Nos. 19-715, 19-760

IN THE

Supreme Court of the United States

DONALD J. TRUMP, et al.,
Petitioners,

v.

MAZARS USA, LLP, et al.,
Respondents.

DONALD J. TRUMP, et al.,
Petitioners,

v.

DEUTSCHE BANK AG, et al.,
Respondents.

On Writs of Certiorari to the
United States Courts of Appeals for the
District of Columbia and Second Circuits

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

ALLISON M. ZIEVE
Counsel of Record
ADAM R. PULVER
SCOTT L. NELSON
KAITLIN E. LEARY
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
azieve@citizen.org

March 2020

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Statutes and Rules

INTEREST OF AMICUS CURIAE[1]

Public Citizen is a nonprofit consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues. To advance the public interest, Public Citizen works for the enactment and enforcement of laws fostering open, accountable, and responsive government.

Public Citizen has long supported laws that require government officials and candidates for office to make disclosures regarding their personal financial interests because such disclosure is vital to preserving the public's trust in government. Public Citizen submits this brief because it believes that a major premise of Petitioners' argument—their assertion that Congress is categorically prohibited from enacting any financial disclosure laws that would apply to the President—is erroneous, and that adoption of that view by the Court would be both unsupported by precedent and harmful to our system of government.

SUMMARY OF ARGUMENT

This Court has held that a congressional subpoena will be upheld where the "subject [is] one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit." *McGrain v. Daugherty*, 273 U.S.

---

[1] This brief was not written in whole or in part by counsel for a party. No one other than amicus curiae made a monetary contribution to the preparation or submission of this brief. Counsel for the parties have filed blanket consents to the filing of amicus briefs or have provided written consent to the filing of this brief.

135, 177–78 (1927). As part of the proceedings leading up to the subpoena at issue in the *Mazars* case, the Chairman of the House Committee on Oversight and Reform stated that the information sought pertained to its review of whether "changes … are necessary" to "laws relating to financial disclosures required of the President." *Mazars* Pet. App. 186a (quoting Letter from Chairman Cummings to White House Counsel, dated Feb. 15, 2019).

As part of their argument that the subpoena at issue in *Mazars* is invalid, Petitioners contend that such possible disclosure laws fail to meet the first of the *McGrain* requirements—that is, that they do not concern a subject "on which legislation could be had." Petitioners go so far as to assert that Congress lacks *any* "power to pass legislation requiring the President [to] disclose his personal finances." Pet'rs Br. 47. The United States disagrees, *see* U.S. Br. 28 (acknowledging, but deeming it irrelevant, that "accurate reporting of the President's finances could in theory result in valid legislation amending the financial-disclosure laws")—and rightly so. The enactment of laws requiring the President to provide information about his personal financial holdings would be necessary and proper to Congress's execution of several of its enumerated powers.

The Court has, for example, recognized that Congress has the authority to enact laws that minimize the risk of corruption and increase public confidence in the federal government. *See Burroughs v. United States*, 290 U.S. 534 (1934). Disclosure laws could also be germane to Congress's authority to manage federal property, direct federal spending, and regulate interstate commerce. Laws aimed at ensuring that those who carry out congressionally

delegated functions pursuant to those authorities do so in a manner that preserves the public trust and is free from corruption are necessary and proper.

Moreover, under this Court's precedent, financial disclosure laws applicable to the President are permitted by the separation-of-powers doctrine because disclosure does not unduly interfere with the President's performance of his constitutionally assigned functions—the standard under which the Court has repeatedly assessed separation-of-powers claims. Given that financial disclosure entails no restriction on the President's official activities whatsoever, laws requiring the filing of accurate paperwork regarding personal activities is far less intrusive on executive functions than other laws that this Court has already approved.

Finally, Petitioners' argument that any required financial disclosure requirement would be an unconstitutional "qualification" on those who could hold office is belied by this Court's case law interpreting the congressional Qualifications Clauses. A law that requires the President to disclose certain financial records does not exclude any individual or class of individuals from eligibility for office. That an otherwise-valid federal law would require the President to do something that he would rather not do does not make it a "qualification" for the office.

