ORAL ARGUMENT SCHEDULED FOR MARCH 24, 2022

No. 21-5289

UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

COMMITTEE ON WAYS AND MEANS, UNITED STATES HOUSE OF REPRESENTATIVES,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF THE TREASURY; INTERNAL REVENUE SERVICE; CHARLES PAUL RETTIG, in his official capacity as Commissioner of the Internal Revenue Service; and JANET L. YELLEN, in her official capacity as Secretary of the United States Department of the Treasury,

Defendants-Appellees,

DONALD J. TRUMP; DONALD J. TRUMP REVOCABLE TRUST; DJT HOLDINGS LLC; DJT HOLDINGS MANAGING MEMBER, LLC; DTTM OPERATIONS LLC; DTTM OPERATIONS MANAGING MEMBER CORP.; LFB ACQUISITION LLC; LFB ACQUISITION MEMBER CORP.; LAMINGTON FARM CLUB, LLC,

Intervenors for Defendant – Appellants.

On Appeal from the U.S. District Court for the District of Columbia, No. 1:19-cv-1974-TNM

APPELLANTS' REPLY BRIEF

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INTRODUCTION & SUMMARY OF ARGUMENT

No one forced the Committee or the Government to file a motion to dismiss. They could have proceeded to summary judgment, as in *Mazars*, or resisted a preliminary injunction, as in *Thompson*. But once Intervenors threatened discovery, the other parties moved for dismissal. *See* Doc. 114 at 6; 8/9/21 Tr. 5-7. Now they must live with the pleading standard.

District courts are often reminded not to dismiss a claim because they doubt its allegations are true. *E.g.*, *Strike 3 Holdings, LLC v. Doe*, 964 F.3d 1203, 1211 (D.C. Cir. 2020). But here, the problem is the opposite. The district court dismissed a claim that, in the real world, everyone knows and believes. Intervenors meticulously documented why the Committee's purpose for demanding President Trump's tax returns is something other than studying legislation. All agree that Congress is liable if its purpose is nonlegislative. And courts let far less substantiated claims of unlawful purpose go to discovery every day.

The Committee and the Government thus must explain how a legally cognizable, factually true, and thoroughly pleaded claim can be dismissed *as a matter of law*. They try, but not one of their authorities dismissed a challenge to a congressional demand at the pleading stage. And they ignore that the Committee's demand raises separation-of-powers

concerns. If heavy presumptions and blind deference to Congress are ever appropriate, they aren't when Congress threatens the separation of powers. Even the Committee's proposed test—a freeform "balancing" of competing interests—cries out for resolution at a later stage.

This case is not the first time a House committee has asked courts "not to see what all others can see and understand" about its demands for President Trump's information. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2034 (2020) (cleaned up). That position garnered zero votes at the Supreme Court. It should fare no better now. Nor should the faulty arguments against Intervenors' facial challenge and First Amendment claim. This Court should reverse.

ARGUMENT

Intervenors plausibly alleged that the disclosure of their tax information is authorized by an unconstitutional statute, fails heightened scrutiny, and violates other constitutional safeguards. The other parties defend, but do not improve upon, the district court's faulty reasoning. These claims should go forward.

I. 26 U.S.C. §6103(f)(1) is facially unconstitutional.

Congress's power to demand information is defined and limited. A committee cannot demand information unless it has a legitimate legisla-

tive purpose. But the statute that authorizes this demand omits that limitation. The statute is facially unconstitutional because it states an invalid rule—a kind of facial challenge that this Court recognized in *Gordon v. Holder*. Br.21-25.

The other parties concede this analysis all the way to the last point. They do not deny that §6103(f)(1) is the sole legal basis for the Committee's request. They also admit that the statute is subject to the legitimate-legislative-purpose requirement. Gov't-Br.53; Cmte.-Br.57. And they never respond to Intervenors' textual arguments why §6103(f)(1) cannot be read to require a legitimate legislative purpose. Br.21-22. They instead deny that a law can be facially unconstitutional when it states an invalid rule. And the Committee insists that §6103(f)(1) states a valid rule. The parties also suggest that §6103(f)(1) can be saved through severability or constitutional avoidance. These arguments fail.

1. This Court has already recognized the type of facial challenge that Intervenors make here. *Gordon* explains that laws can be facially unconstitutional when they "omit constitutionally-required jurisdictional elements, *even though all such laws necessarily have a 'plainly legitimate sweep*.'" 721 F.3d 638, 654 (D.C. Cir. 2013) (emphasis added). Specifically,

the plaintiff in *Gordon* could argue that the PACT Act facially violates due process by omitting the minimum-contacts requirement, even though the statute could be constitutionally applied everywhere a seller "has minimum contacts." *Id.* at 654-55.

The Government cannot distinguish *Gordon*. That opinion rejects the same argument about facial challenges, based on all the same cases, that the Government raises here. *See id.* at 654. While *Gordon* also noted that the Government's objection would require "significant fact-finding," the "[m]ore fundamenta[l]" point was that this Court was "not convinced by the government's premise: that Gordon may challenge the PACT Act only 'as applied.'" *Id.* Plaintiffs can "maintain a facial challenge," *Gordon* observed, on the theory that the statute states an invalid rule. *Id.* at 655. The Supreme Court, other circuits, and influential commentators agree. Br.23-24.

Valid-rule facial challenges *satisfy* the no-set-of-circumstances test from *Salerno*, so the Government's repeated references to that standard miss the point. Section 6103(f)(1) is unconstitutional in every case because it "contains 'no jurisdictional element which would ensure' that the [demands] it imposes comport with [the limits on Congress's

constitutional authority]." *Gordon*, 721 F.3d at 654. In no case does the statute allow Treasury to consider whether the request has a legitimate legislative purpose, since the statute lists other requirements but omits that one. As the Government has convinced courts before, "a statute [that] fails the relevant constitutional test … can no longer be constitutionally applied to anyone—and thus there is 'no set of circumstances' in which the statute would be valid." *United States v. Supreme Ct. of N.M.*, 839 F.3d 888, 917 (10th Cir. 2016). *See generally* Isserles, *Overcoming Overbreadth*, 48 Am. U. L. Rev. 359, 395-420 (1998).

Section 6103(f)(1) is not facially unconstitutional because it fails to "parrot every constitutional requirement that might be implicated." Cmte.-Br.54. It is facially unconstitutional because it removes what the Supreme Court calls the "[m]ost importan[t]" constraint on Congress's power to demand information. *Mazars*, 140 S. Ct. at 2031. It thus "erases the boundaries that define [Congress's authority]" and allows requests to "bleed over from legitimate" legislative pursuits to illegitimate ones. *Gordon*, 721 F.3d at 654. While not every constitutional defect can form the basis of a valid-rule facial challenge, defects that go to "the scope of

congressional power" to legislate "clearly" can. Isserles 443-44 & n.381; *see id.* at 438-51.

