ORAL ARGUMENT HELD ON JULY 12, 2019
DECISION ISSUED ON OCTOBER 11, 2019

No. 19-5142

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

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,

Plaintiffs-Appellants,

v.

MAZARS USA LLP,

Defendant-Appellee,

COMMITTEE ON OVERSIGHT AND REFORM OF THE U.S. HOUSE OF REPRESENTATIVES,

Intervenor-Defendant-Appellee.

RESPONSE OF THE COMMITTEE ON OVERSIGHT AND REFORM OF THE U.S. HOUSE OF REPRESENTATIVES TO THE PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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INTRODUCTION AND SUMMARY

Rehearing en banc in this Court is unusual and would plainly be unwarranted here. Applying settled precedent from the Supreme Court, a panel of this Court wrote a thorough and well-reasoned opinion, rejecting the arguments of the Trump Plaintiffs. There is not even an arguable conflict within this Circuit or among the Circuits. And the dissent is based on a novel theory proposing that this Court take the unprecedented step of requiring the House of Representatives to decide at the outset of an investigation whether to pursue legislation or impeachment in exercising its Article I authority. Neither the Trump Plaintiffs nor the amicus curiae Department of Justice argued this theory, and the Trump Plaintiffs have tellingly not embraced it in their rehearing petition. Under these circumstances, review by the full Court would be inappropriate. *See* Fed. R. App. P. 35(a).

As the panel's opinion describes, President Donald J. Trump and several of his business entities filed this suit to enjoin an accounting firm, Mazars USA, LLP, from complying with a subpoena issued by the House Committee on Oversight and Reform. The Committee sought financial records from Mazars to further its investigations concerning Executive Branch ethics, Presidential financial disclosures, and related legislative reforms and oversight. A panel of this Court held that "[c]ontrary to the President's arguments, the Committee possesses authority under both the House Rules and the Constitution to issue the subpoena, and Mazars must comply." Op. 2.

The Court recognized that "[t]he power of the Congress to conduct investigations … is broad," and may be "as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress." Op. 18-19 (quoting *Watkins v. United States*, 354 U.S. 178, 187 (1957), and *Townsend v. United States*, 95 F.2d 352, 361 (D.C. Cir. 1938)). It stressed that the Committee "has *not* subpoenaed President Trump," but rather an "accounting firm with whom President Trump has voluntarily shared records." Op. 20.

The Court held that the Committee issued its subpoena for "legitimate legislative pursuits, not an impermissible law-enforcement purpose." Op. 25. And as the Court emphasized, "the relevant inquiry is whether legislation '*may* be had,' not whether constitutional legislation *will* be had." Op. 36 (quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 508 (1975)). The Court further recognized that the Committee "began its inquiry at a logical starting point" by "focus[ing] an investigation into presidential financial disclosures on the accuracy and sufficiency of the sitting President's filings." Op. 31.

The Trump Plaintiffs nevertheless insist that the Committee's "primary purpose is law enforcement" (Pet. 6), not legislation and oversight. The Court correctly rejected that argument, holding that the record here—including then-Chairman Elijah Cummings's express avowal of the Committee's purpose and legislative proposals pending before the House—is "more than sufficient to

demonstrate the Committee's interest in investigating possible remedial legislation." Op. 28.

The Trump Plaintiffs further contend that one of many possible legislative reforms—imposing financial disclosure requirements on Presidents—would be unconstitutional. But the Court rejected that argument, Op. 38-45, correctly reasoning from established Supreme Court precedent and the text of the Constitution that there is "no inherent constitutional flaw in laws requiring Presidents to publicly disclose certain financial information," Op. 45.

Finally, the Trump Plaintiffs argue that House Rules must clearly authorize subpoenas for records of the President in the hands of a third party (Pet. 14-15), but that argument is invented out of whole cloth and provides no basis for rehearing. The Court held that it has "no authority to impose such a requirement on the House." Op. 62.

