ORAL ARGUMENT HELD ON MARCH 24, 2022
DECISION ISSUED ON AUGUST 9, 2022

No. 21-5289

UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

COMMITTEE ON WAYS AND MEANS, UNITED STATES HOUSE OF REPRESENTATIVES,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF THE TREASURY; INTERNAL REVENUE SERVICE; CHARLES PAUL RETTIG, in his official capacity as Commissioner of the Internal Revenue Service; and JANET L. YELLEN, in her official capacity as Secretary of the United States Department of the Treasury,

Defendants-Appellees,

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,

Intervenors for Defendant – Appellants.

On Appeal from the U.S. District Court for the District of Columbia, No. 1:19-cv-1974-TNM

OPPOSITION TO MOTION TO EXPEDITE MANDATE AND CROSS-MOTION TO STAY MANDATE

Before this appeal began, the district court entered a stay that, in effect, barred Defendants from turning over Intervenors' tax information pending this appeal. Doc. 155. That stay pending appeal, which no party opposed, *id.* at 2, ends "upon issuance of the mandate." *Powe v. Deutsche*

Bank Nat'l Tr. Co., 2019 WL 7630996, at *2 (E.D. Tex. Dec. 20). (In an email to counsel, Defendants have confirmed that they will not produce Intervenors' tax information before the mandate issues.) This Court's mandate would normally issue on September 30. *See* Circuit R. 41(a)(1); Fed. R. App. P. 40(a)(1). But today Intervenors filed a petition for rehearing en banc, which itself stays the mandate. *See* Circuit R. 41(a)(1); Fed. R. App. P. 41(b). If Intervenors' petition is denied, then the mandate will remain stayed for seven days (unless this Court grants a longer stay). *See* Circuit R. 41(a)(1)-(2). But once the mandate issues, this case will become moot: The district court's order will expire, and Defendants will irreparably reveal Intervenors' confidential information to the Committee.

Given those stakes, the Committee's motion to expedite the mandate is egregious. At its boldest, it asks a panel of this Court to *deliberately moot* this dispute, unilaterally deciding that the full Court and the Supreme Court should get no chance to consider further review. The House has asked for that relief before, but this Court denied it. *See Trump v. Mazars*, Doc. #1814803, No. 19-5142 (Nov. 7, 2019). The Supreme Court also denied the House's motion to expedite its judgment

after *Mazars*. *See Comms. of U.S. House of Reps. v. Trump*, 141 S. Ct. 197 (U.S. July 20, 2020).

This Court should not expedite the mandate; instead, if rehearing is denied, it should stay its mandate to preserve the Supreme Court's chance to consider the important questions in this case. These cases involving congressional requests for President Trump's information "implicat[e] a number of difficult questions of first impression," *Trump v. Mazars USA, LLP*, 39 F.4th 774, 812 (D.C. Cir. 2022) (Rogers, J., concurring), and this Court's opinion expressly noted "the possibility of further appellate review in … this case," Op.14. But without a stay, that further appellate review will be impossible. Intervenors will suffer the classic form of irreparable harm—the end of their case—and the Supreme Court's jurisdiction will be defeated. Yet the Committee will suffer no irreparable harm from a stay, especially since disputes like this one do not become moot when the current Congress ends. *See Mazars*, 39 F.4th at 785-87.

Alternatively, this Court should administratively stay its mandate until Intervenors can seek a stay pending certiorari from the Supreme Court. This Court entered that exact relief in *Trump v. Thompson*,

granting former President Trump "14 days" to file his motion for interim relief with the Supreme Court and, "if such a motion is filed," a stay that lasted until "the Supreme Court's disposition of that motion." 20 F.4th 10, 49 n.20 (D.C. Cir. 2021). In all, that stay lasted 41 days—a fraction of the more than 1,100 days that this case has already been stayed—often upon the motion or with the consent of Defendants and the Committee. The Committee will cry delay, but all agree that this case implicates the separation of powers. *See* Op.13; Concur.Op.1. Accuracy, not speed, is the watchword in this kind of important interbranch conflict. *See United States v. AT&T*, 567 F.2d 121, 133 (D.C. Cir. 1977). A modest stay thus is warranted to allow higher court review.

