19-1540-cv

United States Court of Appeals
for the
Second Circuit

DONALD J. TRUMP, DONALD J. TRUMP, JR., ERIC TRUMP, IVANKA TRUMP, DONALD J. TRUMP REVOCABLE TRUST, TRUMP ORGANIZATION, INC., TRUMP ORGANIZATION LLC, DJT HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER LLC, TRUMP ACQUISITION LLC, TRUMP ACQUISITION, CORP.,

Plaintiffs-Appellants,

– v. –

DEUTSCHE BANK AG, CAPITAL ONE FINANCIAL CORPORATION,

Defendants-Appellees,

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

Intervenor Defendants-Appellees.

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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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INTRODUCTION

Judges "are 'not required to exhibit a naiveté from which ordinary citizens are free.'" *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). Yet accepting the Committees' argument that they want to rifle through years of the President's private bank records to conduct a "case study" of the banking sector—not to uncover suspected wrongdoing or expose his information for political gain—requires "naiveté" in the extreme. The nature and breadth of these subpoenas, their subject matter, their history, and the public statements made about them all reveal that their "real object" is not legislation, but enforcement and exposure. *McGrain v. Daugherty*, 273 U.S. 135, 178 (1927). And because anyone could be a "case study" for legislation or be suspected of "foreign influence," Cmtes. Br. 36, 18, upholding these subpoenas would turn Congress's unenumerated subpoena power into a limitless font of legislative authority. *Contra United States v. Lopez*, 514 U.S. 549, 564 (1995); *NFIB v. Sebelius*, 567 U.S. 519, 559-60 (2012).

"Choice is left," however. *United States v. Rumely*, 345 U.S. 41, 47 (1953). The district court recognized that these subpoenas are overbroad. They should at least be narrowed, either by a court or through structured negotiations—the tried-and-true way these disputes have been resolved in the past. Br. 29. And the subpoenas should not be enforced until Congress complies with the Right to Financial Privacy Act. Because Plaintiffs raised serious questions on all of these issues and will suffer case-ending harm

if the Banks disclose their confidential information to Congress, this Court should reverse the denial of Plaintiffs' motion for a preliminary injunction.

ARGUMENT

The Committees concede that Plaintiffs face "'irreparable harm,'" so Plaintiffs are entitled to a preliminary injunction if they prove either a "'likelihood of success on the merits'" or "'sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward [them].'" *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010). Plaintiffs satisfy both standards.

The Committees suggest, in a single sentence, that the "serious questions" standard is unavailable here because "the Committees are exercising their Article I authority." Cmtes. Br. 27. The Court should ignore this suggestion. Below, the Committees conceded that the serious-questions standard applies. Dkt. 51 at 19 n.28; *see Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994) ("[A]n appellate court will not consider an issue raised [by the government] for the first time on appeal."). Even on appeal, the Committees' contrary suggestion is conclusory and undeveloped. Cmtes. Br. 27-28; *see Greene*, 13 F.3d at 586 (refusing to entertain a new argument on appeal that the government briefed "in less than three pages"). And the district court applied the serious-questions standard. JA147-50.

It was correct to do so. The serious-questions standard is not off the table "'merely because a movant seeks to enjoin government action'"; this Court has repeatedly "applied [it] in suits against governmental entities." *Time Warner Cable of N.Y.C. v. Bloomberg L.P.*, 118 F.3d 917, 923 (2d Cir. 1997) (quoting *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1339 (2d Cir. 1992)). While this Court does not apply it when plaintiffs challenge policies produced by "the full play of the democratic process involving both the legislative and executive branches," this Court does apply it when plaintiffs "challenge[] action taken pursuant to [a] policy formulated solely by [one] branch." *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995); *cf. Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 111 (2d Cir. 2014) (policy was "defined and reaffirmed by all three branches of government"). The subpoenas here were not jointly approved by the political branches; they were approved by one committee, of one house of Congress, *against* a sitting President.

In inter-branch disputes like these, courts cannot assume that the challenged action is "presumptively reasoned," or afford one branch "a higher degree of deference." *Able*, 44 F.3d at 131. In *Morrison v. Olson*, for example, the Court did not give Congress "deference" or "a presumption of validity" because, where the "political branches are ... in disagreement, neither can be presumed correct." 487 U.S. 654, 705 (1988) (Scalia J., dissenting). "The playing field …, in other words, is a level one…. Congress, no more than the President, is entitled to the benefit of the doubt." *Id.* That

is especially true in cases, like this one, where the entire dispute is whether Congress is acting within its constitutional authority. *See Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980) (applying the serious-questions standard against the government because "the public interest also requires obedience to the Constitution"); *U.S. Servicemen's Fund v. Eastland*, 488 F.2d 1252, 1256 (D.C. Cir. 1973) (applying the serious-questions standard where the plaintiff challenged the constitutionality of a congressional subpoena to a third-party custodian).

