Nos. 19-715 & 19-760

IN THE
Supreme Court of the United States

DONALD J. TRUMP, ET AL.,
Petitioners,
v.
MAZARS USA, LLP, ET AL.,
Respondents.

DONALD J. TRUMP, ET AL.,
Petitioners,
v.
DEUTSCHE BANK AG, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the D.C. and Second Circuits

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amicus Curiae Foundation for Moral Law ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers. The Foundation has an interest in this case because it believes that the lower courts' judgments violate the Fourth Amendment's prohibition of unreasonable searches, which is essential not only to protecting the President from undue harassment but also to protecting every American from undue harassment. If the House can make the President respond to such sweeping subpoenas, then it can do the same to any unpopular political group, including Christians.

SUMMARY OF ARGUMENT

In addition to the violations listed by the Petitioners in their principal brief, the subpoenas at issue in this case violate the Fourth's Amendment.[2]

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[1] Pursuant to Rule 37.3, all parties have consented to the filing of this brief except Respondent Mazars USA, which declined to take a position on consenting to this brief but stated that it did not object. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

[2] There is overlap between this argument and the ones that Petitioners have raised. As will be demonstrated below, many of the Fourth Amendment cases addressing congressional

The plain text of the Constitution and this Court's precedents confirm that the Fourth Amendment applies to congressional subpoenas. Congress undoubtedly has broad power to demand information, but the Fourth Amendment forbids, in the words of Justice Holmes, "fishing expeditions into private papers ... in hope that something will turn up." *Federal Trade Comm'n v. American Tobacco Co.*, 264 U.S. 298, 305-06 (1924).

Under this Court's most relevant precedent, the inquiry as to whether a congressional subpoena violates the Fourth Amendment requires a three-step analysis. First, is Congress authorized by law to make the demand? Second, are the materials specified in the subpoena relevant? Third, is the request for things particularly described either too indefinite or too broad? *Oklahoma Press Pub'g Co. v. Walling*, 327 U.S. 186, 208 (1946). In this case, the answer to the first two questions is no, because the Constitution does not authorize the House to issue subpoenas if the gravamen of those subpoenas has no legitimate legislative purpose. The object of these subpoenas is not to gather information for legislation

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subpoenas consider whether Congress had proper authority to issue the subpoenas in the first place, which is the Petitioner's principal argument. Several of the Petitioner's key cases addressing congressional authorization to issue subpoenas cited the Fourth Amendment as the constitutional basis for their holdings. *See, e.g.*, *Watkins v. United States*, 354 U.S. 178, 188, 200 (1957) (citing the Fourth Amendment as part of the reason for its holding). *Amicus*'s Fourth Amendment argument is therefore "inextricably linked" with those raised by the parties, and the Court may consider it. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214 n.8 (2005).

but rather to harass President Trump. The answer to the third question is also no, because subpoenaing all of the President's financial records is exceedingly broad compared to the House's stated goals. Just as the U.S. District Court for the District of Columbia quashed a congressional subpoena on Fourth Amendment grounds in the Watergate trial, so this Court should do the same in this case. The subpoenas in this case also resemble more of a bill of attainder than a regular congressional subpoena.

The House's abuse of the Fourth Amendment is particularly alarming for people of faith. If the lower court's judgments are allowed to stand, then the House's sweepingly broad subpoena power will be used to target its political opponents. The power to conduct unreasonable searches is the power to harass and oppress. Christians in Houston, Texas, recently faced a similar situation from a hostile mayor, who used broad subpoena powers to intimidate local pastors who opposed her pro-LGBT agenda. If the lower courts' judgements are allowed to stand, then there the House of Representatives may use its subpoena power to harass evangelical Christians who are opposed to its socially liberal agenda. Thus, the precedent that the Court sets in this case will affect not only this President and the office of the Presidency, but also every American who finds himself or herself in the crosshairs of a hostile House of Representatives.

There has been great outcry against President Trump for refusing to comply with unlawful subpoenas. However, a brief review of history reveals

that he is doing exactly the same thing that our first President, George Washington, did under similar circumstances. Just as this Court looks to the practices of the First Congress to determine whether laws comport with the Establishment Clause, it should also look to the practices of the first President to determine whether the President's actions are lawful. Just as President Washington resisted an unlawful subpoena from the House of Representatives, so President Trump has the right to object to the House's unlawful subpoenas today.

