[ORAL ARGUMENT SCHEDULED FOR MARCH 24, 2022]

No. 21-5289

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

Committee on Ways and Means, United States House of Representatives,

Plaintiff-Appellee,

v.

United States Department of the Treasury, *et al*.,

Defendants-Appellees,

Donald J. Trump, *et al*.,

Intervenors for Defendant-Appellants.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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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* represents that counsel for all parties have been sent notice of the filing of this brief. All parties consent to *amicus curiae*'s participation.[1]

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amicus curiae* certifies that a separate brief is necessary. 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 this case and in the scope of Congress's investigative powers.

[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.

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 *AMICUS*

Except for *amicus curiae* 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: February 7, 2022

By: /s/ Brianne J. Gorod
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

GLOSSARY

IRS Internal Revenue Service

OLC Office of Legal Counsel

INTEREST OF *AMICUS CURIAE*

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 this case and in the scope of Congress's investigative powers.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court has long recognized that "[t]he power of the Congress to conduct investigations is inherent in the legislative process," and "[t]hat power is broad." *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). Pursuant to that broad authority, Congress passed a federal law that provides that, "[u]pon written request" of the Chairman of the House Committee on Ways and Means, the Secretary of the Treasury shall furnish the Committee with "any return or return information." 26 U.S.C. § 6103(f)(1).

Exercising that power in April 2019, Representative Richard Neal, Chairman of the House Committee on Ways and Means, requested that the Department of the

Treasury and the Internal Revenue Service ("IRS") provide the Committee with then-President Donald Trump's individual tax returns and the tax returns of eight of Trump's businesses for each of the tax years 2013 through 2018. It sought these returns as part of its investigative work as it "consider[ed] legislative proposals and conduct[ed] oversight related to our Federal tax laws, including, but not limited to, the extent to which the IRS audits and enforces the Federal tax laws against a President." J.A. 46. The Treasury Secretary denied that request after consulting with the Office of Legal Counsel ("OLC"). *See* Letter from Steven T. Mnuchin, Secretary, Dep't of the Treasury, to Richard E. Neal, Chairman, H. Comm. on Ways and Means (May 6, 2019), *available at* https://home.treasury.gov/system/files/136/Secretary-Mnuchin-Response-to-Chairman-Neal-2019-05-06.pdf.

In June 2021, Chairman Neal issued a new request under 26 U.S.C. § 6103(f)(1) for the same categories of tax information, but for each of the tax years 2015 through 2020. That request stated that the former president's tax information "[is] not only instructive—but indispensable—to the Committee's inquiry into the mandatory audit program," J.A. 90—a program described in the Internal Revenue Manual under which "individual income tax returns of a President are subject to mandatory examination," *id.* at 88. It also explained that "former President Trump's tax returns could reveal hidden business entanglements raising tax law and other issues, including conflicts of interest, affecting proper execution of the former

President's responsibilities" and that "[a]n independent examination might also show foreign financial influences on former President Trump that could inform relevant congressional legislation." *Id.* at 90.

The Treasury Department again sought advice from OLC, asking whether it must comply with the Chairman's new request. J.A. 97. At that point, OLC determined there was "ample basis" for concluding that the Chairman's request would further the Committee's stated objectives for reviewing these tax records, *id.* at 98, noting that the second request provided even greater detail than did the first about the Committee's need for the information in these returns, *id.* at 111. OLC also noted that the new request pertained to a *former* president, which "greatly mitigates" any separation of powers concerns. *Id.* at 122. For these and other reasons, OLC advised the Treasury Department that it "must comply" with the new request, *id.* at 133, and in light of that opinion, the Treasury Department decided that it would comply with the Chairman's request.

Notwithstanding the incumbent administration's determination that the Treasury Secretary should comply with the Chairman's request, Trump and his businesses argue that the returns should not be handed over. According to Trump and his businesses, "the Committee's request implicates the separation of powers and must satisfy heightened scrutiny." Appellants' Br. 18. They also argue that the Chairman's request lacks a legitimate legislative purpose and that the real purpose

for the request is "to expose the President's tax returns for the sake of exposure." *Id.* at 49, 9 (quotation marks omitted). Both arguments are without merit, and they would, if accepted, drastically cabin the scope of Congress's authority to investigate, thereby undermining Congress's ability to fulfill its institutional role in our system of government.