"[I]n litigation such as is presented herein, no party has an exclusive claim on the public interest." *Haitian Ctrs.*, 969 F.2d at 1339. Plaintiffs are thus entitled to a preliminary injunction if they satisfy the serious-questions standard.

I. The subpoenas exceed the Committees' authority.

A. The subpoenas are overbroad.

In their opening brief, Plaintiffs thoroughly explained why subpoenas must be pertinent to their legitimate legislative purpose, why this pertinency requirement is not limited to criminal-contempt cases, and why subpoenas that make impertinent requests must be invalidated (or at least narrowed). Br. 27-30. While there is also a "statutory pertinency" requirement in the criminal contempt-of-Congress statute, Plaintiffs are invoking the "jurisdictional concept of pertinency" that is "drawn from the nature of a congressional committee's source of authority"—*i.e.*, Article I of the Constitution and the Committees' authorizing legislation. *Watkins v. United States*, 354 U.S. 178, 206 (1957). That requirement applies in civil and criminal cases alike. The Committees agree.

They admit that their subpoenas must be "'reasonably relevant'" to their legitimate legislative purposes. Cmtes. Br. 33-34 (quoting *McPhaul v. United States*, 364 U.S. 372, 381 (1960)).

The subpoenas fail that standard. In arguing otherwise, Cmtes. Br. 40-43, the Committees forget that their purpose here is supposed to be *passing legislation*, not nailing down the minutiae of Plaintiffs' finances. "There is a clear difference between Congress's legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions." *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974). While grand juries focus on the "precise reconstruction of past events," "the most precise evidence," and "the exact text of … statements," there is "no comparable need in the legislative process." *Id.*

Specifically, the Committees claim that they need the records of grandchildren and spouses to detect *Plaintiffs'* "financial fraud"—forgetting that they are supposed to be investigating "industry-wide" money-laundering and lending practices. Cmtes. Br. 43, 48. The Committees also claim that Plaintiffs are a good case study based on their "real estate" transactions and "loans," Cmtes. Br. 9-10, 36, but documents about "real estate transaction[s]" and "loan[s]" are only two of the myriad categories of information that the Committees request, JA51-52, 37-39. The Committees' explanation for requesting all of Plaintiffs' purely domestic transactions also makes little sense; the subpoenas already flag documents that reveal any "relationship" or "tie" to

foreigners. JA37-39. Nor do the Committees meaningfully explain how decade-old documents could reveal any *current* leverage over the President, interference with the *2016* election, or *live* threats to the banking sector.

Most importantly, the district court found that these subpoenas are overbroad. It declared them not "reasonable" and said it would have forced the parties to narrow them if it thought it could. JA94; *see also* JA82 ("I can't go and look at the subpoena and read it line by line and determine, okay, you can get this category of documents and not that category of documents"). The district court misjudged its authority. Courts can refuse to enforce overbroad subpoenas, *United States v. Patterson*, 206 F.2d 433, 434 (D.C. Cir. 1953); narrow them, *Bergman v. Senate Special Comm. on Aging*, 389 F. Supp. 1127, 1130 (S.D.N.Y. 1975); and force the parties back to the negotiating table, *United States v. AT&T Co.* (*AT&T I*), 551 F.2d 384, 395 (D.C. Cir. 1976). Again, the Committees do not argue otherwise. In fact, they concede that court-ordered negotiations would not injure their interests. *See* Cmtes. Br. 57.

The Committees nevertheless resist that path because, in their subjective and self-serving view, Plaintiffs' desire for court-ordered negotiations is not "credible." Cmtes. Br. 44. The district court disagreed. It reminded the Committees that Plaintiffs' counsel stated, "no less than twice, that he was willing to sit down and have a reasonable discussion about limiting the subpoenas." JA116; *see* JA82-83, JA112-13. And despite their baseless assertion that Plaintiffs only want "delay," Cmtes. Br. 45, 56, the

Committees do not dispute that "Plaintiffs have agreed to expedite these proceedings at every step," Br. 49. The Committees also neglect to inform the Court that, before the preliminary-injunction hearing, undersigned counsel approached the Committees' counsel and offered to negotiate a resolution. *Cf.* JA82-83. The Committees have declined at every step to engage in negotiations that could narrow the worst aspects of the subpoenas while giving the Committees the essential information they claim to need. While Plaintiffs continue to believe the subpoenas are invalid in full, they are willing to pursue a resolution if the Committees would consider meaningfully narrowing their requests.