The Government cannot solve §6103(f)(1)'s textual defect by asserting that most requests do, in fact, have a legitimate legislative purpose. *Cf.* Gov't-Br.58-59. That evidence-free assertion cannot be credited without "significant fact-finding," *Gordon*, 721 F.3d at 654—let alone at the pleading stage. It's also beside the point. Intervenors can maintain a valid-rule facial challenge even if §6103(f)(1) "ha[s] a 'plainly legitimate sweep.'" *Id.* Because it states an invalid rule, "any legitimate application" of §6103(f)(1) is "pure happenstance." *Id.* As the Committee puts it, "the Constitution alone" requires requests to have a legitimate legislative purpose. Cmte.-Br.56. That the Constitution overrides §6103(f)(1) is not a reason to ignore the statute. *Cf.* Cmte.-Br.56. It's why the statute is facially invalid. *See Nat'l Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1408 (D.C. Cir. 1998); *Babbitt v. Sweet Home Ch. of Cmtys. for Great Ore.*, 515 U.S. 687, 731-32 (1995) (Scalia, J., dissenting).

2. The Committee (but not the Government) insists that §6103(f)(1) does "stat[e] a 'valid rule.'" The Committee tries to draw a distinction between a statute that "*affirmatively*" requires something unconstitu-

tional and a statute that merely "*omits*" the relevant constitutional requirement. The latter, the Committee says, is never facially unconstitutional. Cmte.-Br.55-56.

The Committee's analysis is refuted by *Gordon*—a key precedent that it simply ignores. *Gordon* explains that facial challenges can be raised against laws that "*omit* constitutionally-required jurisdictional elements." 721 F.3d at 654 (emphasis added). The statute in *Gordon* omitted the minimum-contacts requirement. And *Gordon* cited *Lopez* and *Morrison* as examples where the Supreme Court "sustain[ed] facial challenges" to laws that "'contain[ed] no jurisdictional element'" tying the regulated conduct to "'interstate commerce.'" *Id.*

The Committee reads *Lopez* and *Morrison* as cases where the statutes were unconstitutional "in all instances." Cmte.-Br.56. But this Court is bound by *Gordon*'s reading of those precedents. And *Gordon* was correct. The Supreme Court *agreed* in those cases that Congress could regulate gun possession and gender-motivated crime when they affect interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 561-62 (1995); *United States v. Morrison*, 529 U.S. 598, 613 n.5 (2000). And cases clearly could have arisen under both statutes where the requisite connection to

interstate commerce was present. *See Gordon*, 721 F.3d at 654. The problem was that the statutes contained "no express jurisdictional element" requiring that connection in every case. *Lopez*, 514 U.S. at 562. In other words, their omissions made them state invalid rules.

The Committee's distinction between requiring something unconstitutional and omitting something constitutionally required also makes no sense. They're the same thing. Section 6103(f)(1) does—in the Committee's words—"*affirmatively* establis[h] an unconstitutional requirement." Cmte.-Br.55. It requires Treasury to disclose tax information without considering whether the request has a legitimate legislative purpose. And it requires Treasury to comply with requests that lack a legitimate legislative purpose. To quote the Committee, the "text of the statute runs headlong into constitutional prohibitions." Cmte.-Br.55.

3. The parties also miss the mark when they invoke severability and constitutional avoidance. Gov't-Br.54-55; Cmte.-Br.57. This Court cannot use either doctrine to insert the legitimate-legislative-purpose requirement into §6103(f)(1). Neither doctrine allows courts to "rewrite Congress's work to say whatever the Constitution needs it to say." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2207 (2020); *see Murphy v. NCAA*,

138 S. Ct. 1461, 1482 (2018) (same for severability). And avoidance does not apply absent ambiguity. *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 494 (2001). Section 6103(f)(1) unambiguously lacks a legitimate-legislative-purpose requirement. Br.21-22. Both the Committee and the Government agree.[1]

If Congress wants to use §6103(f)(1) to demand an objecting taxpayer's information, then it can amend that statute to conform to the Constitution. (Or committees can seek the same information through subpoenas, as the Committee initially did here. *See* Doc. 1-11.) But what the Committee cannot do is ask courts to ignore the constitutional standard, or to jam it into a statute where it doesn't fit. This Court should reverse the dismissal of Intervenors' fifth cross-claim.

II. Intervenors plausibly alleged that the Committee's request fails heightened scrutiny.

The parties continue to agree that some version of heightened scrutiny applies, but disagree about which version and whether the request plausibly fails it. This Court should hold that *Mazars* applies. Or it could

[1] *E.g.*, JA112 ("The command of section 6103(f)(1) is unambiguous"); JA103-04 & nn.10-12 (similar); Doc. 1-11 at 2 ("Section 6103 has long been regarded as clear and unambiguous" and "[c]ompliance is not discretionary under any circumstance"); Doc. 1-5 at 2 (similar); JA211-12 ¶322 (similar).

bypass that question because, under any meaningful scrutiny, Intervenors' allegations cross the plausibility threshold.

A. The district court should have applied *Mazars*.

When Congress demands personal information, it must have a legitimate legislative purpose. And when its demand raises separation-of-powers concerns, it must satisfy the four-part test from *Mazars*. That test applies here because the Committee's demand raises comparable separation-of-powers concerns: It was made while President Trump was President, because he was President, and with the goal of studying legislation that would restrict the presidency. Br.26-33.

The other parties ask this Court to disregard *Mazars*. They say the separation-of-powers concerns are reduced because the Committee's demand is authorized by statute, directed at a former President, and approved by the current administration. These points are irrelevant, inaccurate, or both.

1. The parties seem to concede that, if President Trump were still President, then the Committee's request would have to satisfy *Mazars*. So their attempt to distinguish *Mazars* on the ground that it involved a subpoena, rather than a statutory request under §6103(f)(1), rings hollow. The district court was right to reject this argument. JA232 n.5.

No constitutional distinction exists between subpoenas and requests under §6103(f)(1). As the parties concede, both are exercises of Congress's power to demand information and, thus, both must satisfy the legitimate-legislative-purpose test. Gov't-Br.25; Cmte.-Br.21-22. Because *Mazars* explains how to apply that test, it applies equally to both demands. Nor does it matter that §6103(f)(1) went through bicameralism and presentment. Subpoenas, too, are supported by a statute that went through bicameralism and presentment. *See* 2 U.S.C. §192. And the fact that *one President* signed a statute in the past cannot resolve separation-of-powers concerns for *the Presidency* as a whole. *Nat'l League of Cities v. Usery*, 426 U.S. 833, 841 n.12 (1976).

2. That President Trump is a former President doesn't meaningfully reduce the separation-of-powers concerns, at least not here. Because *Mazars* involved a sitting President, the Supreme Court did not address what standard would govern a former President. So the parties' repeated quotations to the parts of *Mazars* that mention a sitting President are beside the point. *See Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944) ("[W]ords of our opinions are to be read in the light of the facts of the case

under discussion."). Instead, the question is whether the *reasoning* of *Mazars* extends here. It does.

Mazars held that congressional demands for the President's personal information must satisfy a heightened version of the legitimate-legislative-purpose test. Br.26-27. The test is heightened—and courts do not give their normal deference and presumptions to Congress—because these requests are suspicious. They carry a "heightened risk of … impermissible purposes" because they have a "less evident connection to a legislative task," target sensitive and "personal" information of "intense political interest," and come from "a rival political branch" with "incentives to use subpoenas for institutional advantage." 140 S. Ct. at 2034-36.

The Committee's demand is equally suspicious. If any documents are "of intense political interest," *id,* at 2034, it's President Trump's tax returns—House Democrats' "holy grail" and "white whale." JA186 ¶206; JA194 ¶245. Their relentless pursuit of this information is anything but "a run-of-the-mill legislative effort." *Mazars*, 140 S. Ct. at 2034. The Committee's demand also comes from a "rival political branch," since it was issued while President Trump was President and has been continuously pursued. *Id.* at 2036. And the Committee admits that the demand was

made because he was President with the supposed purpose of studying legislation to constrain the presidency. Cmte.-Br.22-24.

