[ORAL ARGUMENT NOT YET SCHEDULED]

Nos. 21-5176 & 21-5177

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

DONALD J. TRUMP, et al.,

Plaintiffs-Appellants–Cross-Appellees,

v.

MAZARS USA, LLP,

Defendant-Appellee–Cross-Appellee,

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

Intervenor-Defendant-Appellee–Cross-Appellant.

On Appeal from a Final Order of the United States District Court for the District of Columbia (No. 19-cv-01136-APM) (Hon. Amit P. Mehta, J.)

BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF APPELLEE–CROSS-APPELLANT

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amicus curiae* Constitutional Accountability Center (CAC) represents that counsel for all parties have been sent notice of the filing of this brief. Plaintiffs-Appellants–Cross-Appellees and Intervenor-Defendant-Appellee–Cross-Appellant consent to *amicus curiae*'s participation. Defendant-Appellee–Cross-Appellee takes no position on *amicus curiae*'s participation. *Amicus curiae* has moved for leave to file this brief pursuant to Fed. R. App. P. 29(b) and D.C. Circuit Rule 29(b).[1]

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amicus curiae* certifies that a separate brief is necessary. *Amicus* is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to protect the rights, freedoms, and structural safeguards that our nation's charter guarantees. In furtherance of those goals, CAC has studied the rich history of legislative oversight and the critical role that oversight plays in our nation's system of checks

[1] Pursuant to Fed. R. App. P. 29(a), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

and balances. CAC is accordingly well situated to discuss the history of congressional oversight and how that history informs the issues in this case.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND *AMICI*

Except for *amicus* Constitutional Accountability Center and any other *amici* who had not yet entered an appearance in this case as of the filing of the Brief for Appellants, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellants.

II. RULING UNDER REVIEW

Reference to the ruling under review appears in the Brief for Appellants.

III. RELATED CASES

Reference to any related cases pending before this Court appears in the Brief for Appellants.

Dated: September 30, 2021

By: /s/ Brianne J. Gorod
Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

Amicus Constitutional Accountability Center ("CAC") is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights, freedoms, and structural safeguards that our nation's charter guarantees. CAC accordingly has a strong interest in the scope of Congress's investigative powers and in this case.

INTRODUCTION

As the Supreme Court has long recognized, "[t]he power of the Congress to conduct investigations" is "broad" and "inherent in the legislative process." *Watkins v. United States*, 354 U.S. 178, 187 (1957). Indeed, it "is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt v. United States*, 360 U.S. 109, 111 (1959). Exercising that power, the House Committee on Oversight and Reform ("Committee") subpoenaed certain documents from Mazars USA, LLP ("Mazars") related to the finances of former president Donald Trump and his businesses from 2011 until 2018. The Committee did so after concluding that its review of this information would aid its consideration of legislation concerning "presidential conflicts of interest, presidential contracting and self-dealing, and presidential emoluments[,]" as well as "landmark ethics reform

and other remedial legislation." Memorandum from Carolyn B. Maloney, Chairwoman, House Comm. on Oversight & Reform, to Members of the Comm. on Oversight & Reform 3 (Feb. 23, 2021) [hereinafter "Maloney Feb. Memo"], *available at* https://perma.cc/QP9B-3ATS; *see also* Appellee's Br. 8-23 (discussing the history of this oversight effort).

This congressional investigation is just the latest in a long line of inquiries designed to aid Congress's efforts to legislate. Indeed, the history of legislative investigations predates the birth of the United States, and Congress has exercised its power to investigate since the beginning of the Republic. As early as 1792, Congress examined a military defeat by "send[ing] for necessary persons, papers and records" from the Washington Administration. *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927). James Madison and other Framers of the Constitution voted in favor of this inquiry, *id.*, and Washington's cabinet, after discussions with Congress, complied with the request, *Trump v. Mazars*, 140 S. Ct. 2019, 2029 (2020).

Consistent with this long history, the Supreme Court has repeatedly affirmed the existence of Congress's power to investigate and reiterated that the scope of that power is coextensive with the scope of Congress's power to legislate. As the Court recently explained, Congress has the "power 'to secure needed information' in order to legislate," and this "'power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.'" *Mazars*, 140 S. Ct. at 2031

(quoting *McGrain*, 273 U.S. at 161). In discussing the breadth of Congress's investigatory power, the Court has made clear that the judiciary should not second-guess the legislature's judgment as to what investigations will facilitate its exercise of legislative power. Specifically, courts must uphold a congressional request for records so long as it is not "plainly incompetent or irrelevant to any lawful purpose [of Congress] in the discharge of [its] duties." *McPhaul v. United States*, 364 U.S. 372, 381 (1960) (quoting *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943)).

