No. 22A362

IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,

Applicants,

v.

COMMITTEE ON WAYS AND MEANS,
UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,

Respondents.

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES, AND RULES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTRODUCTION

For more than three years, the House of Representatives has been considering legislative proposals and conducting oversight related to whether the IRS can effectively and impartially apply the federal tax laws to Presidents. Concerns about the IRS's ability to do so are not entirely new: in the early 1970s, a Congressional investigation revealed that the IRS had under-determined President Nixon's liability by more than $400,000, prompting the IRS to adopt a policy that Presidents' (and Vice Presidents') annual tax returns will be subject to mandatory audit.

Former President Donald Trump's term in office raised such concerns anew—and amplified them. Unlike his predecessors, Mr. Trump owned a complex web of businesses, engaged in business activities internationally, had a history of aggressive tax avoidance (as he has boasted), claimed to be under "continuous audit" since before his Presidency, and repeatedly denounced IRS audits of him as "unfair."

These substantial concerns prompted the Chairman of the House Committee on Ways and Means, Richard E. Neal, to begin an investigation of the IRS's mandatory Presidential audit program with respect to Mr. Trump's returns. In furtherance of that investigation, in 2021 Chairman Neal exercised his authority under 26 U.S.C. § 6103(f) to request from the IRS the income tax returns of Mr. Trump and certain of his businesses for tax years 2015 through 2020, along with related return information (including IRS audit files). Guided by this Court's precedents—including the case at the center of the pending stay application, *Trump* v. *Mazars USA, LLP*, 140 S. Ct. 2019 (2020)—the Chairman's request robustly articulated and documented the legislative need for the request. The request explained that the Committee is examining the need

for "legislation on equitable tax administration, including legislation on the President's tax compliance," and the Committee "cannot properly evaluate the effectiveness or fairness of the mandatory audit program, in practice" or "legislate responsibly on this matter or address the real potential for abuse of power" without access to the requested materials relating to Mr. Trump's returns. App.2a-3a. Treasury subsequently determined that it was obligated to furnish the requested information, consistent with advice from the Department of Justice's Office of Legal Counsel.

Mr. Trump and the businesses whose returns were requested (collectively, "Trump parties") sought to enjoin Treasury from complying with Chairman Neal's request, raising numerous statutory and constitutional claims aimed at thwarting the Committee's investigation. The district court rejected those claims across the board and dismissed the complaint. A panel of the D.C. Circuit then affirmed unanimously, and the en banc court of appeals denied the Trump parties' petition for rehearing without calling for a response and with no judges recording a dissent.

Further review from this Court is unwarranted, so there necessarily is no basis to issue emergency relief pending appeal. The Committee's request plainly serves valid Article I purposes. Congress's "power to obtain information is broad and indispensable," *Mazars*, 140 S. Ct. at 2031 (cleaned up), and the request here pertains to "subject[s] on which legislation could be had," *id.* (cleaned up). Longstanding precedent makes clear, moreover, that courts are "bound to presume that the action of the legislative body was with a legitimate object if it is capable of being so construed"—and the request here is manifestly capable of being so construed. *McGrain* v. *Daugherty*, 273 U.S. 135, 178 (1927) (cleaned up). Thus, the Trump parties' allegations of improper

Congressional motive or ulterior purpose do "not vitiate [the] investigation." *Watkins* v. *United States*, 345 U.S. 178, 200 (1957).

The Trump parties assert that this case raises the "unsettled" question of whether, under the standard announced in *Mazars*, "courts must defer to the legislative purpose on the face of a [C]ongressional request for a President's personal information" when a President—or here, former President—alleges that the stated purpose is pretextual. They contend that *Mazars'* accounting for Executive Branch interests requires that courts "go[] beyond the face of a congressional request to determine its purpose." But on this issue, *Mazars* tracked this Court's considered precedent: It instructs courts to assess the validity of the Congressional request based on Congress's "*asserted* legislative purpose" and "the nature of the evidence *offered by Congress* to establish" that purpose, 140 S. Ct. at 2035-2036 (emphasis added), not to engage in judicial fact finding and second guess such statements of purpose. *Mazars* also stressed that "[l]egislative inquiries might involve the President in appropriate cases," and it rejected an approach that gave "short shrift to Congress's important interests in conducting inquiries to obtain the information it needs to legislate effectively." *Id.* at 2033. The Trump parties' implausible interpretation of *Mazars* "would risk seriously impeding Congress in carrying out its responsibilities" by allowing allegations of political motive or mixed purpose to halt a valid legislative investigation. *Id.*

As the court of appeals determined, the Chairman's request comports with the constitutional principle of separation of powers under any proposed test, including the one announced in *Mazars*. The Trump parties' contention that the lower court "misapplie[d] this Court's decision in *Mazars*" is the kind of asserted error that "rarely"

warrants this Court's review. S. Ct. R. 10. And even if this case could be the exception to that rule, there is no error requiring correction here. As the court of appeals explained, the Committee has a strong interest in the Trump parties' tax returns and return information given the unique challenges Mr. Trump presented for the IRS during his Presidency; the request is well-tailored to illuminating how the IRS conducted any audits of Mr. Trump while he was President and whether reforms are needed to enhance the IRS's ability to audit Presidents in the future; the Committee has gone to great lengths to substantiate its needs; and, the request will burden the Executive Branch negligibly, if at all, because it pertains to a former President and seeks records that in large part modern Presidents have routinely released voluntarily.

Moreover, cases challenging the validity of Congressional requests must "be given the most expeditious treatment" by the courts, lest "delay … frustrate[] a valid congressional inquiry." *Eastland* v. *U.S. Servicemen's Fund*, 421 U.S. 491, 511 n.17 (1975).

The application should therefore be denied. Additionally, for the same reasons, the Court should accept the Trump parties' invitation (at 1) to "construe [their] application as a petition for certiorari" and deny it.

BACKGROUND

A. The Ways And Means Committee's Authority Under Section 6103(f)

Congress's Article I "power to obtain information is broad and indispensable," *Mazars*, 140 S. Ct. at 2031 (cleaned up), "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution," *Eastland*, 421 U.S. 491, 504 n.15. In short, Congress may inquire into any "subject on which legislation could be had," including "the administration of existing laws, studies of proposed laws, and surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them." *Mazars*, 140 S. Ct. at 2031 (cleaned up).

One subject within Congress's legislative power, and thus its investigative power, is taxation. The Constitution grants Congress the power "[t]o lay and collect Taxes," U.S. Const. art. I, § 8, cl. 1, as well as the authority to control the appropriation of funds to federal agencies like the IRS, *see id.* art. I, § 9, cl. 7. Pursuant to these constitutional authorities, the Ways and Means Committee has legislative and oversight authority over all tax and revenue measures generally, including developing legislation for protecting and enhancing the country's tax system and conducting oversight of the IRS to ensure that the tax laws are administered in a fair and effective manner. *See* U.S. House of Representatives Rule X.1(t), cl. 1(t), at p. 9, 117th Cong. (Feb. 2, 2021).[1]

For almost a century, the political branches have recognized that a statutory right of access to taxpayer information is vital to Congress's ability to investigate wrongdoing by Executive Branch officials—including Presidents. In 1924, after

[1] https://rules.house.gov/sites/democrats.rules.house.gov/files/117-House-Rules-Clerk.pdf.

President Coolidge refused to provide Congress with the tax records of high-ranking Executive-branch officials suspected of bribery, *see* 65 Cong. Rec. 3664, 3700-3702 (1924), Congress passed the precursor to Section 6103(f). That provision stated that the Ways and Means Committee (and certain other Congressional committees) "shall have the right to call on the Secretary of the Treasury" for tax returns; that it "shall be [the Secretary's] duty to furnish … any data of any character contained in or shown by the returns" requested; and that the Committee "shall have the right … to inspect all or any of the returns." Revenue Act of 1924, Pub. L. No. 68-176, § 257(a), 43 Stat. 253, 293.

In 1973, the Joint Committee on Taxation relied on Section 6103(f)'s predecessor to obtain President Nixon's tax information as part of its independent review of his tax liability for 1969 to 1972, years during which he was President. Even though President Nixon had voluntarily disclosed his tax returns for those years, the Joint Committee requested—and received—numerous additional materials from the IRS, such as his non-public returns for years predating his Presidency (1966 to 1968), certified copies of the tax returns he had voluntarily disclosed, and returns of certain associated taxpayers. *See* Staff of Joint Comm. on Internal Revenue Tax'n, *Examination of President Nixon's Tax Returns for 1969 through 1972*, S. Rep. No. 93-768, at 2, 4-7 (1974); H.R. Rep. No. 116-186, at 4, 24-27 (2019). Although the IRS had accepted President Nixon's returns as filed, the Joint Committee determined that the IRS had under-determined President Nixon's tax liability by more than $400,000. S. Rep. No. 93-768, at 4. After that, and to relieve IRS employees of having to decide whether to audit the returns of Presidents and Vice Presidents, the IRS adopted an internal policy of conducting a mandatory audit for them. *See* Staff of Joint Comm. on Tax'n, 116th

Cong., No. JCX-3-19, *Background Regarding the Confidentiality and Disclosure of Federal Tax Returns* 20-21 (Feb. 4, 2019).[2]

The current version of Section 6103, enacted in 1976, continues the statutory right of Congressional access to taxpayer information. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 1202, 90 Stat. 1520, 1667 (amending 26 U.S.C. § 6103). The 1976 amendment was prompted, in part, by concerns about President Nixon's abuse of the tax system. *See* Staff of Joint Comm. on Internal Revenue Tax'n., 93d Cong., No. JCS-37-73, *Investigations into Certain Charges of the Use of the Internal Revenue Service for Political Purposes* (Comm. Print Dec. 20, 1973).[3] As amended, Section 6103(a) prohibits the disclosure of taxpayer returns and return information, with "thirteen tightly drawn categories of exceptions." *Electronic Priv. Info. Ctr.* v. *IRS*, 910 F.3d 1232, 1237 (D.C. Cir. 2018). One exception, Section 6103(f)(1), provides that, "[u]pon written request from the chairman of the Committee on Ways and Means of the House of Representatives …, the Secretary shall furnish [the] committee with any return or return information specified in such request." 26 U.S.C. § 6103(f)(1).

