No. 19-760

IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
Petitioners,

v.

DEUTSCHE BANK AG, *et al.*
Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF FINANCIAL INVESTIGATION AND MONEY LAUNDERING EXPERTS AS AMICI CURIAE IN SUPPORT OF RESPONDENT COMMITTEES OF THE U.S. HOUSE OF REPRESENTATIVES

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STATEMENT OF INTEREST[1]

Amici are law professors, former government attorneys, and staff of non-governmental public interest organizations whose research and publications, professional experiences, and/or investigative efforts reflect their expertise in financial investigation and legal and regulatory enforcement regimes in U.S. and global finance, including systems designed to protect the U.S. marketplace from infiltration by criminally-derived proceeds. Amici have no financial stake in this litigation, but have an interest, consonant with their professional and/or academic expertise, in affirming Congress's broad power to investigate activities that may reveal limitations in the current legal and regulatory enforcement regime against money laundering and thereby inform its efforts to better protect the U.S. financial sector and marketplace through legislation.

Amici further recognize that the potential adverse influence of criminally-derived proceeds of foreign origin, and the accompanying threat of foreign entanglements, over persons of influence in the United States—in particular, the President—are equally compelling and complementary concerns that Congress is fully empowered to investigate through its subpoena power.

Amici accordingly submit this brief to address

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[1] The parties consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

issues specifically relevant to the subpoenas issued to Deutsche Bank AG (Deutsche Bank) and Capital One Financial Corporation (Capital One) (together, the "bank subpoenas") by the Committee on Financial Services of the U.S. House of Representatives ("Financial Services Committee") and the Permanent Select Committee on Intelligence of the U.S. House of Representatives (together, the "Committees"). A full list of amici, who (except where otherwise noted) joined this brief as individuals and not representatives of any institutions with which they are affiliated, is set forth in the Appendix to this brief.

SUMMARY OF ARGUMENT

Money laundering is a disruptive threat to the economy because it allows large illegitimately-obtained sums of cash to enter and skew the marketplace for things, such as real estate, that criminals may use to shield their ill-gotten proceeds. Concern over money laundering may be compounded when such proceeds originate from overseas, raising the threat of foreign persons' and entities' sway over U.S. companies and persons of influence and possible corruption of the U.S. marketplace.

As efforts to launder money in the United States have evolved and become more sophisticated, Congress has enacted new legislation—aided and informed by investigation, including compulsory process—to keep pace. Over many years, Congress has expressed bipartisan concern over gaps and "loopholes" in the existing anti-money laundering (AML) regime that continue to allow criminally-derived proceeds of foreign origin, in particular, to

infiltrate the U.S. economy.[2]

Accordingly, two of the specific areas of concern that Congress has identified as appropriate for legislation are: (i) the lack of controls and monitoring in the real estate industry, especially the high-end luxury market, that allows individuals (particularly foreign criminals and other illicit actors) to purchase properties without disclosing their identities, and (ii) the ease with which shell corporations can be created and used, particularly in the United States, to shield personal identities and make criminally-derived proceeds impossible to trace.[3]

The bank subpoenas at issue here seek information directly pertinent to these stated legislative concerns. For decades, the Trump family has been in the business of licensing its name to luxury residential buildings and vacation resorts to promote and earn income from the sales of residential units and interests in those ventures. Public reporting by news media and non-governmental organizations indicates that luxury real estate in the United States has become a particularly appealing target for money launderers to shield their assets, precisely because of loopholes in the U.S. legal and enforcement regime that allow purchasers' identities to remain hidden. Some of that reporting further indicates that Trump properties, in particular, have been sought out for this purpose by illicit actors from Russia and other

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[2] *See, e.g.,* 165 Cong. Rec. H2697-2701 (daily ed. Mar. 13, 2019).

[3] *Id.*

countries. This information warrants additional concern by Congress over potential foreign entanglements and possible corrupt influence in the U.S. financial and governmental spheres by foreign criminal elements.

Petitioners claim that the "lack of historical precedent" for the bank subpoenas, to the extent they seek the private financial records of the President, his family, and their related business entities, "casts serious doubt" on their validity. (Pet. Br. at 32). In fact, there is nothing unusual about Congressional investigations of the financial affairs of Presidents and their family members. (Resp. Br. at 7-12). What is unusual is for the President and his family to own and manage a business before and after his taking office that credible reports have indicated may be associated with money laundering. And it is equally unusual for the President to have consistently demonstrated his resolute opposition to the disclosure of financial information relevant to Congress's concerns. The uniqueness of the present factual context only adds urgency to upholding Congress's well-established and legitimate investigative power here.

The bank subpoenas are an extension of Congress's continuing efforts, consistent with its plenary power to regulate commerce, to shield the U.S. marketplace from the negative effects of criminal activity and corruption through foreign influences and entanglements. Beginning with the Bank Secrecy Act of 1970, and continuing through the ensuing decades, Congress has enacted statutes designed to reduce the profitability and reach of

organized crime by, *inter alia*, making it more difficult to hide and keep the proceeds from criminal activity. To do this, Congress has repeatedly sought to stem the funneling of criminally-derived proceeds into the legitimate stream of commerce through the banking, real estate, or small business industries, among others.

No law that this or any other Court has articulated requires Congress to meet any judicially-devised test of relevance or importance in choosing what information to seek by subpoena. The bank subpoenas represent a legitimate and pressing line of legislative inquiry that should be allowed to proceed.

ARGUMENT

I. THE BANK SUBPOENAS HAVE A LEGISLATIVE PURPOSE CONSISTENT WITH CONGRESS'S HISTORICAL INTEREST IN PROTECTING THE U.S. MARKETPLACE FROM CORRUPT INFLUENCE.