Former president Trump and affiliated organizations and entities argue that the Mazars subpoena is constitutionally invalid. *See* Appellants' Br. 1-2. Invoking the Supreme Court's earlier decision in this case, *id.* at 25, which instructed courts to "carefully scrutinize[]" congressional subpoenas directed toward "the President and his papers," *Mazars*, 140 S. Ct. at 2035-36, Appellants argue that the subpoena is "a threat to the proper balance of powers," Appellants' Br. 1. They also argue that it lacks a legitimate legislative purpose. *Id.* at 2.

They are wrong on all counts. To be sure, the Supreme Court recognized that a court's analysis of congressional subpoenas involving a sitting president should include "special considerations," such as "whether the asserted legislative purpose warrants the significant step of involving the President and his papers" and the extent of the "burdens imposed on the President by [the] subpoena," *Mazars*, 140 S. Ct. at

2035-36, but any separation of powers concerns here are significantly lessened now that the request pertains to a former president and his businesses. Indeed, there is ample precedent for treating former presidents and sitting presidents differently.

Moreover, the subpoena has a valid legislative purpose. The requested documents would aid the Committee's investigations regarding the potential need to enact certain ethics and disclosure laws, as well as laws that would facilitate oversight of the General Services Administration ("GSA"). Indeed, the subpoena would exceed Congress's authority only if it were "plainly incompetent or irrelevant to any lawful purpose [of Congress] in the discharge of [its] duties." *McPhaul*, 364 U.S. at 381 (quoting *Endicott Johnson Corp*., 317 U.S. at 509). Appellants have not made—and cannot make—that showing here.

ARGUMENT

I. Legislative Investigations Have a Long History, Both in the British Parliament and in Early American Congresses.

The practice of legislative oversight predates the birth of the United States, with "roots [that] lie deep in the British Parliament." James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 159 (1926). In the 1680s, for example, the English Parliament investigated issues as diverse as the conduct of the army in "sending Relief" into Ireland during war, "Miscarriage in the Victualing of the Navy," and the imposition of martial law by a commissioner of the East India Company. *Id.* at 162 (internal citation and

quotation marks omitted). Parliament premised these investigations on the idea that it could not properly legislate without first gathering information relevant to the topics of possible legislation.

American colonial legislatures replicated the British practice of legislative investigation. "The colonial assemblies, like the House of Commons, very early assumed, usually without question, the right to investigate the conduct of the other departments of the government and also other matters of general concern brought to their attention." C.S. Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. Pa. L. Rev. 691, 708 (1926).

In the decades following the nation's Founding, congressional committees conducted investigations concerning "the enactment of new statutes or the administration of existing laws." *Watkins*, 354 U.S. at 192-93. For instance, in 1827, the House Committee on Manufactures initiated an investigation to consider a revision of the tariff laws and sought the power to send for persons and papers in aid of that investigation. Although at least one member of Congress thought "that the only cases in which the House has a right to send for persons and papers, are those of impeachment, and of contested elections," 4 Cong. Deb. 882 (1827) (statement of Rep. Wood), other members responded that when Congress is considering a measure "deeply affecting the interest of every man in the United States," it may "compel the attendance of witnesses who can give . . . practical information upon the subject,"

id. at 875 (statement of Rep. Buchanan). In the end, Congress voted to grant the committee subpoena power. *Id.* at 889.

This rich history of congressional inquiry also included investigations of presidents and their cabinets. *See, e.g.*, George Galloway, *Investigative Function of Congress*, 21 Am. Pol. Sci. Rev. 47, 48 (1927) (noting that presidents had "been the subject of investigation twenty-three times" in a survey of committee investigations from 1789 to 1925). As the Supreme Court has recounted, the first Congresses generally used their investigative powers to address "suspected corruption or mismanagement of government officials." *Watkins*, 354 U.S. at 192; *see also* Landis, *supra*, at 212 ("[T]hat scarcely a challenge to the exercise of such a power was evoked[] is significant.").