To start, while the Supreme Court has 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," *Trump v. Mazars*, 140 S. Ct. 2019, 2035-36 (2020), any separation of powers concerns here are significantly lessened now that the request pertains to a *former* president and the executive branch has concluded that the returns should be handed over.

Moreover, the Committee's requests under Section 6103(f)(1) are plainly valid. This congressional investigation is just the latest in a long line of inquiries designed to aid Congress's efforts to legislate. Indeed, Congress has exercised its investigative power since the beginning of the Republic. Consistent with this long history, the Supreme Court has repeatedly affirmed that Congress has the "power 'to secure needed information' in order to legislate," and this power "'is an essential and appropriate auxiliary to the legislative function.'" *Mazars*, 140 S. Ct. at 2031

(quoting *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927)). Here, the requested tax documents would aid the Committee's investigations into, among other things, the need to amend or extend the nation's tax laws, enact new legislation on the IRS's presidential audit program, and address presidential conflicts of interest and business entanglements.

As the Supreme Court has made clear, an investigation exceeds Congress's powers only when it is "plainly incompetent or irrelevant to any lawful purpose [of Congress] in the discharge of [its] duties." *McPhaul*, 364 U.S. 372, 381 (1960) (quoting *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943)). Trump and his business entities have not made—and cannot make—that showing here.

ARGUMENT

I. Legislative Investigations, Including of Sitting and Former Presidents, Have a Long History, and Consistent with This History, the Supreme Court Has Long Recognized the Breadth of Congress's Oversight Authority.

A. The practice of legislative oversight predates the birth of the United States. Its "roots . . . lie deep in the British Parliament," James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 159 (1926), and American colonial legislatures quickly replicated this British practice of legislative investigation, C.S. Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. Pa. L. Rev. 691, 708 (1926).

After the nation's Founding, the U.S. Congress quickly took actions demonstrating that it viewed its authority to investigate broadly, as congressional committees conducted investigations concerning "the enactment of new statutes or the administration of existing laws," *Watkins*, 354 U.S. at 192-93, as well as into presidents and their cabinets, *see, e.g.*, George Galloway, *Investigative Function of Congress*, 21 Am. Pol. Sci. Rev. 47, 48 (1927) (presidents were "the subject of investigation twenty-three times" between 1789 and 1925). In March 1792, for example, the House created a committee to inquire into a significant military defeat by "send[ing] for necessary persons, papers and records" from the Washington Administration. *McGrain*, 273 U.S. at 161. 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." *Id.* (citing 3 Annals of Cong. 494 (1792)). President Washington's cabinet, after discussions with Congress, cooperated with the investigation. *Mazars*, 140 S. Ct. at 2029-30.

Less than a decade later, a House committee investigated 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, a House committee investigated 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." *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).

Former presidents were also often the subjects of congressional investigations. In 1846, former presidents Tyler and Quincy Adams participated in a House committee's investigation of Secretary of State 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 (noting 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 congressional investigations about monopolization in the steel industry, *see Investigation of the United States Steel Corporation: Hearing Before the H. Spec. Comm.*, 62d Cong. 1369-92 (1911) (testimony), and into campaign contributions during the 1904 and 1908 presidential elections, *see Campaign Contributions: Hearings Before the S. Subcomm. on Privileges and Elections*, 62d Cong. 177-96 (1912) (letter from Roosevelt); *id.* at 469-527 (testimony).

These former presidents who testified before Congress did not raise separation of powers concerns. *See* H.R. Rep. No. 29-686, at 28; *Campaign Contributions*, *supra*, at 473, 486. 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 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 only 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).