Rehearing cannot be "necessary to secure or maintain uniformity of the court's decisions," Fed. R. App. P. 35(a)(1): the petition cites only four other opinions of this Court and does not argue that the Court's opinion conflicts with any of them, *see* Pet. 8, 9, 15, 16. Nor does this "proceeding involve[] a question of exceptional importance," Fed. R. App. P. 35(a)(2)—the mere fact that the President, in his individual capacity, objects to a third-party subpoena does not warrant the full Court's review. The panel's opinion applied settled precedent to uphold the subpoena at issue here, and no "extraordinary circumstances exist that call for authoritative

consideration and decision by" the full Court. *United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960).

This Court's "duty to see that … litigation" involving a Congressional subpoena "is swiftly resolved," *Eastland*, 421 U.S. at 511 n.17, strongly supports moving this litigation along to its conclusion.

BACKGROUND

1. The Committee, the House's principal oversight body, is charged with "'review[ing] and study[ing] on a continuing basis the operation of Government activities at all levels'" and is "permitted to 'conduct investigations' 'at any time … of any matter,' 'without regard to' other standing committees' jurisdictions." Op. 3 (quoting House Rule X.3(i), 4(c)(2)). To fulfill these "functions and duties," the Committee may "require, by subpoena or otherwise … the production of such … documents as it considers necessary." *Id.* at 3 (quoting House Rule XI.2(m)). The Committee's jurisdiction, as set forth by the House Rules, "unquestionably includes financial-disclosure and other ethics-in-government laws." *Id.* at 56 (citing House Rule X).

The Committee is currently investigating serious issues concerning Executive Branch ethics and conflicts of interest, including the accuracy of Mr. Trump's financial disclosures mandated by the Ethics in Government Act of 1978 and the adequacy of existing laws requiring such disclosures. Following the identification of an error in Mr. Trump's disclosures—the omission of a substantial payment on behalf

of Mr. Trump by his former personal lawyer, Michael Cohen, to a third party—and testimony by Mr. Cohen that Mr. Trump had misstated his financial condition in accounting statements (including those prepared by Mazars), the Committee in early 2019 requested documents from various sources related to Mr. Trump's financial disclosures. Op. 4-6; *see, e.g.*, *id.* at 5-6 (citing February 2019 letter from the Committee to the White House).

In furtherance of its investigation, the Committee sought documents from Mazars in March 2019 for certain accounts relating to Mr. Trump, highlighting "specific concerns" relating to the adequacy of Mr. Trump's disclosures. Op. 7-9. When Mazars did not supply the materials, then-Committee Chairman Cummings issued a subpoena on April 15, 2019 for documents concerning Mr. Trump and several of his business entities dating from 2011 to 2018. *Id.* at 8-9.

Before issuing the subpoena, the Chairman issued a memorandum describing the areas of the Committee's investigation: (1) "whether the President may have engaged in illegal conduct before and during his tenure in office," (2) "whether [the President] has undisclosed conflicts of interest that may impair his ability to make impartial policy decisions," (3) "whether [the President] is complying with the Emoluments Clauses of the Constitution," and (4) "whether [the President] has accurately reported his finances to the Office of Government Ethics and other federal entities." Op. 8 (quoting JA107). The Chairman emphasized that "[t]he Committee's interest in

these matters informs its review of multiple laws and legislative proposals under our jurisdiction." *Id.* (quoting JA107).

Indeed, the House "has pending several pieces of legislation related to the Committee's inquiry." *Id.* at 27 (citing various pending disclosure and other legislation). And the information sought is also relevant to the Committee's oversight of, among other things, the Office of Government Ethics and the General Services Administration (which manages the lease for the Trump International Hotel in Washington, D.C.). *See generally* Op. 56-57 (describing Committee's oversight jurisdiction).

