No. _____

In the Supreme Court of the United States

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

Applicants,

v.

COMMITTEE ON WAYS AND MEANS, UNITED STATES HOUSE OF REPRESENTATIVES; UNITED STATES DEPARTMENT OF THE TREASURY; INTERNAL REVENUE SERVICE; CHARLES PAUL RETTIG, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE INTERNAL REVENUE SERVICE; JANET L. YELLEN, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY,

Respondents.

ON APPLICATION FOR STAY
TO THE U.S. COURT OF APPEALS, D.C. CIRCUIT

EMERGENCY APPLICATION FOR STAY OF MANDATE PENDING THE FILING AND DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Applicants are Donald J. Trump; Donald J. Trump Revocable Trust; DJT Holdings LLC; DJT Holdings Managing Member, LLC; DTTM Operations LLC; DTTM Operations Managing Member Corp.; LFB Acquisition LLC; LFB Acquisition Member Corp.; and Lamington Farm Club, LLC. Applicants were intervenor-defendants in the district court and appellants in the court of appeals.

Respondents are the Committee on Ways and Means, United States House of Representatives; United States Department of the Treasury; Internal Revenue Service; Charles Paul Rettig, in his official capacity as Commissioner of the Internal Revenue Service; and Janet L. Yellen, in her official capacity as Secretary of the United States Department of the Treasury. The Committee was the plaintiff in the district court and appellee in the court of appeals. The Government respondents were defendants in the district court and appellees in the court of appeals.

The proceedings below were:

1. *Committee on Ways and Means, United States House of Representatives v. United States Department of the Treasury*, No. 21-5289 (D.C. Cir.) – Judgment entered August 9, 2022. Applicants moved for a stay pending certiorari on August 18, 2022, which the Court denied on October 27, 2022.

2. *Committee on Ways and Means, United States House of Representatives v. United States Department of the Treasury*, No. 19-1974 (D.D.C.) – Judgment entered December 14, 2021.

There are no other related proceedings.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicants represent that they do not have any parent entities or publicly-held companies with a 10% or greater ownership interest in them.

Respectfully submitted,

/s/ Cameron T. Norris

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Dated: October 31, 2022

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE D.C. CIRCUIT:

This case raises important questions about the separation of powers that will affect every future President. The only way to preserve these certiorari-worthy questions and to avoid causing Applicants irreparable harm is for this Court to grant an administrative stay by Wednesday, November 2, and then to stay the issuance of the mandate pending the filing and disposition of a petition for writ of certiorari. If the Court wishes, it could alternatively construe this application as a petition for certiorari and grant review.

The House Committee on Ways & Means, through its chairman, Rep. Richard Neal, has requested from the IRS six years of tax returns and related files for President Trump and eight of his business entities. As justification for seeking these papers—and these papers alone—the Committee has offered only an interest in studying the staffing and funding of the IRS's audit process for Presidents and Vice Presidents. This case is about whether that bare statement alone—as a matter of law, and even in the face of extensive evidence of pretext—satisfies the test this Court announced in *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020).

The Committee's purpose in requesting President Trump's tax returns has nothing to do with funding or staffing issues at the IRS and everything to do with releasing the President's tax information to the public. Business entities aren't even subject to the program of the Committee's professed concern, nor were the requested individual returns from years outside President Trump's tenure in office. And although every President and Vice President since 1977 has been subject to the

Presidential Audit Program, *see* App.3, the Committee sought records related to a single individual. On top of this objective mismatch, Chairman Neal and Speaker Pelosi's on-the-record statements, as well as statements by other officials involved in making the request, evince quite a different purpose: exposing President Trump's tax information to the public for the sake of exposure.

A panel of the D.C. Circuit, however, held that all evidence of pretext—which the district court called "impressive" and "troubling"—is insulated from review. The panel concluded that the bare statement of purpose on the face of the request satisfies the test announced in *Mazars*, despite extensive evidence that this stated purpose was only a pretext. This error will hamstring the President in disputes over any future demands for information. If allowed to stand, it will undermine the separation of powers and render the office of the Presidency vulnerable to invasive information demands from political opponents in the legislative branch. Review is of the utmost importance, and the Court should preserve its ability to grant it—not just for one "particular President," but also for "the Presidency itself." *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018).

The Court will only have the chance to *consider* granting review if it stays the mandate of the D.C. Circuit. The Government has said it will release the requested information to the Committee without delay when the mandate issues, currently scheduled for Thursday, November 3. Applicants sought a stay below, while the Committee sought immediate issuance of the mandate to moot the case on the spot. The court of appeals denied both motions. The Committee now opposes a stay of any

length, including an administrative stay. The Government opposes a stay pending certiorari but takes no position on an administrative stay.

OPINION BELOW

The district court's opinion is reported at 575 F. Supp. 3d 53, and it is reproduced at Appendix ("App.") 37-81. The D.C. Circuit's opinion was entered on August 9, 2022. It is reproduced at App.1-33 and is reported at 45 F.4th 324. The D.C. Circuit's order denying rehearing en banc is available at 2022 WL 15524456, and it is reproduced at App.36.

JURISDICTION

The D.C. Circuit issued its opinion on August 9, 2022. On August 11, 2022, the Committee moved for immediate issuance of the mandate and for expedited treatment of the motion. On August 18, 2022, Applicants filed a timely petition for rehearing and rehearing en banc. That same day, Applicants also moved the D.C. Circuit to stay its mandate pending the filing and disposition of a petition for writ of certiorari. On October 27, 2022, the D.C. Circuit denied Applicants' motion to stay the mandate and the Committee's motion to expedite the mandate. App.35. It also denied Applicants' petition for rehearing en banc. App.36. Without a stay from this Court, the mandate will issue on November 3, 2022. *See* Fed. R. App. 41(b). The Court has jurisdiction to stay issuance of the D.C. Circuit's mandate pending the filing and disposition of a petition for writ of certiorari. *See* 28 U.S.C. §2101(f). The Court has jurisdiction for a writ of certiorari under 28 U.S.C. §1254(1).