ARGUMENT

I. The House of Representatives' Subpoenas Violate the Fourth Amendment

In his dissent below, Judge Katsas noted that allowing the House of Representatives to issue such a broad subpoena to the President would threaten his ability to do his job. *Trump v. Mazars USA, LLP*, No. 19-5142 (D.C. Cir. Nov. 13, 2019) (Katsas, J., dissenting). Judge Katsas noted that in regular court proceedings, the Federal Rules of Civil and Criminal Procedure protect parties from discovery requests that produce "embarrassment, oppression, or undue harassment." *Id.*, slip op. at 2 (citing Fed. R. Civ. P. 26(c)(1) and Fed. R. Crim. P. 17(c)(2)). However, he warned that under the panel's decision, "the courts are powerless to take comparable considerations into account" when Congress subpoenas the President. *Id.* The unavailability of privileges or procedural protections "creates an open season on the President's personal records." *Id.* With all due respect

to Judge Katsas, the Foundation believes there is one constitutional rule that would prohibit such harassment in this case: the Fourth Amendment.

The Foundation agrees with Petitioners that the House lacked authority to subpoena the President's records because it was not acting pursuant to a constitutional power. But if this Court disagrees, then it should consider the President's last line of defense: the Fourth Amendment.

A. The Fourth Amendment Applies to Congress

The Fourth Amendment states, in relevant part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...." U.S. Const. amend. IV. Unlike other constitutional provisions that address only the judicial and executive branches, the Fourth Amendment by its terms binds the entire federal government—including the legislative branch.

It should be no surprise then that this Court has stated that the Fourth Amendment applies to Congress's subpoena power. During the McCarthy era,[3] this Court faced several cases addressing whether the Bill of Rights limited Congress's power

[3] The Foundation wishes to clarify that it does not refer to the McCarthy era in a pejorative sense. As a Christian conservative organization, *Amicus Curiae* is vehemently anti-communist. It uses the phrase "McCarthy Era" here only to provide context for discussing the following cases.

of investigation, usually on First or Fifth Amendment grounds. *See, e.g., Gibson v. Florida Investigation Committee,* 372 U.S. 539 (1963) (holding that the First Amendment precluded congressional subpoenas); *Barenblatt v. United States*, 360 U.S. 109 (1959) (discussing the framework for determining whether Congress violates the First Amendment through certain subpoenas); *United States v. Rumley*, 345 U.S. 41 (1953) (acknowledging for the first time that congressional subpoenas might violate the First Amendment). The most pertinent of these cases was *Watkins v. United States*, in which this Court held that Congress's subpoena violated the Fifth Amendment's Self Incrimination Clause. In reaching this conclusion, the Court stated the following about the constitutional limitations on Congress's power of investigation:

> It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation. This, of course, assumes that the constitutional rights of witnesses will be respected by the Congress as they are in a court of justice. *The Bill of Rights is applicable to investigations as to all forms of governmental action*. Witnesses cannot be compelled to give evidence against themselves. *They cannot be*

> *subjected to unreasonable search and seizure*. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged.

United States v. Watkins, 354 U.S. 178, 188 (1957) (emphasis added).

After reaching these conclusions, the Court further reasoned,

> We have no doubt that there is no congressional power to expose for the sake of exposure. The public is, of course, entitled to be informed concerning the workings of its government. That cannot be inflated into a general power to expose when the predominant result can only be an invasion of private rights of individuals.

Id. at 200 (footnote omitted).

The Court's rationale in *Watkins* fits with its rationale in other Fourth Amendment cases. For instance, this Court has held that "[t]he Fourth Amendment provides protection against a grand jury subpoena *duces tecum* too sweeping in its terms to be regarded as reasonable." *United States v. Dionisio*, 410 U.S. 1, 11-12 (1973) (citation and quotation marks omitted). The Court continued in *Dionisio*,

> the Constitution could not tolerate the transformation of the grand jury into an instrument of oppression: 'Official

> harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.'"

Id. (quoting *Branzburg v. Hayes*, 408 U.S. 665, 707-08 (1972)).

Thus, the right of the people to be free from unreasonable searches can be violated not only by law-enforcement officers but also by Congress. Our Founders knew that limiting the government's power to search was "indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1895 (1833). Without such a limitation, the government could have the power to harass and oppress any person simply because it did not like him. As the D.C. Circuit accurately stated, "We have taken the language of *Watkins* to mean that 'the consequences of the denial of these rights are no less severe merely because their denial is brought about by a congressional subcommittee.'" *United States v. McSurely*, 473 F.2d 1178, 1193 (D.C. Cir. 1972) (quoting *United States v. Fort*, 443 F.2d 670, 678 (D.C. Cir. 1970)).