2. Before Mazars complied, the Trump Plaintiffs sued to invalidate the subpoena and the Committee intervened. *See* Op. 9. The district court "worked quickly" to resolve the litigation and held the subpoena valid and enforceable, granting summary judgment to the Committee. *Id.* at 9-10.

The Trump Plaintiffs appealed, and the parties agreed to an expedited briefing and argument schedule that also provided for a suspension of the time for production set by the subpoena until this Court issues its mandate. *See* Joint Mot. to Expedite Appeal at 2 (May 22, 2019); Op. 10.

A panel of this Court has now upheld the subpoena to Mazars as valid and enforceable under established Supreme Court precedent. Op. 2. Rejecting the Trump Plaintiffs' argument that the subpoena constituted "impermissible congressional law enforcement," Op. 22, the Court held that the Committee had "a valid legislative

purpose," Op. 25 (quoting *Barenblatt v. United States*, 360 U.S. 109, 127 (1959)). The Cummings memorandum and the Committee's other correspondence, together with pending legislation, were "more than sufficient to demonstrate the Committee's interest in investigating possible remedial legislation." Op. 28. The Court dismissed the Trump Plaintiffs' other arguments, holding that Congress has multiple "constitutionally permissible options" for regulating Presidential financial disclosures, Op. 45, 38-45, and that the House sufficiently authorized the Committee to issue the subpoena, Op. 54-65.

Dissenting on grounds that no party or amicus (including the Department of Justice) had urged, Judge Rao distinguished between legislative and impeachment investigations. *See* Dissent Op. 1. While acknowledging that the Committee's "interest in remedial legislation may support any number of investigations, including into the conduct of agencies and how officials administer the laws," in Judge Rao's view, the nature of the conduct at issue here may "be pursued exclusively through impeachment." *Id.* at 7. As described below, Judge Rao's concern is of no practical effect given the recent House resolution affirming the ongoing impeachment investigation.

Shortly after the Court's ruling, the Committee filed a motion for immediate issuance of the mandate to ensure that Mazars produces the subpoenaed records in time to aid the Committee's legislative and oversight aims. The Trump Plaintiffs have opposed that motion.

ARGUMENT

THE PANEL'S FACT-BOUND DECISION THAT THE SUBPOENA IS VALID IS CORRECT, DOES NOT CONFLICT WITH ANY DECISION OF THE SUPREME COURT OR THIS COURT, AND DOES NOT WARRANT FURTHER REVIEW

The Court should deny rehearing en banc, and the best argument for that result is provided by the Court's opinion in this case. There is no division of authority within the Circuit. Fed. R. App. P. 35(a)(1). And the Trump Plaintiffs' challenge to the application of settled law regarding a Congressional subpoena issued to a third party—not the President—does not raise questions of "exceptional importance." Fed. R. App. P. 35(a)(2). The Trump Plaintiffs' primary objection is to the Court's application of governing legal principles to determine the validity of the subpoena at issue here, but such case-specific application of law to fact does not warrant further review.

1. a. The Trump Plaintiffs' petition makes clear that, in their view, as they recently informed the Second Circuit, the Court "accepted the President's explanation of the governing legal principles." Rule 28(j) Resp. Letter at 1*, Trump v. Deutsche Bank*, No. 19-1540 (2d Cir. Oct. 14, 2019), ECF No. 202. The Trump Plaintiffs disagree only with how the Court "*applied* these principles" to the Committee's subpoena. *Id.* at 2.

The application of settled legal principles to determine whether this subpoena serves a legitimate legislative purpose does not warrant rehearing. Even "[f]ollowing" the Trump Plaintiffs' suggestion that it "rely upon available evidence … to discern for

[itself] what the Committee's *actual* purpose is," Op. 25 (quoting in part Appellants' Br. 29-30), and "[a]ssuming" that it "owe[d] Congress no deference," *id.*, the Court held that there was "more than sufficient" evidence of "the Committee's interest in investigating possible remedial legislation," Op. 28. That evidence includes: (1) the Committee's own descriptions of its inquiry, (2) "the fact that the House has pending several pieces of legislation related to the Committee's inquiry," Op. 27, and (3) the fact that "the House has even put its legislation where its mouth is" by passing one of those bills, Op. 30 (referring to H.R. 1, 116th Cong. (2019)).

