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[ORAL ARGUMENT SCHEDULED FOR MARCH 24, 2022]

No. 21-5289

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

COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF THE TREASURY, ET AL.,

Defendants-Appellees,

DONALD J. TRUMP, ET AL.,

Intervenors-Appellants.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR EXECUTIVE BRANCH DEFENDANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiff-Appellee is the Committee on Ways & Means, United States House of Representatives.

Defendants-Appellees are the United States Department of the Treasury, the Internal Revenue Service, Janet Yellen, Secretary of the Treasury, and Charles P. Rettig, Commissioner of Internal Revenue.

Intervenors-Appellants are 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, and Lamington Farm Club, LLC.

The following parties participated as amicus curiae in the district court: Constitutional Accountability Center, Constitutional Law Scholars, Lee Bollinger, Michael Dorf, Walter Dellinger, Pamela S. Karlan, Charles Tiefer, Thomas Spulak, William Pittard, Irvin B. Nathan, Kerry W. Kircher, Geraldine R. Gennet, and Duane Morley Cox.

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B. Rulings Under Review

Appellant seeks review of (1) the Memorandum Opinion entered on December 14, 2021, by the United States District Court for the District of Columbia (McFadden, J.), which is available at 2021 WL 5218398; and (2) the Order Granting Appellee's Motions to Dismiss on December 14, 2021, by the United States District Court for the District of Columbia (McFadden, J.).

C. Related Cases

This case has not previously been before this Court. Undersigned counsel is unaware of any related cases within the meaning of the Circuit Rule 28(a)(1)(c).

/s/ Gerard Sinzdak
Gerard Sinzdak

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GLOSSARY

Br.	Appellants' Opening Brief
Committee	Committee on Ways & Means, United States House of Representatives
IRS	Internal Revenue Service
IRM	Internal Revenue Manual
JA	Joint Appendix
OLC	Office of Legal Counsel
Secretary	Secretary of the Treasury

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INTRODUCTION

In 2021, the House Committee on Ways and Means invoked its statutory authority to obtain tax return information and submitted a request for former President Trump's tax information to the Secretary of the Treasury and the Internal Revenue Service. The Committee's request sets out in detail its reasons for seeking the former President's tax information, identifies the legislative purposes underlying the request, and explains why the former President's information is of particular value to its legislative inquiries. Based on that submission, the Executive Branch determined, and the district court agreed, that the request furthers a valid legislative purpose and comports with the Constitution. Accordingly, the law requires the Secretary to comply with the request.

The former President nonetheless asks this Court to declare the request invalid, assertedly because the request is motivated by an improper purpose and violates the separation of powers. Those assertions do not withstand scrutiny. The Committee's detailed justification for its request is sufficient to establish that the request is in furtherance of a legitimate function of Congress. As the Supreme Court has repeatedly emphasized, evidence that individual legislators may be seeking information for

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political gain cannot alone defeat an objectively valid congressional request that is adequately justified. Moreover, the Committee's detailed justification, the fact that the Committee seeks the records of a former President, and the Executive Branch's view that the request does not unduly interfere with the functioning of the Executive Branch, among other things, demonstrate that the Committee's request does not intrude upon the separation of powers.

For these reasons and those set forth below, this Court should affirm the district court's order dismissing the former President's claims.

STATEMENT OF JURISDICTION

The Committee on Ways & Means of the House of Representatives (Committee) invoked the district court's subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1361, asserting claims against the Executive Branch arising under the Constitution, the Internal Revenue Code, and the Administrative Procedure Act. Former President Trump and eight of his associated business entities intervened as defendants. On September 28, 2021, intervenors filed amended cross-claims and counter-claims against the Committee and the Executive Branch. Joint Appendix (JA) 134-218. Those claims arise under the Constitution. On December 14, 2021, the

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district court entered an order dismissing intervenors' cross-claims and counter-claims. JA264. Intervenors filed a timely notice of appeal on December 14, 2021. JA266. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Committee's request for the former President's tax information pursuant to 26 U.S.C. § 6103(f) furthers a legitimate legislative purpose and seeks information pertinent to that purpose.

2. Whether the Committee's request for the former President's tax information violates the separation of powers because it impermissibly intrudes on the functions of the Executive Branch.

3. Whether 26 U.S.C. § 6103(f) is unconstitutional on its face and thus invalid in all its applications.

4. Whether the Executive Branch's intent to comply with the Committee's request violates the First Amendment because the Executive Branch is purportedly doing so in retaliation for the former President's political views.

PERTINENT STATUTES AND REGULATIONS

The pertinent statute are reproduced in the addendum to this brief.

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STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The Internal Revenue Code provides that, as a general matter, tax "[r]eturns and return information shall be confidential." 26 U.S.C. § 6103(a). Except where authorized by the Internal Revenue Code, current and former officers and employees of the United States are thus prohibited from "disclos[ing] any return or return information obtained by [them] in any manner." *Id.* A willful unauthorized disclosure of tax information is a felony, *id.* § 7213(a)(1)-(2), and a taxpayer whose information has been subject to unauthorized inspection or disclosure may, under certain circumstances, seek damages, *id.* § 7431. The Code defines "return" and "return information" broadly to include, among other things, "any" information "received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Treasury] with respect to a return or with respect to the determination of the existence, or possible existence, of liability" under the Code. *Id.* § 6103(b)(2)(A).

Section 6103 sets forth thirteen categories of exceptions to the general rule that tax return information must remain confidential. *See* 26 U.S.C. § 6103(c)-(o). One of those exceptions, *id.* § 6103(f), requires the Secretary

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of the Treasury to disclose tax return information to congressional committees under specified conditions. Consistent with statutes dating back nearly a century, § 6103(f) contains a preferred role for congressional tax committees. As relevant here, § 6103(f)(1) provides that, "[u]pon written request from the chairman of the Committee on Ways and Means of the House of Representatives," the Secretary of the Treasury

> shall furnish such committee with any return or return information specified in such request, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

Id. § 6103(f)(1). Tax information so obtained by the Committee, including information associated with individual taxpayers, may be submitted by the Committee to the Senate, the House, or both. *Id.* § 6103(f)(4)(A).

The Secretary of the Treasury and the Commissioner of Internal Revenue are charged with the responsibility of administering and enforcing the Internal Revenue Code. 26 U.S.C. §§ 7801 and 7803(a). Since the 1970s, Internal Revenue Service (IRS) rules have required the agency to audit the tax returns of sitting Presidents and Vice-Presidents. *See* JA232.

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The procedures governing the IRS's mandatory audit program are set forth in the IRS's Internal Revenue Manual (IRM). *See* IRM §§ 3.28.3; 4.8.4.2.5.

B. Factual Background and Prior Proceedings

1. On April 3, 2019, invoking his authority under § 6103(f), Representative Richard E. Neal, Chairman of the Committee, sent a letter to the IRS requesting that the IRS produce the tax returns of then-President Trump and eight business entities associated with the President for the tax years 2013-2018, together with the administrative files associated with each return. JA46-JA47. Chairman Neal noted that IRS policy requires IRS agents to audit a President's tax return each year and explained that the information requested was necessary to determine "the extent to which the IRS audits and enforces the Federal tax laws against a President." JA46.

On May 6, 2019, after consulting with the Office of Legal Counsel (OLC), Treasury denied the Committee's request. JA224; JA48-JA80. OLC advised Treasury that the Constitution required the Committee to establish "a legitimate legislative purpose in support of its request for [President Trump's] tax returns." JA66. After reviewing the public record, including public statements made by Chairman Neal and other Members of Congress, OLC concluded that the Committee's stated reason for

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requesting the records—"to consider legislation regarding the IRS's practices in auditing presidential tax filings"—was "implausible" and "pre-textual" and its "actual purpose was simply to provide a means for public disclosure of the President's tax returns." JA73, JA78. "Given that Congress may not pursue public disclosure for its own sake," OLC opined, the Committee's request lacked a legitimate legislative purpose, and disclosure was not authorized under § 6103(f). JA78.

2. In response, the Committee filed suit against Treasury and the IRS, seeking to compel disclosure of the requested tax information. President Trump and his associated businesses (collectively, the Trump parties) intervened as party defendants in support of the Executive Branch defendants. JA224.

3. While the case was pending in the district court, President Trump left office. Subsequently, on June 16, 2021, Chairman Neal sent a new request to the Secretary of the Treasury and the Commissioner of the IRS seeking the individual tax returns of now former President Trump and the same eight associated business entities named in the 2019 request. JA87-JA93. The Committee's 2021 request again seeks tax return information

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and the associated administrative files, but for the tax years 2015-2020, rather than for the tax years 2013-2018. JA92-JA93.

