19-1540-cv

United States Court of Appeals

for the

Second Circuit

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 HOLDINGS MANAGING MEMBER LLC, TRUMP ACQUISITION LLC, TRUMP ACQUISITION, CORP.,

Plaintiffs-Appellants,

– v. –

DEUTSCHE BANK AG, CAPITAL ONE FINANCIAL CORPORATION,

Defendants-Appellees,

COMMITTEE ON FINANCIAL SERVICES OF THE UNITED STATES HOUSE OF REPRESENTATIVES, PERMANENT SELECT COMMITTEE ON INTELLIGENCE OF THE UNITED STATES HOUSE OF REPRESENTATIVES,

Intervenor Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants The Trump Organization, Inc., Trump Organization LLC, DJT Holdings LLC, DJT Holdings Managing Member LLC, Trump Acquisition LLC, and Trump Acquisition Corp. state that they have no parent companies or publicly-held companies with a 10% or greater ownership interest in them.

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JURISDICTION

The district court had jurisdiction because this case arises under federal law, 28 U.S.C. §1331, and is brought to enforce the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. §3416. The district court denied Plaintiffs' motion for a preliminary injunction on May 22, 2019, and Plaintiffs filed a timely notice of interlocutory appeal on May 24, 2019. JA11. This Court has jurisdiction to review the denial of a preliminary injunction. 28 U.S.C. §1292(a)(1); *Ragbir v. Homan*, 923 F.3d 53, 62 (2d Cir. 2019).

STATEMENT OF THE ISSUES

1. Did Plaintiffs raise a serious question that the challenged subpoenas are not supported by a legitimate legislative purpose?

2. Did Plaintiffs raise a serious question that the RFPA applies to investigative subpoenas issued by congressional committees?

3. Does the balance of hardships favor Plaintiffs?

STATEMENT OF THE CASE

This case is about the legality of three congressional subpoenas for the private banking records of President Donald J. Trump, his family, and his businesses (all Plaintiffs here). Plaintiffs filed this suit to challenge the subpoenas' legality, and they moved for a preliminary injunction to freeze compliance until their challenges could be heard on the merits. In an oral decision, the district court (Ramos, J., S.D.N.Y.) denied Plaintiffs' motion for a preliminary injunction and denied a stay pending appeal. This interlocutory appeal followed.

I. Factual Background

Immediately after the 2018 midterm elections, members of the new House majority party announced their plans to probe all aspects of the President's public and private life. Soon-to-be House Speaker Nancy Pelosi proclaimed that "tomorrow will be a new day in America" and that the "subpoena power" is "a great arrow to have in your quiver." JA19. Another congressional aide declared that "Congress is going to force transparency on this president." JA19. As the new Congress approached, House Democrats spent months preparing a "subpoena cannon" to fire at President Trump based on a "wish-list" of nearly 100 investigatory topics. JA19. John Yarmuth, chair of the House Budget Committee, stated that the new House majority would be "brutal" for President Trump: "We're going to have to build an air traffic control tower to keep track of all the subpoenas flying from here to the White House." JA19.

Among those empowered by the election were Representative Adam Schiff, chair of the House Permanent Select Committee on Intelligence, and Representative Maxine Waters, chair of the House Financial Services Committee. After the new Congress convened, Chairwoman Waters assured supporters that "I haven't forgotten about 45"—meaning President Trump. "I have the gavel—and subpoena power—and I am not afraid to use it." JA19. On another occasion, she promised the President that "[w]e're going to find out where your money has come from." JA20. Schiff and Waters also entered into a secret agreement with House Oversight Committee Chairman Elijah

Cummings to coordinate their efforts to expose the private financial affairs of the President and his family. JA20.

The Democrats made good on their promises. House committees have issued a barrage of subpoenas and requests for information about the President's family, personal finances, and businesses. Chairman Jerrold Nadler of the House Judiciary Committee, for example, has asked at least 81 different individuals and entities for information about President Trump. JA20. Chairman Cummings, moreover, subpoenaed the President's accountant for a wide swath of his business records, going back eight years. JA20; *see Trump v. Comm. on Oversight & Reform of U.S. House of Representatives*, 2019 WL 2171378, at *1 (D.D.C. May 20, 2019). A short time later, investigators for the Financial Services and Intelligence Committees sent the three subpoenas at issue here.

The Committees' subpoenas are not cabined to the President's actions in his official capacity; they target financial institutions that the President, his businesses, and his family used long before his election to office. The subpoenas seek documents reaching back more than a decade, cover individuals who have never held government office (including minor children), and seek virtually every financial detail that the institutions might have about Plaintiffs' private affairs. *See* JA36-67.

A. Capital One Subpoena

The Financial Services Committee subpoenaed Capital One for account records concerning fifteen of the President's business entities, as well as any "parent, subsidiary, affiliate" and "principal, including directors, shareholders, or officers." JA52. The subpoena also demands information about any account "in which such entities are or were a beneficiary, or beneficial owner, or in which such entities have or have had in any way control over, individually or with others." JA52. For each and every account, the subpoena seeks:

- "[A]ny document"—regardless of date[1]—"related to account opening, due diligence, or closing";
- "[A]ny monthly or periodic statement showing line item detail for all account activity";
- "[A]ny summary record or analysis of account deposits and transfers," including the source of each deposit and destination of each transfer;
- "[A]ny document related to any transfer of funds in excess of $10,000";
- "[A]ny document" related to bank reviews for suspicious or illegal conduct;
- "[A]ny document … related to any loan or extension of credit";
- "[A]ny document related to any real estate transaction"; and
- "[A]ny document related to, or provided in response to" any federal, state or local criminal, administrative, or civil inquiry, or any search warrant.

JA52-53.

[1] The Capital One subpoena limits some (but not all) of its other requests to the period from July 19, 2016, through the present. JA52.

The only legislative purpose that the Financial Services Committee has asserted for the Capital One subpoena is the inquiry referenced in House Resolution 206. JA132. That resolution describes Congress's general concerns about "money laundering and other financial crimes" and specifically "encourages transparency to detect, deter, and interdict individuals, entities, and networks engaged in money laundering and other financial crimes," "urges financial institutions to comply with the Bank Secrecy Act and anti-money laundering laws and regulations," and "affirms that financial institutions and individuals should be held accountable for money laundering and terror financing crimes and violations." H.R. Res. No. 116-206, at 5 (Mar. 13, 2019); *see also* JA132. The Committee contends that it wants to use "Mr. Trump, his family, and his businesses … as a useful case study" to learn about "unsafe lending practices" and "money laundering." Dkt. 51 at 25.

B. Deutsche Bank Subpoenas

Both the Financial Services Committee and the Intelligence Committee issued identical subpoenas to Deutsche Bank. JA130. These subpoenas are even broader than the Capital One subpoena; they demand information about seven specific business entities, as well as the personal accounts of not only the President, but also Donald Trump Jr., Eric Trump, and Ivanka Trump. JA37. But the subpoenas go even further than that: The Committees also demand account records for all of the named individuals' immediate families—meaning their spouses and minor children (and, in the

President's case, his grandchildren). JA37. The subpoenas cover any "trustee, settler or grantor, beneficiary, or beneficial owner" of each account, as well as "any current or former employee officer, director, shareholder, partner, member, consultant, senior manager, manager, senior associate, staff employee, independent contractor, agent, attorney or other representative." JA37. And they seek these records for a time period of *at least* ten years (dating back to January 1, 2010); some requests have no time limitation at all. *See* JA37-42. The subpoenas ask Deutsche Bank to produce, among other things:

- "[A]ny document related to account applications, opening documents … due diligence, and closing documents";
- "[A]ny monthly or other periodic account statements";
- "[A]ny document related to any domestic or international transfer of funds in the amount of $10,000 or more";
- "[A]ny summary or analysis of domestic or international account deposits, withdrawals and transfers";
- "[A]ny document related to monitoring for, identifying, or evaluating possible suspicious activity"; and
- "[A]ny document related to any investment bond offering, line of credit, loan, mortgage syndication, credit or loan restructuring, or any other credit arrangement."

JA37.

Although the Intelligence Committee has jurisdiction over "[i]ntelligence and intelligence-related activities," Rules of the House of Representatives X.11(b)(1)(B), 116th Congress (Jan. 11, 2019), it is not an intelligence-gathering agency. The

Committee's Chairman nonetheless has justified the subpoena as part of an investigation into "efforts by Russia and other foreign entities to influence the U.S. political process during and since the 2016 U.S. election." JA135. The Intelligence Committee has also contended that the subpoena would advance its understanding of "the threat of foreign financial leverage, including over the President, his family, and his business." JA137-38. The Financial Services Committee again relies on House Resolution 206 to justify its subpoena to Deutsche Bank. JA132.