The Committee has no good reason why this important separation-of-powers dispute should end before the Supreme Court gets the chance to even *consider* weighing in. The House was similarly confident that no further review was necessary in *Mazars*, but the Supreme Court disagreed and ruled 9-0 against its position. Instead of burdening the Supreme Court with emergency proceedings again, this Court should deny the Committee's motion to expedite the mandate and, if Intervenors'

petition for rehearing is denied, grant Intervenors' cross-motion to stay the mandate.

ARGUMENT

This Court should not grant the Committee's request to expedite the mandate, deliberately mooting this case and depriving the en banc court and the Supreme Court of jurisdiction. Given the importance of this case and the questions presented, this Court should stay its mandate, either pending certiorari (as the Supreme Court did in *Mazars*) or pending the Supreme Court's disposition of a similar stay motion (as this Court did in *Thompson*). At a minimum, this Court should give Intervenors some time to file an emergency stay with the Supreme Court—as the panel did in the first *Mazars* case.

I. The Court should not expedite the mandate.

This Court "ordinarily" withholds the mandate "until 7 days after the expiration of the time for filing a petition for rehearing or a petition for rehearing en banc and, if such petition is timely filed, until 7 days after disposition thereof." Circuit R. 41(a)(1). The Court did so here. CADC Doc. #1958453. And it did so after its first *Mazars* decision, including by denying the Committee's motion to expedite the mandate. *See Mazars*, CADC Doc. #1814803, No. 19-5142 (stating that "the

mandate will issue 7 days from the date of denial," which "takes into consideration the Trump appellants' request for a period of at least 7 days to seek relief in the Supreme Court"). Though this Court also denied a cross-motion for a stay pending certiorari in *Mazars*, the Supreme Court effectively reversed that part of this Court's order by later granting that same relief. *See Trump v. Mazars USA, LLP*, 140 S. Ct. 660 (2019).

This Court's "normal" practice of waiting before issuing the mandate makes good sense. *W. Power Trading Forum v. FERC*, 245 F.3d 798, 801 (D.C. Cir. 2001). The initial delay "allow[s] petitions for rehearing" to be filed. *Id.* If a petition is filed, the mandate is stayed to give the full Court time to consider it. And if the petition is denied, the mandate is stayed an additional 7 days. "That seven-day post-denial period is a vital one," as it "gives counsel just enough time to prepare and file a motion for a stay." Wright & Miller, 16AA Fed. Prac. & Proc. Juris. §3987 (4th ed.). The ordinary rules governing the mandate thus create an orderly process that ensures the losing party has a fair opportunity to seek further review. Given the important interests that this procedure serves, the Court may move faster only for "good cause shown." Circuit R. 41(a)(1).

The Court should not move faster here. The Committee's motion to expedite is improper now that Intervenors have sought rehearing. And the Committee cannot show good cause to expedite the mandate.

A. The Committee's motion is improper.

Contemporaneous with this filing, Intervenors filed a petition for rehearing en banc (as they previously advised the Committee they would). That petition effectively moots the Committee's request to expedite the mandate. The mandate is automatically stayed while the full Court considers Intervenors' petition. *See* Fed. R. App. P. 41(b); Circuit R. 41(a)(1). That automatic stay is effectively issued by the *full Court* so it has time to consider whether to grant rehearing. So a mere panel "must" withhold the mandate while Intervenors' petition remains "pending." *Missouri v. Jenkins*, 495 U.S. 33, 48-49 (1990).

Even if it could, a panel of this Court *should not* use its power over the mandate to effectively deny a petition for rehearing en banc. Issuing the mandate while a petition is pending would allow rehearing to be decided by a majority of the panel rather than "[a] majority of the circuit judges who are in regular active service." Fed. R. App. P. 35(a). There's a simple way to test the Committee's position that there is no ground for en banc review, and it's not shortening the mandate: it's letting the en

banc Court vote on Intervenors' petition. *See, e.g.*, *Chrysler Grp., LLC v. Fox Hills Motor Sales, Inc.*, Doc. 105, No. 13-2117 (6th Cir. Feb. 9, 2015) (denying defendants' motion to expedite the mandate in light of plaintiffs' en banc petitions); 1C *West's Fed. Forms*, *Courts of Appeals* §7:143.50 (6th ed.) ("The [*Chrysler*] court was unwilling to shut off all opportunity for a rehearing, which would have been the result if it had issued its mandate immediately.").