Perhaps Justice Holmes said it best, warning that "[a]nyone who respects the spirit as well as the letter of the Fourth Amendment" should be wary of any "attempt to sweep all our traditions into the fire ... and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of a crime.... It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in hope that something will turn up." *Federal Trade Comm'n v. American Tobacco Co.*, 264 U.S. 298, 305-06 (1924) (citation omitted).[4]

B. The House's Search of the President's Financial Records Is Unreasonable

When it comes to the specific issue of subpoenas that compel the production of business or corporate records, this Court has held that the Fourth Amendment "guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant." *Oklahoma Press Pub'g Co. v. Walling*, 327 U.S. 186, 208 (1946). The Fourth Amendment inquiry to the case before us therefore requires a three-step analysis. First, is Congress authorized by law to make the demand?

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[4] Quoting Justice Holmes's language from *American Tobacco Co.*, the D.C. Circuit once held that a subpoena requiring telegraph companies to produce all messages transmitted during a seven-month period was "contrary to the first principles of justice." *Hearst v. Black*, 87 F.2d 68, 71 (D.C. Cir. 1936).

Second, are the materials specified in the subpoena relevant? Third, is the request for things particularly described either too indefinite or too broad? The Foundation will answer each of these questions in turn.

1. The House Committees Are Not Authorized to Make These Demands

a. Mazars

First, as argued thoroughly by the Petitioners, as well as in the well-reasoned dissent of Judge Rao below, the House Committee was not authorized to make this inquiry. This Court has long held that both houses of Congress have jurisdiction to subpoena information regarding matters in which they may lawfully act. *See McGrain v. Daugherty*, 273 U.S. 135, 171 (1927); *Kilbourn v. Thompson*, 103 U.S. 168 (1881). However, this power does not include a "general power of making inquiry into the private affairs of the citizen." *McGrain*, 273 U.S. at 171 (quotation marks omitted). Consequently, this Court must ask whether a legitimate purpose was the "real object" of the subpoena. *Id.* at 178.

As Judge Rao argued thoroughly below, the real object of this subpoena was not to gather information for proposed legislation or even impeach the President, but rather to investigate whether he broke the law. *Trump v. Mazars USA*, 940 F.3d 710, 774 (D.C. Cir. 2019) (Rao, J., dissenting). The Constitution gives the House of Representatives the powers of legislation and impeachment, but not law

enforcement. Thus, the House was not authorized to issue this subpoena.

b. Deutsche Bank

As the Second Circuit admitted, Maxine Waters, the Chair of the Financial Services Committee, stated that the purpose of her investigation was to examine the implementation of anti-money laundering laws. *Deutsche Bank AG*, No. 19-1540-cv (2d Cir. Dec. 3, 2019), slip op. at 61. While this is a facially acceptable reason to launch an investigation, Adam Schiff, the Chairman of the House Intelligence Committee, admitted that one of the primary purposes of the investigation was to determine whether Russia interfered with the 2016 Presidential election and held any influence over President Trump through his finances.[5] Reps. Schiff and Waters admitted that this was a joint venture between them, focusing specifically on the President and whether he had any connection with Russia through Deutsche Bank.[6]

Perhaps being aware of this Court's precedents, the Intelligence and Financial Services Committees

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[5]Press Release, *Chairman Schiff Statement on House Intelligence Committee Investigation*, U.S. House of Representatives Permanent Select Committee on Intelligence (Feb. 6, 2019), *available at* https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=447

[6]Zachary Warmbrodt, *Schiff, Waters Plan Joint Deutsche Bank Investigation*, Politico (Jan. 23, 2019), https://www.politico.com/story/2019/01/23/adam-schiff-maxine-waters-deutsche-bank-1108140

subpoenaed not only the President's records but the records of seven other financial institutions having nothing to do with the President himself. *Deutsche Bank AG*, slip op. at 74. Nevertheless, Reps. Schiff and Waters announced the real purpose of the subpoenas months before they issued them. Their inclusions of other financial institutions cannot prevent this court from seeing the "real object" of the subpoenas. *McGrain*, 273 U.S. at 178.

2. The Subpoenas Fail the Relevance Test Because They Are Pretexts.

The House's subpoena power is based in the Necessary and Proper Clause. *McGrain*, 273 U.S. at 160. In the exposition of that Clause, Chief Justice Marshall once noted,

> Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.

McCullough v. Maryland, 17 U.S. (4 Wheat.) 159, 207 (1819). Thus, it has been black letter law for centuries that Congress may use a means that is proper to exercise an enumerated power, but it may

not use means that are pretextual for accomplishing an improper objective.

