EN BANC ORAL ARGUMENT SCHEDULED FOR FEB. 23, 2021

No. 19-5331

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

Plaintiff-Appellee,

v.

DONALD F. MCGAHN, II,

Defendant-Appellant.

On Appeal from the U.S. District Court for the District of Columbia (No. 19-cv-2379) (Hon. Ketanji Brown Jackson, District Judge)

BRIEF OF FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

A. Parties and Amici. All parties, intervenors, and *amici* appearing before this court are listed in the En Banc Briefs for Appellant and Appellee. A full list of the *amici* Former Members of Congress is also included as an appendix to this brief. *Amici curiae* are not corporate entities for which a corporate disclosure statement is required pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rules 27(a)(4) and 28(a)(1)(A).

B. Rulings Under Review. References to the rulings at issue appear in the En Banc Brief for Appellant.

C. Related Cases. This case is a continuation of the same case that this Court previously decided en banc on August 7, 2020. Some of the same or similar legal issues are also presented in *U.S. House of Representatives v. Mnuchin*, 976 F.3d 1 (D.C. Cir. 2020), *Committee on Ways and Means, U.S. House of Representatives v. Department of Treasury*, No. 1:19-cv-01974-TNM (D.D.C.), and *Committee on Oversight and Reform, U.S. House of Representatives v. Barr*, No. 1:19-cv-03557-RDM (D.D.C.).

/s/ Samuel F. Callahan
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STATEMENT OF AUTHORITY TO FILE

Both Appellant and Appellee have consented to the filing of this brief.

Pursuant to Circuit Rule 29(d), *amici* certify that a separate brief is necessary to provide the unique perspective of a large, bipartisan group of former Members of Congress having vast collective experience with the congressional subpoena process.

/s/ Samuel F. Callahan
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STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No party's counsel authored this brief in whole or in part. Nor did any party or party's counsel, or any other person other than *amici curiae*, contribute money that was intended to fund preparing or submitting this brief.

/s/ Samuel F. Callahan
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION AND INTEREST OF AMICI CURIAE

Amici curiae are a large bipartisan group of former Senators and Representatives who have served an aggregate of nearly 1,000 years in Congress. *Amici* disagree on many issues of policy and politics. But all are deeply concerned that the panel's decision will severely hinder Congress's ability to oversee the Executive Branch. At the eleventh hour, the panel purported to discover that for the House's 230-year history, it has never had the power to sue to enforce its subpoenas. Apparently the Executive Branch and Congress have been wrong all along to assume such a cause of action exists. So has the Supreme Court, which just last term resolved an Executive Branch challenge to a House subpoena without even momentarily doubting the existence of an implied right of action.

Like the panel's decision denying the House standing to enforce its subpoenas, which the full Court found necessary to rehear and reverse, the panel's decision here invites a seismic shift in the relationship between the Legislative and Executive Branches. *Amici* fear that erecting unprecedented barriers to the enforcement of subpoenas—barriers that apply *only* to Congress, and not to Executive actors seeking to evade

compliance—will give the Executive *carte blanche* to ignore legitimate demands for information.

In *amici*'s experience, our checks and balances serve as a model for democracies (and aspiring democracies) worldwide. Global leaders routinely ask how Members of Congress can meaningfully conduct oversight if executive officials can refuse to produce information or to answer questions. The answer, at least until this administration's campaign of obstinance, has been that the legislature can compel the production of information when such compulsion becomes necessary. The parliamentarians to whom we have extolled the virtues of our system continue to watch this case to see whether the system's checks and balances will be hollowed out into unenforceable aspirations.

The full Court has intervened once to prevent that hollowing. It must do so again. The split panel decision presents the same existential threat to democratic governance as its decision denying standing. Indeed, its reasons for taking judicial review off the table fly in the face of the full Court's previous decision, which was founded on the necessity of judicial enforcement in cases of noncompliance.

This Court should affirm the district court's judgment in full. There is no reason to suffer continued piecemeal resolution of this case, which involves a subpoena issued eighteen months ago, has been on appeal for almost a year, and will not become moot given the Committee Chairman's stated commitment to promptly reissuing the subpoena to Mr. McGahn when the new Congress convenes. *See* Appellee's En Banc Br. 13-14. Prolonged delay in enforcing a congressional subpoena is tantamount to erasure. It fundamentally frustrates the ability of Congress—and particularly the short-lived House—to execute its legislative functions. Any further delay signals to future parties that if they assert a wide enough array of defenses to enforceability—no matter the merit of those defenses—they can wait out the House's need for the information, or even the two-year term of the House itself. *Amici* urge this Court to expeditiously affirm the district court's judgment in order to preserve Congress's constitutional prerogative to effectively check executive overreach and lawbreaking.