The Committee's June 2021 letter offers a more detailed justification for the request than the Committee's prior letter. JA87-JA93. The Committee's 2021 letter specifies that, to ensure the full and fair administration of the tax laws, the Committee is "considering legislative proposals and conducting oversight related to our Federal tax laws, including, but not limited to, the extent to which the IRS audits and enforces the Federal tax laws against a President." JA87-JA88. In particular, the Committee expressed "serious concerns" that the IRS's mandatory audit program may not be "advancing the purpose for which it was created." JA88. The Committee feared that the program does not account for a President, like former President Trump, with hundreds of businesses and inordinately complex returns and does not include explicit safeguards in the event a President interferes with an audit. JA88.

The Committee also explained the importance of individual tax information to its inquiry. To learn how the Presidential audit program operates "*in practice*," the Committee stated that it needed information about the audit of an actual taxpayer to ascertain, among other things,

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(i) whether IRS agents are shielded from improper interference by a President or his representatives; (ii) whether agents look at ongoing audits that predate a President's term in office; (iii) whether agents review a President's underlying business activities, and have access to the necessary books and records to substantiate amounts on the return; and (iv) whether agents have access to the necessary resources to undertake an exhaustive review of a complex taxpayer. JA89.

The Committee also set forth the reasons why it considers former President Trump's tax information, in particular, to be "indispensable" to its inquiry into the robustness and objectivity of the Presidential audit program. *See* JA90-JA92. The Committee noted that the former President was a "unique taxpayer," whose situation differed from that of his predecessors. JA90. The Committee noted, for example, that the inordinate size and complexity of the former President's returns, reflecting his control of more than 500 businesses through a revocable trust, make him "markedly different from other Presidents" examined under the mandatory audit program and raised questions regarding whether the program's procedures sufficiently account for complicated tax situations like those of the former President. JA90-JA91. Former President Trump's

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public criticism of his treatment by the IRS, both before and during his term in office, also raised "serious questions" in the Committee's mind about the ability of IRS agents "to freely enforce the tax laws against him." JA90-JA92. Reviewing the former President's tax information would thus permit the Committee to analyze the IRS's audit program during a period when the program faced particularly significant challenges. JA90-JA92.

In addition to its concerns about the proper functioning of the IRS's Presidential audit program, the Committee also stated that "President Trump's tax returns could reveal hidden business entanglements raising tax law and other issues, including conflicts of interest, affecting proper execution of [a President's] responsibilities." JA90. The Committee explained that such information "could inform relevant congressional legislation" addressing such conflicts and potential "foreign financial influences" on the Office of the President. JA90.

Following receipt of this new request, Treasury asked OLC for its opinion regarding "whether the Secretary must furnish the requested returns and return information to the Committee." *See* JA97. Applying a different, more deferential mode of analysis than it had deployed in evaluating the 2019 request, OLC found "ample basis to conclude" that the

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Committee's 2021 request "would further the Committee's principal stated objective of assessing" the Presidential audit program. JA98; *see also* JA113 (stating that the 2019 OLC opinion "failed to give due weight to Congress's status as a co-equal branch of government"). OLC further concluded that the Committee's "additional stated objectives" for reviewing the Trump parties' tax information—including an investigation into potential Presidential conflicts of interest—furthered a legislative purpose. JA98, JA128. Thus, OLC concluded that "the Secretary must comply with the Ways and Means Committee's June 16, 2021 request pursuant to 26 U.S.C. § 6103(f)(1) to furnish the Committee with the specified tax returns and related tax information." JA133.

In arriving at this determination, OLC concluded that the Committee had invoked subjects of inquiry on which legislation might be had and emphasized that the Committee had "articulated in some detail" why the Trump parties' tax information was particularly relevant to informing Congress about those subjects. JA123; JA123-JA133. OLC noted that this expanded justification and adjustments the Committee made to the request (including altering the tax years covered by the request) addressed shortcomings that OLC had found in the Committee's 2019 request. JA125-

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JA128. OLC further emphasized that, in light of the request's facial validity and well-reasoned explanation, the possibility that some members of Congress might hope to embarrass former President Trump or profit politically from the exposure of his tax information "would not serve to invalidate the Committee's request." JA132-JA133 (citing *Barenblatt v. United States*, 360 U.S. 109, 133 (1959)). In short, OLC concluded that this was not a case in which the Committee's asserted purposes (at least as explained in its 2021 request) was facially implausible or are otherwise "obvious[ly]" improper. JA120, JA125. As a result, the Secretary was legally required to comply with the 2021 request.

4. Treasury subsequently informed the Committee, the Trump parties, and the district court that it intended to comply with the Committee's 2021 request. JA225. The Committee therefore voluntarily dismissed its claims against the Executive Branch. JA225.

Immediately thereafter, the Trump parties filed counter-claims against the Committee and cross-claims against Treasury and the IRS, seeking an injunction barring disclosure of their tax information to the Committee. The Trump parties asserted that (1) the Committee's 2021 request lacks a legitimate legislative purpose; (2) the requested information

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is not pertinent to legislation Congress could validly enact; (3) the request violates the separation of powers because it impermissibly interferes with the functioning of the Executive Branch; (4) § 6103(f) is facially unconstitutional because it does not specify that Congress must act with a valid legislative purpose; (5) the Executive Branch's decision to comply with the request violated the First Amendment because it was purportedly made in retaliation for former President Trump's protected speech; and (6) the sharing of the Trump parties' tax information with Congress violates the separation of powers and due process because the information pertains to an ongoing IRS investigation. JA225.

The district court granted the Committee's and the Executive Branch's motions to dismiss. JA219. The court held that the Committee's 2021 request served a valid legislative purpose because, as the Committee explained in its letter, it furthered Congress's study of the Presidential audit program, a subject matter on which valid legislation could be had. JA232-JA234. The court noted that Congress could, for example, "legislate how many staff the IRS may assign to the audit of a sitting President" or "ensure adequate funding for presidential audits if the IRS undertakes them." JA233.

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The court rejected the Trump parties' claim that the Committee's stated rationale for its request was a pretext for its actual objectives of exposing the former President's tax information to the public or investigating the former President for law enforcement purposes. JA234-JA239. The court noted that statements made by Chairman Neal and others "plausibly show[ed] mixed motives" underlying the Committee's 2021 request. JA238. But, the court concluded, Supreme Court precedent requires only that a congressional inquiry have a valid legislative purpose, not that it have only one purpose. JA238. Because the Committee's request furthered a legitimate task of Congress, the court concluded that the request could not be invalidated, regardless of the possible existence of other motives on the part of some Committee Members. JA238.

The district court also determined that the Committee's 2021 request was reasonably related to the Committee's asserted audit-related purpose. JA239-JA243. The court reasoned that, "[a]s a President's tax information, the Trump returns would aid the Committee's study of the [Presidential Audit] Program." JA241. The court also found that the temporal scope of the Committee's request—which sought returns for the 2015-2020 tax years—was reasonable given that, unlike the 2019 request, it covered only

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the years the former President was subject to the audit program plus one year on either side. JA242.

The district court next addressed and rejected the Trump parties' assertion that the Committee's 2021 request violated the separation of powers because it purportedly interferes with the functioning of the Executive Branch. JA243-JA255. In analyzing the Trump parties' separation-of-powers claim, the court declined to apply the four-factor test the Supreme Court adopted in *Trump v. Mazars, LLP*, 140 S. Ct. 2019 (2020), for evaluating a congressional request for a sitting President's personal information. The court reasoned that, because this case involves a request for a former President's information and does not involve a "clash between rival branches of government," the *Mazars* approach was inapplicable. JA250 (quoting *Mazars,* 140 S. Ct. at 2034). Instead, the court applied the "less searching" balancing test set forth in *Nixon v. Administrator of Gen. Servs*. (*Nixon v. GSA*), 433 U.S. 425, 439 (1977), which requires a court to weigh the burden a request places on the functioning of the Executive Branch against Congress's need for the requested information. JA249-JA255.

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Applying that framework, the court concluded that the Committee's 2021 request posed only a "slight" burden on the functioning of the Executive. The court emphasized that a request for a former President's information did "not by its own terms restrict the President from taking any action." JA253. Nor would such a request occupy a substantial amount of the sitting President's time. JA253. And while a sitting President would understand that Congress might obtain his tax information post-Presidency, that mere possibility was unlikely to affect an incumbent President's actions during his time in office. JA253.