ARGUMENT

The House Committee on Oversight and Reform has jurisdiction over "[a]ll bills, resolutions, and other matters" relating to "[g]overnment management and accounting measures generally" and the "[o]verall economy, efficiency, and management of government operations and activities, including Federal procure-

ment," among other subjects. Rules of the House of Representatives, 116th Cong., Rule X, cl. 1 & 1(n). The House Rules direct the Committee to "review and study on a continuing basis the operation of Government activities at all levels, including the Executive Office of the President." *Id.*, cl. 3(i). Pursuant to these provisions, and in light of revelations of violations of existing ethics laws, the Committee sought certain materials relating to the President's personal finances to "help the Committee determine," among other things, "whether reforms are necessary to address deficiencies with current laws, rules and regulations." *Mazars* Pet. App. 186a (quoting Letter from Chairman Cummings to White House Counsel, dated Feb. 15, 2019).

As part of their challenge to the resulting subpoena in the *Mazars* case, Petitioners argue that any such reforms would be unconstitutional if they required the President to make disclosures concerning his personal finances. They do so even though, as all three judges emphasized in the D.C. Circuit below, no specific proposals are before the Court for consideration. *See Mazars* Pet. App. 41a (noting that the court must "tread carefully" and "avoid passing on the constitutionality of hypothetical statutes"); *id*. at 143a (Rao, J., dissenting) (noting that any determinations about the constitutionality of hypothetical legislation "are advisory at best"). That no specific proposed legislation is before the Court, however, is not a sign of the subpoena's invalidity. To the contrary, the purpose of a legislative subpoena is to obtain information and use it to craft a law. As this Court has noted, "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to

affect or change." *McGrain*, 273 U.S. at 175. Thus, as the district court in the *Mazars* case explained, "the critical inquiry … is not legislative certainty, but legislative potential." *Mazars* Pet. App. 183a (citing *McGrain*, 273 U.S. at 177; *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975)).

In light of this posture, as the D.C. Circuit correctly noted, acceptance of Petitioners' argument that the subpoena at issue in *Mazars* does not pertain to a subject on which legislation "may be had," *Mazars* Pet. App. 41a (quoting *Eastland*, 421 U.S. at 508), would require this Court to conclude that *no* hypothetical presidential financial disclosure law could pass muster under the Constitution, *see id*. Petitioners cannot meet that high burden. Multiple provisions of the Constitution provide Congress with authority to enact such legislation, and hypothetical legislation could exist comfortably within limitations mandated by separation-of-powers principles and the Qualifications Clause.

I. Financial disclosure laws are necessary and proper exercises of Congress's constitutional powers.

Petitioners argue that Congress lacks any authority "to pass legislation requiring the President [to] disclose his personal finances" because the presidency is a creation of the Constitution, not an act of Congress. Pet'rs Br. 46–47. This argument ignores both the purpose of disclosure laws and this Court's precedent on the scope of Congress's authority.

Pursuant to the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, Congress has "broad power to enact laws that are 'convenient, or useful' or 'conducive' to the 'beneficial exercise'" of all authority

granted by the Constitution. *United States v. Comstock*, 560 U.S. 126, 133 (2010) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 413, 418 (1819)). Congress "possesses every … power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption." *Burroughs*, 290 U.S. at 545. In *Burroughs*, the Court held that Congress had authority to enact a law that required organizations seeking to influence presidential electors to make certain financial disclosures. Although presidential electors are not themselves government officers, and their role is a creation of the Constitution rather than an Act of Congress, Congress's power to protect the "general government from impairment or destruction" provided it with the authority to act. *Id.* As the Court explained, a contrary conclusion would "deny the nation in a vital particular the power of self-protection." *Id.*

Although in *Burroughs* the Court focused on the "clear" "power of Congress to protect the election of President and Vice President from corruption," *id.* at 547, this Court's subsequent case law makes clear that *Burroughs* reflects Necessary and Proper Clause principles. *See Comstock*, 560 U.S. at 135; *Buckley v. Valeo*, 424 U.S. 1, 90, 132 (1976). And the Court's reasoning in *Burroughs* contradicts Petitioners' arguments that the status of the President as a constitutional officer *ipso facto* invalidates Congress's power to enact measures concerning the President that will counter threats of corruption of the government.