In March 1792, the House created a special committee to inquire into a significant military defeat. *Mazars*, 140 S. Ct. at 2029. Records of the House debate show that most members believed that Congress should establish a select committee to investigate this matter itself, rather than direct the president to investigate. For example, Representative Thomas Fitzsimons argued that a committee was better suited than the President "to inquire relative to such objects as came properly under the cognizance of this House, particularly respecting the expenditures of public money." 3 Annals of Cong. 492 (1792). Similarly, Representative Abraham Baldwin "was convinced the House could not proceed but by a committee of their

own," which "would be able to throw more light on the subject." *Id.* Thus, the House rejected a proposal directing the president to carry out the investigation, and instead passed, by a vote of 44-10, a resolution creating its own investigative committee that was "empowered to call for such persons, papers, and records, as may be necessary to assist their inquiries." *Id.* at 493. Notably, "Mr. Madison, who had taken an important part in framing the Constitution only five years before, and four of his associates in that work, were members of the House of Representatives at the time, and all voted [in favor of] the inquiry." *McGrain*, 273 U.S. at 161 (citing 3 Annals of Cong. 494 (1792)). President Washington cooperated with the investigation. *Mazars*, 140 S. Ct. at 2029-30.

In 1800, the House of Representatives formed a select committee to investigate the circumstances of the Treasury Secretary's resignation. 10 Annals of Cong. 787-88 (1800). The committee was directed "to examine into the state of the Treasury, the mode of conducting business therein, the expenditures[] of the public money, and to report such facts and statements as will conduce to a full and satisfactory understanding of the state of the Treasury." *Id.* at 796-97. The Treasury Secretary cooperated completely with the committee's "thorough examination." Landis, *supra*, at 172.

Similarly, in 1832, the House created a committee to assess whether the former Secretary of War had given a fraudulent contract and whether "the President

of the United States had any knowledge of such attempted fraud," and it gave the committee the "power to send for persons and papers." *Id.* at 179 (quoting H.R. Rep. No. 22-502 (1832)). Later, in 1860, Congress created a special committee to determine whether "any person connected with the present Executive Department of this Government" improperly attempted to influence legislation in the House "by any promise, offer, or intimation of employment, patronage, office, favors, or rewards." Cong. Globe, 36th Cong., 1st Sess. 1017-18 (1860). This committee, too, had the "power to send for persons and papers" and to "examine witnesses." *Id.*

Former presidents were often subjects of congressional investigations, as well. In 1846, former presidents John Tyler and John Quincy Adams participated in a House committee's investigation of Secretary of State Daniel Webster's alleged misuse of a contingent fund during Tyler's presidency. *See* H.R. Rep. No. 29-686, at 22 (1846) ("It was agreed that Mr. Tyler, the late President, might be examined as a witness by interrogatories . . . without requiring his personal attendance before the committee."); *id.* at 27 (recording deposition of former president Adams). Adams's deposition focused on State Department practices for securing confidential files and concerned events that occurred while he was Secretary of State. *Id.* at 27-29. Tyler's interrogatories addressed his management of the State Department as president. H.R. Rep. No 29-684, at 8-11. Decades later, former president Theodore Roosevelt also participated in several congressional investigations. *See*, *e.g.*, *Investigation of*

the United States Steel Corporation: Hearing Before the H. Spec. Comm., 62d Cong. 1369-92 (1911) (testimony); *Campaign Contributions: Hearings Before the S. Subcomm. on Privileges and Elections*, 62d Cong. 177-96 (1912) (letter from Roosevelt); *id.* at 469-527 (testimony).

The former presidents who testified before Congress did not raise separation of powers concerns relating to their testimony. Notably, Adams had, as a member of Congress, objected to congressional investigations with the "exceptionable and odious properties of general warrants," *Mazars*, 140 S. Ct. at 2041 (Thomas, J., dissenting) (quoting App. to 8 Cong. Deb. 54 (1833)), but congressional records do not suggest that he objected to providing his own "recollection[s]" to Congress when he was a former president, *see* H.R. Rep. No. 29-686, at 28. Similarly, Tyler, who had refused to comply with a House Committee's request for documents while sitting as president, *see* 67 Cong. Rec. 4549 (1926) (describing Tyler's "insistence on the executive prerogative" in the face of an 1842 House investigation), submitted interrogatories as an ex-president, leaving it to the incumbent President Polk to unsuccessfully object to the House of Representative's "grand inquest" into the "archives and the papers of the executive departments," *id.* (reproducing Polk's response). Finally, Theodore Roosevelt raised no separation of powers objection to testifying after he was president. *See Campaign Contributions*, *supra*, at 473 (objecting to the committee's use of "hearsay evidence"); *id.* at 486 (objecting that

the committee investigated "as to the expense of the Progressives" but not members of other parties).

