No. 19A640

In the Supreme Court of the United States

DONALD J. TRUMP; DONALD J. TRUMP, JR.; ERIC TRUMP; IVANKA TRUMP; DONALD J. TRUMP REVOCABLE TRUST; TRUMP ORGANIZATION, INC.; TRUMP ORGANIZATION LLC; DJT HOLDINGS LLC; DJT MANAGING MEMBER LLC; TRUMP ACQUISITION LLC; TRUMP ACQUISITION, CORP.,

Applicants,

v.

DEUTSCHE BANK AG; CAPITAL ONE FINANCIAL CORPORATION; COMMITTEE ON FINANCIAL SERVICES OF THE UNITED STATES HOUSE OF REPRESENTATIVES; PERMANENT SELECT COMMITTEE ON INTELLIGENCE OF THE UNITED STATES HOUSE OF REPRESENTATIVES,

Respondents.

On Application for Recall and Stay

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR A RECALL AND STAY OF MANDATE

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Whether the Court should grant a stay is not a close question. A stay is justified for the same reasons that the Court granted one in the *Mazars* litigation. Try as they might, the Committees cannot distinguish the cases for purposes of whether interim relief is warranted. Both cases involve unprecedented subpoenas by congressional committees for the President's personal records, both involve the same underlying legal issues, and, here too, Applicants' right to file a certiorari petition will be mooted absent a stay. The Court need not venture any deeper into the record to conclude that the status quo should be preserved.

But a stay is also warranted in this case on its own terms. The Committees do not dispute that the Court has historically granted review in cases like this. The Committees nevertheless oppose a stay because "[m]ore than one-third of the 116th Congress has elapsed" since they issued the subpoenas, they believe that the lower courts correctly applied precedent, and the House "urgently needs" these records "to exercise its constitutional functions." Committees' Opposition ("Opp.") at 1-2. The Committees omit, however, that they voluntarily stayed enforcement of the subpoenas for more than six months, that those same lower-court rulings generated opinions totaling nearly two hundred pages, including a dissent, and that they have never been able to explain why these specific records are immediately needed for the House to pass legislation.

The Court should grant the stay. This is a significant separation-of-powers clash between the President and Congress. Judge Livingston made a compelling case why review is warranted and the decision below is unlikely to survive further review.

And the Committees now say that "expedite[d] consideration of certiorari in this case" "would lessen" their alleged injury, Opp. 32, while Applicants will obviously suffer irreparable harm if a stay is denied. Accordingly, there is no basis to deny interim relief and end this case before Applicants have the opportunity to file a certiorari petition. To that end, Applicants are prepared to proceed on any schedule that the Court deems appropriate should the stay pending certiorari be granted.

I. A stay is warranted here for the same reasons the Court granted one in the *Mazars* litigation.

The Committees suggest that this Court's grant of a stay in *Mazars* has no bearing on whether the same relief is warranted here because these subpoenas are "'significantly different'" and the alleged legislative purposes are "particular" to the underlying subpoenas. Opp. 16-17. This argument misses the point. As an initial matter, there *is* factual similarity between the subpoenas in the two cases: both involve unprecedented legislative subpoenas for reams of the President's personal papers. *See* Mot. 5-6, 11; Petition for Certiorari, *Trump v. Mazars USA, LLP*, No. 19-715, 2, 4, 14-16 (filed Dec. 4, 2019) ("*Mazars* Pet."). But more importantly, Applicants have not argued that the subpoenas themselves or the Committees' allegedly legislative purposes are exactly the same—nor is that the relevant question.

The interim relief granted in *Mazars* is warranted here because the subpoenas present the same *legal* questions. Indeed, the Committees have repeatedly claimed as much—even *arguing* that the issues presented in the two cases are "identical." CA2 Doc. 37 at 94 (Mr. Letter: "[T]he best brief of the House of Representatives today is the opinion issued the other day by Judge Mehta in [*Mazars*]. Judge Mehta

recognized that these arguments being made today are identical to what was made before him except for [an additional statutory argument not relevant here]."); *see* CA2 Doc. 201 at 1 ("*Mazars* involves the same legal issues presented here."); CA2 Doc. 205 at 1 (same). The Committees' position then matches the argument that House Counsel made to this Court, just yesterday, that this case and *Mazars* turn on the "same precedents." Brief in Opposition, *Trump v. Mazars USA, LLP*, No. 19-715, 1 (filed Dec. 11, 2019) ("*Mazars* BIO").