Yet the Committees remain unwilling to negotiate, at least until a court forces the issue. *See* Cmtes. Br. 45 (dismissing the idea of negotiations out of hand because "[i]t is obvious" that Plaintiffs would offer "nothing" satisfactory). While Plaintiffs' believe their pertinency and overbreadth arguments prove their entitlement to a preliminary injunction, this Court could send the dispute to mediation before ordering that relief. *See* Local Rule 33.1 ("At any time during the pendency of a case, … a party may request referral to the Circuit Mediation Office or the Court may so order."). The Committees could not complain, since this Court could impose time limits on mediation and the Local Rules require the parties' attorneys to "participate in good faith." *Id.*

Better yet, this Court could remand for the parties to conduct settlement negotiations under the district court's supervision. The D.C. Circuit did that in *AT&T I* in lieu of adjudicating a congressional subpoena to a third-party custodian. It remanded "to the District Court for further proceedings during which the parties and counsel are requested to attempt to negotiate a settlement" and ordered "the District Court to report to us concerning the progress of these negotiations within three months." 551 F.2d at 395.

This case is no different. Here, too, court-supervised negotiations would "avoid a possibly unnecessary constitutional decision." *Id.* at 385. And the notion that "this suit is not … a dispute 'between Congress and the Executive,'" Cmtes. Br. 44, blinks reality. The *only* reason that the Intelligence Committee is "investigating whether Mr. Trump is subject to foreign leverage" is because he is the President. Cmtes. Br. 17-18. And even accepting the absurd notion that the Financial Services Committee just so happened to pick the sitting President for their "case study," *any* congressional subpoena for the private documents of a sitting President implicates the separation of powers. Such subpoenas seriously "distract the President from his public duties, to the detriment of not only the President and his office but also the Nation." *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982). Blessing these unprecedented subpoenas to a sitting President's banks (and, by extension, subpoenas to a sitting President's accountants, bankers, lawyers, doctors, friends, and family) would certainly "tilt the scales" of "the

country's constitutional balance" in favor of Congress. *AT&T I*, 551 F.2d at 394. For the sake of all future Presidents and the "long-term staying power of government," this Court should explore the possibility of "mutual accommodation" before affirming the Committees' "claims of absolute authority." *United States v. AT&T Co.* (*AT&T II*), 567 F.2d 121, 133, 123 (D.C. Cir. 1977).[1]

B. The subpoenas' actual purposes are enforcement and exposure.

Congressional subpoenas lack a "legitimate legislative purpose" if they attempt to conduct law enforcement. Br. 22. Of course, Congress is not technically trying, convicting, or imprisoning anyone. But the prohibition on law enforcement recognizes that congressional investigations are *themselves* a form of "punishment" that legislators will be tempted to use for "personal aggrandizement" and to sway "the public mind." *Watkins*, 354 U.S. at 187; *Marshall v. Gordon*, 243 U.S. 521, 546 (1917).

The Committees agree. While they note that a subpoena is not unconstitutional unless it is "'*obvious* that there was a usurpation of functions exclusively vested in the Judiciary or the Executive,'" Cmtes. Br. 33, the power to enforce the law *is* obviously "assigned under our Constitution to the Executive and the Judiciary," *Quinn v. United*

[1] Just yesterday, the Court invited the Solicitor General to file a brief in this case—an acknowledgment that its resolution could have lasting implications for the Presidency. Indeed, if Congress can pursue these subpoenas, then personal investigations of the President will become the new normal in times of divided government, with one House constantly probing the President's private life under the pretense of a "case study" on whatever generalized topic it can gin up.

States, 349 U.S. 155, 161 (1955). Congress similarly has no power to "expose for the sake of exposure." *Watkins*, 354 U.S. at 200.

The Committees insist that a congressional investigation does not become impermissible merely because it "may reveal unlawful conduct," Cmtes. Br. 25, 46-47, but they are responding to an argument Plaintiffs never made. Plaintiffs agree that congressional investigations must be evaluated *ex ante*, so an otherwise "legitimate legislative investigation need not grind to a halt whenever … crime or wrongdoing is disclosed." *Hutcheson v. United States*, 369 U.S. 599, 618 (1962). A legislative investigation is not "legitimate" in the first place, however, if its actual purpose is law enforcement or exposure. *Watkins*, 354 U.S. at 187, 200; *United States v. Cross*, 170 F. Supp. 303, 309 (D.D.C 1959). That is the issue here.

