ORAL ARGUMENT HELD ON JULY 12, 2019

No. 19-5142

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

DONALD J. TRUMP; THE TRUMP ORGANIZATION, INC.; TRUMP ORGANIZATION LLC; THE TRUMP CORPORATION; DJT HOLDINGS LLC; THE DONALD J. TRUMP REVOCABLE TRUST; and TRUMP OLD POST OFFICE LLC,

Plaintiffs-Appellants,

v.

MAZARS USA, LLP,

Defendant-Appellee,

COMMITTEE ON OVERSIGHT AND REFORM OF THE U.S. HOUSE OF REPRESENTATIVES,

Intervenor-Defendant–Appellee.

On Appeal from the United States District Court
for the District of Columbia, No. 19-cv-01136 (APM)

APPELLANTS' SUPPLEMENTAL BRIEF

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Dated: August 31, 2020

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INTRODUCTION AND SUMMARY OF ARGUMENT

In its opinion vacating this Court's decision, the Supreme Court made one point abundantly clear: this congressional subpoena for the President's records "unavoidably" raises "significant separation of powers issues." *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2033-34 (2020). The Supreme Court stressed this point on virtually every page of its opinion, and the Justices were unanimous in their belief that these weighty separation of powers concerns must inform the resolution of every issue in this case. The Court also articulated a new, multi-factor test that no court has ever applied before. That test requires a "careful analysis" and a "balanced approach" that tries to "'avoid[] whenever possible'" confrontation between the two branches, respects the interests of "both" branches, and does not "needlessly disturb" the balance of power between them. *Id.* at 2035, 2031. The Supreme Court quickly proved its dedication to this cautious and deliberate approach, as it denied the Committee's request to expedite the judgment in light of the House's looming expiration. *Comms. of U.S. House of Reps. v. Trump*, 2020 WL 4044718 (U.S. July 20, 2020).

Based on the existing record and the justifications that the Committee gave when it subpoenaed Mazars, the Committee's subpoena cannot possibly survive the Supreme Court's new standard. The Committee has not even *attempted* to describe its legislative aims with "specificity" or bolster them with "detailed and substantial … evidence." *Mazars*, 140 S. Ct. at 2036. Even if it had, the Committee cannot possibly need eight years of detailed financial records about this President to consider reforms to disclosure

laws—especially since it has not tried narrower requests first, or meaningfully participated in the traditional process of accommodation with the executive branch. The Supreme Court's opinion also bolsters several of Plaintiffs' other objections to the Mazars subpoena—most notably, their argument that the subpoena is not clearly authorized by the House Rules. After the Supreme Court's opinion, it can no longer be said that clear authorization is unnecessary because this subpoena presents no serious constitutional questions and risks no disruption to the separation of powers. *Cf. Trump v. Mazars USA, LLP*, 940 F.3d 710, 744-45 (D.C. Cir.), *vacated*, 140 S. Ct. 2019 (2020).

The Committee knows its subpoena cannot stand on the existing record. So it will likely attempt to bolster the subpoena by supplementing the record with reams of new evidence. It will likely urge this Court to consider and weigh that evidence for the first time on appeal. And it will likely resist a remand to the district court on the ground that it urgently needs the President's records before its term expires in January 2021.

But these arguments will be unpersuasive. Invalid congressional subpoenas cannot be resuscitated with retroactive rationalizations. *See Watkins v. United States*, 354 U.S. 178, 204, 206 (1957). New evidence cannot be introduced for the first time on appeal. *See* Fed. R. App. P. 10(a); D.C. Cir. R. 10(a). And the Committee's desire for haste was rejected by the Supreme Court and is no basis to depart from this Court's usual practice of remanding for the district court to apply the new legal standard in the first instance. Because this case "implicate[s] weighty concerns regarding the separation of powers," this Court should create more opportunities for "careful analysis,"

"accommodation," "negotiation," and "compromise"—not less. *Mazars*, 140 S. Ct. at 2035, 2030-31. The Court should either vacate the district court's judgment and remand for further proceedings or reverse.

BACKGROUND

On April 15, 2019, the Oversight Committee of the House of Representatives issued a subpoena to Mazars USA, LLP, the accounting firm for President Trump and several Trump entities. The Mazars subpoena arose from a Committee hearing in February 2019 that featured the testimony of Michael Cohen. Cohen claimed that the President had "inflated" and "deflated" assets on "personal financial statements from 2011, 2012, and 2013" to obtain a bank loan for a deal "to buy the Buffalo Bills" and to "reduce his [state] real estate taxes" and insurance premiums. *Hearing Before the H. Comm. on Oversight & Reform,* 116th Cong. 13 (2019), bit.ly/2IrXTkX. The subpoena required Mazars to produce eight years of accounting and other financial information "related to work performed for President Trump and several of his business entities both before and after he took office." *Mazars*, 940 F.3d at 714. The District Attorney of New York County "copied" the Committee's subpoena because, according to him, it is well-suited to investigate violations of state criminal law. *Trump v. Vance*, 140 S. Ct. 2412, 2420 & n.2 (2020).

