DEBRA ANN LIVINGSTON, *Circuit Judge*, concurring in part and dissenting in part:

Although not expressly provided for in the Constitution, Congress's power to conduct investigations for the purpose of legislating is substantial, "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975) (quoting *Barenblatt v. United States*, 360 U.S. 109, 111 (1959)). Yet this power is not unlimited. When Congress conducts investigations in aid of legislation, its authority derives from its *responsibility to legislate*—to consider the enactment of new laws or the improvement of existing ones for the public good.[1] Congress has no power to expose personal information for the sake of exposure, *see Watkins v. United States*, 354 U.S. 178, 200 (1957) (expressing "*no doubt* that there is no congressional power to expose for the sake of exposure" (emphasis added)), nor

[1] None of these subpoenas issued in connection with an impeachment proceeding, in which Congress's investigatory powers are at their peak, but rather, as stated, "in aid of legislation." *See Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880) (noting that "[w]here the question of . . . impeachment is before [the House or the Senate] acting in its appropriate sphere on that subject, we see no reason to doubt the right to compel the attendance of witnesses, and their answer to proper questions, in the same manner and by the use of the same means that courts of justice can in like cases"); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974) (citing to Article I, Section 2 of the Constitution when noting that impeachment investigations in the House have "an express constitutional source" which differentiates them from Congress's general oversight or legislative power).

may it seek information to enforce laws or punish for their infraction—responsibilities which belong to the executive and judicial branches respectively, and not to it. *Id.* at 187 (noting that Congress is neither "a law enforcement [n]or trial agency," as "[t]hese are functions of the executive and judicial departments of government"). As the Supreme Court has put it: "No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Id.*

The legislative subpoenas here are deeply troubling. Targeted at the President of the United States but issued to third parties, they seek voluminous financial information not only about the President personally, but his wife, his children, his grandchildren, his business organizations, and his business associates.[2] Collectively, the subpoenas seek personal and business banking records stretching back nearly a decade (and with regard to several categories of

[2] The Plaintiff entities here are defined to include not only parents, subsidiaries, related joint ventures and the like, but 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 of any of those entities," so that the banking records of numerous individuals beyond the President's immediate family are potentially included in this dragnet. J.A. at 47, 58.

information, *with no time limitation whatsoever*) and they make no distinction between business and personal affairs, nor consistently between large and small receipts and expenditures. To be sure, breadth may be necessary in legislative subpoenas so that Congress can learn about a proposed subject of legislation sufficiently to enact new laws or improve the old ones: such learning is "an indispensable ingredient of lawmaking."[3] *Eastland*, 421 U.S. at 505. Still, the district court was of the view that in a routine civil case, it would have sent the parties into a room with the instruction that "you don't come out until you come back with a reasonable subpoena." J.A. at 94. The majority doesn't disagree. It, too, characterizes the subpoenas as "surely broad in scope." Maj. Op. at 45. It acknowledges that compliance will "subject [the President's] private business affairs to the Committees' scrutiny," *id.* at 48, and impose irreparable harm, *id.* at 13. It could have added that *personal* banking records of the President and his family are not excluded, and that neither House committee seeking this

[3] That said, "legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events," which appears to be the focus of the present subpoenas. *Nixon*, 498 F.2d at 732.

information will commit to treating any portion of it as confidential, irrespective of any public interest in disclosure. J.A. at 122–23.

The majority and I are in agreement on several points. First, we agree that the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. §§ 3401–3423, does not apply to Congress because, as the majority correctly concludes, Congress is not a "Government authority" within the meaning of that statute. Maj. Op. at 24–33. We likewise agree that 26 U.S.C. § 6103 of the Internal Revenue Code does not pose an obstacle to Deutsche Bank AG's disclosure of tax returns in its possession in response to the Committees' subpoenas. *Id.* at 34–44. Accordingly, I concur that, as to the statutory arguments presented by the Plaintiffs, they have raised no serious question suggesting that the House subpoenas may not be enforced.

The statutory arguments, however, are not the only arguments presented. The majority and I agree that this appeal raises an important issue regarding the investigative authority of two committees of the United States House of Representatives—the House Committee on Financial Services and the House Permanent Select Committee on Intelligence (collectively, "Committees")—in the context of their efforts to obtain voluminous personal and business banking records of the President of the United States, members of his immediate family,

his primary business organization and affiliated entities, and his business associates. Maj. Op. at 4. In fact, the question before us appears not only important (as the majority acknowledges) but of first impression: the parties are unaware of *any* Congress before this one in which a standing or permanent select committee of the House has issued a third-party subpoena for documents targeting a President's personal information solely on the rationale that this information is "in aid of legislation." Trump Br. at 14; Tr. of Oral Arg. at 34:24–35:3–4. But this House has now authorized *all* such House committees to issue legislative subpoenas of this sort, so long as directed at information involving this President, his immediate family, business entities, or organizations. H.R. Res. 507, 116th Cong. (2019); *see also* H.R. Res. 509, 116th Cong. § 3 (2019) ("House Resolution 507 is hereby adopted.").

In such a context, "experience admonishes us to tread warily." *United States v. Rumely*, 345 U.S. 41, 46 (1953). I agree with the majority that our review of the denial of a preliminary injunction is "appropriately more exacting where the action sought to be enjoined concerns the President . . . in view of '[t]he high respect that is owed to the office of the Chief Executive,'" Maj. Op. at 11 (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 385 (2004)). We disagree, however, as to

the preliminary injunction standard to be applied. In my view, a preliminary injunction may issue in a case of this sort when a movant has demonstrated sufficiently serious questions going to the merits to make them a fair ground for litigation, plus a balance of hardships tipping decidedly in that party's favor, that the public interest favors an injunction, and that the movant, as here, will otherwise suffer irreparable harm. *See Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35, 38 (2d Cir. 2010).

And as to the merits showing, I respectfully disagree with the majority's determination that the Plaintiffs' constitutional arguments and those raised by the United States as amicus curiae are *insubstantial*—not sufficiently serious for closer review.[4] Maj. Op. at 89–98. I cannot accept the majority's conclusions that "this case does not concern separation of powers," *id.* at 89, and that there is "minimal at best" risk of distraction to this and future Presidents from legislative subpoenas of this sort, *id.* at 97. Instead, I conclude that the Plaintiffs have raised serious

[4] Given my determination herein that the Plaintiffs have made a showing of "serious questions" as to the merits and that this case must be remanded, I need not now address whether the Plaintiffs have also satisfied the "likelihood of success" standard—and I do not do so, given the obligation in this context to avoid unnecessary judicial determinations on constitutional questions implicating Congress's investigative powers. *See Rumely*, 345 U.S. at 46. I note, however, that I do not concur in the majority's determination that as to the *present* reach of these subpoenas, the Plaintiffs have shown no likelihood of success.

questions on the merits, implicating not only Congress's lawmaking powers, but also the ability of this and future Presidents to discharge the duties of the Office of the President free of myriad inquiries instigated "more casually and less responsibly" than contemplated in our constitutional framework. *Rumely*, 345 U.S. at 46.

Nor do I agree with the majority's determination substantially to affirm the judgment and order compliance with these subpoenas. The majority itself recognizes that these broad subpoenas cannot be enforced *precisely* as drafted because they call for the production of material that may either bear "an attenuated relationship" to *any* legislative purpose or that "might [even] reveal sensitive personal details having *no* relationship to the Committees' legislative purposes." Maj. Op. at 84 (emphasis added). The majority remands for a culling process pursuant to which information disclosing, for instance, the payment of medical expenses would be exempt from disclosure. *Id*. The majority's limited culling, however, is tightly restricted to specified categories of information, leaving out almost all "business-related financial documents" from *any* review by the district court, *id*., irrespective of any threatened harm from disclosure, and potentially leaving out substantial *personal* information as well.

Indeed, given the tight limitations imposed by the majority on the district court's review, even sensitive records reflecting personal matters unrelated to any conceivable legislative purpose could potentially be disclosed.

I agree with the majority that remand is necessary. But we *disagree* as to the reasons why. I conclude that the present record is insufficient to support the majority's determination that the voluminous records of Plaintiffs sought from Deutsche Bank AG ("Deutsche Bank") and Capital One Financial Corporation ("Capital One") should at this time be produced.[5] The majority concludes in advance—before these records have been assembled—that only a select *"few documents"* will implicate privacy concerns or bear "such an attenuated relationship" to any legislative purpose that "they need not be disclosed." Maj. Op. at 85 (emphasis added). I disagree that the present record is sufficient to make that determination or to conclude, more fundamentally, where the balance of hardships lies with regard to the preliminary relief that the Plaintiffs seek. In this sensitive separation-of-powers context, serious questions have been raised as

[5] The Plaintiffs challenge the subpoenas as they relate to the banking records of President Donald J. Trump, his family, and his businesses—the Plaintiffs here. Trump Br. at 1. To the extent the subpoenas seek other information related to parties who are not Plaintiffs, the subpoenas have not been challenged and are not part of this appeal.

to the historical precedent for these subpoenas; whether Congress has employed procedures sufficient to "prevent the separation of power from responsibility," *Watkins*, 354 U.S. at 215, in seeking this President's personal information; and whether the subpoenas are supported by valid legislative purposes and seek information reasonably pertinent to those purposes, *see Quinn v. United States*, 349 U.S. 155, 161 (1955) (noting that Congress's power to investigate "cannot be used to inquire into private affairs unrelated to a valid legislative purpose"). These questions, like the balance of hardship question, also require further review.