In short, Congress has enjoyed the power to subpoena relevant witnesses and documents, including from sitting and former presidents and their cabinets, since the early days of the Republic. Since then, Congress has used its subpoena power to investigate a broad range of matters, including the "means used to influence the nomination of candidates for the Senate," *Reed v. Cnty. Comm'rs of Delaware Cnty.*, 277 U.S. 376, 386 (1928), alleged "interference with the loyalty, discipline, or morale of the Armed Services," *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 500 (1975), the problem of "mob violence and organized crime," *In re Application of U.S. Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232, 1233 (D.C. Cir. 1981), and the prevention of "sex trafficking, on the Internet," *Senate Permanent Subcomm. v. Ferrer*, 199 F. Supp. 3d 125, 128 (D.D.C. 2016), *vacated as moot*, 856 F.3d 1080 (D.C. Cir. 2017). As the next Section discusses, the Supreme Court has repeatedly recognized that Congress's power to investigate is as broad as this history suggests.

II. The Supreme Court Has Consistently Affirmed that Congress's Power to Investigate Is Coextensive with Its Power to Legislate.

Consistent with this long history, the Supreme Court has recognized that Congress's power to investigate is inherent in and as broad as its power to legislate. In *McGrain v. Daugherty*, the Court considered whether the Senate, in the course of

an investigation of the Department of Justice, could compel a witness—in that case, the attorney general's brother—to appear before a Senate committee to give testimony. 273 U.S. at 150-52. The Court held that "the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution." *Id.* at 154. As the Court explained, the power to compel witnesses to testify is an essential aspect of the power to legislate: "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." *Id.* at 175. The Court continued: "where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it." *Id.*

Two years later, the Court reiterated that "the power of inquiry is an essential and appropriate auxiliary to the legislative function." *Sinclair v. United States*, 279 U.S. 263, 291 (1929). It affirmed an individual's conviction for contempt of Congress under 2 U.S.C. § 192, which provides for the criminal punishment of witnesses who refuse to answer questions or provide documents pertinent to a congressional investigation. Rejecting the defendant's claim that the investigation at issue was not related to legislation, the Court stated that because Congress can

legislate "respecting the naval oil reserves" and "other public lands and property of the United States," a Senate committee "undoubtedly" had the power "to investigate and report what had been and was being done by executive departments under [statutes relating to naval land and reserves] and to make any other inquiry concerning the public domain." *Sinclair*, 279 U.S. at 294.

The Court again outlined a broad view of Congress's power to investigate in another case involving 2 U.S.C. § 192. In *Quinn v. United States*, 349 U.S. 155 (1955), the Court made clear the breadth of Congress's investigatory powers, explaining that "[t]here can be no doubt as to the power of Congress, by itself or through its committees, to investigate matters and conditions relating to contemplated legislation. This power, deeply rooted in American and English institutions, is indeed co-extensive with the power to legislate." *Id.* at 160. The Court emphasized that "[w]ithout the power to investigate—including of course the authority to compel testimony, either through its own processes or through judicial trial—Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively." *Id.* at 160-61.

Similarly, in *Watkins v. United States*, the Court made clear yet again that "an investigation is part of lawmaking," 354 U.S. at 197, and once more described the congressional investigatory power expansively. The Court explained that this power "encompasses inquiries concerning the administration of existing laws as well as

proposed or possibly needed statutes." *Id.* at 187. And again, in *Eastland v. U.S. Servicemen's Fund*, the Court recognized that "the power to investigate is inherent in the power to make laws" and that the "[i]ssuance of subpoenas . . . has long been held to be a legitimate use by Congress of its power to investigate." 421 U.S. at 504. Indeed, the Court explained, "[t]he issuance of a subpoena pursuant to an authorized investigation" is "an indispensable ingredient of lawmaking." *Id.* at 505.

The Court also relied on "Congress' broad investigative power" when upholding a statute that required the preservation of materials from the Nixon Administration. Among the "substantial public interests that led Congress to seek to preserve [these] materials" was "Congress' need to understand how [our] political processes had in fact operated" during "the events leading to [Richard Nixon]'s resignation . . . in order to gauge the necessity for remedial legislation." *Nixon v. Adm'r of Gen. Servs*., 433 U.S. 425, 453 (1977).

Most recently, when the Court considered the Committee's initial subpoena to Mazars, it confirmed the breadth and importance of Congress's investigative authority. The Court reiterated that "[t]he congressional power to obtain information is 'broad' and 'indispensable,' [and] encompasses inquiries into the administration of existing laws, studies of proposed laws, and 'surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.'" *Mazars*, 140 S. Ct. at 2031 (quoting *Watkins*, 354 U.S. at 187, 215). It

recognized Congress's "power 'to secure needed information' in order to legislate," which is "'an essential and appropriate auxiliary to the legislative function.'" *Id.* (quoting *McGrain*, 273 U.S. at 161). Without this power, the Court explained, "Congress would be shooting in the dark, unable to legislate 'wisely or effectively.'" *Id.* (quoting *McGrain*, 273 U.S. at 175).