II. Procedural Background

Once Chairman Schiff and Chairwoman Waters publicly confirmed the subpoenas' existence, JA20, Plaintiffs informed Capital One and Deutsche Bank that they objected to the production of their private records. The banks informed Plaintiffs that, absent a court order, they would produce the documents by May 6. JA21. Plaintiffs then contacted the Committees to request copies of the subpoenas—a request the Committees rebuffed. JA20-21.[2] Plaintiffs filed their complaint in the district court on April 29, 2019, and then filed (per an agreed-upon expedited briefing schedule) a preliminary-injunction motion on May 3. Plaintiffs contended that the subpoenas were invalid because they (1) lacked a legitimate legislative purpose and (2) violated the RFPA, which restricts the government's authority to obtain customers' financial records

[2] After filing suit, Plaintiffs moved to compel the subpoenas' production. *See* Dkt. 30. The Committees relented and agreed to produce the relevant portions of the subpoenas.

from banks. JA22-23. Plaintiffs argued that because the disclosure of their private information would irreparably harm them, and because their complaint raised at least a "serious question" on the merits, *Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010), they were entitled to a preliminary injunction prohibiting the banks from turning over their financial records to the Committees.

The Committees formally intervened as defendants. JA7-8. All parties agreed to suspend the return date of the subpoenas until after the district court resolved Plaintiffs' preliminary-injunction motion. The Committees opposed Plaintiff's preliminary-injunction motion, arguing that the subpoenas were a legitimate exercise of legislative authority and that the RFPA did not apply to Congress. Dkt. 51. Deutsche Bank and Capital One took no position. Dkt. 38; 40. The parties appeared before the district court for a hearing on May 22. JA68-69.

At the hearing, the district court questioned both Plaintiffs and the Committees extensively about their arguments. It then took a ten-minute recess, returned to the bench, and read aloud a prepared 25-page order, the transcript of which is the only record of the decision below. JA117.

The district court first held that Plaintiffs had "demonstrate[d] a likelihood of irreparable harm" because "the disclosure of private, confidential information is the quintessential … harm that cannot be compensated or undone by money damages."

JA121. The court opined that "Plaintiffs possess strong privacy interests in their financial information" that would be infringed if the Banks disclosed it to Congress. JA122. Moreover, the district court observed, the Committees "have not committed … to keeping plaintiffs' records confidential from the public once received." JA122-23.

Having found irreparable harm, the district court then turned to the merits to determine if Plaintiffs had identified sufficiently "serious" questions to justify a preliminary injunction. JA146-50. In the district court's view, "the answer [wa]s no." JA118.

With respect to the RFPA claim, the district court held that the statute did not apply to Congress. It noted that the statute applies to "any agency or department of the United States" and that in 1995—nearly 20 years after the RFPA's passage—the Supreme Court had interpreted similar language in a different (criminal) statute to exclude Congress. JA124 (citing *Hubbard v. United States*, 514 U.S. 695 (1995)). The district court also referenced the Committees' arguments that "the structure and context of the RFPA makes clear that Congress did not believe it was binding itself to the RFPA," but did not elaborate. JA125. The district court acknowledged that it was the first to address the applicability of the RFPA to Congress, but nonetheless determined that this question was not "serious" given its view of the text, structure, and "binding Supreme Court precedent" in *Hubbard*. JA147.

The district court also concluded that the subpoenas were a legitimate exercise of Congress's constitutional authority. It acknowledged that "[w]hile broad, Congress' investigative powers are not unlimited" and in fact "are subject to several limitations." JA128. The court recognized that any congressional investigation must be "related to a valid legislative purpose." JA128. Moreover, "the Supreme Court has made clear" that Congress's power to investigate "cannot be inflated into a general power to expose." JA129. And "since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government." JA129. Finally, the district court acknowledged that the Committees' investigative powers "are further restricted to the missions delegated to them, i.e., to acquire certain data to be used by the House or the Senate in coping with a problem that falls within its legislative sphere." JA129. "[C]onsequently, no witness can be compelled to make disclosures on matters outside that area." JA129. The district court then concluded that the challenged subpoenas transgress none of these limitations.

First, the court concluded that the subpoenas "are in furtherance of a legitimate legislative purpose, plainly related to the subjects on which legislation can be had." JA133. It noted that the Financial Services Committee had jurisdiction over banking laws, and had asserted that the subpoenas were "an important piece to that investigation" because Plaintiffs' private financial records might reveal that they "served

as conduits for illicit funds or may not have been properly underwritten" and, thus, Plaintiffs "serve as a useful case study for the broader problems being examined by the committee." JA133. The district court similarly credited the Intelligence Committee's assertions that the Deutsche Bank subpoena was part of its investigation into foreign influence, financial leverage, and "whether the structure, legal authorities, policies, and resources of the U.S. Government's intelligence, counterintelligence, and law enforcement elements are adequate to combat such threats to national security." JA134. The court conceded that "the mere assertion of a need to consider remedial legislation may not alone justify an investigation accompanied with compulsory process." JA136 (citing *Shelton v. United States*, 404 F.2d 1292 (D.C. Cir. 1968)). But it stated that "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." JA136.

Second, although the Court noted during argument that it was "easy to argue with the breadth of the subpoenas that have been issued" and "[i]f this were an ordinary civil case, I would send you guys into a room and tell you don't come out until you come back with a reasonable subpoena," it declined to order any narrowing of the subpoenas. JA93-94, 137. The district court concluded that it lacked the authority to constrain the subpoenas' scope. JA138.

Third, the district court rejected Plaintiffs' argument that the subpoenas amount to a law-enforcement investigation. The court again recognized that the "Supreme

Court has made clear that the power to investigate should not be confused with any of the powers of law enforcement," which "are assigned under our Constitution to the Executive and the Judiciary." JA139-40 (citing *Quinn v. United States*, 349 U.S. 155 (1955)). But it held that "it is not *obvious* that the committees usurped any powers exclusively vested in the Judiciary or the Executive," since "[t]here is nothing here to suggest that the sole function of the challenged subpoenas is to amass evidence either to prosecute plaintiffs, civilly or criminally." JA141 (emphasis added). Instead, the court found that the Committees "have provided ample justification establishing clear, legitimate legislative purposes for the information requested in the subpoenas." JA141.

Finally, the district court concluded that the Committees' alleged "ulterior motives" were "insufficient to vitiate their subpoena powers." JA142. In the court's view, "even in the face of investigations in which the predominant result is exposure of an individual's privacy, courts generally lack authority to halt an investigation otherwise supported by a facially legitimate legislative purpose." JA143. Thus, the court held, it "lacks authority to intervene on the basis of the [Committees'] motives." JA145.

The Court recognized that the "use of congressional subpoena power to receive from a third party a sitting President's financial records will always be serious in that the outcome will have serious political ramifications." JA150. But it held that the questions about the legitimacy of these subpoenas, and particularly Plaintiffs' arguments that upholding them would render Congress's investigatory power limitless, were not

"open to reasonable debate." JA150. In the district court's view, it was "well settled that the committees possessed the power to issue and enforce subpoenas of the type challenged by Plaintiffs." JA150-51.

The Court then briefly addressed the balance of hardships, finding that it favored the Committees. JA151-53. Because the court had already concluded "that the committees' subpoenas are likely lawful," it reasoned that "delaying what is likely lawful legislative activity is inequitable." JA151. It also noted that the House is not a "continuing body"—meaning it cannot enforce the subpoenas after December 2020—and thus "any delay in the proceedings may result in irreparable harm to the committees." JA152. The court discounted Plaintiffs' asserted harm (notwithstanding its early finding that it was "quintessential[ly]" irreparable). JA121, 152.

The district court denied a stay pending appeal, and Plaintiffs quickly filed a notice of appeal. JA159-60. The parties subsequently agreed to stay further compliance of the subpoenas during the pendency of this appeal, and jointly offered this Court an expedited briefing schedule. CA2 Doc. 5-2. This Court granted the parties' joint motion to expedite. CA2 Doc. 8.

SUMMARY OF THE ARGUMENT

Under our Constitution, "[t]he powers of the legislature are defined, and limited." *Marbury v. Madison*, 5 U.S. 137, 176 (1803). Congress's power to investigate is no exception. *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975) ("[T]he

power to investigate … is not unlimited."); *Barenblatt v. United States*, 360 U.S. 109 (1959) ("[Congress'] power of inquiry … is not … without limitations."); *Watkins v. United States*, 354 U.S. 178, 187 (1957) ("[Congress'] power of inquiry … is not unlimited."); *Quinn*, 349 U.S. at 161 ("[Congress'] power to investigate … is … subject to recognized limitations."); *McGrain v. Daugherty*, 273 U.S. 135, 173-74 (1927) ("[Congress] is invested … only with [a] limited power of inquiry."). For more than a century, the Supreme Court has imposed limitations on Congress's power to investigate and applied "the most careful scrutiny" to its attempts to compel testimony and documents. *Kilbourn v. Thompson*, 103 U.S. 168, 192 (1880). Precedent requires Congress to, among other things, have a legitimate legislative purpose, not exercise law-enforcement authority, not exceed the requesting committee's jurisdiction, and not make overbroad or impertinent requests.