As set forth herein, I would remand, directing the district court promptly to implement a procedure by which the Plaintiffs may lodge their objections to disclosure with regard to specific portions of the assembled material and so that the Committees can clearly articulate, also with regard to specific categories of information, the legislative purpose that supports disclosure *and* the pertinence of such information to that purpose. The objective of this remand is the creation of a record that is sufficient more closely to examine the serious questions that the Plaintiffs have raised and to determine where the balance of hardships lies with regard to an injunction in this case, and concerning particular categories of information. The district court acknowledged that in a routine civil case, it would

not have ordered the disclosures here. The majority errs in implicitly concluding that a President has *less* protection from the unreasonable disclosure of his personal and business affairs than would be afforded any litigant in a civil case.

Only on the basis of this fuller record would I determine the question whether a preliminary injunction should have issued, and with regard to what portions of the records sought. In reaching this conclusion, I am guided by the Supreme Court's counsel in *Rumely* that in the context of delicate constitutional issues involving limits on the investigative power of Congress, our duty is to avoid pronouncement "unless no choice is left." *Rumely*, 345 U.S. at 46; *cf. Cheney*, 542 U.S. at 389–90 (suggesting that courts should "explore other avenues" to avoid adjudicating "overly broad discovery requests" and "unnecessarily broad subpoenas" that present "collision course" conflicts between coequal branches). Indeed, *Rumely* affirms that the duty of constitutional avoidance is "even more applicable" in the context of congressional investigations "than to formal legislation." *Rumely*, 345 U.S. at 46; *see also Tobin v. United States*, 306 F.2d 270, 275 (D.C. Cir. 1962) (recognizing duty of courts in appropriate circumstances to avoid "passing on serious constitutional questions" presented by Congress's exercise of

its investigative power). Decision here may be required, but is premature on the present record.

Remand will also afford the parties an opportunity to negotiate. This is not the essential point of the remand I propose, but efforts at negotiation in this context *are* to be encouraged, since they may narrow the scope of these subpoenas, and thus avoid judicial pronouncement on the "broad confrontation now tendered." *United States v. Am. Tel. & Tel. Co* (*AT&T I*), 551 F.2d 384, 395 (D.C. Cir. 1976). The Plaintiffs have repeatedly sought the opportunity to negotiate. Reply Br. at 6–7; Tr. of Oral Arg. at 17:18–19, 18:3–20, 66:7-67:2. And the Committees, while preferring the more immediate disposition that the majority affords them, have expressed a willingness to attempt negotiation on an expedited basis if requested by this Court.[6] Tr. of Oral Arg. at 46:8–19.

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[6] Before this Court, counsel for the Committees stated that "[i]f this court thinks there should be negotiation . . . [p]lease make it really, really fast, because we think that Mr. Trump's statements make clear this is absolutely insincere . . . [b]ut fine, give us a day." Tr. of Oral Arg. at 46:8-15. Counsel for the Plaintiffs specifically affirmed in response that "I don't think there is any basis to determine that we are being insincere, and I certainly welcome, I think that we have made clear, sending this case back down for judicially refereed negotiations on whatever timeline the court thinks is appropriate is absolutely something we are willing to participate in in good faith." Tr. of Oral Arg. at 66:21-67:2.

Referencing an October 8, 2019 letter from Pat A. Cippolone, Counsel to the President, to the Speaker of the House of Representatives and three House committee chairs (a letter that is not part of the record before us), the majority concludes that a

To be clear, and as set forth herein, the Plaintiffs have raised serious questions on the merits as to these subpoenas, which implicate profound separation-of-powers concerns.[7] But pending the full remand that I outline

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remand for negotiation is futile because the President has prohibited certain members of the Administration from appearing in connection with the ongoing impeachment inquiry. Maj. Op. at 71–72, 72 n.66. With respect, however, this letter references only the "impeachment inquiry" and not the legislative investigations at issue here. This letter thus provides no basis for this Court to disregard the express representations of the Plaintiffs' attorney that the Plaintiffs, including the President, seek to negotiate in good faith.

[7] The majority suggests that these subpoenas do not implicate separation of powers because, *inter alia*, President Trump is not suing in his official capacity. Maj. Op. at 70. I disagree. As in *Rumely*, "we would have to be that 'blind' Court . . . that does not see what '(a)ll others can see and understand,'" not to recognize that these subpoenas target the *President* in seeking personal and business financial records of not only the President himself, but his three oldest children and members of their immediate family, plus the records of the Trump Organization and a litany of organizations with which the President is affiliated. *Rumely*, 345 U.S. at 44 (quoting *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37 (1922)); *see also id.* (acknowledging "wide concern, both in and out of Congress, over some aspects of the exercise of the congressional power of investigation"); *cf. Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (noting that courts are "'not required to exhibit a naiveté from which ordinary citizens are free'"(quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.))). Indeed, the Committees themselves acknowledge that "President Trump and the Trump Organization" are the focus of their investigations, *see* 165 Cong. Rec. H2698 (daily ed. Mar. 13, 2019) (statement of Rep. Waters), and that "given the closely held nature of the Trump Organization," investigation must "include [the President's] close family members," District Court Doc. No. 51 at 25–26. To be sure, Presidents are not immune from legislative subpoenas. But as I explain below, this dragnet around the President implicates separation-of-powers concerns for this and future Presidents, supporting a remand as to all the Plaintiffs here. To the extent that certain of the requested records may ultimately be found not to implicate separation-of-powers concerns, such a determination can only properly be made following a remand for development of the record.

herein, I defer for now the question whether they have also shown a balance of hardships tipping decidedly in their favor. The remainder of this opinion sets out the reasons for my conclusions: (1) that the Plaintiffs have raised serious constitutional questions as to these legislative subpoenas; and (2) that the serious question formulation of the preliminary injunction standard is applicable, contrary to the majority's position.

I

A

To reiterate, the subpoenas here are very troubling. Congress "cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." *Eastland*, 421 U.S. at 504. At the same time, ill-conceived inquiries by congressional committees "can lead to ruthless exposure of private lives in order to gather data" that is unrelated and unhelpful to the performance of legislative tasks. *Watkins*, 354 U.S. at 205. And the "arduous and delicate task" of courts seeking to accommodate "the congressional need for particular information" with the individual's "personal interest in privacy," *id.* at 198, does not grow *easier* when Congress seeks a *President's* personal information. Indeed, given the "unique

constitutional position of the President" in our scheme of government, *see Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992), and the grave importance of diligent and fearless discharge of the President's public duties, our task grows more difficult. *See Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982) (recognizing that distraction from public duties is "to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve").

The majority disagrees. It concludes that this case "does not concern separation of powers" because the sought-after records are personal, not official, and because Congress "has not arrogated to itself any authority of the Executive Branch," nor "sought to limit any authority of the Executive Branch." Maj. Op. at 89. With respect, however, this conclusion gives too short shrift to the Supreme Court's analysis in *Clinton v. Jones*, 520 U.S. 681 (1997), on which the majority principally relies. There, the Supreme Court concluded that permitting a civil case to go forward "relat[ing] entirely to the unofficial conduct of the individual who happens to be the President" did not represent a *per se* impermissible intrusion by the federal judiciary on executive power and that the doctrine of separation of powers did not impose a *categorical rule* that all such private actions must be stayed against the President while in office. *Id.* at 701,

705–06. At the same time, however, the Court recognized that it is insufficient that a branch "not arrogate power to itself": "the separation-of-powers doctrine [also] requires that a branch *not impair another in the performance of its constitutional duties*." *Id.* at 701 (emphasis added) (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996)); *see also Nixon v. Admin'r of Gen. Servs.*, 433 U.S. 425, 443–45 (1977). And as for the judiciary in the context of private litigation against a sitting President, "[t]he high respect that is owed to the office of the Chief Executive," the Court recognized, "though not justifying a rule of categorical immunity, is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery." *Id.* at 707; *see also Fitzgerald*, 457 U.S. at 751–56 (noting that the "special nature of the President's constitutional office and functions," *id.* at 756, and the "singular importance," *id.* at 751, of her duties require particular "deference and restraint," *id.* at 753, in the conduct of litigation involving the President).

The majority concludes that legislative subpoenas to third parties targeting a President's personal or financial information, however broad and tangentially connected to any legislative purpose, do not seriously implicate separation of powers on the theory that "any concern arising from the risk of distraction in the

performance of the [President's] official duties is minimal," Maj. Op. at 90, perhaps less than that, *id.* at 103–05, at least as compared to the potential burden of standing trial in a civil case while President, which *Jones* held is not categorically prohibited by separation-of-powers concerns.[8] But this analysis is flawed in two key respects.