To determine whether a subpoena is pursuing an impermissible goal, courts must inquire thoughtfully. They cannot delve into legislators' hidden motives, Br. 26, but they must determine the subpoena's *actual* purpose, *see McGrain*, 273 U.S. at 178 ("real object"); *Barenblatt v. United States*, 360 U.S. 109, 133 (1959) ("'primary purpose[]'"); *Kilbourn v. Thompson*, 103 U.S. 168, 194-95 (1880) ("nature," "*gravamen*"). After all, courts cannot assess whether a subpoena has a "legitimate legislative purpose" without first identifying what the "purpose" is. They do that by evaluating all the available evidence, including statements of committee members and committee documents, as well as the

subpoena's nature, scope, and subject matter. Br. 25-26. The Committees do not disagree. Cmtes. Br. 45.

Nor could they, especially given the Supreme Court's recent decision in *Department of Commerce v. New York*. That decision reiterated the distinction between motive and purpose that Plaintiffs draw here. Courts normally cannot inquire into the "'motivation'" or "unstated reasons" of "another branch of Government." 139 S. Ct. at 2573. But they must "scrutinize[]" another branch's "reasons" by examining "the record" and "viewing the evidence as a whole." *Id.* at 2575-76. While courts are "deferential," they "are 'not required to exhibit a naiveté from which ordinary citizens are free.'" *Id.* at 2575; *accord Rumely*, 345 U.S. at 44 (courts must not refuse to "see what all others can see and understand" when evaluating the "congressional power of investigation." (cleaned up)).

That is what happened in *McGrain*. True, the district court, which invalidated the subpoena on separation-of-powers grounds, was reversed. But the Supreme Court did not contradict the district court's *legal* conclusion that Congress cannot use compulsory process to investigate the Attorney General's guilt; it disagreed with the district court's *factual* conclusion that Congress was actually doing that. 273 U.S. at 177-80. *McGrain* carefully evaluated whether the subpoena's "real object" was legislative, examining "the substance of the resolution," "the debate on the resolution," and "the subject-matter" of the investigation. *Id.* at 178-79. And it warned that the case would have come out

differently "if an inadmissible or unlawful object were affirmatively and definitely avowed." *Id.* at 180; *accord Cross*, 170 F. Supp. at 306 (explaining that while courts often "presume[]" a "legitimate legislative purpose," "any presumption" can be "controverted by adequate evidence to the contrary").

Here, the Committees have "affirmatively and definitely avowed" an "unlawful" purpose. *McGrain*, 273 U.S. at 180. As they admitted in resolutions, committee documents, and statements from their chairs and lawyers, the subpoenas' primary purposes are to prove wrongdoing and to explore and expose Plaintiffs' private information. Br. 2, 15, 31, 35; *see also* JA106 ("There is massive public interest in disclosure here"); JA111-12 ("[A]re they beholden to foreign financial interest because of their major personal financial dealings that they will not disclose and have, thus far, resisted disclosing to the American people?"). The Committees' brief only adds fuel to the fire, repeatedly describing the subpoenas' purposes in these terms. *E.g.*, Cmtes. Br. 24 ("illicit transactions" by Plaintiffs); Cmtes. Br. 11 (same); Cmtes. Br. 42 ("financial fraud" by Plaintiffs); Cmtes. Br. 39 ("shed light on 'Mr. Trump's complex financial arrangements'"); Cmtes. Br. 17 ("expose 'conflicts of interest'").[2]

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[2] The Committees accuse Plaintiffs of trying to mislead the Court about a statement their counsel made at the district-court hearing. Cmtes. Br. 48 n.23. But it was hardly unreasonable for Plaintiffs to assume that, in the process of analogizing the President of the United States and his family to a "drug lord," the Committees' counsel was referring to a *criminal* matter he handled during his "many years" at the Department

The subpoenas themselves confirm that the Committees are pursuing impermissible purposes. Indeed, a grand jury investigating criminal misconduct wouldn't change one word of them. The Committees' "indiscriminate dragnet" requests for reams of documents about anyone related to Plaintiffs stretching back many years also reveal their non-legislative bent. *Wilkinson v. United States*, 365 U.S. 399, 412 (1961). So do their targeting of the businesses and family of one person and their singular focus on the "precise reconstruction of past events." *Senate Select Comm.*, 498 F.2d at 732; *accord Hutcheson*, 369 U.S. at 617 (explaining that a congressional investigation would not be legislative if it tried to determine "whether petitioner had in fact defrauded the State of Indiana").