This case involves subpoenas that, on their face, go far beyond these established boundaries. As part of a coordinated and unprecedented flurry of subpoenas directed at the President, his family, and his private businesses, the Intelligence and Financial Services Committees have demanded documents from two banks that did business with the President. These subpoenas seek an enormous volume of documents, reaching back *decades*. Among other things, they require production of private account records regarding every single transaction not only of the President, but also his employees, agents, representatives, children, and grandchildren. The subpoenas are not limited to

his time as President, or to those family members who have served in the government. Nor are they tied to any legislative proposals; to the contrary, the subpoenas seek documents with the express goal of investigating purported illegal activity—a law-enforcement power that lies within the exclusive province of the executive branch. Tellingly, in their efforts to justify the subpoenas, the Committees have publicly promised to "find out where [the President's] money has come from," JA20, have argued that these records will reveal whether the President has "commit[ed] financial fraud," JA101, and have tied the subpoenas to their concern that the President and his family "will not disclose and have, thus far, resisted disclosing [their financial records] to the American people." JA112.

In sum, this is not a case that simply pushes the limits of Congress's ability to compel the production of sensitive, private financial records; it is an attempt to override those limits and insulate Congress's subpoena power from any meaningful review. For if the Congress can seek the records of the President's minor grandchildren and investigate supposed criminal violations by simply asserting that the President provides an interesting "case study" or will promote "transparency" in the banking industry, JA132-33, then there is no limit to be enforced. Anyone can be a "case study"—an average citizen, a political opponent, even judges and law clerks hearing a case that a congressional committee deems important. Under the Committee's view of the law,

Congress can freely obtain individuals' private financial records, and there is nothing a federal court can do about it.

The district court uncritically accepted this argument, citing Congress's "broad" power to investigate and accepting the Committees' vague references to possible remedial legislation. JA127-28. And despite its acknowledgment that the subpoenas' scope was not "reasonable," JA94, it declined to make any effort to confine them to those areas actually pertinent to a legitimate legislative purpose. By abdicating its obligation to scrutinize the actual purpose of the subpoenas—even "inadmissible or unlawful" purposes that the Committees "affirmatively and definitely avowed," *McGrain*, 273 U.S. at 178, 180—the district court has embraced a standard so deferential as to lack any limit whatsoever. This is underscored by its declaration that Plaintiffs—in an unprecedented dispute between the sitting President and House that pushes the boundaries of the relatively scarce caselaw on congressional subpoenas—failed to even raise "serious questions" on the merits.

Equally flawed is the court's conclusion that the RFPA—a statute enacted to restore privacy protections of sensitive financial records—was never intended to reach beyond the executive branch. Numerous provisions of the Act refute the Committees' reading. Moreover, the language that Congress used in 1978 to define the "government authorit[ies]" that are bound by the RFPA had long been understood to include Congress. This Court must presume that Congress was aware of that understanding

when it enacted the RFPA. *Dekalb Cty. Pension Fund v. Transocean Ltd.,* 817 F.3d 393, 409-10 (2d Cir. 2016). In light of this interpretive rule, the district court's reliance on a subsequent decision interpreting another statute in 1995—nearly twenty years after the RFPA was enacted—cannot sustain the Committees' atextual interpretation.

For these and other reasons discussed below, the district court's denial of a preliminary injunction should be reversed. As the Supreme Court told the House Un-American Activities Committee during the McCarthy era, judicial "deference" to congressional subpoenas "cannot yield to an unnecessary and unreasonable dissipation of precious constitutional freedoms." *Watkins*, 354 U.S. at 204. Now, as then, a "measure of added care on the part of the House and Senate in authorizing the use of compulsory process" is a "small price to pay" to "uphold the principles of limited, constitutional government." *Id.* at 215-16.

ARGUMENT

"For the last five decades, this circuit has required a party seeking a preliminary injunction to show '(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.'" *Citigroup*, 598 F.3d at 35. Below, the Committees never disputed that the "serious questions" standard applies here, Dkt. 51 at 19 n.28, and the district court in fact applied that standard, JA147-50. This Court reviews its

decision for abuse of discretion, though "'the factual findings and legal conclusions underlying [it] are evaluated under the clearly erroneous and *de novo* standards, respectively.'" *NYC v. Golden Feather Smoke Shop, Inc.*, 597 F.3d 115, 120 (2d Cir. 2010).

The district court should have granted Plaintiffs' motion for a preliminary injunction. The Committees' subpoenas are sweeping and unprecedented attempts to obtain the private financial information of a sitting President. Plaintiffs have raised a serious question that the subpoenas are not reasonably relevant to a legitimate legislative purpose. And Plaintiffs have raised a serious question that the subpoenas must comply with the RFPA. Because the balance of equities decisively favors Plaintiffs, this Court should reverse and order the district court to enter a preliminary injunction.

I. Whether the subpoenas are supported by a legitimate legislative purpose is a serious question.

A. When Congress issues subpoenas in aid of valid legislation, it needs a legitimate legislative purpose.

The power of Congress to issue subpoenas, enforceable through contempt, has always been controversial. "The powers of Congress ... are dependent solely on the Constitution," and this power is not "found in that instrument." *Kilbourn*, 103 U.S. at 182; *accord McGrain*, 273 U.S. at 161; Note, *Congressional Power to Punish for Contempt*, 30 Harv. L. Rev. 384 (1917).

For over a century, however, the issue was not joined. "There was very little use of the power of compulsory process in early years to enable the Congress to obtain facts pertinent to the enactment of new statutes or the administration of existing laws."

Watkins, 354 U.S. at 192-93. In those days, Congress mostly employed compulsory process to investigate its own members, *id.* at 192, a power it *does* expressly hold, Art. I, §5, cl. 2. "It is not surprising," then, that "[t]he Nation was almost one hundred years old before the first case reached the Court to challenge the use of compulsory process as a legislative device, rather than in inquiries concerning the elections or privileges of Congressmen." *Watkins*, 354 U.S. at 193-94.

That case was *Kilbourn*. There, Congress asserted "unlimited" power to issue and enforce subpoenas that "it must be presumed … was rightfully exercised." 103 U.S. at 181-82. In pressing this view, Congress offered two arguments: first, "the House of Commons of England" held this power; and second, the power was "necess[ary]" to help Congress legislate. *Id.* at 183.

The Supreme Court rejected the first argument. Unlike Congress, "the assembled Parliament exercised ... the judicial authority of the king in his Court of Parliament." *Id.* The "powers and privileges of the House of Commons of England," in other words, "rest on principles which have no application to … the House of Representatives of the United States—a body which is in no sense a court, which exercises no functions derived from its once having been a part of the highest court of the realm." *Id.* at 189; *accord* Note, *supra*.

The Court then determined that it did not need to pass on "the existence or non-existence of such a power in aid of the legislative function." 103 U.S. at 189. Another

constitutional error rendered that issue immaterial: the "power" exercised by the House in *Kilbourn* was "judicial and not legislative," which violated the fundamental maxim that "the powers confided by the Constitution to one of [the] departments cannot be exercised by another." *Id.* at 192-93. As a result, the Court could *assume* that Congress had an implied subpoena power, since the investigation was unconstitutional in any event. *Id.* at 195-96.

It was not until 1927 that the Supreme Court decided "whether [the subpoena] power is so far incidental to the legislative function as to be implied." *McGrain*, 273 U.S. at 161. The Court decided that issue in Congress's favor, holding that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *Id.* at 174. The Court was equally clear, however, that "neither house of Congress possesses a 'general power of making inquiry into the private affairs of the citizen'"; Congress may not "'assume[] a power which could only be properly exercised by another branch of the government'"; and Congress must be investigating a "matter" for which "valid legislation could be had." *Id.* at 170-71 (quoting *Kilbourn*, 103 U.S. at 190, 192).

The Supreme Court has drawn these lines ever since. Congressional inquiries "must be related to, and in furtherance of, a legitimate task of the Congress." *Watkins*, 354 U.S. at 187. That usually means subpoenas need a "legitimate legislative purpose." *Eastland*, 421 U.S. at 501 n.14. The Supreme Court "has not hesitated" to invalidate

subpoenas "when it found Congress was acting outside its legislative role." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). And it has not allowed Congress to be "the final judge of its own power and privileges." *Kilbourn*, 103 U.S. at 199. Specifically, at least four legal rules demark the line between a subpoena with a legitimate legislative purpose and one that exceeds Congress's legislative role.