BACKGROUND AND PROCEDURAL HISTORY

Democrats made a national issue out of President Trump's tax returns in the 2016 election. And for the two years before he became Chairman of the Ways & Means Committee, then-Ranking Member Neal sought to expose President Trump's tax returns to the public, without offering any legislative purpose. To the contrary, he openly stated that he wanted to disclose the tax returns to enable "the media to sift and sort" them and so the public could see "whether he uses tax shelters, loopholes, or other special-interest provisions to his advantage." App.102-03 ¶¶37-41. In a published report, Neal wrote that "the public" needed to see President Trump's returns to get "the clearest picture of ... how much he earns, how much tax he pays, his sources of income ... , whether he makes charitable contributions, and whether he uses tax shelters, loopholes, or other special-interest provisions." App.103 ¶41. Minority Leader Pelosi called it "one of the first things" the Democratic majority would do, and Neal affirmed that Democrats would "force" disclosure, adding that "Democrats ha[d] voted again and again to *release* those documents." App.109 ¶¶75-76 (emphasis added).

After Democrats took control of the House in 2019, Chairman Neal did not disavow his stated purpose. But he warned his Democratic colleagues not to "step on [their] tongue[s]" to avoid undermining their case. App.111 ¶88. At the same time, Speaker Pelosi—who approved Chairman Neal's ultimate request—said, "I think overwhelmingly the public wants to see the President's tax returns.... They want to know the truth, they want to know the facts and that he has nothing to hide." App.110 ¶81. Speaker Pelosi's spokeswoman later told the press that "all roads le[d] back" to

President Trump's tax returns, which would show his "improprieties," "potential tax evasion," and "violations of the Constitution." App.113 ¶96.

In April 2019, Chairman Neal formally requested the tax returns of President Trump and eight Trump business entities, along with audit information and IRS administrative files, for tax years 2013 to 2018. *See* 26 U.S.C. §6103(f); App.118 ¶123. Chairman Neal claimed he needed these materials to study "the extent to which the IRS audits and enforces the Federal tax laws against a President" under the "mandatory examination" process specified in the "Internal Revenue Manual." App.118-19 ¶124. But Committee-Member Rep. Pascrell explained that Neal's rationale was "chosen according to counsel" as "the best way" to "make sure we got the tax returns." App.120 ¶130. And Chairman Neal himself elsewhere acknowledged that he had strategically "constructed" the best possible "case" to "stand[] up" in court. App.119 ¶¶127-28. Indeed, in three years of demanding disclosure of President Trump's tax returns up to that point, he had never once offered the IRS's mandatory audit process as a rationale. App.120 ¶131.

As a supposed attempt to study the presidential audit program, the Committee's request was far off target. President Trump was not subject to that program for half of the tax years in the initial request, and none of the business entities in the request ever have been. The request also purported to study a program that has covered every President and Vice President since 1977 by requesting information related to a single individual. It called for files from audits that were still

ongoing. And it called for the underlying tax-return information, which has no relevance to a legislative study of the auditing process. App.137 ¶218.

Meanwhile, Committee members, including Chairman Neal, repeatedly contradicted their request's stated purpose even after it was announced. They continued to describe the request's purpose in terms of exposing President Trump's tax information to "the public," App.123-30 ¶¶143-87, but a proper request would only allow the Committee to review the information while "sitting in closed executive session," 26 U.S.C. §6103(f). To the extent they discussed the IRS's audit process, they did so in law-enforcement terms, expressing their desire to audit President Trump's returns themselves and to uncover evidence of illegal conduct. For example, in a press release issued on the same day as the request, Chairman Neal said that the request would help the Committee determine whether President Trump is "complying with" the tax laws. App.123 ¶143. And throughout 2019 and 2020, Rep. Pascrell and other Committee Members continued to say that the Committee needed to see Trump's tax information to see "how far his crimes go" and otherwise expose his tax information to the American public. App.124-30 ¶¶147-187.

The Committee's improper purpose was not lost on the Executive Branch. Treasury rejected the Committee's request as having illegitimate purposes in May 2019. It noted that the request was "the culmination of a long-running, well-documented effort to expose the President's tax returns for the sake of exposure." App.137 ¶217. Treasury highlighted the "widespread, contemporaneous acknowledgement by the Committee Chairman and other key Members that the

actual objective is to use the IRS as a means to expose the tax returns of a political opponent." *Id.* Collecting over forty pages of public statements, Treasury told Chairman Neal that his stated purpose was "at odds with what you and many others have repeatedly said is the request's intent: to publicly release the President's tax returns." App.137 ¶217.

Treasury also highlighted the "objective" mismatch between the Committee's audit rationale and "the terms of [its] request," including request for files from ongoing audits and the focus on a single President even though most of the requested categories of information have "never been publicly released with respect to any President." App.137 ¶218. Treasury further noted that the request "does not inquire about the IRS's procedures for presidential audits," ask for "additional information about those policies," ask "whether [they] have changed over time," or ask about "the extensive protections that ensure such audits are conducted with extreme confidentiality and without improper interference." *Id.* Accordingly, Treasury determined it was not authorized to fulfill the Committee's request.