A comparison of the legal issues presented in the two cases proves the point. First, both cases raise the question whether a heightened showing of need is required to sustain subpoenas that target the President of the United States. Mot. 12, 18-19; *Mazars* Pet. 16-17, 24-25. As Applicants have argued here and in *Mazars*—and as the President has argued in *Trump v. Vance*—such a showing is required. *See* Mot. 18-19; *Mazars* Pet. 24-25; Petition for Certiorari, *Trump v. Vance*, No. 19-635, 34-36 (filed Nov. 14, 2019). The Committees' failure to meet that standard is fatal to their claims in both cases. *See* Mot. 18-19; *Mazars* Pet. 24-25.

Second, both cases raise the question whether the Committees have asserted legitimate legislative purposes to sustain the subpoenas or are instead pursuing unconstitutional ends like law enforcement and exposure for the sake of exposure. Mot. 13-17; *Mazars* Pet. 18-25. Importantly, and perhaps obviously, although it is possible that the particularities of the respective subpoenas could yield different outcomes, Opp. 16-17, those outcomes turn on the resolution of the *same* underlying legal question—namely, whether "primary purpose" or something more deferential to

Congress is the proper test for evaluating legislative subpoenas seeking the President's records. *See* Mot. 13-17; *Mazars* Pet. 14, 21-24; *Mazars* BIO 1. Here, too, the Court has already determined that a stay is warranted pending the filing and disposition of a petition for a writ of certiorari.

Third, both cases present the question whether—given the dearth of historical precedent, and in the absence of express authorization to the Committees to issues these subpoenas—the lower courts should have narrowly construed the Committees' statutory authority in order to avoid the constitutional questions presented. Mot. 19-20; *Mazars* Pet. 32-33.[1] Proper cognizance of the "threat to presidential autonomy and independence" posed by these subpoenas, *Trump v. Mazars USA, LLP*, 941 F.3d 1180, 1181 (D.C. Cir. 2019) (Katsas, J., dissenting from denial of rehearing en banc), should have led both the Second Circuit and D.C. Circuit to be especially reluctant to reach the weighty constitutional issues raised, Mot. 19-20; *Mazars* Pet. 32-33.

Finally, the Committees themselves frame the balance of the equities in this case as nearly indistinguishable from the balance that this Court already considered in *Mazars*. Opp. 28-31; Committee Opposition, *Trump v. Mazars USA, LLP*, No. 19A545, 23-28 (filed Nov. 21, 2019). Here, as in *Mazars*, the balance tips decidedly in Applicants' favor. *See infra* 5-8.

[1] The Committees claim that Applicants' constitutional avoidance argument, premised on the scope of authorization from the House Rules, "was not raised by Applicants below and therefore is forfeited." Opp. 24. That is wrong. *See e.g.*, CA2 Doc. 93 at 22; CA2 Doc. 112; CA2 Doc. 149 at 5-8. It is also irrelevant. The Court's "traditional rule … precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'" *United States v. Williams*, 504 U.S. 36, 41 (1992). Because "this rule operates (as it is phrased) in the disjunctive, … review of an issue not pressed" is permitted "so long as it has been passed upon" in the court of appeals. *Id.* The Second Circuit passed on this question. App. 95a-97a.

II. This Court should grant a stay irrespective of *Mazars*.

A. The balance of the equities strongly favors Applicants.

The balance of the equities here is not close, Mot. 22-25, and nothing in the Committees' opposition alters that conclusion. The Committees cannot dispute that, absent a stay, this case will become moot before this Court can decide whether to hear it—the kind of irreparable harm that provides the "'most compelling'" basis for a stay. *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers). They argue instead that "Applicants do not articulate any valid reason" for a stay because "the President has no right to this Court's review of every case in which he seeks it." Opp. 30.