B. IRS Procedures For Auditing Presidents' Tax Returns

The IRS policy providing for mandatory audit of Presidents' returns has never been codified into law. Rather, it is set forth in the Internal Revenue Manual ("Manual")—a compilation of internal, non-binding guidelines for IRS employees, which "clearly do not have the force and effect of law." *Electronic Priv.*, 910 F.3d at 1244-

[2] https://www.jct.gov/publications/2019/jcx-3-19/.

[3] https://www.jct.gov/publications/1973/jcs-37-73/.

1245.[4] The Manual provides that the "individual income tax returns for the President and Vice President are subject to mandatory examinations" and "should be processed similar to the examination of an employee return." *Processing Returns and Accounts of the President and Vice President*, Manual 4.2.1.15(1), (8); *see also Mandatory Examination*, Manual 3.28.3.5.3(1). Although the Manual provides the general approach for examining a President's individual income tax returns, the Committee was told in an IRS briefing that many of those provisions are outdated and no longer are followed.

Moreover, significant aspects of the audit process are left to the relevant IRS revenue agent's discretion. The Manual does not specify the scope of the IRS's examination of the returns, such as whether the audit extends to a President's businesses or related entities—especially pass-through and closely held entities whose income is reflected on the President's individual return—or to pre-Presidential tax years already under ongoing audit.

The Manual also does not address what to do regarding a President who, like former President Trump, owned hundreds of business entities, had inordinately complex returns, used aggressive tax avoidance strategies, and allegedly had ongoing audits. Further, although the Manual specifies generically that "[e]xaminers must ensure impartiality and independence," *Examiner Impartiality*, Manual 4.2.6.3.2, it does not establish any safeguards to ensure impartiality and independence when the person under examination is the President, let alone when the President publicly

[4] https://www.irs.gov/irm.

criticizes the IRS for auditing him at all, or otherwise pressures the IRS implicitly or explicitly. The Manual does not establish how the revenue agent who conducts the audit should be selected and supervised, direct how that agent should interact with the President and his representatives as the audit proceeds, or provide explicit safeguards if the President tries to interfere with or question the appropriateness of the audit. Indeed, the revenue agent's identity is known by the President and his representatives, who communicate with the agent directly, heightening the risk of improper influence. In short, the IRS's current procedures, which are neither fully written nor (apparently) closely followed, appear insufficient to ensure that there are sufficient safeguards in place to the protect the integrity of Presidential audits and the ability of revenue agents objectively and fully to enforce the tax laws with respect to Presidents.

C. Chairman Neal's 2019 Request

In February 2019, the Committee held a hearing at which Committee Members and witnesses discussed possible legislation relating to the disclosure of Presidents' tax returns and the fairness and efficacy of the IRS's auditing of such tax returns. *See* Transcript 8, 17, 23, 40-41, 57-58, *Legislative Proposals and Tax Law Related to Presidential and Vice-Presidential Tax Returns: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 116th Cong. (Feb. 7, 2019) ("Oversight Tr.").[5] Two months later, Committee Chairman Neal sent a letter (the "2019 Request") to the IRS Commissioner pursuant to Section 6103(f) requesting the tax returns and return information of then-President Trump and eight of his business entities for tax

[5] https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/Transcript%20-%20Final.pdf.

years 2013 through 2018, including the IRS's "administrative files" for the requested returns. CAJA46-47. Chairman Neal explained that the request was in furtherance of the Committee's consideration of legislative proposals and oversight related to "the extent to which the IRS audits and enforces the Federal tax laws against a President." CAJA46.

The Department of Justice's Office of Legal Counsel ("OLC"), however, advised Treasury that it was not required to comply with Chairman Neal's request because, according to OLC, his stated purposes were pretextual. *See Congressional Committee's Request for the President's Tax Returns Under 26 U.S.C. § 6103(f)*, 43 Op. O.L.C. __, slip op. at 16-17 (June 13, 2019).[6] Accordingly, Treasury denied the 2019 Request. As Treasury has subsequently acknowledged, that is the only time a Congressional request under Section 6103(f) was denied. *See Ways and Means Committee's Request for the Former President's Tax Returns and Related Tax Information Pursuant to 26 U.S.C. § 6103(f)(1)*, 45 Op. O.L.C. __, slip op. at 11 (July 30, 2021) ("2021 OLC Op.").[7]

D. Chairman Neal's June 2021 Request

In June 2021, Chairman Neal submitted another request under Section 6103(f)—the request at issue now (the "2021 Request"). *See* App.1a-7a. This request again sought the tax returns and return information for Mr. Trump and eight of his business

[6] https://www.justice.gov/olc/file/1456646/download.

[7] https://www.justice.gov/olc/file/1419111/download.

entities, but for a period different from the 2019 Request's: tax years 2015 through 2020. *See* App.6a-7a.

In the 2021 Request, Chairman Neal explained that it was made in furtherance of the Committee's "responsibility to conduct rigorous oversight of the [IRS] to ensure that our tax laws are administered in a fair and impartial manner and to inform legislation necessary for safeguarding the tax system." App.1a. The request explained that "Americans must have confidence that no taxpayer"—not even the President—"is able to operate above the law." *Id.* Accordingly, the request noted, "[t]he Committee has been considering legislative proposals and conducting oversight related to our Federal Tax laws, including, but not limited to, the extent to which the IRS audits and enforces the Federal tax laws against a President." *Id.*

The 2021 Request then described the Committee's specific interests raised by former President Trump's tax examinations. The Committee sought to determine whether IRS agents conducting a mandatory Presidential audit "have been able to operate free from improper interference by a President or his representatives," whether agents have considered "ongoing audits that predate a President's term," whether they have "reviewed" a President's "underlying business activities, especially activities involving many interrelated entities and income from and deductions related to foreign sources," whether they have had "access to the necessary books and records" and "resources," and how a President has "responded to" any "examination findings or adjustments." App.3a.

These questions, the 2021 Request explained, were raised by Mr. Trump's actions during his Presidential campaign and Presidency, and thus Chairman Neal

focused on the IRS's examination of Mr. Trump. App.4a. "Unlike his predecessors," Chairman Neal explained, Mr. Trump "controlled … [a] large, complex, and far-reaching web of" businesses engaged in both "domestic and foreign business activities," and he (according to news reports) "used his businesses to take aggressive tax positions to minimize his tax liability." App.4a-5a. Additionally, Mr. Trump's "tax returns could reveal hidden business entanglements raising tax law and other issues, including conflicts of interest, affecting proper execution of the former President's responsibilities." App.5a. And, according to Mr. Trump himself, he had "been under continuous audit since before his Presidency," which would mean that he could have used his power as President to improperly influence those preexisting audits. App.5a. All these circumstances, in Chairman Neal's judgment, made Mr. Trump "markedly different from other Presidents." *Id.*

Chairman Neal's concerns about the IRS's ability to properly audit Mr. Trump when he was President were heightened by Mr. Trump's open "disdain for IRS audits" while a candidate and President. App.5a. The 2021 Request recounted how candidate Trump said the IRS was "very unfair" toward him and how then-President Trump had complained that "people in the IRS … treat [him] very, very badly" and pronounced (through his press secretary) the "automatic[]" Presidential audit "extremely unfair." App.5a-6a. In sum, the 2021 Request concluded, the Committee "cannot properly evaluate the effectiveness or fairness of the mandatory audit program, in practice" or "legislate responsibly on this matter or address the real potential for abuse of power" without access to the requested materials relating to Mr. Trump's tax returns. App.3a; *see also* App.6a.

E. The 2021 OLC Opinion

Upon receiving the 2021 Request, Treasury again sought OLC's guidance. In July 2021, OLC concluded that Chairman Neal's 2021 Request was valid and therefore, under Section 6103(f)(1), Treasury must comply with it. *See* 2021 OLC Op. at 3. As in its 2019 Opinion, OLC determined that Section 6103(f)(1) is subject to "the constitutional requirement that congressional demands for information must serve a legitimate legislative purpose." *Id.* at 3-4. Unlike the 2019 Opinion, though, OLC determined that the Committee's request would "further" the Chairman's "principal stated objective of assessing the IRS's presidential audit program—a plainly legitimate area for congressional inquiry and possible legislation." *Id.* at 4.

