No. 22A362

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

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY OF MANDATE

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INTRODUCTION

Constitutionally, the stakes could not be greater. No prior Congress has used its legislative power to obtain and expose the private financial information of a President. The last time Congress tried, this Court entered a stay, granted review, and rejected Congress's assertion of authority 9-0. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020). This Court's intervention helped preserve the balance of power, forcing Congress to narrow its demands and jumpstarting the accommodation process. *See Mazars*, Doc. #1961693, No. 21-5176 (D.C. Cir. 2022) (noting settlement); *Deutsche Bank*, Doc. 126, No. 1:19-cv-3826 (S.D.N.Y. 2022) (noting ongoing negotiations).

Among the unprecedented demands for President Trump's finances, however, this demand was always the worst. No records have more "intense political interest" than the tax returns, *Mazars*, 140 S. Ct. at 2034, and no request was supported by more objective evidence of improper purpose. The evidence is so blatant that, even before *Mazars* raised the legal standard, the executive branch rejected the Committee's request for lacking a legitimate legislative purpose. App.138-39 ¶¶219-22 (OLC); *accord* ¶27 (Committee concluding same in 115th Congress); ¶138 (Senator Grassley concluding same). Yet the D.C. Circuit dismissed all that evidence as an improper hunt for congressional "motive," even under the now-heightened *Mazars* test. Because that test also governs *sitting* Presidents and because these disputes usually arise in D.C., the decision below will force all Presidents to fight abusive congressional demands for their personal information with two hands tied behind their back.

Meanwhile, the equities could not be more lopsided. Respondents don't disagree that, absent a stay, President Trump will immediately and irretrievably lose his

rights to taxpayer privacy and judicial review. Respondents also don't identify any remotely comparable harm on their side. The executive has no legitimate interest in rapidly exposing the private finances of its former boss. And Congress has no pressing interest in studying how the IRS audits Presidents. Even though the Committee has access to reams of information about presidential audits now—including an eager IRS—it hasn't begun any serious legislative study. It remains singularly focused on getting the information of one particular President, whose audits aren't even finished yet. And all agree that, should this Court grant a stay and later deny certiorari or affirm, the Committee is free to continue its investigation in the next Congress.

In fact, the legislative calendar weighs in favor of more deliberation, not less. Just last week, Americans voted to elect a new House and Senate. That new Congress will convene on January 3, 2023. Meanwhile, the old Congress has only a few days left on its legislative calendar. Though a few days is enough time to improperly expose the most sensitive documents of its chief political rival, it's not enough time to properly study, draft, debate, or pass legislation. As the D.C. Circuit once held in similar circumstances, granting a stay would have the "benefit of permitting ... the new House an opportunity to express their views on the merits of the lawsuit." *Cmte. on Judiciary of U.S. House of Reps. v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008). Only that result reflects the "special solicitude" that this Court gives certiorari petitions from former Presidents, *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982), and only that result honors every branch's duty to avoid these kinds of constitutional clashes "'whenever possible,'" *Mazars*, 140 S. Ct. at 2035. This Court should enter a stay.

ARGUMENT

This Court should stay the D.C. Circuit's mandate pending certiorari; then it should either set a schedule for expedited certiorari briefing or grant certiorari and set an expedited schedule for briefing and argument. This Court took the same course in *Mazars* under indistinguishable circumstances. The equities are lopsided in favor of a stay. And a stay is the only way to preserve this Court's ability to review the important questions presented.

I. This Court granted a stay in *Mazars* under materially indistinguishable circumstances.

To resist a stay pending certiorari, the House pressed the same arguments in *Mazars* that Respondents press here. Yet the Court granted a stay. It should grant one here, too. Though *Mazars* was decided before President Trump left office, the Committee's demand for his tax information was issued while he was in office, was continuously pursued, and was evaluated under the *Mazars* test precisely because it implicates the separation of powers. How the D.C. Circuit decided this case thus has sweeping implications for both former Presidents and sitting Presidents.

This case presents issues no less weighty than *Mazars*, again concerning a congressional demand for a President's personal information and the related separation-of-powers concerns. All parties agree that the Committee's request implicates the separation of powers because it's an interbranch conflict between Congress and a former President. Just as the congressional demand in *Mazars* raised unique questions about a President's private papers, the Committee's demand for a prior President's papers puts the judiciary in "uncharted territory." App.40. Whether and how the considerations from *Mazars* apply here are "sensitive ... questions of first impression"

and "foundational" to our constitutional structure. *Trump v. Mazars USA, LLP*, 39 F.4th 774, 812 (D.C. Cir. 2022) (Rogers, J., concurring); App.29 (Henderson, J., concurring). While Respondents disagree, they ignore that the executive branch previously found this same request unconstitutional, and for precisely the same reasons that President Trump presses here. App.137-38 ¶¶218-22. Like *Mazars*, this case is thus critically important to the separation of powers. And like *Mazars*, it's the sort of case where this Court should have the last word.