The details of possible financial disclosure legislation could vary widely, but "it is scarcely

debatable that, as a general matter, financial disclosure effectively combats fraud and provides valuable information to the public." *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 222 (1999) (Thomas, J., concurring). And, as a general matter, "Congress appropriately enacts prophylactic rules that are intended to prevent even the appearance of wrongdoing…. Legislation designed to prohibit and to avoid potential conflicts of interest in the performance of governmental service is supported by the legitimate interest in maintaining the public's confidence in the integrity of the federal service." *Crandon v. United States*, 494 U.S. 152, 164–65 (1990). Together, these interests would provide support for any number of hypothetical disclosure requirements that Congress could enact in aid of its authority to protect the integrity of both the government as a whole, and agencies and functions over which Congress has broad power.

Given that one of the Petitioners in this action, Trump Old Post Office LLC, is a current lessee of federal property, Congress's vast authority under the Property Clause, U.S. Const. art. IV, § 3, cl. 2, provides an obvious example of a power that legislation concerning financial disclosures by the President could advance. This Court has "repeatedly observed that the power over the public land thus entrusted to Congress is without limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). As to public property, "Congress exercises the powers both of a proprietor and of a legislature." *Id.* at 540. Thus, courts have repeatedly upheld laws limiting executive branch agencies in their use or disposition of federal property. For example, in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of*

Aircraft Noise, Inc., 501 U.S. 252 (1991), the Court saw "no doubt" that Congress had the power to "defin[e] the policies that govern [the] operations" of federally-owned airports, and that Congress could choose to "formulate the details" itself rather than "enact general standards and assign to the Executive Branch the responsibility for making necessary managerial decisions in conformance with those standards." *Id*. at 271–72; *see Kleppe*, 426 U.S. at 539–40 (collecting cases upholding broad exercises of congressional authority pursuant to the Property Clause).

In light of this expansive authority, Congress could enact legislation requiring any federal officeholder, including the President, to disclose his or her financial interest in any company that seeks a lease of federal property. Such disclosure would both increase public trust in the management of federal property and serve as a prophylactic measure against misconduct by decisionmakers in congressionally created offices. *Cf. Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (observing that an "informed public opinion is the most potent of all restraints upon misgovernment"). Congress could also enact limits on the lease or sale of federally owned property to federal officeholders including the President, as well as to entities in which they have specified financial interests, in order to avoid impropriety or the appearance of impropriety in the disposition of federal property. For such a law to function, Congress could require the President and other federal officers to disclose their financial holdings in advance, so that potential conflicts of interest could be identified—similar to the way in which potential conflicts are monitored within the federal judiciary.

Similar laws could be enacted to aid Congress in the exercise of other enumerated powers. For example, pursuant to the Spending Clause, U.S. Const. art. I, § 8, cl. 1, Congress could enact a disclosure law that works in tandem with grant or procurement laws to limit how and/or whether federal taxpayer dollars are provided to entities in which the President has a personal financial stake. As the Court has held, the Necessary and Proper Clause provides Congress with authority "to see to it that taxpayer dollars appropriated under [the Spending Clause] are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars." *Sabri v. United States*, 541 U.S. 600, 605 (2004). A law that requires disclosure of presidential financial holdings would serve this same purpose.

Beyond federal properties and funds, Congress has the authority to enact legislation that aims to maintain public trust and confidence in the actions of federal officers and employees with regulatory authority. For example, a disclosure law that enabled members of the public to assess whether the Federal Trade Commission was considering matters involving a company owned in part by the President in the same way as those involving other companies would be "necessary and proper" for the exercise of the Commerce Clause authority pursuant to which Congress created the FTC.