At this juncture, Applicants are not seeking a stay so that this Court can decide the case on the merits. A stay is needed so that Applicants can file a certiorari petition—a "right" they do hold. *See* 28 U.S. C. § 1257(a); S. Ct. R. 10. The point of a stay pending certiorari is "'to protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals.'" *John Doe*, 488 U.S. at 1309 (Marshall, J., in chambers). In fact, when this Court loses the chance to grant certiorari because the winning party moots the case, it penalizes this behavior by vacating the appellate decision. *See Azar v. Garza*, 138 S. Ct. 1790, 1792-93 (2018). Preserving the Court's ability to decide whether it wants to hear this case is, alone, a sufficient reason to grant the stay pending certiorari. Mot. 20-22, 24.

Nor have Applicants asserted that "every" petition a President files should be granted. Applicants have instead explained that the Court has rightly granted review in every case *like this one* in which a President has sought review. Mot. 12-13. The

Committees' cases allegedly to the contrary, *see* Opp. 30, are simply not in that class. And, because a dispute over congressional subpoenas for the President's personal papers will become moot without the Court's intervention, it is difficult to imagine a stronger stay application. At bottom, ensuring that the President does not suffer case-mooting harm in a major separation-of-powers clash with Congress should end any debate over Applicants' right to a stay.

The Committees respond that granting relief would mean that the President "has the right to stall any Congressional subpoena to which he objects through the months or years that it takes for a challenge to work its way through the lower courts and for this Court then to grant or deny certiorari." Opp. 31. But the Committees had every opportunity to press for enforcement of the subpoena in the district court and in the court of appeals. They instead chose to defer enforcement for more than six months so those courts could hear this important case without needing to adjudicate requests for emergency relief. Mot. 1, 6-7. The only court to which the Committees are unwilling to extend that courtesy is this one.

Regardless, granting relief in cases like this will have little to no bearing on the House's "ability to conduct oversight or to collect information relating to the Executive Branch." Opp. 31. That is because the case-mooting problem that Applicants confront is a product of the Committees' decisions to circumvent the Executive Branch and seek the records from his banks. When Congress subpoenas the Executive Branch, the recipient can object, retain the documents, and risk contempt. But since it is "unlikely that the third party would risk a contempt

citation," there is a "limited class of cases where denial of" interim relief "would render impossible any review whatsoever of an individual's claims." *United States v. Nixon*, 418 U.S. 683, 691 (1974) (citations and quotations omitted). Unsurprisingly, then, all the Committees' cases involve the denial of a stay pending certiorari where the recipient was willing to challenge the subpoena's legality. *See Office of President v. Office of Indep. Counsel*, No. A-108, 1998 WL 438524, at *1 (U.S. Aug. 4, 1998) (Rehnquist, C.J., in chambers) (Deputy White House Counsel refused to testify before a federal grand jury); *Rubin v. United States*, 524 U.S. 1301, 1302 (1998) (Rehnquist, C.J., in chambers) (Secret Service officers refused to testify to federal grand jury); *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319 (1994) (Rehnquist, C.J., in chambers) (Senator refused to comply with congressional subpoena). Dissatisfaction with the judiciary's refusal to allow the Committees to "frustrate any ... inquiry" into the subpoena is not a justification for mooting Applicants' ability to seek certiorari. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 n.14 (1975).

The claim that the harm the Committees suffer through "delay … by depriving them of important information … outweighs any harm Applicants might suffer from the banks' compliance with the subpoenas" is thus meritless. Opp. 28. Generalized "efforts to protect the integrity of the U.S. financial system," Opp. 29, must give way to the immediate, case-mooting harm that Applicants face, Mot. 22-25. And while foreign interference in elections is a serious matter, Opp. 29, the Intelligence Committee fails to offer any compelling reason why its investigation and legislative response would be compromised by a short delay in obtaining documents from a small

group of individuals that date back more than a decade—that is, documents that are, at best, only tangentially related to any such investigation. *See infra* 11. Indeed, the Committee's asserted "urgent" need for these documents is undermined by the fact that several pieces of legislation have already passed without them. *See* Opp. 7-8. In short, the Intelligence Committee cannot just assert an important interest, demand immediate compliance with broad subpoenas, and deprive this Court of its ability to review the claim without offering a reasoned explanation for why its need for the documents supersedes the right of the recipient to seek further appellate review. Congress is not a superlitigant who automatically wins the balance of the equities, and this Court does not "assume … that every congressional investigation … overbalances any private rights affected." *Watkins v. United States*, 354 U.S. 178, 198 (1957). That should apply with special force when the congressional subpoena targets the President.