First, the *Jones* Court concluded that the burden in that case—namely, a civil suit against the President while in office—did not categorically constitute a "constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions" in light of the long history of judicial review of executive action and of presidential amenability to judicial process. 520 U.S. at 702; *see also id.* at 701–06. In assessing the separation-of-powers issue, the Court

[8] The majority also relies on the fact that President Trump seeks a preliminary injunction in his individual capacity, not his official capacity, and that the United States has filed an amicus curiae brief rather than a motion to intervene in asserting its view that this case presents "thorny constitutional questions involving separation of powers" and that the district court's order should be reversed. Brief of United States as Amicus Curiae at 27; *see* Maj. Op. at 91 n.76. In *Jones* itself, however, President Clinton proceeded in his individual capacity and the United States filed an amicus brief addressing its separation-of-powers concerns. The Court nonetheless noted that "[t]he representations made on behalf of the Executive Branch as to the potential impact" of a rule permitting private litigation to proceed against a sitting President "merit . . . respectful and deliberate consideration," 520 U.S. at 689–90, and concluded, as already observed, that as to any civil action regarding personal conduct permitted to proceed, "the conduct of the entire proceeding, including the timing and scope of discovery," should be informed by respect for the Office of Chief Executive, *id.* at 707.

heavily weighed the pragmatic accommodation between the judiciary and the executive demonstrated by longstanding interbranch practice. *See id.* at 704–05 (discussing historical practice and the manner in which the judiciary has permissibly burdened the Executive Branch). It directed inferior courts that even as it rejected a rule of categorical immunity, the President's unique role in the constitutional framework should inform the entire conduct of any civil action, *id.* at 707, and that "the availability of sanctions" would "provide[] a significant deterrent to litigation directed at the President in his unofficial capacity for purposes of political gain or harassment," *id.* at 708–09. The *Jones* Court was thus solicitous of separation-of-powers concerns in the context of litigation over a President's personal conduct; moreover, it continued a long tradition of placing "great weight" on historical practice in addressing questions "concern[ing] the allocation of power between two . . . branches of Government," *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)).[9]

[9] The high value placed on historical practice "is neither new nor controversial." *Noel Canning*, 573 U.S. at 525. James Madison observed that a "regular course of practice" could "liquidate & settle" constitutional meaning in the face of "difficulties and differences of opinion" involved in the practice of government under the Constitution. James Madison, Letter to Spencer Roane (Sept. 2, 1819), *in* 8 *Writings of James Madison* 450 (Gaillard Hunt ed., 1908)); *see also Noel Canning*, 573 U.S. at 525 (collecting cases stating

Here, the parties have not identified, and my own search has failed to unearth, *any* previous example, in any previous Congress, of a standing or permanent select committee of the House of Representatives or the Senate using compulsory process to obtain documents containing a President's personal information from a third party in aid of legislation. Trump Br. at 14; Tr. of Oral Arg. at 34:24–35:4. Historical practice instead suggests that, on the few past occasions on which a President's personal documents have been subpoenaed from third parties, such requests have emanated either from a special committee established and authorized to pursue a specific, limited investigation or from a committee proceeding under the impeachment power.[10] It is possible that a

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the relevance of past practice to separation-of-powers issues).

[10] President Andrew Johnson had his personal bank records examined as part of his impeachment, but those records appear to have been relevant because of personal loans made to him by the Treasury Department. *See* Stephen W. Stathis, *Executive Cooperation: Presidential Recognition of the Investigative Authority of Congress and the Courts*, 3 J.L. & Pol. 183, 219 (1986); *see also* Michael Les Benedict, *The Impeachment of President Andrew Johnson, 1867–68*, *in* 1 *Congress Investigates: A Critical and Documentary History* 254, 264–68 (Roger A. Bruns et al. eds., rev. ed. 2011). President Clinton may have had some financial information, or at the very least some financial information of then–First Lady Hillary Clinton, examined by the Whitewater Special Committee, though it appears to have been turned over voluntarily. *See* S. Rep. No. 104-280, at 155–61 (1996). The House and Senate Banking Committees also appear to have subpoenaed witnesses to testify regarding Whitewater and the death of Vince Foster; however, they do not appear to have subpoenaed the President's personal financial information. *See* Stephen Labaton, *The Whitewater Affair: The Hearing; House Committee Told of Contacts Over Whitewater*, N.Y. Times, July 27, 1994, at A1 (describing testimony); Raymond W. Smock,

contrary example exists. But the historical precedent for the congressional subpoenas here, in contrast to the judicial processes assessed in *Jones*, is sparse at best, and perhaps nonexistent.[11] And this paucity of historical practice alone is

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The Whitewater Investigation and Impeachment of President Bill Clinton, 1992–98, *in* 2 *Congress Investigates: A Critical and Documentary History*, *supra*, at 1041, 1044–45. President Nixon voluntarily disclosed several years of tax returns to a House Committee; that same Committee used statutory authority not at issue here to procure additional information from the IRS. *See* S. Rep. No. 93-768, at 1–3 (1974); Memorandum from Richard E. Neal, Chairman, to the Members of the H. Comm. on Ways and Means 3 (July 25, 2019), https://perma.cc/UYZ2-QTCU. Other investigations do not appear to have involved either subpoenas of the President's personal financial information or subpoenas to third parties to obtain documents concerning the President in a personal capacity. *See generally* Stathis, *supra*.

[11] Notably, the dearth of historical practice here may be partially attributable to the fact that "[t]he authority to issue a subpoena was once delegated from the full House to its committees very sparingly because the power appears long to have been deemed too serious a matter for general delegation." Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. Pa. J. Const. L. 77, 106 (2011) (internal quotation marks and citation omitted). It appears that the House did not authorize standing committees to issue subpoenas until 1975. *Id.* at 107. Moreover (and more generally), it should also be noted that disputes between the two elected branches over congressional subpoenas have historically been resolved through a process of direct negotiation and accommodation between these two branches, undertaken *outside* the supervision of the federal courts. *See, e.g.*, *Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 56–57 (D.D.C. 2008) (noting that "negotiation and accommodation . . . most often leads to resolution of disputes between the political branches" and "strongly encourag[ing] the political branches to resume their discourse and negotiations in an effort to resolve their differences constructively"). The majority rejects this approach due to its view that this case does not involve separation of powers, Maj. Op at 69–73; however, given the expressed willingness of the parties to negotiate and my view that separation-of-powers concerns are present here, the traditional practice of further negotiation is a viable resolution.

reason for courts to pause in assessing this dispute between a President and two House committees.[12]

The second flaw in the majority's analysis lies in its assumption that third-party subpoenas of this sort pose, at best, "minimal" risk of distraction to this and future Presidents. Maj. Op. at 90. Contrary to the majority's suggestion, it is not at all difficult to conceive how standing committees exercising the authority to issue third-party subpoenas in aid of legislation might significantly burden presidents with myriad inquiries into their business, personal, and family affairs. *See Watkins*, 354 U.S. at 205 (recognizing potential for "ruthless exposure of private lives" by committees seeking information "neither desired by the Congress nor useful to it"); *cf. Jones*, 520 U.S. at 701–02 (considering the likelihood that frivolous civil litigation against the President could overly burden the Executive Branch). *Jones* relied on the relative rarity of civil litigation against past presidents to discount concerns of distraction, *see* 520 U.S. at 702, but the subjects on which

[12] This Court's recent decision in *Trump v. Vance*, 941 F.3d 631 (2d. Cir. 2019), is not to the contrary. The *Vance* panel explicitly relied on the "long-settled" amenability of presidents to judicial process, and in particular to subpoenas issued as part of a criminal prosecution, to inform its holding that the state grand jury subpoena to a third-party custodian of the President's tax returns at issue in that case was lawful. *See id.* at 640 (discussing the historical practice of ordering presidents to comply with grand jury subpoenas). Here, there is no such longstanding practice, and the subpoenas in question were not issued by a grand jury as part of a criminal investigation.

legislation might be had are vast.[13] And the risk of undue distraction from ill-conceived inquiries might be particularly acute today, in an era in which (as the Supreme Court and individual Justices have repeatedly acknowledged) digital technologies have lodged an increasingly large fraction of even our most intimate information in third-party hands. *See, e.g., Riley v. California*, 573 U.S. 373, 395 (2014) (discussing how "Internet search and browsing history" can "reveal an individual's private interests or concerns"); *Carpenter v. United States*, 138 S. Ct. 2206, 2261 (2018) (acknowledging "powerful private companies" collecting "vast quantities of data about the lives of ordinary Americans") (Alito, J., dissenting); *United States v. Jones*, 565 U.S. 400, 417 (2012) (noting that in the digital age, "people

[13] To be clear, while civil litigation against sitting presidents is unusual, presidents are routinely the subjects of congressional investigation while in office—as they must be, and for appropriate reasons. But there is no substantial historical precedent for the use of subpoena power to obtain a President's personal information from a third party in aid of legislation. And as to such subpoenas, there is no analogue for the possibility of sanctions in the civil litigation context, which the *Jones* Court relied on as "provid[ing] a significant deterrent to litigation directed at the President in his unofficial capacity for purposes of political gain or harassment." 520 U.S. at 708–09. Nor do established rules of procedure provide a mechanism for narrowing congressional subpoenas so as to avoid "embarrassment, oppression, or undue burden." Fed. R. Civ. P. 26(c)(1). Historically, in those few instances in which investigators have sought a President's personal documents, Congress has instead typically proceeded pursuant to the *political* checks inherent in the invocation of impeachment authority or the narrow authorization afforded to a special committee.

reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks") (Sotomayor, J., concurring).