The equities also strongly favor a stay—just as they did in *Mazars*. President Trump faces the same quintessential form of irreparable harm: case-mooting disclosure of his private documents. No Respondent contests the point. *See* Cmte.Opp.20; Gov't.Opp.14. The arguments they do make were all raised, and rejected, in *Mazars* itself. The committee there also pressed its need for efficient investigations, the impending end of its legislative session, and the supposed correctness of the lower courts' rulings. *See* Stay Opp. 23-28, No. 19A545 (U.S. 2019). Unlike the Committee here, the committee there could even invoke a "rapidly advancing impeachment inquiry" as a reason for haste. *Id.* at 25. But instead of crediting these concerns, this Court entered a stay, granted expedited certiorari, and ultimately reversed 9-0.

The Court should do the same here. Careful deliberation, not haste, is the watchword when considering cases that will affect the long-term balance of interbranch power. *See Cmtes. of the U.S. House of Reps. v. Trump*, 141 S. Ct. 197 (2020) (denying a similar request for expedition after *Mazars*). This Court should follow the

course it charted in *Mazars* by granting a stay and giving itself the chance to at least entertain—after full briefing and deliberation—certiorari.

II. The equities overwhelmingly favor a stay.

Respondents concede that President Trump will suffer irreparable harm without this Court's intervention. *See* Cmte.Opp.20; Gov't.Opp.14. They are correct. Without a stay, his legal claims will become moot and his confidential information will be disclosed. Nor does the Committee contest that the equities strongly favor this Court's intervention. *See* Cmte.Opp.20. Right again. No party will be harmed by a stay, while Applicants and the public will be significantly harmed without one.

In just over a single page at the back of its brief, the Committee suggests that "granting the application would seriously harm Congress." Cmte.Opp.37-38. It claims that a stay "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." *Id.* at 37 (emphasis added). This claim has at least three problems.

First, *this* Congress already lacks enough time to start the Committee's supposed legislative work, let alone complete it. With only 17 days left in its final session, the 117th Congress's time for legislating is effectively over. *See House of Representatives Schedule* (last visited Nov. 14, 2022), bit.ly/3E8ihUN. It's inconceivable that Congress will adequately analyze the voluminous sets of documents that the request demands, propose new legislation, and vote on it in that remaining time. In its lone paragraph suggesting harm to the current Congress, the Committee has nothing to say about this problem.

Second and relatedly, the equities favor a brief delay so that the *new* Congress can consider the matter. All agree that "no amount of delay would moot [the Committee's] request" because it "could carry over into later terms (as it already has) and inform the Committee's work then." Stay.Appl.26 (citing CADC Doc. #1960284, at 5-6 and *Mazars*, 39 F.4th at 785-87). So to the extent a stay would push this matter into the next Congress, that result *helps*—not hurts—Respondents' institutional interests. A Congress's rapidly approaching end presents "no pressing need for an immediate decision," but instead permits "the new House an opportunity to express their views on the merits of the lawsuit." *Miers*, 542 F.3d at 911. The executive branch typically appreciates this benefit. *See* Mot., *Mayorkas v. Innov'n Law Lab*, No. 19-1212 (U.S. Feb. 1, 2021) (asking for the briefing schedule to be postponed and the case to be removed from the argument calendar so that the new administration could reconsider the rule at issue); Mot., *Cochran v. Gresham*, No. 20-37 (U.S. Feb. 22, 2021) (similar).

Third, any urgency is largely of Respondents' own making. Applicants have stressed that "[t]his case has already been stayed for over 1,100 days, across two Congresses," and that the "delay was often either with the Committee's consent or upon its own motion." Stay.Appl.26; *see also id.* (explaining that in 2021 "the Committee took *six months* to decide whether to lift a stay and pursue Applicants' confidential documents"). Any prejudice the Committee might suffer is thus largely self-inflicted. Neither the Government nor the Committee disputes their complicity in delaying this case.

