No. 19-715

IN THE

Supreme Court of the United States

DONALD J. TRUMP; THE TRUMP ORGANIZATION, INC.; TRUMP ORGANIZATION LLC; THE TRUMP CORPORATION; DJT HOLDINGS LLC; THE DONALD J. TRUMP REVOCABLE TRUST; AND TRUMP OLD POST OFFICE LLC,

Petitioners,

v.

MAZARS USA, LLP; COMMITTEE ON OVERSIGHT AND REFORM OF THE U.S. HOUSE OF REPRESENTATIVES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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The petition seeks review of a decision upholding an unprecedented congressional subpoena for the President's personal records. The Court traditionally grants review in these circumstances. The Committee's Brief in Opposition ("BIO") nevertheless urges the Court to deny certiorari because, in its view, the D.C. Circuit's decision is correct. That is mistaken. The decision below is deeply flawed. More importantly, the Court reviews these cases because of the importance of the issue and the respect due to the President and the Executive Branch—not based on a prediction as to who will ultimately prevail on the merits. This case should be no exception.

I. The Committee's arguments for why certiorari should be denied are unpersuasive.

As explained, this is precisely the type of important case the Court traditionally hears. The Committee, for good reason, doesn't dispute the point, as it would be disagreeing with *every* judge to weigh in on this controversy. Petition ("Pet.") 13-14. To be sure, the Committee hopes it can kick up enough dust to deter the Court from granting review. But it cannot deny that "this case presents exceptionally important questions regarding the separation of powers among Congress, the Executive Branch, and the Judiciary." App. 215a (Katsas, J., dissenting from denial of rehearing en banc). The Court should answer them.

The Committee's attempt to paint this case as merely "about the purpose of one subpoena" rings hollow. BIO 23. The issues in this case go to the heart of the relationship between the Office of the President and Congress. Pet. 2-3. If the decision below stands, every congressional committee will have sweeping authority to subpoena the President's personal records. And, in turn, "it is not at all difficult to conceive how standing committees exercising the authority to issue third-party subpoenas in aid of legislation might significantly burden presidents with myriad inquiries into their business, personal, and family affairs." *Trump v. Deutsche Bank AG*, 2019 WL 6482561, at *45 (2d Cir. 2019) (Livingston, J., concurring in part and dissenting in part). The "profound separation-of-powers concerns" that would be triggered by upholding this subpoena are inescapable. *Id.* at *42. It will be "open season on the President's personal records." App. 216a (Katsas, J.).

The Committee is right that "*any* private litigant" can challenge a congressional subpoena and the Court "rarely" reviews absent a circuit split. BIO 10. But this is no routine congressional subpoena, and the President is no ordinary litigant. Pet. 16. The Committee may not see the difference, but the Court does. This is a "subpoena for the records of a sitting President." App. 215a (Katsas, J.). And, the Court's responsibility "does not grow easier when Congress seeks *a President's* personal information." *Deutsche Bank*, 2019 WL 6482561, at *42 (Livingston, J.).

The Committee (at 22-23) counters that a legislative subpoena for presidential records is not

unprecedented. But it gets the history wrong. App. 99a-119a (Rao, dissenting); *Deutsche Bank*, 2019 WL 6482561, at *44 (Livingston, J.). The Committee cannot identify "*any* Congress before this one in which a standing or permanent select committee of the House has issued a third-party subpoena for documents targeting a President's personal information solely on the rationale that this information is 'in aid of legislation.'" *Id.* at *39. Nor can the Committee identify *any* judicial decision upholding *any* congressional subpoena for *any* presidential records. App. 215a (Katsas, J.). Contrary to the Committee's assertion, this *is* "the unprecedented case that Petitioners claim." BIO 23.

The Committee (at 11-12) attempts to cast doubt on the importance of this dispute by suggesting that the Court has, on occasion, denied review even though the President was seeking certiorari. But Petitioners do not argue that the Court should grant every petition a President files; they argue that the Court has traditionally granted review in cases *like this one* where a President has sought certiorari. Pet. 16-17 (collecting cases). The Committee's cases are not in that class. The Committee offers no explanation for why review would be appropriate in *United States v. Nixon*, 418 U.S. 683 (1974), and *Clinton v. Jones*, 520 U.S. 681 (1997), yet not here.