To be clear, this is not to suggest that a President is immune from legislative subpoenas into personal matters—not at all. But as the D.C. Circuit recognized in *Trump v. Mazars* (while concluding that the House Committee on Oversight and Reform possessed authority to issue a legislative subpoena to President Trump's accounting firm), "separation-of-powers concerns still linger in the air" with regard to such subpoenas. *Trump v. Mazars USA, LLP*, 940 F.3d 710, 726 (D.C. Cir. 2019). And in such a circumstance, there is reason to conclude that courts must not only undertake the "arduous and delicate task" of "[a]ccommodat[ing] . . . the congressional need for particular information with the individual and personal interest in privacy," Maj. Op. at 51 (quoting *Watkins*, 354 U.S. at 198). They must also take on the equally sensitive task of ensuring that *Congress*, in seeking the President's personal information in aid of legislation, has employed "procedures which prevent the separation of power from responsibility," *Watkins*, 354 U.S. at 215 (discussing such procedures in the context of a threat to individual rights from congressional investigations), and which ensure due consideration to the separation-of-powers concerns that the Supreme Court identified and deemed

essential for *judicial* respect in *Jones*. *See Jones*, 520 U.S. at 707 (noting that "high respect that is owed to the office of the Chief Executive," while not mandating categorical immunity from suit for private conduct while in office, should "inform the conduct of the entire proceeding, including the timing and scope of discovery"); *Cheney*, 542 U.S. at 385 (noting that President's "constitutional responsibilities and status [are] factors counseling judicial deference and restraint" in conduct of litigation) (quoting *Fitzgerald*, 457 U.S. at 753 (alteration in *Cheney*)).

B

These subpoenas are deeply problematic when considered against the backdrop of these separation-of-powers concerns. In fact, this much is evident from even cursory consideration of the differences between the present case and *Mazars*, the only other precedent directly addressing a legislative subpoena served on a third party and seeking a President's personal financial information.[14] In *Mazars*, the D.C. Circuit recently upheld a legislative subpoena directed at the

[14] As noted at the outset, *see supra* page 5, the parties are unable to cite any Congress before this one in which a standing committee of the House of Representatives has issued a third-party subpoena for documents targeting a President's personal information solely in aid of legislation. The practice appears to have begun with the committees of *this* House of Representatives, which has issued such subpoenas repeatedly, thus raising the separation-of-powers concerns discussed herein.

President's accounting firm, concluding that it had properly issued in connection with the consideration of changes to laws relating to financial disclosures required of Presidents.[15] *Mazars*, 940 F.3d at 748. At the same time, the *Mazars* Court pointedly suggested that the articulation of just *any* rationale for concluding that a sitting President's personal information might inform a committee in considering potential legislation is not enough to state a valid legislative purpose:

> Just as a congressional committee could not subpoena the President's high school transcripts in service of an investigation into K-12 education, nor subpoena his medical records as part of an investigation into public health, it may not subpoena his financial information except to facilitate an investigation into *presidential* finances.

[15] Judge Rao dissented, concluding that even assuming the Committee on Oversight and Reform had a legislative purpose, it had also asserted an intent to determine "whether the President broke the law," an inquiry that "must be pursued through impeachment," and not via Congress's authority to investigate for legislative purposes. *Mazars*, 940 F.3d at 748 (Rao, J., dissenting). In the instant case, given the need for remand here, I need not now determine whether the House Committees have avowed such an intent, so I have no occasion to consider the arguments raised in Judge Rao's thorough analysis. However, it is worth noting that nowhere in the *Mazars* majority or Judge Rao's extensive discussion of historical practice, *id.* at 718–24 (majority opinion), 757–67 (Rao, J., dissenting), is there any hint of a prior occasion on which a standing or permanent select committee has used compulsory process to obtain documents targeting a President's personal information from a third party justified solely on the basis of future legislation.

Id. at 733. Key to the result in *Mazars*, then (and assuming, *arguendo*, that it was correctly decided) was the majority's conclusion that there was "no inherent constitutional flaw in laws requiring Presidents to publicly disclose financial information" and that the subpoena on its face thus properly sought relevant information "about a subject on which legislation may be had." *Id.* at 737 (quoting *Eastland*, 421 U.S. at 508).

This case is significantly different, at least as to the subpoenas issued by the Committee on Financial Services. This Committee seeks a universe of financial records sufficient to reconstruct over a decade of the President's business and personal affairs, not in connection with the consideration of legislation involving the Chief Executive, but because the President, his family, and his businesses present a "*useful case study*," according to the Committee, for an inquiry into the lending practices of *institutions such as Deutsche Bank and Capital One.*[16] District Court Doc. No. 51 at 25. More specifically, the Committee is investigating

[16] The Capital One subpoena, moreover, seeks the President's personal and business financial records starting from the exact date on which he became the Republican nominee for President—an unusual date, to be sure, for specifying the precise moment at which his banking records became a useful point of inquiry into the possibility of tightening up the regulation of lending practices with potentially "broad effects on the national economy." District Court Doc. No. 51 at 25.

"whether existing policies and programs at financial institutions are adequate to ensure the safety and soundness of lending practices and the prevention of loan fraud," *id.* at 12, as well as "industry-wide compliance with banking statutes and regulations, particularly anti-money laundering policies," *id.* at 13. The Committee urges that "[b]ecause of his prominence, much is already known about Mr. Trump, his family, and his business, and this public record establishes that they serve as a useful case study for the broader problems" under its consideration.[17] *Id.* at 25. The majority endorses this statement of legislative purpose and intimates (albeit with no evidence in the record before us) that past transactions between Deutsche Bank and the President in his pre-presidential business life may have violated banking regulations and that "no other bank would extend credit" to President Trump. Maj. Op. at 73 n.67, 74.

To be sure, legislative subpoenas issue not when all is known, but on the reasonable theory that "[a] legislative body cannot legislate wisely or effectively"

[17] The House Financial Services Committee asserts that the subpoenas' objective can be derived in part from House Resolution 206, which affirms that the House "supports efforts to close loopholes that allow corruption, terrorism, and money laundering to infiltrate our country's financial system." H.R. Res. 206, 116th Cong. (2019). House Resolution 206, however, does not materially aid in defining more clearly the reasons for the Committee's "case study" approach, as it does not call for a congressional investigation, much less one by a designated committee, nor does it reference the President and his family.

without obtaining "information respecting the conditions which the legislation is intended to affect or change." *Eastland*, 421 U.S. at 504 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927) (alteration in *Eastland*)). But the rationale proffered for these subpoenas of the House Financial Services Committee falls far short of demonstrating a clear reason why a congressional investigation aimed generally at closing regulatory loopholes in the banking system need focus on over a decade of financial information regarding this President, his family, and his business affairs.[18] Nor does the proffered rationale reveal how the broad purposes pursued by the Committee are consistent with the granular detail that these subpoenas seek. *See Watkins*, 354 U.S. at 204 (noting the troubling tendency of some legislative investigations to "probe for a depth of detail . . . removed from any basis of legislative action" and to "turn their attention to the past to collect minutiae on remote topics").

[18] Thus, the majority references the fact that Deutsche Bank "has been fined in connection with a $10 billion money laundering scheme." Maj. Op. at 73 n.67. But the record is devoid of any *claim*, much less any evidence, that this fine had anything at all to do with the President, his children, his business organizations, or his business associates, all of whom will be irreparably harmed by the majority's endorsement of the "case study" approach of the House Financial Services Committee.

This is a reason for pause. As suggested by Judge Katsas in his dissent from the denial of rehearing in banc in *Mazars*, the "uncompromising extension of *McGrain v. Daugherty*" to this new context raises the serious question whether future Presidents will be *routinely* subject to the distraction of third-party subpoenas emanating from standing committees in aid of legislation—a practice for which there is scant historical precedent, as already discussed. *Trump v. Mazars USA,* LLP, No. 19-5142, 2019 WL 5991603, at *1 (D.C. Cir. Nov. 13, 2019) (Katsas, J., dissenting from the denial of rehearing en banc). Some case study rationale (in this instance, to learn whether regulators were adequately equipped to scrutinize Deutsche Bank's and Capital One's lending practices in relation to the President before he obtained the Office of Chief Executive) will *always* be present. But the regular issuance of third-party legislative subpoenas by single committees of one House of Congress targeting a President's personal information would be something new, potentially impairing public perceptions of the legislative branch by fueling perceptions that standing committees are engaged, not in legislating, but in opposition research.[19] More relevant here, such investigative practices by

[19] Such subpoenas, moreover, will inevitably result, as here, in recourse to the courts, potentially embroiling them, as well, in political battles between committees of Congress and the President.

Congress, undertaken "more casually and less responsibly" than is the constitutional ideal, *see Rumely*, 345 U.S. at 46, pose a *serious* threat to "presidential autonomy and independence," *Mazars*, 2019 WL 5991603, at *1 (Katsas, J., dissenting from the denial of rehearing en banc). And this is a substantial concern in our constitutional scheme, which relies on the proposition that the occupant of the Office of Chief Executive is positioned to "'deal fearlessly and impartially with' [its] duties," even as Presidents may be "easily identifiable target[s]" of legal process, personally vulnerable by virtue of the "visibility of [the] office and the effect of [their] actions on countless people." *Fitzgerald*, 457 U.S. at 752–53 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979)).

