impossible . . . to declare that [a committee] has ranged beyond the area committed to it by its parent assembly." *Id.* at 205.

To be clear, *Watkins* addressed this problem in the context of a House proceeding implicating a private citizen's constitutional liberties, and not separation of powers. But its caution is still relevant: that "excessively broad charter[s]" to investigating committees make it difficult, if not impossible, for courts "to ascertain whether any legislative purpose justifies the disclosures sought and, if so, the importance of that information to the Congress in furtherance of its legislative function." *Id.* at 205–06. With respect, the majority thus errs in dismissing the Department of Justice's concern that the blank-check approach adopted here to authorizing third-party subpoenas seeking personal information about the President and his family represents "a failure of the House to exercise 'preliminary control of the Committee[s],'" *see* Brief of United States as Amicus Curiae at 19 (quoting *Watkins*, 354 U.S. at 203)—a failure which not only throws into question the adequacy of authorization in this case, but which also raises significant issues for the future regarding interbranch balance and the ability of

this and future Presidents to perform their duties without undue distraction, *id.* at 5–7; *see Jones*, 520 U.S. at 690 (noting that "representations made on behalf of the Executive Branch as to the potential impact" of inquiries on the Office of the President "merit our respectful and deliberate consideration").[22] In short, Resolution 507 itself, given its retrospective and prospective nature, and its purported authorization of any and all third-party committee subpoenas seeking not only official, but personal information about the President, his family, and his businesses, presents a serious question as to whether the House has discharged its

[22] The Department of Justice argues that a clear statement rule should apply to the authorization of legislative subpoenas seeking a President's personal information. Brief of United States as Amicus Curiae at 10. The majority dismisses this argument, noting that neither *Franklin v. Massachusetts*, 505 U.S. 788, nor *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991), on which the Department relies, concern congressional subpoenas, but *statutes* "claimed to limit presidential power." Maj. Op. at 89. But *Rumely* makes clear that the duty of constitutional avoidance (implemented, in part, through mechanisms such as clear statement rules) "is even more applicable" in the context of congressional investigations than in the interpretation of statutes. 345 U.S. at 46. It also affirms that "[w]henever constitutional limits upon the investigative power of Congress have to be drawn . . . , it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits." *Id.* In short, while I need not at this time reach the question, the Department's clear statement argument merits serious consideration, as does its assertion that the House's "blank-check" approach to use of compulsory process directed at the President, his family, and his businesses runs afoul of *Watkins*'s caution that "[a] measure of added care on the part of the House and the Senate in authorizing the use of compulsory process" would help "prevent the separation of power from responsibility." 354 U.S. at 215.

"responsibility . . . in the first instance, to insure that compulsory process is used only in furtherance of a legislative purpose." *Watkins,* 354 U.S. at 201.

II

These third-party legislative subpoenas thus raise serious questions on the merits, implicating substantial separation-of-powers concerns. In such a context, *Rumely*'s caution kicks in, which "counsel[s] abstention from adjudication unless no choice is left." 345 U.S. at 46. The majority disagrees, asserting that even assuming serious questions regarding the separation of powers have been raised, affirmance here is still required because our "serious questions" approach to whether a preliminary injunction should issue is unavailable in the context of these third-party legislative subpoenas.[23] I have already outlined my disagreement

[23] The majority also argues that any serious questions presented here "are properly rejected at this stage of the litigation" because they "involve solely issues of law." Maj. Op. at 101. I disagree. As an initial matter, our case law has recognized that, in appropriate circumstances, purely legal issues can present sufficiently serious questions to warrant a preliminary injunction. *See, e.g.*, *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326, 1339–40 (2d Cir. 1993) (finding sufficiently serious questions going to the merits based on the novel questions of law presented by plaintiffs' claims), *judgment vacated as moot by Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993); *see also, e.g.*, 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.3 (3d ed.) (Westlaw) (database updated August 2019) (referring to "the existence of a factual conflict, *or* of difficult questions of law," as components of the merits showing in the preliminary injunction context (emphasis added)). Moreover, the majority itself is remanding for some development of the factual record. As set forth herein, I conclude that the majority's limited remand is inadequate, and that the record

with the majority's determination that "this case does not concern separation of powers," Maj. Op. at 89, and that the questions raised, even if "serious in at least some sense, lack merit," *id*. at 101. I also disagree as to the supposed unavailability of our traditional preliminary injunction approach. Indeed, I conclude, with respect, that the majority badly errs in deciding that this approach is unavailable in the sensitive context of challenges to congressional subpoenas.