The district court further concluded that Congress's need for the former President's information easily justified the limited intrusion the Committee's request imposed. JA253-JA255. The court found that, among other things, the former President's "unique" situation—including his complicated financial arrangements and his frequent criticisms of the IRS—presented the Committee with a singular opportunity to study the resiliency and effectiveness of IRS procedures under difficult circumstances. JA255.

Next, the district court declined to hold § 6103(f) facially unconstitutional. JA255-JA258. The court rejected the Trump parties'

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contention that, because § 6103(f) does not expressly require that Congress have a valid legislative purpose, it is unconstitutional on its face. JA255. The court emphasized that a statute is facially unconstitutional only where "no set of circumstances exists under which the law would be valid." JA255 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Because there were many circumstances, including this one, in which a request under § 6103(f) would be valid, the court concluded that the Trump parties' facial challenge necessarily failed. JA255-JA256.

The court next dismissed the Trump parties' First Amendment retaliation claim, concluding that any retaliatory motive on the Secretary's part could not have been a but-for cause of the Executive Branch's decision to comply with the Committee's request. JA259. Citing § 6103(f)'s mandatory language, the court reasoned that the Secretary has no choice but to comply with a valid congressional request for taxpayer information pursuant to that statute. JA259. Because, in the court's view, the Committee's request was legitimate, the Secretary is required to comply, and disclosure of the former President's information will occur regardless of the Secretary's motivations.

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Finally, the district court concluded that the disclosure to Congress of the former President's information while that information remains subject to an ongoing audit will not violate either the separation of powers or due process. JA260-JA262. The court reasoned that the separation of powers does not categorically prohibit the Executive Branch from sharing with Congress information related to an ongoing investigation and that the authority cited by the Trump parties recognized as much. JA260-JA261. And the Committee's mere request for the former President's information did not create the appearance of improper congressional influence on the IRS's ongoing audits and thus raised no due process concerns. JA261.[1]

5. The district court subsequently granted the Trump parties' unopposed motion for an injunction barring disclosure of the requested tax information pending this Court's resolution of the Trump parties' appeal. Dkt. No. 155.

[1] The Trump parties do not challenge on appeal the district court's dismissal of their claims alleging that the Executive Branch's disclosure of files related to an open audit violates the separation of powers and due process. *See* Br. 14.

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SUMMARY OF ARGUMENT

I.A. The Committee's 2021 request seeking the former President's tax information furthers valid legislative purposes and comports with the Constitution. As the Committee explained, the requested information would further the Committee's study of the IRS's Presidential audit program, including the fairness, robustness, and independence of that program. The requested information may also shed light on possible conflicts of interest and relationships with foreign governments that the former President's extensive financial holdings may have engendered. These are subjects on which "legislation may be had." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 508 (1975). Congress could codify standards to govern the audit program, appropriate additional funds to ensure the program has adequate capacity, and legislate safeguards to ensure auditors' independence. Although the Constitution places significant limits on Congress's authority to enact legislation directed at the President, the requested information could also inform potentially valid legislation addressing financial disclosure requirements for future Presidents.

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The Committee also explained in detail why the requested information is pertinent to its legislative objectives. The Committee emphasized that its review of an actual Presidential taxpayer's information is essential to understanding how the Presidential audit program functions in practice. It also explained why the former President's tax information was of particular value to the Committee's inquires. Among other things, the size and complexity of the former President's tax returns, his extensive business relationships, and his public criticism of the IRS and its audit program provide the Committee with a unique opportunity to study the effectiveness, robustness, and impartiality of the IRS's program when that program is placed under stress. And the former President's information may provide the Committee with unique insight into the types of financial transactions and holdings that can give rise to potential conflicts of interest and foreign influence.

The Trump parties' arguments to the contrary lack merit. Citing public statements made by Committee Members and others, the Trump parties assert that the Committee's real purpose is to expose the former President's tax returns publicly for the sake of exposure or to conduct a criminal investigation. That assertion is unavailing. Supreme Court

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precedent establishes that a court may set aside a congressional request only in the rare case where an improper congressional purpose is obvious on the face of the request or from other objective evidence unrelated to legislators' motives, such as where a request is inconsistent with an asserted legislative purpose or seeks information that is not pertinent to that purpose. Such a circumstance is not present here. The Committee's detailed and well-reasoned explanation amply supports its request and defeats any claim of an improper objective. That individual legislators may have additional motives for seeking the former President's tax records does not, as the Supreme Court has emphasized, alone invalidate the Committee's lawful request. *See Watkins v. United States*, 354 U.S. 178, 199-200, 199 n.32 (1957).

B. The Committee's 2021 request does not violate the separation of powers. Separation-of-powers concerns are greatly diminished where, as here, Congress seeks a former President's information pursuant to a longstanding statute affording congressional tax committees special access to tax records, the Executive Branch does not object to disclosure on separation-of-powers grounds, and there is no claim of executive privilege. In such circumstances, there is no "clash between rival branches of

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government." *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2034 (2020). The Committee, moreover, has adequately explained why the former President's information is needed and why pertinent information is not available from other sources; has limited its request to a timeframe (2015-2020) that corresponds to its legislative purposes; and has made a request that, at most, places a slight burden on the time and attention of the incumbent President. Accordingly, whether the Trump parties' separation-of-powers claim is evaluated under the four-factor test set forth in *Mazars* or the more lenient balancing test described in *Nixon v. GSA*, 433 U.S. 425 (1977), the Committee's 2021 request passes muster.

II.A. The Trump parties' additional constitutional claims are also unavailing. The Trump parties contend that § 6103(f) is unconstitutional on its face because its text would appear to require the Secretary of the Treasury to comply even with an invalid congressional request for tax information. That contention lacks merit. A statute is facially unconstitutional, and thus invalid in all its applications, if there is no set of circumstances in which it can be constitutionally applied or if it lacks a plainly legitimate sweep. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008). This case is a circumstance in

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which the statute can be constitutionally applied, and, because congressional requests for information will be valid in many instances, the statute has a plainly legitimate sweep. The Trump parties' counter-intuitive assertion that the statute must be invalidated in its entirety because it would be unconstitutional if applied in a hypothetical future case involving an unlawful congressional request is supported by neither law nor logic.

B. The Trump parties' First Amendment claim also lacks merit. Section 6103(f) requires the Secretary of the Treasury to comply with a lawful request by a tax committee for tax information. Both the Executive Branch and the district court have concluded that the Committee's 2021 request is lawful. As a result, the Secretary must provide the requested information. The Trump parties thus cannot establish that a retaliatory motive (even assuming, contrary to all available evidence, that such a motive exists) was a but-for cause of the Secretary's decision to comply with the Committee's request. Their First Amendment claim fails as a matter of law.

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STANDARD OF REVIEW

This Court reviews a district court order granting a motion to dismiss de novo. *Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 272 (D.C. Cir. 2018).

ARGUMENT

I. The Committee's 2021 Request Is Constitutional

Invoking its authority under 26 U.S.C. § 6103(f), the Committee has requested access to the Trump parties' tax return information for tax years 2015-2020. The Committee has explained that the requested information will aid its study of the IRS's Presidential audit program and inform potential legislation on a range of topics related to the program and to a President's financial interests more generally. The Trump parties challenge the validity of the Committee's request, primarily on the grounds that the Committee is seeking the tax records for an impermissible purpose and the disclosure of the former President's information would unduly interfere with the operations of the Executive Branch. Neither of those arguments has merit. The Supreme Court has made clear that where, as here, objective evidence supplies a valid basis for a congressional request, the request is not unconstitutional simply because there is evidence that Members of Congress may have additional reasons for seeking particular

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information. And the Committee's request for a former President's tax return does not threaten undue interference with the operations of the Executive Branch in these circumstances.

A. The Committee's 2021 Request Seeks Information That Is Reasonably Related To A Valid Legislative Purpose

The Trump parties assert (Br. 48-56) that the Committee's 2021 request exceeds the Committee's constitutional authority because it does not further a valid legislative purpose. The district court correctly rejected that argument.

1. The Supreme Court has held that Congress has an implicit but limited power to investigate in furtherance of its constitutionally assigned functions. A congressional request for information "is valid only if it is 'related to, and in furtherance of, a legitimate task of the Congress.'" *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (quoting *Watkins v. United States*, 354 U.S. 178, 187 (1957)). One of those tasks is legislation. The authority to investigate "is inherent in the legislative process." *Watkins*, 354 U.S. at 187; *see also Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975) ("[T]he power to investigate is inherent in the power to make laws."). Congress's investigative authority in aid of legislation

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extends to a "subject on which legislation 'could be had.'" *Mazars*, 140 S. Ct. at 2031 (quoting *Eastland*, 421 U.S. at 506). That "encompasses inquiries into the administration of existing laws, studies of proposed laws, and 'surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.'" *Id.* (quoting *Watkins*, 354 U.S. at 187).