Petitioners' argument that the bank subpoenas are serving an impermissible "law enforcement" purpose (Pet. Br. at 36) is both self-contradictory and contrary to law. Any effective investigation into possible gaps or weaknesses in the laws designed to prevent the infiltration of criminally-derived proceeds into the U.S. economy must seek to expose undesirable activity of one sort or another, including evasion of currently applicable laws. *See* JA297a-298a. To deny that would be to deny Congress the opportunity to carry out its

legislative function through pertinent inquiry.

To Petitioners, however, the pertinence of the information sought by the bank subpoenas (including requests intended to ferret out possible wrongdoing or evasions of law) is the very thing that invalidates the bank subpoenas' legislative purpose. That is not the law—and it cannot be, for Congress to fulfill its legislative function.

A. Congress's power to investigate, including through compulsory process, is broad and not constrained by the possibility it may uncover wrongdoing.

Congress's power to conduct investigations is "broad" and "inherent in the legislative process." *Watkins v. United States*, 354 U.S. 178, 187 (1957). Importantly, that investigatory power "encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes," and may also "include[] surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them." *Id.* "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." *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

The mere possibility that an investigation may reveal violations of law, therefore, does nothing to invalidate its legitimate legislative purpose. *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.") (citation omitted). Indeed, "the legitimacy of a congressional inquiry [is not] to be defined by what it produces. . . . To be a valid legislative inquiry there need be no predictable end result." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 509 (1975).[4]

Congress accordingly may investigate whether laws are being evaded or broken, where "the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit." *McGrain*, 273 U.S. at 177. In fact, this Court has held that the scope of Congress's power of inquiry "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) (emphasis added).

Accordingly, it is not necessary that Congress explicitly articulate its legislative aim at the outset of an investigation; a facially rational legislative purpose, based on the facts and circumstances giving rise to that investigation, is sufficient to be considered within Congress's expansive constitutional authority. *McSurely v. McClellan*, 521 F.2d 1024, 1038, 1040 (D.C. Cir. 1975). That remains true even if the investigation is directed "toward a particular individual, organization, or

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[4] *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.").

institution." *Id.* Where Congress's potential legislative aim behind an investigation can fairly be inferred, courts are ordinarily satisfied. *Eastland*, 421 U.S. at 509 ("The wisdom of congressional approach or methodology is not open to judicial veto.").

While it is not necessary that Congress explicitly articulate its legislative purpose for an investigation,[5] where—as here—Congress has explicitly done so, its motives may not be questioned. As the Court stated in *Eastland*, "[o]ur cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it."[6] *Id.* at 508.

Additionally, compulsory process in the form of subpoenas "has long been held to be a legitimate use by Congress of its power to investigate." *Eastland*, 421 U.S. at 504; *see also McGrain*, 273 U.S. at 174 ("the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."). As the Court stated in

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[5] *See, e.g., McGrain*, 273 U.S. at 178 (holding that though "[a]n express avowal of the object [of the congressional investigation] would have been better. . . in view of the particular subject matter [it] was not indispensable.").

[6] The Court additionally stated, while discussing Congressional immunity under the speech or debate clause (using reasoning that equally applies here), "[i]f the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the Clause, then the Clause simply would not provide the protection historically undergirding it. In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed." 421 U.S. at 508-09 (internal quotation marks omitted).

Eastland:

> The issuance of a subpoena pursuant to an authorized investigation is . . . an indispensable ingredient of lawmaking; without it our recognition that the act of authorizing [an investigation] is protected would be meaningless. To hold that Members of Congress are protected for authorizing an investigation, but not for issuing a subpoena in exercise of that authorization, would be a contradiction denigrating the power granted to Congress in Art. I and would indirectly impair the deliberations of Congress.

Eastland, 421 U.S. at 505 (internal quotations omitted). A congressional subpoena need only be "intended to gather information about a subject on which legislation may be had" in order to have an appropriate legislative purpose. *Id*. at 508.

In the present case, Congress's historical interest in protecting the U.S. marketplace from the corrupting influence of criminally-derived proceeds, combined with Congress's statements of concern for areas of needed improvement in anti-money laundering laws, show that the bank subpoenas have a legitimate legislative purpose.

B. Congress has continually sought to protect the U.S. marketplace from the corrupting influence of criminally-derived proceeds, consistent with its plenary power to regulate commerce.

"The plenary authority of Congress over both interstate and foreign commerce is not open to dispute[.]" *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 46 (1974).[7] Since the passage of the Bank Secrecy Act of 1970 (BSA), that plenary authority has found its expression in numerous congressional efforts to stem, by way of statute, the corrupting influence of criminally-derived proceeds of both foreign and domestic origin on the U.S. marketplace.

Congress enacted each of these statutes after investigating, conducting hearings, and/or otherwise determining that there were issues that required legislative action. These statutes also illustrate how the law has evolved and adapted to changing criminal patterns that threaten the stability of the marketplace—and provide useful context for consideration of the Committees' present efforts to investigate and shore up marketplace protections. In the interest of concision, this section will briefly discuss six of the most significant enactments demonstrating Congress's continuing attention to criminally derived proceeds affecting U.S. interests, through investigation and legislation.

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[7] *See also California Bankers Ass'n,* 416 U.S. at 59 ("The plenary authority of Congress to regulate foreign commerce, and to delegate significant portions of this power to the Executive, is well established.") (citations omitted).

1. **The Bank Secrecy Act.**

Congress enacted the Bank Secrecy Act of 1970 (BSA), 31 U.S.C. §§ 5311 et seq., "following extensive hearings concerning the unavailability of foreign and domestic bank records of customers thought to be engaged in activities entailing criminal or civil liability." *California Bankers Ass'n*, 416 U.S. at 26. Among other things, Congress was concerned about (i) "a serious and widespread use of foreign financial institutions, located in jurisdictions with strict laws of secrecy as to bank activity, for the purpose of violating or evading domestic criminal, tax, and regulatory enactments," and (ii) the "heavy utilization of [the U.S.] domestic banking system by the minions of organized crime . . . ." *Id.* at 27, 30.

