Nos. 19-635, 19-715, 19-760

In the Supreme Court of the United States

DONALD J. TRUMP, President of the United States,

Petitioner,

v.

CYRUS R. VANCE, JR., in his official capacity as District Attorney of the County of New York, *et al.*,

Respondents.

DONALD J. TRUMP, *et al.*,

Petitioners,

v.

MAZARS USA, LLP, *et al.*,

Respondents.

DONALD J. TRUMP, *et al.*,

Petitioners,

v.

DEUTSCHE BANK AG, *et al.*,

Respondents.

On Writs of Certiorari to the U.S. Courts of Appeals for the Second and District of Columbia Circuits

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AMICUS CURIAE BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus Eagle Forum Education & Legal Defense Fund[1] ("EFELDF") is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. While not involved in electoral politics, EFELDF supports many of the issues advanced by President Trump. The subpoenas challenged here are part of a broader campaign of harassment by the President's political opponents with the goal of sidetracking his effectiveness and degrading the ability to advance his agenda. For these reasons, EFELDF has direct and vital interests in the questions presented.

STATEMENT OF THE CASE

The President challenges third-party subpoenas that the House Intelligence Committee and the House Oversight Committee (collectively, the "Committees") issued to accountants and financial companies who work either for him in his personal capacity or his family businesses. In addition, the District Attorney for New York County has issued similar subpoenas as part of a criminal investigation before a state-court grand jury. The President and related petitioners have filed opening briefs in the two cases (hereinafter, the "House Pets.' Opening Br." and the "Vance Pet.'s Opening Br." respectively). *Amicus* EFELDF files this brief in both the House and Vance cases.

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[1] *Amicus* files this brief pursuant to the parties' blanket consents lodged with the Clerk. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity — other than *amicus* and its counsel — contributed monetarily to preparing or submitting the brief.

EFELDF adopts the petitioners' statement of the facts. Vance Pet.'s Opening Br. at 1-8; House Pets.' Opening Br. at 2-8. Although the lower courts in these related matters sought to treat each attempt at gaining access to the Presidents' personal records as *sui generis*, these efforts all are of a piece. Indeed, the President's political opponents have long sought to inquire into his finances, especially his tax returns. The President's political opponents in legislative bodies and executive offices held or occupied by the opposition political party have pursued him with all imaginable means short of formally declaring war. *Compare* Vance Pet.'s Opening Br. at 1-8 *with* U.S. CONST. art. I, § 8, cl. 11. For example, quite apart from these efforts to acquire those records via subpoenas, California's Legislature recently enacted – and California's Supreme Court recently struck down – a requirement to disclose tax returns as a condition for appearing on ballots in California's presidential primaries, a bill "prompted by Trump's break with the customary practice" of presidential candidates' disclosing their tax returns. *Patterson v. Padilla*, 8 Cal. 5th 220, 227, 451 P.3d 1171, 1176 (Cal. 2019) (citing legislative history of bill).[2] As the opening briefs explain, these efforts began with the President's election and have continued throughout his presidency.

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[2] Although the California Supreme Court relied on state-law grounds, *id.*, a federal court had enjoined the California law on a variety of federal constitutional grounds before the state court's decision mooted the federal challenge. *Griffin v. Padilla*, 408 F. Supp. 3d 1169 (E.D. Cal. 2019), *vacated as moot*, 2019 U.S. App. LEXIS 38890 (9th Cir. Dec. 16, 2019).

SUMMARY OF ARGUMENT

Under the canon of constitutional avoidance, this Court should rely on non-constitutional grounds to avoid the constitutional questions of the House's power for these types of subpoenas (Section I.A), which the Court can do here because the House rules do not authorize the Committees to issue subpoenas against the President (Section I.B.1). Alternatively, if the House has delegated its full subpoena authority to the Committees, this Court should hold that the House's implied authority to issue subpoenas extends only to legislative subpoenas, not to law-enforcement subpoenas (Section I.B.2).

Under the separation-of-powers and federalism facets of the Constitution, neither federal legislators like the Committees (Section II.A) nor state or local law enforcers like Mr. Vance (Section II.B) can bring criminal charges or process against sitting Presidents. Instead, impeachment is the only option, and these subpoenas are not impeachment-related subpoenas. Nor are the Committees' subpoenas proper legislative subpoenas (Section III). The subpoenas' boilerplate claims of legislative purpose are obviously pretextual (Section III.A), and the lack of historical precedent for this escalation – which is obviously political – should guide this Court to extricate the federal courts from this type of political fight by deeming such subpoenas unenforceable in court and thus purely a political question for the political branches to resolve bilaterally (Section III.B).