Two key factors drove OLC's different conclusion. First, "the 2019 Opinion failed to give due weight to Congress's status as a co-equal branch of government." 2021 OLC Op. at 19. The Executive Branch, like the courts, should "presume that … Legislative Branch officials act in good faith and in furtherance of legitimate objectives." *Id.* Although the Executive Branch need not "'blindly accept a pretextual justification,'" where "a tax committee requests tax information pursuant to section 6103(f)(1) and has invoked facially valid reasons for its request … , the Executive Branch should conclude that the request lacks a legitimate legislative objective only in exceptional circumstances." *Id.* Neither "the fact that a congressional request for information might serve partisan or other political interests," *id.* at 26, OLC explained, nor the fact that legislators might want to "'expose for the sake of exposure,'" *id.* at 38-39 (quoting *Barenblatt* v. *United States*, 360 U.S. 109, 133 (1959)), can "'vitiate an

investigation … if [a] legislative purpose is [also] being served,'" *id.* at 38-39 (quoting *Watkins*, 354 U.S. at 200).

Second, OLC explained that the 2021 Request left no room for doubt that it served legitimate Article I purposes. 2021 OLC Op. at 37. Specifically, OLC noted that the 2021 Request adjusted the tax years covered, and "explain[ed] in detail how review of those" materials "could assist" the Committee's legislative work, including why "it is reasonable for the Committee to focus on former President Trump's returns." *Id.* at 31-33.

Finally, OLC did "not understand *Mazars* to alter the legal framework for reviewing the June 2021 Request" because the request "seeks the tax information, not of a sitting President, but of a former President," which greatly mitigated any separation-of-powers concerns. 2021 OLC Op. at 28. OLC further emphasized that this request, unlike that in *Mazars*, was made pursuant to a statute embodying the considered judgment of the political branches. *Id.*

F. Procedural History

1. District Court Proceedings

After OLC released its 2021 Opinion, Treasury informed Mr. Trump and Chairman Neal that it intended to furnish to Chairman Neal materials responsive to the 2021 Request. *See* Dist. Ct. Dkt. 111 at 2. The Committee subsequently dismissed a complaint it had previously filed against Treasury concerning the 2019 Request, and Mr. Trump and his business entities ("Trump parties") counterclaimed against the Committee and cross-claimed against Treasury (along with the Secretary, the IRS, and the IRS Commissioner) seeking an "injunction prohibiting [Treasury] from complying

with [the request], or taking any other action[,] to disclose[] [their] tax information." CAJA217. As relevant here, the Trump parties argued that the 2021 Request lacks a legitimate legislative purpose and violates the separation of powers under *Mazars*. Trump.App.154-160.[8] Treasury agreed to "forbear voluntarily from releasing the requested returns" pending the resolution of dispositive motions, Dist. Ct. Dkt. 114 at 2; *see also* Dist. Ct. Dkt. 111 at 3, and based on that "agreement," the district court ordered that Treasury provide 72 hours' notice to the Trump parties before "any release of the tax return information at issue," Dist. Ct. Minute Order (July 30, 2021).

The district court granted the Committee's and Treasury's motions to dismiss in their entirety. First, the court concluded that the request served a valid legislative purpose because Congress has authority to enact legislation relating to the Presidential audit program, like laws "[i]mposing … 'safeguards' or 'guardrails' on the IRS's discretionary process." Trump.App.51-52. The court further reasoned that the public statements cited in the Trump parties' pleading at most demonstrated "mixed motives"—which, even if true, would not invalidate the request. Trump.App.55-56. As the court explained, this Court's "precedents analyze whether Congress has a valid legislative purpose, not whether that is the only purpose." Trump.App.56. Thus, even if the Trump parties were able to prove other motives, that would not undermine or negate the validity of the Chairman's stated purpose of studying the IRS's mandatory Presidential audit program. Trump.App.55-56.

[8] The Trump parties pressed additional claims against Treasury, Trump.App.160-166, but they have since abandoned them.

Second, the district court concluded that the request comported with the separation of powers. Declining the Trump parties' exhortation to apply the test articulated in *Mazars* and instead applying the test set forth in *Nixon* v. *Administrator of General Services ("GSA")*, 433 U.S. 425 (1977), the court found that any burden the request might impose on the Executive Branch is "slight … when directed at a past President" because the request "does not by its own terms restrict the President from taking any action" or occupy the sitting President's time. Trump.App.70-71. Moreover, although Congress could theoretically "threaten a sitting President with a post-presidency" request, a sitting President could choose to ignore such a threat because, post-Presidency, the "tax returns would be less salient" and "Congress might drop its threat once the President leaves office or control of Congress changes hands." Trump.App.70-71. On the other side of the ledger, the Court reasoned that the Committee had adequately demonstrated a need for the requested information. Given that Mr. Trump "routinely criticized the IRS" while he was in office, the Committee had "reason to explore … how the IRS deals with such pressure from a sitting President." Trump.App.72. And "the Committee could learn from the Trump returns how the IRS includes a President's business entities in any audit." Trump.App.73.

Upon granting the motions to dismiss, the district court entered an order "direct[ing] the Executive Branch Defendants not to disclose any of [the Trump parties'] tax documents" during an initial 14-day period to "allow the parties to confer regarding next steps." Dist. Ct. Dkt. 150. The Trump parties subsequently filed a motion to continue that order—a motion on which the Committee and Treasury took no position in exchange for expedited briefing in the court of appeals. Dist. Ct. Dkt. 154 at

1-2. The district court granted that motion, "prohibit[ing] [Treasury] from disclosing any of [the Trump parties'] tax documents pending Intervenors' appeal to the D.C. Circuit." Dist. Ct. Dkt. 157 at 1 (cleaned up).

2. Court of Appeals Proceedings

The D.C. Circuit unanimously affirmed the district court's decision, with one judge concurring in much of the majority's opinion and in the judgment.

First, the court of appeals held that the 2021 Request serves at least one "legitimate legislative purpose" on which "legislation could be had": "the administration of the tax laws as they apply to a sitting President." Trump.App.11-13. The court rejected the Trump parties' contention—based on "a deluge of citations to statements of" individual Members of Congress who were not the Chair at the time, including then-Ranking Member Neal and Speaker Pelosi—that "the Chairman's Request is mere pretext for an unconstitutional ulterior motive" (either mere public exposure or law enforcement). Trump.App.9-10. The court concluded that it would only "look to the Chairman's written requests" because only the Chairman "is authorized by statute to request the information" and only he made the request, without a Committee vote. Trump.App.10.

Further, the court held that, under this Court's precedent, legislators' motives are constitutionally irrelevant and beyond the courts' power to investigate or evaluate: "'[I]n determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it.'" Trump.App.10 (alteration in original) (quoting *Eastland*, 421 U.S. at 508). Thus, the court of appeals elaborated, it is not the courts' "function to 'test the motives of committee members for this purpose.'" Trump.App. 10 (quoting

Watkins, 354 U.S. at 200 (brackets omitted). In short, "[t]he mere fact that individual members may have political motivations as well as legislative ones is of no moment." Trump.App.13.

The court of appeals then held that the 2021 Request "passes muster" under both the "heightened," "more rigorous" separation-of-powers test used by this Court in *Mazars* to evaluate a Congressional request for a *sitting* President's personal information and the less-demanding test used in *Nixon* v. *GSA*, which involved a former President's papers. Trump.App.14, 18. With respect to the *Mazars* analysis, the court concluded that "none of [its] four factors weigh in favor of enjoining the 2021 Request." Trump.App.24.

First, the court concluded that Chairman Neal's "'asserted legislative purpose warrants the significant step of involving the President and his papers'" because the Committee "is evaluating a program that applies only to the President and Vice President," not using a President as "a case study for general legislation." Trump.App.19 (quoting *Mazars*, 140 S. Ct. at 2035). Second, the court determined that the 2021 Request was "'no broader than reasonably necessary'" because it seeks "one return that would have been filed before President Trump assumed office, the four returns filed while in office, and one return filed after President Trump left office," along with the related audit files. Trump.App.20 (quoting *Mazars*, 140 S. Ct. at 2036). That scope was "understandable" because it enabled the Committee to evaluate and "compare returns … to see what effect, if any, Mr. Trump being the sitting President had on how his returns were treated." Trump.App.21.

Third, the court found "'the evidence offered" in the 2021 Request "to establish … a valid legislative purpose'" to be sufficiently "detailed and substantial" to "explain[] why the President's information will advance [Congressional] consideration of the possible legislation," Trump.App.22 (quoting *Mazars*, 140 S. Ct. at 2036): "primarily [public] statements by President Trump or his agents" that "directly relate to the areas of the Presidential audit program that the Chairman intends to investigate," not "anonymous tips or pure conjecture." Trump.App.22-23. And fourth, the court found any "'burdens imposed on the President'" insufficient to warrant enjoining or narrowing the request. Trump.App.23 (quoting *Mazars*, 140 S. Ct. at 2036). The court determined that any burden on Mr. Trump (or his businesses) does not have *constitutional* significance because he is no longer President and the information sought is his *personal* information. Trump.App.24. And the court deemed "any burden to the sitting President or the Executive Branch as a whole" to be "tenuous at best" because any Congressional "attempt to threaten the sitting President with an invasive request *after leaving office*" "is not substantial," especially given that "every President takes office knowing that he will be subject to the same laws as all other citizens upon leaving office," Trump.App.24-25—a conclusion confirmed by the current Administration's view that the request is proper, Trump.App.23.