To be sure, the third subpoena to Deutsche Bank, which is identical to the Deutsche Bank subpoena issued by the Committee on Financial Services, emanates from the Permanent Select Committee on Intelligence and is more closely linked to the consideration of legislation related to the Office of the Chief Executive and to this President's affairs, as a recent candidate.[20] The majority is correct,

[20] As the majority states, the Chair of the Intelligence Committee has publicly affirmed that the Committee is investigating matters related to interference by the Russian government in the U.S. political process and that the information sought from Deutsche Bank will inform legislative proposals to protect this process from foreign influence. Maj. Op at 62–64. The House Intelligence Committee, moreover, has an oversight function to which its subpoena could conceivably relate. At the same time,

moreover, that once presented with adequate evidence of legislative authorization and purposes, it is not the province of courts to inquire into legislators' motives, *see* Maj. Op. at 50–51, and that "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." *Watkins*, 354 U.S. at 200.

At the same time, as the majority also affirms, the record must provide "sufficient evidence of legislative authorization and purposes to enable meaningful judicial review." Maj. Op. at 55. And this is particularly the case when a congressional investigation even *potentially* trenches upon constitutional

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however, no House resolution appears specifically to reference this investigation, at least as it relates to efforts to seek the President's financial information, nor is such a legislative purpose easy to square with the extraordinary breadth of the Deutsche Bank subpoenas. The Chair, moreover, has also affirmed that the Committee's investigation is in furtherance of Congress's duty to "ensure that U.S. officials—including the President—are serving the national interest and, if not, are held accountable." Press Release, Permanent Select Comm. on Intelligence, Chairman Schiff Statement on House Intelligence Committee Investigation (Feb. 6, 2019), bit.ly/2UMzwTE. The Plaintiffs argue that the subpoena is thus not in furtherance of legislative purposes, but represents an effort by the Committee to itself conduct intelligence and law enforcement activities. Trump Br. at 35–36. Indeed, at oral argument, the Committees' lawyer appeared explicitly to equate these subpoenas to those issued in connection with federal criminal investigations. Tr. of Oral Arg. at 59:14–60:2. While I do not decide whether the Intelligence Committee has affirmatively avowed an improper purpose, the amorphous nature of the Committee's legislative purpose would be clarified by my proposed remand, as would the connection between this purpose and the particular disclosures that are sought.

limits on Congress's investigative power. *See Rumely*, 345 U.S. at 46 (noting that such limits should be identified by courts only after "Congress has . . . unequivocally authoriz[ed] an inquiry of dubious limits"). Indeed, in such circumstances, the Supreme Court has made clear that courts are to look to the "instructions to an investigating committee," as "embodied in the authorizing resolution," to ascertain whether the legislative assembly has "assay[ed] the relative necessity of specific disclosures." *Watkins*, 354 U.S. at 201, 206. Considered in light of the separation-of-powers concerns that persist with regard to these subpoenas, the Plaintiffs have raised a serious question on this front as well.

As to both the House Financial Services *and* Intelligence Committee subpoenas, there is an open question as to whether these subpoenas have been authorized by the House of Representatives in a manner permitting this Court to determine whether they are "in furtherance of . . . a legitimate task of the Congress." *Watkins*, 354 U.S. at 187. As the *Watkins* Court explained, "[t]he theory of a committee inquiry is that the committee members are serving as the representatives of the parent assembly in collecting information for a legislative purpose" and that "the House or Senate shall have instructed the committee

members on what they are to do with the power delegated to them." *Id.* at 200–01. The majority acknowledges *Watkins*'s requirement that an authorizing resolution "spell out [an investigating committee's] jurisdiction and purpose with sufficient particularity" as to ensure that "compulsory process is used only in furtherance of a legislative purpose." *Id.* at 201; *see* Maj. Op. at 51, 79–80. Critically, moreover, the majority itself recognizes that "[i]t is not clear whether this passage can be satisfied" with regard to these subpoenas by the principal instruction in place here, at the time the subpoenas issued: namely, the instruction "that the House gives to a committee pursuant to a House rule defining a standing committee's continuing jurisdiction." Maj. Op. at 52–53.

The majority treats House Resolution 507 as the cure-all solution to this key uncertainty, rejecting the Plaintiffs' argument that it is not properly considered on the subject of legislative authorization and purposes because it issued after the subpoenas themselves.[21] But House Resolution 507 falls far short of a specific

[21] The majority's support for this conclusion derives solely from cases discussing, in the contempt prosecution context, what evidence may be considered in evaluating whether a question posed to a witness before a congressional committee was pertinent to an investigation's inquiry. *See Watkins*, 354 U.S. at 201–02; *Rumely*, 345 U.S. at 48; *Shelton v. United States*, 327 F.2d 601, 607 (D.C. Cir. 1963); *see also* Maj. Op. at 54–58. This issue is distinct from the threshold question of whether a committee is adequately authorized, so that the majority must necessarily reason by analogy, and its conclusion is far from inevitable, particularly in the context of third-party subpoenas aimed at a President's

"authorizing resolution" issued to make clear that a designated committee is to undertake an investigation on a particular subject within its domain. To be sure, *McGrain* found sufficient a resolution that did not "in terms avow that it [was] intended to be in aid of legislation," on the theory that "the subject-matter was such that [a] presumption should be indulged" that legislating "was the real object." 273 U.S. at 177–78. But in a context like this, presenting serious constitutional concerns, courts "have adopted the policy of construing . . . resolutions . . . narrowly, in order to obviate the necessity of passing on serious constitutional questions." *Tobin*, 306 F.2d at 274–75. And this resolution on its face discusses none of the subpoenas here, nor even the work of the committees from which they issued. Instead, House Resolution 507 authorizes *any* subpoena, by any standing or permanent select committee, already issued *or in the future to be issued*, so long as it concerns the President, his family, or his business entities and organizations:

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personal information, where the President must be able efficiently (and without undue distraction) to determine what, if any, steps she should take, either to assist the inquiry or, as here, to litigate. I need not address this question, however, because, even assuming that Resolution 507 is properly considered, a serious question remains as to whether it constitutes what the majority acknowledges is required: "sufficient evidence of legislative authorization and purposes to enable meaningful judicial review." Maj. Op. at 55.

> Resolved, That the House of Representatives ratifies and affirms all current and future investigations, as well as all subpoenas previously issued or to be issued in the future, by any standing or permanent select committee of the House, pursuant to its jurisdiction as established by the Constitution of the United States and rules X and XI of the Rules of the House of Representatives, concerning or issued directly or indirectly to —
>
> (1) the President in his personal or official capacity;
>
> (2) his immediate family, business entities, or organizations;
>
> . . .
>
> (9) any third party seeking information involving, referring, or related to any individual or entity described in paragraphs (1) through (7).

H.R. Res. 507, 116th Cong. (2019); *see also* H.R. Res. 509, 116th Cong. § 3 (2019) ("House Resolution 507 is hereby adopted").

By purporting to authorize third-party subpoenas for any and all past and future investigations into the President's personal and official business, Resolution 507 would appear to run directly into the primary concern in *Watkins* that "[b]roadly drafted and loosely worded" resolutions can "leave tremendous latitude to the discretion of investigators," 354 U.S. at 201, and thus permit committees "in essence, to define [their] own authority," *id.* at 205. As *Watkins* emphasized, "[a]n essential premise" underlying the investigatory powers of a congressional committee to compel the production of documents or attendance by an individual "is that the House or Senate shall have instructed the committee

members on what they are to do with the power delegated to them." *Id.* at 201. Absent that instruction, such subpoenas defy judicial review, the *Watkins* Court understood, because "it is impossible . . . to declare that [a committee] has ranged beyond the area committed to it by its parent assembly." *Id.* at 205.

To be clear, *Watkins* addressed this problem in the context of a House proceeding implicating a private citizen's constitutional liberties, and not separation of powers. But its caution is still relevant: that "excessively broad charter[s]" to investigating committees make it difficult, if not impossible, for courts "to ascertain whether any legislative purpose justifies the disclosures sought and, if so, the importance of that information to the Congress in furtherance of its legislative function." *Id.* at 205–06. With respect, the majority thus errs in dismissing the Department of Justice's concern that the blank-check approach adopted here to authorizing third-party subpoenas seeking personal information about the President and his family represents "a failure of the House to exercise 'preliminary control of the Committee[s],'" *see* Brief of United States as Amicus Curiae at 19 (quoting *Watkins*, 354 U.S. at 203)—a failure which not only throws into question the adequacy of authorization in this case, but which also raises significant issues for the future regarding interbranch balance and the ability of

this and future Presidents to perform their duties without undue distraction, *id.* at 5–7; *see Jones*, 520 U.S. at 690 (noting that "representations made on behalf of the Executive Branch as to the potential impact" of inquiries on the Office of the President "merit our respectful and deliberate consideration").[22] In short, Resolution 507 itself, given its retrospective and prospective nature, and its purported authorization of any and all third-party committee subpoenas seeking not only official, but personal information about the President, his family, and his businesses, presents a serious question as to whether the House has discharged its

[22] The Department of Justice argues that a clear statement rule should apply to the authorization of legislative subpoenas seeking a President's personal information. Brief of United States as Amicus Curiae at 10. The majority dismisses this argument, noting that neither *Franklin v. Massachusetts*, 505 U.S. 788, nor *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991), on which the Department relies, concern congressional subpoenas, but *statutes* "claimed to limit presidential power." Maj. Op. at 89. But *Rumely* makes clear that the duty of constitutional avoidance (implemented, in part, through mechanisms such as clear statement rules) "is even more applicable" in the context of congressional investigations than in the interpretation of statutes. 345 U.S. at 46. It also affirms that "[w]henever constitutional limits upon the investigative power of Congress have to be drawn . . . , it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits." *Id.* In short, while I need not at this time reach the question, the Department's clear statement argument merits serious consideration, as does its assertion that the House's "blank-check" approach to use of compulsory process directed at the President, his family, and his businesses runs afoul of *Watkins*'s caution that "[a] measure of added care on the part of the House and the Senate in authorizing the use of compulsory process" would help "prevent the separation of power from responsibility." 354 U.S. at 215.