To combat these threats, the BSA accordingly granted the Secretary of the Treasury an "impressive sweep of . . . authority" to prescribe certain bank recordkeeping and reporting requirements, including the "copying and retention of certain negotiable instruments by the bank upon which they were drawn" in order to "facilitate the detection and apprehension of participants in . . . criminal enterprises." *Id.* at 46-47. Precisely because of its broad plenary authority in this area, Congress "was not limited to any one particular approach to effectuate its concern that negotiable instruments moving in the channels of [interstate and foreign] commerce were significantly aiding criminal enterprise." *Id.* at 46.

Affirming the constitutionality of the BSA several years after its passage, the Court observed that the mere fact that the BSA manifested "a

concern for the enforcement of the criminal law does not cast any generalized pall of constitutional suspicion over it," stating:

> We do not think it is strange or irrational that Congress, having its attention called to what appeared to be serious and organized efforts to avoid detection of criminal activity, should have legislated to rectify the situation. *We have no doubt that Congress, in the sphere of its legislative authority, may just as properly address itself to the effective enforcement of criminal laws which it has previously enacted as to the enactment of those laws in the first instance.*

Id. at 77 (emphasis added).

In other words, Congress did not overstep its authority, in the Court's view, when it evinced a concern over lack of enforcement and/or avoidance of existing criminal laws in the course of developing and passing the BSA.

2. **The Money Laundering Control Act of 1986.**

Sixteen years later, Congress passed the Money Laundering Control Act of 1986 (MLA).[8] Codified at 18 U.S.C. §§ 1956 and 1957, the MLA prohibits the laundering of the proceeds of more than 200 federal, state, and foreign offenses that are

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[8] Pub. L. No. 99-570, Title I, §§ 1351-1352, 100 Stat. 3207, 3207-18 - 3207-21 (1986) (codified as amended at 18 U.S.C. §§ 1956 & 1957).

defined as "Specified Unlawful Activities" (SUAs).[9] 18 U.S.C. §§ 1956 & 1957. The SUAs include federal mail, wire, and bank fraud; all RICO[10] predicate crimes; most state common law and statutory violent crimes; and numerous others. *Id.* § 1956(c)(7).

The House Report accompanying the MLA defines money laundering as:

> [t]he process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate. In other words, laundering involves the hiding of the paper trail that connects income or money with a person in order for such person to evade the payment of taxes, avoid prosecution, or obviate any forfeiture of his illegal drug income or assets. . . .[11]

What prompted Congress's interest in and enactment of the MLA was the recognition that at that time, no federal criminal statute directly criminalized money laundering. As a Presidential commission that investigated money laundering put it,

> [t]he money launderer who complies with the recordkeeping and reporting requirements of

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[9] Stefan D. Cassella et al., *Federal Money Laundering: Crimes and Forfeitures*, §1, at 4-5 (2d ed. 2020).

[10] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq.

[11] H.R. Rep. No. 99-746, at 16 (1986) (internal quotation marks omitted).

> the [Bank Secrecy] Act and the regulations by completing [Currency Transaction Reports] and other forms, as money launderers have frequently done in the past, can operate with virtual impunity, unless and until it can be proved that the launderer has violated another Federal statute.

PRESIDENT'S COMM'N ON ORGANIZED CRIME, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING 61 (1984). Moreover, Congress recognized that by the mid-1980s, the volume and sophistication of money laundering had vastly increased:

> [T]here is more money being laundered than ever before, involving more people, and the schemes to wash dirty money are now often so sophisticated that it is not unusual to find an intricate web of domestic and foreign bank accounts, dummy corporations and other business entities through which funds are moved, almost instantaneously, by means of electronic transfers.[12]

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[12] One longstanding technique for both money laundering and evading the reporting requirements of the BSA is to pass off proceeds of one family member for that of another, particularly that of a child or spouse. *See, e.g.*, *United States v. Hall*, 434 F.3d 42, 53 (1st Cir. 2006); *United States v. Shepard*, 396 F.3d 1116, 1122 (10th Cir. 2005). The bank subpoenas' demands for the Trump family members' financial information accordingly are not "dragnet" requests suggestive of an impermissible law enforcement purpose as Petitioners claim (Pet. Br. at 40), but rather are necessary to ensure completeness of, and avoid potentially significant gaps in, Congress's investigation in light

H.R. Rep. No. 746, at 16 (1986) (House Report on Comprehensive Money Laundering Control Act). Accordingly, in 1985 and 1986 both Houses of Congress held hearings on the state of money laundering and the need to criminalize money laundering directly, and passed the MLA. *See, e.g.*, *Drug Money Laundering: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 99th Cong. (1985).[13]

3. **The Annunzio-Wylie Act.**

Even after the enactment of the MLA and the institution of prosecutions under the new money laundering offenses, Congress continued to identify gaps and weaknesses in federal laws and regulations pertaining to money laundering. A critical development in that regard was the collapse of the Luxembourg-registered global bank, Bank of Credit and Commerce International (BCCI), "in one of the largest bank failures in history." *Bank of Credit and Commerce Int'l (Overseas) Ltd. v. State Bank of Pakistan*, 273 F.3d 241, 243 (2d Cir. 2001).

Amidst widespread allegations of BCCI's

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of the specific subject matter and legislation under consideration.