The Committee mentions, in passing, that this is not an executive-privilege dispute and that the President filed this case on his own behalf. BIO 1, 10. But it never explains why that matters. That is because it does not. That was also true of *Clinton*.

Certiorari was unsuccessfully opposed there because, as the Committee argues here, there was "no circuit split" and because the appellate court had applied "well-settled" legal principles to a "fact-bound" dispute in rejecting the President's claim. BIO 1, 10, 27, 29; *compare Clinton*, 520 U.S. at 689. Here too, the Court should "grant the petition" to give the President's legal claims "respectful and deliberate consideration." *Id.* at 689-90.

Finally, there are no vehicles issues that make review of this otherwise worthy petition objectionable. At the stay stage, the Committee argued that the ongoing impeachment inquiry made review inappropriate; indeed, the Committee even warned that it might issue a new impeachment-based subpoena if the Court grants certiorari. Pet. 36-37. Yet that argument has now vanished. That the Committee no longer presses its chief argument for why it has a "time-sensitive" need for these records, BIO 31, is telling.

The Committee continues to suggest, however, that review is inappropriate because it needs these documents so that it can pass "legislation and oversee the workings of the Government" before the House's two-year term expires. BIO 12. But this plea is no more credible than the impeachment-based objection to merits review that the Committee abandoned. While the Committee bemoans that "one-third of that term has now elapsed since the Committee issued the subpoena," *id.*, it still refuses to acknowledge that it *voluntarily* stayed enforcement from the day Petitioners challenged it in court to the day this Court

issued a stay. Pet. 37-38. Enforcement of the subpoena apparently became so "time-sensitive" that it should override orderly judicial review once Petitioners sought certiorari.

The Committee adds that the records will assist it in considering "pending bills" that are within its purview. BIO 8. But H.R. 1—the primary bill the Committee has pointed to throughout this litigation—already passed the House and has failed in the Senate. *See* Congressman Sarbanes, *Senate Republicans Block Effort to Pass H.R. 1* (Oct. 30, 2019), bit.ly/2qeLAD8. Moreover, the D.C. Circuit declined to rely on H.R. 706—which is pending in the House—because of its clear unconstitutionality. App. 43a-44a.

Congress's desire to immediately see the President's financial records, in short, is not a justification for denying review. Regardless, the Committee reiterates that deciding this case "expeditiously," BIO 35, by the end of this Term will mitigate its concerns, and Petitioners are prepared to proceed on any schedule that the Court deems appropriate should review be granted. That is the right way to proceed. *Accord Nixon*, 418 U.S. at 687.

II. The D.C. Circuit's ruling should be reversed.

The Committee devotes most of its brief to defending the D.C. Circuit's decision on the merits. BIO 13-35. As explained, however, the decision to grant certiorari in a case like this turns on the Court's

"appraisal of its importance" instead of a "judgment concerning the merits of the case." *Clinton*, 520 U.S. at 689. But even if the decision to grant review turns on a prediction of who will ultimately prevail, the case should be heard. The Mazars subpoena exceeds the Committee's constitutional and statutory authority.

The subpoena is invalid because it seeks to exercise a law-enforcement power that is not vested in Congress. Pet. 19-25. The Committee seeks to stack the deck in its favor by noting (at 23) that a congressional subpoena has not been invalidated on separation-of-powers grounds since *Kilbourn v. Thompson*, 103 U.S. 168 (1880). But the force of that point is blunted considerably since "the historical precedent" for this subpoena "is sparse at best, and perhaps nonexistent." *Deutsche Bank*, 2019 WL 6482561, at *44 (Livingston, J.). The "paucity of historical practice alone is reason" to doubt the legitimacy of a legislative subpoena for the President's personal records. *Id*.

As for the subpoena itself, the Committee nowhere denies that it is designed to uncover whether the President has engaged in wrongdoing. Nor could it. Pet. 19-21. As the Committee recognizes, the subpoena's purpose is to advance an investigation into "the accuracy of President Trump's own financial disclosures" and "possible violations of the Emoluments Clauses." BIO 4. The Committee's insistence (at 24) that the subpoena's "broadly worded" nature is not indicia of a law-enforcement purpose is thus largely beside the point. The Committee has "affirmatively and definitely avowed"

a prohibited purpose. *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927). Regardless, the subpoena's breadth is not the only evidence that this is law-enforcement. Pet. 20. The Committee has no explanation for why a subpoena that is supposed to be about legislation has all the earmarks of prosecutorial demand.