Petitioners do not address any of these potential sources of authority in their brief, instead addressing only the Emoluments Clauses. *See* U.S. Const. art. I, § 9, cl. 8; *id*. art. II, § 1, cl. 7. As to those, Petitioners assert that "[a]ny suggestion that the Emoluments

Clauses offer Congress an independent legislative foundation for making presidents disclose their finances is wrong," Pet'rs Br. at 50, but they never say why. Rather, they assert only that such a disclosure requirement would be burdensome and contravene the separation-of-powers doctrine. *Id.* at 50–51. But the question whether a law is grounded in a legitimate source of legislative power and the question whether the way Congress has chosen to exercise that legislative power violates the separation of powers are different. *See Comstock*, 560 U.S. at 134 (noting that whether a statute is "authorized by Art. I, § 8" and whether it is "prohibited" by other provisions of the Constitution are separate questions). As to the former question, as the D.C. Circuit noted, "a statute facilitating the disclosure of" any emoluments received by the President would be necessary and proper to carry out Congress's exclusive authority to approve the President's receipt of foreign emoluments. *Mazars* Pet. App. 46a. Petitioners cannot establish that *no* law could be "rationally related to the implementation of" Congress's "constitutionally enumerated power" in this area. *Comstock*, 560 U.S. at 134.

Any or all of the enumerated powers discussed above could support financial disclosure legislation within the Committee's jurisdiction. When Congress "acts in the exercise of its own proper authority, it has a wide choice of the mechanisms and means to adopt." *United States v. Windsor*, 570 U.S. 744, 764–65 (2013) (citing *McCulloch v. Maryland*, 17 U.S. at 421). And where Congress has chosen a valid mechanism to exercise authority it possesses, the possibility that the law at issue could *also* be framed as an exercise of a

power Congress *lacks* has never been found to be a basis for invalidating the law.

For example, courts have regularly found that "[w]hen the federal government exercises any of the powers granted to it by the Constitution, it is not a valid objection that the exercise may bring with it some incidents of the police power," even though Congress could not exercise a general police power independently. *United States v. Volungus*, 595 F.3d 1, 9 (1st Cir. 2010) (citing *Gonzales v. Raich*, 545 U.S. 1, 29 & n.38 (2005), and *Lambert v. Yellowley*, 272 U.S. 581, 596 (1926)). And although domestic relations is an area generally reserved to the States, "Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges." *Windsor*, 570 U.S. at 764. By the same token, Congress's lack of free-standing authority to enact presidential financial disclosure laws is not a valid objection to the constitutionality of disclosure laws passed as necessary and proper to the exercise of enumerated authority that Congress does possess.

II. Disclosure laws applicable to the President do not categorically contravene the separation of powers.

Petitioners appear to argue that, even if Congress has the affirmative power to enact legislation that would require disclosure of financial records, such legislation would violate the constitutional separation of powers. Pet'rs Br. at 47–48. Petitioners, however, fail to acknowledge, let alone apply, the standard that this Court has repeatedly applied in assessing whether legislation enacted by Congress infringes the President's Article II authority: The Court begins by examining whether the enacted legislation "prevents

the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977) (citing *United States v. Nixon*, 418 U.S. 683, 711–12 (1974)). If it does not, the separation of powers is not offended. If, however, "the potential for disruption is present," the Court must "then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Id.* The Court has reaffirmed and applied this core standard repeatedly over the past forty years. *See, e.g.*, *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2094 (2015); *Morrison v. Olson*, 487 U.S. 654, 695 (1988); *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982).

In this case, the question before the Court is not whether *some* conceivable law would fail this test, but whether *every* conceivable law would fail both prongs of the test. Although it is particularly difficult to apply the second prong of this test in the abstract, the D.C. Circuit correctly held that there is no reason why a disclosure law would necessarily disrupt the President's performance of his or her official duties. *Mazars* Pet. App. 45a–49a.

First, a law requiring financial disclosures related to the President's activities *outside* of his exercise of authority as President poses less chance of intruding on the President's exercise of his or her constitutional responsibilities than the disclosures of official records upheld in *Nixon v. Administrator* and required by the Presidential Records Act.[2] In *Clinton v. Jones*, 520

[2] Whether requiring such disclosures might implicate personal privacy rights is an entirely different question from whether it offends separation-of-powers principles. *See Nixon v.*

(*Footnote continued*)

U.S. 681 (1997), the Court relied on this distinction in concluding that presidential immunity from suit for *official* actions does not compel any immunity from suit against a sitting President in his personal capacity, for actions taken prior to his taking office. *Id.* at 692–95. Immunity for unofficial conduct is not necessary to "enabl[e] … officials to perform their designated functions without fear." *Id.* at 693. Thus, in rejecting a separation-of-powers challenge to the subpoena at issue in *Deutsche Bank*, the Second Circuit observed that "the Lead Plaintiff is suing in his individual capacity, no confidentiality of any official documents is asserted, and any concern arising from the risk of distraction in the performance of the Lead Plaintiff's official duties is minimal in light of the Supreme Court's decision in *Clinton v. Jones*, and, in any event, far less substantial than the importance of achieving the legislative purposes identified by Congress." J.A. 290a.