First, "the records called for by the subpoena" must be "pertinent to the [congressional] inquiry." *McPhaul v. United States*, 364 U.S. 372, 380 (1960). This "pertinency" requirement ensures that Congress is "coping with a problem that falls within its legislative sphere." *Watkins*, 354 U.S. at 206. If the congressional subpoena is not "reasonably 'relevant to the inquiry,'" then it lacks a legitimate purpose. *McPhaul*, 364 U.S. at 381-82; *accord Hearst v. Black*, 87 F.2d 68, 71 (D.C. Cir. 1936); *Bergman v. Senate Special Committee on Aging*, 389 F. Supp. 1127, 1130 (S.D.N.Y. 1975). The same is true if the subpoena exceeds the committee's statutory jurisdiction. *Watkins*, 354 U.S. at 200; *Tobin v. United States*, 306 F.2d 270, 275 (D.C. Cir. 1962).

Second, "the power to investigate ... cannot be used to inquire into private affairs unrelated to a valid legislative purpose." *Quinn*, 349 U.S. at 161; *accord Eastland*, 421 U.S. at 504 n.15. Put differently, "there is no congressional power to expose for the sake of exposure." *Watkins*, 354 U.S. at 200. "Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated" are unconstitutional. *Id.* at 187.

Third, Congress cannot exercise "any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary." *Quinn*, 349 U.S. at 161; *accord Watkins*, 354 U.S. at 187. "Lacking the judicial power given to the Judiciary" or the executive power given to "the Executive," Congress "cannot inquire into matters which are within the exclusive province of one of the other branches" or otherwise "trench upon Executive or judicial prerogatives." *Barenblatt*, 360 U.S. at 111-12; *McSurely v. McClellan*, 521 F.2d 1024, 1038 (D.C. Cir. 1975). While a permissible legislative investigation does not become impermissible because it might reveal evidence of a crime, an investigation is not permissible in the first place if tries to exercise powers that Congress does not have. The question is the "nature" of the power that Congress is exercising: legislative (legitimate) or executive/judicial (illegitimate). *Kilbourn*, 103 U.S. at 192.

Fourth, an investigation cannot "extend to an area in which Congress is forbidden to legislate." *Quinn*, 349 U.S. at 161. "The subject of any inquiry always must be one 'on which legislation could be had.'" *Eastland*, 421 U.S. at 504 n.15. Legislation, by definition, cannot be had when it would violate the Constitution. *Tobin*, 306 F.2d at 272-76.

B. The district court misinterpreted the legitimate-legislative-purpose requirement.

The district court purported to apply this framework. JA128-29. But it made several legal errors that must be corrected at the outset.

1. Congress does not have an independent "informing" power.

The district court asserted that Congress has an independent "'informing function'" that allows it to "inquire into and publicize corruption, maladministration or inefficient in agencies of the Government," even absent a connection to "contemplated legislation in the form of a bill or statute." JA127 (citing *Watkins*, 354 U.S. 178). It is unclear what role this "informing function" played in the district court's analysis. What is clear, though, is that the informing function is not a basis to uphold these subpoenas. The informing function is a manifestation of Congress's legislative authority over federal *agencies*. It is not a power that exists independently of legislation, and it does not extend to private individuals or the President.

To begin, the informing function is not distinct from Congress's power to legislate; it is an *application* of it. *See Hutchinson v. Proxmire*, 443 U.S. 111, 132-33 (1979). As *Watkins* explained, Congress's power to "expose corruption, inefficiency or waste" must be part of "the legislative process." 354 U.S. at 187. It is "justified solely as an adjunct to the legislative process," and cannot "be inflated into a general power to expose" private information for the sake of transparency. *Id.* at 197, 200. In other words, congressional investigations to gather information and inform the public—without a tie to valid legislation—are constitutionally illegitimate. That is what the Court meant when it held "there is no congressional power to expose for the sake of exposure." *Id.* at 200; *accord Hutchinson*, 443 U.S. at 133 ("[T]he transmittal of such

information … to inform the public … is not a part of the legislative function or the deliberations that make up the legislative process."). Extending the informing function to private individuals would push it past its "logical extreme"—something Woodrow Wilson, the person who coined the phrase "informing function," never contemplated. *United States v. Rumely*, 345 U.S. 41, 43-44 (1953).

The "informing function" instead allows "Congress to inquire into and publicize corruption, maladministration or inefficiency in *agencies* of the Government." *Watkins*, 354 U.S. at 200 n.33 (emphasis added). Congress can conduct "probes into *departments* of the Federal Government to expose corruption, inefficiency or waste" because such probes are an adjunct to the legislative process. *Id.* at 187 (emphasis added). An agency, after all, is a "creature of statute. It has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001); *accord La. Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Investigating agencies and departments is thus part of Congress's power "to enact and appropriate under the Constitution." *Barenblatt*, 360 U.S. at 111; *accord McGrain*, 273 U.S. at 177-78. But since the Constitution creates the office of the President, he is not an agency that Congress creates or controls, and Congress's "informing function" cannot justify *these* subpoenas.

2. Courts can evaluate contemporaneous evidence of the Committees' "purposes" without inquiring into their hidden "motives."

The district court sometimes confused the required inquiry into the subpoenas' legislative purpose with a search for the Committees' hidden, ulterior "motives." JA142-44. The difference between "purpose" and "motive" is important. The court knew it needed to identify each subpoena's "purpose" to decide whether that purpose is legitimate. JA127. The court also recognized that purpose can be distilled from varied sources: for example, "courts may consider the congressional resolutions authorizing the investigation, the committee's jurisdictional statements, and statements of the members of the committee." JA129-30 (citing *Shelton*, 404 F.2d at 1292); *accord United States v. Cross*, 170 F. Supp. 303, 308-09 (D.D.C 1959) (finding improper purpose based on "the things said and done by [the committee's] chairman, counsel, and members"); *Hentoff v. Ichord*, 318 F. Supp. 1175, 1182 (D.D.C. 1970) (finding improper purpose based on the "face" of a congressional "[r]eport"). A subpoena's "legislative purpose," at bottom, "must be gleaned from the evidence before the court." *United States v. Icardi*, 140 F. Supp. 383, 386 (D.D.C. 1956).

In other words, courts must discern for themselves what the Committee's *actual* purpose is through the available evidence. That is why "retroactive rationalization" is barred. *Watkins*, 354 U.S. at 204. And there is no other way to apply a "legitimate legislative *purpose*" test. *E.g.*, *McGrain*, 273 U.S. at 177-78 (deferring to Congress only

after looking at "the subject-matter" of the investigation and determining that legislation "was the real object"); *Barenblatt*, 360 U.S. at 152 (checking to make sure "'the primary purposes of the inquiry were in aid of legislative processes'"); *Cross*, 170 F. Supp. at 309 (giving the relevant materials "a reading and realistic construction" and concluding that the committee was "usurp[ing] the functions of a … prosecuting attorney in the guise of legislative investigation"); *Icardi*, 140 F. Supp. at 388 (holding that "if the committee is not pursuing a bona fide legislative purpose … , it is not acting as a 'competent tribunal', even though [the same request] could be the subject of a valid legislative investigation").

No aspect of this inquiry involves a search for Congress's hidden "motives." The question is whether the Committees—based on what they are doing and what they have stated—are inappropriately doing something other than legislating. While the absence of public statements does not mean Congress necessarily *lacks* a legitimate legislative purpose, courts can hold Congress accountable when "an inadmissible or unlawful object [is] affirmatively and definitely avowed." *McGrain*, 273 U.S. at 178, 180. And though the district court was right that controlling precedent bars it from "testing the motives of committee members" to vindicate Plaintiffs' First Amendment rights, JA143

(citing *Watkins*, 354 U.S. 178), that did not eliminate its duty to review the evidence to determine whether the subpoenas' actual purposes are legislative.[3]

3. Courts can narrow overbroad subpoenas.

The district court recognized that the Committees' subpoenas are overbroad. JA93-94. "If this were an ordinary civil case," it told the Committees, "I would send you guys into a room and tell you don't come out until you come back with a *reasonable* subpoena." JA94 (emphasis added). Yet the court ultimately concluded that it lacked the authority to narrow congressional subpoenas, insisting it could not "engage in line-by-line review" because "the wisdom of congressional approach or methodology is not open to judicial veto." JA138. The district court was mistaken. Given its stated willingness to narrow the subpoenas if it thought it could, this error is an independent basis for reversal.