Chairman Cummings memorialized the Committee's reasons for issuing the Mazars subpoena in an April 2019 memorandum. *See Mazars*, 940 F.3d at 726. The memorandum articulated four purposes: determining whether President Trump (1)

"may have engaged in illegal conduct before and during his tenure in office" (2) "has undisclosed conflicts of interest that may impair his ability to make impartial policy decisions"; (3) "is complying with the Emoluments Clauses of the Constitution"; and (4) "has accurately reported his finances to the Office of Government Ethics and other federal entities." *Id.* "The Committee's interest in these matters," the memorandum added, would "inform its review of multiple laws and legislative proposals under [its] jurisdiction." *Id.*

Plaintiffs sued Mazars, the Chairman Cummings, and the Committee lawyer who served the subpoena. They alleged that the Committee lacked statutory authority to issue the subpoena and that the subpoena lacked a legitimate legislative purpose. The Committee intervened in place of the individual congressional defendants.[1] The district court treated the preliminary-injunction filings as summary-judgment motions, entered final judgment for the Committee, and denied a stay pending appeal. *See generally Trump v. Comm. on Oversight & Reform of U.S. House of Reps.*, 380 F. Supp. 3d 76 (D.D.C. 2019).

This Court affirmed, holding that the Committee had statutory authority to issue the subpoena and that the subpoena had a legitimate legislative purpose. *See Mazars*, 940 F.3d at 714. Judge Rao dissented. In her view, the subpoena lacked a legitimate legislative purpose. She would have invalidated it on that basis without reaching the

[1] Throughout these proceedings, Mazars has taken the position that "the dispute in this action is between Plaintiffs and the Committee," DDC Doc. 23, and has taken no position on the legal issues.

other issues. *See id.* at 748-84. This Court denied rehearing en banc over the dissents of Judge Katas (joined by Judge Henderson) and Judge Rao (also joined by Judge Henderson), *see Trump v. Mazars USA, LLP*, 941 F.3d 1180 (D.C. Cir. 2019), and then denied a stay pending appeal, *see* CADC Doc. #1814803.

The Supreme Court stayed the mandate, granted certiorari, vacated this Court's judgment, and remanded the case for further proceedings. *See generally Trump v. Mazars USA, LLP*, 140 S. Ct. 660 (2019); *Mazars*, 140 S. Ct. 2019.[2] The Chief Justice, writing for the majority, acknowledged Congress's general authority to issue subpoenas "in order to legislate." *Id.* at 2031. "Because this power is 'justified solely as an adjunct to the legislative process,'" however, "it is subject to several limitations." *Id.* (quoting *Watkins*, 354 U.S. at 197). Legislative subpoenas, among other things, "must serve a valid legislative purpose," "must concern a subject on which legislation could be had," and cannot have been issued "for the purpose of law enforcement" or "to expose for the sake of exposure." *Id.* at 2031-32 (cleaned up).

The main issue though was not whether these limitations applied to legislative subpoenas. The issue was how to apply them to this "first of its kind" congressional subpoena "for the President's records." *Id.* at 2031. For their part, "the courts below treated these cases much like any other, applying precedents that do not involve the

[2] In the same opinion, the Supreme Court vacated the Second Circuit's judgment in *Trump v. Deutsche Bank AG*, No. 19-760, and likewise remanded that case for further proceedings.

President's papers." *Id.* at 2033. That was incorrect. "Congressional subpoenas for the President's personal information implicate weighty concerns regarding the separation of powers." *Id.* at 2034-35.

To begin, the Court had "never addressed a congressional subpoena for the President's information." *Id.* at 2026. "Indeed, from President Washington until now," it had "never considered a dispute over a congressional subpoena for the President's records." *Id.* at 2031. "This dispute therefore represents a significant departure from historical practice." *Id.* "Such longstanding practice 'is a consideration of great weight' in cases concerning 'the allocation of power between [the] two elected branches of Government.'" *Id.* (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 524-26 (2014)). At base, "congressional subpoenas directed at the President differ markedly from congressional subpoenas" the Court had "previously reviewed." *Id.* at 2034.

The approach taken by the lower courts thus did not "take adequate account of the significant separation of powers issues raised by congressional subpoenas for the President's information." *Id.* at 2033. "Far from accounting for separation of powers concerns," moreover, "the House's approach aggravates them by leaving essentially no limits on the congressional power to subpoena the President's personal records." *Id.* at 2034. "Without limits on its subpoena powers, Congress could 'exert an imperious controul' over the Executive Branch and aggrandize itself at the President's expense, just as the Framers feared." *Id.* (quoting The Federalist No. 71, at 484 (A. Hamilton)). "And a limitless subpoena power would transform the 'established practice' of the

political branches. Instead of negotiating over information requests, Congress could simply walk away from the bargaining table and compel compliance in court." *Id.* (cleaned up).