This relates to the relevance prong of *Oklahoma Press*. If the House issues a subpoena in pursuit of an illegitimate objective and uses a pretext to accomplish that objective, then the subpoena fails the relevance test. Forcing a person to answer such a subpoena is therefore an unreasonable search. *See also Watkins*, 354 U.S. at 200 (noting that Congress lacks any "general power to expose *where the predominant result* can only be an invasion of the private rights of individuals") (emphasis added).

The question therefore becomes whether the House's subpoenas were a legitimate means of pursuing a constitutional objective or a mere pretext for pursuing an unconstitutional objective.

a. Mazars

This investigation began when Michael Cohen, who pleaded guilty to lying to Congress, testified before the House that the President might have reported his financial assets inaccurately in 2011 and 2012. *Mazars USA*, 940 F.3d at 716. On April 12, 2019, Chairman Elijah Cummings issued a memorandum to the other members of the Committee on Oversight and Reform, stating that the subpoena was needed to verify Cohen's statements about the President's finances. Memorandum from Chairman Elijah E. Cummings to Members of the Committee on Oversight and

Reform 1-2 (Apr. 12, 2019).[7] Chairman Cummings concluded his memo by stating that the Committee had authority to investigate this matter pursuant to four objectives: (1) "to investigate whether the President may have engaged in illegal conduct before and during his tenure in office, (2) "to determine whether he has undisclosed conflicts of interest that may impair his ability to make impartial policy decisions," (3) "to assess whether he is complying with the Emoluments Clause of the Constitution," and (4) "to review whether he has accurately reported his finances to the Office of Government Ethics and other federal entities." *Id.* at 4. *Only after* stating the aforementioned need for the subpoena and the objectives of serving it did the Chairman mention, in passing, that "[t]he Committee's interest in these matters informs its review of multiple laws and legislative proposals under our jurisdiction ...." *Id.* The Chairman did not even cite a single law or bill to which the subpoena would be relevant. *See id.*

In view of the Cummings Memorandum and the nature of the subpoenas, it is evident that the "real object" of the subpoenas was not legislation. *McGrain*, 273 U.S. at 178. If a passing mention to "multiple laws and legislative proposals" is enough cover such a demanding subpoena, then a House Committee could easily get away with "expose for the sake of exposure." *Watkins*, 354 U.S. at 200. Consequently, because the "predominant result" was "an invasion of the private rights of individuals," *id.*,

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[7] *Available at* https://www.politico.com/f/?id=0000016a-131f-da8e-adfa-3b5f319d0001 (last visited Jan. 3, 2020).

the subpoena is a pretext for another objective and therefore fails the relevance test.

b. Deutsche Bank

A similar analysis applies in *Deutsche Bank AG*. As stated above, Reps. Schiff and Waters had no problem admitting that this investigation was launched with the objective of determining whether President Trump colluded with Russia. Again, the Representatives' own statements show that the means they employed are pretexts for another end, not the objective of passing valid legislation.

3. The Requests Are Too Broad.

The subpoenas violate the Fourth Amendment both because of their illegitimate objective and their pretextual nature. But if for whatever reason this Court disagrees with both of these points, then it should proceed to the final step of the analysis, inquiring whether the subpoenas are too broad.[8]

The subpoenas required the financial respondents to turn over basically all of the information they had on the President's financial records over the past eight years. *See Mazars*, 940 F.3d at 717 (discussing the documents, communications, reports, and other records that the House demanded); *Deutsche Bank AG*, slip op. at 45-46 (admitting that "[t]he subpoenas are surely broad in scope" and listing specific requests).

[8] *Amicus* makes no contention that the subpoenas are too vague.

a. Mazars

The D.C. Circuit held that the subpoenas could have been relevant to three pieces of legislation pending before the House: HR 1, HR 706, and HR 745. *Mazars USA*, 940 F.3d at 727. However, the House passed HR 1 March 8, 2019, which was before it issued the subpoenas.[9] HR 706, if passed, would require Presidential candidates to submit their tax returns for the last 10 years to the Federal Election Commission. *See* HR 706, § 222.[10] But there is a vast difference between making presidential candidates submit their tax returns to the FEC and surrendering all the financial information held by their banks and accountants. The former is much more limited in scope than the latter.