As the district court acknowledged, the challenged subpoenas must be "pertinent" to the Committees' "legitimate legislative purposes." JA137. This "concept of pertinency" is "not wholly different from nor unrelated to the element of pertinency

[3] This precedent is why Plaintiffs have not yet attacked Congress's motives. Had the Committees subpoenaed Plaintiffs themselves for their records, Plaintiffs could have raised First Amendment defenses. *Eastland*, 421 U.S. at 509 n.16. Because the Committees demanded Plaintiffs' documents from third-party custodians, however, Plaintiffs can only contest the subpoenas' legitimate legislative purpose. *Id.* at 501 n.14. Plaintiffs included evidence of the Committees' motives in their complaint so they can raise First Amendment arguments should the Supreme Court revisit this peculiar and unwarranted dichotomy in its jurisprudence.

embodied in the criminal statute" for congressional contempt. *Watkins*, 354 U.S. at 206. It is "jurisdictional" because it keeps the requesting committee "within its legislative sphere" and ensures witnesses are not "compelled to make disclosures on matters outside that area." *Id.*; *see Bergman*, 389 F. Supp. at 1130; *Hearst*, 87 F.2d at 71. Although Congress cannot be penalized if an otherwise valid investigation turns out to be a dead end, JA137-38, its demand must be "reasonably relevant" at the outset to its stated purpose. *McPhaul*, 364 U.S. at 381. That Congress is considering comprehensive immigration reform, for example, could not be a legitimate purpose for subpoenaing the President's medical records.

If a subpoena requests information that is not reasonably relevant to Congress's legitimate legislative purpose, then it is overbroad and must be narrowed. Like everything Congress does, exercises of its subpoena power can be constitutional in part and unconstitutional in part. Otherwise, Congress could easily circumvent the limits on its constitutional power by bundling a legitimate demand with an illegitimate one. So, when faced with a subpoena that reaches beyond Congress's legitimate legislative purpose, a court must grant the plaintiff at least partial relief. *See, e.g. Bergman*, 389 F. Supp. at 1130-31 (enjoining a congressional subpoena that asked for "all" banking records because "insofar as the subpoena calls for documents beyond [plaintiffs' corporate or nursing home activities and dealings], it goes beyond the Subcommittee's power"). Anything less would abdicate the judicial duty to "sustain the rights of private

individuals when … Congress [i]s acting outside its legislative role." *Tenney*, 341 U.S. at 377.

None of this requires courts to micromanage congressional investigations or to "conduct a line-by-line review of the information requested" by subpoenas. JA137. Instead of crafting its own remedy for a partially unconstitutional subpoena, a court could send the parties back to the negotiating table. Most congressional subpoena disputes are resolved this way. *E.g.*, *Bean LLC v. John Doe Bank*, 291 F. Supp. 3d 34, 39 (D.D.C. 2018) (recounting the court's successful efforts to make the parties negotiate and narrow congressional subpoenas); Michael W. McConnell, *Trump Resists Congressional Subpoenas – That's What Presidents Do*, Austin Am.-Statesman (May 2, 2019), atxne.ws/2EYIFTm (explaining that, until *this* Congress, the political branches "[g]enerally" resolved subpoena fights by "meet[ing] somewhere in the middle"); *United States v. AT&T Co.* (*AT&T I*), 551 F.2d 384, 394 (D.C. Cir. 1976) ("The legislative and executive branches have a long history of settlement of disputes that seemed irreconcilable.").

Judicially supervised negotiations are especially important when the dispute is between Congress and the Executive. In *AT&T I*, for example, the executive branch sued a third-party custodian to stop it from complying with a congressional subpoena. 551 F.2d at 385. Instead of resolving this inter-branch dispute, the D.C. Circuit "remand[ed] the record to the District Court for further proceedings during which the

parties and counsel are requested to attempt to negotiate a settlement." *Id.* at 395. The court's effort was largely successful: On remand, the parties' negotiations "narrow[ed] the gap between [them] and provide[d] a more informed basis for further judicial consideration." *United States v. AT&T Co.* (*AT&T II*), 567 F.2d 121, 130 (D.C. Cir. 1977).

But if congressional subpoenas are an all-or-nothing proposition—if they must be enforced entirely or not at all—then a partially unconstitutional subpoena cannot be enforced at all. The "burden is on the court to see that [a] subpoena is good *in its entirety*." *United States v. Patterson*, 206 F.2d 433, 434 (D.C. Cir. 1953) (emphasis added). Congress cannot take actions that violate the Constitution simply because it took other actions that do not; Congress is not entitled to everything because it has a valid claim to something. Accordingly, if a subpoena is partially invalid and cannot be narrowed, then the court must invalidate it and require Congress to go back to the drawing board and craft a fully constitutional subpoena.

C. The subpoenas lack a legitimate legislative purpose.

Having identified the district court's legal errors, the question is whether the challenged subpoenas can be upheld under the correct legal framework. They cannot. None of the three subpoenas—the Financial Services Committee's subpoena to Capital One and both Committees' subpoenas to Deutsche Bank—is supported by a legitimate legislative purpose.

1. Capital One Subpoena

The district court upheld the Capital One subpoena as an exercise of the Financial Service Committee's jurisdiction over "banks and banking"—specifically, its investigation of money laundering and loan underwriting, for which Plaintiffs will "serve as a useful case study." JA131-33. But this stated purpose is classic law enforcement; it is an impermissible attempt by Congress to exercise executive power. And even if Congress had an actual legislative purpose, the Capital One subpoena is massively overbroad.

The subpoena to Capital One attempts to exercise "the powers of law enforcement." *Quinn*, 349 U.S. at 161. The Financial Services Committee has admitted as much. The alleged basis for the subpoena, House Resolution 206, laments that "financial institutions and individuals" are not "facing convictions and sentences" for breaking federal law and "affirms that financial institutions and individuals should be held accountable for money laundering" and other crimes. H.R. Res. 206 at 4-5. When defending the subpoena, moreover, the House's General Counsel insisted that the Committee can "focus on" President Trump and his family and businesses because he might have "commit[ed] financial fraud." JA100-01. The House's various subpoenas "all come through me," he explained, and the Capital One subpoena was framed like the *criminal* subpoenas he used "when [he] was at the Justice Department." JA99, 101. Indeed, the Capital One subpoena is framed exactly like a criminal subpoena; especially

telling are its requests for documents suggesting Plaintiffs engaged in "suspicious activity," violations of "the Bank Secrecy Act," or "[]money-laundering"; and documents regarding any "investigation" by "any U.S. federal or state agency" or any "administrative, civil, or criminal legal action." JA53. The subpoena is also laser-focused on the businesses and family members of one person—a particularity that is the hallmark of executive and judicial power, not legislating. *Kilbourn*, 103 U.S. at 195; *Icardi*, 140 F. Supp. at 387. In short, the subpoena's "*gravamen*" is an attempt to engage in law enforcement. *Kilbourn*, 103 U.S. at 195.

The Committee cannot cure this constitutional violation through "the mere assertion of a need to consider 'remedial legislation.'" *Shelton*, 404 F.2d at 1297. In other words, Congress cannot launch an investigation to determine whether someone broke the law, and then justify the investigation by claiming that Congress is considering strengthening or studying the law that the person allegedly broke. Congress could always make this (non-falsifiable) argument to justify any law-enforcement investigation. Because this argument would erase the lines separating the three branches of government, courts have wisely rejected it. *E.g.*, *Icardi*, 140 F. Supp. at 387-88 (holding that a subcommittee could not "cure the invalidity" of its law-enforcement investigation by tacking on a professed interest in investigating "'whether the Federal statutes were inadequate in any respect or had been improperly administered'"). No one doubts that Congress could have asked Mr. Kilbourn, for example, questions about

potential bankruptcy reform; Article I expressly gives Congress the power to enact "uniform Laws on the subject of Bankruptcies." U.S. Const., Art. I, §8. But instead of reflexively invoking that authority, the Court carefully examined Congress's resolution and applied "the most careful scrutiny" to determine its actual purpose before concluding that "the investigation … was judicial in its character." *Kilbourn*, 103 U.S. at 192-93.

Nor can Congress circumvent the constitutional line between legislation and law enforcement by describing the targeted individual as a "case study." Literally any person in America could be deemed a useful case study. Again, this non-falsifiable argument could be used to justify any law-enforcement investigation by Congress. And the notion that House Democrats are simply using Donald Trump—the sitting President of the United States and their chief political rival—as a "case study" into the American banking sector is absurd. The Committee is targeting President Trump for the sake of targeting President Trump, in the hopes of proving that he broke the law or finding other information to "expose" before the 2020 election. Tellingly, the Capital One subpoena sets the starting date for most of its requests at "July 19, 2016," JA52—the date of the Republican National Convention, when Donald Trump officially became the Republican nominee for President. As the House General Counsel conceded below, "one of the reasons why this [subpoena] is the way it is is because, as everybody knows, Mr. Trump has refused to do what so many others in his position do, which is disclose."