ARGUMENT

I. THE LEGISLATIVE SUBPOENAS ARE OUTSIDE THE COMMITTEES' POWER.

Given the divisive nature of the Committees' vendettas against President Trump, *amicus* EFELDF respectfully submits that a unanimous decision on a narrow procedural ground would be better for the Nation than a close decision on substantive authority. For example, before determining the constitutional powers of the House, this Court should first consider whether the House delegated those powers to the Committees:

> This issue – whether the committee was authorized to exact the information which the witness withheld – must first be settled before we may consider whether Congress had the power to confer upon the committee the authority which it claimed.

U.S. v. Rumely, 345 U.S. 41, 42-43 (1953). Holding the Committees to have failed to "do their homework" may be embarrassing for some of the members involved, but it would not threaten the constitutional fabric or draw this Court into intra-branch political infighting. For that reason, *amicus* EFELDF starts where the courts below and the petitioners ended: the authority of the House Committees. *See* House Pets.' Opening Br. at 55. More importantly, this Court should start there and can end there.

A. The canon of constitutional avoidance compels this Court to resolve these issues on non-constitutional grounds.

Under the canon of constitutional avoidance, a court reviewing congressional action as susceptible to

a reading that would violate the Constitution should avoid that reading if a plausible alternate reading would avoid the constitutional violation. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17-18 (2013). Whenever an alternate reading is "fairly possible" courts "are *obligated* to construe the statute to avoid such problems." *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (interior quotations omitted, emphasis added). Indeed, "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality … unless such adjudication is unavoidable." *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). If this Court can reject the congressional subpoenas as unauthorized by the House rules, this Court should quash the subpoenas on that basis alone.

While the avoidance canon alone should guide this Court to reject these subpoenas, pragmatism also counsels to send these subpoenas back to the House. When litigation has proceeded this far, the Court can decide to allow amended pleadings to cure defects to avoid the "needless waste" of starting over in district court. *Mullaney v. Anderson,* 342 U.S. 415, 416-17 (1952). Here, for example, the whole House could renew the subpoenas or could amend its rules to allow renewed subpoenas by the Committees. If either of those events were to occur, perhaps avoidance of the subpoenas' merits now would merely waste time. But it is also possible that the entire House would not back efforts to expand the scope of the Committees' powers with an election so close and the number of the House

majority's votes that come from districts more favorable to the President than the Committee chairs' districts. In other words, a mere temporary setback for the Committees could prove permanent, thereby avoiding the difficult questions presented here.

B. The Committees lack the authority to subpoena these presidential records.

Assuming *arguendo* that, as an entity, the House of Representatives has the power to issue subpoenas does not mean that each House committee has such power: The House must delegate authority to entities that would act in the House's name.

Congress has no express power to compel testimony or issue such subpoenas:

> But there is no provision expressly investing either house with power to make investigations and exact testimony to the end that it may exercise its legislative function advisedly and effectively. So the question arises whether this power is so far incidental to the legislative function as to be implied.

McGrain v. Daugherty, 273 U.S. 135, 161 (1927). The Court answered that question affirmatively: "the power of inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function." *Id.* at 174. That the House has investigative powers, however, does not mean that *each committee* has such powers or that the House has power for *these subpoenas*.

1. **The Committees lack authority for the subpoenas under House rules.**

The House's committees do not automatically assume the House's subpoena powers, but rather must exercise those powers as delegates, subject to the conditions of the delegation:

> There is no doubt that the subpoena power may be exercised on behalf of Congress by either House and that the subpoenas issued by committees have the same authority as if they were issued by the entire House of Congress from which the committee is drawn. To issue a valid subpoena, however, a committee or subcommittee must conform strictly to the resolution establishing its investigatory powers, and only those parties expressly authorized to sign subpoenas may do so validly.

Exxon Corp. v. Fed'l Trade Comm'n, 589 F.2d 582, 592 (D.C. Cir. 1978) (citations omitted); *Watkins v. U.S.*, 354 U.S. 178, 201 (1957) ("essential premise in this situation is that the House or Senate shall have instructed the committee members on what they are to do with the power delegated to them"); *cf. Raines v. Byrd*, 521 U.S. 811, 820-22 (1997) (subset of members lack the power of the institution). Even if the House had authority to issue these subpoenas, the Committees did not.