Finally, the majority rejected the Trump parties' argument that Section 6103(f)(1) "is facially unconstitutional" because it does not expressly "include a requirement that the request have a legitimate legislative purpose," and rejected his argument that "Treasury's intent to comply with the Chairman's Request violates [the

Trump parties'] First Amendment rights because Treasury is politically motivated." Trump.App.25, 27.

Judge Henderson concurred in the judgment and most of the majority's analysis, but wrote separately to "highlight" that "the burdens borne by the Executive Branch are more severe and warrant much closer scrutiny than [her] colleagues have given them"—though, she concluded, still not severe enough to invalidate the 2021 Request. Trump.App.29; *see also* Trump.App.33.

Two days after the D.C. Circuit's decision, the Committee moved for immediate issuance of the mandate (subject to the possibility of a ten-day stay to allow the Trump parties to seek relief from this Court). C.A. Dkt. #1959035. The Trump parties subsequently petitioned for panel and en banc rehearing, and moved to stay the mandate pending disposition of the rehearing petition. C.A. Dkts. #1959917, #1959919. On October 27, the court denied both parties' motions and the rehearing petition without calling for a response or any recorded dissent. C.A. Dkts. #1970909, #1970910.

ARGUMENT

A party seeking a stay pending certiorari from this Court must demonstrate a "reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari," *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010); S. Ct. R. 10, and a "fair prospect that a majority of the Court will vote to reverse the judgment below" if it were to grant certiorari, *Hollingsworth*, 558 U.S. at 190. The Trump parties have shown neither. As explained below, their asserted errors consist of nothing more than the misapplication of this Court's precedents, and their asserted errors are plainly incorrect; the court of appeals' decision reflects that court's straightforward application

of this Court's longstanding precedent. Moreover, the relief they seek through their application is in effect a preliminary form of the ultimate relief that both lower courts denied after full consideration of the merits: an order that would preclude Treasury from complying with Chairman Neal's request. Consequently, the Court should be especially reluctant to grant the application. *See Respect Maine PAC* v. *McKee*, 562 U.S. 996 (2010) (mem.) (request for injunction "demands a significantly higher justification than a request for a stay" (cleaned up)).

I. THIS CASE IS NOT WORTHY OF CERTIORARI

The decision below does not present a question worthy of this Court's review. As elaborated in the next Part, the court of appeals, like the district court, faithfully applied this Court's precedents in rejecting the Trump parties' attempt to prevent Treasury from providing the requested tax information to the Chairman. Through the proceedings in the district court, the appeal, and the petition for panel and en banc rehearing, not one judge has concluded that the 2021 Request was invalid. Moreover, the particular test applied did not matter: the district court and the court of appeals sustained the request under the *Nixon* v. *GSA* approach, the panel also sustained it under the *Mazars* approach, and Judge Henderson sustained it despite calling for even closer scrutiny of the possible burdens on the Executive Branch. Although the Trump parties assert (at 12-13) that this case raises "important" and "unsettled" "legal issues," their claims of error amount to nothing more than disagreements with the court of appeals about its application of this Court's precedent to the highly unusual facts of this case. Indeed, they introduce (at 14) their discussion of the merits with the statement that "[t]he D.C. Circuit's decision misapplies this Court's decision in *Mazars*." *See also*

Application at 19 ("the lower court misapplied each of the 'special considerations' identified in *Mazars*"). Such claims of error "rarely" merit review. S. Ct. R. 10.

The Trump parties emphasize (at 12) that "Congressional subpoenas for the President's personal information implicate weighty concerns regarding the separation of powers," *Mazars*, 140 S. Ct. at 2035, but not every such case rises to the level of warranting this Court's review. The Trump parties note (at 12) that "this Court has already agreed to review a similar case once before," namely, in *Mazars*, but that actually shows that *this* case is *not* certworthy. Through *Mazars*, this Court has already prescribed the framework for evaluating the two branches' interests in a dispute over a Congressional demand for a President's information, at least when the sitting President is involved. Because the court of appeals applied *Mazars* even though this case concerns a former President, this Court could not craft a framework that is more protective of Executive Branch interests than the one applied by the court below.

Indeed, that is why the court of appeals noted "the possibility of further appellate review in … this case." Trump.App.14. The Trump parties err in asserting (at 12) that that remark shows the court below "seems to agree" that this case presents important questions worthy of this Court's review. The court was saying the opposite: that by analyzing the request not only under the *Nixon* v. *GSA* standard but also under the more demanding *Mazars* standard advocated by the Trump parties here, it was *averting* the need for further review. That the D.C. Circuit did not believe this case presents a certworthy issue is confirmed by its denial of the Trump parties' motion to stay the mandate and rehearing petition, without so much as calling for a response or recording a dissent.

The Trump parties' claim that "this case" raises "unsettled" legal issues is wholly deficient. First, they state (at 12) that this case presents "the question: whether, under the standard of [*Mazars*], 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." But as explained later, that question is already resolved by *Mazars* itself and a line of earlier precedent: courts are simply to ascertain whether the Congressional request serves a valid Article I purpose based on the face of the Congressional explanation for the request. *See infra* pp.25-29. The court of appeals straightforwardly—and correctly—applied those precedents to reject the Trump parties' claim; their assertions of error amount to nothing more than minor, and misguided, quibbles with the court's analysis. Judge Rogers's remark about "a number of difficult questions of first impression," which the Trump parties' quote, was made in a different case and merely suggested that Mr. Trump might seek *rehearing* on issues concerning the *application* of *Mazars*, not that there were issues justifying this Court's intervention. *Trump* v. *Mazars USA, LLP*, 39 F.4th 774, 812-813 (D.C. Cir. 2022) (Rogers, J., concurring), *quoted in* Application at 13. And that this is the first *lawsuit* involving a Congressional "demand [for] a President's tax returns," Application at 13, is factually true but hardly identifies a legal issue warranting this Court's review.[9]

Finally, the Trump parties observe that this Court gives "'special solicitude' to former Presidents bringing 'claims alleging a threatened breach of essential

[9] As noted above, this is not the first time Congress has invoked its statutory power with respect to a President; Congress used Section 6103(f)'s predecessor to demand and obtain then-President Nixon's tax returns and related tax information. *See supra* p.6.

Presidential prerogatives under the separation of powers.'" Application at 14 (quoting *Nixon* v. *Fitzgerald*, 457 U.S. 731, 743 (1982)). But Treasury's compliance with the 2021 Request does not implicate any "actions allegedly taken in the former President's official capacity during his tenure in office," *Nixon*, 457 U.S. at 733; the request seeks only non-privileged, personal information largely of the type that every other person elected President in the last half-century has released voluntarily. And this Court's denial of the stay applications and certiorari petitions that Mr. Trump has filed in other cases involving governmental requests for information concerning him refutes the Trump parties' suggestion that every such dispute deserves this Court's consideration. *See Trump* v. *Thompson*, 142 S. Ct. 1350 (2022) (mem.) (denying certiorari); *Trump* v. *Thompson*, 142 S. Ct. 680 (2022) (mem.) (denying stay); *Trump* v. *Van*ce, 141 S. Ct. 1364 (2021) (mem.) (same).

II. THE DECISION BELOW IS CORRECT

If the Court were to grant certiorari, it would affirm because the court of appeals' decision is based on the straightforward application of this Court's precedent.

A. The Committee's Request Is Within Congress's Article I Power

To be a valid under Article I, a Congressional demand for information must be "related to, and in furtherance of, a legitimate task of Congress," and therefore Congress may demand information on any "subject on which legislation could be had." *Mazars*, 140 S. Ct. at 2031 (cleaned up). Here, Chairman Neal explained in the 2021 Request that he seeks the Trump parties' tax information to help determine whether legislation is needed to ensure that the IRS enforces the tax laws fairly and impartially with respect to Presidents. App.1a; *see supra* pp.10-12. The court of appeals adjudged

that a valid legislative purpose, Trump.App.12, and in their stay application, the Trump parties do not disagree.