The Committee instead repeats *Eastland*'s footnote about giving Congress's claims of legislative immunity "the most expeditious treatment." *See* Cmte.Opp.37 (quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 511 n.17 (1975)). But as Applicants argue—without any discernible response from Respondents—"*Eastland* was a case between Congress and purely private parties; its insistence on 'expeditious treatment' does not apply ... in cases raising separation-of-powers issues." Stay.Appl.30. The same goes for the only other case that the Committee cites: *McGrain v. Daugherty*, 273 U.S. 135 (1927), which unlike this case involved no separation-of-powers issue that will affect every past, present, and future President. *Cf.* Cmte.Opp.37. The Committee's suggestions to the contrary repeat the House's prior sin of invoking "precedents that do not involve the President's papers." *Mazars*, 140 S. Ct. at 2033.

In short, the supposed harms to Congress from delay are not irreparable, let alone reasons to deny a stay and moot this case prematurely. If anything, they are reasons to simply treat this application as a certiorari petition and set an expedited schedule for briefing and argument on the merits. That course would allow for efficient resolution of this case, while also letting the new Congress weigh in, without giving short shrift to these serious legal issues.*

* Strangely, the Committee suggests that this Court should treat the stay application as a certiorari petition and then *deny* it. Cmte.Opp.4, 38. But while quickly granting certiorari would conserve resources and respect the parties' competing interests, quickly denying certiorari would serve no valid purpose. It would only prevent this Court from considering—later, after the case became moot—whether to vacate the D.C. Circuit's decision under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). The Court should decide the question of vacatur later, with full briefing and outside

III. The Court is likely to grant certiorari and reverse.

Respondents' efforts to downplay the importance of this case fail. The Committee casts this dispute as a mere misapplication of law to fact. Cmte.Opp.3-4, 20-22. Even if that were right, some misapplications of law warrant this Court's review. Exhibit A would be the first challenged application of *Mazars*, by the circuit that hears virtually all these cases, to one of the most far-reaching efforts by Congress to expose the most politically charged information about its chief rival. Regardless, the Committee is wrong. Its defenses of the opinion of the court of appeals only highlight the far-reaching questions at stake.

Contrary to Respondents' suggestion, that the D.C. Circuit purported to apply the *Mazars* test—the same test that would govern a *sitting* President—does not avoid momentous legal questions; it creates them. *Cf.* Cmte.Opp.22; Gov't.Opp.26. True, the court held that, because the request passed the most demanding level of review (*Mazars*), it necessarily passed more lenient tests. But that conclusion is not worthy of review only if the D.C. Circuit correctly understood *Mazars*—a question fully presented by this case with resounding consequences for future executive-legislative disputes. It makes this case not only about what standard governs disputes between Congress and a former President, but also a case about what Congress can do to *any* President, current or former, under the highest standard.

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this emergency posture. *Cf.* Pet'r Cert. Reply 1, *Trump v. CREW*, No. 20-330 (U.S. Dec. 23, 2020) (successfully urging the Court, in a post-election posture, to hold the petition until the new administration was sworn in and then to vacate under *Munsingwear*); Pet'r Cert. Reply 1-2, *Trump v. D.C.*, No. 20-331 (U.S. Dec. 23, 2020) (same).

A. Respondents defend the D.C. Circuit's conclusion that, when resolving a dispute between the President and Congress under *Mazars*, courts must accept any valid legislative purpose on the face of an informational demand. *See* Cmte.Opp.25-29; Gov't.Opp.15. In fact, the Committee suggests that courts must accept not just a stated purpose, but any *possible* purpose that the request is "capable of serving." Cmte.Opp.28. The Committee understands *Mazars* to hold as much—as it must, since otherwise it cannot defend the D.C. Circuit's decision to resolve this case on the pleadings, as a matter of law. *Id.* at 28-29.

The Committee misunderstands *Mazars* and, in the process, underscores the need for this Court's review. The core of *Mazars* is a rejection of the ordinary, deferential review that Congress usually gets. The Committee argues that *Mazars* remained "consistent with *McGrain*, *Barry*, *Tenney*, *Watkins*, *Barenblatt*, and *Eastland*," Cmte.Opp.29, but *Mazars* holds that those cases involving private citizens are inapt. In this context, a more "careful analysis" is required to "tak[e] adequate account of the separation of powers principles at stake." 140 S. Ct. at 2035. "[W]here the issue pertains to separation of powers, and the political branches are (as here) in disagreement, neither can be presumed correct." *Morrison v. Olson*, 487 U.S. 654, 704-05 (1988) (Scalia, J., dissenting).

This dispute implicates more than a question of how to apply *Mazars* to an "unusual" set of facts. Cmte.Opp.21. It concerns what courts can look at—and how deferential to Congress they must be—when adjudicating "a clash between rival branches of government over records of intense political interest for all involved."