Given these "special considerations," the Court devised a "balanced approach" for "assessing whether a subpoena directed at the President's personal information is 'related to, and in furtherance of, a legitimate task of the Congress.'" *Id.* at 2035 (quoting *Watkins*, 354 U.S. at 187). "First, courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers." *Id.* "Second, to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective." *Id.* at 2036. "Third, courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose." *Id.* "Fourth, courts should be careful to assess the burdens imposed on the President by a subpoena." *Id.* "Other considerations may be pertinent as well; one case every two centuries does not afford enough experience for an exhaustive list." *Id.*

After the Supreme Court issued its opinion on July 9, 2020, the Committee asked the Court to expedite its judgment. *See* App. for Immediate Issuance of the Judgments, *Trump v. Mazars USA, LLP*, No. 20A15 (U.S. July 13, 2020). Repeating the same argument it (unsuccessfully) made when resisting a stay, the Committee entreated the Court to "accelerate the proceedings in the lower courts" because "[t]he House's

current term expires on January 3, 2021." *Id.* at 3-4. The Supreme Court refused. *Comms. of U.S. House of Rep.*, 2020 WL 4044718. The judgment issued on a normal schedule.

ARGUMENT

This Court asked the parties to address the Supreme Court's decision in *Mazars* "vacating this court's judgment," including "whether this case should be remanded to the district court." CADC Doc. #1855776. In Plaintiffs' view, this Court should follow its usual practice of remanding to the district court to apply the Supreme Court's new standard in the first instance—a practice it must follow if the Committee wants to bolster the subpoena with new evidence. If the Court departs from its usual practice and refuses to consider any new evidence, the subpoena plainly fails the Supreme Court's standard.

I. The Court should remand this case to the district court.

Cases remanded from the Supreme Court are usually returned to the district court for further proceedings. *E.g.*, *United States ex rel. Shea v. Cellco P'ship*, 863 F.3d 923 (D.C. Cir. 2017); *APCC Servs. v. Sprint Commc'ns Co.*, 489 F.3d 1249 (D.C. Cir. 2007). This practice makes sense. The "federal courts of appeals generally are courts of review, not first view." *Rodriguez v. Penrod*, 857 F.3d 902, 906 (D.C. Cir. 2017) (citing *Texas v. United States*, 798 F.3d 1108, 1115 (D.C. Cir. 2015)); *see Am. Soc'y for Testing and Materials, et al. v. Public.Resource.Org, Inc.*, 896 F.3d 437, 453-54 (D.C. Cir. 2018).

Even when a case presents questions of constitutional law subject to de novo review, the "better approach" is to allow "the district court [to], in the first instance,

apply" the new "standard announced in [the intervening Supreme Court decision]." *In re Exxon Valdez*, 270 F.3d 1215, 1241 (9th Cir. 2001); *accord Millipore Corp. v. Travelers Indem. Co.*, 115 F.3d 21, 34 (1st Cir. 1997) (collecting cases). It simply cannot "be incorrect, once the Supreme Court has vacated a circuit court decision and remanded for further assessment in light of one of its decisions, for the court of appeals simply to vacate the district court's decision and to remand for further proceedings in the light of the pertinent Supreme Court decision." *Betz v. Trainer Wortham & Co.*, 610 F.3d 1169, 1171 (9th Cir. 2010).

To be sure, the practice of remanding to the district court is not an ironclad rule. This Court will sometimes retain jurisdiction and answer a question remanded from the Supreme Court in the first instance. For several reasons, however, remand to the district court is the appropriate course here.

First, the Committee will likely seek to supplement the record, given the impossibility of upholding its subpoena on the existing record. Plaintiffs believe the Committee cannot do so under the law governing congressional subpoenas. *See infra* II.A. But if the Court disagrees (or wants to reserve judgment in case the issue ends up being immaterial), remand is needed. The Committee certainly cannot expand the record on appeal. Any new materials would not be part of the appellate record, which includes only those "original papers and exhibits filed *in the district court*." Fed. R. App. P. 10(a) (emphasis added); *accord* D.C. Rule 10(a) (same). Allowing parties to "rely on appeal ... on materials [not] furnished to the district judge" would "deprive the opposing

party of an opportunity to comment on them and the district judge of an opportunity to evaluate their significance." *Henn v. Nat'l Geographic Soc.*, 819 F.2d 824, 831 (7th Cir. 1987). None of the limited exceptions to this rule apply. *See Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003). "The only proper function of a court of appeals is to review the decision below on the basis of the record that was before the district court." *Fassett v. Delta Kappa Epsilon (N.Y.)*, 807 F.2d 1150, 1165 (3d Cir. 1986).

Allowing the Committee to massively expand the record, including by introducing evidence that postdates the subpoena, would essentially allow it to litigate a different case for the first time on appeal—while denying Plaintiffs corresponding rights and procedures. Plaintiffs, too, might introduce new evidence in the district court, depending on what the Committee introduces and whether post-subpoena evidence is deemed relevant. *See, e.g.*, *Pelosi Predicts Democrats Will Get Trump Tax Returns if Biden Wins*, The Hill (Aug. 27, 2020), bit.ly/3hKR9Pf (Speaker of the House explaining that the goal of the House's requests for the President's financial documents is so "the world will see what the president has been hiding all of this time"). And now that the Supreme Court has held that this subpoena *is* a subpoena of the President, *see Mazars*, 140 S. Ct. at 2035, Plaintiffs might amend their complaint to assert a First Amendment informational-privacy claim. That claim requires courts to take on the "arduous and delicate task" of balancing "the congressional need for particular information with the individual and personal interest in privacy." *Watkins*, 354 U.S. at 198. All of this requires a remand.