"responsibility . . . in the first instance, to insure that compulsory process is used only in furtherance of a legislative purpose." *Watkins*, 354 U.S. at 201.

II

These third-party legislative subpoenas thus raise serious questions on the merits, implicating substantial separation-of-powers concerns. In such a context, *Rumely*'s caution kicks in, which "counsel[s] abstention from adjudication unless no choice is left." 345 U.S. at 46. The majority disagrees, asserting that even assuming serious questions regarding the separation of powers have been raised, affirmance here is still required because our "serious questions" approach to whether a preliminary injunction should issue is unavailable in the context of these third-party legislative subpoenas.[23] I have already outlined my disagreement

[23] The majority also argues that any serious questions presented here "are properly rejected at this stage of the litigation" because they "involve solely issues of law." Maj. Op. at 101. I disagree. As an initial matter, our case law has recognized that, in appropriate circumstances, purely legal issues can present sufficiently serious questions to warrant a preliminary injunction. *See, e.g.*, *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326, 1339–40 (2d Cir. 1993) (finding sufficiently serious questions going to the merits based on the novel questions of law presented by plaintiffs' claims), *judgment vacated as moot by Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993); *see also, e.g.*, 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.3 (3d ed.) (Westlaw) (database updated August 2019) (referring to "the existence of a factual conflict, *or* of difficult questions of law," as components of the merits showing in the preliminary injunction context (emphasis added)). Moreover, the majority itself is remanding for some development of the factual record. As set forth herein, I conclude that the majority's limited remand is inadequate, and that the record

with the majority's determination that "this case does not concern separation of powers," Maj. Op. at 89, and that the questions raised, even if "serious in at least some sense, lack merit," *id*. at 101. I also disagree as to the supposed unavailability of our traditional preliminary injunction approach. Indeed, I conclude, with respect, that the majority badly errs in deciding that this approach is unavailable in the sensitive context of challenges to congressional subpoenas.

As the Supreme Court made clear in *Winter v. Natural Resources Defense Council, Inc.*, "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." 555 U.S. 7, 20 (2008). The majority acknowledges that, as to the required merits showing, we have repeatedly said in this Circuit that "district courts may grant a preliminary injunction where a plaintiff . . . meets either of two standards: '(a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation.'" Maj. Op. at 11–12 (quoting *Kelly v. Honeywell Int'l, Inc.*, 933 F.3d 173, 184 (2d Cir. 2019)). When a plaintiff has demonstrated only "serious

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needs further factual development *before* the legal issues here can be adequately assessed.

questions" as to the merits, however, the plaintiff has a higher burden as to the third element: he must show that the balance of hardships tips *decidedly* in his favor. *See Kelly*, 933 F.3d at 184; Maj. Op. at 11–12. The majority also acknowledges that we have reaffirmed our traditional approach in the wake of the Supreme Court's decision in *Winter*. *See Citigroup*, 598 F.3d at 38 ("hold[ing] that our venerable standard for assessing a movant's probability of success on the merits remains valid").[24] Irreparable harm is not in question in this case, moreover, because, *inter alia*, the Plaintiffs have an interest in keeping their banking records private from Congress and neither House committee will commit to treating any portion of the voluminous personal and business records that they seek as confidential. J.A. at 122–23. In such circumstances, the majority and I are in agreement that compliance with these subpoenas will cause irreparable

[24] *Citigroup* carefully assessed *Winter*'s import and concluded that our traditional approach is wholly consistent with that precedent and is properly retained, given "[t]he value of this circuit's approach to assessing the merits of a claim at the preliminary injunction stage," which "lies in its flexibility in the face of varying factual scenarios and the greater uncertainties inherent at the outset of particularly complex litigation." *Citigroup*, 598 F.3d at 35. Moreover, *Citigroup* made clear that, under either the "serious questions" or the "likelihood of success" formulation, courts in this Circuit consider all four elements articulated by the Supreme Court in *Winter*. *See id.* at 34, 38 (citing *Winter*, 555 U.S. at 20).

harm to the President, his family, his businesses, and his business associates. Maj. Op. at 13–14.

The majority asserts that a preliminary injunction is nonetheless unavailable based on our "serious questions" formulation of the merits inquiry because of the so-called "government action exception" to this formulation, as expressed by this Court's decision in *Plaza Health Laboratories, Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989). I disagree. To be sure, our case law has recognized three narrowly defined situations in which a movant *cannot* obtain a preliminary injunction under the "serious questions" formulation. *See id.*; *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 33–34 (2d Cir. 1995); *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985). But *Plaza Health*, on which the majority relies, is not applicable.

To explain my conclusion requires a step back from our traditional formulation, to set forth *why* this Circuit was correct to reaffirm our serious question approach—and, indeed, why we err today in expanding a formulaic exception to it. While sometimes styled in our case law as its own "standard," *see, e.g.*, *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 110 (2d Cir. 2014), the "sufficiently serious questions, plus a balance of hardships

tipping decidedly in favor of the moving party" approach is not actually a *separate* test at all, but rather a way of articulating one point on a single sliding scale that balances likelihood of success against hardship in determining whether a preliminary injunction should issue. *See* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.3 (3d ed.) (Westlaw) (database updated August 2019) (hereinafter "Wright & Miller") (referring to the Second Circuit's "serious questions" formulation as "[p]robably the most often-quoted statement" of the sliding scale principle). Likelihood of success, while of "particular importance" in this inquiry, is not determinative, but must be considered and balanced with the relative hardship *each* side is likely to face from the determination whether an injunction issues, with the so-called "serious questions" standard emerging as simply one point on the sliding scale at which an injunction may be warranted.[25] *Id.* This flexible approach is particularly well-suited to the preliminary injunction context, where courts act pursuant to

[25] As Judge Frank articulated decades ago, when "the balance of hardships tips decidedly toward plaintiff," it should "ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953).

equitable principles.[26] *See, e.g.*, *Holland v. Florida*, 560 U.S. 631, 649–50 (2010) ("In emphasizing the need for flexibility . . . we have followed a tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity." (internal quotation marks, alterations, and citations omitted)).

Against this backdrop, our so-called "exceptions" to the serious questions formulation are best understood not in prescriptive terms, but as the articulation of principles guiding the application of the sliding scale calculus in particular scenarios. As relevant here, the *Plaza Health* "exception" thus reflects a considered judgment, drawing on equitable ideas, that "[w]here the moving party seeks to stay government action taken in the public interest pursuant to a statutory or regulatory scheme," the serious questions formulation should be generally unavailable precisely because the balance of hardships is so unlikely to tip

[26] Indeed, confining preliminary injunctions to circumstances in which a plaintiff has shown there is no difficult question of law that could ultimately go against him would "deprive the remedy of much of its utility." Wright & Miller § 2948.3; *see also Citigroup*, 598 F.3d at 35 (noting that "[p]reliminary injunctions should not be mechanically confined to cases that are simple or easy," as happens when the likelihood-of-success standard is formulaically employed).

decidedly in that party's favor. *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995) (quoting *Plaza Health*, 878 F.2d at 580). In issuing a preliminary injunction based on the conclusion that it *does*, a court impermissibly "substitute[s] its own determination of the public interest" for the one reflected in the statutory or regulatory scheme. *Id.* at 132.

Accordingly, where government action has been fairly characterized as taken pursuant to a statutory or regulatory scheme, we have generally applied the likelihood-of-success standard. *See Citigroup*, 598 F.3d at 35 n.4 (articulating the exception as limited to situations in which "a moving party seeks to stay government action taken in the public interest pursuant to a statutory or regulatory scheme"). And where movants have sought preliminarily to enjoin government action pursuant to a *federal* statutory or regulatory scheme, we have explained that in the context of such action, "developed through presumptively reasoned democratic processes" and resulting from "the full play of the democratic process involving both the legislative and executive branches," it is difficult to envision *any* circumstance in which a movant could demonstrate that the balance of hardships tips decidedly in his favor. *Able*, 44 F.3d at 131.