B. Consistent with this history, the Supreme Court has recognized that Congress's power to investigate is inherent in its power to legislate—and that this power is broad. In *McGrain v. Daugherty*, the Court considered whether the Senate, in the course of an investigation regarding 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, "[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. "[W]here 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 thus 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 the Leasing Act, the Naval Oil Reserve Act, and the President's order in respect of the 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 its 1955 decision in another case involving 2 U.S.C. § 192. As in *McGrain*, the Court in *Quinn v. United States* made clear the breadth of Congress's investigatory powers, explaining, "There 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." 349 U.S. 155, 160 (1955). 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 again made clear that "an investigation is part of lawmaking," 354 U.S. at 197, and once more described the congressional investigatory power expansively. "The power of the Congress to conduct investigations is inherent in the legislative process." *Id.* at 187. The Court explained that Congress's investigative "power is broad," emphasizing that it "encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes," "includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them," and "comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste." *Id.*

Most recently, 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, *id*. at 2044 (quoting *McGrain*, 273 U.S. at 161), which is "'an essential and appropriate auxiliary to the legislative function,'" *id.* at 2031 (quoting *McGrain*, 273 U.S. at 174). 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).

II. The Ways and Means Committee's Broad Power to Access Tax Information for Investigatory Purposes Is Consistent with the History of Section 6103.

Section 6103(f)(1) of the Tax Reform Act of 1976—the provision that the Ways and Means Committee Chair invoked in his 2019 and 2021 requests—provides that "[u]pon written request from the chairman of the Committee on Ways and Means of the House of Representatives, . . . the Secretary shall furnish such committee with any return or return information specified in such request." 26 U.S.C. § 6103(f)(1). The history of this provision and its precursors further demonstrates that the power of the House Ways and Means Committee to inspect tax records is as broad as the text of Section 6103(f)(1) suggests.

The nation's first income tax laws from the 1860s "generally gave the public full access to the tax returns of taxpayers." George K. Yin, *Preventing Congressional Violations of Taxpayer Privacy*, 69 Tax Law. 103, 119 (2015). That full publicity rule was unpopular from its inception, and over the next few decades,

Congress passed laws making "complete secrecy of returns . . . the order of the day unless the President ordered otherwise." *Id.*; *see, e.g.*, Act of July 14, 1870, ch. 255, § 11, 16 Stat. 256, 259 (barring the publication of certain tax information in newspapers); Tariff Act of 1894, ch. 349, § 34, 28 Stat. 509, 557-58 (making it a misdemeanor to disclose certain tax records outside of the tax agency). In the early twentieth century, Congress repeatedly quashed efforts to give its committees the ability to inspect tax returns. *See* Yin, *supra*, at 119-20 (collecting examples).

In 1924, however, in response to failed congressional efforts to access tax records relevant to two key investigations, "the political branches decided to afford the congressional tax committees a special role." J.A. 99; *see* Yin, *supra*, at 120-22 (identifying the 1924 Revenue Act as the first precursor of Section 6103(f)(1)). The first of these investigations concerned those suspected of involvement in the Teapot Dome Scandal, an incident in which government officials accepted bribes in exchange for leasing public oil fields to private interests. *See* Yin, *supra*, at 121. Congress sought the tax returns of the officials who allegedly took part in that scandal, but it lacked direct access to that information; instead, President Coolidge had to authorize the release of the returns. *Id.* Although the president ultimately granted that authorization, "this experience undoubtedly demonstrated to Congress why it should have direct access to the information independent of the President's authority." *Id.*

The second investigation involved a 1924 Senate investigation of the Bureau of Internal Revenue, the predecessor to the IRS. *Id.* That investigation was prompted in part by the Bureau's alleged publication of a senator's tax returns at the direction of the Secretary of the Treasury. *Id.* The investigation of this incident "had been stymied by the inability of the investigating committee to examine tax returns," underscoring Congress's need to access tax records when investigations of alleged misconduct make these records relevant. *Id.*