B. The Committee lacks good cause for expedition.

In all events, the Committee has not shown "good cause" for expediting the mandate. Circuit R. 41(a)(1). Foremost, good cause is lacking for the same reasons that Intervenors are entitled to rehearing and a stay pending certiorari. *See Johnson v. Bechtel Assocs. Pro. Corp., D.C.*, 801 F.2d 412, 415 (D.C. Cir. 1986) (the mandate cannot be expedited if the panel should grant rehearing, if the full Court should grant rehearing en banc, or if there's a "reasonable likelihood that the Supreme Court would grant review").

Good cause is also absent because expedition would irreparably injure Intervenors. The Committee's request for Intervenors' tax information is stayed until this Court issues the mandate; once the mandate issues, Defendants will irretrievably divulge Intervenors'

confidential information to the Committee. Thus, by asking this Court to issue the mandate immediately," the Committee is really asking this Court to moot the appeal and deprive Intervenors, the en banc Court, and the Supreme Court of further review. If "good cause" means anything, it means that the mandate should not be weaponized to irreparably injure one party or to defeat a higher court's jurisdiction. *See Penguin Books USA Inc. v. Walsh*, 929 F.2d 69, 74 (2d Cir. 1991) (condemning "conduct which manipulates procedure so as to make lower court judgments both binding and unreviewable"); *Russman v. Bd. of Educ. of Enlarged City Sch. Dist. of City of Watervliet*, 260 F.3d 114, 121-22 (2d Cir. 2001) (explaining that "the equities" require preventing "the appellee from insulating a favorable decision").

The Committee, by contrast, will not suffer any serious harm between now and when the mandate issues. While the Committee won this appeal and has not yet received the benefit of the judgment in its favor, this "prejudice that comes with any delay in a judicial proceeding" does not constitute good cause. *U.S. ex rel. Chandler v. Cook Cty.*, 282 F.3d 448, 451 (7th Cir. 2002) (Ripple, J., in chambers). And the Committee does not explain why it cannot wait a short time for the

mandate to issue, especially after this case has been stayed already for over three years. The Committee's "interest in receiving [Intervenors'] information immediately" simply "poses no threat of irreparable harm." *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers). Hence why the Supreme Court denied the House's motion to expedite its judgment in *Mazars*. *See Comms. of U.S. House of Reps.*, 141 S. Ct. 197.

II. The Court should stay the mandate.

"Lower courts frequently stay their mandates when notified that the losing party intends to seek … certiorari review." *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022). A stay pending certiorari is warranted if Intervenors show that their forthcoming petition will present "a substantial question" and there is "good cause" for a stay. Fed. R. App. P. 41(d); 28 U.S.C. §1651(a). These questions "focus on whether the applicant has a reasonable probability of succeeding on the merits" of its certiorari petition and "whether the applicant will suffer irreparable injury" without a stay. *Books v. City of Elkhart*, 239 F.3d 826, 827 (7th Cir. 2001) (Ripple, J., in chambers). In a "close case," courts can also "'balance the equities,'" evaluating "the relative harms to applicant and respondent" and "the interests of the public at large." *Rostker v. Goldberg*,

448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). All these considerations favor a stay here.

A. Intervenors' petition will present substantial legal questions with a reasonable probability of certiorari.

A certiorari petition will present a "substantial question"—and thus warrants a stay now—if there is a "reasonable probability that four Justices will vote to grant certiorari" and a "reasonable possibility that five Justices will vote to reverse." *U.S. ex rel. Chandler v. Cook Cty.*, 282 F.3d 448, 450 (7th Cir. 2002) (Ripple, J., in chambers). This assessment turns on "the issues that the applicant plans to raise in the certiorari petition," "the Supreme Court's treatment of other cases presenting similar issues," and "the considerations that guide the Supreme Court in determining whether to issue a writ of certiorari." *Books*, 239 F.3d at 828 (Ripple, J., in chambers).