JA102. Or as Chairwoman Waters told the President more bluntly: "We're going to find out where your money has come from." JA20. This is not about legislation; it is about exposure and vindication.

Even if the Capital One subpoena were a permissible attempt to explore potential banking legislation, large swaths of the subpoena are not "reasonably relevant" to that goal. *McPhaul*, 364 U.S. at 381. The Financial Services Committee purports to be considering legislation to combat "live threats to the nation's financial system" and "urgent questions concerning … banking practices." Dkt. 51 at 34, 10. Yet the subpoena seeks "account opening, due diligence, [and] closing" documents with "no time limitation" whatsoever. JA52. It covers not just the private records of fifteen Trump entities, but also any "affiliate[s]," "directors," "shareholders," "officers," or "any other representatives" of these entities. JA52. As the district court acknowledged, no "reasonable" subpoena would request all this. JA94. Thus, Plaintiffs have identified serious questions about the Capital One subpoena's overbreadth—even setting aside the serious questions about its constitutionality.

2. Deutsche Bank Subpoenas

The district court upheld the Intelligence Committee's subpoena to Deutsche Bank as an exercise of its jurisdiction over "intelligence and intelligence-related activities"—specifically, its investigation into "efforts by Russia and other foreign powers to influence the U.S. political process during and since the 2016 election,

including financial leverage that foreign actors may have over President Trump, his family, and his business." JA133-34. Like the Capital One subpoena, the Deutsche Bank subpoena is an impermissible attempt to exercise executive power. Also like the Capital One subpoena, the Deutsche Bank subpoena is wildly overbroad.[4]

The Deutsche Bank subpoena does not attempt to pursue legislative reforms; it is the Committee's attempt to *itself* conduct intelligence and expose supposed wrong-doing by the President. As Chairman Schiff summed up the purpose of his investigation, "Congress has a duty to expose foreign interference, hold Russia to account, ensure that U.S. officials – including the President – are serving the national interest and, if not, are held accountable." *Press Release* (Feb. 6, 2019), bit.ly/2UMzwTE. The Chairman's comments echoed Committee Democrats' earlier assertion that "the Trump campaign" engaged in conduct that "may very well have violated U.S. laws." House Permanent Select Comm. on Intelligence Minority Members, *Minority Views to the Majority-Produced "Report on Russian Active Measures"* 3 (Mar. 26, 2018), tinyurl.com/HPSCIMinorityViews. The subpoena itself reflects its law-enforcement purpose: Like the Capital One subpoena, it is indistinguishable from a criminal

[4] The district court also upheld the Financial Services Committee's subpoena to Deutsche Bank, which is identical to that of the Intelligence Committee. That subpoena is invalid for the same reasons as the other two subpoenas (plus, Financial Services has no jurisdiction over "intelligence" or "intelligence-related activities").

subpoena and seeks documents from Deutsche Bank employees that identify "suspicious activity" or voice legal concerns. JA38-40.

It is also not clear what legislation, within Congress's constitutional authority and the Committee's jurisdiction, this investigation is possibly pursuing. Even if the Committee uncovered "financial leverage [by] foreign actors," JA134, Congress has no power to regulate the President's finances. *See* Ltr. from Acting Att'y Gen. Silberman to Chairman Cannon 4 (Sept. 20, 1974), bit.ly/2DRBoEo. Congress also has no power to regulate foreign sovereigns or other entitles outside the United States' territorial jurisdiction. Even if Congress could pass such legislation, that legislation would fall outside the Intelligence Committee's jurisdiction. Nor can the Committee vaguely invoke the prospect of "remedial legislation" to justify an investigation into alleged wrongdoing by a sitting President. *Shelton*, 404 F.2d at 1297; *Icardi*, 140 F. Supp. at 387-88.

Even if the Intelligence Committee had a legitimate legislative purpose, the Deutsche Bank subpoena is grossly overbroad. Worst of all, it asks for all documents "including, but not limited to," those concerning foreign individuals, entities, or governments—in other words, it asks for all *domestic* transactions. JA37. Domestic transactions are not reasonably relevant to an alleged investigation into *foreign* leverage and interference. Further, the Committee's interest in uncovering *current* leverage over the President or interference in the *2016 election* are wholly unrelated to the subpoena's

timeframe: "January 1, 2010 through the present" for most documents, and "no time limitation" for others. JA37. The individuals covered by the subpoena, moreover, go far beyond anyone reasonably related to the Committee's stated purposes. By reaching to Plaintiffs' "immediate family" and accounts they hold "with other parties," the subpoena asks Deutsche Bank to give Congress the private financial documents of minor children, the President's grandchildren, and Plaintiffs' spouses. JA37.

Again, the district court recognized that none of this is "reasonable." JA94. It thus should have held that the subpoena's likely overbreadth presents a serious question that entitled Plaintiffs to a preliminary injunction.

II. Whether the Right to Financial Privacy Act applies to congressional subpoenas is a serious question.

Plaintiffs demonstrated below that the RFPA applies to the Committees' subpoenas. The RFPA provides customers of financial institutions—including the individuals covered by the Committees' subpoenas—with procedural and substantive rights before a financial institution can turn over their "records" to any federal "government authority." 12 U.S.C. §3402. The definition of "government authority" is broad; it includes "*any* agency or department of the United States." §3401(3) (emphasis added). The district court's conclusion that this language is limited to the executive branch misreads the text, purpose, and history of the RFPA. It was also the first court decision to ever address whether Congress *sub silentio* excused itself from this statutory

framework. Reviewing this important question of statutory interpretation de novo, *Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006), this Court should reverse.

The RFPA was Congress's direct response to *United States v. Miller*, where the Supreme Court held that bank customers had no "legitimate 'expectation of privacy'" in their records. 425 U.S. 435, 442 (1976). That decision "raised a furor in the United States Congress." Dan L. Nicewandera, *Financial Record Privacy—What Are and What Should Be the Rights of the Customer of a Depository Institution,* 16 St. Mary's L.J. 601, 608 (1985). The RFPA was Congress's "express[]" effort "to overrule *Miller* and restore [customers'] privacy rights." Paul B. Rasor, *Controlling Government Access to Personal Financial Records*, 25 Washburn L.J. 417, 425 (1986). As one House Report described it, the RFPA was "a Congressional response" to *Miller* and the Court's failure to "acknowledge the sensitive nature of these records." H.R. Rep. No. 95-1383, at 28 (1978). Another report reiterated Congress's desire to "protect and preserve the confidential relationship between [financial] institutions and their customers and the constitutional rights of those customers." H.R. Rep. No. 95-9142, §2(b) (1977).

The resulting statute prohibits the federal government from accessing "the financial records of any customer" unless the government first follows certain procedures. §3402. It likewise prohibits banks from disclosing a customer's financial records until the government complies with those procedures, §3403(a), and certifies that it did so, §3403(b). For subpoenas, summons, and other written requests, the RFPA

requires the government to (1) have "reason to believe" that the records are "relevant to a legitimate law enforcement inquiry"; (2) give the customer a copy of the request; and (3) wait at least ten days so the customer can file a motion to quash. §§3405; 3408. If the government fails to follow these procedures, the customer can obtain "injunctive relief … to require that [they] are complied with." §3418. And if a bank turns over the records before the government complies, the bank is liable for statutory damages, actual damages, punitive damages, attorney's fees, and costs. §3417. In short, "the RFPA defines the conditions in which financial institutions may disclose an individual's financial records, defines the conditions in which government officials may access an individual's financial records, and provides a civil cause of action for anyone injured by a violation of the act's substantive provisions." *Lopez v. First Union Nat. Bank of Fla.*, 129 F.3d 1186, 1190 (11th Cir. 1997) (citations omitted).

There is no dispute that the Committees disregarded the RFPA's notice and certification procedures. Their only argument below—which the district court adopted wholesale—is that the statutory definition of "government authority" extends only to the "Executive branch," not "more broadly to Congress." Dkt. 51 at 28-31; *see* JA124-25. This reading cannot be reconciled with the statutory text.