As the petitioners explain, the House rules do not authorize – or even discuss – issuing subpoenas to the President. House Pets.' Opening Br. at 56-57. Indeed, the closest that the rules come is to authorize a single committee (the House Oversight Committee) to issue

subpoenas to the Executive Office of the President. *Id.* at 56 (*quoting* House Rule X, cl. 3(i)). That presents two problems for the Committees. First, as the petitioners explain, the Executive Office of the President ("EOP") does not include either the Office of the President or the President himself, *id.*, and there is no clear statement of an intent to intrude upon another branch. *Id.* at 56-57. Second, by expressly listing the wider EOP, the House rules should be read as *excluding* the narrower Office of the President and *a fortiorari* the President himself. *Kissinger v. Reporters Comm. for Freedom of Press*, 445 U.S. 136, 156 (1980) (excluding the "Office of the President" and "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President" from a statutory definition of "Executive Office of the President"); *Ford v. U.S.*, 273 U.S. 593, 611 (1927) (discussing the *expressio unius est exclusio alterius* canon). At a minimum, the rules suggest only the Oversight Committee has the authority to issue subpoenas to the EOP; the better reading is that *no committee whatsoever* has a pre-existing authority to issue subpoenas to either the Office of the President or the President himself.[3]

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[3] As petitioners explain, the House's after-the-fact effort to cure defects in the subpoenas by a clarifying resolution cures nothing. *See* House Pets.' Opening Br. at 62-63. Even assuming *arguendo* that retroactive amendments could take place, the House stands by its original rule and purports to "clarify" a new meaning to the rules.

2. <u>The House lacks authority for these subpoenas under the Constitution.</u>

Because this Court has implied the congressional subpoena authority from the legislative function, this Court should limit that authority to subpoenas issued in support of legislative functions. *See* House Pets.' Opening Br. at 32-33 (collecting cases). As explained in the next two sections, the House lacks authority to issue law-enforcement subpoenas because the House is not a law-enforcement agency, and the House lacks authority for these subpoenas here because the House lacks a *bona fide* legislative purpose. *See* Sections II-III, *infra*. Classifying the Committees' subpoenas may help determine the reason that the subpoenas are void but they are void in any event.

However this Court characterizes the subpoenas – *e.g.*, as a law-enforcement effort masquerading as a legislative one or simply as an opposition-research effort for political purposes – they raise constitutional concerns. On the one hand, a merely implied power to investigate would be used to circumvent the express power of impeachment. *See* Section II.A, *infra*. On the other hand, the burdens of oppressive subpoenas would be used to debilitate the Presidency. *Nixon v. Fitzgerald*, 457 U.S. 731, 753-56 (1982). This Court need not decide whether the subpoenas cross one or both of those lines. Under the canon of constitutional avoidance, this Court need only decide that the subpoenas raise significant questions. If so, this Court should read the House rules to preclude such interference with the constitutional order. While that would leave the House free to amend its rules to allow such subpoenas, the House may elect not to do so.

II. IMPEACHMENT IS THE ONLY PROCESS THAT A SITTING PRESIDENT CAN FACE ON CRIMINAL ALLEGATIONS.

Sitting presidents cannot be prosecuted in state or federal court; the Constitution's impeachment clauses provide the only basis for criminal action against a President while in office. The subpoenas at issue here have an admitted law-enforcement basis, *see* House Pets.' Opening Br. at 36-45; Vance Pet.'s Opening Br. at 7-8, which is enough for this Court to quash the subpoenas as unenforceable.

A. The House's implied subpoena power cannot displace the Constitution's express impeachment provisions.

Although the British House of Commons had the authority to prosecute, our Framers withheld that power from Congress, providing instead only the power to impeach and remove from office. *See* House Pets.' Opening Br. at 25-26. Although Congress has the implied power to issue subpoenas as part of the legislative process, *see* Section I.B, *supra*, that implied authority does not cover law-enforcement subpoenas because Congress has no law-enforcement authority to which to imply subpoena powers.[4] Constitutionally, then, "congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation." Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO.

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[4] As this Court is likely aware, the House recently impeached the President on unrelated grounds but did not seek to include the information that the Committees' subpoenas seek as part of the impeachment investigation.

L.J. 2133, 2158 (1998). While the subpoenas read like law-enforcement subpoenas, neither the Committees nor the full House have authority for law-enforcement subpoenas.