Finally, regarding HR 745, the D.C. Circuit cited only § 3, which would amend the Ethics in Government Act of 1978 by making the Director of the Office of Government Ethics subject to removal only for inefficiency, neglect of duty, or malfeasance in office.[11] Because that provision does not expand the powers or responsibilities of the Office of Government Ethics, it is difficult to see how the

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[9]*H.R.1 – For the People Act of 2019*, Congress.gov, https://www.congress.gov/bill/116th-congress/house-bill/1/text/eh (last visited Jan. 28, 2020).

[10]Restoring the Public Trust Act, H.R. 706, 116th Congress (2019), *available at* https://www.congress.gov/116/bills/hr706/BILLS-116hr706ih.pdf

[11]Executive Branch Comprehensive Ethics Enforcement Act of 2019, 116th Congress (2019), *available at* https://www.congress.gov/116/bills/hr745/BILLS-116hr745ih.pdf

subpoenas pertain to removing the director only for cause. Perhaps the House suspected that President Trump would fire the Director and appoint a successor who would go easy on him. But even so, it is difficult to justify requiring the President to turn over so much information and be subjected to irreversible prejudice on that hunch alone. In addition, HR 745 had already passed out of committee when the subpoenas were issued.[12] Thus, while the House could certainly investigate more before the final vote, the typical period for investigation was over. Consequently, the scope of the subpoenas was too broad for Congress's stated purposes.

b. Deutsche Bank

As the appellants stated in *Deutsche Bank*, the subpoenas in that case covered the time frame from when the accounts were opened until the present. *Deutsche Bank AG*, slip op. at 77. In addition, the disclosures would reveal much personal information about the President's family members, including his grandchildren. *Id.* The Second Circuit conceded that in ordinary civil litigation, the scope of the subpoenas' requests would likely draw the objection that the requests are too burdensome. *Id.* at 80.

To the Second Circuit's credit, it noted that some documents revealing personal sensitive information

[12]*H.R. 745 – Executive Branch Comprehensive Ethics Enforcement Act of 2019*, Congress.gov, https://www.congress.gov/bill/116th-congress/house-bill/745 (last visited Jan. 28, 2020).

and information that was too attenuated to the Committee's purpose need not be disclosed. *Id.* at 80-81. But the presence of such concessions it *prima facie* evidence that the scope of the subpoenas was too broad. Instead of striking specific provisions, this Court should recognize that the subpoenas were issued in pursuit of an illegitimate objective through a pretextual means that was too broad in its inquiry.

C. Comparison to a Watergate Subpoena

When the news of the Watergate scandal broke during the Nixon administration, Congress issued numerous subpoenas seeking information about the matter. Most of those subpoenas were enforced, but the U.S. District Court for the District of Columbia invalidated one subpoena on Fourth Amendment grounds. "That subpoena called for all documents and tapes relating to 25 White House aides and Nixon campaign aides. According to Judge Gesell, it was 'too vague.' The broad demand in that subpoena, Judge Gesell ruled, 'overlooks the restraints of specificity and reasonableness which derive from the Fourth Amendment.'" Lesley Oelsner, *Judge Bids Nixon Act on Privilege*, New York Times (Jan. 26, 1974). Judge Gesell's decision to quash that subpoena was not published in an opinion, but it continues to be noted in Fourth Amendment analysis of congressional subpoenas. *See* James Hamilton, Robert F. Muse, & Kevin R. Amer, *Congressional Investigations: Politics and Process*, 44 Am. Crim. L. Rev. 1115, 1141 (2007).

In the same way, the subpoenas overlook the Fourth Amendment's requirement of reasonableness

in this case. In the Nixon case, all tapes and documents related to 25 White House aides and Nixon campaign aides were too broad to accomplish Congress's purpose. In the same way here, although the language of the subpoenas are more specific than in the Nixon case, the subpoenas in essence require the financial Respondents to turn over all of their information about President Trump's personal finances. The sheer breadth of these subpoenas overlooks the Fourth Amendment's requirement of reasonableness, just as the subpoena in President Nixon's case did.

It should also be noted that Congress had solid evidence of the President's wrongdoing in President Nixon's case,[13] whereas in this case the House's hunches might not even satisfy reasonable suspicion test. *See Alabama v. White*, 496 U.S. 325 (1990) (discussing the reasonable suspicion standard). The basis for the subpoenas in *Mazars* was the testimony of Michael Cohen, who had pleaded guilty to lying to Congress and provided only minimal suggestions that the President might have exaggerated some statements. *See White*, 496 U.S. at 328-29 (noting that the informant's veracity is "highly relevant in determining the value of his report"); *id.* at 330 (noting that the quantity of information provided is