Congress's investigative authority is further limited in various respects. Congress may not seek information for purposes of "law enforcement" or "to try someone before [a] committee for any crime or wrongdoing." *Mazars*, 140 S. Ct. at 2032. Congress likewise has no "general power to inquire into private affairs and compel disclosures," and "there is no congressional power to expose for the sake of exposure." *Id.* That said, a congressional investigation is not invalid simply because it might uncover "crime or wrongdoing." *McGrain v. Daughtery*, 273 U.S. 135, 179-80 (1927).

The Committee's 2021 request for the Trump parties' tax information satisfies these standards. The request sets out the Committee's legislative purposes. It explains that the Committee is charged with oversight of the tax laws and tax administration and that the Committee is "considering

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legislative proposals and conducting oversight related to our Federal tax laws," including "the extent to which the IRS audits and enforces the Federal tax laws against a President." JA87. The request specifically identifies the IRS's Presidential audit program as a focus of the Committee's investigation and states that the Committee believes legislation may be necessary to ensure that the IRS's program is "advancing the purpose for which it was created"; appropriately accounts for a President with "ongoing audits, hundreds of business entities, and inordinately complex returns"; and includes the "explicit safeguards" needed to ensure that auditors are protected from interference by the President. JA88; *see also* JA88 (stating that the Committee is considering legislation on, among other things, "the President's tax compliance[ ] and public accountability" to ensure that the IRS "treat[s] a President like any other taxpayer subject to an audit"). The request also indicates that the information sought pertains to the Committee's study of legislation addressing "conflicts of interests" and "foreign financial influences" that may arise when a President has extensive and complicated financial holdings. JA90.

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The Committee's study of the IRS's Presidential audit program and its inquiries into possible presidential conflicts of interest and foreign influence involve "subject[s] on which legislation could be had." *Eastland*, 421 U.S. at 506. The tax laws in general and the functions of the IRS in particular are "subject to regulation by congressional legislation." *McGrain*, 273 U.S. at 178; *see also* U.S. Const. art. I, § 8, cl. 1 (granting Congress the authority "[t]o lay and collect Taxes"). Moreover, the IRS "is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year." *McGrain*, 273 U.S. at 178. Consistent with its authority to regulate the IRS and its activities, Congress could enact legislation that defines the minimum standards IRS agents must apply when conducting Presidential audits, provides protections to IRS employees engaged in such audits, appropriates additional funds to support the audit program, or requires the IRS to submit reports of Presidential audits to Congress's tax-writing committees for oversight purposes. *See also* JA233-JA234. While there are substantial constitutional limits on Congress's authority to regulate the President and it is not difficult to envision hypothetical laws related to the President's financial holdings that would raise serious constitutional

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questions, *see, e.g.*, Br. 57, not all laws addressing the President's financial interests would overstep Congress's authority. Congress has, for example, long required Presidents to disclose publicly certain financial information. *See, e.g.*, 5 U.S.C. app. § 101 (requiring the President to disclose specified financial information within 30 days of assuming office). The Committee's review of the former President's tax information could inform such legislation.

The Committee also adequately explained why the specific records it has requested are "reasonably relevant" to the Committee's inquiries. *McPhaul v. United States*, 364 U.S. 372, 381-82 (1960). The Committee's 2021 request emphasizes that the Committee requires information from an "actual audit and an actual taxpayer" to evaluate how the IRS's mandatory audit program operates "*in practice*." JA89. Because Presidents are the only actual taxpayers subject to a Presidential audit, their tax information is, by definition, the only information relevant to an investigation of the IRS's handling of such audits. The Committee further explained why the former President's tax information were of particular value to its investigation. The Committee emphasized that the former President was unique among recent Presidents because, among other things, his returns

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are "inordinately large and complex"; he "controls hundreds of business entities," including some with foreign ties; and he has been openly critical of the IRS. JA92. The former President's tax information is thus of especial value to the Committee in assessing the robustness and resiliency of the IRS's Presidential audit program, the need for additional safeguards to ensure the objectivity of presidential audits, and the value and potential content of legislation requiring additional financial disclosures by Presidents. *See also* JA92 (stating that "[t]o be sure that the mandatory audit program will work for all future President-taxpayers (including those with similarly complex taxes), [the Committee] must see how the program fared under the exceedingly challenging circumstances presented by former President Trump").

2. The Trump parties' counterarguments are unavailing. The Trump parties assert that the Committee's request is infirm because (1) its stated purpose is pretextual, Br. 48-56; and (2) it does not seek information pertinent to valid legislation, Br. 56-59. The district court properly rejected both contentions.

a. Citing public statements from Members of Congress and others, the Trump parties assert that the Committee's stated legislative objectives

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are "pretexts" and its "real aim" is to expose the former President's tax information for the sake of exposure or to conduct a law enforcement investigation. Br. 50; *see also* Br. 48-49. The Trump parties' contention that a court may reject an asserted legislative purpose that is both facially valid and well-explained on the basis of extrinsic evidence reflecting the motives of individual legislators is at odds with Supreme Court precedent. That precedent indicates that a court may reject a committee's asserted legislative purpose only where it is "obvious" from the face of the request and other objective evidence unrelated to motive that the avowed purpose is unworthy of credence, such as where the information sought is inconsistent with or bears little connection to the committee's avowed purpose. *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951). Evidence that individual legislators have other motives for seeking the requested information is generally irrelevant to such an inquiry. *See Eastland*, 421 U.S. at 508 ("[I]n determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it.").

The Supreme Court's decision in *McGrain* is illustrative. In *McGrain*, the Senate formed a select committee to investigate the former Attorney General's alleged malfeasance in the handling of certain anti-trust and

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criminal matters. 273 U.S. at 151-52. The committee subpoenaed the former Attorney General's brother to testify, asserting, in a resolution, that the brother's testimony was "necessary as a basis for . . . legislative and other action." *Id.* at 153. The brother refused to comply, arguing, among other things, that the committee sought his testimony for an improper purpose. *Id.* at 152-54. The district court agreed. *Id.* at 176-77. It reasoned that "the extreme personal cast" of the resolutions establishing the committee; "the spirit of hostility towards the then Attorney General which [the resolutions] breathe"; the Senate's failure to avow a legislative purpose until its actions had been challenged; and the Senate's avowal that it sought information for purposes other than legislation all indicated that its asserted legislative purpose was "an afterthought" and that the true purpose of the committee's investigation was to "determine the guilt of the Attorney General." *Id.*

The Supreme Court reversed, concluding that it "sufficiently appear[ed]" from the record of the committee's proceedings that "the object of the investigation and of the effort to secure the witness' testimony was to obtain information for legislative purposes." *McGrain*, 273 U.S. at 177. The Court emphasized that the subject of the committee's

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investigation—"the administration of the Department of Justice," including "whether its functions were being properly discharged"—was "[p]lainly" one "on which legislation could be had," given Congress's legislative oversight over federal agencies. *Id.* at 177-78. As particularly relevant here, the Court expressly rejected the argument that the committee's avowed interest in seeking the brother's testimony for "other," non-legislative purposes invalidated the committee's subpoena. *Id.* at 180. In the Court's view, the committee's suggestion that it had other, potentially improper objectives in mind took "nothing from the lawful object avowed in the same resolution." *Id.*

The Supreme Court applied a similar approach in *Barenblatt v. United States*, 360 U.S. 109, 130-33 (1959), where the Court rejected the petitioner's claim that a congressional committee's inquiry into his association with the Communist Party lacked a valid legislative purpose. The Court noted that there was some evidence that the committee was seeking to expose the petitioner's political affiliation for the sake of exposure. *Id.* at 133 n.33. But the Court concluded that the record, including the official statements of the committee chairman and witness testimony at committee hearings, sufficiently established that the "primary purposes of the [committee's]

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inquiry were in aid of legislative processes." *Id.* at 133. This was not a case, the Court emphasized, where the committee's inquiries lacked "relevanc[e]" to a legislative purpose or where the committee lacked reason to believe that the witness "possessed information which might be helpful to the Subcommittee." *Id.* at 134. The Court was thus unwilling to set the committee's inquiries aside on the ground that they may have been motivated in part by a desire to expose. *Id.* at 133-34; *see also Watkins*, 354 U.S. at 199-200, 199 n.32 (declining to invalidate a congressional inquiry on the ground of improper purpose, despite an "impressive array of evidence" indicating that the committee believed it had a duty to "expose for the sake of exposure," because improper "motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served").