Instead, the Trump parties insist that the court should have held that the 2021 Request's "stated purpose was pretextual and its actual purpose" exceeded Congress's authority, based on statements by Representative Neal before he was Chairman and by other Members of Congress, some of whom were not even on the Committee. Application at 17 (cleaned up). As the court of appeals correctly recognized, this Court's precedent unequivocally forecloses the judicial inquiry the Trump parties want. Trump.App.10. In *Eastland*, this Court held that "in determining the legitimacy of a congressional act [courts] do not look to the motive alleged to have prompted it." 421 U.S. at 508. Earlier, in *Watkins*, this Court declared that "testing the motives of committee members … is not [the courts'] function" because "[t]heir motives alone would not vitiate an investigation … if [a] legislative purpose is being served." 354 U.S. at 200.[10]

[10] The statements on which the Trump parties rely are also irrelevant because, as the court of appeals recognized, the 2021 Request was made solely by the Chairman pursuant to statutory power vested solely in the Chairman, and therefore courts should look solely at the Chairman's statements in connection with the request. Trump.App.10. The only statements by Chairman Neal that the Trump parties rely on, *see* Application at 4-5; Trump.App.111-112—show *not* that his stated purpose was pretextual, but that he was appropriately mindful of applicable law and wanted to minimize the risk that such an important investigation would be undermined by inadvertently exceeding Congress's constitutional authority. That is entirely appropriate and responsible conduct for a Committee Chairman. The public acknowledgement of a deliberative process based on advice of counsel should not invalidate Congressional action, lest it deter Congress from accounting for its legal boundaries or assuring the public that it is doing so.

The Trump parties argue (at 18) that the court of appeals conflated "motive" with "purpose." Their *ipse dixit* that their evidence shows purpose rather than motive, however, is irrelevant because this Court's precedent establishes that a Congressional information demand need only (possibly) serve a valid Congressional purpose, even if it *also* allegedly serves some other (invalid) purpose. In *McGrain*, this Court held that courts are "bound to presume that the action of the legislative body was with a legitimate object, if it is capable of being so construed." 273 U.S. at 178 (cleaned up); *see also Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, 619 (1929) ("The presumption in favor of regularity … cannot be denied to the proceedings of the houses of Congress, when acting upon matters within their constitutional authority."). Then, in *Barenblatt* v. *United States*, the Court declared, "So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene." 360 U.S. 109, 132 (1959). And in *Eastland*, the Court admonished courts "not [to] go beyond the narrow confines of determining that a committee's inquiry may be fairly deemed within its province," and stated a "cursory look at the facts" would suffice to make that determination. 421 U.S. at 506 (cleaned up).

The Trump parties' assertion (at 17) that "there is a long record of courts going beyond the face of a congressional request to determine its purpose" is wrong. They point to *Barenblatt*'s reference to "the entire record," but they disregard both the statement quoted above and the fact that *Barenblatt* referred to "the entire record" to fault the *challenger* for overlooking the Committee's own statement of purpose, which *validated* its investigation. 360 U.S. at 133 & n.33. In other words, *Barenblatt* "scrutinized th[e] record" to find a valid Congressional purpose, not to find evidence

vitiating the stated Congressional purpose, as the Trump parties want. *Id.* at 133. Contrary to the Trump parties' suggestion, the same is true of *Wilkinson* v. *United States*, where the Court sustained the Congressional investigation based on the relevant subcommittee's "explicit" statements of purpose in a resolution and at the ensuing hearing. 365 U.S. 399, 408, 410 (1961).

The Trump parties argue (at 16, 18-19) that *Mazars* carved out an exception to these longstanding principles for cases where the requested information concerns a President (or former President). True, as they note, *Mazars* stated that "congressional subpoenas directed at the President differ markedly from congressional subpoenas we have previously reviewed," such as in *Barenblatt* and *Eastland*. 140 S. Ct. at 2034. But the Trump parties misunderstand this Court's point. In *Mazars*, the House was urging the Court to "ignore" the Executive Branch interests and focus exclusively on whether the request concerned "a subject on which legislation could be had"; rejecting that approach, this Court articulated the four additional "special considerations" to guide judicial review of Congressional requests for a President's documents. *Id.* at 2033-2035 (cleaned up). Thus, those additional considerations already account for the Executive Branch interests that might be implicated by the 2021 Request.

The Trump parties fail to appreciate the distinct separation-of-powers dynamic raised by their challenge to the 2021 Request's purpose. While *Mazars* concerned the separation of powers between Congress and the Executive Branch, the Trump parties'

challenge concerns the separation of powers between Congress and *the Judiciary*.[11] As the above quotations from *McGrain*, *Watkins*, *Barenblatt*, and *Eastland* show, the settled principle that a Congressional information demand need only be capable of serving a valid Congressional purpose reflects an appropriately cautious and respectful disposition of the courts toward Congress. Although courts can evaluate whether a Congressional act unduly jeopardizes Executive Branch interests, they are not positioned to divine legislators' supposedly "true" motives or purposes in the face of mixed evidence. *See, e.g.*, *Edwards* v. *Aguillard*, 482 U.S. 578, 637-639 (1987) (Scalia, J., dissenting) ("determining the subjective intent of legislators is a perilous enterprise"). Otherwise, it would be virtually impossible for Congress to validly demand information. After all, Congress is by design a "political branch[]," *Mazars*, 140 S. Ct. at 2026; *see also id.* at 2034 (noting "intense political interest" in Congressional request), and "[i]n times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies." *Tenney* v. *Brandhove*, 341 U.S. 367, 378 (1951); *see* 2021 OLC Op. at 26 ("If the mere presence of a political motivation were enough to disqualify a congressional request, the effect would be to deny Congress its authority to seek information."). That is true regardless of whether the target or recipient of the Congressional request is a President.

[11] Of course, as explained below (*infra* Part II.B), the 2021 Request does not implicate any significant Executive Branch interests anyway, including because the current Administration has determined that the request will not interfere with the operation of the Presidency or the Executive Branch.

Nowhere did *Mazars* suggest otherwise or endorse the view urged by the Trump parties. On the contrary, consistent with *McGrain*, *Barry*, *Tenney*, *Watkins*, *Barenblatt*, and *Eastland*, *Mazars* calls for courts to consider Congress's "*asserted* legislative purpose" and the "nature of the evidence *offered by Congress* to establish that a subpoena advances a valid legislative purpose." 140 S. Ct. at 2035-2036 (emphasis added). The Trump parties highlight (at 18) the Court's statement in *Mazars* that it would not "blind" itself to "what all others can see and understand," 140 S. Ct. at 2034, but there the Court meant only that it would not ignore the "separation of powers concerns" raised by the Congressional requests even though they were served on private entities, *id.*, not that it would second-guess Congress's stated intentions or purposes. The Trump parties' assertion (at 17) that, under the court of appeals' approach—which is to say, under *this Court*'s longstanding approach—"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" is dramatically overblown. At a minimum, courts would still have to ensure that such a request accounts for legitimate Executive Branch interests—and as explained below, the 2021 Request does.

B. The Request Does Not Violate The Separation Of Powers

The court of appeals correctly concluded that, under the demanding *Mazars* test, the 2021 Request does not unnecessarily intrude into the operation of the Presidency because "none of the … four factors [prescribed by *Mazars*] weigh in favor of enjoining the 2021 Request." Trump.App.24. The Trump parties' objections are both minor and mistaken. Their approach "giv[es] short shrift to Congress's important interests in

conducting inquiries to obtain the information it needs to legislate effectively" and, if adopted, would "risk seriously impeding Congress in carrying out its responsibilities"—an outcome *Mazars* expressly avoided. 140 S. Ct. at 2033.

1. The Trump parties contend (at 19) that the court of appeals erroneously "blessed a sweeping request" that is "broader than reasonably necessary to support Congress's legislative objective," *Mazars*, 140 S. Ct. at 2036. That the Trump parties consider (at 19) this the court's "most glaring[]" error highlights just how weak their case is. First, they object (at 19) to the 2021 Request's temporal scope: six tax years. But as the court of appeals recognized, that timeframe is justified because it enables the Committee to "compare returns … to see what effect, if any, Mr. Trump being the sitting President had on how his returns were treated." Trump.App.21; *see* App.3a-4a. The court of appeals' analysis does not reflect "deference," Application at 19, but rather a judgment that the scope of Chairman Neal's request is justified.

Second, the Trump parties argue (at 20) that the 2021 Request is overbroad in that it "target[s] eight businesses" that, they assert, are not subject to the IRS's mandatory Presidential audit program. Chairman Neal does not know that to be true; the Manual does not address the issue, and the IRS declined to answer the question at its briefing with the Committee. *See* Dist. Ct. Dkt. 44-3 at 12/413, 376/413, 381/413, 386/413. Some or all of these business entities might be limited liability companies or partnerships with income, deductions, and other tax attributes that are included on Mr. Trump's individual income tax returns. Thus, it is possible that the mandatory audit program covers these underlying businesses. But understanding whether and how the IRS handles such business entities in the context of a Presidential audit is central to

Chairman Neal's articulated and legitimate interest in making the 2021 Request. *See* App.4a-5a; *supra* pp.11-12.

And third, the Trump parties criticize (at 20) the court of appeals for declining to "narrow the request with a guarantee of confidentiality." But as the court of appeals recognized (Trump.App.22), the disclosure of Mr. Trump's returns would already be prohibited except as provided in Section 6103(f) and the Rules of the Committee and the House. Moreover, courts have no authority to require that Congress maintain the confidentiality of information. Nothing in *Mazars* or any other cases that the Trump parties cite would require confidentiality. *Cf. Mazars*, 140 S. Ct. at 2030 (noting that Congress and the Executive may negotiate an accommodation that allows Congressional access while protecting confidentiality).