The same distinction applies in the disclosure context: Exemption from disclosure laws would not be necessary to enable the President to perform his or her designated functions. As Judge Katsas noted in his dissent from denial of rehearing *en banc*, "this case does not implicate the President's need to secure candid advice from close governmental advisors." *Mazars* Pet. App. 216a. Petitioners appear to rely solely on the notion that any diversion of time, energy, or effort from the President is an unconstitutional disruption. But such an argument is inconsistent with the Court's decision in *Clinton v. Jones*. There, the Court explicitly rejected the President's argument

---

Adm'r, 433 U.S. at 441–45, 455–64 (addressing separation of powers and privacy as distinct issues).

that the litigation at issue in that case—involving sexual assault allegations and a deposition of the President himself—would "impose an unacceptable burden on the President's time and energy, and thereby impair the effective performance of his office." 520 U.S. at 702.

If the President can be forced to sit for depositions and answer questions about sexual conduct without causing an unconstitutional burden on his ability to perform the functions of his office, it is hard to imagine how submitting paperwork about personal finances would necessarily do so—particularly given that Congress could adopt any number of mechanisms to address potential burdens.

Second, Presidents—including the current President—have made personal financial disclosures for decades without perceptible effect on the performance of their constitutional duties. *Mazars* Pet. App. 47a–48a. This history is strong evidence that a disclosure law would not necessarily impair the President's ability to perform his job. *See Clinton v. Jones*, 520 U.S. at 704–06 (looking to historical evidence that Presidents had participated in litigation without impairment of their performance of their constitutional duties to support the conclusion that the litigation would not prevent President Clinton from doing so).

In arguing that this history is irrelevant, Pet'rs Br. 48 n.5, Petitioners ignore that their position is that *any conceivable* disclosure law would impermissibly burden the President. And they suggest no reason why a court should not look at the impact (or lack thereof) of disclosure on Presidents in the past to determine what impact mandatory disclosure would have in the

future. *See Mazars* Pet. App. 52a (stating that "particularly in separation-of-powers disputes, we 'put significant weight upon historical practice'" (quoting *Zivotofsky*, 135 S. Ct. at 2091)).

Third, although Petitioners paint all conceivable disclosure laws as raising the same separation-of-powers issues, disclosure laws can—and do—work in different ways that would be relevant to both steps of the *Nixon v. Administrator* inquiry. For example, the Committee explicitly stated that one of its goals was to examine potential changes to existing legislation. *See supra* pp. 2, 4. And Congress could enact a number of changes to existing legislation that would not entail any appreciably greater intrusion on the President's exercise of his constitutional responsibilities. For example, in *Lovitky v. Trump*, – F.3d –, No. 19-5199, 2020 WL 625415 (D.C. Cir. Feb. 11, 2020), the D.C. Circuit recently noted that, in enacting the Ethics in Government Act, Congress did not clearly require the President to differentiate personal from business liabilities. The court noted that although the statute therefore has a "potential for mischief," reforms were not the province of the courts, but a task for legislation or regulation. *Id.* at *8. For Congress to do so would not impose an appreciably increased burden on the President's ability to perform his job.

Even if Congress were to enact entirely new disclosure requirements, the laws could have a wide range of features, and Congress's choices could rein in the degree to which they would otherwise intrude on the President's constitutional functions, assuming they might do so at all. Congress could, for example, direct the President to disclose information to another executive agency and limit the degree to which that information was to be made public. As the Court held

in *Nixon v. Administrator*, it would be "less intrusive [on presidential authority] to place custody and screening of the materials within the Executive Branch itself" rather than Congress or an independent agency. 433 U.S. at 444. Congress could also limit the disclosed financial information to that which it deemed most vital to its goals of maintaining public trust in government. Congress would also have a range of options for enforcement mechanisms, which would likewise affect the separation-of-powers analysis.