While the Court also held that Congress's requests for information from a sitting president must be scrutinized to protect "the President's time and attention" and avoid "weighty concerns regarding separation of powers," *id.* at 2035-36, it emphasized that Congress retains the power to access presidential information in appropriate circumstances, *id.* at 2033, and it did not address how separation of powers concerns should apply in the context of a former president. Those concerns are significantly lessened once an individual is no longer president, as the next Section discusses.

III. Permitting Congress to Subpoena the Information of a Former President Does Not Raise the Same Separation of Powers Concerns as Subpoenaing the Information of a Sitting President.

Appellants argue that "requests for a former President's documents still invite 'a conflict between the branches,'" Appellants' Br. 30 (quoting *United States v. Poindexter*, 727 F. Supp. 1501, 1505 (D.D.C. 1989)), and urge this Court to apply the "*Mazars* test" to address the separation of powers concerns posed by a subpoena to a sitting president, *id.* at 26. The Supreme Court crafted the *Mazars* test, however,

to analyze the constitutionality of subpoenas that create a "clash between rival branches of government," *Mazars*, 140 S. Ct. at 2034, and have the potential to "render [the president] 'complaisan[t] to the humors of the Legislature,'" *id.* (quoting *The Federalist No. 71*, at 483 (James Madison) (Jacob Cooke ed., 1961)). Because the subpoena at issue here does not target the records of a sitting president, these concerns are not present.

A. In *Mazars*, the Court outlined a set of unique concerns that apply in the context of congressional subpoenas seeking the records of sitting presidents and held that courts should "carefully scrutinize[]" those subpoenas to avoid "unnecessary intrusion into the operation of the Office of the President." *Id.* at 2036 (quoting *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 387 (2004)). As the Court explained, "congressional subpoenas for the President's information unavoidably pit the political branches against one another." *Id.* at 2034. A subpoena power "[w]ithout limits," the Court feared, would enable Congress to "exert an imperious contro[l] over the Executive Branch and aggrandize itself at the President's expense." *Id.* at 2034 (internal quotation marks omitted). The Court also worried that an unlimited subpoena power would "transform the established practice of the political branches," enabling Congress to "simply walk away from the bargaining table and compel compliance in court" rather than "negotiating over information requests." *Id.* (internal quotation marks omitted).

The same separation of powers concerns do not apply when Congress requests information from a former president. Critically, the Constitution gives former presidents no role in the "ongoing institutional relationship [between] the 'opposite and rival' political branches." *Id.* at 2033-34 (quoting *The Federalist No. 51*, *supra*, at 349 (James Madison)). Article II states that the president "shall hold his office during the term of four years," U.S. Const. art. II, § 1, unless he is impeached and removed from office, *id.* § 4, or replaced in cases of "Inability to discharge the Powers and Duties of the said Office," *id.* § 1. To the Framers, the president's limited tenure was necessary to distinguish American leaders from European monarchs, ensuring that the "whole power" of government would "be in the hands of the elective and periodical servants of the people." *The Federalist No. 69*, *supra*, at 470 (Alexander Hamilton); *id.* at 463 (emphasizing that the president "is to be elected for *four* years" so that "there is a total dissimilitude between *him* and a king of Great Britain, who is an hereditary monarch"); *see* 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 200 (Jonathan Elliot ed., 1836) (Statement of Richard Law) ("Our President is not a King, nor our Senate a House of Lords.").

As a result, when the subject of a subpoena is not a sitting president, the subpoena does not pit "the political branches against one another," *Mazars*, 140 S. Ct. at 2034, nor does it give Congress an "institutional advantage," *id.* at 2036.