B. There is a reasonable probability that this Court will grant certiorari and a fair prospect that this Court will reverse the Second Circuit's decision.

This case is worthy of review and is likely to be reversed if certiorari is granted. Whether the Committees are engaging in prohibited law enforcement, whether they have demonstrated a heightened need for these documents, and whether they had statutory authority are all important issues over which there is a serious dispute. Mot. 11-20. At the outset, the Committees' wholesale rejection, Opp. 25-26, of the "profound separation-of-powers concerns" animating each issue undermines their ability to credibly engage with both the importance and resolution of the specific

issues presented. *See* App. 118a (Livingston, J., concurring in part and dissenting in part). More broadly, the Committees are unable to muster strong opposition to Applicants' stay request.

The Committees barely contest the importance of this dispute. Nor could they. Mot. 11-13. "It is not a sufficient reason for review," according to the Committees, "that Applicants make separation-of-powers arguments." Opp. 25. But this is not a mine-run interbranch dispute. This subpoena, and the Second Circuit's decision upholding it, are unprecedented. *See* App. 124a-26a (Livingston, J., concurring in part and dissenting in part); *Mazars*, 941 F.3d at 1180-81 (Katsas, J., dissenting from denial of rehearing en banc). None of the Committees' examples, Opp. 26-28, involved judicial enforcement of a legislative subpoena for the personal records of a sitting President. *See* App. 124a-26a & n.10 (Livingston, J., concurring in part and dissenting in part); *Trump v. Mazars USA, LLP*, 940 F.3d 710, 758-67 (D.C. Cir. 2019) (Rao, J., dissenting). Indeed, the only litigated dispute between Congress and the President over presidential records of *any* kind ended with the subpoena being invalidated. *See Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (en banc). The history of subpoenas like this "is sparse at best, and perhaps nonexistent." App. 125a (Livingston, J., concurring in part and dissenting in part).

The Committees' attempt to frame the case as "fact-bound" and thus unworthy of review, Opp. 17, is equally unavailing. This Court has been unwilling to ignore serious constitutional claims from the President even in "'one-of-a-kind'" cases with

"no precedent supporting the President's position." *Clinton v. Jones*, 520 U.S. 681, 689 (1997). Nor can the Committees sidestep the implications of the office of the Presidency by repeatedly pointing to the fact that the President brought this suit in his individual capacity and that the case involves no claim of executive privilege. Opp. 11, 21, 23-25. That, too, was true of *Clinton v. Jones*. In fact, every reason the Committee offers for denying review was rejected by the Court in explaining why it granted President Clinton's petition. Mot. 12-13. When unprecedented action—like these legislative subpoenas—is leveled against the President himself, this Court does not hesitate to grant review. There is no way for the Committees to mask the importance of this case.

This Court is also likely to reverse the Second Circuit's erroneous decisions on the important questions this case raises. First, the Committees' subpoenas pursue unconstitutional ends of law enforcement and exposure for the sake of exposure. Mot. 15-17. The Committees quibble with the characterization of a few isolated pieces of evidence in the record. Opp. 18-19. But the record speaks for itself. So does the Committees' failure to engage what the subpoenas actually *do*—not just what has been said about them. These "dragnet" subpoenas are hyper-focused on the businesses, family, and papers of a single individual (coincidently, the highest-ranking political rival), and seek evidence of suspicious activity and wrongdoing. Mot. 15. If the Committees' best explanation for why they aren't investigating the President for forbidden law-enforcement purposes is that they've never been caught saying so—a tenuous proposition contradicted by the House General Counsel's own

assertion, *see* App. 136a n.20 (Livingston, J., concurring in part and dissenting in part)—then they have no winning argument. The Committees are not exempt from the rule that courts "are 'not required to exhibit a naiveté from which ordinary citizens are free.'" *Department of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019).