It is not a "valid objection to [a congressional] investigation that it might possibly disclose crime or wrongdoing." *McGrain v. Daughtery*, 273 U.S. 135, 180 (1927). No precedent suggests that the established rule that a subpoena with a legitimate legislative purpose is enforceable yields when the President's alleged wrongdoing is at issue. Nor is Congress's "authority … to require pertinent disclosures in aid of its own constitutional power … abridged because the information sought to be elicited may also be of use" in criminal prosecutions. *Sinclair v. United States*, 279 U.S. 263, 295 (1929). That is so because "an interest in past illegality can be wholly consistent with an intent to enact remedial legislation." Op. 29. Information concerning how laws are violated can aid Congress in writing stronger laws. And here the subpoenaed information could "shed light on" whether "current financial disclosure laws are successfully eliciting the right information from the sitting President." Op. 32, 53.

It is, moreover, "not for [the courts] to speculate as to the motivations that may have prompted the decision of individual [committee] members" to issue the subpoena. *Wilkinson v. United States*, 365 U.S. 399, 412 (1961). And "motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served." *Watkins*, 354 U.S. at 200. Thus, "when the purpose asserted is supported by references to specific problems which in the past have been or which in the future could be the subjects of appropriate legislation, then [courts] cannot say that a committee of the Congress exceeds its broad power when it seeks information in such areas." *Shelton v. United States*, 404 F.2d 1292, 1297 (D.C. Cir. 1968).

The Trump Plaintiffs seek to portray their fact-bound dispute about this subpoena's purpose as a legal question concerning a subpoena's validity when its purported "primary purpose" or "gravamen" is law enforcement. Pet. 8. As the Court held, however, this subpoena does *not* involve "an insubstantial, makeweight assertion of [legislative] purpose." Op. 28 (quotation marks omitted). To the contrary, as the Court correctly concluded here, the Committee's subpoena "seeks information important to determining the fitness of legislation to address potential problems within the Executive Branch and the electoral system." Op. 50 (emphasis omitted). Indeed, as the Court observed, the Committee has demonstrated an interest in enacting remedial legislation "even more so," Op. 30, than the committees in

Hutcheson v. United States, 369 U.S. 599 (1962), and *Sinclair v. United States*, 279 U.S. 263 (1929), where subpoenas were upheld by the Supreme Court. Op. 30.

In any event, *Hutcheson* and *Sinclair* both confirm, that a Committee's subpoena is valid even when its primary purpose is to investigate illegality. *See Hutcheson*, 369 U.S. at 617-18 (holding subpoena valid even though the "Committee's concern … was to discover whether … [union] funds … had been used … to bribe a state prosecutor"); *Sinclair*, 279 U.S. at 289-90 (holding subpoena valid even though a committee member had said that, "[i]f we do not examine Mr. Sinclair about th[e] matters [for which he was being prosecuted], there is not anything else to examine him about").

b. The Trump Plaintiffs quote Judge Rao's dissent, but they do not adopt or defend her reasoning. Judge Rao shared the majority's view that the Committee is engaged (at least in part, in her view) in a "valid legislative inquiry," which could "continue in any number of legitimate directions." Dissent Op. 44. But she reasoned that, "[w]hen Congress seeks information about the President's wrongdoing, it does not matter whether the investigation also has a legislative purpose." *Id.* at 1. Such an investigation, she stated, "may be pursued only through impeachment." *Id.* at 44.

The Trump Plaintiffs do not ask the Court to adopt Judge Rao's novel theory on rehearing. And Judge Rao's theory is foreclosed by settled law: Congress's power to investigate in furtherance of legislation "is not abridged because the information sought to be elicited may also be" used for other purposes. *Sinclair*, 279 U.S. at 295.