Members of Congress have no reason to use requests for information to check or control the behavior of former presidents, as they could with sitting presidents, because they do not have to work with former presidents on other matters of governance. Indeed, it is impossible for a congressional investigation to "exert an imperious contro[l] over the Executive Branch," *id.* at 2034, when the subject of the investigation is no longer in control of the executive branch. Finally, once the subject of the subpoena is no longer in office, there is no danger that the subpoena will transform the "established practice of the political branches," *id.*, with respect to congressional information requests of the executive branch.[2]

In sum, the special scrutiny described in *Mazars* is not necessary to protect former presidents from congressional information requests because such requests do not pose the same threat to the separation of powers. As Theodore Roosevelt explained several years after his presidency, a former president is "like any other citizen" and has a "plain duty to try to help [a congressional] committee or respond to its invitation, just as anyone else would respond." *Investigation of the United*

[2] Appellants argue that Congress could use the threat of future subpoenas to influence or punish sitting presidents. Appellants' Br. 30-31. As an initial matter, Appellants have provided no evidence that Congress made such threats. And even assuming that a Congress might try to use this threat—one that would take months or years to make good on—rather than the numerous other tools available to it in negotiations with the executive branch, the fact remains that the considerations that led the Supreme Court to conclude that there are heightened separation of powers concerns when a subpoena is directed to a sitting president are much less salient when a subpoena is directed to a former president.

States Steel Corporation, *supra*, at 1392.

B. Furthermore, there is ample precedent for treating former presidents and sitting presidents differently. For example, in disputes about whether sitting presidents can be subject to civil or criminal prosecution, the Court has often reiterated that regardless of whether sitting presidents can be subject to prosecution, *former* presidents certainly can be. *See, e.g.*, *Trump v. Vance*, 140 S. Ct. 2412, 2426-27 (2020) (noting that "state grand juries are free to investigate a sitting President with an eye toward charging him *after* the completion of his term"); *see also A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 257 (Oct. 16, 2000) ("A sitting President who engages in criminal behavior . . . is always subject to removal from office upon impeachment by the House and conviction by the Senate, and is *thereafter* subject to criminal prosecution." (emphasis added)).

Similarly, in cases involving executive privilege, the Supreme Court has recognized a distinction between sitting and former presidents. *Gen. Servs.*, 433 U.S. at 448-49. While the Court in *General Services* recognized that former presidents may retain some form of executive privilege because the particular interests served by executive privilege—that is, ensuring that a president "receive[s] the full and frank submissions of facts and opinions upon which effective discharge of his duties depends," *id.* at 449—would be undermined if the privilege disappeared

entirely when a president left office, it rejected the argument that the privilege protects incumbents and ex-presidents in exactly the same way. *Id.* at 451 (a former president's claim of executive privilege is "subject to erosion over time"). There, the Court rejected former president Richard Nixon's argument that presidential privilege shielded his records from "archival scrutiny." *Id.* at 446; *id.* at 453 (noting that among the "substantial public interests that led Congress to seek to preserve" the materials was "Congress' need to understand how [certain] political processes had in fact operated in order to gauge the necessity for remedial legislation" and that "by preserving these materials, the Act may be thought to aid the legislative process and thus to be within the scope of Congress' broad investigative power").

Indeed, in the years after *General Services*, federal courts have repeatedly required disclosure from former presidents of materials that might otherwise be privileged, holding that the public interest justifies such disclosure. *See, e.g.*, *United States v. Poindexter*, 732 F. Supp. 142, 161 (D.D.C. 1990) (permitting subpoena of former president Ronald Reagan's diaries after an in camera review to determine relevancy and materiality to the defense); *United States v. North*, 713 F. Supp. 1448, 1449 (D.D.C. 1989) (noting that "[d]eference to the high office of the presidency and the presumptive privilege involved do not prevent requiring the appearance of a former President at a criminal trial provided a sufficient showing has been made that the former President's testimony is essential to assure the defendant a fair trial"); *see*

also Nixon v. Fitzgerald, 457 U.S. 731, 735 n.5 (1982) (noting that the former president submitted to depositions in the case). Thus, even when materials subject to executive privilege are at issue, unlike in this case, courts routinely recognize the distinction between sitting presidents and their predecessors.

* * *

In sum, a subpoena of a former president does not present the same separation of powers concerns as a subpoena of a sitting president. The subpoena in this case is plainly valid, as the next Section discusses.

IV. The Oversight Committee's Request for Documents in this Case Falls Well Within Congress's Investigatory Powers.

As described above, Congress's power to investigate is "broad," encompassing "administration of existing laws, studies of proposed laws, and surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them." *Mazars*, 140 S. Ct. at 2031 (internal quotation marks omitted). This Court therefore must uphold the congressional request for records in this case so long as it is not "plainly incompetent or irrelevant to any lawful purpose [of Congress] in the discharge of [its] duties." *McPhaul*, 364 U.S. at 381 (quoting *Endicott Johnson Corp.*, 317 U.S. at 509).

The Oversight Committee's investigation—and the related subpoena—plainly satisfies this test. The Committee seeks information to aid the 117th Congress in its consideration of "once-in-a-generation ethics reforms."