The majority argues that the *Plaza Health* exception sweeps more broadly, relying for this proposition on cases involving action taken by state and local governments.[27] *See* Maj. Op. at 15–16. While certain of these cases did not analyze why the *Plaza Health* exception was applicable, and appear simply to have assumed that the government action in question was taken pursuant to a statutory or regulatory scheme, *see, e.g.*, *Cent. Rabbinical Cong.*, 763 F.3d at 192; *Monserrate*, 599 F.3d at 154, those that did engage with this analysis explicitly identified a statutory or regulatory scheme and accordingly concluded that the presumptive

[27] *See, e.g.*, *Cent. Rabbinical Cong. of U.S. & Canada v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 192 (2d Cir. 2014) (likelihood-of-success standard applied to preliminary injunction sought by religious organizations against a city ordinance based on the court's conclusion, without further analysis, that the ordinance constituted "government action taken in the public interest pursuant to a statutory or regulatory scheme" (citation omitted)); *Monserrate v. N.Y. State Senate*, 599 F.3d 148, 154 (2d Cir. 2010) (same, as to a preliminary injunction seeking to unwind the expulsion of a state senator); *NAACP v. Town of East Haven*, 70 F.3d 219, 223 (2d Cir. 1995) (likelihood-of-success standard applied to a preliminary injunction seeking to enjoin a town from hiring police officers or firefighters, based on the court's conclusion that the town acted "in the public interest" and "pursuant to established municipal regulations and state civil service laws"); *N.Y. Urban League, Inc. v. State of New York*, 71 F.3d 1031, 1036 n.7 (2d Cir. 1995) (applying likelihood-of-success standard to a preliminary injunction seeking to bar transit authority from implementing a proposed fare increase on the basis that the action in question "was to be implemented in accordance with the special powers" of the transit authority board as set forth in a state statute); *see also Molloy v. Metro. Transp. Auth.*, 94 F.3d 808, 811 (2d Cir. 1996) (relying on *New York Urban League* in applying the likelihood-of-success standard to a preliminary injunction sought against transit authority's implementation of a staff reduction plan).

public interest weighed against the movant, *see, e.g.*, *NAACP*, 70 F.3d at 223; *see also, e.g.*, *Otoe-Missouria Tribe of Indians*, 769 F.3d at 110 (determining that New York's ban on certain loans was "a paradigmatic example of governmental action taken in the public interest, one that vindicated proven policies implemented through legislation or regulations" and therefore applying the likelihood-of-success standard (internal quotation marks and citations omitted)).[28]

Where, by contrast, government action has *not* been taken pursuant to a specific statutory or regulatory scheme, the narrow *Plaza Health* exception has *not* been applied, precisely because the public interest has not been presumed to rest with a single party. This explains why this Court recently upheld the denial of a preliminary injunction sought by President Trump to restrain the enforcement of a grand jury subpoena issued by the New York County District Attorney without applying the *Plaza Health* exception in determining the applicable preliminary injunction standard. *See Trump v. Vance*, 941 F.3d 631, 639–40 (2d Cir. 2019). It explains our decision in *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1993), *judgment vacated as moot by Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 918

[28] Such cases may also exhibit an especial hesitancy on the part of federal courts to substitute their own view of the public interest for that reached by local and state governments in light of principles of comity and federalism.

(1993), in which we applied the serious questions standard to an injunction sought against the actions of the Immigration and Naturalization Service only after rejecting the government's argument that the action was taken "pursuant to Congress'[s] broad grant of authority in the [Immigration and Nationality Act]," and reasoning that "in litigation such as is presented herein, no party has an exclusive claim on the public interest," *id; see also, e.g.*, *Patton v. Dole*, 806 F.2d 24, 29–30 (2d Cir. 1986); *Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 836 F.2d 760, 763 (2d Cir. 1988); *Mitchell v. Cuomo*, 748 F.2d 804, 806–07 (2d Cir. 1984); *cf. Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980) (rejecting the Census Bureau's argument that "the public interest [rests] solely with it").

The government action at issue in the instant case plainly falls outside the current confines of the narrow *Plaza Health* exception. Here, far from a situation in which a movant seeks to enjoin action that is the product of "the full play of the democratic process," *Able*, 44 F.3d at 131, these legislative subpoenas, with due respect, do *not* constitute governmental action pursuant to a statutory or regulatory scheme and do not reflect the presumptively public-interested actions of both the legislative and executive branches. Rather, each subpoena is the

product of a sub-component of a single chamber of one branch of the federal government and, critically, implicates the interests of another branch.[29]

The majority's approach, which concludes that, because the Committees act pursuant to powers under the Constitution, such action should "[s]urely . . . not" be evaluated under a "less rigorous standard" than that "applied to plaintiffs seeking to preliminary enjoin state and local units of government" in cases such as *Central Rabbinical Congress* and *Monserrate*, Maj. Op. at 20–21, is misguided for two reasons. First, by deeming the "serious questions" standard to be less rigorous, the majority ignores the fact that the *ultimate* burden is equivalent under both standards.[30] More fundamentally, the majority errs by categorically extending

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[29] Indeed, precisely because subpoenas of this sort implicate separation of powers so that neither Congress *nor* the Plaintiffs can be taken to represent the public interest with regard to their enforcement, the D.C. Circuit in *Mazars* declined to determine, in an analogous context, what deference it owed to the congressional subpoena reviewed in that case. *Mazars*, 940 F.3d at 726.

[30] As is the nature of a sliding scale, the variables move in tandem and the Plaintiffs' ultimate burden is equivalent either way. The majority perceives tension between this Court's observation in *Citigroup* that the "overall burden" of the serious questions standard is "no lighter than the one it bears under the 'likelihood of success' standard," *Citigroup*, 598 F.3d at 35, and language in our other opinions that refers to the likelihood-of-success standard as "more rigorous," *see, e.g.*, *Cent. Rabbinical Cong.*, 763 F.3d at 192. *See* Maj. Op. at 14 n.22. I disagree. Because one standard requires a more demanding showing as to the merits and a correspondingly less demanding showing as to hardship, while the other standard requires the reverse, the overall burdens are clearly equivalent. Deeming the likelihood-of-success standard to be "more rigorous" refers only to its increased rigor as to the required merits showing. It was for this reason,

the *Plaza Health* exception to a situation in which "no party has an exclusive claim on the public interest," *Time Warner Cable of N.Y.C. v. Bloomberg L.P.*, 118 F.3d 917, 923 (2d Cir. 1997) (quoting *Haitian Centers*, 969 F.2d at 1339), when the so-called "government action exception" is premised entirely on the assumption that the public interest weighs decidedly *against* the movant.

To be clear, preliminary injunctions constitute an extraordinary form of relief and should not issue lightly. *See, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quoting Wright & Miller § 2948). The majority's expansion of our so-called "government action exception" into the delicate arena of congressional investigations, however, is unwise, precisely because this is a context in which flexible application of equitable principles is vital. Historically, federal courts have undertaken some of their most difficult assignments in the context of reviewing the actions of congressional committees. The Supreme Court has thus been required to take on the "arduous and delicate task" of "[a]ccommodat[ing] . . . the congressional need for particular information with the

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among others, that we concluded in *Citigroup* that the Supreme Court's decision in *Winter* revealed "no command . . . that would foreclose the application of our established 'serious questions' standard as a means of assessing a movant's likelihood of success on the merits" against the other components required to obtain preliminary relief. 598 F.3d at 38.

individual and personal interest in privacy." *Watkins*, 354 U.S. at 198. It has been called upon to address the "[g]rave constitutional questions" presented when "the power of Congress to investigate" appears to encroach on the limits on that power imposed by the Bill of Rights and, in particular, the First Amendment. *Rumely*, 345 U.S. at 44, 48. Disputes between congressional committees and Presidents arising from subpoenas, as here, also not uncommonly require courts to "search for accommodation between the two branches"—a task for which this Circuit's flexible approach to making the difficult judgment whether a preliminary injunction should issue is particularly well-suited. *United States v. Am. Tel. & Tel. Co* ("*AT&T II*"), 567 F.2d 121, 131 (D.C. Cir. 1977).

In short, we should not deprive ourselves of our traditional approach in such a sensitive context. As we affirmed in *Citigroup*, "[r]equiring in every case a showing that ultimate success on the merits is more likely than not is 'unacceptable as a general rule,'" and also "deprive[s] the remedy of much of its utility." 598 F.3d at 35–36 (quoting Wright & Miller § 2948.3). Because this case is not squarely covered by *Plaza Health* or any other previously-articulated "exception," I conclude we are bound to (and should) undertake our usual approach: namely, to consider the Plaintiffs' showing as to the merits, balance of

hardships (merged here with the public interest inquiry, *see Nken v. Holder*, 556 U.S. 418, 435 (2009)), and irreparable harm and determine whether an injunction is warranted under *either* the likelihood of success *or* serious questions standard. As set forth already, moreover, these subpoenas do, in fact, present serious questions implicating not only the investigative authority of these two House committees, but the separation of powers between Congress and the Presidency.

* * *

Having determined that Plaintiffs have raised serious questions as to the merits, in the usual case, the next step would be to assess the balance of hardships. But this leads to my final point of departure from the majority. The majority orders immediate compliance with these subpoenas save for a "few documents that should be excluded" pursuant to its call for a restricted culling of certain records assembled under specific subpoena categories. Maj. Op. at 86. In contrast, I would not remand for the limited culling ordered by the majority, but would instead remand in full, directing that the district court assist in the development of the record regarding the legislative purposes, pertinence, privacy, and separation-of-powers issues at stake in this case.