"[E]ven quite burdensome interactions [do not] necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Clinton v. Jones*, 520 U.S. at 702. Petitioners' argument that *every* conceivable disclosure law would impermissibly frustrate the President's ability to exercise his constitutional responsibilities disregards this fundamental principle and must be rejected.

III. Disclosure laws applicable to the President do not categorically violate the Qualifications Clause.

Finally, Petitioners argue that *any* statute that would require disclosure of a President's personal finances would change or expand the qualifications for serving as President, and thus be unconstitutional. As the D.C. Circuit held, *Mazars* Pet. App. 51a, however, a disclosure requirement does not itself constitute a qualification for office.

The Constitution sets out three qualifications for individuals to serve as President: They must be (1) natural born citizens, (2) at least thirty-five years of age, and (3) inhabitants of the United States for at

least fourteen years. U.S. Const. art. III, § 1, cl. 5. This Court has never had occasion to opine on the exclusivity of these qualifications, but it has held that the qualifications in the analogous clauses for members of Congress, *see id.* art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3, are "fixed" "in the sense that they may not be supplemented by Congress." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 798 (1995) (citing *Powell v. McCormack*, 395 U.S. 486 (1969)). And other courts have applied the reasoning of *U.S. Term Limits* to measures imposing qualifications on presidential candidates, noting that the presidential Qualifications Clause "is nearly identical to the congressional clauses in language and scope." *De La Fuente v. Merrill*, 214 F. Supp. 3d 1241, 1253 & n.11 (M.D. Ala. 2016); *see Herman v. Local 1011, United Steelworkers of Am.*, 207 F.3d 924, 925 (7th Cir. 2000) (relying on *U.S. Term Limits* for the exclusivity of Constitution's qualifications for President); *Faas v. Casco*, 225 F. Supp. 3d 604, 613 (S.D. Tex. 2016) (stating that the reasoning in *U.S. Term Limits* is applicable to measures imposing qualifications on presidential candidates).

Consistent with these decisions, the D.C. Circuit assumed (without deciding) that the presidential Qualifications Clause, like the congressional clauses, is fixed, *Mazars* Pet. App. 51a, but it rightly concluded that disclosure requirements triggered by the President's *assumption* of office are not *qualifications* for office, *id.* As the court explained, "laws requiring disclosure exclude precisely zero individuals from running for or serving as President; regardless of their financial holdings, all constitutionally eligible candidates may apply." *Id.*

Many existing laws require the President to take actions, without imposing "qualifications." For example, although the Constitution requires the President to "give to the Congress information of the State of the Union," U.S. Const. art. II, § 3, cl. 1, no one would reasonably characterize this duty as a "qualification." Likewise, the Budget and Accounting Act, 31 U.S.C. § 1105(a), requires the President to submit a budget to Congress; yet performance of that task is not a qualification for office. And below, the President conceded that, although the Presidential Records Act requires the President to take certain actions regarding his papers, *see* 44 U.S.C. § 2203, that "Act does not add or alter the qualifications for office." *Mazars* Pet. App. 51a (alteration in original; internal quotation marks omitted).

Precedent defining an impermissible "qualification" under the congressional Qualifications Clauses confirms that financial disclosure requirements are not qualifications. A statute is impermissible under that clause only if it both "has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly." *U.S. Term Limits*, 514 U.S. at 836. Applying this standard, courts have struck down as unconstitutional a variety of laws that would categorically exclude a class of people from serving in office.