The Committees' only response to all this evidence of their impermissible purposes is that the Court should ignore it, since their subpoenas also "might ... inform [their] legislative judgments." Cmtes. Br. 46. But illegitimate subpoenas cannot be saved by "the mere assertion of a need to consider 'remedial legislation.'" *Shelton v. United States*, 404 F.2d 1292, 1297 (D.C. Cir. 1968). And they cannot be justified by "retroactive rationalization[s]"—lawyers "[l]ooking backward" to find "any legislative purpose

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of Justice. JA100. After the hearing, counsel revealed that he was referring to a *civil* proceeding to freeze the drug lord's assets. But such proceedings usually result from—or are at least adjacent to—criminal inquiries, and Congress has no constitutional authority to enforce *civil* laws either. So the analogy offered by the Committees' counsel supports Plaintiffs' point, regardless of the precise nature of the proceeding he was discussing.

which might have been furthered by the [subpoenas]" instead of evaluating the reasons "the House of Representatives itself" gave. *Watkins*, 354 U.S. at 204, 206. "It is the responsibility of the Congress, in the first instance, to insure that compulsory process is used only in furtherance of a legislative purpose." *Id.* at 201.

Yet tack-on remedial legislation and retroactive rationalizations are all the Committees offer. Instead of making "specific" references to potential legislative solutions, *Shelton*, 404 F.2d at 1297, the Committees state in the vaguest, most generic terms that their investigations will help them determine whether to "reform" or "strengthen" the laws that were allegedly broken (or the agencies that failed to detect the alleged violations). *E.g.*, Cmtes. Br. 10, 14, 25, 45. This is precisely the kind of non-falsifiable reasoning that the law forbids, as it turns the ban on law-enforcement investigations into a mere word game. Br. 32-33.

Other than tack-on references to remedial legislation, the Committees identify no legislation that "could be had." *McGrain*, 273 U.S. at 177. Any such legislation would have to be pertinent, within the Committees' legislative jurisdiction, and constitutional. Br. 21-22.[3] Yet the Committees do not dispute that a sitting President's finances and

[3] While the Committees cite some specific bills, Cmtes. Br. 13, 18-19, many of them passed the House *before* these subpoenas were issued and none of them is pertinent to these requests. Plaintiffs' private financial information has nothing to do with, for example, using paper ballots (H.R. 1) or gathering intelligence about NATO (H.R. 1617).

the conduct of foreign companies, individuals, and governments are "area[s] in which Congress is [constitutionally] forbidden to legislate," *Quinn*, 349 U.S. at 161; *see* Br. 36. While they insist (with no citations to caselaw) that the constitutionality of legislation cannot be evaluated at this stage, Cmtes. Br. 48-49, courts disagree. *See, e.g.*, *Tobin v. United States*, 306 F.2d 270, 275-76 (D.C. Cir. 1962) (refusing to enforce a congressional subpoena under the avoidance canon because, otherwise, the court would "have to … decide" whether the subpoena could result in valid legislation under the Compact Clause); *Rumely*, 345 U.S. at 46-48 (reaching a similar decision based on a potential First Amendment violation). Here, the Committees are not pursuing legislation that is pertinent, valid, and within their jurisdiction—unsurprisingly, since their actual purposes are law enforcement and exposure.

II. The subpoenas violate the Right to Financial Privacy Act.

In their opening brief, Plaintiffs explained how the RFPA's text, history, and purpose refute the Committees' attempt to cabin the statute to the executive branch. Br. 37-45. Among other points, Plaintiffs noted that when the RFPA was enacted in 1978, the Supreme Court had long held that the phrase "any department or agency of the United States" included Congress. *See United States v. Bramblett*, 348 U.S. 503, 504 n.1, 509 (1955) (interpreting 18 U.S.C. §1001). Plaintiffs explained that courts must "assume that Congress is aware of existing law when it passes legislation," *Dekalb Cty. Pension Fund v. Transocean Ltd.*, 817 F.3d 393, 409-10 (2d Cir. 2016), and that statutory

interpretation "must take into account [the] *contemporary* legal context," *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-99 (1979) (emphasis added). The Committees and district court were thus wrong to rely almost entirely on the Supreme Court's decision to overrule *Bramblett* in *United States v. Hubbard*, 514 U.S. 695 (1995), because "[a] decision issued in 1995 has no bearing on how Congress understood these terms in 1978." Br. 43.