[13] The 1988 Anti-Drug Abuse Act, Pub. L. No. 100-690, § 6471(a), 102 Stat. 4181 (1988), subsequently expanded on the reach and enforcement of the MLA by, *inter alia*, (i) adding a "sting" provision (18 U.S.C. § 1956(a)(3)); (ii) adding tax evasion to the promotional money laundering statute (18 U.S.C. § 1956(a)(1)(A)(ii)); and (iii) expanding the forfeiture provisions in 18 U.S.C. §§ 981-82 as they relate to money laundering. *See* 134 Cong. Rec. S17379 (daily ed. Nov. 10, 1988) (statement of Senator Joe Biden).

involvement in money laundering and fraud, *see United States v. BCCI Holdings, Luxembourg, S.A.*, 69 F. Supp. 2d 36, 39 (D.D.C. 1999), foreign regulators were able to effect BCCI's closure abroad, but the U.S. government discovered that it "lacked the authority to close BCCI's offices in the United States, despite BCCI's conviction on money laundering charges." Duncan E. Alford, *Anti-Money Laundering Regulations: A Burden on Financial Institutions*, 19 N.C. J. INT'L L. & COM. REG. 437, 460 (1994).

Subsequently, while the U.S. Department of Justice and federal bank regulators pursued a variety of enforcement actions stemming from BCCI, Congress held extensive hearings on BCCI and related issues. *See, e.g.*, *The BCCI Affair: Hearings Before the Subcomm. on Terrorism, Narcotics, and Int'l Operations of the S. Comm. on Foreign Relations*, 102nd Cong., 1st Sess. (1991). Ultimately, Congress passed the Annunzio-Wylie Anti-Money Laundering Act. *See* Pub. L. No. 102-550, 106 Stat. 3672 (1992) (codified as amended at 31 U.S.C. § 5318). That Act, among other things, added language to the Federal Deposit Insurance Act that authorized the revocation of federal deposit insurance of institutions convicted of certain money laundering crimes, required financial institutions to file Suspicious Activity Reports (SARs), and mandated verification and recordkeeping for wire transfers. *See id.*

4. **Title III of the USA PATRIOT Act.**

In the immediate aftermath of the September 11, 2001 terrorist attacks in New York and

Washington, D.C., multiple Congressional committees, including the House Financial Services Committee and the Senate Banking, Housing and Urban Affairs Committee, held hearings on the government's response to terrorism. *See, e.g.*, *Dismantling the Financial Infrastructure of Global Terrorism: Hearing Before the H. Comm. on Fin. Services*, 107th Cong. (2001). Those hearings led to enactment of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001. *See* Pub. L. No. 107-56, 115 Stat. 272.

Title III of the USA PATRIOT Act—also titled the International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001—contained numerous findings regarding money laundering and terrorism, as well as three subtitles containing 43 sections that amended the BSA and the MLA and created other legal requirements. Subsection A, International Counter Money Laundering and Related Measures, included provisions that (1) authorized the Secretary of the Treasury to take special measures regarding jurisdictions of primary money laundering concern, including obtaining information on beneficial ownership of financial accounts opened or maintained in the United States by foreign persons;[14] (2) added special due diligence requirements for U.S. private banking and correspondent bank accounts with foreign persons;[15]

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[14] Pub. L. No. 107-56, § 311(a), 115 Stat. 298-99 (adding 31 U.S.C. § 5318A(b)(2)).

[15] Pub. L. No. 107-56, § 312(a), 115 Stat. 304-305 (adding 31 U.S.C. § 5318(i)).

(3) prohibited U.S. correspondent accounts with foreign shell banks;[16] (4) included foreign corruption offenses as money laundering crimes;[17] (5) established long-arm jurisdiction over foreign money launderers;[18] (6) prohibited laundering money through a foreign bank;[19] and (7) authorized the Secretary of the Treasury to issue regulations establishing minimum requirement for identifying and verifying financial institution accountholders.[20]

Subsection B, Bank Secrecy Act Amendments and Related Improvements, included provisions that (1) established civil and criminal penalties for violations relating to Treasury Department Geographic Targeting Orders (GTOs);[21],[22] (2) lodged the Financial Crimes Enforcement Network

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[16] Pub. L. No. 107-56, § 313, 115 Stat. 306 (adding 31 U.S.C. § 5318(j)).

[17] Pub. L. No. 107-56, § 315, 115 Stat. 308 (amending 18 U.S.C. § 1956(c)(7)).

[18] Pub. L. No. 107-56, § 317, 115 Stat. 310 (amending 18 U.S.C. § 1956(b)).

[19] Pub. L. No. 107-56, § 318, 115 Stat. 311 (amending 18 U.S.C. § 1956(c)).

[20] Pub. L. No. 107-56, § 326, 115 Stat. 317-318 (adding 31 U.S.C. § 5318(l)).

[21] Under the BSA, the Secretary of the Treasury has authority to issue orders, effective for not more than 180 days (unless renewed), requiring financial institutions or nonfinancial trades or businesses in a geographic area to obtain information concerning certain defined transactions and any other person participating in those transactions, to maintain records of such information, and file reports with respect to those transactions. *See* 31 U.S.C. § 5326(a).

[22] Pub. L. No. 107-56, § 353(a)-(c), 115 Stat. 322-323 (amending 31 U.S.C. §§ 5321(a)(1), 5322, and 5324(a)).

(FinCEN), which receives and analyzes reports filed under the BSA, as a bureau in the Treasury Department;[23] and (3) increased civil and criminal penalties for money laundering.[24]

Subsection C, Currency Crimes and Protection, contained various provisions criminalizing a range of other money laundering-related activities, such as bulk cash smuggling[25] and laundering the proceeds of terrorism.[26]

Additionally, Title III of the USA PATRIOT Act included statutory provisions allowing a federal court to order the confiscation of the funds in a correspondent bank account in the United States of the foreign bank in which criminal proceeds have been placed. *See* 18 U.S.C. § 981(k). Section 981(k) puts the burden on the foreign depositor to come forward and claim the confiscated funds in a forfeiture action in a U.S. court.[27] This enhancement to the AML regime was the result of an inquiry conducted by the Senate Permanent Subcommittee on Investigations, which revealed the extent to

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[23] Pub. L. No. 107-56, § 361, 115 Stat. 329-332 (adding 31 U.S.C. § 310)).