B. The President is immune from the Vance subpoena and proceedings.

Mr. Vance's hand is weaker than the Committees' hand for two reasons: (1) he cannot cite legislative authority as an alternate basis for his subpoena, *see* Section III, *infra*, and (2) the Supremacy Clause acts against his assertions of authority over the President, in addition to federalism and the separation of powers in the constitutional structure. *Fitzgerald*, 457 U.S. at 749; *see* Vance Pet.'s Opening Br. at 19-39. In defense of his office's investigative powers, Mr. Vance cites several arguments in his brief in opposition ("BIO") to the petition for a writ of *certiorari*. None of his claims have merit.

First, Mr. Vance cites *U.S. v. Nixon*, 418 U.S. 683 (1974), for the proposition that subpoenas can issue against presidents as witnesses (*i.e.*, for evidence in someone else's prosecution), but that is inapposite here because President Trump is clearly a target of Mr. Vance's "John Doe" investigation.

Second, Mr. Vance cites *Clinton v. Jones*, 520 U.S. 681 (1997), which allowed civil litigation (not criminal prosecution) for a President's unofficial conduct, but it applied to federal court (not state court):

> *Clinton v. Jones* indicated that the President is subject to *private* lawsuits to remedy individuals harmed. But the Court's decision does not apply to *criminal* proceedings against

> the President, which seek to enforce *public*, not private, rights.

Kavanaugh, *supra*, 86 GEO. L.J. at 2159 (emphasis in original). The Vance case is thus several steps removed from *Jones*.

Third, Mr. Vance argues that "'[t]he decision to prosecute a criminal case," in contrast to a civil case, "is made by a publicly accountable prosecutor subject to budgetary considerations and under an ethical obligation, not only to win and zealously to advocate for his client but also to serve the cause of justice.'" BIO at 29 (*quoting Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 386 (2004)). Originally, this language comes from this Court's decision in *Berger v. U.S.*, 295 U.S. 78 (1935), and does not apply to county officials like Mr. Vance:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger, 295 U.S. at 88, *overruled on other grounds*, *Stirone v. United States*, 361 U.S. 212 (1960). Neither New York County nor county prosecutors have histories clear of political corruption and abuse of process. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 195 n.11 (2008); *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶¶1-13, 363 Wis. 2d 1, 25-32, 866 N.W.2d 165, 176-80 (Wisc. 2015) (politically motivated and spurious John Doe

investigations by a county prosecutor). Again, the Vance case is at least one step removed from the authority it cites.

Fourth, Mr. Vance disputes the President's federalism argument by appealing to the presumption against preemption *vis-à-vis* the traditional state and local interest that he purports to pursue. BIO at 12. Preemption does not look to the state field at issue (here, prosecutions generally) but to the federal field (here, prosecuting Presidents). *See U.S. v. Locke,* 529 U.S. 89, 107-08 (2000) (concerning state regulation of public health, but analyzed under the narrower *maritime-commerce* field); *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 910 (2000) (applying presumption to "common-law no-airbag suits," not to all tort law); *cf. Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373-74 & n.8 (2000) (declining to address presumption's application to Burma trade sanctions, not to states' discretion to spend state funds). In sum, neither federalism nor any presumption against preemption aids Mr. Vance here.

Fifth, Mr. Vance cites *U.S. v. Armstrong*, 517 U.S. 456, 464 (1996), for the presumption of regularity for local prosecutors:

> The Attorney General and United States Attorneys retain broad discretion to enforce the Nation's criminal laws. They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to take Care that the Laws be faithfully executed. As a result, the presumption of regularity supports their prosecutorial

> decisions and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties. In the ordinary case, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.

Armstrong, 517 U.S. at 464 (citations and interior quotations omitted). Here again, Mr. Vance is several steps removed from the authority he cites, but implicit claims of regularity, ordinary cases, and probable cause warrant this Court's rejection.

This is not truly an "ordinary case" at all. It occurs against a backdrop of elaborate, preposterous efforts to obtain the President's tax returns as an opposition-party totem. *See* Vance Pet.'s Opening Br. at 1-8. And Mr. Vance prepared his subpoena as a "cut-and-paste" job of the Committees' subpoenas. Moreover, when the direct target of his original subpoena prepared a massive response in good faith and disputed whether the original subpoena covered – or could cover – the President's taxes, Mr. Vance did not negotiate in good faith, but issued a new subpoena to third parties. At a minimum, the prosecution did not act "regularly."

Finally, at least some of the alleged crimes in the BIO are absurd. Regardless of what the President's former personal lawyer has said, so-called "hush money" payments cannot violate the Federal Election Campaign Act, 52 U.S.C. §§30101-31046 ("FECA"), when they are self-financed by a candidate to spare personal and family embarrassment. Simply put, the

First Amendment context in which FECA operates required review under strict scrutiny, with the result that this Court has limited FECA to campaign-related expenses and contributions. *Buckley v. Valeo*, 424 U.S. 1, 43-44 & n.52, 75 (1976). At a minimum, this Court should require Mr. Vance to show that probable cause truly exists to proceed with what otherwise appears to be a sham investigation for political purposes.