To overcome these obstacles to the conduct of future investigations, Senator George Norris proposed an amendment to the tax laws that would have made tax returns fully open to the public once again. *See* 65 Cong. Rec. 7692 (1924). The Senate passed that amendment, *id.*, but the House rejected the full publicity proposal and agreed instead to a provision limiting access to tax returns to congressional committees, *see* H.R. 6715, 68th Cong. § 257 (1924). Thus, the Revenue Act of 1924 provided that the House Ways and Means Committee, the Senate Finance Committee, and a "special committee" of Congress "shall have the right to call on the Secretary of the Treasury for, and it shall be his duty to furnish, any data of any character contained in or shown by the returns . . . that may be required by the committee." Revenue Act of 1924, ch. 234, § 257(a), 43 Stat. 253, 293. Two years later, Congress created the Joint Committee on Internal Revenue Taxation and granted it the same right of access to returns enjoyed by the Ways and Means

Committee. Those "committees were given the discretion to determine what tax returns, if any, would be disclosed to the public." Yin, *supra*, at 127.

A common sentiment among members of Congress in the debates preceding the 1924 Act's passage was that "[t]he existing secrecy provisions in the law should be properly amended" so that "[t]he insurmountable wall of secrecy now existing in the law would [no longer] block any . . . proposed investigation [by Congress]." 65 Cong. Rec. 2614 (1924) (Rep. Jeffers). Even those who believed in more limited disclosure laws "agree[d] . . . that there should be some congressional method found to examine these returns" so as not to "restrict the power of Congress to investigate false returns." *Id.* at 2959 (statement of Rep. Hawes). The Revenue Act therefore reflected Congress's recognition that the effective operation of critical investigations required that certain congressional committees, including the House Ways and Means Committee, have broad and direct access to individuals' tax returns.

Fifty years later, the pendulum swung back in favor of greater protection of tax information, but Congress continued to recognize the vital importance of allowing its tax committees special access to that information. In the mid-1970s, concerns about confidentiality arose when President Nixon and the Secretary of the Treasury repeatedly shared individuals' tax information with members of the executive branch, even though the Revenue Act had allowed only certain congressional committees to access tax returns. *See* J.A. 101. For instance,

President Nixon issued two executive orders authorizing the Department of Agriculture to inspect the tax returns of all farmers, "spark[ing] public and congressional outrage." Yin, *supra*, at 130; *see also Confidentiality of Tax Return Information: Hearing Before H. Comm. on Ways & Means*, 94th Cong. 90 (1976) (hereinafter "*Confidentiality Hearing*") (statement of Rep. Litton) (expressing concerns after Nixon's executive orders that "the returns of other Americans are equally susceptible to mass inspection"). Members of Congress began to question "whether the extent of actual and potential disclosure of returns and return information to other Federal and State agencies for non-tax purposes breached a reasonable expectation of privacy." Staff of the Joint Comm. on Taxation, 94th Cong., *General Explanation of the Tax Reform Act of 1976*, JCS-33-76, at 314 (1976) (hereinafter "*General Explanation*"). In response, Congress reformed the Internal Revenue Code by passing the Tax Reform Act of 1976, which sought to "balance Government's need for tax return information with the citizens' right of privacy." 122 Cong. Rec. 24013 (1976) (statement of Sen. Dole); *see Confidentiality Hearing* at 154 (noting that "inspection [by the congressional committees] presumably is needed either as part of [congressional committees'] tax oversight function or as an aid in the drafting of tax legislation" and "recommend[ing] that the existing statutory authority . . . for disclosure . . . to [these committees] be continued"). Among other things, the new law limited the executive branch's access

to individuals' tax returns and guaranteed that "[r]eturns" and "return information" "shall be confidential, . . . except as authorized by this title." 26 U.S.C. § 6103(a).