As the Supreme Court made clear in *Winter v. Natural Resources Defense Council, Inc.*, "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." 555 U.S. 7, 20 (2008). The majority acknowledges that, as to the required merits showing, we have repeatedly said in this Circuit that "district courts may grant a preliminary injunction where a plaintiff . . . meets either of two standards: '(a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation.'" Maj. Op. at 11–12 (quoting *Kelly v. Honeywell Int'l, Inc.*, 933 F.3d 173, 184 (2d Cir. 2019)). When a plaintiff has demonstrated only "serious

needs further factual development *before* the legal issues here can be adequately assessed.

questions" as to the merits, however, the plaintiff has a higher burden as to the third element: he must show that the balance of hardships tips *decidedly* in his favor. *See Kelly*, 933 F.3d at 184; Maj. Op. at 11–12. The majority also acknowledges that we have reaffirmed our traditional approach in the wake of the Supreme Court's decision in *Winter*. *See Citigroup*, 598 F.3d at 38 ("hold[ing] that our venerable standard for assessing a movant's probability of success on the merits remains valid").[24] Irreparable harm is not in question in this case, moreover, because, *inter alia*, the Plaintiffs have an interest in keeping their banking records private from Congress and neither House committee will commit to treating any portion of the voluminous personal and business records that they seek as confidential. J.A. at 122–23. In such circumstances, the majority and I are in agreement that compliance with these subpoenas will cause irreparable

[24] *Citigroup* carefully assessed *Winter*'s import and concluded that our traditional approach is wholly consistent with that precedent and is properly retained, given "[t]he value of this circuit's approach to assessing the merits of a claim at the preliminary injunction stage," which "lies in its flexibility in the face of varying factual scenarios and the greater uncertainties inherent at the outset of particularly complex litigation." *Citigroup*, 598 F.3d at 35. Moreover, *Citigroup* made clear that, under either the "serious questions" or the "likelihood of success" formulation, courts in this Circuit consider all four elements articulated by the Supreme Court in *Winter*. *See id.* at 34, 38 (citing *Winter*, 555 U.S. at 20).

harm to the President, his family, his businesses, and his business associates. Maj. Op. at 13–14.

The majority asserts that a preliminary injunction is nonetheless unavailable based on our "serious questions" formulation of the merits inquiry because of the so-called "government action exception" to this formulation, as expressed by this Court's decision in *Plaza Health Laboratories, Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989). I disagree. To be sure, our case law has recognized three narrowly defined situations in which a movant *cannot* obtain a preliminary injunction under the "serious questions" formulation. *See id.*; *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 33–34 (2d Cir. 1995); *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985). But *Plaza Health*, on which the majority relies, is not applicable.

To explain my conclusion requires a step back from our traditional formulation, to set forth *why* this Circuit was correct to reaffirm our serious question approach—and, indeed, why we err today in expanding a formulaic exception to it. While sometimes styled in our case law as its own "standard," *see, e.g.*, *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 110 (2d Cir. 2014), the "sufficiently serious questions, plus a balance of hardships

tipping decidedly in favor of the moving party" approach is not actually a *separate* test at all, but rather a way of articulating one point on a single sliding scale that balances likelihood of success against hardship in determining whether a preliminary injunction should issue. *See* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.3 (3d ed.) (Westlaw) (database updated August 2019) (hereinafter "Wright & Miller") (referring to the Second Circuit's "serious questions" formulation as "[p]robably the most often-quoted statement" of the sliding scale principle). Likelihood of success, while of "particular importance" in this inquiry, is not determinative, but must be considered and balanced with the relative hardship *each* side is likely to face from the determination whether an injunction issues, with the so-called "serious questions" standard emerging as simply one point on the sliding scale at which an injunction may be warranted.[25] *Id.* This flexible approach is particularly well-suited to the preliminary injunction context, where courts act pursuant to