The same goes for the Financial Services Committee's "case-study" rationale and Intelligence Committee's specific focus on the President. Opp. 21-23. To put it charitably, there is not only an expansive disconnect between the Committees' proffered purposes and the nature and scope of their subpoenas, but also undeniable opportunism in singling out the President of the United States (and his papers) as an "example[]," Opp. 21-22, to promote study of the law in either context. *See* App. 133a-34a (Livingston, J., concurring in part and dissenting in part). After all, this is not the first attempt by House Democrats to "get their hands on the [President's] long-sought after documents." Lisa Hagen, *Congress Returns, Trump Investigations Resume*, U.S. News & World Report (Sept. 9, 2019), bit.ly/2NGeLIt. The Court should not refuse to "see what all others can see and understand" when evaluating "congressional power of investigation." *United States v. Rumely*, 345 U.S. 41, 44 (1953) (cleaned up).

The Committees also argue that review is unwarranted because even if the subpoenas have some law-enforcement purpose, they can "serve multiple purposes simultaneously" so long as a valid legislative purpose is merely "*presen[t].*" Opp. 20. That is mistaken. This Court has said that a subpoena's relevant purpose is its "real

object," "primary purpose[]," and "gravamen." *McGrain v. Daughtry*, 273 U.S. 135, 178 (1927); *Barenblatt v. United States*, 360 U.S. 109, 133 (1959); *Kilbourn v. Thompson*, 103 U.S. 168, 195 (1880). A review of the Committees' subpoenas, their history, and their context demonstrates a primary purpose of exposing and pursuing wrongdoing by the President. Mot. 15-17.

Contrary to the Committees' assertion, neither *Sinclair v. United States* nor *Hutcheson v. United States* allow for a more forgiving "purpose" test. Opp. 20. The claim did not fail in *Sinclair* because Congress may engage in law enforcement so long as it also professes a legislative purpose; it failed because the "contention that the investigation was *avowedly* not in aid of legislation" lacked proof. 279 U.S. 263, 295 (1929) (emphasis added). "The record" demonstrated that the investigation's gravamen was legislative in nature. *Id.* Similarly, the challenge to the investigation in *Hutcheson* failed because the "episodes" presented as evidence of a "departure from … legitimate congressional concerns" fell "far short of sustaining what [was] sought to be made of them." 369 U.S. 599, 619 (1962). The plurality opinion thus reiterated that a "committee which is engaged in a legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding." *Id.* at 618. Justice Brennan agreed. His controlling concurrence explained that the Court "will give the *closest scrutiny to assure that indeed a legislative purpose was being pursued* and that the inquiry was not aimed at aiding the criminal prosecution." *Id.* at 625 (Brennan, J., concurring in the result) (emphasis added).

Next, the Committees argue that the Court should not review this case because the heightened showing of need required when subpoenaing the President's records does not apply to legislative subpoenas to the President when he appears in his individual capacity and does not assert a claim of executive privilege. Opp. 23-24. But this Court says otherwise. *See, e.g.*, *Nixon*, 418 U.S. at 708 ("*In no case of this kind* would a court be required to proceed against the president as against an ordinary individual." (cleaned up) (emphasis added)). So does the Department of Justice. *See, e.g.*, U.S. Amicus Br., *Trump v. Vance*, No. 19-635, 18-20 (filed Nov. 22, 2019); CA2 Br. 143 at 14-15. Indeed, *Cheney v. U.S. District Court for D.C.*, makes clear that the "special considerations" that "control" review of demands directed at the President are not driven by the particular nature of his claims but instead serve to protect the "autonomy" of his office. 542 U.S. 367, 385 (2004).