The Supreme Court likewise rejected a claim that a legislative inquiry was motivated by an "unworthy purpose" in *Tenney v. Brandhove,* 341 U.S. at 377. There, the Court stressed that, in evaluating whether a legislative inquiry furthers a legitimate purpose, a court "should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed" to further a valid legislative purpose. *Id.* at 378. Only where it is

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"obvious" that a committee's inquiry "has exceeded the bounds of legislative power" may a court set aside that inquiry on the ground that it has an improper objective. *Id.* Because the relevant committee's inquiry could fairly be deemed to further its legislative function, the Court held that the inquiry was not invalid. *Id.*

The Supreme Court reaffirmed the "narrow" scope of judicial inquiry into the legislative purpose underlying a congressional request for information in *Eastland,* 421 U.S. at 506-07. In concluding that a congressional subpoena furthered a valid legislative purpose, the Court again rejected a claim that the committee's subpoena was improperly designed to expose publicly the respondents' and others' unpopular beliefs. *Id.* at 509. The Court reiterated that a claim of improper motive does not undermine "the legitimacy of a congressional act." *Id.* at 508.

Applying the Supreme Court's framework here, the Trump parties fall short of establishing that the Committee's 2021 request lacks a valid legislative purpose. As explained *supra* pp. 26-30, the Committee's request seeks information that is reasonably relevant to subjects on which "legislation may be had." *Eastland*, 421 U.S. at 506; *see also McGrain*, 273 U.S. at 177. Nor is it "obvious," *Tenney*, 341 U.S. at 378, from the objective

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circumstances that the Committee's asserted purposes are unworthy of credit. The Committee has explained in some detail why the information it seeks is "relevan[t]" to its asserted purpose and why it reasonably believes the former President's tax return information will be "helpful" to Congress, *Barenblatt*, 360 U.S. at 134. The temporal scope of the request is also reasonably tailored to the Committee's asserted purposes. *See infra* pp. 47-48. At a minimum, the Committee's request and its detailed explanation accompanying that request can "fairly be deemed" to further valid legislative purposes. *Tenney*, 341 U.S. at 378. And, contrary to the Trump parties' contentions (Br. 53-54), the Committee's detailed request provides the Judiciary with a "concrete" basis for evaluating the validity of its request and does not require a court to "simply assume[]" the Committee's request has lawful legislative purposes.

The Trump parties assert (Br. 51-52) that the district court should have disregarded the Committee's explanation of its purpose in favor of a free-ranging inquiry into the subjective motivations of Committee Members, as expressed in public statements. The Supreme Court has repeatedly admonished, however, that an inquiry into legislators' motives is not appropriate, as the improper motives of committee members alone

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"would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served." *Barenblatt*, 360 U.S. at 133 (quoting *Watkins*, 354 U.S. at 200). Given that the Committee has asserted valid legislative purposes and has provided an explanation for its request that is not objectively deficient or inconsistent with those asserted purposes, the Committee's avowed purposes support its request here. That some legislators might have other reasons for seeking access to the former President's information does not, in this case, invalidate the Committee's legitimate request.

The Trump parties are also incorrect in arguing that the district court failed to account for separation-of-powers principles in its analysis. Br. 55. To the contrary, the district court recognized that the Committee's request raised separation-of-powers concerns, JA243, JA252, and thus required the Committee to establish not only that it had a valid legislative purpose but also that it had a "need" for the information that overrode the request's potential intrusion on the Executive Branch, JA253-JA255. Moreover, nothing in the Supreme Court's decision in *Mazars* or elsewhere suggests that a court may reject an asserted legislative purpose as invalid where, as here, "Congress adequately identifies its aims and explains why the

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President's information will advance its consideration of the possible legislation," 140 S. Ct. at 2036. Indeed, it is the Trump parties' assertion that a court should invalidate a congressional request under the circumstances presented here on the ground that it was motivated by an improper purpose that implicates separation-of-powers concerns. *See Watkins*, 354 U.S. at 200 (emphasizing that it is not the "function" of the Judiciary to "test[] the motives of committee members" in evaluating the validity of a congressional request). In any event, as explained *infra* Part I.B, the Committee's request does not violate separation-of-powers principles.

b. The Trump parties fare no better when they assert (Br. 56-59) that the 2021 request is invalid because it does not seek information pertinent to valid legislation. To the extent the Trump parties suggest that there is no potentially valid legislation to which the Committee's request pertains, *see* Br. 56-57, that suggestion is erroneous. As discussed above, *see supra* pp. 26-30, the administration of the IRS's Presidential audit program and revisions to the program that legislators may deem necessary to ensure it functions properly, are subjects on which Congress may legislate under

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Article I. *See also* JA233-JA234. Congress likewise could enact legislation requiring additional financial disclosures from a sitting President.

As explained above, the Committee's request for the former President's tax information is also "reasonably relevant," Br. 58, to the study of such legislation. To determine what standards should apply to a Presidential audit, what safeguards may be necessary, and what funds should be appropriated for such audits, the Committee seeks information demonstrating how the program works "in practice." JA89. Information from an actual audit of a President is directly relevant to such an inquiry. The Committee has also explained why the former President's tax information is particularly material to its inquiry. JA89-JA92; *see supra* pp. 9-10, 29-30. The reasons include the size and complexity of his returns—reflecting the number and complicated nature of his business relationships—and his public criticism of his treatment by the IRS. This combination of circumstances, peculiar to former President Trump, has raised questions for the Committee about the extent to which IRS revenue agents can and do substantiate the information reported in returns so complex and about the capacity of existing safeguards to prevent improper interference in the Presidential audit process. JA88. The Trump parties are

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thus incorrect in asserting that the Committee's 2021 request lacks "references to specific problems which in the past have been or which in the future could be the subjects of appropriate legislation." Br. 58 (quoting *Shelton v. United States*, 404 F.2d 1292, 1297 (D.C. Cir. 1968)).

B. The Committee's Request Does Not Violate The Separation Of Powers

The district court correctly rejected the Trump parties' contention that the Committee's request violates separation-of-powers principles. JA243-JA255. A number of factors—including President Trump's status as a former President, the current Administration's judgment that compliance will not unduly interfere with Executive Branch operations, and the Committee's detailed explanation for its request—collectively demonstrate that the Committee's request does not run counter to the separation of powers.

1. As an initial point, the Trump parties err in asserting (Br. 29-32) that a separation-of-powers analysis of the Committee's request should assume the world that existed at the time of the Committee's initial request in 2019 and thus should assume that the request targets the tax information of a sitting President. The Trump parties are not defending themselves

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against a criminal contempt charge. Accordingly, this is not a case in which due process demands that the validity and clarity of a congressional request for information be evaluated "as of the time" the defendant refused to answer—*i.e.*, at the time the allegedly criminal conduct occurred. *United States v. Rumely*, 345 U.S. 41, 48 (1953); *see also Watkins*, 354 U.S. at 214-15. The Trump parties' reliance on criminal contempt cases such as *Rumely* and *Watkins* is thus misplaced.

As the district court emphasized, the Trump parties here seek prospective injunctive relief barring the Executive Branch from disclosing their tax information. *See* JA228. Because "[r]elief by injunction operates in futuro," the "right to it must be determined as of the time of the hearing." *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 477 F.3d 765, 766 (2d Cir. 2007) (quoting *American Steel Foundries v. Tri–City Cent. Trades Council*, 257 U.S. 184, 201 (1921)); *see also, e.g.*, *Government of the Province of Manitoba v. Zinke*, 849 F.3d 1111, 1117 (D.C. Cir. 2017) (a district court must consider "changed circumstance[s]" in deciding whether injunctive relief is equitable). The district court thus appropriately evaluated the Trump parties' request for prospective relief in light of the circumstances that existed at the time of the court's decision. Those circumstances include the

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significant fact that the former President is no longer in office. The relevant circumstances also include the fact that the Committee has altered its request (by, for example, amending the request's temporal scope) and provided a more detailed justification for its request. It would make little sense to treat a prior request (issued by a prior Congress), with which the Executive Branch did not comply and which was superseded by a later, different request, as the operative one for purposes of a forward looking injunction.

The Trump parties are also incorrect insofar as they contend (Br. 31-32) that the Committee is forever limited to the explanation it offered in its 2019 request. Like an administrative agency, a congressional committee is not barred from offering "a fuller explanation of the [committee's] reasoning" in support of a past decision or from supplying a "new" decision with additional reasoning. *Department of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907-08 (2020) (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990)). Neither law nor logic supports the view that, under the circumstances here, a court should disregard the Committee's more detailed explanation of its reasons for soliciting the former President's tax information.