[25] As Judge Frank articulated decades ago, when "the balance of hardships tips decidedly toward plaintiff," it should "ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953).

equitable principles.[26] *See, e.g.*, *Holland v. Florida*, 560 U.S. 631, 649–50 (2010) ("In emphasizing the need for flexibility . . . we have followed a tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity." (internal quotation marks, alterations, and citations omitted)).

Against this backdrop, our so-called "exceptions" to the serious questions formulation are best understood not in prescriptive terms, but as the articulation of principles guiding the application of the sliding scale calculus in particular scenarios. As relevant here, the *Plaza Health* "exception" thus reflects a considered judgment, drawing on equitable ideas, that "[w]here the moving party seeks to stay government action taken in the public interest pursuant to a statutory or regulatory scheme," the serious questions formulation should be generally unavailable precisely because the balance of hardships is so unlikely to tip

[26] Indeed, confining preliminary injunctions to circumstances in which a plaintiff has shown there is no difficult question of law that could ultimately go against him would "deprive the remedy of much of its utility." Wright & Miller § 2948.3; *see also Citigroup*, 598 F.3d at 35 (noting that "[p]reliminary injunctions should not be mechanically confined to cases that are simple or easy," as happens when the likelihood-of-success standard is formulaically employed).

decidedly in that party's favor. *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995) (quoting *Plaza Health*, 878 F.2d at 580). In issuing a preliminary injunction based on the conclusion that it *does*, a court impermissibly "substitute[s] its own determination of the public interest" for the one reflected in the statutory or regulatory scheme. *Id.* at 132.

Accordingly, where government action has been fairly characterized as taken pursuant to a statutory or regulatory scheme, we have generally applied the likelihood-of-success standard. *See Citigroup*, 598 F.3d at 35 n.4 (articulating the exception as limited to situations in which "a moving party seeks to stay government action taken in the public interest pursuant to a statutory or regulatory scheme"). And where movants have sought preliminarily to enjoin government action pursuant to a *federal* statutory or regulatory scheme, we have explained that in the context of such action, "developed through presumptively reasoned democratic processes" and resulting from "the full play of the democratic process involving both the legislative and executive branches," it is difficult to envision *any* circumstance in which a movant could demonstrate that the balance of hardships tips decidedly in his favor. *Able*, 44 F.3d at 131.

The majority argues that the *Plaza Health* exception sweeps more broadly, relying for this proposition on cases involving action taken by state and local governments.[27] *See* Maj. Op. at 15–16. While certain of these cases did not analyze why the *Plaza Health* exception was applicable, and appear simply to have assumed that the government action in question was taken pursuant to a statutory or regulatory scheme, *see, e.g.*, *Cent. Rabbinical Cong.*, 763 F.3d at 192; *Monserrate*, 599 F.3d at 154, those that did engage with this analysis explicitly identified a statutory or regulatory scheme and accordingly concluded that the presumptive

[27] *See, e.g.*, *Cent. Rabbinical Cong. of U.S. & Canada v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 192 (2d Cir. 2014) (likelihood-of-success standard applied to preliminary injunction sought by religious organizations against a city ordinance based on the court's conclusion, without further analysis, that the ordinance constituted "government action taken in the public interest pursuant to a statutory or regulatory scheme" (citation omitted)); *Monserrate v. N.Y. State Senate*, 599 F.3d 148, 154 (2d Cir. 2010) (same, as to a preliminary injunction seeking to unwind the expulsion of a state senator); *NAACP v. Town of East Haven*, 70 F.3d 219, 223 (2d Cir. 1995) (likelihood-of-success standard applied to a preliminary injunction seeking to enjoin a town from hiring police officers or firefighters, based on the court's conclusion that the town acted "in the public interest" and "pursuant to established municipal regulations and state civil service laws"); *N.Y. Urban League, Inc. v. State of New York*, 71 F.3d 1031, 1036 n.7 (2d Cir. 1995) (applying likelihood-of-success standard to a preliminary injunction seeking to bar transit authority from implementing a proposed fare increase on the basis that the action in question "was to be implemented in accordance with the special powers" of the transit authority board as set forth in a state statute); *see also Molloy v. Metro. Transp. Auth.*, 94 F.3d 808, 811 (2d Cir. 1996) (relying on *New York Urban League* in applying the likelihood-of-success standard to a preliminary injunction sought against transit authority's implementation of a staff reduction plan).