In response to this straightforward application of precedent, the Committees offer nothing. They merely invoke *Hubbard* again and try to minimize the "general principle" that Congress legislates against the backdrop of judicial interpretations. Cmtes. Br. 54-55. But the Committees ignore the critical interpretive point: "It's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary ... meaning ... *at the time Congress enacted* the statute." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (emphasis added). As the Supreme Court recently underscored, "as usual, we ask what [a] term's 'ordinary, contemporary, common meaning' was *when Congress enacted* [it]." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019) (emphasis added). *Bramblett* had been on the books for nearly three decades when Congress deployed the identical phrase in the RFPA, and the Committees offer no basis for assuming that Congress disagreed with *Bramblett* in 1978. While they suggest that *Hubbard* was closer to Congress's actual intent, Congress apparently disagreed. Immediately after *Hubbard*, it amended 18 U.S.C. §1001 to restore

Bramblett and make the statute again apply to Congress. *See* False Statements Accountability Act of 1996, Pub. L. No. 104-292, §2, 110 Stat. 3459 (1996).

Crucially, the Committees also never dispute that their interpretation would read an implied exception for Congress into the RFPA. Br. 41. The statute already contains more than a dozen express exceptions. *See* 12 U.S.C. §3413. When "Congress explicitly enumerates certain exceptions . . . additional exceptions are not to be implied." *United States v. Smith*, 499 U.S. 160, 167 (1991); *accord Hillman v. Maretta*, 569 U.S. 483, 496 (2013); *United States v. Pettus*, 303 F.3d 480, 485 (2d Cir. 2002).

Nor do the Committees provide a persuasive response to the two provisions of the RFPA that most directly refute their "executive only" interpretation. First, the RFPA specifies the sole circumstance where congressional inquiries are not subject to its procedures: when the request is from "a duly authorized committee or subcommittee of Congress" to "any officer or employee of a supervisory agency." §3412(d). This limited exception demonstrates that Congress was aware that its committees might seek RFPA-protected material, and that it wanted to exempt those requests only when they were made to "supervisory" agencies. The "most natural reading of [§3412(d)] is that Congress implicitly excluded a general [exception for Congress] by explicitly including a more limited one," and it "would distort [the RFPA's] text by converting the exception into the rule." *TRW Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001); *see also Leatherman v.*

Tarrant Cty. Narcotics Intel. & Coord. Unit, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius.*").

Second, the Committees do not dispute that that the RFPA expressly exempts certain GAO investigations, §3413(j); that the GAO is a *legislative* agency; or that this provision would be entirely unnecessary under their reading. The Committees half-heartedly suggest that the GAO exception supports their interpretation by supposedly differentiating the GAO from "a government authority." Cmtes. Br. 53 n.24. Not so. The provision states that "[t]his chapter shall not apply when financial records are sought by the Government Accountability Office pursuant to an authorized proceeding, investigation, examination or audit directed at a government authority." §3413(j). While it acknowledges that the GAO is not subject to the RFPA when it investigates *other* government authorities, it does not suggest that the GAO itself falls outside the definition of "government authority." A limited exception does not imply a general exemption, as the Supreme Court has repeatedly explained. *See Hillman*, 569 U.S. at 496; *TRW*, 534 U.S. at 28-29; *Smith*, 499 U.S. at 167.

The Committees attempt to make several contextual arguments based on scattered provisions of the RFPA, but none overcomes Plaintiffs' stronger evidence. The Committees note that the RFPA generally requires records to be "sought for a 'legitimate law enforcement inquiry,'" and that Congress has no *constitutional* authority to conduct "law enforcement." Cmtes. Br. 50. This gambit fails. The RFPA's definition

of "law enforcement inquiry" includes "a lawful investigation or official proceeding inquiring into a violation of, or failure to comply with, any criminal or civil statute." §3401(8). As revealed in this litigation, Congress sees no constitutional problem with engaging in these kinds of inquiries. *See, e.g.*, Cmtes. Br. 6 (purporting to investigate "'compliance with laws and regulations'"); Cmtes. Br. 9 ("compliance with banking laws"); Cmtes. Br. 34, 35, 36, 41, 46 (similar). And it takes an extremely narrow view of the constitutional prohibition on "law enforcement." *See, e.g.*, JA96 (arguing that Congress does not cross the constitutional line so long as it does not "prosecute anybody" or "send anybody to jail"); Cmte. Br. 48 (arguing that Congress must be doing "the equivalent of a criminal trial"); Cmtes. Br. 46 (asserting that Committees can investigate "criminal" and "unlawful" conduct). Plaintiffs disagree as a matter of constitutional law. But it is hardly surprising that Congress drafted a statute consistent with *its* view, rather than Plaintiffs'. Because the definition of "law enforcement inquiry" under the RFPA is broader than the House's view of the constitutional limits in this area, there is no reason to infer that the use of the term "law enforcement" says anything about the statute's application to Congress.