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2. In arguing that the Committee's request violates the separation of powers, the Trump parties invoke the heightened standard of scrutiny the Supreme Court applied to the congressional request in *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020). That standard does not apply under the circumstances presented here. In *Mazars*, the Supreme Court set forth a non-exclusive four-factor test that courts must deploy when considering the validity of a committee subpoena for a sitting President's personal information pursuant to its inherent powers to issue compulsory process. *Id.* at 2035-36. The Supreme Court concluded that more careful scrutiny of a congressional request for information in such circumstances was required given the "ongoing institutional relationship" between Congress and the Executive Branch and the possibility that Congress might deploy its subpoena power to "'exert an imperious controul' over the Executive Branch" and "aggrandize itself at the President's expense." *Id.* at 2033-34 (quoting The Federalist No. 71, at 484 (A. Hamilton)). The Court also emphasized that heightened scrutiny was necessary to protect the "established practice" of accommodation and negotiation between the political branches, by ensuring that Congress could not easily "walk away from the bargaining table and compel compliance in court." *Id.* at 2034.

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The separation-of-powers considerations underlying the Court's decision in *Mazars* are greatly reduced where, as here, Congress requests the records of a *former* President pursuant to authority conferred by statute, the incumbent Administration does not object to disclosure on separation-of-powers grounds, and no claim of executive privilege has been made. In such circumstances, the Executive Branch has necessarily concluded that providing the Committee with access to the requested information will not impair the Executive Branch in the carrying out of its constitutional responsibilities. Such a case thus does not present a "clash between rival branches of government" or threaten the "established practice" of negotiation and accommodation between the political branches. *Mazars*, 140 S. Ct. at 2034. And given that the request seeks the records of a former President and does not seek records that are subject to a claim of executive privilege, any "intrusion into the operation of the Office of the President" is far less pronounced. *Id.* at 2036.

Moreover, unlike in *Mazars*, the congressional request in this case was made pursuant to authority conferred by a duly enacted statute, 26 U.S.C. § 6103(f). The statutory authority to access taxpayer records that § 6103(f) grants to congressional tax committees dates back almost 100

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years and reflects the political branches' longstanding view that such committees have a legislative need for taxpayer information and can be expected to use such information wisely and responsibly, and not in a manner that interferes with the functioning of the Executive Branch. *See* JA98-JA101; JA118.

In any event, even assuming the *Mazars* standard applies here, the Committee's 2021 request satisfies that standard. To determine "whether the asserted legislative purpose warrants the significant step of involving the President and his papers," the first *Mazars* factor requires courts to consider whether "other sources could reasonably provide Congress the information it needs." 140 S. Ct. 2035-36. As noted *supra* p. 29, because Presidents are the only taxpayers subject to a Presidential audit, Congress could not reasonably and completely review the IRS's program for auditing Presidential returns without access to the tax return information of a Presidential taxpayer. The Trump parties' suggestion (Br. 44) that the Committee could rely on the "returns of other individuals with complex finances" is thus unavailing. The tax information of other taxpayers would not provide insight into the IRS's program for auditing a President's returns and the robustness of the procedures the IRS uses in the unique

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context of a Presidential taxpayer. As also explained *supra* pp. 29-30, the Committee could not review the functioning, capacity, and resilience of the Presidential audit program under the challenges presented by President Trump, as it wishes to do, without reviewing the Trump parties' tax information. Examining the audits of "other Presidents," Br. 44, would not provide insight into the functioning of the Program under the unique stressors posed by former President Trump's audits. For similar reasons, no other taxpayer's business dealings implicate potential conflicts of interest or foreign entanglements affecting the Presidency to the same extent as those of former President Trump, and therefore those filings would not inform the Committee's consideration of such matters.

Mazars next requires a court to evaluate whether a congressional request for information is "no broader than reasonably necessary to support Congress's legislative objective." 140 S. Ct. at 2036. The Committee's request meets that requirement, as it seeks the tax return and audit information for the former President and eight affiliated companies from a period (2015-2020) relevant to its inquiry.

None of the Trump parties' arguments to the contrary withstand scrutiny. The Trump parties suggest that the Committee's investigation

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into the audit program could proceed without access to the "tax returns themselves." Br. 45. But it is difficult to understand how the Committee's study of the manner, fairness, and thoroughness with which the IRS audits a President's tax returns could reasonably proceed without reference to or knowledge of the items being audited.

The Trump parties likewise miss the mark in asserting that the Committee should have limited itself to "one year's worth of information" or at most the four years that the former President was subject to the audit program. Br. 45 (emphasis omitted). As the district court found, JA240-JA241, the temporal scope of the Committee's request was reasonable. Audits of a particular return "can extend beyond a current return to 'related returns' from other years." JA241-JA242 (quoting IRM § 4.10.2.7.1.5). Moreover, returns from the year immediately preceding and following the former President's term in office "can serve as a control sample with which to compare the audited returns" and may provide "context" for those returns. JA241-JA242. Requesting more than a single year's tax information will allow the Committee to investigate how the audit program functioned over time, whether the IRS's procedures and

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rules are consistently applied, and how the IRS may have responded to criticism from the former President or others.

The Trump parties also assert that the Committee's request is broader than reasonably necessary "because it promises no confidentiality." Br. 46. But § 6103(f) reflects the political branches' considered judgment that the congressional tax-writing committees may disclose otherwise confidential tax information to the Senate or House of Representatives when the relevant committee deems it necessary in furtherance of legitimate congressional functions. *See* 26 U.S.C. § 6103(f)(4)(A). The possibility that the Committee might exercise that authority does not render a request for taxpayer information unreasonable. If it did, no request would be valid.

The Committee's request likewise satisfies *Mazars*'s third factor, which calls on courts to "be attentive to the nature of the evidence offered by Congress to establish that a [request for information] advances a valid legislative purpose" and notes that the "more detailed and substantial the evidence of Congress's legislative purpose, the better." 140 S. Ct. at 2036. As discussed *supra* Part I.A., the Committee's 2021 request outlines in sufficient detail the basis for its request and why it is seeking the former President's information in particular. The Trump parties criticize the

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Committee (Br. 41-42) for failing to identify specific statutes it is considering. But a congressional committee is not required to identify specific legislation in advance of its investigation. *See In re Chapman*, 166 U.S. 661, 669-70 (1897). Here, the Committee has "adequately identifie[d] its aims" and the subjects of "possible legislation" to which the former President's records relate. *Mazars*, 140 S. Ct. at 2036; *see also* JA88-JA89 (discussing the subjects of legislation the Committee is considering). At least where the records sought are those of a former President, the current Administration has no separation-of-powers-based objection to disclosure, and no claim of executive privilege is involved, the Committee need go no further.

Finally, the Committee's request does not impose undue "burdens on the President's time and attention." *Mazars*, 140 S. Ct. at 2036. The Trump parties identify various burdens that the Committee's request purportedly imposes on *them*—including the potential public exposure of their tax information and the possibility that the request will taint the results of the IRS's ongoing audits. *See* Br. 39. But the "burdens" to which *Mazars* refers are the burdens imposed on a sitting President, who has "an ongoing relationship" with Congress. 140 S. Ct. at 2036. The incumbent

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Administration has not raised a separation-of-powers objection to the Committee's request and has therefore necessarily concluded that complying with the request will not unduly interfere with the operations of the Executive Branch. That all but dooms the Trump parties' claim that the request "excessive[ly]" burdens the Executive, Br. 39. *See Nixon v. GSA*, 433 U.S. 425, 449 (1977) (noting that it is the incumbent President who is "vitally concerned with and in the best position to assess the present and future needs of the Executive Branch").

The Trump parties assert (Br. 40) that a congressional request for a former President's tax records burdens the incumbent President because the incumbent might worry that a similar request will follow the end of his tenure. The district court correctly recognized that the potential disruption to the Office of President that such a threat might pose is, at best, "slight." JA252. Section 6103(f) authorizes Congress to obtain tax return and related information, but nothing more. An incumbent President is unlikely to be particularly distracted by the possibility that Congress might obtain his tax records years later and after he has left public office, particularly if the incumbent follows the modern practice of disclosing tax return information voluntarily. An incumbent might also reasonably conclude that Congress's

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interest in the incumbent's tax information is likely to wane following his departure from office, rendering any threat to expose his returns of little concern. *See* JA253 (noting that "a sitting President could justifiably decide to call Congress's bluff"). The Trump parties' suggestion that congressional requests for a former President's tax information are likely to burden a sitting President is thus unpersuasive.