The other parties do not dispute that the Committee's demand warranted *Mazars*-level scrutiny in 2019 and 2020. But they cannot explain how its suspicious qualities magically disappeared in 2021. If anything, former Presidents are *more* vulnerable, as they no longer have the power of the office to force Congress to come to the bargaining table.

Independently, this Court should apply *Mazars* because the Committee's request legally *is* a request to a sitting President. The other parties agree that, at least in criminal cases, congressional demands must be constitutional when issued. True, this case is not criminal (though, the Government's agents could face criminal liability if they unlawfully disclose taxpayers' information to Congress, JA69). But even in civil cases involving equitable relief, the separation of powers sometimes requires courts to evaluate government action ab initio. *Mazars* instructs courts to do that here—a point the Government once stressed. Br.30-32.

Mazars' citations to the timing rules from *Watkins* were not random. *Cf.* Cmte.-Br.42 n.12. They responded to this Court's rejection of *Watkins*. *See Trump v. Mazars USA, LLP* (*Mazars II*), 940 F.3d 710, 730

(D.C. Cir. 2019), *vacated*, 140 S. Ct. 2019. And they furthered the Supreme Court's goal of keeping these disputes out of court. Looking to the beginning is also how courts evaluate "purpose," which is the key question here (unlike in executive-privilege cases). Though a "'supersed[ing]'" demand might sometimes cleanse an original demand's invalid purpose, Cmte.-Br.39, the Committee does not argue that here. It concedes that its purpose in 2021 is no different from its purpose in 2019.

The Committee also concedes that, "unlike [the] subpoena" in *Mazars*, requests under §6103(f)(1) "d[o] not automatically expire at the end of a Congress." Cmte.-Br.39. That concession is crucial because it means that the 2021 letter can be read as simply narrowing the *existing* request to a sitting President from 2019. Intervenors allege precisely that. *E.g.*, JA210 ¶315. The 2021 letter is more naturally read that way, Br.29-30, and a contrary conclusion would impermissibly construe the facts against Intervenors. The Committee's demand thus must be judged as of 2019, when *Mazars* indisputably applied.[2]

[2] Congress also benefits from this timing rule. *E.g.*, *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 509 (1975) (noting that "the legitimacy of a congressional inquiry" does not turn on "what it produces"). If the Court agrees that the Committee's demand must be valid as of 2019, it should not consider either party's post-2019 facts. *Cf.* Cmte.-Br.41.

3. Nor are the separation-of-powers concerns here meaningfully reduced by the current administration's acquiescence. The other parties ask this Court to defer to the Justice Department because "'it must be presumed that the incumbent President is vitally concerned with and in the best position to assess the present and future needs of the Executive Branch.'" Cmte.-Br.43-44. But that "presumption" is unwarranted here.

While the Justice Department believes the Committee's request is lawful now, it previously deemed the Committee's request unlawful. And the reasoning it used applies both before and after President Trump left office. *See* JA50; JA65; JA76-78. Even if this Court defers to incumbent executives, it has no basis to choose one incumbent over another. *See Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991) ("[T]he case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views."); *cf. Trump v. Thompson*, 20 F.4th 10, 35 (D.C. Cir. 2021) (deferring to "President Biden's judgment" because it was consistent with "decisions made by other Presidents").

Separately, presumptions can be overcome. Intervenors allege that the current administration's decision was based not on an honest

assessment of executive needs, but on a desire to retaliate against President Biden's top political rival. JA213-15 ¶¶330-37. One of the separation-of-powers concerns here is that Congress will use these demands to control who can *be* President. Br.28. That concern is particularly acute when the target is a one-term President who just left office. When that happens, Congress will often find an eager accomplice in the incumbent President who just ran against him and could face him again.

In these circumstances, the presumption that the incumbent's decision is grounded in long-term institutional concerns is plausibly rebutted. *See Trump v. Thompson*, 142 S. Ct. 680, 681 (2022) (Kavanaugh, J., respecting denial of application) (explaining that a President will be "chilled" if he knows his interests are subject to "a subsequent President who could be [his] political opponent"); *cf. Nixon v. GSA*, 433 U.S. 425, 449 (1977) (stressing that "neither President Ford nor President Carter" agreed with former President Nixon). The presumption is even further rebutted here, where the current administration cut the former President out of the negotiations and is caving to the Committee's demand in full. JA199-200 ¶268; JA215 ¶337; *cf. Thompson*, 20 F.4th at 34 (stressing that President Biden consulted with former President Trump and

withheld documents that Congress wanted). The current administration's view thus cannot meaningfully reduce the separation-of-powers concerns here.

B. The district court should not have applied the balancing test from *Nixon v. GSA*.

This Court should apply *Mazars*, the test that the Supreme Court articulated for congressional demands that seek personal information and raise separation-of-powers concerns. The other parties disagree. While the Committee asks for *Nixon v. GSA*, the Government won't say what test it thinks applies. But at most, the parties' arguments are a reason to apply "*Mazars* lite."

1. The parties argue that the separation-of-powers concerns here are reduced. But reduced does not mean eliminated. This case thus involves a congressional demand for personal information that implicates the separation of powers. *Mazars* tells courts how to apply the legitimate-legislative-purpose test to that kind of demand. If the other parties are right that the separation-of-powers concerns are meaningfully reduced, then a court should apply a reduced version of *Mazars*—or "*Mazars* lite," as Judge Mehta called it. *Trump v. Mazars USA LLP* (*Mazars IV*), 2021

WL 3602683, at *13 (D.D.C. Aug. 11). It should not abandon *Mazars*, which remains the most recent, most analogous test. Br.36-37.

If the parties disagree that the logical conclusion of their arguments is *Mazars* lite, they never say so in their briefs. The Government never explains what test should apply. Below, it "seem[ed] to agree" on *Mazars* lite. JA244. The Committee, for its part, wants *Nixon v. GSA*. But it never explains why the Court should stretch that test to fit this entirely different context, rather than simply applying *Mazars*. The Committee even agrees with Judge Mehta that its balancing approach would "correspon[d] to the first and fourth *Mazars* factors." Cmte.-Br.38. But as Judge Mehta went on to explain, courts have no good reason to jettison the second and third factors. *Mazars IV*, 2021 WL 3602683, at *13. Congressional demands to former Presidents still should be avoided if possible, justified by evidence, and well-tailored. Br.37. Intervenors stressed these points in their opening brief, but the Committee offers no discernible response.

2. Applying *Nixon v. GSA* would present other problems too. Most notably, the cited section has nothing to do with this case. As Intervenors explained, section IV.A of *Nixon v. GSA* did not involve a congressional

demand for information, or even a claim that turned on Nixon's status as a former President. Nixon argued, like any injured citizen could, that a statute violated Article II. The Court disposed of that claim by applying its generic balancing approach—the same approach it applied in *Youngstown*, *Morrison*, *Zivotofsky*, and countless other cases that do not involve congressional demands for information. Br.36.

The other parties do not dispute Intervenors' reading of *Nixon v. GSA*. The Government is silent, presumably maintaining its position that *Nixon v. GSA* doesn't fit this case. Br.34. As for the Committee, it claims that Intervenors' careful parsing of *Nixon v. GSA* "misses the point." Even if that case involved wholly different circumstances, the Committee highlights "dicta" from *Thompson* that suggests its balancing approach "applies more broadly." Cmte.-Br.38-39.