public interest weighed against the movant, *see, e.g.*, *NAACP*, 70 F.3d at 223; *see also, e.g.*, *Otoe-Missouria Tribe of Indians*, 769 F.3d at 110 (determining that New York's ban on certain loans was "a paradigmatic example of governmental action taken in the public interest, one that vindicated proven policies implemented through legislation or regulations" and therefore applying the likelihood-of-success standard (internal quotation marks and citations omitted)).[28]

Where, by contrast, government action has *not* been taken pursuant to a specific statutory or regulatory scheme, the narrow *Plaza Health* exception has *not* been applied, precisely because the public interest has not been presumed to rest with a single party. This explains why this Court recently upheld the denial of a preliminary injunction sought by President Trump to restrain the enforcement of a grand jury subpoena issued by the New York County District Attorney without applying the *Plaza Health* exception in determining the applicable preliminary injunction standard. *See Trump v. Vance*, 941 F.3d 631, 639–40 (2d Cir. 2019). It explains our decision in *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1993), *judgment vacated as moot by Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 918

[28] Such cases may also exhibit an especial hesitancy on the part of federal courts to substitute their own view of the public interest for that reached by local and state governments in light of principles of comity and federalism.

(1993), in which we applied the serious questions standard to an injunction sought against the actions of the Immigration and Naturalization Service only after rejecting the government's argument that the action was taken "pursuant to Congress'[s] broad grant of authority in the [Immigration and Nationality Act]," and reasoning that "in litigation such as is presented herein, no party has an exclusive claim on the public interest," *id; see also, e.g.*, *Patton v. Dole*, 806 F.2d 24, 29–30 (2d Cir. 1986); *Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 836 F.2d 760, 763 (2d Cir. 1988); *Mitchell v. Cuomo*, 748 F.2d 804, 806–07 (2d Cir. 1984); *cf. Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980) (rejecting the Census Bureau's argument that "the public interest [rests] solely with it").

The government action at issue in the instant case plainly falls outside the current confines of the narrow *Plaza Health* exception. Here, far from a situation in which a movant seeks to enjoin action that is the product of "the full play of the democratic process," *Able*, 44 F.3d at 131, these legislative subpoenas, with due respect, do *not* constitute governmental action pursuant to a statutory or regulatory scheme and do not reflect the presumptively public-interested actions of both the legislative and executive branches. Rather, each subpoena is the

product of a sub-component of a single chamber of one branch of the federal government and, critically, implicates the interests of another branch.[29]

The majority's approach, which concludes that, because the Committees act pursuant to powers under the Constitution, such action should "[s]urely . . . not" be evaluated under a "less rigorous standard" than that "applied to plaintiffs seeking to preliminary enjoin state and local units of government" in cases such as *Central Rabbinical Congress* and *Monserrate*, Maj. Op. at 20–21, is misguided for two reasons. First, by deeming the "serious questions" standard to be less rigorous, the majority ignores the fact that the *ultimate* burden is equivalent under both standards.[30] More fundamentally, the majority errs by categorically extending

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[29] Indeed, precisely because subpoenas of this sort implicate separation of powers so that neither Congress *nor* the Plaintiffs can be taken to represent the public interest with regard to their enforcement, the D.C. Circuit in *Mazars* declined to determine, in an analogous context, what deference it owed to the congressional subpoena reviewed in that case. *Mazars*, 940 F.3d at 726.