For the foregoing reasons, the Committee's 2021 request satisfies the *Mazars*'s requirements and is consistent with the separation of powers.[2]

II. The Trump Parties' Remaining Constitutional Claims Also Lack Merit

The Trump parties also contend that the Executive Branch should be barred from complying with the Committee's request because § 6103(f) is purportedly unconstitutional on its face and because the Treasury Department allegedly violated the Trump parties' First Amendment rights

[2] In evaluating the Trump parties' separation-of-powers claim, the district court declined to apply the four-factor test set out in *Mazars*, opting instead for the less demanding balancing test set forth in *Nixon v. GSA*, 433 U.S. at 443. JA251-JA255. For the same reasons the Committee's request satisfies the *Mazars* test, it satisfies the less demanding test described in *Nixon v. GSA*. The Committee's adequately explained need for the requested information overcomes the slight "potential for disruption" that its request may cause. *See Nixon v. GSA*, 433 U.S. at 443.

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in agreeing to provide the requested information. The district court correctly dismissed both claims.

A. Section 6103(f) Is Not Facially Unconstitutional

Section 6103(f) provides, in relevant part, that "[u]pon written request from the chairman of the Committee on Ways and Means of the House of Representatives, . . . the Secretary [of the Treasury] shall furnish such committee with any return or return information specified in such request." 26 U.S.C. § 6103(f)(1). The Trump parties assert that § 6103(f) states an "invalid rule of law" because it would allegedly require the Treasury Department to comply with a congressional request even in those circumstances in which the request lacked a legitimate legislative purpose. And because the Executive Branch cannot be compelled to comply with a congressional request in such circumstances, the Trump parties' argument goes, § 6103(f) is unconstitutional on its face and must be enjoined in all its applications. Br. 23-25. The Trump parties' argument misapprehends the standards governing facial challenges, is at odds with this Court's precedent, and runs afoul of other established legal principles. The district court properly rejected it.

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To succeed on a facial challenge, a plaintiff must establish "'that no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications," *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)), or that the statute lacks a "plainly legitimate sweep," *id.* *See also In re Sealed Case*, 936 F.3d 582, 589 (D.C. Cir. 2019) ("Although there has been some debate whether every facial challenge must meet the *Salerno* standard, all agree that a facial challenge must fail where the statute has a plainly legitimate sweep."). The "fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1077-78 (D.C. Cir. 2003) (quoting *Salerno*, 481 U.S. at 745)). If that were the test, then countless statutes would be declared invalid because of the mere theoretical possibility of some unconstitutional applications.

Section 6103(f) is not facially unconstitutional under these standards. The statute is valid whenever a congressional request meets constitutional requirements (*e.g.*, it seeks information pertinent to a valid legislative purpose and does not violate the separation of powers). Thus, there are

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numerous "sets of circumstances" in which § 6103(f) may be constitutionally applied, including this one. *See supra* Part I; *see also Rancho Viejo*, 323 F.3d at 1077-78 ("Because Rancho Viejo's own case represents a 'set of circumstances' under which the ESA may constitutionally be applied . . .[,] plaintiff cannot shoulder the 'heavy burden' required to prevail in a facial challenge."). And because the majority of Congressional requests can be expected to comply with the Constitution, the statute has a plainly legitimate sweep. *See General Elec. Co. v. Jackson*, 610 F.3d 110, 117 (D.C. Cir. 2010) (noting that a statute has a "plainly legitimate sweep" where "the statute's application would be constitutional 'in many circumstances'" (quoting *Troxel v. Granville*, 530 U.S. 57, 85 (2000))).

The Trump parties do not argue otherwise. Instead, they assert that the statute must be enjoined in all its applications, including its many concededly constitutional ones, because it does not expressly include a "valid legislative purpose" requirement and cannot be interpreted as including one. Br. 21-22. The Trump parties' novel argument is at odds with basic principles of remedial law and judicial restraint. As this Court has explained, "a court may invalidate only some applications even of indivisible text, so long as the valid applications can be separated from the

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invalid ones." *Natural Res. Def. Council v. Wheeler*, 955 F.3d 68, 81 (D.C. Cir. 2020). Thus, "when a court encounters statutory or regulatory text that is 'invalid as applied to one state of facts and yet valid as applied to another,' it should 'try to limit the solution to the problem' by, for instance, enjoining the problematic applications 'while leaving other applications in force.'" *Id.* at 81-82 (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006)); *see also Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) (The "normal rule" is that "partial, rather than facial, invalidation is the required course," such that a "statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact."). Because § 6103(f) is incontrovertibly valid in many of its applications, including this one, the Trump parties' claim that the statute should be set aside in its entirety is baseless. Indeed, if the Trump parties' argument were correct, "a court would be compelled to grant facial relief in any successful as-applied challenge to a statutory or regulatory provision," *Wheeler*, 955 F.3d at 82, as the statutory text would, on its face, state an invalid rule of law. "That of course is not the law." *Id.*

This Court has previously rejected arguments like the one the Trump parties raise here. In *Nebraska v. EPA*, 331 F.3d 995, 998 (D.C. Cir. 2003), for

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example, a statute stated that an Environmental Protection Agency (EPA) regulation "shall apply to each public water system in a State." *Id.* at 997 (quoting 42 U.S.C. § 300g). The plaintiffs challenged the statute as violating the Commerce Clause because, in requiring EPA to regulate all public water systems in a state, the statute required EPA to regulate public water systems engaged in purely "intrastate distribution and sale of drinking water." *Id.* at 998. This Court rejected the plaintiffs' facial attack on the statute, concluding that it fell "well short of satisfying th[e] considerable burden" plaintiffs face when raising such a challenge. *Id.* This Court emphasized that, because EPA data demonstrated that "a number of water utilities sell substantial volumes of drinking water across states lines," there were numerous "set[s] of circumstances under which the Act is a valid exercise of power under the Commerce Clause." *Id.* And because such circumstances existed, the plaintiffs' facial challenge failed, regardless of whether the statute might be unconstitutional in certain factual situations. *Id.*; *see also, e.g.*, *Rancho Viejo*, 323 F.3d at 1077-78; *Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 972-73 (D.C. Cir. 1996) (Facial attack on statute failed even though, on its face, the statute authorized

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unconstitutional conduct, because there were circumstances in which the conduct authorized would be deployed in a constitutional manner.).

This Court's decision in *Gordon v. Holder*, 721 F.3d 638 (D.C. Cir. 2013), is not to the contrary. *See* Br. 24. *Gordon* involved a constitutional challenge to a "novel" and "unique" statute under which Congress imposed a federal duty on businesses to collect state and local taxes from their out-of-state customers. 721 F.3d at 650. The plaintiff, a business owner, challenged the law on due process grounds, arguing that the law unconstitutionally required him to collect and pay taxes to States with which he did not have minimum contacts. *Id.* at 645. In affirming a preliminary injunction barring the statute's application to the plaintiff in its entirety, this Court emphasized that tailoring the injunction more narrowly would have been difficult because "significant fact-finding" was required to identify those circumstances in which the statute could be constitutionally applied to the plaintiff. *Id.* at 654. The court also stressed that the law's purpose was to "erase[]" the "boundaries of state and local taxing jurisdictions." *Id.* As a result, "any legitimate application" of the statute was "pure happenstance." *Id.*

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The unique factors that led the Court in *Gordon* to affirm an injunction barring application of the challenged statute to the plaintiff in its entirety are not present here. Section 6103(f) was not designed to grant Congress authority it does not constitutionally possess. Rather, it ensures congressional access to otherwise confidential tax information in furtherance of the legislature's legitimate functions. A constitutional application of the statute would thus not be "pure happenstance," *Gordon*, 721 F.3d at 654, but rather intended and typical. Nor is significant fact-finding required to determine whether and to what extent the statute may be constitutionally applied. Its application will be constitutionally permissible in cases, like this one, in which a congressional request has a valid legislative purpose and does not transcend other constitutional limitations. *Gordon* therefore supplies no basis for an injunction barring § 6103(f)'s application in all circumstances.

The Trump parties' theory suffers from an additional flaw. The Trump parties ask this Court to presume that Congress will in the future submit requests to the Executive Branch that exceed Congress's constitutional authority. But it is well established that "the judiciary must rightly presume that Congress [will] act[] consistent with its duty to

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uphold the Constitution." *National Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008); *see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it."). The Trump parties' suggestion that this Court should indulge the assumption that Congress will act in an unconstitutional manner when submitting requests under § 6103(f) is thus fundamentally flawed and can be rejected for that reason alone.