[13] Among other things, "the FBI had concluded the Watergate break-in was part of a broader spying effort connected to Nixon's campaign." Daniel Bush, *The Complete Watergate Timeline (It Took Longer Than You Realize)*, PBS (May 30, 2017), https://www.pbs.org/newshour/politics/complete-watergate-timeline-took-longer-realize. There were also reports that the Attorney General "had controlled a secret fund that paid for spying on the Democratic Party." *Id.*

relevant to the inquiry). The basis for the subpoenas in *Deutsche Bank AG* is the theory that the Trump campaign colluded with Russia in the 2016 election. After conducting a thorough investigation, Special Counsel Robert Mueller concluded that "the investigation did not establish that members of the Trump Campaign conspired or coordinated with the Russian government in its election interference activities." 1 Robert S. Mueller, III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election* 2 (2019). It is therefore difficult to see how under the "totality of the circumstances," the House Committee's basis for the search was anything more than a 'hunch.'" *White*, 496 U.S. at 329 (citations omitted). Thus, there is even less of a basis for the investigation into President Trump's affairs than there was into President Nixon's.

D. The House's Searches Look More of Bills of Attainder Than Legitimate Exercises of the House's Subpoena Power

The Constitution gives Congress the power to pass generally applicable legislation, but it does not give Congress the power to punish individuals it does not like. Concerning the latter, the Constitution says, "No Bill of Attainder ... shall be passed." U.S. Const. art. I § 9. "A bill of attainder is a legislative act which inflicts punishment without a judicial trial" and is usually "directed against individuals by name." *Cummings v. Missouri*, 71 U.S. 277, 323 (1867).

The power to harass is the power to punish. Requiring citizens to bear incidental burdens while

assisting Congress in a lawful investigation is one thing, but requiring a specific citizen to bear an oppressive burden when Congress has no serious intent of legislating is another. The latter is simply "expose for the sake of exposure," designed to oppress, burden, and humiliate a person rather than to pass generally applicable legislation. *Watkins*, 354 U.S. at 200.

E. Affirming the Lower Courts' Judgments In Spite of the Fourth Amendment Violation Would Be Dangerous for Any American Whom the House of Representatives Wishes to Harass

Undoubtedly, this case is very important because the Petitioner is the President of the United States. But as the Court observed in another case addressing the constitutionality of congressional subpoenas, "[t]he interests here at stake are of significant magnitude, and neither their resolution nor impact is limited to, or dependent upon, the particular parties involved here.... [W]hatever affects the rights of the parties here, affects all." *Gibson*, 372 U.S. at 546.

The preceding arguments establish that the House's real object in these cases is not to consider a valid legislative purpose but to expose for the sake of exposure. Whatever the House can do to the President in this case, it can do to any American that it wishes to target in a similar manner.

This is especially concerning for people of faith. There is a growing intolerance for religious doctrine,

especially Christianity, when it clashes with the orthodoxy of political correctness. *See Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1729-30 (2018) (condemning commissioner's comments likening traditional Christian doctrine on homosexuality to the holocaust); *Kennedy v. Bremerton Sch. Dist.*, 139 S.Ct. 634, 636-37 (2019) (statement of Alito, J.) (expressing alarm at the Ninth Circuit's suggestion that a high school football coach who freely exercises his faith violates his duty to serve as a good role model); *Obergefell v. Hodges*, 135 S.Ct. 2584, 2642-43 (2015) (Alito, J., dissenting) (warning that "those who cling to old beliefs" on homosexuality will be "labeled as bigots and treated as such by governments" if they "repeat those views in public.").

The notion that the government may abuse subpoenas to punish Christians is not mere conjecture, but it has actually happened in recent times. In 2014, a group of conservative evangelical Christians in Houston, Texas, attempted to repeal Houston's Equal Rights Ordinance, which allowed transgender individuals to choose whether to use a male or female restroom.[14] During this political battle, Houston's openly gay mayor issued subpoenas to five pastors, ordering them to turn over their sermons for inspection, sparking national outrage

[14] Josh Sanburn, *Houston's Pastors Outraged After City Subpoenas Sermons over Transgender Bill*, Time Magazine (Oct. 17, 2014), https://time.com/3514166/houston-pastors-sermons-subpoenaed.

among Christians and conservative politicians.[15] Houston's mayor eventually dropped the subpoena request for sermons in the face of the fierce backlash.[16] While the State of Texas eventually passed legislation ensuring that such subpoenas could never be issued again,[17] the subpoenas in that case raised grave constitutional concerns.