[30] As is the nature of a sliding scale, the variables move in tandem and the Plaintiffs' ultimate burden is equivalent either way. The majority perceives tension between this Court's observation in *Citigroup* that the "overall burden" of the serious questions standard is "no lighter than the one it bears under the 'likelihood of success' standard," *Citigroup*, 598 F.3d at 35, and language in our other opinions that refers to the likelihood-of-success standard as "more rigorous," *see, e.g.*, *Cent. Rabbinical Cong.*, 763 F.3d at 192. *See* Maj. Op. at 14 n.22. I disagree. Because one standard requires a more demanding showing as to the merits and a correspondingly less demanding showing as to hardship, while the other standard requires the reverse, the overall burdens are clearly equivalent. Deeming the likelihood-of-success standard to be "more rigorous" refers only to its increased rigor as to the required merits showing. It was for this reason,

the *Plaza Health* exception to a situation in which "no party has an exclusive claim on the public interest," *Time Warner Cable of N.Y.C. v. Bloomberg L.P.*, 118 F.3d 917, 923 (2d Cir. 1997) (quoting *Haitian Centers*, 969 F.2d at 1339), when the so-called "government action exception" is premised entirely on the assumption that the public interest weighs decidedly *against* the movant.

To be clear, preliminary injunctions constitute an extraordinary form of relief and should not issue lightly. *See, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quoting Wright & Miller § 2948). The majority's expansion of our so-called "government action exception" into the delicate arena of congressional investigations, however, is unwise, precisely because this is a context in which flexible application of equitable principles is vital. Historically, federal courts have undertaken some of their most difficult assignments in the context of reviewing the actions of congressional committees. The Supreme Court has thus been required to take on the "arduous and delicate task" of "[a]ccommodat[ing] . . . the congressional need for particular information with the

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among others, that we concluded in *Citigroup* that the Supreme Court's decision in *Winter* revealed "no command . . . that would foreclose the application of our established 'serious questions' standard as a means of assessing a movant's likelihood of success on the merits" against the other components required to obtain preliminary relief. 598 F.3d at 38.

individual and personal interest in privacy." *Watkins*, 354 U.S. at 198. It has been called upon to address the "[g]rave constitutional questions" presented when "the power of Congress to investigate" appears to encroach on the limits on that power imposed by the Bill of Rights and, in particular, the First Amendment. *Rumely*, 345 U.S. at 44, 48. Disputes between congressional committees and Presidents arising from subpoenas, as here, also not uncommonly require courts to "search for accommodation between the two branches"—a task for which this Circuit's flexible approach to making the difficult judgment whether a preliminary injunction should issue is particularly well-suited. *United States v. Am. Tel. & Tel. Co* ("*AT&T II*"), 567 F.2d 121, 131 (D.C. Cir. 1977).

In short, we should not deprive ourselves of our traditional approach in such a sensitive context. As we affirmed in *Citigroup*, "[r]equiring in every case a showing that ultimate success on the merits is more likely than not is 'unacceptable as a general rule,'" and also "deprive[s] the remedy of much of its utility." 598 F.3d at 35–36 (quoting Wright & Miller § 2948.3). Because this case is not squarely covered by *Plaza Health* or any other previously-articulated "exception," I conclude we are bound to (and should) undertake our usual approach: namely, to consider the Plaintiffs' showing as to the merits, balance of

I would request the district court on remand promptly to implement a procedure by which the Plaintiffs identify on privacy or pertinency grounds specific portions of the material assembled in response to these subpoenas for nondisclosure. Like the majority, I would then provide counsel for the Committees with an opportunity to object, but I would also require counsel, provided with a general description of such material, to articulate clearly the legislative purpose that disclosure serves and to specify how the material sought is pertinent to that purpose. Even assuming, *arguendo*, that the Committees act pursuant to adequate authorization from the House as a whole, serious questions persist as to the ends the Committees are pursuing and whether these ends are adequate to justify the sought-after disclosures.[31] A fuller record would permit a more informed calculus regarding balance of hardships and would further clarify the stakes as to the serious questions that the Plaintiffs have already raised. This full remand is superior to the majority's approach for at least three reasons.