[24] Pub. L. No. 107-56, § 363, 115 Stat. 332-333 (amending 31 U.S.C. §§ 5321(a) and 5322).

[25] Pub. L. No. 107-56, § 371(c), 115 Stat. 337-338 (adding 31 U.S.C. § 5332).

[26] Pub. L. No. 107-56, § 376, 115 Stat. 342 (amending 18 U.S.C. § 1956(c)(7)(D)).

[27] *See, e.g., United States v. Union Bank for Savings and Investment (Jordan),* 487 F.3d 8, 17 (1st Cir. 2007); *United States v. $1,879,991.64 Previously Contained in Sberbank of Russia's Interbank or Correspondent Bank Account,* 185 F. Supp. 3d 493 (D.N.J. 2016).

which criminal proceeds are concealed in foreign bank accounts that at the time were beyond the reach of U.S. law enforcement and U.S. courts.[28]

The PSI Report similarly led to the enactment of 31 U.S.C. § 5318(k), which gives federal courts the ability to compel a foreign bank to produce records of foreign transactions by requiring any foreign bank that maintains a correspondent bank account at a U.S. bank to appoint a person to receive such compulsory process. *See In Re Grand Jury Investigation,* 381 F. Supp. 3d 37 (D.D.C. 2019), *aff'd sub nom. In Re: Sealed Case,* 932 F.3d 915 (D.C. Cir. 2019).

5. The Intelligence Reform and Terrorism Prevention Act of 2004.

At the time of its enactment, Title III of the USA PATRIOT Act represented "the most far-reaching anti-money laundering legislation" since the enactment of the BSA in 1970. H.R. Rep. No. 108-724, pt. 3, at 50 (2004). Subsequently, in 2004 the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) issued a report that contained its investigative findings and lessons learned concerning the events surrounding 9/11. See NATIONAL COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT xvi (2004). Among other findings, the 9/11 Commission took note of the U.S. Department of the Treasury's

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[28] *See Role of U.S. Correspondent Banking in International Money Laundering: Hearing Before the Subcomm. on Investigations of the S. Comm. On Gov. Affairs*, 107th Cong. 130, 316-17 (2000), https://perma.cc/VGL6-TCR4.

and the U.S. financial sector's general focus on "drug trafficking and high-level international fraud" for their AML efforts, to the exclusion of terrorist financing. *Id.* at 186.

Subsequently, multiple Congressional committees in both Houses conducted wide-ranging investigations that encompassed not only the 9/11 Commission's recommendations, but also the need for Executive Branch agencies to take new measures to address cross-border financial transactions pertaining to money laundering and terrorist financing. *See, e.g.*, H.R. Rep. No. 108-724, pt. 3, at 57-60 (2004); OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, REFORMING INTELLIGENCE: THE PASSAGE OF THE INTELLIGENCE REFORM AND TERRORISM PREVENTION ACT 14-17 (2009).

Ultimately, Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA). Pub. L. No. 108-458, 118 Stat. 3638. The IRTPA included a number of measures "to provide additional enforcement tools against terrorist activity, e.g. money laundering and terrorist financing laws." H.R. Rep. No. 108-796, at 243 (2004) (Conf. Rep.). In addition to authorizing additional appropriations for the Treasury Department's Financial Crimes Enforcement Network (FinCEN), IRTPA § 6102(b), those measures included two specific directives to the Executive Branch pertaining to cross-border financial transactions that could be associated with money laundering or terrorist financing.

First, the IRTPA amended the BSA to direct that the Secretary of the Treasury "prescribe

regulations requiring such financial institutions as the Secretary determines to be appropriate to report to [FinCEN] certain cross-border electronic transmittals of funds, if the Secretary determines that reporting of such transmittals is reasonably necessary to conduct the efforts of the Secretary against money laundering and terrorist financing." IRTPA § 6302 (adding 31 U.S.C. § 5318(n)(1)).[29] Second, it directed the President, acting through the Secretary of the Treasury, "to submit to Congress a report evaluating the current state of United States efforts to curtail the international financing of terrorism." *Id.* § 6303.

6. The Corporate Transparency Act of 2019.

In November 2017, the House Financial Services Committee held a hearing on legislative proposals to counter terrorism and illicit finance,

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[29] Those revisions of the BSA also required the Treasury Secretary, as a prerequisite for issuing those regulations, to provide a feasibility report to Congress that, in pertinent part, (1) identified "the information in cross-border electronic transmittals of funds that may be found in particular cases to be reasonably necessary" for the Secretary's efforts to identify money laundering and terrorist financing, and outlined the criteria that the Secretary is to use to select the situations in which such reporting may be required; (2) outlined "the appropriate form, manner, content, and frequency of filing of the reports that may be required under such regulations"; and (3) identified the technology necessary for FinCEN "to receive, keep, exploit, protect the security of, and disseminate information from reports of cross-border electronic transmittals of funds to law enforcement and other entities engaged in efforts against money laundering and terrorist financing." IRTPA § 6302 (adding 31 U.S.C. § 5318(n)(4)(A)(i)-(iii)).

which included a discussion on beneficial ownership transparency legislation. This informed the subsequent passage by the House of the Corporate Transparency Act in October 2019, which requires small corporations and limited liability companies, which are commonly used vehicles to launder money, to disclose information about their beneficial owners to FinCEN and to keep it up to date. *See* H.R. 2513, 116th Cong. (2019).