2. The Trump parties argue (at 20-21) that the court of appeals "did not address whether Congress could obtain relevant information from other sources." That claim is false: the court analyzed the question and concluded, "There is no other source that would reasonably provide the Committee with the information it seeks while also completely circumventing separation of powers concerns." Trump.App.19-20. The Trump parties' stay application offers no sound reason to reject that conclusion.

First, they say (at 20) Chairman Neal could have sought "other Presidents' or Vice Presidents' returns." Although the Chairman could seek such returns, those returns would not obviate the need for the Trump parties' tax information. As the 2021 Request explained, Mr. Trump was a "unique taxpayer" among Presidents given his continuing control of a large and complex set of businesses, his aggressive tax positions, his business' foreign entanglements, his continuous audits, and his active contempt for

the IRS's auditing of him. App.4a; *supra* p.12. No other President's tax information would have shown whether the IRS was adequately equipped to handle the complexities and pressures likely posed by Mr. Trump (or a similarly challenging future President).

Moreover, as the court of appeals explained, requesting a different former President's tax information would still "involve" a President and thus would not "circumvent[] separation of powers concerns." Trump.App.19-20. The Trump parties respond (at 20) that "such a request would implicate lesser privacy interests for those [Presidents] who previously publicly released their returns," but that is irrelevant because privacy interests are distinct from separation of powers concerns. In any event, the Chairman would likely still need the associated confidential audit files or return information to be able to evaluate the efficacy and integrity of the audits and needed reforms.

Second, the Trump parties assert (at 20) that the Chairman should have requested information "about [IRS] budgeting, staffing, and testimony from personnel about any external pressure." Again, yes, the Chairman could request such information, but the IRS informed the Committee that any information about staffing and external pressure would also have to be obtained under Section 6103(f). And the Trump parties do not explain why it would be permissible for Treasury to release that information but not the information included in the 2021 Request. Moreover, the Trump parties offer no explanation of how such information could adequately inform the Committee about the question at the heart of the 2021 Request: whether and how the unique challenges presented by Mr. Trump's Presidency affected the efficacy and

integrity of the IRS's audit. Although such information could bear on that question, it plainly would not substitute for the requested Trump parties' tax information.

And third, the Trump parties fault (at 21) the Committee for not conducting "talks with the IRS" during the current administration. But Congress has a constitutional right to conduct *oversight* of the Executive Branch, and as a co-equal branch, it could not adequately do so if it had to accept the Executive's assurances. CAJA254. As this Court recognized long ago, "information which is volunteered is not always accurate or complete." *McGrain*, 273 U.S. at 175. Indeed, history contains an abject lesson in the importance of ensuring that Congress can conduct a thorough and independent investigation of Presidential auditing procedure: Congress's prior finding that the IRS under-determined President Nixon's tax liability by more than $400,000 even though the IRS had assured Congress it had properly assessed his liability. *See supra* p.6.

3. According to the Trump parties (at 21), Chairman Neal based the 2021 Request on "a handful of brief statements by President Trump about the audit process," and that is inadequate "evidence … to establish that [the 2021 Request] advances a valid legislative purpose," *Mazars*, 140 S. Ct. at 2036. But all that *Mazars* requires is that Congress "identif[y] its aims and explain[] why the President's information will advance its consideration of the possible legislation." *Id.* As the court of appeals found, Trump.App.22-23, the Chairman has done so with ample "detailed and substantial … evidence," *Mazars*, 140 S. Ct. at 2036, including extensive "public, verifiable sources," Trump.App.23.

The 2021 Request contains more than five single-spaced pages explaining the Committee's legislative and oversight needs for the Trump parties' tax returns and the related IRS administrative files. The request recites: the lack of information about the Presidential audit program, App.2a; the Committee's specific concerns about the program's ability to handle highly complex returns or to withstand improper pressure by a President, based on its review of the IRS Manual and the IRS's "own admission," App.2a-4a; the unprecedented pressures Mr. Trump has applied to the Presidential audit program through his unusually complex returns, foreign business activities, and hostility towards audits of him, based on media reports about his business activities and many public statements by him and his representatives—which are cited in the 2021 Request, App.4a-6a; what information the requested returns and related administrative files might reveal regarding the Committee's concerns, App.4a, App.6a; and the Committee's legislative goals to redress these concerns should they be borne out, App.2a-3a.

That is alone sufficient, but the 2021 Request is further substantiated by information obtained by the Committee during its preceding Hearing on Legislative Proposals and Tax Law Related to Presidential and Vice-Presidential Tax Returns. At that hearing, witnesses testified that Mr. Trump's tax returns would inform the Committee's assessment of whether the Presidential audit program functions effectively, particularly under the challenging circumstances presented by Mr. Trump. One tax expert witness testified that, "without seeing [Mr. Trump's] returns, the Committee cannot tell whether the returns are being properly reviewed by the IRS" and "cannot understand how any disputes have been resolved." Rosenthal, *The Value*

of Presidential and Vice-Presidential Tax Returns to the Public and Congress 6, Tax Policy Center (Feb. 7, 2019) (submitted to and accepted by Subcommittee during hearing, Oversight Tr. 24). Another expert witness cited the "experience in the Nixon administration" as evidence "that the IRS may not be able to … vigorously enforce the law relative to the President," and recommended that audit requirements be codified in a statute rather "than handled through the internal policies of the IRS." Oversight Tr. 40-41 (testimony of Joseph J. Thorndike).

Witnesses also testified at the hearing that Mr. Trump's tax returns could disclose foreign entanglements that would create conflicts of interest or suggest improper influence. "[T]ax transparency," one witness testified, "could lead to greater accountability" concerning subjects like the receipt of "funds from foreign sources," noting that "a lot of foreign governments have very extensive funds that invest in businesses." Oversight Tr. 26, 52 (testimony of Noah Bookbinder). Because of such concerns, witnesses urged the Committee to request Mr. Trump's business tax returns in addition to his individual income tax returns. *See, e.g.*, *id.* at 27, 51, 55.

In sum, the 2021 Request rests on extensive evidence that "directly relate[s] to the areas of the Presidential Audit Program that the Chairman intends to investigate." Trump.App.23.

4. Finally, the Trump parties argue (at 21-22) that enforcing the 2021 Request will "burden[] … the President," *Mazars*, 140 S. Ct. at 2036, by subjecting the President to "legislative threats." That claim reflects an implausible view of a weak and delicate President. The Framers intended Congress and the President to be "opposite and rival," and thus Congressional efforts to scrutinize Presidents' conduct, though

predictably unwelcome by Presidents, are an ordinary part of "the hurly-burly, the give-and-take of the political process between the legislative and the executive" that *Mazars* intended to preserve. *Id.* at 2026, 2029, 2033, 2035.

Moreover, as the court of appeals correctly observed, any such burden here is "tenuous at best" because a Congressional "attempt to threaten the sitting President with an invasive request *after leaving office*" "is not substantial," especially given that "every President takes office knowing that he will be subject to the same laws as all other citizens upon leaving office." Trump.App.24-25. Or, as the district court put it, "Section 6103(f) is a twig, not a cudgel, against the Executive when directed at a past President." Trump.App.70. The Trump parties' response (at 22) that that "treats this request like a run-of-the-mill legislative effort" disregards the fact that the court of appeals expressly addressed the effect *on Presidents*. The Trump parties also stress (at 22) that this "legislative effort … arose when [Mr. Trump] was in office," but the 2021 Request both was issued and would be enforced *after* he left office. In any event, as the court of appeals observed, "sitting Presidents" are likely to "view [such a request] as no burden at all" because Presidents routinely "voluntarily release tax returns and return information." Trump.App.16.[12]

[12] Judge Henderson's concern that the 2021 Request burdens the "Executive Branch" because the IRS "must retrieve, examine and prepare the requested tax documents for disclosure," Trump.App.33, does not alter this analysis. Virtually all Congressional oversight has that effect, and thus her view would improperly "risk seriously impeding Congress in carrying out its responsibilities." *Mazars*, 140 S. Ct. at 2033. Even the Trump parties apparently do not share her concern.

III. GRANTING THE APPLICATION WOULD SERIOUSLY HARM CONGRESS

Granting a stay until after the disposition of the Trump parties' certiorari petition would seriously harm Congress's interests. Delaying Treasury from providing the requested tax information would leave the Committee and Congress as a whole little or no time to complete their legislative work during this Congress, which is quickly approaching its end. This work depends on the documents at issue, for as this Court has recognized, Congress "cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change," *McGrain*, 273 U.S. at 175. But here, "one branch of Government is being asked to halt the functions of a coordinate branch." *Eastland*, 421 U.S. at 511 n.17. Thus, lest "delay … frustrate[] a valid congressional inquiry," this case must "be given the most expeditious treatment" by the courts. *Id.*

Similarly, blessing the Trump parties' position on the merits would significantly undermine Congress's constitutional authority to investigate and legislate. The "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *McGrain*, 273 U.S. at 161. And more recently, this Court in *Mazars* confirmed that "[l]egislative inquiries might involve the President in appropriate cases" and rejected an approach that gave "short shrift to Congress's important interests in conducting inquiries to obtain the information it needs to legislate effectively." 140 S. Ct. at 2033. To rule for the Trump parties on the merits would disregard those important Congressional interests and "risk seriously impeding Congress in carrying out its responsibilities" by in effect preventing Congress from

completing any investigation involving a former President whenever there are allegations that the investigation was politically motivated.