ARGUMENT

I. A Cause of Action To Enforce Subpoenas Is Necessary To Congress's Ability To Check the Executive Branch

A. Congress's investigative and oversight powers are integral to its constitutional role.

Essential to Congress's legislative and impeachment powers is its authority to sit as "Grand Inquest of the Nation." Raoul Berger, *Congressional Subpoenas to Executive Officials*, 75 Colum. L. Rev. 865, 872 (1975). "Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served." *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (quotation marks omitted). Reflecting Congress's long-recognized need for information, the "[i]ssuance of subponeas … has long been held to be a legitimate use by Congress of its power to investigate." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975); *see Comm. on Judiciary of U.S. House of Representatives v. McGahn* (*McGahn II*), 968 F.3d 755, 764-66 (D.C. Cir. 2020) (en banc).

Amici know firsthand that both Congress and the Executive have long understood that the courts will provide a backstop if the Executive unreasonably fails to comply with legitimate demands for information.

As the full Court has recognized, this assumption has been confirmed by Congress's unyielding practice of going to court to enforce its subpoenas when judicial process is necessary. *See McGahn II*, 968 F.3d at 771. In July the Supreme Court confirmed that it shared the same assumption: it addressed the validity of a congressional subpoena without acknowledging that the executive official might have lacked an equitable cause of action to challenge that subpoena. *Mazars*, 140 S. Ct. 2019. It cannot be that executive officials can challenge House subpoenas to third parties, *see id.*, while the House cannot enforce its own subpoenas.

That all have shared this assumption is no surprise. A cornerstone of our constitutional system is the principle that with every constitutional right there must be some remedy to enforce it. And as the panel dissent powerfully explained, subpoena-enforcement actions naturally give rise not only to an implied right of action under the Constitution, but also to such a right under the Declaratory Judgment Act. *Comm. on Judiciary of U.S. House of Representatives v. McGahn* (*McGahn III*), 973 F.3d 121, 127-29 (D.C. Cir. 2020) (Rogers, J., dissenting).

The panel's purported discovery that this assumption was wrong all along nullifies an essential, inherent legislative power by holding

that there can be no enforcement unless both chambers of Congress, over the President's veto, manage to force open the courthouse doors. Without the availability of judicial enforcement, subpoenas become "mere requests." *Eastland,* 421 U.S. at 505. Executive officials will treat the panel's decision as an invitation to refuse to share information with Congress, even in response to compulsory process. While future administrations may recognize the harm to our system caused by an utter failure to compromise, *amici* fear that the panel decision opened a Pandora's box not so easily closed.

Outside judicial enforcement, the House has no viable method to ensure compliance with its subpoenas. True, the Supreme Court has long recognized that Congress has inherent power to handle persons in contempt. *See Anderson v. Dunn*, 19 U.S. 204 (1821). This inherent remedy remains available. But it is not reasonable to insist that the House pit the Sergeant at Arms against federal executive officials to effect an arrest, risking violence, and *then* litigate the issue in the context of a habeas action. There is no need to provoke such a dramatic constitutional confrontation when the courts are fully competent to address

the issue through the civil process of declaratory and injunctive relief—as they have for decades.

As for Congress's power of the purse, *amici*'s service convinces them that the threat of withholding funds—which the panel previously suggested as preferable to judicial enforcement—will be far too blunt, and too potentially detrimental to our nation, to justify wielding in service of an oversight dispute. Congress should not need to endanger the United States' credit rating, retirees' social-security checks, and food-stamp recipients' dinners to obtain information that since the founding of the country has been recognized as essential to "effective and honest" government. *Watkins v. United States*, 354 U.S. 178, 194-95 (1957).

B. The panel's contrary decision defies and undermines the full Court's rationale for holding that the House has standing to enforce subpoenas.

The full Court's decision that the House has standing to enforce its subpoenas rested not just on the foundational importance of Congress's investigative powers, or even on the importance of the subpoena power, but specifically on the *necessity* of judicial enforcement of congressional subpoenas in certain cases. This Court could hardly have been clearer when it said that "the ordinary and effective

functioning of the Legislative Branch critically depends on the legislative prerogative to obtain information, and constitutional structure and historical practice support judicial enforcement of congressional subpoenas when necessary." 968 F.3d at 761. It identified the "threat of a subpoena enforcement lawsuit" as an "essential tool in keeping the Executive Branch at the negotiating table." *Id.* at 771. The panel's decision to hold enforcement suits unavailable absent a statute specifically authorizing them cannot be reconciled with the en banc Court's holding.

The panel offered no persuasive reason for its eleventh-hour finding that the House, for its 230-year history, has never had the power to go to court to enforce its subpoenas. The general judicial disfavor for implied rights of action for damages or to enforce statutory rights is a distraction: the House's power to issue subpoenas is a right that courts for centuries have understood as implied by our Constitution, and the remedy the House seeks here is purely equitable. *McGahn III*, 973 F.3d at 129-31 (Rogers, J., dissenting).