To begin, the RFPA's definition of "government authority" is intentionally broad. It applies to "*any* agency or department of the United States." §§3403(a), 3401(3) (emphasis added); *see Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("[T]he word

'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"). And Congress's inclusion of the word "department" next to "agency" strongly suggests that the RFPA applies beyond the executive branch, since Congress commonly uses the word "agency" alone to cover the entire executive branch. *E.g.,* 5 U.S.C. §551(1)(A). This Court is "obliged to give effect, if possible, to every word Congress used," *NAM v. DOD*, 138 S. Ct. 617, 632 (2018), and avoid "treat[ing] statutory terms as surplusage," *Duncan v. Walker*, 533 U.S. 167, 167 (2001).[5]

Nor is there anything unusual about referring to Congress as a "department" of the federal government. James Madison wrote of "the three great *departments* of the government." 5 *The Writings of James Madison* 244 (New York: J.P. Putnam's Sons, 1900) (emphasis added); *see also Marbury*, 5 U.S. at 177 ("It is emphatically the province and duty of the judicial *department* to say what the law is." (emphasis added)); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935) (describing "[t]he fundamental necessity of maintaining each of the three general *departments* of government" (emphasis added)). The term was commonly used the same way at the time of the RFPA's passage. *See, e.g.,*

[5] This reading is also consistent with how the term "government authority" was understood "in the ordinary sense." *Cochise Consultancy, Inc. v. U.S. ex rel. Hunt*, 139 S. Ct. 1507, 1514 (2019); *see, e.g.*, Black's Law Dictionary (4th ed. 1951) (defining authority "in government law" to mean "the right and power of public officers to require obedience to their orders lawfully issued in the scope of their public duties").

Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972); *Nixon v. Admin'r of Gen. Servs.*, 433 U.S. 425, 443 (1977).

Moreover, when Congress enacted the RFPA in 1978, the Supreme Court had interpreted identical language in 18 U.S.C. §1001—which prohibited making false statements "in any matter within the jurisdiction of *any department or agency of the United States*"—to include Congress. *United States v. Bramblett*, 348 U.S. 503, 504 n.1, 509 (1955). Among other things, *Bramblett* noted that Congress had elsewhere used "department" to refer to the legislative branch. *Id.* at 508-09 (citing 18 U.S.C. §6). Congress would have expected the RFPA to track the Supreme Court's reading of the same words in *Bramblett*. Courts must "assume that Congress is aware of existing law when it passes legislation," and that Congress "was aware of … the judicial background against which it was legislating.'" *Dekalb Cty. Pension,* 817 F.3d at 409-10 (cleaned up); *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

The structure of the RFPA confirms Congress's intent to apply the statute beyond the executive branch. The statute contains a number of specific exemptions. *E.g.*, §3413(c) (tax proceedings); §3413(g) (certain law-enforcement inquiries); §3413(i) (grand jury subpoenas). It does not, however, provide a general exemption for congressional subpoenas. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of

evidence of a contrary legislative intent." *United States v. Smith*, 499 U.S. 160, 167 (1991); *United States v. Pettus*, 303 F.3d 480, 485 (2d Cir. 2002) (same).

Even more telling, the RFPA specifically addresses the one circumstance where congressional inquiries are *not* subject to its procedures: when the request is from "a duly authorized committee or subcommittee of Congress" to "any officer or employee of a supervisory agency." §3412(d). If congressional subpoenas were never intended to come within the statute's scope, there would be no reason to include this provision. If they were, however, the exception makes perfect sense: When a "supervisory agency"[6] has already obtained documents (presumably in compliance with or under an exemption from the RFPA's procedures), a congressional committee can obtain the information from the executive branch without itself going through the procedures. But the subpoenas here were directed to banks, not a supervisory agency, so §3412(d) cannot help the Committees.

A separate provision of the RFPA, moreover, specifically exempts certain requests made by the Government Accountability Office. *See* §3413(j) ("This chapter shall not apply when financial records are sought by the Government Accountability

[6] The RFPA defines "supervisory agency" with specificity, naming (among other institutions) the Federal Deposit Insurance Corporation, the Bureau of Consumer Financial Protection, the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Securities and Exchange Commission, and "any State banking or securities department or agency." §3401(7).

Office pursuant to an authorized proceeding, investigation, examination or audit directed at a government authority"). The GAO is unquestionably a *legislative* agency. *Bowsher v. Synar*, 478 U.S. 714, 731 (1986); *Cause of Action v. NARA*, 753 F.3d 210, 213-14 (D.C. Cir. 2014). If the district court was correct and the RFPA is limited to the executive branch, then there was no need to provide any exemption for the GAO. The fact that Congress believed the GAO required an exception confirms Plaintiffs' reading.

Rather than explain how its reading could be reconciled with the text, history, or purpose of the RFPA, the district court relied almost exclusively on *Hubbard v. United States*, 514 U.S. 695 (1995). In *Hubbard*, the Supreme Court revisited the scope of 18 U.S.C. §1001 and determined that it should not be read to include false statements made to Congress, overruling its prior decision in *Bramblett*. But *Hubbard* was decided nearly two decades *after* the RFPA was enacted. When Congress enacted the definition of "government authority" in the RFPA, *Bramblett* was the governing interpretation. A decision issued in 1995 has no bearing on how Congress understood these terms in 1978. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019).

The Supreme Court has been crystal clear on this point. In *Cannon v. University of Chicago,* it considered whether to imply a private right of action under Title IX, which prohibits sex discrimination in education. 441 U.S. 677, 696-99 (1979). At the time Title IX was enacted, the Court had repeatedly found that similarly worded statutes permitted a private right of action. Later, however, the Court began to take a "strict approach" to

implying private rights of action. *Id.* at 698. Nevertheless, the Court held that its more recent decisions were irrelevant to the meaning of the 1972 statute, because "our evaluation of congressional action in 1972 must take into account its *contemporary* legal context." *Id.* at 698-99 (emphasis added); *accord Morse v. Republican Party of Va.*, 517 U.S. 186, 230 (1996); *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 259 (2009). In other words, the district court's reliance on *Hubbard* "might be somewhat impressive if we were dealing with legislation passed by Congress today. But the law here before us was enacted [in 1978] and 'the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the law was.'" *Leist v. Simplot*, 638 F.2d 283, 315-16 (2d Cir. 1980) (quoting *Brown v. GSA*, 425 U.S. 820, 828-29 (1976)).[7]

Below, the Committees scoffed at the notion that Congress would ever subject itself to the RFPA's procedures. Dkt. 51 at 30-31. But there is little doubt that Congress, in direct response to *Miller,* "determined that the best way to protect financial records from unwarranted governmental intrusion … was to regulate the government's access."

[7] Even if *Hubbard* could be read to retroactively govern the intent of Congress in 1978, it would still not overcome Plaintiffs' reading. Setting aside the fact that *Hubbard* interprets a *criminal* statute, to which different presumptions apply, the decision itself reiterated that "'the text of the Act of Congress surrounding the word at issue'" could dictate a different result in a different case. 514 U.S. at 700-01. Here, unlike §1001, the context of the RFPA—including its enumerated exceptions for the GAO and certain congressional-committee requests—confirms that it was meant to extend beyond the executive branch.

Young v. DOJ, 882 F.2d 633, 636-37 (2d Cir. 1989). What would truly be astounding is if Congress meant to wholesale exempt its committees from the RFPA's modest procedures and to give them unfettered power to gather the most personal and sensitive financial records at will—a prospect that (as demonstrated here) can be every bit as obtrusive as a traditional law-enforcement investigation. Indeed, it is the Committees' reading of the RFPA, adopted by the district court, that undermines the "serious concern for the privacy interests of individuals in their bank records" that motivated the Act's passage. *Botero-Zea v. United States*, 915 F. Supp. 614, 619 (S.D.N.Y. 1996).

The district court thus erred—both in finding that Congress was exempt from the RFPA and in asserting that Plaintiffs' failed to raise a serious question.[8] In light of Plaintiffs' undisputed irreparable harm, this Court can reverse and remand on this ground alone.

[8] Although it has stayed neutral in this case, Deutsche Bank is on record supporting Plaintiffs' reading of the RFPA. *See* Ltr. from Deutsche Bank to Reps. Waters et al. (June 29, 2017), bit.ly/2XOViaH (refuting assertion that RFPA "does not apply to Members of Congress"). That the district court's interpretation contradicts the view of one of the largest financial institutions in the country underscores the seriousness of this question.

III. The balance of equities decisively favors Plaintiffs.

The district court alternatively held that the balance of harms tipped in favor of the Committees.[9] JA151. This ruling contradicted the court's own conclusion that Plaintiffs faced irreparable harm, baselessly assumed that the time needed to litigate this case would interfere with the Committees' investigations, and improperly deferred to the Committees' alleged need for information that is many years old. The district court's balance of hardships was thus clearly erroneous, *see Chem. Bank v. Haseotes*, 13 F.3d 569, 573 (2d Cir. 1994), and is not a basis to affirm its decision.