Thompson is too thin a reed to justify stretching a wholly irrelevant test to fit this case. Its discussion of *Nixon v. GSA* is less than "dicta." Cmte.-Br.39. The Supreme Court went out of its way to say that it "must … be regarded as nonbinding." *Thompson*, 142 S. Ct. at 680. *Thompson*'s reliance on *Nixon v. GSA* also made some sense, since both cases involved official papers and a claim of executive privilege. But to the extent

Thompson's dicta suggests that *Nixon v. GSA* should apply to a case like this one, it is wrong.

* * *

Getting the law right is always important. But the parties in this case all say they can win under any version of heightened scrutiny. Br.38; Cmte.-Br.42; Gov't-Br.45. Only Intervenors can really make that claim. The upshot of *Nixon v. GSA*, according to the Committee, is that it omits the second and third *Mazars* factors. Cmte.-Br.38. But those factors—especially the requirement that courts carefully scrutinize "the evidence," 140 S. Ct. at 2036—are ill-suited for a motion to dismiss, where Intervenors' allegations must be credited and the other parties' "evidence" doesn't exist. *See Thomas v. Kaven*, 765 F.3d 1183, 1196-97 (10th Cir. 2014); *Johnson v. D.C.*, 2021 WL 3021458, at *14 (D.D.C. July 16).

If the Court agrees that *Nixon v. GSA* does not apply, then it should at least remand for the district court to apply *Mazars* or *Mazars* lite. The district court could have, but did not, conclude that the Committee satisfies those standards. It remains "in the best position to evaluate these arguments upon remand." *Boler v. Earley*, 865 F.3d 391, 414 (6th Cir. 2017); *accord In re SuperValu, Inc.*, 870 F.3d 763, 774 n.7 (8th Cir. 2017).

In a footnote, the Committee (but not the Government) resists remand because it would cause "delay." Cmte.-Br.42 n.13. But when congressional demands implicate the separation of powers, this Court treats delay as a plus: It encourages compromise and helps avoid a decision that could permanently alter the balance of power. *E.g.*, *Comm. on Judiciary v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008); *United States v. AT&T*, 567 F.2d 121, 133 (D.C. Cir. 1977). And the Committee can hardly complain. It waited three months to issue its 2019 letter, waited another two months to sue, let this case languish for another eighteen months, and then waited another six months to issue its 2021 letter. *See* Doc. 114 at 3-4. After dragging its feet for years, the Committee cannot suddenly demand the "'most expeditious treatment.'" Cmte.-Br.42 n.13.

C. Intervenors plausibly alleged that the Committee's request fails any version of heightened scrutiny.

Though heightened scrutiny could be applied with various degrees of rigor, any reasonable version would consider the four considerations from *Mazars*: burden, need, evidence, and overbreadth. Intervenors plausibly alleged that the Committee's demand fails each consideration—any one of which would be fatal. Br.38-47.

It's important to reiterate that this case is at the pleading stage. Unlike *Mazars* (which involves cross-motions for summary judgment), the question here is whether Intervenors *alleged* enough to make it *plausible* that they *could prove* a violation of heightened scrutiny. This Court must answer that question by accepting Intervenors' factual allegations and construing everything in their favor. The other parties' attempts to engage Intervenors in a point-by-point battle of the record are thus premature. What matters is that Intervenors pleaded enough to take this dispute out of the pleadings and into the evidence.

1. Burden: The Committee's demand burdens the presidency in two main ways: Congress can use the threat of similar demands both to control a President's conduct in office and to influence who can be President. The other parties minimize the first burden and ignore the second. Both are well-pleaded.

Congress can threaten "post-Presidency" demands to "try and influence the President's conduct while in office." *Thompson*, 20 F.4th at 44. Minimizing these burdens as "*personal*" or indirect, Cmte.-Br.44, is no more persuasive than it was in *Mazars*. 140 S. Ct. at 2034-35. These burdens matter because the more painful the demand to the person, the more

coercive the threat to the office. And the Committee's demand is designed to be maximally painful: The Committee seeks reams of sensitive financial information protected by federal law, is interfering with ongoing audits, and will disclose everything to the public. Br.39-41.

It is no answer to say that seven Presidents have voluntarily disclosed their tax returns. *Cf.* Cmte.-Br.45. That practice is recent, voluntary, and limited. JA148 ¶12. And the Court must consider the precedent it will set if it approves the Committee's demand. *See Mazars*, 140 S. Ct. at 2036. If the Committee can justify this demand on this showing, then other committees can justify almost any request for a President's sensitive financial information. The risk isn't theoretical: The House issued several subpoenas that seek to uncover every detail of President Trump's financial life, and is still pursuing them after he left office. JA185 ¶¶204-05. These demands were no "'bluff.'" Gov't-Br.51.

In addition to this chilling effect, demands like this one allow Congress to influence who can be President by exposing (or threatening to expose) sensitive information about a disfavored candidate. The other parties do not address this separate burden. Far from a theoretical

possibility, Intervenors allege that it's happening here. *E.g.*, JA192 ¶234; JA194 ¶244; JA215 ¶337.

2. Evidence: Intervenors plausibly allege that the Committee's demand will fail for lack of "detailed and substantial" evidence. *Mazars*, 130 S. Ct. at 2036. The Supreme Court demanded this kind of evidence to ensure that Congress is considering "constitutional" legislation—a major concern when legislation "concern[s] the Presidency." *Id.* While the Committee identified legislation that would codify the IRS's mandatory audit process, it never defends the constitutionality of that legislation. *Infra* III.B.1. Its only other evidence consists of "'vague'" and "'loosely worded'" gestures toward broad subject areas. *Mazars*, 140 S. Ct. at 2036. Without more, it is "'impossible'" for a court to tell whether the Committee is considering permissible legislation in this constitutional minefield. *Id.* It is likewise "'impossible'" to tell whether Intervenors' information would shed any light on that constitutional legislation. *Id.*; *e.g.*, JA203 ¶284 (tax returns would not show business ties or foreign entanglements).

Requiring the Committee to say more is not a "Catch-22." Cmte.-Br.48. If saying more reveals that the Committee already has enough information to legislate, then its demand for personal information from a

President *should* fail heightened scrutiny. The Committee assumes it should be easy to demand a President's personal information—demands that every other Congress in our nation's history managed to legislate without. It should be hard.

3. Need: The Committee has many "other sources" that it should use instead—or at least *before*—it demands President Trump's information. *Mazars*, 140 S. Ct. at 2035. The parties' counterarguments impermissibly reject Intervenors' factual allegations. And they forget that the Committee is supposed to be studying *legislation* for *future Presidents*, not diagramming President Trump's finances or recreating precisely what happened in Intervenors' audits. Br.42.

The Committee can discover everything it wants to know by simply talking to the IRS. Far more than Intervenors' returns and files, the IRS has precise answers to every question in the Committee's brief. *See* Cmte.-Br.48-49. The Committee claims, citing several of its own declarations, that it already spoke to the IRS in 2019. Cmte. 50. But those extrinsic declarations cannot be considered at the pleading stage, and they are contradicted both by Intervenors' allegations, JA204 ¶286, and the Government's counter-declarations, Doc. 44-3; Doc. 44-4.