The Department of Justice reached the same conclusion. In a June 2019 memorandum, the Office of Legal Counsel concluded that the request "represents the culmination of a sustained effort over more than two years to seek the public release of President Trump's tax returns." Office of Legal Counsel, *Congressional Committee's Request for the President's Tax Returns Under 26 U.S.C. §6103(f)*, at 7 (June 13, 2019) (hereinafter "OLC 2019"). OLC found that the Committee's stated purpose "blinks reality. It is pretextual. No one could reasonably believe that the

Committee seeks six years" of a single President's "tax returns because of a newly discovered interest in legislating on the presidential-audit process." *Id.* at 16. It further noted that "throughout 2017 and 2018, Chairman Neal and other Members of Congress ... offered many different justifications for such an action," but never "oversight of 'the extent to which the IRS audits and enforces the Federal tax laws against a President.'" *Id.* at 11. Instead, they had "made clear their intent to acquire and release the President's tax returns." *Id.* OLC thus concluded that the Committee's purpose was not what Chairman Neal wrote in his request. *See* App.138 ¶¶219-20. OLC further agreed with Treasury that "the Committee's request does not objectively 'fit' [its] stated purpose." App.189 ¶221; OLC 2019 at 27. "[M]any of the requested documents are barely relevant" to the audit process, including the tax returns themselves, which are filed before that process begins. App.189 ¶221; OLC 2019 at 27. Instead, OLC found the request "'perfectly tailored' to accomplish the Committee's long-standing and avowed goal" of exposing the President's tax returns. App.190 ¶222; OLC 2019 at 29.

In July 2019, the Committee sued Treasury and other governmental defendants to enforce its request, and Applicants intervened in the case as defendants. App.193-94. The case was stayed pending the resolution of *Committee on Judiciary of United States House of Representatives v. McGahn*, No. 19-5331 (D.C. Cir.), and remained stayed for six months after President Biden took office while the new administration considered how to respond to the request. App.201, 204-05.

In July 2021, the Government reversed course. It informed the district court (and Applicants) that Chairman Neal had updated his request for President Trump's tax returns six weeks earlier—pursuing the same information for tax years 2015 and 2020, instead of 2013 to 2018—and that the Government now intended to comply. D.D.C. Doc. 111. The Government then revealed a new OLC opinion, contradicting its 2019 opinion. App.147 ¶264. The new 2021 opinion did not deny the Committee's long campaign to expose President Trump's tax returns to the public or retract its previous conclusions about the Committee's true purpose; instead, it simply concluded that despite all the evidence, Treasury had to accept the Committee's stated purpose at face value. App.157 ¶267. Perhaps thinking the case was over, Speaker Pelosi candidly celebrated the Government's reversal—not because the House could now study the presidential audit program, but instead "[t]he American people" would now "know the facts" about President Trump. App.149 ¶270. Applicants immediately answered the Committee's original complaint and filed counterclaims and crossclaims against the Committee and Government challenging the lawfulness of the request. App.208. The Committee and Government moved to dismiss Applicants' claims.

In its ruling, the district court recounted Chairman Neal's statements related to the request and concluded that they "are relevant" and "undermine the alleged purpose of studying [legislation]." App.54-55. It found the evidence of an improper purpose both "impressive" and "[t]roubling." App.56. Given the 12(b)(6) posture, Applicants' allegations of an invalid purpose thus should have survived the motions

to dismiss. The district court, however, dismissed all of Applicants' claims. The district court declined to apply this Court's test from *Mazars* and instead evaluated the request under the deferential standard of *Nixon v. GSA*, 433 U.S. 425 (1977). The court thus concluded that the Committee "need only *state* a valid legislative purpose." App.56 (emphasis added).

A panel of the D.C. Circuit affirmed. Unlike the district court, the panel purported to apply the *Mazars* test, not *Nixon v. GSA*. Nevertheless, it agreed with the district court that it was required to ignore all of Applicants' allegations establishing an invalid purpose, and instead could only consider the purposes Congress identified in the request itself. App.10. With this highly deferential review, the panel accepted the Committee's "need" for the requested information without regard for other potential sources. Rather than enforce *Mazars*'s demand that a request be "no broader than reasonably necessary to support Congress's legislative objective," 140 S. Ct. at 2036, the panel did not analyze the Request's sprawling breadth—six years of returns and audit files, including business returns which are not subject to the Presidential Audit Program, without even limited guarantees of confidentiality—in relation to its purpose. Instead of demanding "detailed and substantial" evidence of the Request's purpose, *id.*, the Court ignored Applicants' substantial evidence of pretext. Finally, when assessing the "burdens" imposed by the Request, *id.*, the panel held—at the 12(b)(6) stage—that Request was only tolerably "inconvenient" to President Trump and a "possible" but "not substantial" threat to

ongoing relations between the political branches, App.24.[1] The panel thus reduced *Mazars*'s scrutiny of legislative purpose to a magic-words test—approving the request so long as the Committee mouthed some permissible justification.

REASONS FOR GRANTING THE STAY

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010)

. Applicants meet this test.

To preserve its ability to review this case, the Court should enter an administrative stay pending the disposition of this emergency application. *See, e.g.*, *Graham v. Fulton Cnty. Special Purpose Grand Jury*, No. 22A337 (U.S. Oct. 24, 2022) (Thomas, J., in chambers) (granting administrative stay); *Ward v. Thompson*, No. 22A350 (U.S. Oct. 26, 2022) (Kagan, J., in chambers) (same). Without interim relief, the D.C. Circuit's mandate will issue on Thursday, November 3, upon which the

[1] Judge Henderson concurred in part and, as relevant here, concurred in the judgment only. She "conclude[d] that the burdens borne by the Executive Branch are more severe and warrant much closer scrutiny" than the majority provided. App.29. Although Judge Henderson apparently concluded that the Committee's request does not threaten the separation of powers, her separate opinion—which correctly criticizes the panel for watering down the *Mazars* test—never actually applies the *Mazars* test itself or explains why the request satisfies it.