[31] As to the "case study" rationale proffered by the House Financial Services Committee, for instance, if that Committee is unable more clearly to articulate the pertinence of its subpoenas to the legislative purposes it pursues, *see Watkins*, 354 U.S. at 214–15, the balance of hardships may well lie with the Plaintiffs, who will suffer irreparable harm from the disclosure of their private and business affairs.

the majority's remand is inadequate to address the privacy and pertinency concerns that the majority *itself* identifies and deems important. As to sensitive personal information and an unspecified category of "nonpertinent" material, the majority concludes that the Plaintiffs should be afforded an opportunity to object to disclosure on privacy and pertinency grounds. It notes that "[t]he Committees have advanced no reason why the legislative purposes they are pursuing require disclosure" of "payment for anyone's medical expenses," for instance, and the majority thus forbids it. Maj. Op. at 84. But by providing the Plaintiffs with an opportunity to object only as to limited, specific categories of information sought pursuant to these subpoenas, the majority creates the very potential for unwarranted disclosure of sensitive information that it purports to disallow. The majority thus orders compliance with, for instance, the Deutsche Bank subpoena's demand for "any document related to any domestic or international transfer of funds in the amount of $10,000 or more," including any "check," J.A. at 38, providing *no* opportunity for Plaintiffs to object that the sought-after material is sensitive and related to no legislative purpose at all.

Perhaps there is no material responsive to this category that would trigger Rule 26(c)(1)'s protections against "embarrassment, oppression, or undue burden"

in a routine civil case. Fed. R. Civ. P. 26(c)(1). Perhaps such material *does* exist. We cannot know until the documents are assembled and objections are made. The privacy and pertinency concerns that the majority *purports* to address simply *cannot* be addressed in the abstract. And by declining a full remand to permit a record to be made, the majority affords *less* protection against the unwarranted disclosure of personal information regarding a sitting President and his family than would be afforded to any litigant in a civil case.

Finally, I also disagree with the majority's implicit assessment that the Plaintiffs have demonstrated no stake in the privacy of their business-related information that merits further review. Indeed, to the extent that the majority *does* show a reasonable concern for the needless disclosure of Plaintiffs' private and nonpertinent information, this concern does not generally extend to private *business* information at all, even though such information may implicate the same issues of privacy and (non)pertinence. To be sure, the majority is correct that Congress must have the ability to investigate businesses (even closely-held ones) in aid of legislation. And such investigations, serving a public good, will sometimes cause competitive harm.[32] But particularly in light of the very broad

[32] Federal Rule of Civil Procedure 26(c)(1)(G) permits a district court to issue

disclosure sought by these subpoenas (which, with regard to many transactions, could require the production of information from both this year and from *decades* ago), the majority has proffered no clear reason for denying the Plaintiffs an opportunity to object more generally to the disclosure of such material.

The majority argues that any hardship from business disclosures is offset in this case by the fact that Presidents already "expose for public scrutiny a considerable amount of personal financial information pursuant to the financial disclosure requirement of the Ethics in Government Act, 5 U.S.C. app. §§ 101-111." Maj. Op. at 102. But this is beside the point—or perhaps makes the point that the majority's approach is problematic.

Public disclosures made pursuant to the Ethics in Government Act are required by law, pursuant to a statute that has run the gantlet of bicameralism and presentment. In making disclosures pursuant to this Act, a President complies with a statute that presumptively reflects a democratically enacted consensus

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protective orders to prevent public disclosure of "confidential . . . commercial information," a protection not afforded or offered to the Plaintiffs by the Committees here. The majority does not include these competitive harms as "irreparable injuries" in its analysis, restricting its focus only to "loss of privacy." *See* Maj. Op. at 101–02. The irreversible nature of the competitive harm risked by immediate and unconditional disclosure, and the lack of safeguards common to typical discovery procedures in civil litigation, further buttress my view that these subpoenas, as drafted, raise serious questions which a remand would aid in resolving.