For example, several courts have held laws that would impose residency requirements on congressional candidates to be unconstitutional, because such laws "handicap[] the class of nonresident candidates who otherwise satisfy the Qualifications Clause." *Schaefer v. Townsend*, 215 F.3d 1031, 1037 (9th Cir. 2000); *see Tex. Democratic Party v. Benkiser*, 459 F.3d

582, 589 (5th Cir. 2006); *Campbell v. Davidson*, 233 F.3d 1229, 1234 (10th Cir. 2000); *Dillon v. Fiorina*, 340 F. Supp. 729, 730 (D.N.M. 1972) (three-judge district court); *Hellmann v. Collier*, 141 A.2d 908 (Md. 1958). Similarly, courts have held that laws barring candidates with criminal histories from congressional office are unconstitutional. *See, e.g.*, *Campbell*, 233 F.3d at 1234; *Application of Ferguson*, 294 N.Y.S.2d 174, 175–76 (N.Y. Sup. Ct. 1968); *Danielson v. Fitzsimmons*, 44 N.W.2d 484, 486 (Minn. 1950). And, of course, this Court used the standard announced in *U.S. Term Limits* to strike down a law that, by imposing term limits, would prevent current or former members of Congress from seeking re-election. *See* 514 U.S. at 837.

All of these laws go beyond requiring a candidate or officeholder to take some action; instead, they identify a class of people and bar members of that class from office or candidacy. By contrast, financial disclosure laws do not inherently have the "purpose and … effect of … handicapping a class of candidates." *Id*. at 831. They target no discernible "class" of candidates. Nearly all presidential candidates will have accumulated investments in *something* prior to running for office. Indeed, many presidential candidates of both the major parties, as well as of third parties, have been extraordinarily wealthy. To the extent that Petitioners suggest that only *some* candidates would be offended by a financial disclosure law, that suggestion, even if relevant, does not establish any effect on a discernible class of candidates. "There is no reason to believe that those most sensitive to their privacy will be Republicans or Democrats, liberals or conservatives, blacks or

whites." *Plante v. Gonzalez*, 575 F.2d 1119, 1127 (5th Cir. 1978).

A disclosure requirement also would not have "the sole purpose of creating additional qualifications indirectly," *U.S. Term Limits*, 514 U.S. at 836, let alone directly. A law that, for example, required the President to identify the entities in which he held investments so that federal agencies could note potential conflicts in making decisions about federal property would not keep any candidate, or class of candidates, out of office. That a potential presidential candidate might choose not to run for President because he or she did not want to make such a disclosure would not transform the requirement into a qualification for office, any more than the possibility that a prospective candidate might choose not to seek office because of disagreement with the recordkeeping requirements of the Presidential Records Act renders that law a qualification.[3]

A choice not to seek office because of unwillingness to perform the obligations that come with the office is just that—a choice. *See Plante*, 575 F.2d at 1126 (citing *Bullock v. Carter*, 405 U.S. 134 (1972), and noting the meaningful distinction between a law that might deter someone from seeking office and one that prohibits someone from seeking office); *Merle v. United States*, 351 F.3d 92, 97 (3d Cir. 2003) (rejecting a Qualifications Clause challenge to the Hatch Act's

[3] Petitioners attempt to distinguish the Presidential Records Act based on the particulars of the statutory requirements. Pet'rs Br. 48 n.5. The particulars are not relevant here, however, because Petitioners' argument is that, regardless of the details, *any* law requiring financial disclosure by the President would constitute an impermissible qualification.

prohibition on current federal employees running for partisan office because the prohibition "allows a citizen a choice" and "does not disqualify any individual from running for public office").

The financial disclosure laws that already apply to the President demonstrate that such disclosures do not limit who can serve in office. The Ethics in Government Act, 5 U.S.C. app. 4 § 101(a), (f)(1), for example, compels the President and other federal officials to make financial disclosures. Although the subpoenas in this case were issued in response to errors the President made in making those disclosures, *see Mazars* Pet. App. 4a, no one has suggested that those errors rendered the President ineligible to continue to serve as President.

Petitioners also argue that the absence of a mechanism to force the President to comply with a financial disclosure law or be removed from office proves that such a law would be invalid. *See* Pet'rs Br. at 49–50. Laws are not unconstitutional, however, simply because they lack a strong enforcement mechanism. That Petitioners think such a law would be weak does not make the law a "qualification." To the contrary, it *refutes* the suggestion that it is a qualification.

CONCLUSION

For the foregoing reasons, the decisions below should be affirmed.

Respectfully submitted,

ALLISON M. ZIEVE
Counsel of Record
ADAM R. PULVER
SCOTT L. NELSON
KAITLIN E. LEARY
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
azieve@citizen.org
Attorneys for Amicus Curiae

March 2020