Government will fulfill the Committee's request and deprive this Court of the opportunity to rule even on this emergency application. Having entered an administrative stay to consider this application, the Court should then grant a stay pending the filing and disposition of a petition for writ of certiorari.

In addition, the Court may wish to construe this Application as a petition for writ of certiorari as to the question: whether, under the standard of *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020), courts must defer to the legislative purpose on the face of a congressional request for a President's personal information, even when all the evidence suggests that purpose is pretextual. *Cf. Nken v. Mukasey*, 555 U.S. 1042 (2008).

I. This Court is likely to grant the petition for certiorari.

The petition will present "an important question of federal law that has not been, but should be, settled by the Court." S. Ct. R. 10(c). At the very least, it will present important questions that are substantial enough that the Court should preserve for itself *a shot* at considering further review. The court of appeals seems to agree. *See* App.14 (stressing "the possibility of further appellate review").

As further testament to this case's importance, this Court has already agreed to review a similar case once before. Like *Mazars*, this case arises from a congressional demand for a President's personal information—a "clash between rival branches of government over records of intense political interest for all involved." *Mazars*, 140 S. Ct. at 2034. It therefore "implicate[s] weighty concerns regarding the separation of powers." *Id.* at 2035.

Moreover, the legal issues in this case are unsettled and in need of this Court's review. Until *Mazars*, this Court had "never addressed a congressional subpoena for the President's information." *Id.* at 2026. The Court further noted at the end of its analysis that "one case every two centuries does not afford enough experience for an exhaustive" treatment of this area of law. *Id.* at 2036. So it is unsurprising that even after the *Mazars* decision, cases involving similar demands still "implicate[] a number of difficult questions of first impression." *Trump v. Mazars USA, LLP* [*Mazars V*], 39 F.4th 774, 812 (D.C. Cir. 2022) (Rogers, J., concurring).

No Congress has ever wielded its legislative powers to demand a President's tax returns. As the district court put it, "[w]e are in uncharted territory." App.40. The parties all agree that the Committee's request implicates the separation of powers at some level, and the United States once agreed that the request is unconstitutional. App.13-14. Even now, the Government appears to agree that this case "implicate[s] important institutional principles" of "importance to the Executive Branch," and presents "novel and complex questions about the privileges and authority of all three branches of the federal government." D.D.C. Doc. 134, at 2 ¶¶4-5.

Left unreviewed, the D.C. Circuit's decision will have far-reaching implications. It will establish important (but incorrect) precedent for the political branches moving forward, binding in the circuit in which most conflicts over congressional demands for information must be litigated. Even more so because the court of appeals applied the full-blown *Mazars* test, which means its analysis will also control future disputes between Congress and *sitting* Presidents. Simply put, this

Court should be the one setting precedent to guide those disputes. On top of these reasons for granting certiorari, the Supreme Court also gives "special solicitude" to former Presidents bringing "claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers." *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982). In short, Applicants' petition will have at least a "reasonable probability" of convincing the Court to grant certiorari again. *Hollingsworth*, 558 U.S. at 190.

II. There is a fair prospect this Court will reverse the D.C. Circuit's decision upholding the Committee's request.

The D.C. Circuit's decision misapplies this Court's decision in *Mazars*. Rather than balancing the important institutional interests of the political branches, it afforded the Committee broad deference. Though it purported to apply *Mazars* with full force, it effectively treated the request like "a run-of-the-mill legislative effort" instead of "a clash between rival branches of government over records of intense political interest for all involved." *Mazars*, 140 S. Ct. at 2034. This Court would likely reverse.

A. This Court's *Mazars* decision struck a "balanced approach" to disputes over legislative demands for a President's information. *Id.* at 2035. The Court recognized both political branches' significant interests at stake in such disputes. *Id.* at 2033-34. It therefore "'resist[ed]' the 'pressure inherent within each of the separate Branches to exceed the outer limits of its power.'" *Id.* at 2035 (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

It also took "a 'considerable impression' from 'the practice of the government,'" *id.* (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819)), and sought to avoid "needlessly disturb[ing] 'the compromises and working arrangements that [those] branches ... themselves have reached,'" *id.* at 2031. The Court feared that a "limitless subpoena power would transform the 'established practice' of the political branches." *Id.* at 2034. It would mean that "[i]nstead of negotiating over information requests, Congress could simply walk away from the bargaining table and compel compliance in court." *Id.* But with a balanced approach, similar disputes in the future might be resolved—as they usually have been historically—not in court but through negotiation, "in the 'hurly-burly, the give-and-take of the political process between the legislative and the executive.'" *Id.* at 2029 (quoting Hearings on S. 2170 et al. before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 94th Cong., 1st Sess., 87 (1975) (A. Scalia, Assistant Attorney General, Office of Legal Counsel)).