Second, the Committee might try to salvage aspects of the subpoena by having it narrowed, given that the subpoena is fatally overbroad under the Supreme Court's new standard. That kind of narrowing, too, is impermissible under the law governing congressional subpoena. *See infra* II.C. But if the Court does not want to foreclose that possibility, remand would be needed for this reason too. Much like management of discovery, narrowing a subpoena is a task that a trial judge—not an appellate panel—is best equipped to perform. *Cf. Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1283 (9th Cir. 2003) (district court best positioned to narrow statute); *Am. Family Mut. Ins. Co. v. Roth*, 485 F.3d 930, 934 (7th Cir. 2007) (district court best positioned to narrow injunction). This case is no exception. *See Trump v. Deutsche Bank AG*, 943 F.3d 627, 680-81, 699-700 (2d Cir. 2019) (Livingston, J., concurring in part and dissenting in part).

Last, the potential expiration of the subpoena is not a justification for charting a different course. The Supreme Court rejected this argument in denying the Committee's request to expedite issuance of the judgment. *See Comms. of U.S. House*, 2020 WL 4044628. If the Committee's argument isn't a basis for accelerating that purely ministerial step, then it surely isn't a basis for rushing to judgment on the critical separation-of-powers questions the Supreme Court has remanded for consideration. In short, such "serious constitutional questions ... presented by this litigation ... require more time" for careful resolution—not less. *U.S. Servicemen's Fund v. Eastland*, 488 F.2d 1252, 1256 (D.C. Cir. 1973).

But the argument would also fail on its own terms. In *Committee on Judiciary of U.S. House of Representatives v. Miers,* for example, this Court stayed a congressional subpoena notwithstanding that "this controversy will not be fully and finally resolved by the Judicial Branch … before the 110th Congress ends." 542 F.3d 909, 911 (D.C. Cir. 2008). Since resolution of the interbranch dispute would have "potentially great significance for the balance of power between the Legislative and Executive Branches," the Court saw an "additional benefit of permitting … the new House an opportunity to express their views on the merits of the lawsuit." *Id.* The separation-of-powers at issue here are no less significant. *See Mazars*, 140 S. Ct. at 2033-36.

After the Supreme Court confirmed that this case does in fact raise "significant separation of powers issues," *id.* at 2033, the Committee cannot fall back on cases like *Eastland* that involve congressional subpoenas to purely private parties. *Cf. Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 511 n.17 (1975) (stressing the need for "the most expeditious treatment"). Instead, this Court's instruction in *AT&T*—a case involving a congressional subpoena for *executive* records that was *twice* remanded to the district court—controls: Though "any alternative to outright enforcement of the subpoena entails delay," delay "is an inherent corollary of the existence of coordinate branches. The Separation of Powers often impairs efficiency," but "the long-term staying power of government … is enhanced by the mutual accommodation required by the Separation of Powers." *United States v. AT&T Co.*, 567 F.2d 121, 133 (D.C. Cir. 1977) (*AT&T II*).

Indeed, as the Supreme Court recognized, Congress and the President have "maintained [a] tradition of negotiation and compromise—without the involvement of this Court—until the present dispute." *Mazars*, 140 S. Ct. at 2031; *see also United States v. AT&T Co.*, 551 F.2d 384, 394 (D.C. Cir. 1976) (*AT&T I*). After all, "efforts at negotiation in this context *are* to be encouraged, since they may narrow the scope of these subpoenas, and thus avoid judicial pronouncement on the 'broad confrontation now tendered.'" *Deutsche Bank*, 943 F.3d at 680 (Livingston, J., concurring in part and dissenting in part). That accommodation process was short-circuited here by the Committee's decision to "sidestep" the President and demand his personal records from a custodian. *Mazars*, 140 S. Ct. at 2035; *see id.* at 2048 (Alito, J., dissenting) ("If Congress attempts to obtain such documents by subpoenaing a President directly, those two heavyweight institutions can use their considerable weapons to settle the matter."); *Mazars*, 940 F.3d at 753 (Rao, J., dissenting) (similar). Whether or not a compromise is ultimately reached, remand to the district court would facilitate negotiations and encourage settlement.

II. The Mazars subpoena is invalid under the Supreme Court's test.

Evaluated under the existing record (as it must be), the Mazars subpoena flunks every aspect of the multi-factor test articulated by the Supreme Court. The Committee did not explain (in detail and with evidence) its precise legislative aims. Any legitimate aims it might have do not warrant the significant step of coercing disclosure of the President's papers. Its sweeping request is not reasonably necessary to any valid

legislative goal and, if affirmed, would set a precedent that upsets the balance of power between Congress and the President. Finally, in light of the Supreme Court's decision, this Court's prior holdings on whether the subpoena has an improper purpose, pursues invalid legislation, or is clearly authorized by the House Rules cannot stand.