The panel's invocation of "history" was wrong not just in that repeated the mistaken approach to history that the full Court once re-

versed, but in that it disregarded the longstanding, undisputed ability of the House to hold noncompliant individuals in contempt and thereby to require judicial resolution of compliance disputes. In *Anderson*, 19 U.S. 204, the Supreme Court upheld the House's power to imprison the contemnor until he removes the contempt or the term of the House expires. *Id.* at 230-31. The contemnor, of course, has a right to seek habeas corpus review in court, and the court is required to determine if the basis for contempt was justified. *See McGrain v. Daugherty*, 273 U.S. 135, 154 (1927).

The House's long-recognized contempt power, like the House's action here, is an implied power that brings informational disputes before federal courts. It defines the "power of subpoena that the House of Representatives is already understood to possess," and thus is integral to "the historical practice." *McGahn II*, 968 F.3d at 771. If the panel decision stands, contempt is the sole remaining option for enforcement. That would massively "alter the *status quo ante*," *id.*, and cause routine escalation of informational disputes to the level of constitutional crises.

II. This Court Should Fully Affirm The District Court Rather Than Permit Continued Piecemeal Resolution

This Court should resolve this entire case now by affirming the district court's decision in full. The House issued the subpoena here some 20 months ago and this case has been on appeal for over a year. In investigations by the House, time is frequently of the essence. The Constitution demands that all Members of the House stand for election every two years. The People's business—including the fact-gathering needed to formulate, evaluate, and enact legislation and inform oversight—must be completed before that clock expires. Every day's delay in the enforcement of Congress's subpoenas directly undercuts Congress's ability to carry out its constitutional responsibilities. This Court has long recognized as much. *See Exxon Corp. v. FTC*, 589 F.2d 582, 588 (D.C. Cir. 1978) ("[E]nforced delay [of ten days] on the legitimate investigations of Congress … could seriously impede the vital investigatory powers of Congress and would be of highly questionable constitutionality."); *United States v. AT&T*, 567 F.2d 121, 133 n.40 (D.C. Cir. 1977) (in context of congressional subpoena, "there is a plain duty on both the executive and judicial branches to advance any problems for prompt consideration").

Allowing piecemeal resolution of the remaining defenses signals to future parties facing subpoenas that they can avoid compliance so long as they raise a wide enough variety of threshold arguments. That message here will be especially strong because the Executive's defense on the merits is so weak. The President has claimed absolute authority to prevent any person who has ever served as a senior-level presidential aide from appearing in response to any legislative subpoena. The district court, in a thorough decision applying established precedent, properly rejected that categorical claim as "a fiction" based on "aspirational assertions." JA949, JA963. Two of the panel's three judges have agreed that McGahn's assertion of absolute testimonial immunity is "a step too far … under Supreme Court precedent." *McGahn I*, 951 F.3d at 531-32 (Henderson, J., concurring); *McGahn III*, 973 F.3d at 131 (Rogers, J., dissenting). There is no reason to permit further delay through the assertion of defenses that were fully briefed and rejected in the district court and that a majority of the panel has deemed baseless.

III. It Will Remain Imperative That The Court Decides This Case Even After The New House Convenes

The Committee is correct that, for two independent reasons, this case will not become moot with the conclusion of the 116th Congress on

January 3, 2021. Appellee's Br. 13-17. First, the new House will adopt rules authorizing the continuation of ongoing litigation as successor in interest to the 116th House, and the Committee has indicated that it will reissue the subpoena promptly so that important legislation and oversight may continue uninterrupted. *Id.* at 13-14. Second, even if the House after January 3 were not authorized to continue this litigation, this case would present an important question that is capable of repetition yet evading review, and for that reason alone would not be moot. *Id.* at 16-17; *see Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 322 (D.C. Cir. 2009).

Indeed, it is imperative that the full Court now decide the important separation of powers questions presented in this case. Lingering uncertainty about the enforceability of congressional subpoenas will force the next Congress to engage in additional time-consuming litigation, hindering the time-sensitive fact-gathering necessary for legislation and oversight. And the Committee eighteen months from now could end up in the same place it is in today: the victor in a series of iterative appeals, and yet unable to enforce its subpoena. The full Court should

have the last word now and should hold the Committee's subpoena is fully enforceable.

CONCLUSION

The Court should fully affirm the district court's judgment.

Dated: December 23, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 2,343 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Cir. R. 32(e)(1). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Century Schoolbook font using Microsoft Word.

/s/ Samuel F. Callahan
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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d) and Cir. R. 25, that on December 23, 2020, the foregoing brief was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

/s/ Samuel F. Callahan
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