The "substantial question" standard requires the appellate court to acknowledge that, even though it obviously believes its decision is correct, it should stay the mandate where the issues are important, open, and subject to reasonable debate. *See AMMIC v. Am. Broad.-Paramount Theatres, Inc.*, 87 S. Ct. 1, 2 (1966) (Harlan, J., in chambers) (granting stay because issues could not "be regarded as lacking in substance," did

not "appear to be precisely controlled by any decision of this Court," and were "highly debatable"); *Rostker v. Goldberg*, 448 U.S. 1306, 1309 (1980) (Brennan, J., in chambers) (granting stay because issues were "difficult and perplexing" and "[m]y task … is not to determine my own view on the merits, but rather to determine the prospect of reversal by this Court as a whole"); *Chandler*, 282 F.3d at 450 (granting stay even though panel was "unanimous" and "[n]o judge in regular active service requested a vote for rehearing en banc"). The losing party would be in a "near impossible position" if he could not receive a stay unless he "convince[d] a judge who had just ruled against [him] that [he] is likely to succeed on appeal." *Cigar Ass'n of Am. v. FDA*, 317 F. Supp. 3d 555, 561 n.4 (D.D.C. 2018). So the law requires him to identify only substantial questions.

Here, this case "implicates a number of difficult questions of first impression." *Mazars*, 39 F.4th at 812 (Rogers, J., concurring). Of course it does: No Congress has ever wielded its legislative powers to demand a President's tax returns, the parties agree that the Committee's request implicates the separation of powers, and the United States once agreed that the request is unconstitutional. *See* Doc. 148, at 4; Op.3, 13-14. This Court's decision will set an important precedent for the political branches

moving forward, especially since most conflicts over congressional demands for information must be brought in this circuit. And because this Court applied the full-blown *Mazars* test, its analysis will also control future disputes between Congress and *sitting* Presidents. For its part, the Government appears to agree: it told the district court that this case "implicate[s] important institutional principles" of "importance to the Executive Branch," and echoed the district court's observation that the case presented "novel and complex questions about the privileges and authority of all three branches of the federal government." Doc. 134 at 2.

A testament to its importance, the Supreme Court has already agreed to review a similar case once before. *See Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2029 (2020). Even for former Presidents, the Supreme Court gives "special solicitude" to their certiorari petitions "alleging a threatened breach of essential Presidential prerogatives under the separation of powers." *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982). Intervenors' petition in this case will have at least a "reasonable probability" of convincing the Court to grant certiorari again. *Chandler*, 282 F.3d at 450. It will present important questions, as detailed in Intervenors' rehearing petition, that are substantial enough to at least

give the Supreme Court *a shot* at considering further review. The panel seems to agree. *See* Op.14 (stressing "the possibility of further appellate review").

B. Intervenors have good cause for a stay because, without one, they will suffer irreparable and case-mooting harms.

In addition to the merits, "[t]he other assessment usually undertaken in deciding an application for stay of mandate is whether irreparable injury will take place if the stay is not granted." *Books*, 239 F.3d at 828. Without a stay, Intervenors will suffer the "quintessential type of irreparable harm": disclosure of their confidential personal information, which once released can never be unreleased. *Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 499 (S.D.N.Y. 2019). Specifically, without a stay, Defendants will disclose Intervenors' confidential information to the Committee. That disclosure will moot the case, denying a President the chance to even ask the Supreme Court for review, and it will strip Intervenors of confidentiality in their private tax information.