The same hearing informed consideration of the Coordinating Oversight, Upgrading and Innovating Technology, and Examiner Reform Act ("COUNTER Act") of 2019, H.R. 2514, 116th Cong. (2019). That bill, which (like H.R. 2513) the House passed in October 2019 and is now under consideration in the Senate, would strengthen the U.S. AML framework through a variety of measures. They would include directing the Secretary of the Treasury to work with foreign counterparts, including multilateral organizations such as the Financial Action Task Force (FATF), to promote stronger AML frameworks and enforcement of anti-money laundering laws, and studies on trade-based money laundering and on Chinese money laundering activities in the United States and worldwide. *See* H.R. 2514, 116th Cong. §§105(a), 110(a), 113(a) (2019). Such measures also would include strengthening oversight of AML and counter-terrorism financing (AML/CTF), including expansion of the BSA and directing the Secretary of the Treasury to issue a GTO[30] applicable to commercial

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[30] In 2019, the Secretary of the Treasury, through FinCEN, renewed GTOs requiring identification of "the natural persons behind shell companies used in all-cash purchases of

real estate. *See id.* §§ 201-203, 206-209, 212, 213, 214.[31]

II. THE BANK SUBPOENAS SEEK INFORMATION THAT IS HIGHLY PERTINENT TO CONGRESS'S INVESTIGATIONS THAT WILL MATERIALLY AID CONGRESS'S LEGISLATIVE PURPOSE.

Petitioners misunderstand the decisions of this Court regarding Congress's investigative authority when they assert that the "[bank] subpoenas are not pertinent to any of the [House] investigations at issue here." (Pet. Br. at 36). It is not the subpoenas themselves, but the information they seek, that is pertinent to the Committees' investigations. *See, e.g., McGrain*, 273 U.S. at 180.

Petitioners also misunderstand this Court's decisions on Congressional authority in asserting that the Committees must show a "demonstrably critical" need for the records sought by the bank subpoenas, which Petitioners argue is required of Congress when it seeks the personal financial

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residential real estate for purchases of $300,000 or more. *See, e.g.*, FINANCIAL CRIMES ENFORCEMENT NETWORK, FINCEN REISSUES REAL ESTATE GEOGRAPHIC TARGETING ORDERS FOR 12 METROPOLITAN AREAS (May 14, 2019), https://perma.cc/5CYT-EDHP.

[31] In its report on H.R. 2514, the Financial Services Committee highlighted the fact that "[t]he last major reforms to the BSA were in 2001 before the rise of lone-actor terrorists, decentralized cryptocurrencies, sophisticated transnational trafficking schemes, and cybercrime." H.R. Rep. No. 116-245, pt. 1, at 18 (2019).

records of the President. *Id.* at 53 (citing *Senate Select Comm. v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974)). Nothing in those decisions establishes a basis for such a heightened standard where executive privilege is not implicated—and even if executive privilege did apply, Congress has demonstrated a specific need for the information sought. *See United States v. Nixon*, 418 U.S. 683, 713 (1974) (generalized assertion of privilege must yield to demonstrated, specific need for evidence in response to Fed. R. Crim. P. 17(c) subpoena).

Petitioners take issue with using President Trump as a "case study." (Pet. Br. at 20, 39, 41). However, high-profile examples and case studies have driven AML legislative reforms for decades, from the 1912 "Money Trust" investigations (Resp. Br. at 5-6) to tax haven investigations by the Senate Permanent Subcommittee on Investigations in 2006-2008 (Resp. Br. at 6-7). The subpoenas at issue here are part of a broader industry-wide inquiry, much of which is wholly unrelated to the President. However, Congress has a specific need for Petitioners' information here because of the unique fit between (i) Congress's persistent concerns over money laundering and foreign interference and (ii) the singular role in United States commerce and government that the President and his family has played and continues to play.

A. Congressional statements and testimony clearly specify the legislative concerns that the bank subpoenas seek to address.

As discussed above, Congress need not

explicitly state a legislative purpose in order for its investigative demands not to be judicially overruled. In any event, no guesswork is required here. Congress has made its legislative purpose plain, in clear and contemporaneous statements on the record (informed by testimony and reports from experts and enforcement officials), regarding the need to take further action to protect the marketplace from money laundering activity.

The Financial Services Committee continues to look for ways to close loopholes in the U.S. AML framework. Despite Congress's requirement (under the USA PATRIOT Act) that persons involved in real estate settlements and closings have AML programs, the Treasury Department has exempted the sector from being required to perform due diligence on its clients. FinCEN's current GTO, requiring title companies in specific high-end real estate markets to collect beneficial ownership information for residential real estate purchases[32] in the names of companies, is a temporary measure that cannot address the full scope of this problem without amendment of the BSA. The Committee sees anonymity and the lack of due diligence in high-end real estate purchases, both residential and commercial, as a vulnerability it is seeking to address, in part by analyzing banking practices.

In statements on the House floor prior to the issuance of the bank subpoenas, Rep. Maxine Waters, Chair of the Financial Services Committee, referenced Congress's record of having "enacted

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[32] See Financial Crimes Enforcement Network, *supra* note 30.

numerous laws to improve the transparency of financial transactions that touch institutions in the United States" that "have created reporting mechanisms, strengthened law enforcement and intelligence capacities, and promoted responsible, privacy-protecting information regimes to ensure that both the industry and government have the tools needed to rid the economy of . . . illicit funds. However," the Chair continued, "there are still *glaring problems and loopholes in our system that Congress must address.*"[33]

Chief among these "loopholes" is that concerning high-end real estate, which, as the Chair stated:

> . . . is frequently used to launder dirty money. Bad actors like Russian oligarchs and kleptocrats often use anonymous shell companies and all-cash schemes to buy and sell commercial and residential real estate to hide and clean their money. *Today, these all-cash schemes are exempt from the Bank Secrecy Act.*[34]

It bears noting that congressional concern over the continuing allure of real estate and/or anonymous shell companies to international money launderers substantially predates the circumstances that gave rise to this litigation. It is also bipartisan.[35] This undermines Petitioners' claim

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[33] 165 Cong. Rec. H2698 (daily ed. Mar. 13, 2019) (emphasis added).