A. The Committee's explanation for why the subpoena is in aid of valid legislation is woefully insufficient.

The Court need only review the lack of "evidence offered by Congress," *Mazars*, 140 S. Ct. at 2036, to invalidate this subpoena. As the Supreme Court explained, "it is 'impossible' to conclude that a subpoena is designed to advance a valid legislative purpose unless Congress adequately identifies its aims and explains why the President's information will advance its consideration of the possible legislation." *Id.* "The more detailed and substantial the evidence of Congress's legislative purpose," therefore, "the better." *Id.* The Committee's explanation for why it subpoenaed the President's personal records is not only lacking detail—it is essentially no explanation at all.

The Cummings memo, the key "starting point" for the inquiry, *Mazars*, 940 F.3d at 726, flatly says that "the Committee's interest in these matters informs the Committee's review of multiple laws and legislative proposals under its jurisdiction." *Id.* (cleaned up). This Court also pointed to a letter the Chairman had previously sent to the White House Counsel. *See id.* at 726-27. That letter asserts that the President's records "will help the Committee determine ... whether reforms are necessary to address deficiencies with current laws, rules, and regulations" and "whether changes to the laws

are necessary." *Id.* at 727. In other words, neither the memo nor the letter provides *any* substantive explanation for why these records will advance possible legislation—let alone a detailed explanation supported by evidence.

That should be the end of the matter. It is *impossible* to uphold the subpoena on this meager showing, and the Committee is legally foreclosed from relying on rationales that postdate the subpoena. A legislative subpoena cannot be justified by "retroactive rationalization[s]"—*i.e.*, "[l]ooking backward" to identify "any legislative purpose which might have been furthered by the [subpoena]" instead of evaluating the reasons "the House of Representatives itself" gave. *Watkins*, 354 U.S. at 204, 206; *accord United States v. Rumely*, 345 U.S. 41, 44 (1953). Plaintiffs "had a right … to have the [Committee] responsibly consider whether or not [they] should be subpoenaed before the subpoena issued." *Shelton v. United States*, 327 F.2d 601, 607 (D.C. Cir. 1963). The Committee cannot cure its failure to do so with post-hoc arguments and explanations.

But there's no post-hoc evidence that could save the subpoena anyway. In this Court's prior view, "that the House has pending several pieces of legislation related to the Committee's inquiry offers highly probative evidence of the Committee's legislative purpose." *Mazars*, 940 F.3d at 727. But the existence of potentially relevant proposed legislation does not suffice. Even assuming that the existence of these bills offers some insight into the subpoena's purpose, the Committee has never explained "why the President's information will advance its consideration of the possible legislation."

Mazars, 140 S. Ct. 2036. The Committee's "'vague' and 'loosely worded'" explanation falls short. *Id.*

In all, this Court previously rejected the argument "that Congress must identify its legislative purpose with sufficient particularity in order to justify an investigative subpoena." *Mazars*, 940 F.3d at 730. But the Supreme Court disagreed and adopted Plaintiffs' reading of the governing law (including *Watkins*). *Compare Mazars*, 140 S. Ct. at 2036, *with Mazars*, 940 F.3d at 730-32. The absence of "the specific articulation" of legislative purpose that is now constitutionally required is decisive. *Mazars*, 940 F.3d at 731. The subpoena is invalid for this reason alone.

B. No legitimate legislative purpose justifies issuing a sweeping subpoena for the President's personal records.

Even if the Committee had sufficiently articulated its legislative aims and explained why it needed the President's records, the Committee could not possibly justify "the significant step of involving the President and his papers." *Mazars*, 140 S. Ct. at 2035. The Committee's legislative possibilities here are, at best, exceedingly narrow. Because Congress cannot subpoena the President's records for "general legislation," *id.* at 2036, the Committee cannot justify the Mazars subpoena by citing generic laws concerning executive agencies, campaign-finance reform, and the like. The only relevant laws here are "laws that apply to Presidents"—specifically, "*presidential* finances." *Mazars*, 940 F.3d at 733. Further, Congress cannot subpoena anyone's records to help it consider unconstitutional legislation. *Id.* at 732; *Mazars*, 140 S. Ct. at 2031. Laws that

impose financial "'conflict-of-interest restrictions on the President'" not only "raise difficult constitutional questions," *Mazars*, 940 F.3d at 733, but they are unconstitutional, *see* Appellants' Br. (CADC Doc. #1791954) 37-40. Thus, the "litmus test" for the Mazars subpoena must be laws that require the President to "do nothing more than *disclose* financial information." *Mazars*, 940 F.3d at 733.

Nothing about presidential disclosure legislation "warrants the significant step" of subpoenaing the President's papers. *Mazars*, 140 S. Ct. at 2035. Courts must "carefully assess" the need to involve the President and can uphold subpoenas for his records only as a last resort, "'avoid[ing]'" that result "'whenever possible.'" *Id.* (quoting *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 389-90 (2004) (in turn quoting *United States v. Nixon*, 418 U.S. 683, 692 (1974))). The Committee does not come close to meeting that standard. As this Court noted before, Congress has enacted several laws requiring presidential disclosures—the Foreign Gifts and Decorations Act, the STOCK Act, the Presidential Records Act, the Ethics in Government Act. *Mazars*, 940 F.3d at 734-35. Yet Congress passed *all* of those laws without subpoenas for the President's records.