Mazars, 140 S. Ct. at 2034. And it is precisely the kind of legal question on which this Court will grant review.

B. Respondents also argue that Applicants are attacking the subjective motives of certain legislators, which are not reviewable. Gov't.Opp.15; Cmte.Opp.28. But Applicants have always distinguished subjective motive from objective purpose and focused their legal claims on the latter. Stay.Appl.18-19. Respondents do not engage with that distinction or offer any sensible way to distinguish between "motive" (which the caselaw says is off limits) and "purpose" (which the caselaw requires courts to consider). As Applicants have explained, the difference between subjective motive and objective purpose is both important and familiar. Stay.Appl.18. Applicants allege that the Committee's request has an improper aim—exposure for the sake of exposure—evidenced by voluminous record statements from Chairman Neal, Speaker Pelosi, and others close to the drafting of the request, as well as the structure and scope of the request itself.

To recast Applicants' claim as a matter of mere motive, Respondents ignore all evidence other than statements of congressmen. But Applicants allege more than just "citations to statements," Cmte.Opp.17 (quoting App.9); Gov't.Opp.21, just as the executive branch previously relied on similar objective evidence to reject the Committee's request, App.137 ¶218, 138-39 ¶¶221-22. The court of appeals found all this evidence irrelevant *as a matter of law*. That error is momentous and certworthy.

C. When addressing the four "special considerations" of *Mazars*, 140 S. Ct. at 2035, Respondents further demonstrate why the D.C. Circuit's decision warrants this Court's review.

Consider the second *Mazars* consideration—that "courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective." *Id.* at 2036. The Internal Revenue Manual provides that the presidential-audit program covers only "*individual* income tax returns for the President and Vice President." Manual 4.2.1.15(1), *cited by* Cmte.Opp.8. Nevertheless, the Committee's request covers not only President Trump's individual returns but also returns of 8 business entities. The Government does not comment on this mismatch at all. *See* Gov't.Opp.23-24. For its part, the Committee asserts, without citation, that "Chairman Neal does not know" if these businesses are subject to the program. Cmte.Opp.30. But the Manual's statement is clear, and Applicants alleged that the program covers only individual returns. App.153 ¶287. More importantly, Chairman Neal's ready-shoot-aim approach should have been key evidence that the Committee failed to justify the "significant step" of demanding a President's information without first looking to "other sources"—such as asking the IRS what the scope of the program is. *Mazars*, 140 S. Ct. at 2035. In the Committee's own words, Chairman Neal could have asked the IRS "whether and how the IRS handles such business entities in the context of a Presidential audit." Cmte.Opp.30. But it didn't because its goal is exposure, not legislating.

Respondents cannot hide behind the generic principle that Congress is allowed to go "up some blind alleys and into nonproductive enterprises." *Eastland*, 421 U.S. at 509. When it comes to Presidents, congressional demands must be "no broader than reasonably necessary to support Congress's legislative objective." *Mazars*, 140 S. Ct. at 2036. Loose citations to precedents like *Eastland*, a "run-of-the-mill legislative effort" where the separation of powers was not in play, are precisely what this Court warned about in *Mazars*. *Id.* at 2034.

The United States once agreed. *Mazars* "direct[s] special attention," it explained on remand, to "'the nature of the evidence offered by Congress.'" U.S.-Amicus-Br.12, *Mazars*, No. 19-5142 (D.C. Cir. 2020). And that evidence must include "contemporaneous statements" that "the Committee was improperly searching for evidence" with an improper purpose like law enforcement or mere exposure. *Id.* at 9. Even in cases involving purely private citizens, courts can evaluate the "purpose" of a congressional demand by evaluating "statement[s] of the [committee's] [c]hairman" and "statements of the members of the committee." *Shelton v. United States*, 404 F.2d 1292, 1297 (D.C. Cir. 1968). The *Mazars* test was designed to *heighten* the test for proving a legitimate legislative purpose, not lower it. Both Respondents and the D.C. Circuit fail to honor the overarching theme from *Mazars*: that courts cannot be "blind" to "what all others can see and understand .... The Constitution ... deals with substance, not shadows." 140 S. Ct. at 2034-35 (cleaned up).

CONCLUSION

This Court should order that the mandate of the D.C. Circuit, which is now stayed pending further order of the Court, be further stayed pending the filing and

disposition of a writ of certiorari. The Court could also construe this application as a petition for certiorari and grant review.

Respectfully submitted,

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