With these considerations in mind, the Court crafted a "careful analysis that takes adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the 'unique position' of the President." *Id.* at 2035. This analysis is built on the foundation of the standard assessment of "whether a subpoena ... is 'related to, and in furtherance of, a legitimate task of the Congress.'" *Id.* (citing *Watkins v. United States*, 354 U.S. 178, 187 (1957)). But it further relies on "[s]everal special considerations" to inform the analysis. *Id.* "First, courts should carefully assess whether the asserted legislative purpose

warrants the significant step of involving the President and his papers," and particularly whether "other sources could reasonably provide Congress the information it needs in light of its particular legislative objective." *Id.* at 2035-36. Second, "courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective." *Id.* at 2036. Third, courts should require Congress to offer sufficiently "detailed and substantial evidence" of its legislative purpose—"particularly ... when Congress contemplates legislation that raises sensitive constitutional issues, such as legislation concerning the Presidency." *Id.* Finally, "courts should be careful to assess the burdens imposed on the President by a subpoena." *Id.*

B. The court of appeals (correctly) assumed that *Mazars* applies here, and it purported to apply that framework with full force. App.14, 18. But it departed sharply from *Mazars* in application, diluting the analysis at every step. Indeed, the court's *Mazars* analysis repeatedly relied on cases outside the separation-of-powers context, which *Mazars* said "differ markedly" from information requests "directed at the President." 140 S. Ct. at 2034. This Court would likely reverse the decision for failing to "take[] adequate account of the separation of powers principles at stake." *Id.* at 2035.

***First*,** on the foundational question of whether the Committee's request is "related to, and in furtherance of, a legitimate task of Congress," the court of appeals held that all of Applicants' allegations of improper purpose were legally irrelevant, as mere evidence of legislators' subjective "motives." App.13. That approach violates

precedent, including *Mazars* itself. It reduces *Mazars* to a magic-words test, where any request or subpoena will automatically be deemed constitutional so long as the Committee is not so foolish as to avow its improper purpose on the face of the request.

All agree that congressional requests for information must have a legitimate legislative purpose. *Mazars*, 140 S. Ct. at 2031. Congress cannot make demands for information to "expose for the sake of exposure." *Id.* at 2032 (quoting *Watkins*, 354 U.S. at 200). Applicants plausibly alleged that the Committee's purpose here was exposure, not studying legislation. They described the objective mismatch between the request and its stated purpose, the long campaign to obtain President Trump's tax returns, myriad statements from key decisionmakers admitting nonlegislative purposes, numerous admissions from the Chairman that his stated purpose was pretextual, the shifting explanations for the request, and the conclusions of inside and outside observers—including the United States itself—that "the Committee's stated purpose was pretextual and its actual purpose was simply to provide a means for public disclosure of the President's tax returns." OLC 2019 at 31.

Nevertheless, the court of appeals reasoned that so long as the face of the request "identified a legitimate legislative purpose that it requires information to accomplish," it could not "delve deeper than this." App.13. To consider the extensive evidence of nonlegislative purpose, the court reasoned, would inappropriately "probe the motives of individual legislators." *Id.* To the contrary, there is a long record of courts going beyond the face of a congressional request to determine its purpose. Courts have always "scrutinized [the] record"—not just "the Committee's report," but

"the entire record." *Barenblatt v. United States*, 360 U.S. 109, 133 & n.33 (1959); *see also Shelton v. United States*, 404 F.2d 1292, 1297 (D.C. Cir. 1968) (instructing courts to consider "several sources," including statements of committee members and staff); *Wilkinson v. United States*, 365 U.S. 399, 410 (1961) (consulting "[a] number of ... sources," including statements of committee chair and staff).

Applicants' allegations demonstrated the *purpose* of the request, not merely some legislators' *motives*, and longstanding precedent delineates an important distinction between the two. *E.g.*, *Watkins*, 354 U.S. at 200. Motive is "why an individual Member sponsored or supported" an action, while purpose is "what that [action] was designed to accomplish." *Jewish War Veterans of the U.S. of Am., Inc. v. Gates*, 506 F. Supp. 2d 30, 60 (D.D.C. 2007). To gauge purpose, courts "must focus … on objectively discernible conduct or communication that is temporally connected to the challenged activity." *Bauchman v. W. High Sch.*, 132 F.3d 542, 560 (10th Cir. 1997); *see also Trump v. Mazars USA, LLP* [*Mazars II*], 940 F.3d 710, 767-71 (D.C. Cir. 2019) (Rao, J., dissenting). This is a familiar judicial task: courts must often "scrutinize[]" a branch of government's "reasons" by examining "the record" and "viewing the evidence as a whole." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019). But the logic of the court of appeals means that absent a chairman foolishly stating an illegal purpose (and *only* an illegal purpose) in the request itself, or else offering no purpose at all, no allegations of improper purpose can ever defeat a request. The court of appeals was wrong to "blind" itself to "what all others can see and understand." *Mazars*, 140 S. Ct. at 2034 (cleaned up).

The court's refusal to consider any evidence beyond Committee's own carefully constructed statement is especially inappropriate in separation-of-powers cases like this one. The court agreed that this case should be treated as a dispute between Congress and the Executive. *See* App.14. In such cases, deferential presumptions have no place. *See Morrison v. Olson*, 487 U.S. 654, 704-05 (1988) (Scalia, J., dissenting). Indeed, this Court in *Mazars* chided the lower courts for "applying precedents that do not involve the President's papers," 140 S. Ct. at 2033—including the very cases that the panel used here to ignore the extensive record undermining the Committee's asserted purpose. *Compare, e.g.*, *Mazars*, 140 S. Ct. at 2034 (distinguishing *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975)), *with* App.10 (relying on *Eastland*). This Court would likely reverse that error.