[34] *Id.* (emphasis added).

[35] *See, e.g.,* Press Release, Office of Senator Tom Cotton (R-AK),

that the bank subpoenas may simply be chalked up to a political dispute.[36] For example,

> . . . the significance of the real estate loophole in the United States was acknowledged in 2017 by [FinCEN], when it issued Geographic Targeting Orders (GTOs), requiring limited ownership information to be disclosed and reported in some high-end real estate transactions. In fact, FinCEN has noted that "about 30 percent of the transactions covered by the GTOs involve a beneficial owner or purchaser representative that is also the subject of a previous suspicious activity report."[37]

Additionally, in June 2017 testimony provided to the House Financial Services Subcommittee on Financial Institutions and Consumer Credit, the Legal Counsel and Director of Government Affairs of Global Financial Integrity stated:

> Other actors that handle large sums of money, such as persons involved in real estate transactions, escrow agents, investment advisors, lawyers, corporate service providers, and accountants must also take responsibility for knowing with whom they are doing

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Senators Introduce Legislation To Improve Corporate Transparency And Combat Money Laundering, Terrorist Financing, (Sept. 26, 2019), https://perma.cc/Z4AB-7CHQ (quoting Sen. Tom Cotton: "Right now, criminals and terrorists are exploiting our financial system using shell companies that hide their identities.").

[36] Pet. Br. at 39, 44.

[37] 165 Cong. Rec. H2698 (daily ed. Mar. 13, 2019).

> business and guard against their services being used to launder dirty money. *Excluding these non-bank sectors renders the U.S. financial system vulnerable to serious, ongoing money laundering threats* as shown by multiple media reports about how, for example, *anonymous ownership of high-value real estate facilitates money laundering*,[38] a 60 Minutes segment showing how lawyers facilitate money laundering by *corrupt foreign government officials,*[39] and of course the Panama Papers which disclosed how *corporate formation agents and lawyers help wrongdoers hide and launder criminal proceeds*.[40]

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[38] *See, e.g.,* Louise Story & Stephanie Saul, *Stream of Foreign Wealth Flows to Elite New York Real Estate*, N.Y. Times (Feb. 7, 2015), https://perma.cc/X2BU-3BKF.

[39] *See* Steve Kroft, *Anonymous, Inc.*, 60 Minutes (Jan. 31, 2016), https://perma.cc/HB4F-DCMG (while "the White House, the Justice Department and the U.S. Treasury have been among the world's strongest proponents for cracking down on money laundering . . . the U.S. is one of the easiest places in the world to set up the anonymous companies that facilitate it.").

[40] *Examining the BSA/AML Regulatory Compliance Regime: Hearing Before the Subcomm. on Fin. Institutions and Consumer Credit of the H. Comm. on Fin. Services*, 115th Cong (2017) (testimony of Heather A. Lowe) (emphases added; citations omitted); *see also, e.g., Implementation of FinCEN's Customer Due Diligence Rule: Hearing Before the Subcomm. on Fin. Institutions and Consumer Credit of the H. Comm. on Fin. Services*, 115th Cong. (2018) (testimony of FinCEN Director Kenneth A. Blanco) ("[t]he misuse of legal entities to disguise illicit activity has been a key vulnerability in the U.S. financial system"); FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures in the United States* 3 (2016), https://perma.cc/YD26-4J98 (noting that (i) "the regulatory framework has some significant gaps, including minimal

Petitioners cursorily argue that the bank subpoenas could not result in valid legislation, restricting those arguments to just two brief paragraphs in a section of their brief that otherwise entirely focuses on the separate subpoena issued by the Committee on Oversight and Reform of the U.S. House of Representatives on Mazars USA, LLP ("Mazars"). (*See* Pet. Br. at 45-52). In so doing, Petitioners wrongly conflate the situation presented to the District of Columbia Circuit regarding the Mazars subpoena (which directly concerns disclosure obligations by the President) with that presented here (concerning the broader security of our financial and political systems from foreign corrupt and criminal influence).

Here, in contrast to the Mazars subpoena, the fact that President Trump is the President is incidental to the inquiry. Petitioners nonetheless argue that the fact that the President has assumed the office means that Congress may only seek his personal records if it is specifically seeking to legislate concerning presidential finances. (Pet. Br. at 51). This argument lacks merit. Not only may Congress legislate regarding presidential disclosure obligations,[41] but more relevantly, the President's

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coverage of certain institutions and businesses ([including] real estate agents . . . [and] [o]ther comprehensive AML/CFT obligations do not apply to these sectors"; (ii) "[l]ack of timely access to adequate, accurate and current beneficial ownership (BO) information remains one of the fundamental gaps in the U.S. context"; and (iii) "vulnerabilities [remain] particularly in respect of the high-end real estate sector and those sectors involved in the formation of legal persons.").

[41] *See Trump v. Mazars USA LLP*, 940 F.3d 710, 734 (D.C. Cir. 2019) ("The United States Code . . . provides ample precedent

activities as a private businessperson may be the subject of legislation just like those of any other private businessperson. As with all previously enacted laws regarding money laundering and disclosure, the law(s) under consideration here would be of general applicability, not just to the President and his family. Petitioners' records are being sought because their experiences are particularly illuminating for Congress's investigation.