That's not surprising. Disclosure laws rest on "Congress' *general* belief that public disclosure … is desirable." *Id.* at 730 (emphasis added; quoting *Wash. Post Co. v. U.S. Dep't of Health & Human Servs.*, 690 F.2d 252, 265 (D.C. Cir. 1982)). Passing these laws requires "predictive policy judgments" about whether certain types of information should be disclosed. *Mazars*, 140 S. Ct. at 2036 (citing *Senate Select Comm. on Presidential*

Campaign Activities v. Nixon, 498 F.2d 725, 732 (D.C. Cir. 1974)). These laws mandate disclosures of all information (good or bad) for all individuals who hold a particular office; their wisdom does not require Congress to sleuth "'all the facts'" surrounding a particular disclosure or officeholder or to create a "precise reconstruction of past events." *Id.*; *Senate Select*, 498 F.2d at 732.

Relatedly, the Committee's "interests in obtaining information … are not sufficiently powerful to justify access to the President's personal papers" because "other sources could provide Congress the information it needs" to legislate. *Mazars*, 140 S. Ct. at 2036. Most obviously, the Committee can rely on information already in the public record to decide whether it wants to enact additional disclosure laws. Indeed, the House has already reviewed that record, drawn firm conclusions from it, and used it to pass and propose various disclosure laws. *See Mazars*, 940 F.3d at 727 (discussing H.R. 1 and other bills). Under the Supreme Court's standard, the Committee cannot subpoena the President's papers in order to persuade "the Senate," a "subsequent conference committee," or "the House itself … post-conference" to join the conclusion that the Committee has already reached. *Id.* at 731-32. The Senate can request documents itself, and no conference is anywhere remotely on the horizon; these rationales do not heed the Supreme Court's instruction that "the significant step" of subpoenaing the President's papers should be "'avoided whenever possible'" and done only when "reasonably necessary." *Mazars*, 140 S. Ct. at 2035-36.

Additionally, if the Committee needed Plaintiffs' financial information for some reason, it could have asked Plaintiffs themselves—instead of "sidestep[ping]" them by subpoenaing a neutral third-party custodian. *Id.* at 2035. The Supreme Court repeatedly stressed the importance of the traditional accommodation process that occurs when Congress requests executive records from the executive itself. *See id.* at 2029-31, 2034, 2035. While then-Chairman Cummings did request documents from the White House, *see Mazars*, 940 F.3d at 715-16, that request sought different documents from the Mazars subpoena. *See* JA35-36; *Ltr. from Cummings, Chairman, House Comm. on Oversight and Reform, to Cipollone, Counsel to the President, The White House* 1-2 (Jan. 8, 2019). And instead of engaging in the "'hurly-burly'" of "negotiation and compromise," the Committee quickly "walk[ed] away from the bargaining table" and "'evad[ed]'" the accommodation process by subpoenaing a third-party custodian. *Mazars*, 140 S. Ct. at 2034-35.

The Committee cannot argue that the Mazars subpoena is warranted until it first makes a good-faith effort to seek the information from Plaintiffs themselves—a tried-and-true process that has "managed for over two centuries to resolve such disputes" without judicial interference. *Id.* at 2031. This Court can and should direct the parties to engage in the constitutional accommodation process before enforcing the subpoena. *See, e.g.*, *AT&T I*, 551 F.2d at 394-95; *AT&T II*, 567 F.2d at 131-32. While accommodation might require the Committee to compromise, "a compromise worked out between the branches is most likely to meet their essential needs and the country's constitutional balance." *AT&T I*, 551 F.2d at 394.

C. The subpoena is broader than reasonably necessary to consider and pass legislation.

The subpoena's overbreadth also requires its invalidation. "The specificity of the subpoena's request 'serves as an important safeguard against unnecessary intrusion into the operation of the Office of the President.'" *Mazars*, 140 S. Ct. at 2036 (quoting *Cheney*, 542 U.S. at 387). But there is *nothing* specific about this subpoena. It seeks "'all memoranda, notes, and communications'" and "all underlying, supporting, or source documents and records" relating to multiple categories of financial statements going back to 2011, as well as "all engagement agreements or contracts" "without regard to time." In addition, the subpoena specifically demands "all communications" between President Trump and his accountants and "all communications related to" any "potential concerns" that President Trump's records "were incomplete, inaccurate, or otherwise unsatisfactory." *Mazars*, 940 F.3d at 769-70.

While this Court previously held that all of these documents were "reasonably relevant" to the Committee's legitimate legislative purpose, *id.* at 742, reasonable relevance is no longer the standard. This Court now must "insist on a subpoena no broader than reasonably necessary." *Mazars*, 140 S. Ct. at 2036. It is not enough that the President's papers "'relate to'" potential topics for legislation. *Id.* at 2034.