***Second*,** the lower court misapplied each of the "special considerations" identified in *Mazars*. Most glaringly, the court did not "insist on a [request] no broader than reasonably necessary to support Congress's legislative objective." *Mazars*, 140 S. Ct. at 2036. On this point, the panel blessed a sweeping request for six years of data because "[t]he Chairman has stated that the value of requesting six years of information is the ability to compare one year with another." App.21. That level of deference befits an ordinary legislative inquiry, not one with serious separation-of-powers implications. Tellingly, the court's analysis here again cited precedent without any separation-of-powers implications, for the Committee's right to "go up some 'blind alleys' and into nonproductive enterprises." *Id.* (quoting *Eastland*, 421 U.S. at 509) (internal quotation marks omitted). The court also rejected

the possibility of narrowing the request with a guarantee of confidentiality, even though *Mazars* itself recognized that solution in earlier interbranch clashes. 140 S. Ct. at 2030. Here, too, the court resorted to caselaw outside the separation-of-powers context, contrary to *Mazars*. App.21 (citing *United States v. Rumely*, 345 U.S. 41, 43 (1953)). Finally, the request was broader than necessary by targeting eight business entities related to President Trump, even though the Presidential Audit Program covers only individual returns. The lower court passed over the obvious overbreadth concerns without a mention.

The court also failed to "carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers" and to reject the request if "other sources could provide Congress the information it needs." *Mazars*, 140 S. Ct. at 2035-36. Here, other sources—indeed, better sources—are available to study whether the IRS's Presidential Audit Program "is adequately resourced and sufficiently guarded from external pressures." App.19. For one, the Committee has never considered seeking other Presidents' or Vice Presidents' returns—even though they were all subject to the same program. The lower court rejected this possibility because it would still "require ... the personal information of a former President," *id.*, but such a request would implicate lesser privacy interests for those who previously publicly released their returns. Moreover, a good-faith request for legislative study of a program's funding would seek information from the IRS about budgeting, staffing, and testimony from personnel about any "external pressure"—not six years of detailed individual returns and audits for a single person

and his businesses. Although the Committee claimed that prior talks with the IRS had failed, it did not renew those efforts under the Biden Administration before issuing its amended request in 2021. The decision below did not address whether Congress could obtain relevant information from other sources. Its silence is inconsistent with *Mazars*'s heightened scrutiny.

Mazars also requires courts to "be attentive to the nature of the evidence offered by Congress to establish that a [request] advances a valid legislative purpose." 140 S. Ct. at 2036. The court of appeals found this factor satisfied by a handful of brief statements by President Trump about the audit process. This is hardly the sort of "detailed and substantial" evidence this Court demanded from Congress, especially when the Committee claims to be studying "legislation concerning the Presidency." *Id.* At the same time, the lower court refused to consider any of Applicants' allegations (and supporting evidence) of improper purpose. The whole point of *Mazars* is to impose extra scrutiny of Congress's asserted purpose. Here again, the lower court failed to do so.

Lastly, the panel failed to "careful[ly] ... assess the burdens imposed on the President" by the request. *Id. Mazars* recognized in this section of the opinion that institutional dynamics matter, and that congressional requests "stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage." *Id.* Those incentives do not disappear when a former President is targeted. *See, e.g.*, *Mazars V*, 39 F.4th at 787. But the court of appeals dismissed these concerns, reasoning that "[w]hile it possible that

Congress may attempt to threaten the sitting President with an invasive request after leaving office, every President takes office knowing that he will be subject to the same laws as all other citizens upon leaving office." App.24. That reasoning again treats this request like "a run-of-the-mill legislative effort," *Mazars*, 140 S. Ct. at 2034, instead of one that arose when the President was in office. It serves as a warning to all future Presidents that they may be subject to such legislative threats. Applicants plausibly alleged that the burden of these requests threatens the relationship between Congress and the President. This Court would likely recognize that danger and reverse the judgment of the court of appeals.

* * *

The lower court's deferential scrutiny undermines the balance struck in *Mazars*. Effectively, the court adopted the approach proposed by the House and rejected by this Court in *Mazars*, blessing a request as long as it "relate[s] to a valid legislative purpose" or "concern[s] a subject on which legislation could be had." *Id.* at 2033. This rule promises to disrupt the historical relationship between the political branches, send more interbranch disputes to court, and leave Presidents—including sitting Presidents—exposed to harassing demands from political opponents in the legislature. *Id.* at 2034. "[A] more searching inquiry into the burdens imposed by the Committee's request is warranted given the core constitutional principle at issue." App.33 (Henderson, J., concurring in the judgment). This Court would likely agree and reverse the judgment of the D.C. Circuit.

III. Without a stay, Applicants will suffer the mooting of their claims and loss of confidentiality, the quintessential irreparable harms.

There is a clear "likelihood of irreparable harm if the judgment is not stayed." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1302 (2010) (Scalia, J., in chambers). Without a stay, the Government will fulfill the Committee's request once the D.C. Circuit's mandate issues. That threatens Applicants with irreparable harm on two fronts: the mooting of their legal claims and the disclosure of their confidential information.