The Committees' reliance on §3408(2) of the RFPA, which requires "the head" of government authorities to authorize formal written requests, is equally unavailing. The House Rules authorize committees to investigate matters and issue subpoenas—a point the Committees emphasize in their brief. *E.g.*, Cmtes. Br. 8 (citing House Rule

XI.2(m)(1)(B)). And no less than executive agencies, legislative agencies and committees have "heads." *See, e.g.*, 31 U.S.C. §702(b) ("The head of the [GAO] is the Comptroller General"); 2 U.S.C. §1901 ("The Capitol Police shall be headed by a Chief"). Indeed, House officials often refer to the chairs of committees and subcommittees as the "head." *See, e.g.*, Leader Pelosi, *Weekly Press Conference Today* (Nov. 16, 2018), bit.ly/2y3riND; Leader Pelosi, *Statement on President Trump's First Address to Congress* (Mar. 1, 2017), bit.ly/2XOSa2V; Speaker Pelosi, *Weekly Press Conference Today* (Mar. 28, 2019), bit.ly/2CKjcw4.[4]

It is also hardly remarkable that Congress would impose restrictions on its own requests for information, given the "serious concern for the privacy interests of individuals in their bank records" that motivated the Act's passage. *Botero-Zea v. United States*, 915 F. Supp. 614, 619 (S.D.N.Y. 1996). As the Committees concede, Cmtes. Br. 50, the RFPA was a direct response to the Supreme Court's decision in *United States v. Miller*, 425 U.S. 435 (1976)—a decision that "raised a furor in the United States

[4] Nor is it odd that the provision about disciplining "agent[s] or employee[s]" who willfully violate the RFPA, §3417(b), would apply to agents or employees of the legislative branch. When the RFPA was enacted, disciplinary authority was delegated to the Civil Service Commission. Pub. L. No. 95-630, tit. XI, §1117, 92 Stat. 3709 (1978). The Commission was an *independent* agency. *Free Enterprise Fund v. PCAOB*, 537 F.3d 667, 677 (D.C. Cir. 2008); 37 Op. Att'y Gen. 227 (1936). The Commission frequently exercised power over legislative-branch employees. *See, e.g.*, Pub. L. No. 88-352, tit. VII, §717(a), 86 Stat. 111 (1972) (empowering the Commission to enforce civil-rights provisions against "units of the legislative and judicial branches … in the competitive service").

Congress," Dan L. Nicewandera, *Financial Record Privacy—What Are and What Should Be the Rights of the Customer of a Depository Institution*, 16 St. Mary's L.J. 601, 608 (1985), and that galvanized Congress's resolve to "protect and preserve the confidential relationship between [financial] institutions and their customers and the constitutional rights of those customers," H.R. Rep. No. 95-9142, §2(b) (1977).

The Committees try to shore up their case for an implied exemption for Congress by taking a deep dive into legislative history. How deep? Their principal authority is two isolated references to a proposed amendment that was appended to a 652-page floor debate and was never enacted. Courts are rightly dubious of arguments speculating why Congress rejected a proposed amendment. "'Mute intermediate legislative maneuvers' are not reliable indicators of congressional intent." *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989). It is just as logical to suppose that Congress viewed the amendment as unnecessary in light of the Supreme Court's longstanding interpretation of the phrase "any department or agency of the United States" in *Bramblett*.

Finally, the Committees argue that, even if the RFPA applies here, it would only protect the records of the *individual* Plaintiffs. Cmtes. Br. 50. Yet that is the bulk of the subpoenas. Individuals covered by the subpoenas include four of the named plaintiffs plus "their immediate family"—meaning "any parent, spouse, child, step child, daughter-in-law, or son-in-law." JA37, 47. The subpoenas also request the account records of any "trustee, settler or grantor, beneficiary, or beneficial owner," as well as

"any current or former employee officer, director, shareholder, partner, member, consultant, senior manager, manager, senior associate, staff employee, independent contractor, agent, attorney or other representative." JA37; *see also* JA52 (requesting account records of "[a]ny principal, including directors, shareholders, or officers, or any other representatives of the foregoing" named individuals). Whether the trust plaintiff is a protected individual under the RFPA is also an open, unbriefed question.

There is no merit to the Committees' attempt to distinguish between their requests for the "banks' internal records" and the "financial records of any customer." Cmtes. Br. 50. In fact, the RFPA's definition of "financial record" is intentionally broad, encompassing "an original of, a copy of, or information known to have been derived from, *any record* held by a financial institution pertaining to a customer's relationship with the financial institution." §3401(2) (emphasis added). This easily covers most, if not all, of the Committees' requests.