As OLC pointed out, Section 6103(f)(1) presents one of those exceptions, which, like its predecessors since 1924, "singles out the tax committees for special treatment and enhanced access to tax information." J.A. 102 (citing *General Explanation* at 317-18; S. Rep. No. 94-938, at 320 (1976)). Moreover, as the July 2021 OLC Opinion observed, "[o]ne notable change from earlier iterations of the law is that tax committee requests for tax information must be submitted in writing by the chairman of one of the committees. *Id.* at 103 (comparing 26 U.S.C. § 6103(f)(1) (2018) with 26 U.S.C. § 6103(d)(1) (1970)). The "apparent purpose" of the requirement that "the highest-ranking official of a particular governmental unit [must] pass upon and approve any request for a disclosure" is "to ensure that disclosure is warranted." *Congressional Access to Tax Returns—26 U.S.C. § 6103(f)*, 1 Op. O.L.C. 85, 89 (1977). Thus, as OLC explained, Section 6103(f)(1) "continues the longstanding practice of according the tax committees unique and especially broad access to tax information." J.A. 103; *see id.* at 118 ("The political branches have repeatedly determined over the course of the last century that the congressional tax committees should have a statutorily unlimited right of access to tax information—an authority predicated, at least in part, upon the judgment that those committees are uniquely suited to 'assure explicit, deliberate, and responsible

Congressional attention to the use made by its members and committees of individual tax returns.'" (quoting *Confidentiality Hearing* at 154)).

Since the passage of the 1976 statute, "the tax committees have occasionally relied upon section 6103(f)(1) to inspect and obtain tax returns and (more frequently) information about the IRS's treatment of tax returns," and "before 2019, Treasury had never before denied such a section 6103(f)(1) request." *Id.* at 105. Here, the Committee is plainly entitled to the records that it is seeking under Section 6103(f)(1), as the next Section explains.

III. The Committee Is Entitled to the Records that It Is Seeking.

A. Permitting Congress to Access the Tax Records of a Former President Does Not Raise the Same Separation of Powers Concerns as Accessing the Records of a Sitting President.

Trump and his businesses argue that because the Chairman's request "implicates the separation of powers," this Court should apply the test the Supreme Court crafted in *Mazars*. Appellants' Br. 25. The Supreme Court crafted that 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)). The Court reasoned that unique concerns apply when Congress subpoenas the records of a sitting president and that courts should therefore "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 related to 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 records request is not a sitting president, the request 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 the sitting president, 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 request is no longer in office, there is no danger that it will transform the "established practice of the political branches," *id.*, with respect to congressional information requests of the executive branch.

Indeed, the Supreme Court has long recognized that the incumbent administration's position is an important consideration in assessing separation of powers claims made by former presidents. For example, in upholding a statute that required the preservation of presidential materials against former president Nixon's separation of powers challenge, the Court concluded that the proper inquiry "focuses on the extent to which" an alleged intrusion on the separation of powers "prevents the Executive Branch from accomplishing its constitutionally assigned function." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977). And it is the incumbent president, the Court explained, who is "vitally concerned with and in the best position to assess the present and future needs of the Executive Branch." *Id.* at 449. Therefore, the fact that the incumbent administration does not support a former president's separation of powers claim necessarily "detracts from the weight" of that argument. *Id.*; *id.* at 441 (noting that "[n]either President Ford nor President Carter supports this claim").

This Court recently applied that precedent in a case concerning a congressional committee's request for Trump's presidential records as part of its investigation into the January 6 attack on the Capitol. There, this Court observed not only that any separation of powers concerns raised by the request "necessarily have less traction when the request is for records from a former administration," but also that such concerns "have less salience when the Political Branches are in

agreement." *Trump v. Thompson*, 20 F.4th 10, 41 (D.C. Cir. 2021). Indeed, this Court concluded that if it allowed Trump to block disclosure of the requested records, it would in fact "start an interbranch conflict that the President and Congress have averted." *Id.* at 32-33. So too here. Chairman Neal has now twice requested the tax returns of Trump and his businesses, and upon receiving the 2021 request, the Treasury Department sought the advice of OLC, which explained in a carefully-reasoned opinion why it should comply with the request. *See generally* J.A. 95-133 (2021 OLC Opinion). In heeding that advice, the incumbent administration has avoided a standoff between the political branches, and there is no reason for this Court to "instigate an interbranch dispute" where now there is none. *Thompson*, 10 F.4th at 37.