First, without a stay, this case will be mooted. Without a stay, Applicants' legal right to pursue their claims and petition for certiorari will be irrevocably destroyed. *See* 28 U.S.C. §1257; S. Ct. R. 10. Certiorari is part of "'the normal course of appellate review,'" and "foreclosure of certiorari review by this Court would impose irreparable harm." *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers); *accord Mikutaitis v. United States*, 478 U.S. 1306, 1309 (1986) (Stevens, J., in chambers); *see also Chafin v. Chafin*, 568 U.S. 165, 178 (2013) ("If these cases were to become moot upon return, courts would be more likely to grant stays as a matter of course, to prevent the loss of any right to appeal."). "The fact that disclosure would moot th[e] part of the Court of Appeals' decision requiring disclosure ... would also create an irreparable injury." *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers). Preventing mootness is "'[p]erhaps the most compelling justification'" for a stay pending certiorari. *Id.*

Second, and apart from mootness, the "disclosure of private, confidential information 'is the quintessential type of irreparable harm that cannot be

compensated or undone by money damages.'" *Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 499 (S.D.N.Y. 2019); *accord Maness v. Meyers*, 419 U.S. 449, 460 (1975); *Araneta v. United States*, 478 U.S. 1301, 1304-05 (1986) (Burger, C.J., in chambers); *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979). Loss of confidentiality is "[c]learly ... irreparable" because "[t]here is no way to recapture and remove from the knowledge of others information improperly disclosed." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop*, 839 F. Supp. 68, 72 (D. Me. 1993); *see also Robert Half Int'l Inc. v. Billingham*, 315 F. Supp. 3d 419, 433 (D.D.C. 2018) ("[T]he disclosure of confidential information is, by its very nature, irreparable 'because such information, once disclosed, loses its confidential nature.'"); *Metro. Life Ins. Co. v. Usery*, 426 F. Supp. 150, 172 (D.D.C. 1976). The Committee's counsel has conceded as much in a similar case. *See Trump v. Deutsche Bank, AG*, CA2 Doc. 37 at 105:24-25, No. 19-1540 (2d Cir.) (Mr. Letter: "Obviously I concede that if the documents are out, it is then irreparable."). This alone establishes irreparable harm warranting a stay.

This irreparable harm to Applicants will be immediate. Even if Defendants disclose only to the Committee, disclosure to the government is itself an irreparable harm. *E.g.*, *Maness*, 419 U.S. at 460; *Araneta*, 478 U.S. at 1304-05. As the Southern District of New York explained in a similar case: "[T]he very act of disclosure to Congress is ... irreparable.... [P]laintiffs [like Applicants here] have an interest in keeping their records private from everyone, including congresspersons …." CA2 Doc. 37 JA122:18-JA123:4, *Trump v. Deutsche Bank, AG*, No. 19-1540.

In all events, it would be "naïve to reality" to assume that Applicants' information won't be promptly disclosed to the public as well. *Trump v. Comm. on Oversight & Reform of U.S. House of Representatives*, 380 F. Supp. 3d 76, 105 (D.D.C. 2019). In this very case, the D.C. Circuit agreed that public disclosure is both allowed by its order and likely to occur. App.21 (noting that the kind of information at issue here—*i.e.*, "tax returns"—"often comes to light").

Moreover, because this Court must assume that Applicants are correct on the merits when assessing irreparable harm, *Philip Morris*, 561 U.S. at 1302, it must assume that these disclosures will occur without a legitimate legislative purpose. Denying a stay will thus violate Applicants' statutorily protected right to taxpayer privacy. That right is an "essential protection" that both secures "sensitive or otherwise personal information" and "is fundamental to a tax system that relies upon self-reporting." *NTEU v. FLRA*, 791 F.2d 183, 184 (D.C. Cir. 1986).

IV. The balance of the equities and public interest also support a stay.

That Applicants will suffer severe, case-mooting harm should end the debate. But even if this were a "close case," the "'balance [of] equities'" strongly favors a stay. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). That's because a stay will harm no one, while Applicants and the public will be significantly harmed without one.

To start, no party will be harmed by a stay. The Committee would suffer "only the prejudice that comes with any delay in a judicial proceeding." *United States ex rel. Chandler v. Cook Cnty.*, 282 F.3d 448, 451 (7th Cir. 2002). That prejudice is inconsequential. *Id.* And that's especially true if the Committee is ultimately entitled

to Applicants' information, because stays pending certiorari are relatively "short." *In re Biaggi*, 478 F.2d 489, 493 (2d Cir. 1973) (Friendly, J.). And the Committee has no pressing need for Applicants' information so it can study generic legislation about funding and regulating future IRS audits of future Presidents. *Cf.* App.11-12. This case has already been stayed for over 1,100 days, across two Congresses. That delay was often either with the Committee's consent or upon its own motion. For example, the Committee took *six months* to decide whether to lift a stay and pursue Applicants' confidential documents after the Biden Administration took office. App.204-06; *see Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (agreeing that a self-imposed "eight-week delay ... undermines [an] allegation of irreparable harm"). The Committee also previously agreed to stay the district court's judgment pending further review. Its complicity in the delay of this case makes any claim of urgency confounding. In short, any "interest" the Committee has "in receiving [this] information immediately" simply "poses no threat of irreparable harm." *John Doe Agency*, 488 U.S. at 1309.

It is no answer to say that the Committee is prejudiced because further delay will moot the Committee's request. Before the D.C. Circuit, the Committee agreed that no amount of delay would moot its request. CADC Doc. #1960284, at 5-6 (citing *Mazars V*, 39 F.4th at 786). And even if the Committee's request were not fulfilled by the end of the current Congressional term, it could carry over into later terms (as it already has) and inform the Committee's work then. *See Mazars V*, 39 F.4th at 785-87.