As Judge Livingston explained, "it is not at all difficult to conceive" how the potential for countless and pervasive legislative inquiries could "significantly burden" the President and threaten that autonomy. App. 126a; *see Mazars*, 941 F.3d at 1181 (Katsas, J., dissenting from denial of rehearing en banc) (recognizing the "threat to presidential autonomy and independence"). The Committees' "extraordinarily broad subpoenas" raise "significant issues for the future regarding interbranch balance and the ability of this and future Presidents to perform their duties without undue distraction." App. 158a, 141a-42a (Livingston, J., concurring in part and dissenting in part). The Committees might be permitted to "investigate broadly" "up some blind alleys" when it comes to ordinary individuals, Opp. 24

(citations and quotations omitted), but not when it comes to the President. *Mazars*, 940 F.3d at 771-73 (Rao, J., dissenting). Demanding "specificity of the subpoena requests serves as an important safeguard against unnecessary intrusion into the operation of the Office of the President." *Cheney*, 542 U.S. at 387.

The Committees also claim that, regardless, the Second Circuit sufficiently conducted this "more exacting" review in light of the President's office. Opp. 23. To be sure, the majority claimed it was showing respect to the Office of the President. App. 11a. Ultimately, however, it held that neither the President's constitutional status nor a concern for separation of powers impacted its analysis. App. 9a, 89a-97a. And its decision to uphold the bulk of the Committees' "dragnet" subpoenas—so broad that "in a routine civil case" the district court would have narrowed them—was anything but exacting. App. 108a n.2, 109a (Livingston, J., concurring in part and dissenting in part).[2]

Finally, the Committees argue that Applicants' challenges to their statutory authority to issue the subpoenas to the President "lacks merit, is not important enough for this Court's review, and is no longer even relevant to this case." Opp. 25.

[2] Notably, and for good reason, the Committees do not raise the interlocutory posture of the case as an impediment to relief from this Court. Despite ordering limited remand, the Second Circuit expressly acknowledged that it was "ruling on the ultimate merits of Appellants' claims," which, in its view, was appropriate because "'the injunction rests on a question of law.'" App. 98a (quoting *Munaf v. Geren*, 553 U.S. 674, 691 (2008)). In other words, the court purported to finally resolve the legal questions presented. Thus, here, declining a stay on the basis of the limited remand to the district court would fail to provide any further clarity on the law. It would also moot Applicants' important constitutional claims. Mot. 20-21. Denying a party the "opportunity for review on the theory that [a lower court decision] was interlocutory" in a way that renders that party "'powerless to avert the mischief of the order,'" impermissibly turns "the doctrine of finality [into] a means of denying … any appellate review of his constitutional claim." *See Cobbledick v. United States*, 309 U.S. 323, 328-29 (1940) (quoting *Perlman v. United States*, 247 U.S. 7, 13 (1918)); *see also Pennsylvania v. Ritchie*, 480 U.S. 39, 48-49 & n.7 (1987).

It is certainly important enough. As Judge Livingston explained, giving every congressional committee power to pursue "myriad inquiries instigated 'more casually and less responsibly' than contemplated in our constitutional framework" raises "serious" separation-of-powers concerns. App. 112a-13a, 137a. This Court's precedent dictates that, under these circumstances, the Second Circuit should have construed the Committees' authorization narrowly to avoid unnecessary collision with these constitutional questions. Mot. 19-20.

The Committees' argument that any open question regarding the scope of their authority has been closed by the subsequent adoption of H. Res. 507, 116 Cong. (2019) also fails. Opp. 25. Because "the delegation of power to the committee must be clearly revealed in its charter," *Watkins*, 354 U.S. at 198, the "scope" of its statutory authority must "be ascertained as of th[e] time" of the request and "cannot be enlarged by subsequent action of Congress," *Rumely*, 345 U.S. at 48. There remains an "open question" as to whether the Committees have statutory authority to issue these subpoenas. App. 137a (Livingston, J., concurring in part and dissenting in part).

CONCLUSION

For all of these reasons, and for those presented in the application, Applicants respectfully ask that the Court order the mandate for the United States Court of appeals for the Second Circuit, which is now recalled and stayed until December 13 at 5:00 p.m., be further stayed pending the filing and disposition of a petition for certiorari.

Respectfully submitted,

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