Instead of disclaiming a law-enforcement purpose, the Committee argues that "an avowed legislative interest in past illegality is often entirely consistent with an intent to legislate and does not invalidate a legislative subpoena." BIO 24-25. But the Committee's cases—*Sinclair v. United States*, 279 U.S. 263 (1929), and *Hutcheson v. United States*, 369 U.S. 599 (1962)—say no such thing. Pet. 23-24. More broadly, there is no precedent that authorizes Congress to embark on a law-enforcement investigation so long as it "simultaneously" promises to use the subpoena's results "to legislate effectively." BIO 24, 27. The Committee (at 27-29) ultimately makes a clumsy—and failed—attempt to erase the primary-purpose requirement from the Court's cases. Petitioners have the far better reading of those decisions. Pet. 21-22.

To its credit, the Committee does not feign interest in a limiting principle that would keep its test from becoming a congressional rubber stamp. That is because there is none. Pet. 24. The absence of any discernible limit on the ability of Congress to investigate wrongdoing under the pretense of lawmaking is troubling. The Necessary and Proper Clause does not "'permit Congress to exercise a police power.'" *United States v. Kebodeaux*, 570 U.S. 387, 402

(2013) (Roberts, C.J., concurring in the judgment) (quoting *United States v. Morrison*, 529 U.S. 598, 618-19 (2000)). But that is of course what Congress can do without judicial inquiry into the subpoena's "'gravamen.'" App. 85a (Rao, J., dissenting) (quoting *Kilbourn*, 103 U.S. at 193).

Granting Congress blanket authority to subpoena the President's personal records is even more problematic. Pet. 24-25. According to the Committee, "election of a President" with "extensive financial interests" was all Congress needed to launch this probe under its *legislative* authority. BIO 4-5. Presumably, then, Congress could subpoena a President's medical records if he was elected with a health condition or a President's high-school records if he was elected without graduating from college. "Whether new legislation on these subjects is needed," under those circumstances, would be "a natural subject of Congressional inquiry." BIO 4. Resting this awesome power on the Necessary and Proper Clause is intolerable. The Court should "find it implausible to suppose—and impossible to support—that the Framers intended to confer such authority by implication rather than expression." *Kebodeaux*, 570 U.S. at 402 (Roberts, C.J., concurring in the judgment).

Finally, the Committee argues that the D.C. Circuit actually applied the primary-purpose test "that Petitioners had advocated." BIO 27. But the Committee argued just the opposite in its stay brief and is mistaken in any event. Pet. 20-21. The D.C. Circuit rejected Petitioners' argument that a stated

law-enforcement "rationale spoils the Committee's otherwise valid legislative inquiry." App. 32a. In its view, there is no barrier to subpoenaing the President based on an express interest in determining "whether and how illegal conduct has occurred" so long as the Committee "professed that it seeks to investigate remedial legislation." App. 34a. That legal error was decisive.

The Committee's attempt to create distance between Petitioners and Judge Rao similarly fails. BIO 30. Like Petitioners, she explained that "investigating allegations of illegal conduct against the President" may not be upheld as "part of the *legislative power*." App. 77a. Like Petitioners, she explained that whether the subpoena is, in fact, an investigation of illegality turns on whether the "'gravamen' of the investigation rests on 'suspicions of criminality.'" App. 85a (quoting *Kilbourn*, 103 U.S. at 193, 195). And, like Petitioners, it was her view that because "the gravamen" of the Committee's subpoena "is the President's wrongdoing," App. 135a, "the mere statement of a legislative purpose ... cannot support this subpoena," App. 127a. It is not testing the limits of advocacy to read Judge Rao's dissent the same way she does. App. 218a (Rao, J., dissenting from denial of rehearing en banc). It is disappointing that the Committee would suggest otherwise.