Nor is it any answer to say, as the Committee likely will, that immediate disclosure is necessary to "*this* Committee's and *this* Congress's ... work." CADC Doc. #1960284, at 6. This Court has already rejected that argument in *Mazars*. After the Court ruled in that case, the House sought immediate issuance of the judgment, citing the impending expiration of the House's current term. Application at 3-4 ¶9, *Comms. of U.S. House of Rep. v. Trump*, No. 20A15 (July 13, 2020). This Court rejected the request. *See Comms. of U.S. House of Rep v. Trump.*, 141 S. Ct. 197 (2020). On remand from the Supreme Court, the House tried its luck again: it cited the end of its term to argue that any further delay "significantly interfere[d] with Congress's functioning as a coordinate branch." *Mazars*, Doc. #1859172 at 36, No. 19-5142. The D.C. Circuit likewise disagreed. The court then remanded the case to the district court over the House's objections, regardless of "whether the case [would] become moot when the subpoena expires" at the end of the House's term. *Mazars*, Doc. #1877778. So too here. The Court should thus reject the Committee's pleas for needless expedition and stay the case pending a petition for a writ of certiorari.

The Committee's only possible need for Applicants' records is to help it study legislation. But studying IRS funding and staffing is not urgent in any meaningful sense, especially given the "time and difficulty of enacting new legislation." *Coal. for Responsible Regulation, Inc. v. EPA*, 2012 WL 6621785, at *22 (D.C. Cir. 2012) (Kavanaugh, J., dissenting from denial of rehearing en banc). Nor does the Committee "need" these records to legislate given that "legislative judgments normally depend more on the predicted consequences of proposed legislative actions"

than on examining "certain named individuals" or "precise[ly] reconstructi[ng] past events." *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974).

Even assuming the Committee would suffer some abstract harm if it could not immediately access these records, that harm is dwarfed by the irreparable, case-mooting harm that Applicants will suffer if a stay is denied. *See Providence Journal*, 595 F.2d at 890 (granting a stay because "the total and immediate divestiture of appellants' rights to have effective review" outweighed any harm from "postpon[ing] the moment of disclosure"); *Araneta*, 478 U.S. at 1304-05 (granting a stay despite the public's "strong interest in moving forward expeditiously with a grand jury investigation" because "the risk of injury to the applicants could well be irreparable and the injury to the Government will likely be no more than the inconvenience of delay"). At bottom, "[r]efusing a stay" in this case "may visit an irreversible harm on applicants, but granting it will apparently do no permanent injury to respondents." *Philip Morris*, 561 U.S. at 1305.

But this Court need not balance the equities anew; several decisions have already balanced them. In *Mazars* itself, when faced with a similar clash between the executive and legislative branches, the Court stayed the D.C. Circuit's mandate pending certiorari. *Trump v. Mazars USA, LLP*, 140 S. Ct. 581 (2019). In *United States v. Nixon*, 418 U.S. 683 (1974), the Court "stayed" the subpoena "pending [its] resolution" of the merits. *Id.* at 714. The Court did so even though the subpoena sought evidence that was "specific and central to the fair adjudication of a particular

criminal case." *Id.* at 713. The Committee does not need Applicants' records more than the President's records were needed in *Nixon*. Likewise, in *Eastland*, the D.C. Circuit twice stayed a congressional subpoena to the plaintiff's bank. *U.S. Servicemen's Fund v. Eastland*, 488 F.2d 1252, 1254 (D.C. Cir. 1973). The "decisive element" favoring a stay was the fact that "unless a stay is granted this case will be mooted, and there is likelihood, that irreparable harm will be suffered" by the plaintiff when the enforcement date arrives. *Id.* This Court ultimately reversed the D.C. Circuit's decision on the merits. But it praised how the court handled the preliminary procedural issues in the case—stressing the need to avoid the risk that "compliance ... could frustrate any judicial inquiry" into the subpoena's legality. *Eastland*, 421 U.S. at 501 n.14. That same risk exists here. And it should lead to the same result: a stay pending further review.

It is unsurprising "that from the legislative viewpoint, any alternative to outright enforcement of the [request] entails delay." *United States v. AT&T Co.*, 567 F.2d 121, 133 (D.C. Cir. 1977). But delay "is an inherent corollary of the existence of coordinate branches." *Id.* Courts "balance" the "public interest in the congressional investigation" against individual rights and "executive ... interests." *Id*. at 128. "The Separation of Powers often impairs efficiency," but that "delay" is justified by the overriding concern in "the long-term staying power of government." *Id.*; *accord Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (refusing to rush a subpoena dispute that had "potentially great significance for the balance of power between the Legislative and Executive

Branches"). The publish interest especially favors preserving the *status quo* when the case raises unprecedented separation-of-powers issues that warrant the Court's review. Generic concerns about "delay" cannot prevail when, as here, the case will have lasting "consequences for the functioning of the Presidency." *In re Lindsey*, 158 F.3d 1263, 1288-89 (D.C. Cir. 1998) (Tatel, J., concurring in part and dissenting in part).

Finally, even if any doubts about the equities remained, the public interest would extinguish them. The public has a strong interest in avoiding "the dangers of intrusion on the authority and functions of the Executive Branch." *Fitzgerald*, 457 U.S. at 754. The Committee will likely invoke *Eastland*'s instruction that congressional demands for information should receive "the most expeditious treatment." 421 U.S. at 511 n.17. But the court rejected that same argument in *Mazars* multiple times. And for good reason: *Eastland* was a case between Congress and purely private parties; its insistence on "expeditious treatment" does not apply, as the D.C. Circuit later explained, in cases raising separation-of-powers issues.

Ultimately, the equitable considerations—like all the others—favor a stay. The Court should follow the same path it did in *Mazars* and grant a stay pending filing and disposition of a petition for certiorari.

CONCLUSION

Applicants respectfully ask the Court to enter an administrative stay by Wednesday, November 2, and then a stay pending the filing and disposition of a writ of certiorari. If the Court wishes, it could also construe this application as a petition for certiorari, and grant review.

Respectfully submitted,

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