III. THE CONGRESSIONAL SUBPOENAS LACK ANY LEGITIMATE LEGISLATIVE PURPOSE.

Although the Vance subpoena fails as criminal process against a sitting president, *see* Section II.B, *supra*, the congressional subpoenas purport to further a legislative purpose. The petitioners tackle that conceit, House Pets.' Opening Br. at 45-52, as though it were a *bona fide* argument. This Court need not be so generous or so exhaustive. Instead, this Court should recognize that the Committees' boilerplate text about a legislative purpose is mere pretext.

A. The Committees' claims of a legislative purpose for the subpoenas is pretextual.

While the Committees may warrant deference as part of the legislative branch of government, this Court is "not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S.Ct. 2551, 2575 (2019) (internal quotations omitted). *Amicus* EFELDF respectfully submits that this Court can reject the purported legislative purpose as pretextual.

Quite simply, no serious consideration is required to reject the congressional subpoenas out of hand. This Court should disregard the subpoenas'

boilerplate claim to a legislative purpose, just as courts routinely ignore agency memoranda that disclaim any binding effect but nonetheless bind agency discretion. *See*, *e.g.*, *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1485 (1992) (referring to such disclaimers as "a charade, intended to keep the proceduralizing courts at bay"). The Committees' empty claims of legislative purpose cannot establish an actual legislative purpose. House Pets.' Opening Br. at 35-55. The next subsection proposes criteria that the Court could consider as bases for rejecting the congressional subpoenas *if* – and it is a big if – further reason is required.

B. The lack of historical precedent should guide this Court to reject these intra-branch disputes as political questions.

As petitioners explain, the lack of precedent for a subpoena like the disputed subpoenas weighs against extending the House's *implied* power to subpoena to allow the sensitive intra-branch friction that these subpoenas cause. *See* Section I.B, *supra*. As part of that history, the D.C. Circuit looked to an early dispute between President Washington and the 1st House. House Pet. App. 12a-13a. *Amicus* EFELF respectfully submits that the lower court did not appreciate the import of that early dispute. There, the House demanded documents, the President resisted, and the House accommodated the President's resistance with a revised request. *See* House Pets.' Opening Br. at 28-29 (*citing* 23 The Papers of Thomas Jefferson, *March 31, 1792*, at 261-62 (Charles T.

Cullen, ed. 1990)). Although this 116th House likely does not respect *this* President as much as the 1st House respected *that* President, this Court should see only to the same presidential *office*.

The political branches can resolve these squabbles without courts' involvement in most instances. If the stakes are high enough, Congress has the power of the purse, and the President has the veto power. If a given matter presented issues of criminal activity that could support something other than a fishing expedition, the courts potentially could involve themselves. *Nixon*, 418 U.S. at 710. Similarly, if a matter involved a President's criminal activity, impeachment would enable a court to enforce a subpoena properly issued pursuant to the House's powers. *See* Section II, *supra*. Short of those easy cases, this Court should simply reject these intra-branch tugs of war as political questions. *U.S. v. Windsor*, 570 U.S. 744, 787 (2013) (Scalia, J., dissenting). The alternative – to allow a mere committee of one house of Congress to harass a President – is not going to end here or end well. For example, in the near term, it is entirely possible that former Vice President Biden could win the 2020 election with the Republicans either holding or taking one or both houses of Congress in either 2020 or 2022. With House inquiries into the alleged financial crimes of Mr. Biden's family as little as two years off, this Court should opt out of this process now. Whether in 2022 or at any time in our further future, precedent established here to allow intrusive – and purely political – subpoenas will weaken the Nation.

To be clear, *these* actions to enjoin enforcing or complying with the Committees' subpoenas are

justiciable. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 579-82 (1985) (action to protect confidential information from disclosure satisfies Article III). It is the underlying congressional subpoenas that should be held to constitute *unenforceable requests* – like the 1st House's response to President Washington – that could never form the basis for third parties like the accounting and financial firms here to release private documents.

CONCLUSION

For the foregoing reasons, and those argued by the petitioners, the Court should reverse the judgments of the D.C. Circuit and Second Circuit and remand with instructions for the lower courts to enter injunctive relief in favor of the petitioners.

February 3, 2020 Respectfully submitted,

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