Even if prior talks were unproductive, no party explains why the IRS would remain uncooperative now. President Trump is no longer its boss, and the agency is doing everything it can to give Congress his information. JA204 ¶286. And surely the IRS would be happy to talk to Congress about getting more money or protections—the only constitutional laws the Committee could be studying. *Infra* III.B.1. If doubts remained, the IRS could assuage them by showing Intervenors' documents to Members, so long as it did so in camera "with no photocopying" and "minimal notetaking." *Mazars*, 140 S. Ct. at 2030.

If the Committee needed still more, other taxpayers' returns and files are available. Whether the IRS needs more money to audit Presidents turns on the complexity of the returns. But plenty of non-Presidents have returns as complex as President Trump's, and audits of those taxpayers are not conducted any differently than audits of Presidents. JA201-02 ¶¶278-81; JA204 ¶287. The notion that *one presidential audit per year* meaningfully impacts the IRS's multi-billion-dollar budget is also far-fetched. Whether the IRS needs new protections, moreover, turns on whether it can conduct these audits freely and fairly. But the Committee could see the same dynamic in the audit files of Treasury Secretaries,

IRS Commissioners, powerful Congressmen, Vice Presidents, and non-objecting Presidents. The IRS would not feel meaningfully less pressure auditing these officials than President Trump—certainly not because, as a candidate and once in office, President Trump criticized the IRS's *non*-presidential audits. JA196-98 ¶¶256-63. For example, the IRS would feel the most pressure (and be applying the most up-to-date procedures) when auditing President Biden's returns. He's their current boss, and his returns have plenty of questionable material that the IRS might be tempted to overlook. JA201-02 ¶278.

4. Overbreadth: The Committee's request is also overbroad because it seeks open files, promises no confidentiality, and covers too many entities and tax years. The parties ignore the first problem, dismiss the second, and impermissibly speculate about the third.

The Committee's request fails heightened scrutiny for the tax years that are still under audit. As Intervenors (and the Government once) explained, the Committee can learn little about an audit until it's over. Br.43; JA204-05 ¶288. And congressional interference in an open audit irredeemably taints it, ensuring the Committee learns nothing valuable. JA75-76. Intervenors briefed and pleaded this point, but the other parties

offer no response. This defect alone should have led the district court to deny the motions to dismiss.

The Committee's refusal to keep Intervenors' information confidential also dooms its request. The question is not whether public disclosure is "possibl[e]." Gov't-Br.48. Intervenors plausibly alleged that the Committee will do it, as it promised all along. *E.g.*, JA161 ¶¶81-83; JA165-67 ¶¶104-16; JA188-89 ¶¶218-20. Tellingly, the Committee states only that "nothing in *Mazars* requires that the material be kept confidential." Cmte.-Br.53. But *Mazars* prohibits overbroad requests and unnecessary burdens, and the Committee does not dispute that confidentiality would be narrower and less burdensome. *Mazars* also stressed the importance of history, and the Committee does not dispute that—until President Trump—every congressional demand to a former President guaranteed confidentiality. Br.47.

Finally, Intervenors plausibly alleged that the Committee has no valid interest in multiple returns from President Trump's businesses and from years before and after he was President. The Committee says it "has no way of knowing" whether the businesses were subject to a mandatory presidential audit. Cmte.-Br.52. But Intervenors alleged that they aren't,

see JA 204 ¶287, and the Government (who knows they aren't) is conspicuously silent on this point. The Committee also claims that it needs multiple years, including individual returns that were concededly not subject to a mandatory presidential audit, to shed light on other years. Cmte.-Br.52. But this logic has no limiting principle and is based on purely speculative concerns. At least until these concerns actually arise, the Committee should be limited to one year when President Trump was President. The Committee again forgets that its "goal" is to study whether the IRS needs more money or protections—not to grade the IRS's homework on specific audits.

For any of these reasons, Intervenors plausibly alleged that the Committee's demand fails heightened scrutiny. They should have been able to prove their claim on a full record.

III. Intervenors plausibly alleged that the Committee's request violates other constitutional limits.

The district court prematurely dismissed several other claims, including Intervenors' allegations of nonlegislative purposes, impertinence to constitutional legislation, and First Amendment retaliation and discrimination. The other parties' briefs largely repeat the district court's faulty reasoning.

A. Intervenors plausibly alleged that the request's purpose is not legislative.

As the Treasury and the Justice Departments once *concluded*, the Committee's purpose is illegitimate exposure. If the Committee had a secondary purpose, it was law enforcement. Its purpose was never studying legislation. Br.48-56.

The parties concede that congressional demands are invalid if their purpose is law enforcement or mere exposure. Cmte.-Br.32-33; Gov't-Br.26. But the Committee claims that invalid-purpose claims are impossible to plead when Congress's demand asserts a legitimate legislative purpose "on its face." Cmte.-Br.26. Alternatively, the parties argue that Intervenors failed to plead an invalid purpose here. Cmte.-Br.29-34; Gov't-Br.36-37. These arguments misstate the law and misread Intervenors' pleading.

1. At its boldest, the Committee claims that a congressional demand need only state a legitimate legislative purpose on "the face of the request." Cmte.-Br.22. But that hyper-deferential standard cannot apply in a case, like this one, that raises separation-of-powers concerns. And it has never been the law in any case.

A. The House made a similar plea for near-total deference in *Mazars*, but this Court refused it. This Court did not think the subpoena in *Mazars* presented an interbranch conflict. 940 F.3d at 725. But because "separation-of-powers concerns" at least "linger[ed] in the air," this Court assumed that it "owe[d] Congress no deference" and could not "presum[e]" a legitimate legislative purpose. *Id.* at 726. That assumption was sound. When Congress demands information from a purely private citizen, courts respect the separation of powers by deferring to Congress. *See Morrison v. Olson*, 487 U.S. 654, 704 (1988) (Scalia, J., dissenting). But when Congress's demand implicates a coequal branch, separation-of-powers concerns appear on both sides. Deference and presumptions are thus inappropriate, and "[t]he playing field" must be "a level one." *Id.* at 704-05. That observation applies here as well, where all agree that separation-of-powers concerns are implicated. Br.33; *see Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982) (giving "special solicitude" to the separation-of-powers claim raised by former President Nixon).

The Supreme Court's opinion in *Mazars* confirms the wisdom of this Court's approach. The Committee thinks *Mazars* went the opposite way—that, by referencing Congress's "'*asserted* legislative purpose'" and

"'the nature of the evidence *offered by Congress*,'" it instructed courts to look only at the face of a request. Cmte.-Br.28. That reading is dubious, since the whole point of *Mazars* was that this Court's analysis was *too lenient*. 140 S. Ct. at 2036. It's also wrong. Congress can assert its purpose and offer its evidence not just on the face of the request, but through other statements and objective evidence. And the Court demanded a clear statement of purpose, not to blindly accept it, but to *facilitate judicial scrutiny*. Congress must "*establish* that a [demand] advances a valid legislative purpose," and courts must "*conclude* that a [demand] *is designed* to advance a valid legislative purpose." *Id.* (emphases added). Congress cannot simply say so.