Of course, the district court, other than concluding that the RFPA does not apply to Congress, never passed on the scope of the Act's protections. It did not resolve which Plaintiffs or which documents are covered. Because this is "'a court of review, not one of first view,'" *Prabhudial v. Holder*, 780 F.3d 553, 555 (2d Cir. 2015), these questions should be remanded to the district court.

III. The balance of equities strongly favors Plaintiffs.

The Committees again concede that Plaintiffs will suffer irreparable harm without a preliminary injunction. Br. 46-47. The Committees do not dispute that the disclosure of Plaintiffs' confidential information is "'the quintessential'" irreparable harm. *Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 499 (S.D.N.Y. 2019). And the Committees do not dispute that the risk of mooting Plaintiffs' ability to obtain full judicial review is "'the most compelling justification'" for preliminary relief. *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers). That's *a lot* on Plaintiffs' side of the ledger. To win the balance of the equities, the Committees would need contrary interests of the highest order.

They have none. While denying preliminary relief will forever defeat Plaintiffs' rights to privacy and judicial review, granting preliminary relief would not defeat the Committees' ability to "obtain[] … information" or diminish their "'investigatory powers.'" Cmtes. Br. 57. It would, at most, delay their access to Plaintiffs' information until the district court enters final judgment. The delay would almost certainly not stretch beyond the current Congress, which has at least 17 months to go.[5] Even if it did, the D.C. Circuit has persuasively explained why that is not the judiciary's concern. If the next Congress reauthorizes the subpoenas, then this litigation will continue and

[5] Plaintiffs requested no more than 90 days of additional time to develop the record before proceeding to a permanent-injunction hearing. JA87.

there is "no pressing need for an immediate decision." *Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008). If the next Congress abandons the subpoenas, then the parties can settle amicably and the judiciary can avoid deciding difficult constitutional questions. *AT&T I*, 551 F.2d at 390; *AT&T II*, 567 F.2d at 133. That the next House might not share the views of the current House is a natural consequence of living in a democracy, not an injury to the Committees. *AT&T I*, 551 F.2d at 390; *Miers*, 542 F.3d at 911.

While the Committees' only injury is a short delay before they receive Plaintiffs' information, the Committees never try to *quantify* that injury or *weigh* it against Plaintiffs'. Courts routinely hold that the inconvenience of delay is dwarfed by the permanent, case-mooting consequences of disclosure. *See* Br. 50-51 (collecting cases). This case is no different. Despite the conclusory assertions in their brief, the Committees have no "pressing" need for Plaintiffs' information. Cmtes. Br. 56. It took them four months to even request it. Then they voluntarily agreed to at least four more months of delay. The Committees' only legitimate need for this information, moreover, would be to pass new legislation. But legislation requires drafting, hearings, committee votes, negotiations, amendments, and approval by the House, Senate, and President—a notoriously difficult and slow process.

If these delays will not irreparably harm the Committees, then neither will the short delay of a preliminary injunction. Especially since one Committee only wants

Plaintiffs' information for a "case study," Cmtes. Br. 36, and the other only wants Plaintiffs' information to redo an investigation that the same Committee already conducted, *see* H. Permanent Select Comm. on Intelligence, *Report on Russian Active Measures* (Mar. 22, 2018), bit.ly/2wk9Je1. Further, the bulk of the Committees' investigations—which they say are "sector-wide and extend far beyond [Plaintiffs]," Cmtes. Br. 1—will be totally unaffected by a preliminary injunction.

Unable to quantify their injuries, the Committees insist that courts cannot question how quickly they need information without committing "an improper usurpation of Congress's constitutional power." Cmtes. Br. 56. This argument would mean that congressional subpoenas to third-party custodians should *never* be preliminarily enjoined. *But see Liberation News Serv. v. Eastland*, 426 F.2d 1379, 1381 (2d Cir. 1970) (doing just that). And it gets constitutional law exactly backwards. Courts often assess "the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures"; judges "cannot simply assume … every congressional investigation is justified by a public need that overbalances any private rights affected." *Watkins*, 354 U.S. at 198. "To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary." *Id.* The whole reason "the Framers adopted a written Constitution," after all, is so "the scope of legislative power" would not be "limited only by … the Legislature's self-restraint." *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).

In short, this Court should reject the Committees' unsubstantiated concern with "delay." This miniscule injury is dwarfed by Plaintiffs' real need to avoid irreparable harm and the judiciary's real need to avoid "a decision upholding" these unprecedented subpoenas. *AT&T II*, 567 F.2d at 123.

CONCLUSION

This Court should reverse and remand with instructions to enter a preliminary injunction prohibiting Defendants from enforcing or complying with the challenged subpoenas.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 6,278 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

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CERTIFICATE OF SERVICE

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

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