B. The Chairman'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 "inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes." *Watkins*, 354 U.S. at 187. This Court therefore must uphold the Committee's requests for documents so long as they are 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 Committee's requests plainly satisfy this standard.

As Chairman Neal explained in the Committee's April 2019 request for then-President Trump's individual tax returns and those of eight of his businesses for tax years 2013 through 2018, the Committee sought that information because it was "considering legislative proposals and conducting oversight related to our Federal tax laws, including, but not limited to, the extent to which the IRS audits and enforces the Federal tax laws against a President." J.A. 46. Reflecting the potential need for new legislation, the Chairman's June 2021 request for tax information from 2015 to 2020 elaborated on the Committee's particular interest in former President Trump's tax returns, emphasizing that, among previous presidents, "Donald J. Trump is a unique taxpayer" because, "[u]nlike his predecessors, he controlled hundreds of businesses throughout his term [in office], raising concerns about financial conflicts of interest that might have affected the administration of laws, including the tax laws." J.A. 90. Thus, Trump's tax records will inform Congress's assessment of whether stronger conflicts of interest laws are necessary to account for the possibility of future presidents with similarly large business holdings.

The Committee indicated that it also needed the requested tax information to perform critical oversight functions, as Trump "also represented that he had been under continuous audit by the IRS prior to and during his Presidency, . . . and routinely complained in public statements about alleged unfair treatment by the IRS." *Id.* Thus, the Committee explained that Trump's tax information "[is] not

only instructive—but indispensable—to the Committee's inquiry into the mandatory audit program." *Id.* The Committee also stated that "former President Trump's tax returns could reveal hidden business entanglements raising tax law and other issues, including conflicts of interest, affecting proper execution of the former President's responsibilities," and that "[a]n independent examination might also show foreign financial influences on former President Trump that could inform relevant congressional legislation." *Id.* In short, the Committee's requests made clear that they sought the requested tax information for legitimate legislative reasons: to investigate the efficacy of current tax laws and assess the need for any amendments, extensions, or new legislation.

Trump is therefore wrong to assert that the real purpose for the request is "to expose the President's tax returns for the sake of exposure." Appellants' Br. 9. In fact, the Chairman's June 2021 request specifically stated that it would be "wrong" to suggest that "the true and sole purpose of the Committee's inquiry here is to expose former President Trump's tax returns." J.A. 93.

The Chairman's stated reasons for the requests are also entitled to a presumption of good faith and regularity, which the Supreme Court typically affords to "the official acts of public officers." *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926); *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *cf. Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2579-80 (2019)

(explaining that executive agencies are entitled to a presumption of regularity, reflecting respect for a coordinate branch of government whose officers take an oath to support the Constitution); *Reno v. Am.-Arab Discrim. Comm.*, 525 U.S. 471, 489 (1999) (requiring "clear evidence" to displace the presumption of regularity afforded to a federal prosecutor (quoting *United States v. Armstrong*, 517 U.S. 456, 465 (1996)). The Supreme Court also generally presumes that acts of Congress are constitutional, *see Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 537-38 (2012) (Roberts, C.J.), exemplifying the trust that courts ordinarily place in members of Congress to act in good faith and consistent with their oaths of office. Given the numerous legitimate legislative reasons the Committee provided for its requests, it is far from "obvious" that those requests "exceeded the bounds of legislative power," *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951), as would be necessary to overcome the requests' presumption of good faith and regularity.

* * *

In sum, the Chairman's requests serve legitimate legislative purposes and are wholly consistent with Congress's plan in passing Section 6103(f)(1) to afford certain congressional committees broad access to tax information. 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 power to investigate.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court.

Respectfully submitted,

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Dated: February 7, 2022

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 6,012 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 7th day of February, 2022.

/s/ Brianne J. Gorod
Brianne J. Gorod

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February, 2022, 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: February 7, 2022

/s/ Brianne J. Gorod
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