regarding the financial disclosures that a Chief Executive should be required to make. These House subpoenas, by contrast, require "considerably more financial information," as the majority concedes, but themselves raise substantial questions as to whether they are supported by "sufficient evidence of legislative authorization and purposes to enable meaningful judicial review." Maj. Op. at 55, 102. And as Judge Katsas suggested in dissent from the denial of rehearing in banc in *Mazars*, the scope of required disclosure "is determined . . . by the whim of Congress—the President's constitutional rival for political power—or even, as in this case, by one committee of one House of Congress." *Mazars*, 2019 WL 5991603, at *1 (Katsas, J., dissenting from the denial of rehearing en banc). In such circumstances, and taking the majority's analysis on its own terms, it is not clear why the majority limits its remand to the particular categories of information that it has selected, as opposed to permitting a more general opportunity to object regarding nonpertinent business information and the irreparable injury that will attend its disclosure.

For all the reasons that I have laid out here, this matter should be returned to the district court. The remand that I have outlined would clarify the issues at stake so that a reasoned determination could be made as to whether serious

questions persist, and where the balance of hardships lies. Indeed, given the lack of historical precedent for these subpoenas; their extraordinary breadth; and the persistent questions here regarding authorization, legislative purposes, and pertinence, a remand for development of the record with regard to specific categories of information is far preferable to the majority's approach.

Such a procedure would also encourage negotiation between the parties and potentially narrow the scope of this dispute. Because I conclude, contrary to the majority, that this case implicates the Supreme Court's caution to "tread warily" in matters pitting the power of Congress to investigate against other substantial constitutional concerns, *Rumely*, 345 U.S. at 46, and because the "serious questions" delineated above sound in separation of powers, *see Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 466 (1989) (noting that the Supreme Court's "reluctance to decide constitutional issues is especially great where . . . they concern the relative powers of coordinate branches of government"), this matter falls within a range of cases in which we *should* attempt, if possible, to "avoid a resolution that might disturb the balance of power between the two branches," *AT&T II*, 567 F.2d at 123. Perhaps that is not possible here. But as the D.C. Circuit has recognized in the past, congressional committees and the Chief Executive "have a long history of

settlement of disputes that seemed irreconcilable" and such resolutions, where possible, are to be preferred, since "[a] court decision selects a victor, and tends thereafter to tilt the scales." *AT&T I*, 551 F.2d at 394; *see also id.* at 391 (noting possibility of "better balance . . . in the constitutional sense" from "political struggle and compromise," rather than court decision); *Rumely*, 345 U.S. at 45–46 (noting that a "[c]ourt's duty to avoid a constitutional issue, if possible, applies not merely to legislation . . . but also to congressional action by way of resolution"—indeed, *most especially* in this context).

Accordingly, I would withhold decision as to balance of hardships and remand to permit the district court and the parties the opportunity to provide this Court with an adequate record regarding the legislative purpose, pertinence, privacy and separation of powers issues in this case. Such a procedure, as in *AT&T I*, 551 F.2d at 394–95, and *AT&T II*, 567 F.2d at 128–32, could narrow the scope of the present dispute. But it is required in any event, because the record simply does not support the majority's decision to order immediate compliance with these subpoenas, but for a "few documents," Maj. Op. at 85, falling within its preselected categories. To be clear, I reach this resolution guided by the Supreme Court's admonition in *Rumely* that the outer reaches of Congress's investigative

power are to be identified reluctantly, and only after Congress "has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits." 345 U.S. at 46. Serious questions persist with regard to these subpoenas—questions demanding close review lest such novel subpoenas prove a threat to presidential autonomy not only now but in the future, and "to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Fitzgerald*, 457 U.S. at 753. Once the parties have provided this Court with the information that I would seek on remand, we would at that point have a sufficient record on which to make a prompt and reasoned determination as to where the balance of hardships lies and whether the Plaintiffs, having raised serious questions on the merits, are entitled to preliminary relief.