CONCLUSION

The application should be denied. Additionally, the Court should construe the application as a petition for certiorari and deny it.

Respectfully submitted.

/s/ Douglas N. Letter

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NOVEMBER 2022

APPENDIX

COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

June 16, 2021

The Honorable Janet L. Yellen
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

The Honorable Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C. 20224

Dear Secretary Yellen and Commissioner Rettig,

The Committee on Ways and Means ("Committee") has oversight and legislative authority over our Federal tax laws.[1] Pursuant to this authority, the Committee has a responsibility to conduct rigorous oversight of the Internal Revenue Service ("IRS") to ensure that our tax laws are administered in a fair and impartial manner and to inform legislation necessary for safeguarding our voluntary tax compliance system.

In order for our tax system to function, Americans must have confidence that no taxpayer is able to operate above the law. This, of course, extends to the President of the United States, who is the single most powerful public official in the country. With this in mind, the Committee continues to seek the tax returns and return information, including audit files, of former President Donald J. Trump to inform its legislative work. As you know, the Committee previously requested former President Trump's tax returns and return information, but the previous Administration refused to comply with the Committee's lawful request.[2] Because this matter remains in active litigation, and as an accommodation to the Department of the Treasury and the IRS, the Committee articulates its need for the requested documents below.[3]

I. The Committee Has Serious Concerns About the IRS's Ability to Audit a President in a Fair and Impartial Manner.

The Committee has been considering legislative proposals and conducting oversight related to our Federal tax laws, including, but not limited to, the extent to which the IRS audits and enforces the Federal tax laws against a President. In 1974, it became known publicly that the IRS

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[1] Under Rule X.1(t) of the United States House of Representatives (117th Cong.), the Committee has been delegated broad legislative, investigative, and oversight authority over revenue measures generally, which encompasses all aspects of our nation's tax laws and their administration.

[2] Letter from Hon. Richard E. Neal, Chairman, H. Comm. on Ways and Means to Hon. Charles P. Rettig, Comm'r, IRS (Apr. 3, 2019).

[3] Pursuant to Section 6103(f) of the Internal Revenue Code, the Chairman of the Committee on Ways and Means has the authority to request and receive tax returns and return information. Section 6103(f) does not require the Chairman to articulate or explain the Committee's legislative purpose for seeking the requested information.

did not properly examine President Nixon's returns. Shortly thereafter, the IRS implemented a mandatory audit program for a sitting President's returns "in the interest of sound tax administration."[4] However, since the program was adopted in 1977, the American people have heard nothing further from the IRS about the specifics of this program, which is merely IRS policy and is not codified in the Federal tax laws. In truth, we do not know for certain that these audits are conducted and, if so, whether they are in accordance with this policy and are both thorough and fair. As is discussed in more detail below, the Committee has serious concerns about the IRS's full and fair administration of the tax laws with respect to a President and believes legislation may be needed in this area.

The Committee has reason to believe that the mandatory audit program is not advancing the purpose for which it was created, which may require Congress to act through legislation. Under the Internal Revenue Manual ("IRM"), individual income tax returns of a President are subject to mandatory examination, but, by the IRS's own admission, many of the relevant IRM provisions are outdated and no longer followed. Further, the applicable IRM sections do not account for a President who, like former President Trump, had ongoing audits, hundreds of business entities, and inordinately complex returns. Critically, the IRM also does not provide explicit safeguards in the event a President interferes with or questions the appropriateness of such examination, which imperils the integrity of the entire process. Considering the enormous power that a President wields over the IRS, these gaps in the IRM procedures warrant Congress's close attention.

The IRM grants an IRS revenue agent substantial discretion to shape the course of the President's audit and to determine, among other things, whether the mandatory audit will include a rigorous review of open tax years or underlying business income required to be reported on an individual income tax return. Over the last two years, the IRS has been unable to provide the Committee assurance that sufficient safeguards exist to shield a revenue agent from undue influence at the hands of a President trying to secure a favorable audit. Perhaps the most troubling fact is that, while the revenue agent's identity is largely secret within the IRS, it is known by the President and the President's representatives, who communicate directly with the agent without supervision. This raises critical questions as to whether this employee is adequately protected and able to act objectively and impartially.

Among the Committee's goals is ensuring that the tax laws are administered fully and fairly. Accordingly, the Committee continues to consider and prioritize legislation on equitable tax administration, including legislation on the President's tax compliance, and public accountability. The mandatory audit should not be merely a rubber stamp, and the IRS must, at a minimum, treat a President like any other taxpayer subject to an audit. Importantly, the Committee also seeks to explore legislation intended to ensure that IRS employees in any way involved in a President's audit are protected in the course of their work and do not feel intimidated because of the taxpayer's identity. Indeed, the purpose underlying inclusion of the mandatory audit in the

[4] Bill Curry, "Yearly Audits Set for Carter, Mondale," Wash. Post (June 21, 1977), https://www.washingtonpost.com/archive/politics/1977/06/21/yearly-audits-set-for-carter-mondale/aad47cd9-7906-4cb2-9272-930722027d2a/.

IRM was so that no IRS employee would have to make the decision to audit a sitting President.[5] However, there is more to an audit than just the decision to initiate it.

Under the Rules of the House of Representatives, the Committee's authority to legislate on tax administration is indisputable. Should the Committee find that the mandatory audit program is inadequate, it is within our jurisdiction to consider and enact legislation to address these findings. To the same extent, if the Committee determines that adequate safeguards do not exist to prevent improper influence by a President, we can and will propose legislation to provide the appropriate guardrails.

II. The Committee is Entitled to Request and Receive Tax Return Information Necessary to Inform Legislation on the Mandatory Audit Program.

Understandably, the Committee cannot properly evaluate the effectiveness or fairness of the mandatory audit program, in practice, without relevant information. And, unless the Committee can assess the sufficiency of current procedures, we cannot legislate responsibly on this matter or address the real potential for abuse of power. If it is, in fact, the case that Presidents can improperly steer the course of their own audits either through their actions or public declarations, the Committee must implement a legislative solution. But, the IRS must first provide us with the necessary information.

Tax returns and return information, including audit files, are integral to the Committee's inquiry into the mandatory audit program. At its core, what the Committee seeks to understand is how the IRM provisions have been applied *in practice* and whether IRS agents have been able to act objectively in the past. Specifically, the Committee requires information about an actual audit and an actual taxpayer. This will help the Committee determine, among other things: (i) whether IRS agents have been able to operate free from improper interference by a President or his representatives; (ii) whether agents have looked at ongoing audits that predate a President's term in office; (iii) whether agents have reviewed underlying business activities, especially activities involving many interrelated entities and income from and deductions related to foreign sources; (iv) whether agents have had access to the necessary books and records to substantiate amounts on the tax return; (v) whether there have been any examination findings or adjustments and how a President has responded to such findings or adjustments; and (vi) whether agents have had access to the necessary resources to undertake an exhaustive review of a complex taxpayer on an annual basis. Information that would shed light on these issues is, necessarily, protected under Section 6103(a) of the Internal Revenue Code ("Code") and subject to disclosure to a covered committee pursuant to Section 6103(f).

In particular, the Committee seeks information about a President who implicates many of our wide-ranging concerns about the mandatory audit program and equitable tax administration, as well as other matters of concern that, unquestionably, lie within Congress's competence to

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[5] *Id.* At the time, the IRS explained that this decision "automatically relieves any particular IRS employee" of having to make the decision to audit a President. *See also* JCX-3-19, *Background Regarding the Confidentiality and Disclosure of Federal Tax Returns* (Feb. 4, 2019), at 21 (quoting IRS spokesperson).

explore. As is described in more detail below, former President Trump is the sole President the Committee is aware of who controlled hundreds of business entities while in office and who routinely criticized the IRS for auditing him. His returns, reportedly, have been under continuous audit since before his Presidency and raise serious questions of tax policy, administration, and compliance. For these reasons, his tax returns and return information are not only instructive—but indispensable—to the Committee's inquiry into the mandatory audit program. Further, former President Trump's tax returns could reveal hidden business entanglements raising tax law and other issues, including conflicts of interest, affecting proper execution of the former President's responsibilities. An independent examination might also show foreign financial influences on former President Trump that could inform relevant congressional legislation.

As Chairman of the Committee, I am authorized by Section 6103(f) of the Code to request and receive tax returns and return information, including that of a current or former President. Indeed, there exists direct precedent for exactly this type of inquiry. In 1973, President Nixon's tax compliance became a matter of public concern when journalists and tax lawyers questioned the appropriateness of a large deduction he had taken on his 1969 tax return. In response, President Nixon generally denied any impropriety and released a note from the IRS stating that his returns were accepted as filed and complimenting him for the care taken in preparing his returns. Between 1973 and 1974, the Joint Committee on Internal Revenue Taxation ("Joint Committee") requested and received copies from the IRS of President Nixon's returns for multiple tax years, including years that predated his Presidency. Ultimately, the Joint Committee found numerous deficiencies in the IRS's auditing of President Nixon's returns and concluded that President Nixon had an unpaid tax liability of more than $400,000. In the wake of the Joint Committee's findings, the IRS implemented the mandatory audit program in 1977, demonstrating precisely how a congressional committee's investigation served as a highly valuable oversight tool for the IRS's review of a President's returns.