Memorandum from Carolyn B. Maloney, Chairwoman, House Comm. on Oversight & Reform, to Members of the Comm. on Oversight & Reform 4 (Aug. 26, 2020) [hereinafter "Maloney Aug. Memo"], *available at* https://tinyurl.com/34by2cpe. Specifically, Congress is considering laws that would "close loopholes in the financial disclosure process," *id.* at 4-5, "ensure that GSA administers federal contracts with the President in a fair and transparent manner," *id.*, and enable Congress to identify "noncompliance" with the Emoluments Clauses and "conflicts of interest involving foreign governments," *id.* at 5; *see also* Maloney Feb. Memo 3. The Committee has also explained that the subpoena would aid its investigation into the former president's lease agreement with GSA. Maloney Aug. Memo 5. These subjects plainly fall within Congress's power to investigate and legislate—they are inquiries into the "administration of existing laws as well as proposed or possibly needed statutes." *Watkins*, 354 U.S. at 187.

Significantly, Congress need not point to any proposed legislation to justify an investigation. "The very nature of the investigative function—like any research—is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result." *Eastland*, 421 U.S. at 509. Even subpoenas to a sitting president, as the Supreme Court has explained, can be justified by Congress's investigation of "*possible* legislation." *Mazars*, 140 S. Ct. at 2036. Nevertheless, the Committee has identified

specific pieces of legislation that Congress is considering, underscoring the validity of this investigation. For instance, H.R. 1 would amend the Ethics in Government Act to require that additional financial disclosures be filed with the Office of Government Ethics and that the president and vice president either divest from financial holdings that may pose a conflict of interest or disclose significant financial information regarding their business interests. *See* Maloney Aug. Memo 12; H.R. 1, 117th Cong. (2021). Congress is also considering bills that would require financial disclosure from the president, H.R. 347, 117th Cong. (2021), that would facilitate the oversight of GSA's management of federal leases, Appellee's Br. 73-80, and that would regulate the tracking of presidential emoluments, *id.* at 82-83.

Appellants insist that this Court should disregard these plainly valid legislative purposes because Congress's actual purpose is "law enforcement." Appellants' Br. 51. As an initial matter, the Committee has identified a variety of legislative objectives that are unrelated to law enforcement, as discussed above. Furthermore, longstanding Supreme Court precedent "make[s] clear that in determining the legitimacy of a congressional act, [courts] do not look to the motives alleged to have prompted it." *Eastland*, 421 U.S. at 508. While courts must be "attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose," *Mazars*, 140 S. Ct. at 203, they are "bound to presume that the action of the legislative body was with a legitimate

object, if it is capable of being so construed," *McGrain*, 273 U.S. at 178 (quoting *People ex rel. McDonald v. Keeler*, 99 N.Y. 463, 487 (1885)); *see Watkins*, 354 U.S. at 200 ("the motives of committee members . . . alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served").[3]

To be sure, this investigation may uncover violations of law, and some members of Congress may have an interest in knowing whether the former president has violated the law, but that does not mean that the investigation lacks a legitimate legislative purpose. To the contrary, it is possible that the former president has violated the law *and* that Congress may wish to legislate on topics related to presidential conflicts of interest and financial disclosures. Indeed, as the Supreme Court has explained, although Congress "is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits," its authority "to require

[3] Indeed, many valid legislative investigations have been laced with the "colorful threads of political motive." Galloway, *supra*, at 55. When Washington complied with the House's 1792 request for papers concerning a military defeat, *Mazars*, 140 S. Ct. at 2029-30, he recognized the "delicacy" involved in his relationship with legislators, who often "wound[ed] his feelings" in engagements regarding military affairs. 31 George Washington, *The Writings of Washington* 493 (John Fitzpatrick ed., 1939); *see also* Galloway, *supra*, at 55 (attributing the 1792 inquiry to political opponents of Alexander Hamilton). Similarly, Congress's 1842 inquiries into Secretary of State Webster, with which two former presidents voluntarily complied, were motivated by "long-festering personal or political quarrels," as well as the legislature's interest in corruption. Todd Garvey, *The Webster and Ingersoll Investigations*, in *When Congress Comes Calling* 289 (Morton Rosenberg ed., 2017).

pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits." *Sinclair*, 279 U.S. at 295; *see also McGrain*, 273 U.S. at 179-80 ("Nor do we think it a valid objection to the investigation that it might possibly disclose crime or wrongdoing on [an executive branch official's] part."); *Hutcheson v. United States*, 369 U.S. 599, 618 (1962) ("[S]urely a congressional committee which is engaged in a legitimate legislative investigation need not grind to a halt . . . when crime or wrongdoing is disclosed." (internal citations omitted)).