The Mazars subpoena cannot possibly satisfy this standard. Even if the subpoena satisfied "the test for relevancy," *Mazars*, 940 F.3d at 741, the Committee certainly does not *need* to conduct a full-blown audit of a particular President's finances over the last

eight years to determine whether Presidents generally should disclose more information. *See Mazars*, 140 S. Ct. at 2037 (stressing that legislative judgments do not require "every scrap of potentially relevant evidence"). Nor does the Committee need records that predate the President's public life to make the general policy judgment that disclosure laws should "go back" further. *Mazars*, 940 F.3d at 741. And the Committee does not need the President's agreements or sensitive communications with his accountants—requests that this Court acknowledged present overbreadth concerns. *See id.* at 742. At the very least, the Committee should have to make "specific[]," narrower requests first before it seeks "everything under the sky." *Mazars*, 140 S. Ct. at 2036 (citing *Cheney*, 542 U.S. at 387); *Cheney*, 542 U.S. at 387. Its failure to even try means the Mazars subpoena's staggering breadth cannot possibly be "reasonably necessary" to the Committee's supposed aims. *Mazars*, 140 S. Ct. at 2036.

D. This kind of subpoena significantly burdens the President.

The "burdens imposed on the President" also weigh against upholding this subpoena. *Id.* For congressional subpoenas, the relevant burdens are not limited to a particular subpoena's "burdens on the President's time and attention." *Id.* This Court must "carefully scrutinize[]" congressional subpoenas in the broader context of Congress's "ongoing relationship with the President" and its inherent "'pressure'" to expand its relative authority. *Id.* at 2035-36, 2033-34.

The "'allocation of power between the two elected branches'" "would be transformed by judicial enforcement" of this subpoena. *Id.* at 2032, 2035 (cleaned up).

Automatically, every President would be subject to a thorough and public audit of his finances by whichever House of Congress is run by his political rivals. Indeed, the Committee's "disclosure" rationale is a foolproof way to obtain *any* presidential papers, not just the myriad financial documents requested here. Congress could obtain any presidential records by asserting that it's considering legislation to require Presidents to disclose those types of records.

Affirming the Committee's boundless rationale would give Congress a new "institutional advantage" over the Presidency. *Id.* at 2036. It "could declare open season on the President's information held by schools, archives, internet service providers, e-mail clients, and financial institutions" simply by invoking the possibility of new disclosure legislation. *Id.* at 2035. "The Constitution does not tolerate such ready evasion." *Id.* And the Framers did not sneak that substantial disruption to the separation of powers into a congressional subpoena power that is not even "enumerated" in the Constitution. *Id.* at 2031; *see Anderson v. Dunn*, 19 U.S. 204, 225-26 (1821).

E. Additional considerations support invalidating the subpoena.

The Supreme Court's list of factors for reviewing congressional subpoenas to the President is deliberately nonexhaustive. *See Mazars*, 140 S. Ct. at 2036. In its opinion, the Supreme Court reaffirmed several longstanding limits on congressional subpoenas. *See id.* at 2031-32. Plaintiffs' reassert and reincorporate their prior arguments on these points. While this Court previously rejected Plaintiffs' arguments, its opinion was vacated and this Court should assess those arguments anew, "tak[ing] adequate account

of" the "special concerns" that arise with "[c]ongressional subpoenas for information from the President." *Id.* at 2036. Reasoning from "precedents that do not involve the President's papers" cannot suffice. *Id.* at 2033.

Law Enforcement/Exposure: Congressional subpoenas cannot have "the purpose of 'law enforcement'" or "'expos[ur]e for the sake of exposure.'" *Id.* at 2031-32. As Plaintiffs argued and Judge Rao found, "the 'gravamen' of the subpoena" is pursuing these illegal aims, not legislating. *Id.* at 2028 (quoting *Mazars*, 940 F.3d at 773-74 (Rao, J., dissenting)); *see* Appellants' Br. 33-37; Reply Br. (CADC Doc. #1796503) 9-17. This Court disagreed, relying on precedents that did not involve subpoenas to the President and faulting the dissent for "propos[ing] a brand-new test for the President" that would make "Congress's power to investigate … the President … no longer … 'co-extensive with [its] power to legislate.'" *Mazars*, 940 F.3d at 727-30, 737-39.

This Court's analysis did not survive the Supreme Court's decision. The Supreme Court held that courts cannot treat this case "like any other, applying precedents that do not involve the President's papers." *Mazars*, 140 S. Ct. at 2033. So while it might be safe to assume that investigations into "past illegality" by private citizens "can be wholly consistent with an intent to enact remedial legislation," *Mazars*, 940 F.3d at 728 (citing *Hutcheson v. United States*, 369 U.S. 599 (1962), and *Sinclair v. United States*, 279 U.S. 263 (1929)), that assumption is not safe when the investigative target is *the President*—Congress's "'opposite and rival.'" *Mazars*, 140 S. Ct. at 2033. This Court "would have to be 'blind' not to see" that the Mazars subpoena requests "records of intense political

interest" to the President's political rivals in the House. *Id.* at 2034. It is precisely because of their "personal nature" that the Committee wants them so badly, and why they have a "less evident connection to a legislative task." *Id.* at 2035. Legislation is simply not the primary purpose or gravamen of this subpoena.

Valid Legislation: Legislative subpoenas "must concern a subject on which legislation could be had"—i.e., legislation that would be *constitutional*. *Mazars*, 140 S. Ct. at 2036 (cleaned up). As Plaintiffs previously explained, legislation that imposes conflict-of-interest restrictions or disclosure requirements directly on the President are unconstitutional. *See* Appellants' Br. 37-40; Reply Br. 17-20. While this Court disagreed about disclosure requirements, it should reconsider in light of the Supreme Court's intervening holdings.