One does not have to be a constitutional scholar to see that the government has absolutely no business censoring what pastors can preach from the pulpit. It may be safely presumed that under this Court's precedents, the Religion Clauses of the First Amendment absolutely protect what a minister preaches from the pulpit. *See Masterpiece Cakeshop*, 138 S.Ct. at 1727 (noting that the religion clauses would prohibit the government from forcing a minister to marry two people of the same sex); *Obergefell*, 135 S.Ct. at 2607 (noting that the First Amendment protects the right to teach traditional religious doctrine concerning same-sex marriage). And this Court's precedents condemn the express

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[15] Aman Batheja, *Subpoenas for Sermons in Houston Draw Outrage*, The Texas Tribune (Oct. 16, 2014), https://www.texastribune.org/2014/10/16/subpoenas-sermons-draw-outrage-houston.

[16] Valerie Richardson, *Houston Mayor Removes Church Sermons from Subpoena Requests After Outcry*, The Washington Times (Oct. 17, 2014), https://www.washingtontimes.com/news/2014/oct/17/houston-mayor-removes-church-sermons-subpoena-requ.

[17] Peter LaBarbera, *Texas Protects Freedom: Pastors Won't Be Forced to Turn Over Sermons*, LifeSite News (May 23, 2017), https://www.lifesitenews.com/news/texas-protects-freedom-pastors-wont-be-forced-to-turn-over-sermons.

targeting of churches and people of faith, even if legislation is facially neutral. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). But this Court's precedents do not protect Christians from "valid and neutral laws of general applicability." *Employment Division v. Smith*, 494 U.S. 872, 879 (1990). Consequently, if the government sought to harass or punish Christians for the free exercise of their faith, then a legislative body issuing a sweepingly broad subpoena would only need to employ a lawyer who could write the subpoenas in a way that would not expressly trigger the condemnation of *Hialeah* or *Masterpiece Cakeshop*. In reality, that would not be so hard to do.[18]

For this reason, this Court must also enforce the command of the Fourth Amendment, which prohibits unreasonable government searches. The government can oppress its targets through other means than a direct assault. As Chief Justice Marshall recognized in context of Congress's taxing power, "the power to tax involves the power to destroy." *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 159, 210 (1819). In the same way, the power to search involves the powers to oppress and harass. The government undoubtedly must have the power to search, but the Founders

[18] This Foundation has argued on numerous occasions that the Framers of the First Amendment recognized religious liberty as an unalienable right from God that should provide a protection for religious liberty that is even stronger than the strict-scrutiny standard of *Sherbert v. Verner*, 374 U.S. 398 (1963). *See, e.g.*, Brief of *Amicus Curiae* Foundation for Moral Law at 9-12, *Arlene's Flowers v. State of Washington* (No. 19-333). We continue to urge the Court to reconsider its free exercise jurisprudence at the first opportunity.

prohibited searches that are unreasonable. If crafty lawyering could save a harassing subpoena from a First Amendment violation, then the Fourth Amendment is a person's last line of defense.

It cannot be doubted that the real object of the subpoenas in these cases is to harass President Trump. Whatever this Court allows the House of Representatives to do to him in this case will also be allowed for any other target that the House wishes to harass. The Foundation therefore pleads with this Court to protect not only the President but also the People he serves by enforcing the Fourth Amendment's prohibition of unreasonable searches.

II. The President's Refusal to Comply with Unlawful Subpoenas Is Consistent with the Precedent Established by George Washington

In the Establishment Clause context, this Court has observed that the practices of the First Congress are instructive as to what the Establishment Clause means, because many of the members of the first Congress also had voted on the First Amendment itself. *Marsh v. Chambers*, 463 U.S. 783, 790 (1983). The same logic should apply to the actions of the first President, George Washington, who had also presided over the Constitutional Convention, when it comes to the matter of executive power. George Washington once refused to comply with an unlawful subpoena issued by the House, which is exactly the same objection that President Trump is making in this case. The fact that the House of Representatives

has impeached the President for refusing to comply with subpoenas that he believed were unlawful demonstrates that this issue needs to be discussed.[19]

In 1794, when the United States seemed to be on the verge of war with Great Britain, John Jay (acting upon President George Washington's directions) negotiated a treaty with Britain, known as Jay's Treaty. John C. Miller, *The Federalist Era* 164-67 (1960). The terms of the treaty had been kept secret until the Senate reviewed it. *Id.* at 167. When the terms were leaked to the press, the Republicans in the House of Representatives strongly opposed it, while the Federalist Senate and President reluctantly approved it. *Id.* at 167-71. With the House bent on revenge, it adopted a motion calling upon Washington "to submit to [the House's] scrutiny all the papers relating to Jay's Treaty excepting 'such papers as any existing negotiation may render improper to be disclosed.'" *Id.* at 172.[20]

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[19] *See* H.R. Res. 755, 116th Cong. art. II (2019) (impeaching President Trump for refusing to comply with certain subpoenas). The President's impeachment obviously is not before this Court. But given the controversy surrounding whether the President may disregard subpoenas under certain circumstances, the Foundation believes it would be helpful to remind the Court in the present case that even George Washington disregarded invalid subpoenas during his Presidency.