And, as the panel majority observed, it cannot be that Congress must "abandon its legislative role at the first scent of potential illegality and confine itself exclusively to the impeachment process." Op. 46.

Such an approach, which the dissent sought to broadly apply to "any impeachable official," Dissent Op. 47, would force the House at a very early stage of an investigation to make the consequential decision whether to pursue impeachment without first obtaining relevant information about the scope and significance of the conduct at issue. This approach does not account for the practical realities of the legislative process and would severely hobble Congress's ability to oversee and remedy wrongdoing by the hundreds of impeachable "civil Officers" across the Executive Branch. *Id.* at 15 (quoting U.S. Const., Art. II, § 4).

Contrary to the dissent's reasoning, history makes clear that Congress is not immediately put to the choice of deciding whether to pursue impeachment whenever it investigates the Executive Branch. For example, the House's 1792 investigation of the St. Clair expedition involved the prospect of impeachment, possibly of Secretary of War Henry Knox. *See* 3 Annals of Congress 490 (statement of Rep. Vining) ("[L]et those who are to blame be impeached."); *id.* at 491 (statement of Rep. Steele) (stating "he had no great doubt that an inquiry would lead to an impeachment"); 1 *Congress Investigates: A Critical and Documentary History* 9 (Roger A. Bruns et al. eds., rev. ed. 2011) (St. Clair "believed that the committee's motive was to discover some cause of complaint against Knox").

Additionally, judicially enforcing the dissent's distinction between legislative and impeachment investigations would require courts to define which offenses are impeachable, despite the Constitution's commitment of the "sole Power of Impeachment" to the House. U.S. Const., Art. I, § 2, cl. 5; *see also Nixon v. United States*, 506 U.S. 224, 230-31 (1993) ("'[T]he Senate shall have the sole Power to try all Impeachments.' We think that the word 'sole' is of considerable significance. Indeed, the word 'sole' appears only one other time in the Constitution—with respect to the House of Representatives' '*sole* Power of Impeachment.' Art. I, § 2, cl. 5 (emphasis added)."). The prospect that courts would, under the dissent's theory, opine on a question that the Constitution assigns solely to the House is not a hypothetical concern: indeed, in opining that "maladministration" is not an impeachable offense, *see* Dissent Op. 15-16, Judge Rao has issued what appears to be the first judicial opinion ever purporting to define "high Crimes and Misdemeanors." U.S. Const., Art. II, § 4.

In any event, the practical consequence of the dissent's theory that the House could issue this subpoena only pursuant to its impeachment authority has been limited by subsequent events. On October 31, 2019, the House approved a resolution confirming that the Committee's "ongoing investigation[]" is "part of the existing House of Representatives inquiry into whether sufficient grounds exist for the House … to exercise its Constitutional power to impeach Donald John Trump." H. Res. 660, 116th Cong., at 1-2 (2019).

2. The Trump Plaintiffs contend (Pet. 10) that the Court erred in holding that legislation could be had on Presidential financial disclosures and that the Committee's inquiry, therefore, had a valid legislative purpose. But the Court correctly decided this issue and noted that disclosure was not the only "potentially fertile grounds from which constitutional legislation could flower." Op. 45.

The Court recognized that it must "tread carefully," because courts' "limited judicial role gives [them] no authority to reach out and strike down a statute before it is even enacted." Op. 36 (quotation marks and alterations omitted). It then observed that the Mazars subpoena sought information relevant to a class of laws that would require the President and Presidential candidates "to do nothing more than disclose financial information." Op. 38 (emphasis omitted).