Echoing Plaintiffs' arguments, the Supreme Court emphasized that "legislation concerning the Presidency" "raises sensitive constitutional issues." *Mazars*, 140 S. Ct. at 2036. That's because "[t]he President is the only person who alone composes a branch of government." *Id.* at 2034. Congress can no more impose external disclosure requirements on him or his office than it can the Supreme Court Justices. This is not an "'archaic'" view of the separation of powers that has been abandoned in favor of a "'pragmatic, flexible approach.'" *Mazars*, 940 F.3d at 746, 733-34. The Supreme Court rejected calls for a "pragmatic, flexible approach" to the separation of powers mere months ago, instead enforcing "constitutional restraints that are not known—and were

not chosen—for their efficiency or flexibility." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2207 (2020).

House Rules: The Supreme Court did not disturb the longstanding rule that the subpoena must be authorized by the House Rules. *See Mazars*, 940 F.3d at 742 (citing *Rumely*, 345 U.S. at 42-43, and *Exxon Corp. v. FTC*, 589 F.2d 582, 592 (D.C. Cir. 1978)). The House Rules do not clearly authorize subpoenas for the President's papers. *See* Appellants' Br. 15-16; Reply Br. 1-9; Appellants' Response to 28(j) Ltr. (CADC Doc. #1799866); Appellants' Response to Amicus Br. (CADC Doc. #1802960) 5-7. And the later passed "Resolution 507 … 'enlarges' nothing"; it "purports neither to enlarge the Committee's jurisdiction nor to amend the House Rules." *Mazars*, 940 F.3d at 746-47.

This Court, in its prior opinion, did not disagree. Rather than hold that the House Rules *do* clearly authorize subpoenas for the President's records, this Court held that no such clarity is required. The presidential clear-statement rule did not apply, according to this Court, "[b]ecause Congress already possesses—in fact, has previously exercised—the authority to subpoena Presidents and their information" and so a House Rule authorizing such subpoenas could not "in any way alter the balance between the two political branches of government." *Id.* at 744 (cleaned up). Nor did the constitutional-avoidance canon apply, according to this Court, because "the constitutional questions raised here are neither grave nor serious and difficult." *Id.* at 745 (cleaned up).

The Supreme Court unanimously rejected this reasoning. On the clear-statement rule, the Court viewed the history of congressional subpoenas quite differently, stressing that it had "never addressed a congressional subpoena for the President's information," that "[t]his dispute … represents a significant departure from historical practice," and that "congressional subpoenas directed at the President differ markedly from congressional subpoenas we have previously reviewed." *Mazars*, 140 S. Ct. at 2026, 2031, 2034. Congressional subpoenas directed at the President do "'alter the balance between' the two political branches," *Mazars*, 940 F.3d at 744, because these branches have "an ongoing institutional relationship as … 'opposite and rival' political branches" that requires "limits on [Congress's] subpoena powers," lest Congress "aggrandize itself at the President's expense," *Mazars*, 140 S. Ct. at 2033-34. The Mazars subpoena thus "implicate[s] weighty concerns regarding the separation of powers." *Id.* at 2035. The Supreme Court made this point over and over. *E.g.*, *id.* at 2033 (noting the "significant separation of powers issues"); *id.* at 2036 (similar); *id.* at 2034 (rejecting that "separation of powers concerns are not fully implicated by the particular subpoenas here"); *id.* at 2035 (similar).

As for constitutional avoidance, the Supreme Court likewise disagreed, unanimously, that the Mazars subpoena does not present substantial constitutional questions. Most obviously, the Court stayed this Court's judgment, granted certiorari, voted 9-0 to at least vacate this Court's judgment (with two Justices voting to reverse), and remanded for further consideration of Plaintiffs' challenges. It also stressed the

"sensitive constitutional issues" raised by "legislation concerning the Presidency," *id.* at 2036—the only kind of legislation that the Mazars subpoena possibly furthers, *see Mazars*, 940 F.3d at 733. Given these "unavoidably" weighty concerns and difficult constitutional questions, *Mazars,* 140 S. Ct. at 2034, this Court should refuse to uphold the subpoena until the full House amends the Rules to "inescapably" present them for decision, *Rumely*, 345 U.S. at 48.

CONCLUSION

This Court should remand the case to the district court for further proceedings consistent with the Supreme Court's opinion or, alternatively, reverse the district court's judgment with instructions to enter judgment for Plaintiffs.

Dated: August 31, 2020

Respectfully submitted,

s/ William S. Consovoy

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CERTIFICATE OF COMPLIANCE

This brief complies with this Court's order from August 10, 2020 because it contains 6,789 words, excluding the parts exempted by Rule 32(f) and Circuit Rule 32(e)(1). This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: August 31, 2020 *s/ William S. Consovoy*

CERTIFICATE OF SERVICE

I filed a true and correct copy of this brief with the Court via CM/ECF, which will electronically notify all counsel requiring notice.

Dated: August 31, 2020 *s/ William S. Consovoy*