III. Former President Trump is a Unique Taxpayer in the Mandatory Audit Program.

Among Presidents, Donald J. Trump is a unique taxpayer. Unlike his predecessors, he controlled hundreds of businesses throughout his term, raising concerns about financial conflicts of interest that might have affected the administration of laws, including the tax laws. Former President Trump also represented that he had been under continuous audit by the IRS prior to and during his Presidency, reportedly received a $73 million refund that was under investigation when he took office, and routinely complained in public statements about alleged unfair treatment by the IRS. The Committee's concerns about the mandatory audit program have been particularly heightened with respect to him for these reasons, which are discussed in more detail below.

First, former President Trump's tax attorneys have described his returns as "inordinately large and complex."[6] Through a revocable trust, former President Trump controlled more than 500 individual business entities that comprise the Trump Organization. The large, complex, and

[6] Letter from Sheri A. Dillon and William F. Nelson to Mr. Donald J. Trump, *Re: Status of U.S. federal income tax returns* (Mar. 7, 2016), *available at* http://static.politico.com/bf/cd/d210b336496e839c1fc7a517407c/letter-from-donald-trumps-tax-attorneys-on-trump-audits.pdf (hereinafter "Morgan Lewis Letter").

far-reaching web of his business empire likely was reported on his individual income tax return, but it is unclear whether any audits (mandatory or otherwise) included a review and substantiation of his underlying domestic and foreign business activities. On their face, the IRM provisions on the mandatory audit program do not account for such substantial business activities. This is especially concerning to the Committee, as news reports indicate that the former President used his businesses to take aggressive tax positions to minimize his tax liability.[7] Indeed, in 2019, he referred to the practice of showing real estate "losses for tax purposes" as "sport."[8]

Second, the former President stated repeatedly that his returns were under routine audit. In 2016, his tax attorneys reported that his returns had been under continuous examination since 2002.[9] Further, last fall, the New York Times reported that former President Trump has been engaged in a decade-long audit battle with the IRS over a $73 million tax refund that he received.[10] According to the New York Times, that amount represents all the Federal income tax that he paid for 2005 through 2007, plus almost $3 million in interest. The New York Times noted that, if the former President were required to repay the entire refund, it could cost him more than $100 million with interest. In no uncertain terms, the continuous audit of his returns, the colossal size of the refund in question, and the use by the former President of a grantor trust controlling hundreds of businesses make him markedly different from other Presidents examined under the IRM's mandatory audit procedures. Understanding how the IRS handled these issues is crucial to the Committee's inquiry into whether the mandatory audit program requires legislative action.

Third, statements by former President Trump and his surrogates raise serious questions about an IRS agent's ability to freely enforce the tax laws against him while he was President. Former President Trump's disdain for IRS audits is widely known. As a Presidential candidate, he expressed his belief that it was "very unfair" that he was "always audited," and claimed that he was audited "when [he] shouldn't be audited."[11] Alarmingly, once he became President, this sentiment was explicitly extended to the automatic, mandatory audit described in the IRM. In 2018, the White House Press Secretary explained, "The President and First Lady filed their taxes on time and as always they are automatically under audit, which the President thinks is extremely

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[7] For example, according to the New York Times, former President Trump regularly reported massive and questionable deductions, such as a deduction for consulting fees paid to a family member and employee of the Trump Organization, a business expense deduction for a private family residence, and charitable deductions for conservation easements at his properties. Russ Buettner, Susanne Craig, and Mike McIntire, "Long-Concealed Records Show Trump's Chronic Losses and Years of Tax Avoidance," N.Y. Times (Sept. 27, 2020), https://www.nytimes.com/interactive/2020/09/27/us/donald-trump-taxes.html?action=click&module=Spotlight&pgtype=Homepage.

[8] Reuters Staff, "Trump blasts report on his business losses, calls accounting a 'sport,'" Reuters (May 8, 2019), https://www.reuters.com/article/us-usa-trump-taxes-sport/trump-blasts-report-on-his-business-losses-calls-accounting-a-sport-idUSKCN1SE1K5.

[9] See *supra* note 6, Morgan Lewis Letter.

[10] See *supra* note 7, "Long-Concealed Records Show Trump's Chronic Losses and Years of Tax Avoidance." *See also Taxpayer Fairness: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means,* 116th Cong. (Oct. 13, 2020).

[11] Jenna Johnson, "Donald Trump says IRS audits could be tied to being a 'strong Christian," Wash. Post (Feb. 26, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/02/26/donald-trump-says-irs-audits-could-be-tied-to-being-a-strong-christian/.

unfair."[12] Following the New York Times report last fall, former President Trump—speaking from the podium in the White House Briefing Room—directly attacked the IRS and its employees, stating "They treat me very badly. You have people in the IRS, they treat me very, very badly."[13]

Knowing only what has been reported publicly, there is ample reason to question whether the mandatory audit program has functioned as intended when the taxpayer's history is as complex as former President Trump's. Simply put, it does not appear that the IRM provisions concerning the mandatory Presidential audit are sufficiently robust for a President who: (i) has "inordinately large and complex" returns; (ii) controls hundreds of business entities, some of which receive income from foreign sources; (iii) raises issues of financial conflicts of interest; (iv) takes aggressive tax positions to minimize his liability; (v) is under continuous audit by the IRS; (vi) has a $73 million refund under review; and (vii) openly attacks the IRS and the very IRS employees conducting the mandatory audit. To be sure that the mandatory audit program will work for all future President-taxpayers (including those with similarly complex taxes), we must see how the program fared under the exceedingly challenging circumstances presented by former President Trump. Further, it would be instructive for the Committee's legislative purposes to understand what happens to the mandatory audit if it is not closed before a President leaves office.

Without seeing the relevant returns and return information, it is impossible to properly assess whether the scope of a mandatory audit was complete, objective, and fair and to legislate accordingly. Therefore, as Chairman of the Committee and pursuant to the authority provided by Section 6103(f) of the Code, I request the following tax returns and return information for each of the tax years 2015 through 2020:

1. The Federal individual income tax returns of Donald J. Trump.

2. For each Federal individual income tax return requested above, a statement specifying: (a) whether such return is or was ever under any type of examination or audit; (b) the length of such examination or audit; (c) the applicable statute of limitations on such examination or audit; (d) the issue(s) under examination or audit; (e) the reason(s) the return was selected for examination or audit; and (f) the present status of such examination or audit (to include the date and description of the most recent return or return information activity).

3. All administrative files (workpapers, affidavits, etc.) for each Federal individual income tax return requested above.

4. The Federal income tax returns of the following entities:

    - The Donald J. Trump Revocable Trust;

[12] Arden Farhi, *Trump Files 2017 Taxes Following 6-month Extension,* CBS News (Oct. 17, 2018), https://www.cbsnews.com/news/trump-files-2017-taxes-following-6-month-extension/.
[13] "Trump Calls Years of Tax Avoidance 'Fake News,' Attacks I.R.S.," N.Y. Times (Sept. 27, 2020), https://www.nytimes.com/video/us/politics/100000007364069/trump-taxes.html.

- DJT Holdings LLC;
- DJT Holdings Managing Member LLC;
- DTTM Operations LLC;
- DTTM Operations Managing Member Corp;
- LFB Acquisition Member Corp;
- LFB Acquisition LLC; and
- Lamington Farm Club, LLC d/b/a Trump National Golf Club—Bedminster.

5. For each Federal income tax return of each entity listed above, a statement specifying: (a) whether such return is or was ever under any type of examination or audit; (b) the length of such examination or audit; (c) the applicable statute of limitations on such examination or audit; (d) the issue(s) under examination or audit; (e) the reason(s) the return was selected for examination or audit; and (f) the present status of such examination or audit (to include the date and description of the most recent return or return information activity).

6. All administrative files (workpapers, affidavits, etc.) for each Federal income tax return of each entity listed above.

7. If no return was filed for the tax year requested, a statement that the entity or individual did not file a return for such tax year.

* * *

There have been claims that the true and sole purpose of the Committee's inquiry here is to expose former President Trump's tax returns. These claims are wrong. I echo the words of the Supreme Court: "A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it."[14] We have a duty to our constituents to eliminate unfairness where we see it, and we have an obligation to do so by legislating in an informed and responsible manner. The Committee will not shy away from its constitutional duty to serve the American people, not in this instance, not ever.

Sincerely,

The Honorable Richard E. Neal, *Chairman*
Committee on Ways and Means

[14] *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

CERTIFICATE OF SERVICE

I, Douglas N. Letter, a member of the bar of this Court, hereby certify that on this 10th day of November, 2022, I caused all parties requiring service in this matter to be served with the accompanying Opposition to Application for a Stay by email and overnight courier to the address below:

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I further certify that paper copies will be submitted to the Court by email and courier on November 10, 2022, per discussion with the Clerk's Office.

/s/ Douglas N. Letter
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