The U.S. Code already contains several such laws, *see* Op. 40-41 (citing, among other statutes, the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342(c), and the Ethics in Government Act, 5 U.S.C. app. 4 § 102(a)), but the Trump Plaintiffs argue that *all* such laws—already enacted and potential—are unconstitutional. The panel correctly rejected that radical argument. As the Court observed, disclosure laws "exclude precisely zero individuals from running for or serving as President" and do not directly or indirectly add to "the exclusive qualifications set forth in the text of the Constitution." Op. 44-45 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 827 (1995)). The Court therefore saw "no inherent constitutional flaw" in such laws. Op. 45.

The Trump Plaintiffs' reliance on *Thornton* is unavailing. There, the Supreme Court held that a law prohibiting long-term incumbents from appearing on the ballot was unconstitutional because it (1) had "the likely effect of handicapping a class of candidates and [(2)] ha[d] the sole purpose of creating additional qualifications indirectly." *Thornton*, 514 U.S. at 836. Financial disclosure laws suffer from neither of those flaws, as they require only disclosure of information.

The Court thus correctly concluded that there are "constitutionally permissible options open to Congress in the field of financial disclosure." Op. 45.

3. The Trump Plaintiffs urge this full Court to hear this case in order to invent a requirement that the House amend its Rules to expressly authorize subpoenas concerning the President (even where he has not himself been subpoenaed). *See* Pet. 14-16. Far from avoiding constitutional issues, the Trump Plaintiffs' preferred outcome would raise significant constitutional and separation-of-powers concerns. *See Rangel v. Boehner*, 20 F. Supp. 3d 148, 172 (D.D.C. 2013), *aff'd on other grounds*, 785 F.3d 19 (D.C. Cir. 2015) ("[R]eaching the merits of dispute over [a] [House] rule would require an invasion into internal [House] processes at the heart of the [House's] constitutional prerogatives, thereby expressing a lack of due respect[.]" (quotation marks omitted)).

The Constitution directs that "[e]ach House may determine the Rules of its Proceedings," U.S. Const., Art. I, § 5, cl. 2. As the Court noted, the Trump Plaintiffs acknowledged that, "literally read, the [House] Rules permit the Committee to issue

the challenged subpoena." Op. 58. To avoid any doubt, the House after oral argument in this case enacted a resolution ratifying "all subpoenas previously issued … concerning … the President in his personal or official capacity … [and] his … business entities." H. Res. 507, 116th Cong. (July 24, 2019).

The Resolution, as the Court noted, "confirms what the Trump Plaintiffs admit—that the plain text of the House Rules authorizes the subpoena, and … provides what the Trump Plaintiffs request"—a clear statement authorizing the subpoena. Op. 64 (citation omitted). Nothing more is required to, as the Trump Plaintiffs would have it, "[f]orc[e] Congress to be fully aware and unequivocal" that the House has subpoenaed the President's financial records. Pet. 15.

Nor is there any possible basis to apply the canon of constitutional avoidance to the House Rules at issue here. That canon "comes into play only when, after the application of ordinary textual analysis, [a] statute is found to be susceptible of more than one construction." *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (quotation marks omitted). It is not a license to rewrite Congress's "unambiguous text." Op. 62 (quoting *Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp.*, 724 F.3d 230, 237 (D.C. Cir. 2013)). After all, "interpreting a congressional rule differently than would the Congress itself[] is tantamount to *making* the Rules—a power that the Rulemaking Clause reserves to each House alone." Op. 62 (quotation marks omitted).

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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November 1, 2019

CERTIFICATE OF COMPLIANCE

1. This response complies with the type-volume limitation of this Court's Order of October 25, 2019 because this response contains 3,881 words excluding the parts of the response exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

2. This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Professional Plus 2016 in 14-point Garamond type.

/s/ Douglas N. Letter
Douglas N. Letter

CERTIFICATE OF SERVICE

I certify that on November 1, 2019, I filed the foregoing Response of the Committee on Oversight and Reform of the U.S. House of Representatives via the CM/ECF system of the United States Court of Appeals for the District of Columbia Circuit, which I understand caused service on all registered parties.

/s/ Douglas N. Letter
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