By asking this Court to consider the separation of powers when analyzing whether the Committee has an invalid purpose, Intervenors are not "conflat[ing] … distinct legal theories." Cmte.-Br.29 n.6. In a footnote, the Committee asserts that "[s]eparation-of-powers concerns do not bear" on whether a demand has a legitimate legislative purpose or how much deference this Court gives Congress. Cmte.-Br.29 n.6. But the Committee is fighting *Mazars*, which articulated a more rigorous version of the legitimate-legislative-purpose test precisely because separation-of-powers

concerns were present. 140 S. Ct. at 2035. And the Committee is fighting this Court's decision, which gave Congress less deference because separation-of-powers concerns lingered in the air. 940 F.3d at 725-26.

The reasoning in these decisions is not "illogical." Cmte.-Br.29 n.6. Demands like the Committee's deserve less deference because they're suspicious. *Supra* II.A.2. And the questions whether Congress is acting within its authority or intruding on the authority of a coequal branch are two sides of the same coin. *See Kilbourn v. Thompson*, 103 U.S. 168, 190-91 (1880). That the Committee is pursuing something other than legislation is also relevant when applying heightened scrutiny. Any burden on the presidency is, by definition, undue when compared to makeweight legislative goals.

b. Even if the Committee's demand were a standard request to a purely private party, courts would not give it the blind deference that the Committee demands here. Though the Committee wants this Court to look to the face of the request alone, neither it nor the Government really defends that position. The Government concedes that courts can analyze a demand's purpose by looking at "the face of the request *and other objective evidence*." Gov't-Br.31 (emphasis added). And below, the district

court asked the Committee, "[W]hat if Chairman Neal right now gave a press conference and said, my lawyers in court are claiming that I'm doing X, but of course we all know I'm doing it for Y reason." Doc. 146 at 6-7. The Committee said it would be "ridiculous" not to weigh that evidence. *Id.*

Intervenors' allegations cannot be disqualified as impermissible attacks on the Committee's "motives," as opposed to its purpose. *Cf.* Gov't-Br.31; Cmte.-Br.33. The other parties put substantial stock in the concept of "motive," but never explain what it means. The cases distinguish motive from purpose. *E.g.*, *Watkins v. United States*, 354 U.S. 178, 200 (1957). Motive is "why an individual Member sponsored or supported an [action]," and purpose is "what that [action] was designed to accomplish." *Jewish War Veterans of the U.S. of Am., Inc. v. Gates*, 506 F. Supp. 2d 30, 60 (D.D.C. 2007). The distinction is "admittedly … fine," but it "finds support in the case law and hence must be respected." *Id.*; *e.g.*, *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573, 2575-76 (2019) (courts normally cannot inquire into "'motivation'" or "unstated reasons" of "another branch," but must "scrutinize[]" the branch's "reasons" by examining "the record" and "viewing the evidence as a whole."). To gauge purpose

without delving into motive, courts "must focus … on objectively discernible conduct or communication that is temporally connected to the challenged activity." *Bauchman v. W. High Sch.*, 132 F.3d 542, 560 (10th Cir. 1997); *e.g.*, *Mazars II*, 940 F.3d at 767-71 (Rao, J., dissenting).

When evaluating purpose, courts consult all the objective evidence, rather than arbitrarily ignoring certain parts. Br.52-54. The cases bear this out both in what they say and what they do:

- *Barenblatt* "scrutinized [the] record"—not just "the Committee's report," but "the entire record." *Barenblatt v. United States*, 360 U.S. 109, 133 & n.33 (1959); *see* Gov't-Br.33 (acknowledging that *Barenblatt* consulted "the record, including the official statements of the committee chairman and witness testimony at committee hearings").

- *Shelton II* instructs courts to consider "several sources," including statements from committee members and staff—not the face of the request alone. *Shelton v. United States*, 404 F.2d 1292, 1297 (D.C. Cir. 1968).

- *Wilkinson* likewise consulted "[a] number of … sources," including statements from the committee chair and his staff. *Wilkinson v. United States*, 365 U.S. 399, 410 (1961); *see also id.* ("[a]ll these sources").

- *McGrain* asked broadly whether a legislative purpose "*sufficiently* appear[ed], when the proceedings [were] *rightly* interpreted." *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927) (emphases added); *see* Gov't-Br.32 (acknowledging that *McGrain* looked at "the record of the committee's proceedings").

- *Watkins* expressly "rejected the committee's argument that its inquiry must be sustained so long as there *could* have been any legislative purpose to support the committee's inquiry." JA70 (citing 354 U.S. at 204).

- *Tenney* concerned federal immunity for state legislators. To the extent it's relevant at all, it notes that immunity must be resolved on "the facts." *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951).

If the law were otherwise, the Committee should be able to cite one case that refused to look at the entire record because only the face of request matters. It cites none.

The opposite rule would be strange. The legitimate-legislative-purpose requirement exists so that Congress does not intrude on other branches' authority or individuals' rights. *Mazars*, 140 S. Ct. at 2032. Evaluating Congress's *purpose* serves that goal, but evaluating its *asserted purpose* does not. No constitutional value is served by having a committee parrot a legitimate purpose in the request, only to turn around and tell the world that its real purpose is something else. The Constitution "'deals with substance, not shadows.'" *Id.* at 2035. A magic-words test would also greatly expand Congress's power. Any House counsel worth her salt could gin up a legislative purpose to put in the request. But if the courts cannot give that purpose "careful scrutiny," nothing

would ensure Congress's implied power to demand information remains limited. *Kilbourn*, 103 U.S. at 192.

2. If Intervenors' pleading does not plausibly allege an invalid purpose, then no pleading could. Intervenors alleged an improper purpose based on the long campaign to obtain President Trump's tax returns, myriad statements from key decisionmakers confessing nonlegislative purposes, numerous statements from the Chairman admitting his stated purpose was pretextual, the shifting and inconsistent explanations for the request, the mismatch between the request and its stated rationale, the conclusions of inside and outside observers (including the United States Government), and more. Br.49-50.

If allegations like Intervenors' were presented in a complaint alleging employment discrimination, a motion to dismiss would be swiftly denied. *See Freeman v. Metro. Water Reclamation Dist. Of Greater Chicago*, 927 F.3d 961, 965 (7th Cir. 2019) ("'I was turned down for a job because of my race' is all a complaint has to say."); *Lawrence v. D.C.*, 2019 WL 1101329, at *6 (D.D.C. Mar. 8) (similar). Notably, the Government is currently raising—based on much weaker records—unlawful-purpose claims against various state election laws. When the States moved to

dismiss those claims, the Government responded that they "are generally ill-suited for resolution" until "after full discovery." *E.g.*, *United States v. Georgia*, Doc. 58 at 14, No. 1:21-cv-2575 (N.D. Ga. Aug. 11, 2021).

Nothing in law or logic requires this Court to consider only the allegations quoting "Chairman Neal's statements." Cmte.-Br.29. While only Chairman Neal can "make a request" under §6103(f), Cmte.-Br.29-30, his *purpose* for requesting Intervenors' tax information is not revealed only in his personal statements. (Though, his many damning statements are sufficient on their own. Br.50-51.)