Disclosure will deprive Intervenors of a chance to seek Supreme Court review. "Courts routinely issue injunctions to stay the status quo when" events might "moot the losing party's right to appeal." *John Doe*

Co. v. CFPB, 235 F. Supp. 3d 194, 206 (D.D.C. 2017); *see Chafin v. Chafin*, 568 U.S. 165, 178 (2013) ("'When ... the normal course of appellate review might otherwise cause the case to become moot, issuance of a stay is warranted.'"); *U.S. Servs. Fund. v. Eastland*, 488 F.2d 1252, 1256 (D.C. Cir. 1973) (explaining that the "decisive element" favoring a stay was that "unless a stay is granted this case will be mooted, and there is a likelihood that irreparable harm will be suffered" by plaintiff when the subpoena's due date arrives"). In other words, "disclosure" would "create an irreparable injury" because it "would moot that part of the ... decision requiring disclosure"; and preventing mootness is "'[p]erhaps the most compelling justification'" for a stay. *John Doe Agency*, 488 U.S. at 1309 (Marshall. J., in chambers); *see Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Rep.*, 240 F. Supp. 2d 21, 22-23 (D.D.C. 2003) (explaining that the movant makes "a strong showing of irreparable harm" where disclosure would moot any appeal). That is why the district court stayed its judgment pending appeal here, "recognizing that the absence of a stay could result in the mooting of the case." Doc. 155 at 1.

Separately, "the disclosure of confidential information is, by its very nature, irreparable 'because such information, once disclosed, loses its

confidential nature.'" *Robert Half Int'l Inc. v. Billingham*, 315 F. Supp. 3d 419, 433 (D.D.C. 2018). Disclosure of private information "'is the quintessential type of irreparable harm'" because irreparable simply means "'cannot be compensated or undone by money damages.'" *Airbnb*, 373 F. Supp. 3d at 499; *accord Maness v. Meyers*, 419 U.S. 449, 460 (1975); *Araneta v. United States*, 478 U.S. 1301, 1304-05 (1986) (Burger, C.J., in chambers); *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979); *Metro. Life Ins. Co. v. Usery*, 426 F. Supp. 150, 172 (D.D.C. 1976). The loss of confidentiality is "[c]learly ... irreparable" because there's "no way to recapture and remove from the knowledge of others information improperly disclosed." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop*, 839 F. Supp. 68, 72 (D. Me. 1993). The House's counsel agrees. *See Trump v. Deutsche Bank, AG*, CA2 Doc. 37 at 105:24-25, No. 19-1540 (2d Cir.) (Mr. Letter: "Obviously I concede that if the documents are out, it is then irreparable.").

This irreparable harm to Intervenors will be immediate and widespread. Even if Defendants disclose only to the Committee, disclosure to the government is itself an irreparable harm. *E.g.*, *Maness*, 419 U.S. at 460; *Araneta*, 478 U.S. at 1304-05. But it would be "naïve to

reality" to assume that Intervenors' information won't be promptly disclosed to the public as well. *Trump v. Comm. on Oversight & Reform of U.S. House of Representatives*, 380 F. Supp. 3d 76, 105 (D.D.C. 2019). This Court agreed that public disclosure is both allowed by its order and likely to occur. *See* Op.21 (noting that this kind of "information often comes to light").

And because this Court must assume that Intervenors are correct on the merits when assessing irreparable harm," *Philip Morris ISA Inc. v. Scott*, 561 U.S. 1301, 1302 (2010) (Scalia, J., in chambers), it must assume that these disclosures will occur without a legitimate legislative purpose. Denying a stay will thus violate Intervenors' statutorily protected right to taxpayer privacy. That right is an "essential protection" that both secures "sensitive or otherwise personal information" and "is fundamental to a tax system that relies upon self-reporting." *NTEU v. FLRA*, 791 F.2d 183, 184 (D.C. Cir. 1986).

C. The balance of equities and public interest also favor a stay.

The fact that the Intervenors will suffer irreparable harm if the mandate is not stayed should be "decisive." *Eastland*, 488 F.2d at 1256. But "in a close case it may be appropriate to 'balance the equities'—to

explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Rostker*, 448 U.S. at 1308 (Brennan, J., in chambers). This case for a stay is not close; but even if it were, the balance of the equities would still favor that relief.

No party will be harmed by a stay. The Committee would suffer "only the prejudice that comes with any delay in a judicial proceeding," which carries little weight. *Chandler*, 282 F.3d at 451. If the Committee is ultimately entitled to Intervenors' information, then a stay will cause only some delay. Courts "cannot assume ... that every congressional investigation ... overbalances any private rights affected." *Watkins v. United States*, 354 U.S. 178, 198 (1957). And the Committee has no pressing need for Intervenors' information so it can study generic legislation about funding and regulating future IRS audits of future Presidents. *Cf.* Op.11-12.