Finally, Appellants argue that most of the legislation that would arise from the Committee's investigation—whether already proposed or purely hypothetical—is "likely unconstitutional." Appellants' Br. 11-12, 60-63. This argument is as astounding as it is wrong. As an initial matter, as noted earlier, the Supreme Court has made clear that Congress may investigate so long as the investigation is not "plainly incompetent or irrelevant to any lawful purpose." *McPhaul*, 364 U.S. at 381 (internal citation and quotations omitted). Here, laws governing the president's disclosures and conflicts of interest, like the Ethics in Government Act of 1978, have been on the books for decades. Congressional investigation into whether to amend those laws, or to pass new laws imposing other ethical constraints on the president, can hardly be irrelevant to any lawful purpose. And given this long history of ethics

legislation, it would be remarkable for this Court to rule that any such hypothetical legislation is unconstitutional before it is even passed.

Moreover, there is no basis for Appellants' radical assertion that the laws Congress is considering are likely unconstitutional. Appellants invoke *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 836 (1995), to support their argument that any disclosure requirement imposed on the president would violate the Presidential Qualifications Clause, which sets forth the eligibility requirements to serve as president, U.S. Const. art. II, § 1, cl. 5. But *Thornton* does not stand for nearly so broad a proposition. In *Thornton*, the Court held that states cannot limit the number of terms that a member of Congress can serve, 514 U.S. at 782-83, and noted that a state statute would be unconstitutional if it had "the likely effect of handicapping a class of candidates and ha[d] the sole purpose of creating additional qualifications indirectly," *id.* at 836. Appellants have not demonstrated that any of the legislation under consideration has such an effect or purpose, and the cases they cite do not change that. While a federal court recently invalidated a California law mandating the disclosure of tax returns by candidates in the state's presidential primary, *see* Appellants' Br. 61 (citing *Griffin v. Padilla*, 408 F. Supp. 3d 1169, 1179 (E.D. Cal. 2019)), it did so after carefully reviewing relevant evidence of the Act's purpose and effect. *See Griffin*, 408 F. Supp. 3d at 1179-83 (calling into question California's professed interests in disclosure because the law did not apply to all elections and

because the state had not pursued similar measures when previous presidential candidates failed to release tax return information).[4]

Appellants also argue that the subpoena is invalid because legislation requiring presidential divestment and prohibiting federal contracting "would violate Article II by restricting the President's ability to execute his authority." Appellants' Br. 63 (quoting Memorandum from Laurence Silberman, Deputy Att'y Gen., to Richard Burress, Office of the President 5 (Aug. 28, 1974) [hereinafter "Silberman Memo"], *available at* bit.ly/31k3rql). Appellants cite no Supreme Court or D.C. Circuit case that comes close to supporting this sweeping constitutional rule, which would exempt the president from all disclosure and conflict-of-interest laws. *See id.* That is because no such case exists. Rather, the *only* source that Appellants cite for this proposition is a 1974 letter from Deputy Attorney General Laurence H. Silberman to an assistant to the President that suggests—in passing—that constitutional questions may arise when applying *a particular* conflict-of-interest law to the president. *See* Silberman Memo 5 (noting without elaboration that "there are clearly constitutional problems with respect to [applying 18 U.S.C. § 208(a)] to the President"). Even this letter—again, Appellants' only support—does not stand

[4] Moreover, this holding was vacated as moot after the law in question was held to violate the California Constitution. *See Griffin v. Padilla*, No. 2:19-cv-01477-MCE-DB, 2020 WL 1442091 (E.D. Cal. Jan. 13, 2020); *see also Patterson v. Padilla*, 8 Cal. 5th 220, 248 (2019).

for the proposition that *all* laws requiring presidents to disclose finances or conflicts, set up a blind trust, or otherwise arrange their financial holdings upon taking office are unconstitutional.

* * *

In sum, Appellants' arguments, if accepted, would drastically cabin the scope of Congress's power to investigate. Such a result would be at odds with our nation's rich history of congressional investigations and with decades of Supreme Court precedent affirming that Congress possesses broad constitutional power to investigate.

CONCLUSION

For the foregoing reasons, the Court should conclude that the subpoena at issue here is valid.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 6,477 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 30th day of September, 2021.

/s/ Brianne J. Gorod
Brianne J. Gorod

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2021, I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: September 30, 2021

/s/ Brianne J. Gorod
Brianne J. Gorod