Intervenors' pleading explains, in factual allegations that must be accepted, why the other allegations bear on *Chairman Neal's* purpose. Speaker Pelosi is relevant because she consulted with Chairman Neal and approved his request. *E.g.*, JA159 ¶74. House Democrats, especially Committee members, are relevant because they were consulted on, approved, and helped craft the rationale. *E.g.*, JA159-62 ¶¶74, 85-86. Several rely on their first-hand knowledge to explain why *Chairman Neal* sought Intervenors' information. *E.g.*, JA167-68 ¶¶113-22. Allegations concerning the 2016 campaign and 115th Congress are also relevant because Intervenors plausibly allege a single, long-running campaign to

expose President Trump's tax returns, culminating in the 2019 request and continuing today. *E.g.*, JA192 ¶234; JA188 ¶217; JA163 ¶95; JA149 ¶21; JA153-54 ¶38; JA159 ¶70; JA160 ¶75; JA178 ¶170. That others both inside and outside of Congress found Chairman Neal's purpose illegitimate—including the Treasury Department, the Justice Department, the Committee itself in the 115th Congress, and observers with no discernible bias—only bolsters the plausibility of Intervenors' claim. *E.g.*, JA171-73 ¶¶133-39.

The Committee cannot construe these allegations *against* Intervenors, reading the quoted statements as if they pertain to legislation or reveal a sincere legislative purpose. *Cf.* Cmte.-Br.30-31. Chairman Neal's statements about "constructing a case" are not exonerating: They are a confession of pretext, especially after his "constructed case" was an audit procedure that no one had ever mentioned before. The constructed case also omitted the myriad reasons Committee Democrats *had* given for wanting to see President Trump's tax returns. Those reasons also betray, rather than "*belie*," a nonlegislative purpose. Cmte.-Br.32. They discussed exposure and law enforcement as ends in themselves, never mentioned possible legislation, were conveniently advanced and abandoned

to match the political issue of the day, and alleged private misconduct and local crimes with no possible connection to *federal* legislation. Br.49. Even if these damning statements could be read multiple ways, the Court must read them Intervenors' way for now. Br.20.

Nor can the Committee reinterpret Intervenors' complaint to allege "mixed motives." Cmte.-Br.26. Intervenors do not allege that the Committee had both legislative and nonlegislative purposes. They allege that the Committee had nonlegislative purposes and that its belated, sparse references to legislation were an "artificial pretext." *Trump v. Deutsche Bank AG*, 943 F.3d 627, 664 (2d Cir. 2019), *vacated*, 140 S. Ct. 2019; *e.g.*, JA170 ¶¶125-26; JA171 ¶132; JA200-01 ¶275; JA210 ¶317; JA214 ¶335. This Court must accept Intervenors' allegations of pretext as true. *Johnson*, 2021 WL 3021458, at *14.

Regardless, the evidence of the Committee's nonlegislative purposes is overwhelming and far outweighs any isolated evidence of a legislative purpose. The Committee cites criminal cases where stray evidence of nonlegislative purposes did not outweigh the evidence of a legislative purpose. Cmte.-Br.33. But it cites no case where a court upheld a congressional demand (let alone granted a motion to dismiss), even

though Congress's "primary purpose" or "*gravamen*" was nonlegislative. The caselaw holds the opposite. Br.54; JA71. Intervenors' first two counterclaims and cross-claims should not have been dismissed.

B. Intervenors plausibly alleged that the request is not pertinent to valid legislation.

The Committee's request is unconstitutional unless it "seeks information *pertinent* to a *valid* legislative purpose." Gov't-Br.53 (emphases added). That principle has two requirements: Courts must "'first define the universe of possible legislation that the request provides information about, and then consider whether Congress could constitutionally enact any of those potential statutes.'" Cmte.-Br.34 (quoting *Mazars II*, 940 F.3d at 732). Neither the district court nor the other parties properly put these requirements together.

1. In terms of valid legislation, the district court correctly excluded laws that would *require* the IRS to audit Presidents. Congress cannot usurp the President's executive power, let alone commandeer his subordinates to exercise the executive power against him. Br.57; JA233. Laws forcing the President to recuse himself, or protecting IRS subordinates from removal, would have similar defects. *See Memo. from Deputy Att'y*

Gen. Silberman to Burress 5 (Aug. 28, 1974), bit.ly/31k3rql; *Seila Law*, 140 S. Ct. at 2197.

The other parties spend not one word of their briefs defending the constitutionality of these laws. The Government agrees that they "raise serious constitutional questions." Gov't-Br.28-29. And the Committee says only that this Court has "no need to decide" their constitutionality, without substantively defending them. Cmte.-Br.35. So this Court, too, must assume that laws codifying the presidential-audit process or effectively requiring presidential audits cannot support the Committee's request.

The parties identify another type of law that the district court did not analyze: "legislation requiring additional financial disclosures from a sitting President." Gov't-Br.39; Cmte.-Br.35. They do not explain what this legislation would require Presidents to disclose or to whom. Presumably they mean his tax returns to the public.

But the district court did not consider this kind of legislation because the Committee did not identify it in its 2019 or 2021 letter. Wisely so. The Committee does not have a legitimate legislative purpose unless it plans to study legislation that *Ways and Means* could craft—*i.e.*,

legislation within that committee's jurisdiction. JA208-09 ¶307. But government ethics falls under the Oversight Committee's jurisdiction. *Mazars II*, 940 F.3d at 731, 742-43. House Democrats used the Ways and Means Committee to issue this request, not Oversight, because only Ways and Means can both obtain President Trump's tax returns and *expose them to the public*. *See* 26 U.S.C. §6103(f)(4). But the tradeoff, House Democrats understood, was that they had to claim they were studying legislation within that committee's narrower jurisdiction. JA187 ¶215; JA190 ¶222; JA76; JA151 ¶27. Hence the focus on IRS audits.

The Committee also couldn't say that it wanted to disclose President Trump's tax returns to study laws requiring Presidents to disclose their tax returns. That transparent argument would have reconfirmed that its purpose is exposure for the sake of exposure. And that circular reasoning would fail both heightened scrutiny, *Mazars IV*, 2021 WL 3602683, at *15-16, and ordinary scrutiny, *Shelton II*, 404 F.2d at 1297. Even apart from its circularity, the Committee could not explain why a supposed interest in studying whether *Presidents* should disclose their *tax returns* has anything to do with its requests for *nonpresidential* returns or *audit files*.

Even if all these problems could be overcome, a law that truly required Presidents to disclose their tax returns would be unconstitutional. Unlike agencies created by Congress, the Presidency is "created by the Constitution." *Gordon v. United States*, 117 U.S. 697, 699 (1864). Because the President is "one of the three great" branches and "independent" of the other two, *id.*, Congress cannot coerce him to make disclosures against his will. *See Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524, 610 (1838). The President is like the Supreme Court in this way, *id.*, and the Chief Justice has stressed that Congress's power to impose financial-disclosure requirements on the Supreme Court is an open question. *2011 Year-End Report on the Federal Judiciary* 3-4, 6, bit.ly/2Ku5ZvM. Mandatory disclosure laws would also amend or add to the constitutional qualifications for President. *Griffin v. Padilla*, 408 F. Supp. 3d 1169, 1179 (E.D. Cal. 2019), *vacated*, 2020 WL 1442091 (E.D. Cal. Jan. 13). Congress lacks that power too. *Term Limits, Inc. v. Thornton*, 514 U.S. 779, 827 (1995); *id.* at 861-62 (Thomas, J., dissenting).