To the contrary, the parties have agreed to stays throughout this litigation so that courts could consider and resolve Intervenors' claims. *E.g.*, Doc. 109 at 1; Doc. 111 at 2; Doc. 154 at 1-2; CADC Doc. #1928118. The Committee does not even try to explain why an open-ended stay pending appeal was appropriate, but a much more modest stay would

harm it now. The Committee apparently believes that the Supreme Court is the only court that doesn't deserve to consider these issues. But the Supreme Court rejected that view in *Mazars* when it granted stays over the House's objection. *See Trump v. Mazars USA, LLP*, 2019 WL 6109626 (Nov. 18, 2019) (Roberts, C.J., in chambers) (administrative stay); *Trump v. Mazars USA, LLP*, 140 S. Ct. 581 (2019) (stay pending certiorari).

Even if the Committee suffers some abstract harm from being unable to access Intervenors' information while a stay is in place, that harm would be dwarfed by the irreparable, case-mooting harm to Intervenors. *See Providence Journal*, 595 F.2d at 890 (granting a stay because "the total and immediate divestiture of appellants' rights to have effective review" outweighed any harm from "postpon[ing] the moment of disclosure"); *accord John Doe*, 488 U.S. at 1309; *Araneta*, 478 U.S. at 1305. In *Eastland*, for example, this Court twice stayed a congressional subpoena to the plaintiff's bank. 488 F.2d at 1254. The "decisive element" favoring a stay, this Court explained, was the fact that "unless a stay is granted this case will be mooted, and there is likelihood, that irreparable harm will be suffered" by the plaintiff when its bank complied. *Id.*; *accord* 421 U.S. at 501 n.14 (explaining that this Court was right to stop the

bank from complying with the subpoena and thus mooting the case). And in *United States v. Nixon*—the most famous case involving a subpoena to a President—the Supreme Court "stayed" the subpoena "pending [its] resolution" of the merits. 418 U.S. 683, 714 (1974). In fact, the Court granted a stay even though that subpoena sought evidence "specific and central to the fair adjudication of a particular criminal case." *Id.* at 713.

The public interest also favors a stay here. The public has a strong interest in avoiding "the dangers of intrusion on the authority and functions of the Executive Branch." *Fitzgerald*, 457 U.S. at 754. The Committee cites, as it always does, *Eastland*'s instruction that congressional demands for information should receive "the most expeditious treatment." 421 U.S. at 511 n.17. But the courts rejected that same argument in *Mazars* multiple times, for good reason. *Eastland* was a case between Congress and purely private parties; its insistence on "expeditious treatment" does not apply, as this Court later explained, in cases raising separation-of-powers issues. In these cases, Congress's concern with "delay" is outweighed by the need to reach the correct balance between the two branches. *AT&T*, 567 F.2d at 133. "The Separation of Powers often impairs efficiency," but that "delay" is

justified by the overriding concern in "the long-term staying power of government." *Id.*; *accord Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (refusing to rush a subpoena dispute that had "potentially great significance for the balance of power between the Legislative and Executive Branches.").

At bottom, "[r]efusing a stay" in this case "may visit an irreversible harm on applicants, but granting it will apparently do no permanent injury to respondents." *Philip Morris*, 561 U.S. at 1305 (Scalia, J., in chambers). The equitable considerations, like the other considerations, thus favor a stay.

This Court confirmed as much in another recent case involving former President Trump, the House, and the executive branch. The Court, having already protected its appellate jurisdiction with an administrative injunction, extended that injunction for fourteen days to allow President Trump to seek similar relief from the Supreme Court. *Thompson*, 20 F.4th at 49 n.20. This Court's injunction, it explained, would not dissolve until the Supreme Court ruled on President Trump's motion—thus ensuring that the Supreme Court, not the executive branch, would decide whether and when President Trump's documents

would be disclosed to Congress. *Id.* Intervenors believe the questions in this case are so obviously important that a stay pending certiorari is the more appropriate relief. But if this Court disagrees, it should at least follow *Thompson* and grant a "stay pending stay."