To begin, Plaintiffs' irreparable harm is undisputed. The Committees conceded it below, JA111, and the district court rightly held that Plaintiffs "possess strong privacy interests in their financial information such that unwanted disclosure may properly constitute irreparable injury," particularly since the Committees "have not committed one way or the other to keeping plaintiffs' records confidential from the public once received." JA122-23. The district court's conclusion follows a long line of authority recognizing that "[t]he disclosure of private, confidential information 'is the quintessential type of irreparable harm that cannot be compensated or undone by money damages.'" *Airbnb, Inc. v. City of New York*, 2019 WL 91990, at *23 (S.D.N.Y. Jan. 3, 2019) (quoting *Hirschfeld v. Stone*, 193 F.R.D. 175, 187 (S.D.N.Y. 2000)); *accord*

[9] The district court correctly recognized that, when the government is the party opposing an injunction, the balance of harms and public interest merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Providence Journal Co. v. FBI, 595 F.2d 889, 890 (1st Cir. 1979); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop*, 839 F. Supp. 68, 72 (D. Me. 1993); *Metro. Life Ins. Co. v. Usery*, 426 F. Supp. 150, 172 (D.D.C. 1976).

Moreover, Plaintiffs' showing of harm is even stronger than the district court recognized because an injunction is necessary to ensure that Plaintiffs can obtain full judicial review. A movant makes "a strong showing of irreparable harm" when disclosure would moot the case. *Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Rep.*, 240 F. Supp. 2d 21, 22-23 (D.D.C. 2003); *see John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers) ("The fact that disclosure would moot that part of the Court of Appeals' decision requiring disclosure … create[s] an irreparable injury."). This harm exists when a plaintiff challenges a congressional subpoena to a third party, because "compliance by the third person could frustrate any judicial inquiry" into "whether a legitimate legislative purpose is present." *Eastland*, 421 U.S. at 501 n.14. Allowing this to happen would wrongly deny the plaintiff's rights and "immunize th[e] subpoena from challenge" based on "the fortuity that documents sought by a congressional subpoena are not in the hands of a party claiming injury from the subpoena." *AT&T II*, 567 F.2d at 129. In other words, denying interim relief could "entirely destroy [Plaintiffs'] rights to secure meaningful review." *Providence Journal*, 595 F.2d at 890. That is classic irreparable harm.

Against this established harm to Plaintiffs, the Committees vaguely claimed that they need the documents right away. The district court accepted those assertions, declining to second-guess the Committees' supposed "pressing need." But that's precisely what a court must do when it is asked to balance the harms. It cannot simply defer to one party—even when that party is a committee of Congress. As the Supreme Court has made clear, courts "cannot assume … that every congressional investigation is justified by a public need that overbalances any private rights affected." *Watkins,* 354 U.S. at 198. Nor can a court ignore its prior finding of irreparable harm to the movant, which is "is inherently related to the balance-of-harms analysis." *Paulsson Geophysical Servs., Inc. v. Sigmar*, 529 F.3d 303, 313 (5th Cir. 2008).

The district court's observation that the House is "not a continuing body" does not justify its analysis. JA152. Indeed, prior decisions have expressly rejected this as a basis for denying temporary relief. In *Committee on Judiciary of U.S. House of Representatives v. Miers*, for example, the D.C. Circuit stayed a congressional subpoena notwithstanding that "this controversy will not be fully and finally resolved by the Judicial Branch … before the 110th Congress ends." 542 F.3d 909, 911 (D.C. Cir. 2008). Given that its ultimate decision would have "potentially great significance for the balance of power between the Legislative and Executive Branches," the court was unmoved by this timing consideration. If the expiration of the Congress moots the case—an issue it did not decide—"we would be wasting the time of the court and the parties." *Id.* And the

court saw an "additional benefit of permitting … the new House an opportunity to express their views on the merits of the lawsuit." *Id.*; *see also AT&T I*, 551 F.2d at 390 (describing the House's impending adjournment as an "advantage" to delaying a judicial decision because "negotiations can be conducted not only by a new House but by a new President"). In other words, the fact that the House might adjourn before a court resolves a constitutional clash between the political branches is a feature, not a bug:

> We are aware that from the legislative viewpoint, any alternative to outright enforcement of the subpoena entails delay.… But … this is an inherent corollary of the existence of coordinate branches. The Separation of Powers often impairs efficiency, in terms of dispatch and the immediate functioning of government. It is the long-term staying power of government that is enhanced by the mutual accommodation required by the Separation of Powers.

AT&T II, 567 F.2d at 133.

Even ignoring these decisions, the House will be in session for another year and a half. Plaintiffs have agreed to expedite these proceedings at every step: They agreed to expedite the briefing and hearing on their preliminary-injunction motion, Dkt. 21; they proposed a limited period of discovery and fact development below, JA87; and they agreed to expedite the appeal in this Court, CA2 Doc. 8. There is simply no basis for the district court's suggestion that merits proceedings could not occur before the current Congress adjourns.

Nor should this Court credit the Committees' bare assertion that they cannot afford *any* delay in the enforcement of their subpoenas. Whatever interest the Committees have in their broader investigations of alleged "live threats" to the

country's banking and election systems, they cannot claim that immediate compliance with *these* three subpoenas is critical to advancing those investigations. "[T]he events at issue are already several years old and if the [defendants] prevail[] in this litigation, the records will ultimately be produced." *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 514 F. Supp. 2d 7, 11 (D.D.C. 2007). The Committees admit, after all, that the President's business records will only be used as a "case study." Dkt. 51 at 25. And the Committees can still enforce the portions of the subpoenas that do not pertain to Plaintiffs. The Committees' "interest in receiving the records immediately" thus "poses no threat of irreparable harm to them." *Shapiro v. DOJ*, 2016 WL 3023980, at *7 (D.D.C. May 25, 2016) (quoting *John Doe Agency*, 488 U.S. at 1309 (Marshall, J., in chambers)); *see also EPIC v. DOJ*, 15 F. Supp. 3d 32, 47 (D.D.C. 2014) (explaining that a "'desire to have [the documents] in an expedited fashion[,] without more, is insufficient to constitute irreparable harm'"); *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 222 (D.D.C. 2003) (rejecting government's claim of harm in having its action "delayed for a short period of time pending resolution of this case on the merits").

The public interest also weighs strongly in favor of preserving the status quo. Congress simply "does not have an interest" in violating the Constitution or the RFPA, *Amarin Pharma, Inc. v. FDA*, 119 F. Supp. 3d 196, 237 (S.D.N.Y. 2015), and the public "clearly" has "an interest in the government maintaining procedures that comply with constitutional requirements," *ACORN v. FEMA*, 463 F. Supp. 2d 26, 36 (D.D.C. 2006)

(citing *O'Donnell Const. Co. v. Dist. of Columbia,* 963 F.2d 420, 429 (D.C. Cir. 1992)). The Constitution entrusts this Court to determine whether Congress has "assumed a power which could only be properly exercised by another branch of the government." *Kilbourn*, 103 U.S. at 192. Denying Plaintiffs' request for interim relief would "abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress" has not acted illegitimately in issuing sweeping subpoenas for the confidential financial documents of the President and his extended family. *Watkins*, 354 U.S. at 198-99.

"The public [also] has an interest in enforcing contractual agreements and ensuring the confidentiality of a private business's information." *Robert Half Int'l Inc. v. Billingham*, 315 F. Supp. 3d 419, 435 (D.D.C. 2018); *accord Human Touch DC, Inc. v. Merriweather*, 2015 WL 12564166, at *5 (D.D.C. May 26, 2015); *Saini v. Intern. Game Tech.*, 434 F. Supp. 2d 913, 925 (D. Nev. 2006). These subpoenas seek confidential financial information protected by law. No public interest is served by disclosing the information to the Committees during the pendency of this action. "Although … the public has an interest in ensuring that the [government] can exercise its authority," "Defendants offer no persuasive argument that there is an immediate public interest in enforcing … [now] rather than after a full hearing." *Cigar Ass'n of Am. v. FDA*, 317 F. Supp. 3d 555, 563 (D.D.C. 2018).

In sum, the district court's balance of harms ignored Plaintiffs' strong showing of irreparable harm and simply deferred to the Committees' own assertions of an urgent

need, without conducting the requisite balancing. Application of the proper standard overwhelmingly supports granting a preliminary injunction.

CONCLUSION

This Court should reverse the district court's order and remand with instructions to enter a preliminary injunction that prohibits Defendants from enforcing or complying with the challenged subpoenas until this litigation concludes.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 12,450 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

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CERTIFICATE OF SERVICE

I filed a true and correct copy of this brief with the Clerk of this Court via the CM/ECF system, which will notify all counsel who are registered CM/ECF users.

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