2. All that's left, then, are the laws that the district court identified: ones that would fund or regulate how the IRS audits Presidents, without requiring it to audit Presidents. As Intervenors explained, this legislative

rationale fails the "litmus test" from *Mazars II*. Br.58. The other parties do not argue otherwise, which is odd because the Committee insists that *Mazars II* "'continue[s] to have precedential weight.'" Cmte.-Br.31 n.9 (quoting *Action All. of Senior Citizens of Greater Phila. v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir. 1991)).[3]

The litmus test from *Mazars II* is correct and important. Presidents are tempting targets. If Congress is going to take the significant step of demanding a President's financial information, it must be studying legislation that regulates presidential finances directly. *See* 940 F.3d at 732-33. Anything less would let it declare open season on Presidents: Congress could demand his "high school transcripts in service of an investigation into K-12 education," his "medical records as part of an investigation into public health," or any records as part of an investigation into the funding or mechanics of our vast federal bureaucracy. *Id.* at 733. If Congress is going to target a President to study President-specific legislation, then it needs to forthrightly confront its "circumscribed" power to

[3] To be clear, "precedential weight" means this Court's vacated opinion can be "persuasive" authority, but not binding precedent. *Action All.*, 930 F.2d at 83. Intervenors think some parts of *Mazars II* are persuasive, but others are not.

regulate the presidency. *Id.* It cannot sidestep this problem by claiming that it merely wants to give nonbinding support to "ordinary Executive Branch employees" who work in the President's periphery. *Id.*

C. Intervenors plausibly alleged a violation of the First Amendment.

The Government had its own reason for switching sides and deciding to disclose Intervenors' tax information. That reason, Intervenors alleged, was partisan discrimination and retaliation—a motive that all agree violates the First Amendment. That motive will become clearer in discovery, when Intervenors get access to the now-undisclosed communications between the Committee and Government. *See* 8/9/21 Tr. 8-9. But Intervenors alleged more than enough direct and circumstantial evidence in its pleading to get beyond a motion to dismiss. The district court did not disagree. It instead erroneously reasoned that because *it* had dismissed Intervenors' legitimate-legislative-purpose challenge, the *executive branch* had no choice but to comply with the Committee's demand. Br.59-62.

The Government defends the district court's causation analysis, but no more. In a lone footnote, it suggests that Intervenors' claim is "not plausible" because Treasury's decision to disclose their tax information

was not "improperly motivated." Gov't-Br.63 n.3. But this Court does not entertain arguments raised only in a footnote. *United States v. Delaney*, 651 F.3d 15, 20 n.3 (D.C. Cir. 2011). And that rule should especially apply here, since the Government's cursory footnote doesn't even respond to Intervenors. As explained, courts cannot credit the Government's self-serving assertion of a nonretaliatory purpose at the pleading stage. Br.60. Intervenors pleaded that the Government acted based on retaliation and discrimination, not dispassionate legal "analysis." Gov't-Br.63 n.3. That allegation not only must be taken as true, but also is well-pleaded given the events leading up to the Government's decision, its collusion with the Committee, its specious reasoning, its focus on just one rival President, and more. *See* Br.60-61.

Relatedly, it should go without saying that "the district court's determination" on the motion to dismiss was not why Treasury decided to disclose Intervenors' tax information. Gov't-Br.62. The Government was not agnostic in this case; it didn't decline to take a position and leave the disclosure of Intervenors' information up to the district court. It *decided* to disclose Intervenors' information (and actively opposed Intervenors' efforts to challenge the Committee's request). And the Government made

that decision at least four months before the district court's decision. *Compare* JA81, *with* JA264. A judicial opinion that postdates the Government's unlawful decision obviously "cannot be a 'but for' cause" of that decision. *Hassan v. City of Ithaca*, 2015 WL 5943492, at *14 (W.D.N.Y. Oct. 13). Even today, the district court's decision does not hold that "the law requires" the Government to disclose Intervenors' tax information. Gov't-Br.62. It merely dismisses a suit that tried to bar the Government's disclosure. And that opinion is still under review and could be reversed by this Court.

As for the district court's actual reasoning on causation, the Government's attempts to defend that reasoning are unpersuasive. The Government denies that it "could have reached a different conclusion" about the validity of the Committee's request. Gov't-Br.61. But that assertion is bizarre in a case where the Government *did reach a different conclusion about the validity of the Committee's request*. The Government's decision not to disclose Intervenors' tax information for nearly two years was correct then, and it would still be correct today.

Nothing requires the Government to resolve the validity of the Committee's request the same way as the district court. "[E]ach [branch]

must, in the exercise of its functions, be guided by the text of the Constitution according to its own interpretation"; and "in the event of irreconcilable interpretations," the branch that wins "depend[s] on the nature of the case." 4 *Letters & Other Writings of James Madison* 349 (Lippincott & Co. 1865). In this case, the Government's decision trumps the judiciary's because the Committee has no cause of action to bring the dispute into court. Br.64. A panel of this Court correctly reached that conclusion in *McGahn*, and "the Executive Branch believes the panel's opinion was correct." Mot. to Dismiss 1, *McGahn*, No. 19-5331, Doc. #1902017 (D.C. Cir. June 10, 2021). No party argues otherwise here.

Consider what would have happened if the Government had maintained that the Committee's request was unlawful. The Committee would have sued, as it did at the start of this case. But that lawsuit would have to be dismissed because the Committee lacks a cause of action. *See Comm. on Judiciary v. McGahn*, 973 F.3d 121, 123-25 (D.C. Cir. 2020), *vacated en banc due to subsequent mootness*.

The merits would also be different. The question would not be whether *a court* should block the Committee's request, but whether *the Government acted unlawfully* when it declined to comply with the

Committee's request. Consider how that key difference would affect several of the claims that Intervenors raised here:

- While a court might blindly accept the Committee's assertion of a legitimate legislative purpose, the Government need not do the same when exercising its own constitutional authority. *See* JA71-73. Nor could a court rely on the Government's acquiescence as a reason to apply a lower level of scrutiny. *Cf.* JA250 (citing the Government's acquiescence as a reason to apply *Nixon v. GSA*).

- While a court cannot evaluate whether the Committee had unlawful motives under the First Amendment, nothing stops the Government from doing so. Denying a §6103(f)(1) request because the Committee was engaged in unlawful retaliation or discrimination has no consequences that could implicate Congress's "absolute immunity from *judicial* interference." *Eastland*, 421 U.S. at 509 n.16 (emphasis added).

- A court could hold that the Committee's request violates the separation of powers because it demands open investigative files *over the Government's objection*. *Cf.* JA260-61 (rejecting a similar claim because the Government consented to the disclosure).

Intervenors explained these differences in their opening brief, *see* Br.62-64, but the Government never responds.

In short, the Government's decision to disclose Intervenors' tax information caused the district court's decision, not the other way around. The Government was free to make a different decision, as it did for the first two years of this litigation. It *chose* to disclose Intervenors'

information, and Intervenors plausibly alleged that the Government's choice was driven by an unlawful purpose under the First Amendment. The district court should not have dismissed their sixth cross-claim.

CONCLUSION

This Court should reverse the district court and remand for further proceedings.

Dated: February 22, 2022

Respectfully submitted,

s/ Cameron T. Norris

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CERTIFICATE OF COMPLIANCE

This brief complies with the Court's order authorizing a brief up to 10,000 words because it contains 9,846 words, excluding the parts that can be excluded. *See* Doc. #1935254 (Feb. 15, 2022). 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 Century Schoolbook font.

Dated: February 22, 2022 *s/ Cameron T. Norris*

CERTIFICATE OF SERVICE

I filed this brief with the Court via ECF, which will email everyone requiring service.

Dated: February 22, 2022 *s/ Cameron T. Norris*