B. Details concerning the Trump family's finances are especially relevant to Congress's concerns about money laundering and corrupt foreign influence.

It is neither arbitrary nor harassing, in the present circumstances, for the Committees to seek the requested financial records from third parties concerning the President and his family. If, as Petitioners claim, there is little direct precedent for such a request, that is due to two factors. First, the President's financial history uniquely speaks to the potential threats of foreign financial influence on the U.S. financial sector and system of government. Second, never before in the modern era has a President been so adamantly opposed to all forms of disclosure or congressional oversight, going well beyond what could implicate executive privilege.[42]

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for laws that regulate Presidents' finances and records.").

[42] *See* Seung Min Kim & Rachael Bade, *Trump's Defiance of Oversight Presents New Challenge to Congress's Ability to Rein in the Executive Branch*, Wash. Post (Oct. 7, 2019),

The reality is that few other individuals in the United States today may more readily illustrate the risks of foreign capital of unknown origin to the U.S. financial sector and government, and better demonstrate the existing loopholes in our laws and regulations that permit it, than Petitioners.

The Trump family has for decades been in the business of licensing its name to high-end luxury resorts and residential buildings to encourage, and earn substantial profits from, sales of residential and vacation units from wealthy individuals, many of them foreign.[43] Those family business activities continue, even though President Trump is in office.[44]

Multiple reports by media and non-governmental organizations have indicated that a substantial percentage of those sales have been to individuals whose identities are hidden by shell corporations and/or to individuals from foreign countries—including Russians—who may have enriched themselves through corrupt or illicit activities.[45] Such reports provide a rational basis for congressional concern that the sales of a number of

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https://perma.cc/GWC7-KWQW.

[43] *See* Michael Hirsh, *How Russian Money Helped Save Trump's Business*, Foreign Pol'y (Dec. 21, 2018), https://perma.cc/83RV-Q5YV; *see also* Nicholas Nehamas, *Before Donald Trump Attacked Foreigners, He Helped Sell Them Condos*, Miami Herald (Oct. 14, 2016), https://www.miamiherald.com/news/politics-government/article108150442.html.

[44] *See* Hirsh, *supra* note 43.

[45] *Id.*; *see also* Oren Dorell, *Trump's Business Network Reached Alleged Russian Mobsters*, USA Today (Mar. 28, 2017), https://perma.cc/7UY2-4VCM.

Trump-branded properties may have been—and could continue to be—funded by criminally-derived (i.e., laundered) proceeds.[46] Separately, Congress has received credible testimony that the Russian political and economic system, populated by numerous oligarchs and illicit actors whose wealth and status directly depends on loyalty to Russian President Vladimir Putin, can be analogized to an organized crime family.[47] To the extent the Trumps' fortune is derived from real estate sales to overseas anonymous purchasers from Russia, therefore, it may include laundered proceeds.[48]

It is thus entirely logical and appropriate for Congress to include demands specific to the finances of President Trump, his family, and their business entities, along with their other investigative

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[46] *See* Hirsh, *supra* note 43; *see also* Global Witness, *Narco-a-Lago: Money Laundering at the Trump Ocean Club Panama* (November 2017), https://perma.cc/2PMR-U3WV; Jesse Drucker, *$7 Million Trump Building Condo Tied to Scandal-Scarred Foreign Leader*, N.Y. Times (Apr. 10, 2019), https://perma.cc/KY7R-SCGP.

[47] *Putin's Playbook: The Kremlin's Use of Oligarchs, Money and Intelligence in 2016 and Beyond: Hearing Before the H. Permanent Select Comm. of Intelligence*, 116th Cong. (2019) https://perma.cc/4EZF-XRN3 (prepared statement of Michael McFaul, Former U.S. Ambassador to Russia); *id.*, https://tinyurl.com/StevenHallTestimony (prepared statement of Steven Hall, Former Chief of Russian Operations, Central Intelligence Agency).

[48] *See* Hirsh, *supra* note 43 (quoting Donald Trump Jr. in 2008: "Russians make up a pretty disproportionate cross-section of a lot of our assets."); *see also* David Enrich, *The Money Behind Trump's Money: The Inside Story of the President and Deutsche Bank, His Lender of Last Resort*, N.Y. Times Mag. (Feb. 4, 2020), https://perma.cc/XTW7-EE5Q.

demands, to determine, *inter alia*, (a) how pervasive the use of hidden identities and shell companies is in the realm of luxury high-end real estate in the United States; (b) the extent to which the Trump business may have been funded by foreign proceeds traceable to foreign illicit actors (as well as the factors complicating such tracing efforts); and (c) whether and how U.S. laws may adapt to further prevent the infiltration of foreign proceeds derived from criminal or corrupt activities, as well as proceeds that are simply impossible to trace, into the U.S. marketplace.

Indeed, the demands by the bank subpoenas would have been indisputably appropriate, given Congress's history of investigations, had President Trump not assumed the presidency. The fact that he has, however, underscores the urgency and importance of Congress in investigating these issues, because of its substantial concern with minimizing foreign entanglements that may compromise or corrupt influential U.S. persons such as the President and his family.

Accordingly, Congress has a legitimate legislative interest in the information sought by the bank subpoenas, to inform its efforts to better combat foreign criminal influence more effectively through legislation to protect the U.S. marketplace.

As this Court has stated,

> It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting

> obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation.

Watkins, 354 U.S., at 187-88. When Congress has a clear and justifiable basis for pursuing its inquiry, including through the use of compulsory process seeking information from third parties, there is no valid basis for denying Congress its opportunity to gather that information in the service of intelligent legislative action.

CONCLUSION

The Court accordingly should affirm the rulings below and allow Deutsche Bank and Capital One to respond fully to the bank subpoenas.

March 4, 2020

Respectfully submitted,

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APPENDIX

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