B. The Executive Branch's Compliance With The Committee's Request Does Not Violate The First Amendment

The Trump parties assert (Br. 60-64) that the Executive Branch's intent to comply with the Committee's request violates their First Amendment rights because it is allegedly motivated by an intent to retaliate against the former President for his political views. That assertion is unavailing. As the district court explained, JA259, § 6103(f) requires the Secretary of the Treasury to comply with a valid congressional request. Because the Committee's request is valid, the Secretary has no choice but to

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comply, rendering the Secretary's motive irrelevant and defeating the Trump parties' First Amendment claim.

To state a claim for First Amendment retaliation, a litigant must allege "(1) 'that [he] engaged in protected conduct,' (2) 'that the government took some retaliatory action sufficient to deter a person of ordinary firmness in plaintiff's position from speaking again,' and (3) 'that there exists a causal link'" between the two. *Scahill v. District of Columbia*, 909 F.3d 1177, 1185 (D.C. Cir. 2018) (quoting *Doe v. District of Columbia*, 796 F.3d 96, 106 (D.C. Cir. 2015)). "It is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019). The improper motive "must be a 'but-for' cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive." *Id.*; *see also Hartman v. Moore*, 547 U.S. 250, 261 (2006) (An action tainted by a "bad motive does not amount to a constitutional tort if that action would have been taken anyway.").

The Trump parties cannot establish that a retaliatory motive (even assuming for the sake of argument such a motive exists—an assertion for which there is no support) was a "but for" cause of the Executive Branch's

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decision to comply with the Committee's request. Section 6103(f) requires the Secretary to comply with congressional requests that do not exceed constitutional or other limits on Congress's authority. *See* 26 U.S.C. § 6103(f) (stating that the Secretary "shall furnish" tax information to the Committee upon a written request); Br. 22 (acknowledging that § 6103(f) "creates a mandate"). For the reasons explained above and in the district court's decision, the Committee's request was within its authority and comports with the Constitution. As a result, the Secretary is required by § 6103(f) to provide the requested information, regardless of the Secretary's motive. In other words, the Trump parties cannot establish that the Executive Branch would not have complied with the Committee's request "absent [a] retaliatory motive." *Nieves*, 139 S. Ct. at 1722. The Trump parties' First Amendment claim thus necessarily fails.

The Trump parties' argument to the contrary is baseless. They assert that the Executive Branch could have reached a different conclusion as to the validity of the Committee's request. Br. 63-64. They further contend that the Executive Branch is free to disregard a conclusion from the Judiciary confirming that the request was, in fact, constitutional. *Id*. And because the Executive is free to reject a federal court's conclusion regarding

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the validity of the Committee's request, the Trump plaintiffs claim, there are no circumstances in which the Executive would ever be compelled to produce the requested tax information. *Id.* The Trump parties thus ask this Court to hold that the Secretary of the Treasury violated the First Amendment by failing to reject not only the Executive Branch's own well-reasoned conclusion that the Committee's request is constitutional but also the district court's determination that the request is lawful.

The Trump parties' argument is self-evidently incorrect. The Executive Branch does not violate the Constitution when it abides by judicial determinations specifying what the law requires. Indeed, by the Trump parties' logic, the Secretary would be free to reject a judicial conclusion that the Committee's request was unconstitutional and could comply with the request regardless of the Judiciary's views. Put simply, if this Court confirms that the Committee's request was valid, then § 6103(f) compelled the Secretary of the Treasury to comply with it. The Trump

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parties' suggestion that the Secretary would somehow remain free to refuse to provide the responsive information is without basis.[3]

[3] The Executive Branch's lengthy and well-reasoned explanation as to why the Committee's 2021 request was lawful, *see* JA95-JA133, also fatally undermines the Trump parties' claim that the Secretary's decision to comply with the request was improperly motivated. The Secretary's decision followed from the well-reasoned conclusion, later confirmed by the district court, that the Committee's request did not exceed constitutional bounds. The Trump parties' suggestion that the Secretary's decision was motivated by animus, and not by a careful analysis of the Executive's legal obligations, is not plausible.

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CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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[4] The Acting Assistant Attorney General is recused in this matter.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,270 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Book Antiqua 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

/s/ Gerard Sinzdak
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ADDENDUM

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22 U.S.C. § 6103

§ 6103. Confidentiality and disclosure of returns and return information

(a) General rule.--Returns and return information shall be confidential, and except as authorized by this title--

(1) no officer or employee of the United States,

(2) no officer or employee of any State, any local law enforcement agency receiving information under subsection (i)(1)(C) or (7)(A), any local child support enforcement agency, or any local agency administering a program listed in subsection (l)(7)(D) who has or had access to returns or return information under this section or section 6104(c), and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (c), subsection (e)(1)(D)(iii), paragraph (10), (13), (14), or (15) of subsection (k), paragraph (6), (10), (12), (13) (other than subparagraphs (D)(v) and (D)(vi) thereof), (16), (19), (20), or (21) of subsection (l), paragraph (2) or (4)(B) of subsection (m), or subsection (n),

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term “officer or employee” includes a former officer or employee.

(b) Definitions.--For purposes of this section--

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(1) Return.--The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

(2) Return information.--The term "return information" means--

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense,

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110,

(C) any advance pricing agreement entered into by a taxpayer and the Secretary and any background information related to such agreement or any application for an advance pricing agreement, and

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(D) any agreement under section 7121, and any similar agreement, and any background information related to such an agreement or request for such an agreement,

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

(3) Taxpayer return information.--The term "taxpayer return information" means return information as defined in paragraph (2) which is filed with, or furnished to, the Secretary by or on behalf of the taxpayer to whom such return information relates.

* * *

(f) Disclosure to Committees of Congress.--

(1) Committee on Ways and Means, Committee on Finance, and Joint Committee on Taxation.--Upon written request from the chairman of the Committee on Ways and Means of the House of Representatives, the chairman of the Committee on Finance of the Senate, or the chairman of the Joint Committee on Taxation, the Secretary shall furnish such committee with any return or return information specified in such request, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee

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only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(2) Chief of Staff of Joint Committee on Taxation.--Upon written request by the Chief of Staff of the Joint Committee on Taxation, the Secretary shall furnish him with any return or return information specified in such request. Such Chief of Staff may submit such return or return information to any committee described in paragraph (1), except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(3) Other committees.--Pursuant to an action by, and upon written request by the chairman of, a committee of the Senate or the House of Representatives (other than a committee specified in paragraph (1)) specially authorized to inspect any return or return information by a resolution of the Senate or the House of Representatives or, in the case of a joint committee (other than the joint committee specified in paragraph (1)) by concurrent resolution, the Secretary shall furnish such committee, or a duly authorized and designated subcommittee thereof, sitting in closed executive session, with any return or return information which such resolution authorizes the committee or subcommittee to inspect. Any resolution described in this paragraph shall specify the purpose for which the return or return information is to be furnished and that such information cannot reasonably be obtained from any other source.

(4) Agents of committees and submission of information to Senate or House of Representatives.--

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(A) Committees described in paragraph (1).--Any committee described in paragraph (1) or the Chief of Staff of the Joint Committee on Taxation shall have the authority, acting directly, or by or through such examiners or agents as the chairman of such committee or such chief of staff may designate or appoint, to inspect returns and return information at such time and in such manner as may be determined by such chairman or chief of staff. Any return or return information obtained by or on behalf of such committee pursuant to the provisions of this subsection may be submitted by the committee to the Senate or the House of Representatives, or to both. The Joint Committee on Taxation may also submit such return or return information to any other committee described in paragraph (1), except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(B) Other committees.--Any committee or subcommittee described in paragraph (3) shall have the right, acting directly, or by or through no more than four examiners or agents, designated or appointed in writing in equal numbers by the chairman and ranking minority member of such committee or subcommittee, to inspect returns and return information at such time and in such manner as may be determined by such chairman and ranking minority member. Any return or return information obtained by or on behalf of such committee or subcommittee pursuant to the provisions of this subsection may be submitted by

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the committee to the Senate or the House of Representatives, or to both, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer, shall be furnished to the Senate or the House of Representatives only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(5) Disclosure by whistleblower.--Any person who otherwise has or had access to any return or return information under this section may disclose such return or return information to a committee referred to in paragraph (1) or any individual authorized to receive or inspect information under paragraph (4)(A) if such person believes such return or return information may relate to possible misconduct, maladministration, or taxpayer abuse.