I would request the district court on remand promptly to implement a procedure by which the Plaintiffs identify on privacy or pertinency grounds specific portions of the material assembled in response to these subpoenas for nondisclosure. Like the majority, I would then provide counsel for the Committees with an opportunity to object, but I would also require counsel, provided with a general description of such material, to articulate clearly the legislative purpose that disclosure serves and to specify how the material sought is pertinent to that purpose. Even assuming, *arguendo*, that the Committees act pursuant to adequate authorization from the House as a whole, serious questions persist as to the ends the Committees are pursuing and whether these ends are adequate to justify the sought-after disclosures.[31] A fuller record would permit a more informed calculus regarding balance of hardships and would further clarify the stakes as to the serious questions that the Plaintiffs have already raised. This full remand is superior to the majority's approach for at least three reasons.

[31] As to the "case study" rationale proffered by the House Financial Services Committee, for instance, if that Committee is unable more clearly to articulate the pertinence of its subpoenas to the legislative purposes it pursues, *see Watkins*, 354 U.S. at 214–15, the balance of hardships may well lie with the Plaintiffs, who will suffer irreparable harm from the disclosure of their private and business affairs.

First and most fundamentally, remand is necessary here because the present record does not permit a full assessment of either the serious questions raised by these novel subpoenas or the balance of hardships with regard to specific disclosures. The present record is wholly insufficient to support the conclusion that the voluminous material sought pursuant to these subpoenas should at this time be produced. Serious questions arising from the lack of historical precedent for these subpoenas, their questionable authorization, their legislative purposes, and the pertinence of particular disclosures remain. The record as to hardship, moreover, is sparse, and does not reflect *either* parties' concerns as to the disclosure or nondisclosure of particular categories of information sought by these extraordinarily broad subpoenas. The majority disagrees on both counts, concluding that while the questions here may be "serious," they are without merit, Maj. Op. at 100–01, and that even if the balance of hardships tips in Plaintiffs' favor, it does not do so "decidedly," Maj. Op. at 102. For the reasons already expressed, however, I cannot join in this assessment.

Next (and notably), a broader remand is necessary here, even taking the majority on its own terms—even assuming (incorrectly) that the district court's judgment could be substantially affirmed on the present record. This is because

the majority's remand is inadequate to address the privacy and pertinency concerns that the majority *itself* identifies and deems important. As to sensitive personal information and an unspecified category of "nonpertinent" material, the majority concludes that the Plaintiffs should be afforded an opportunity to object to disclosure on privacy and pertinency grounds. It notes that "[t]he Committees have advanced no reason why the legislative purposes they are pursuing require disclosure" of "payment for anyone's medical expenses," for instance, and the majority thus forbids it. Maj. Op. at 84. But by providing the Plaintiffs with an opportunity to object only as to limited, specific categories of information sought pursuant to these subpoenas, the majority creates the very potential for unwarranted disclosure of sensitive information that it purports to disallow. The majority thus orders compliance with, for instance, the Deutsche Bank subpoena's demand for "any document related to any domestic or international transfer of funds in the amount of $10,000 or more," including any "check," J.A. at 38, providing *no* opportunity for Plaintiffs to object that the sought-after material is sensitive and related to no legislative purpose at all.

Perhaps there is no material responsive to this category that would trigger Rule 26(c)(1)'s protections against "embarrassment, oppression, or undue burden"

in a routine civil case. Fed. R. Civ. P. 26(c)(1). Perhaps such material *does* exist. We cannot know until the documents are assembled and objections are made. The privacy and pertinency concerns that the majority *purports* to address simply *cannot* be addressed in the abstract. And by declining a full remand to permit a record to be made, the majority affords *less* protection against the unwarranted disclosure of personal information regarding a sitting President and his family than would be afforded to any litigant in a civil case.

Finally, I also disagree with the majority's implicit assessment that the Plaintiffs have demonstrated no stake in the privacy of their business-related information that merits further review. Indeed, to the extent that the majority *does* show a reasonable concern for the needless disclosure of Plaintiffs' private and nonpertinent information, this concern does not generally extend to private *business* information at all, even though such information may implicate the same issues of privacy and (non)pertinence. To be sure, the majority is correct that Congress must have the ability to investigate businesses (even closely-held ones) in aid of legislation. And such investigations, serving a public good, will sometimes cause competitive harm.[32] But particularly in light of the very broad

[32] Federal Rule of Civil Procedure 26(c)(1)(G) permits a district court to issue

disclosure sought by these subpoenas (which, with regard to many transactions, could require the production of information from both this year and from *decades* ago), the majority has proffered no clear reason for denying the Plaintiffs an opportunity to object more generally to the disclosure of such material.

The majority argues that any hardship from business disclosures is offset in this case by the fact that Presidents already "expose for public scrutiny a considerable amount of personal financial information pursuant to the financial disclosure requirement of the Ethics in Government Act, 5 U.S.C. app. §§ 101-111." Maj. Op. at 102. But this is beside the point—or perhaps makes the point that the majority's approach is problematic.

Public disclosures made pursuant to the Ethics in Government Act are required by law, pursuant to a statute that has run the gantlet of bicameralism and presentment. In making disclosures pursuant to this Act, a President complies with a statute that presumptively reflects a democratically enacted consensus

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protective orders to prevent public disclosure of "confidential . . . commercial information," a protection not afforded or offered to the Plaintiffs by the Committees here. The majority does not include these competitive harms as "irreparable injuries" in its analysis, restricting its focus only to "loss of privacy." *See* Maj. Op. at 101–02. The irreversible nature of the competitive harm risked by immediate and unconditional disclosure, and the lack of safeguards common to typical discovery procedures in civil litigation, further buttress my view that these subpoenas, as drafted, raise serious questions which a remand would aid in resolving.

regarding the financial disclosures that a Chief Executive should be required to make. These House subpoenas, by contrast, require "considerably more financial information," as the majority concedes, but themselves raise substantial questions as to whether they are supported by "sufficient evidence of legislative authorization and purposes to enable meaningful judicial review." Maj. Op. at 55, 102. And as Judge Katsas suggested in dissent from the denial of rehearing in banc in *Mazars*, the scope of required disclosure "is determined . . . by the whim of Congress—the President's constitutional rival for political power—or even, as in this case, by one committee of one House of Congress." *Mazars*, 2019 WL 5991603, at *1 (Katsas, J., dissenting from the denial of rehearing en banc). In such circumstances, and taking the majority's analysis on its own terms, it is not clear why the majority limits its remand to the particular categories of information that it has selected, as opposed to permitting a more general opportunity to object regarding nonpertinent business information and the irreparable injury that will attend its disclosure.

For all the reasons that I have laid out here, this matter should be returned to the district court. The remand that I have outlined would clarify the issues at stake so that a reasoned determination could be made as to whether serious

questions persist, and where the balance of hardships lies. Indeed, given the lack of historical precedent for these subpoenas; their extraordinary breadth; and the persistent questions here regarding authorization, legislative purposes, and pertinence, a remand for development of the record with regard to specific categories of information is far preferable to the majority's approach.

Such a procedure would also encourage negotiation between the parties and potentially narrow the scope of this dispute. Because I conclude, contrary to the majority, that this case implicates the Supreme Court's caution to "tread warily" in matters pitting the power of Congress to investigate against other substantial constitutional concerns, *Rumely*, 345 U.S. at 46, and because the "serious questions" delineated above sound in separation of powers, *see Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 466 (1989) (noting that the Supreme Court's "reluctance to decide constitutional issues is especially great where . . . they concern the relative powers of coordinate branches of government"), this matter falls within a range of cases in which we *should* attempt, if possible, to "avoid a resolution that might disturb the balance of power between the two branches," *AT&T II*, 567 F.2d at 123. Perhaps that is not possible here. But as the D.C. Circuit has recognized in the past, congressional committees and the Chief Executive "have a long history of

settlement of disputes that seemed irreconcilable" and such resolutions, where possible, are to be preferred, since "[a] court decision selects a victor, and tends thereafter to tilt the scales." *AT&T I*, 551 F.2d at 394; *see also id.* at 391 (noting possibility of "better balance . . . in the constitutional sense" from "political struggle and compromise," rather than court decision); *Rumely*, 345 U.S. at 45–46 (noting that a "[c]ourt's duty to avoid a constitutional issue, if possible, applies not merely to legislation . . . but also to congressional action by way of resolution"—indeed, *most especially* in this context).

Accordingly, I would withhold decision as to balance of hardships and remand to permit the district court and the parties the opportunity to provide this Court with an adequate record regarding the legislative purpose, pertinence, privacy and separation of powers issues in this case. Such a procedure, as in *AT&T I*, 551 F.2d at 394–95, and *AT&T II*, 567 F.2d at 128–32, could narrow the scope of the present dispute. But it is required in any event, because the record simply does not support the majority's decision to order immediate compliance with these subpoenas, but for a "few documents," Maj. Op. at 85, falling within its preselected categories. To be clear, I reach this resolution guided by the Supreme Court's admonition in *Rumely* that the outer reaches of Congress's investigative

power are to be identified reluctantly, and only after Congress "has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits." 345 U.S. at 46. Serious questions persist with regard to these subpoenas—questions demanding close review lest such novel subpoenas prove a threat to presidential autonomy not only now but in the future, and "to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Fitzgerald*, 457 U.S. at 753. Once the parties have provided this Court with the information that I would seek on remand, we would at that point have a sufficient record on which to make a prompt and reasoned determination as to where the balance of hardships lies and whether the Plaintiffs, having raised serious questions on the merits, are entitled to preliminary relief.