This subpoena also could not result in constitutional legislation. Pet. 25-31. The Committee (at 30-32) appears to disagree that imposing financial disclosure requirements on the President would exceed Congress's legislative authority. Yet it never

really explains why. Like the D.C. Circuit, the Committee points to the Presidential Records Act. But this statute is nothing like the financial disclosure requirements that the Ethics in Government Act imposes—*i.e.*, the regime that the D.C. Circuit pointed to as constitutional. App. 46a-48a. The Committee *never* explains why—as a matter of structure—Congress may impose this kind of disclosure requirement on an office that is created by the Constitution itself. Pet. 27-28.

The Committee offers an even more meager response to Petitioners' claim that financial-disclosure requirements violate the Qualifications Clause. The Committee argues that "Petitioners did not develop any such argument below." BIO 32. The D.C. Circuit would be surprised to learn that given that it responded to the argument. App. 50a-51a. On the merits, the Committee says that Congress will not make compliance a condition for holding office or appearing on the ballot. BIO 32. But it *never* addresses the cases rejecting that as a measure of whether a requirement is a prohibited qualification. Pet. 29. At bottom, the only thing undeveloped here is the Committee's explanation for how this subpoena could result in valid legislation.

The Committee retreats to the position it took in the stay briefing: the Court should avoid deciding this question in the context of a subpoena fight. BIO 31. Petitioners agree. But it was the D.C. Circuit that explained why "far-reaching constitutional adjudications" should be avoided in this kind of case. *Tobin v. United States*, 306 F.2d 270, 274 (D.C. Cir.

1962). The Committee also omits that the only remedy for this concern is to narrowly interpret the House Rules. *Id*. at 274-76. Should Congress "adopt a resolution which in express terms authorizes and empowers the Committee ... to initiate an investigation ... as deep and as penetrating as the one attempted here, a challenge of the congressional power so to provide would of course present constitutional issues which we should have to meet and decide." *Id*. at 276.

If the Committee genuinely wants this issue avoided, it should accede to a narrow interpretation of its statutory authority. Pet. 37. The Committee cannot take the position that "'Congress has demonstrated its full awareness of what is at stake,'" BIO 21 (quoting *United States v. Rumely*, 345 U.S. 41, 46 (1953)), *and* avoid having this significant constitutional question decided in a subpoena fight. As *Rumely* and *Tobin* make clear, its one or the other.

In truth, the case should have been decided by ruling that the Committee lacks statutory authority to subpoena the President absent an express statement. Pet. 31-36. The Committee responds that "Petitioners have conceded that the Rules do authorize the Committee's subpoena" under a "'normal' ... reading." BIO 32-33 (citation omitted). But acknowledging that a rule which "placed 'any matter' within the ... Committee's wide purview" is susceptible to a "literal reading" that includes the authority claimed here is not much of a concession. App. 65a-66a. The issue is whether there are good

reasons to narrowly interpret that authority "to carve out the President." App. 65a.

On that score, the Committee incorrectly claims that Resolution 507 solved the problem. Pet. 32 n.7. There is still an "open question" as to whether the House Rules authorize this subpoena. *Deutsche Bank*, 2019 WL 6482561, at *48 (Livingston, J.). The Committee repeats the D.C. Circuit's conclusion that there are no grave constitutional issues without ever explaining why that's so. BIO 34. That is likely because the issues the subpoena raises are plainly serious. Pet. 32-33.

Finally, the Committee (at 34-35) objects to treating the President differently from other subpoena recipients. But the Committee cannot overcome the wall of precedent standing in its path. Whether the President has prevailed—like in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), and *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367 (2004)—or he has not—like in *Nixon* and *Clinton*—the Court has *always* been sensitive to the special nature of the office and the need to adjust legal process due to its unique constitutional status. As the Executive Branch explained in its brief below, those separation-of-powers concerns are equally—if not more—pressing here. Pet. 35-36.

The Committee's complaint (at 35) that Petitioners and Judge Katsas are asking the Court to "draw lines in the first instance" thus misses the mark. These concerns can be addressed by applying settled principles. First, the Court can require

Congress to expressly authorize its committees to subpoena the President before unleashing them to do so. And, second, it can require any committee so authorized to establish a heightened showing of need before being granted access to the President's personal records. Pet. 35. That may not definitively resolve whether Congress has the authority under the Constitution to subpoena the President's personal records in aid of legislation. But it will resolve this dispute and restore at least some "balance ... between Congress and the President" when it comes to unprecedented subpoenas like this one. App. 218a (Rao, J., dissenting from denial or rehearing en banc).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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