[20] The House believed it was entitled to these papers because it held the power of appropriations, which the Republicans used to argue that the House's consent was implicitly required to ratify treaties. *Id.* at 172. The House abandoned this theory after President Washington rejected their request for the papers. *Id.* at 175-76.

President Washington responded to the House of Representatives by denying their request. Letter from George Washington to the House of Representatives (Mar. 29, 1796).[21] President Washington ultimately reasoned that the Constitution did not give the House of Representatives any authority over matters of treaty ratification, stating: "It does not occur that the inspection of the papers asked for, be relative to any purpose under the cognizance of the House of Representatives, except that of an impeachment, which the resolution has not expressed." *Id.*

Washington also noted that a major reason that the Constitution vested the authority to negotiate treaties in the President was the need for secrecy, claiming that that had been his opinion from the Constitutional Convention until then. *Id.* He therefore concluded that to admit "a right in the House of Representatives to demand, and to have as a matter of course, all the Papers respecting a negotiation with a foreign power, would be to establish a dangerous precedent." *Id.*

Thus, in conclusion, President Washington refused the House's request because the Constitution gave the House no power over treaty ratification. He would have granted their request if the House's resolution had stated that the matter was relevant to impeachment, but no such statement was made. He also cited the necessity of secrecy in treaty

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[21] *Available at* https://www.loc.gov/resource/mgw2.027/?sp=119&st=text (last visited Jan. 27, 2020).

negotiations. If anyone doubted his interpretation of the Constitution, he relied on the fact that he presided over the convention and shared the view that the framers ultimately adopted.[22]

Washington's example is instructive in this case. Just as President Washington observed that the House lacked a legitimate constitutional purpose for requesting the letters, President Trump has done the same here. As Judge Rao observed in her dissents below, the gravamen of the subpoenas in *Mazars* is a law enforcement function that the Constitution assigns to the executive branch, not the House of Representatives. And in *Deutsche Bank AG*, the gravamen of the inquiry was the pursuit of the defunct theory that Russia interfered with the 2016 elections. Thus, just as the House was not entitled to the papers relating to Jay's Treaty, it is not entitled to the President's financial information that it seeks.

In addition to the lack of constitutional authority to issue the subpoenas, Washington's other reason for denying the House's request is applicable in this case as well: necessity. In Washington's case, it was necessary to have an element of secrecy in order to negotiate treaties. In the present case, it is necessary to have some element of privacy in one's personal financial affairs in order to effectively execute the office of the Presidency. As the President's lawyers have argued, allowing his records to be subpoenaed

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[22] In the last part of his letter, Washington mentioned that the Convention had expressly considered and rejected an amendment that would have given the House a part in treaty ratification. *Id.*

and made public for the whole world to see would involve such a distraction to the President that he might not be able to fulfill the Take Care Clause. This is not about a "particular President;" it is about "the Presidency itself." *Trump v. Hawaii*, 138 S.Ct. 2392, 2418 (2018).

Finally, even if the House committees somehow had the power to issue these subpoenas, the breadth of the requests violate the Fourth Amendment. George Washington's basis for rejecting the House's request was that their demand violated the Constitution. It therefore follows that if the House's demand violates the Fourth Amendment, then Washington would have rejected it on those grounds as well. Because the House's demand in this case violates the Fourth Amendment, this Court should recognize that the precedent established by George Washington protects President Trump in this case.

CONCLUSION

The subpoenas in these cases violate the Fourth Amendment's requirement of reasonableness, both because of their breadth and because the object of the subpoenas is to harass the President rather than pursue a valid legislative purpose. President Trump's objections to the subpoenas are consistent with the precedent established by our first President, George Washington. If this Court ignores both the Fourth Amendment's requirements and the historical precedent set by the Father of this Country, then it will be open season for the House of Representatives to harass whoever it wishes, especially its political

opponents and people of faith. For these reasons, *Amicus* respectfully requests that this Court reverse the judgments of the D.C. Circuit and Second Circuit.

Respectfully submitted,

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