III. At the very least, the Court should give Intervenors sufficient time to seek a stay from the Supreme Court.

However this Court decides the Committee's motion to expedite and Intervenors' cross-motion for a stay, it should at least give Intervenors time to seek a stay from the Supreme Court. Assuming this Court rejects—as it should—the Committee's proposal to immediately moot this case, Intervenors will need some window that allows them to preserve their right to seek further review. What this Court granted former President Trump in *Thompson*—14 days to seek a stay from the Supreme Court and then an indefinite stay while the Supreme Court considered that motion—is one option. But the seven days provided by this Court's default rules is the absolute, bare minimum amount of time that Intervenors need, since it is "just enough time to prepare and file a motion for a stay." 16AA Fed. Prac. & Proc. Juris. §3987.*

* The Committee appears to agree that a 10-day window would be appropriate. *See* Mot. to Expedite Mandate 7 ¶10. In an email to counsel, Defendants agreed that

Even in "expedited" appeals presenting less momentous issues, courts are careful not to expedite the mandate without first warning the parties and giving them at least seven days to seek a stay. *See, e.g.*, *von Bulow ex rel. Auersperg v. von Bulow*, 811 F.2d 136, 147 (2d Cir. 1987) (expediting the mandate but giving the parties "ten … days" to "apply to the Supreme Court … for a further stay"); *Floyd v. City of New York*, 770 F.3d 1051, 1057 n.8 (2d Cir. 2014) (expediting the mandate but giving the parties "seven days" to "protect any arguable rights … to further appellate review"); *Larbie v. Larbie*, 690 F.3d 295, 312 (5th Cir. 2012) (similar). Intervenors, the Presidency, and the Supreme Court are entitled to no less here.

There are several ways to give Intervenors this minimal relief. The Court could simply deny both parties' motions; the default rules would then stay the mandate for seven days after the denial of rehearing. *See* Circuit R. 41(a)(1). The Court took this route after its first *Mazars* decision (though the Supreme Court later disagreed with its denial of President Trump's motion for a stay pending certiorari). *See Mazars*,

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a 14-day window would be appropriate. But both the Committee and Defendants condition their agreement on expedition of the mandate, which Intervenors believe would be inappropriate given their pending petition for rehearing.

CADC Doc. #1814803, No. 19-5142. The Court could also grant the Committee's motion, but issue the mandate 7-14 days after its order (rather than instantaneously). *E.g.*, *Floyd*, 770 F.3d at 1057 n.8; *Larbie*, 690 F.3d at 312. Or the Court could grant Intervenors' cross-motion, but only stay the Committee's request for 7-14 days so that Intervenors can seek a further stay from the Supreme Court. *E.g.*, *von Bulow*, 811 F.2d at 147; *cf. Atl. Coast Line R. Co. v. Bhd. of Locomotive Engineers*, 396 U.S. 1201, 1203 (1969) (Black, J., in chambers) (granting a stay but ordering petitioner "to expedite all actions necessary to present its petition for certiorari").

As explained, Intervenors believe that the appropriate course under controlling precedent is to deny the Committee's motion and, if rehearing is denied, grant Intervenors a full stay pending certiorari. But among the other possible options, the only *unacceptable* one is the Committee's. The Committee cannot offer a remotely plausible reason (other than an illegitimate desire to deny its adversaries' rights) why it needs the mandate to issue immediately, rather than after a short buffer that preserves Intervenors' rights and the Supreme Court's jurisdiction.

CONCLUSION

The Court should grant Intervenors' motion and stay its mandate pending the filing and disposition of Intervenors' petition for a writ of certiorari. Alternatively, the Court should at least stay its mandate pending the filing and disposition of Intervenors' motion to stay the mandate with the Supreme Court.

Dated: August 18, 2022

Respectfully submitted,

s/ Cameron T. Norris

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CERTIFICATE OF COMPLIANCE

This document complies with Circuit Rule 27(c) because it contains 4,946 words, excluding the parts that can be excluded. This brief also complies with Rule 27(d)(1)(E) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Century Schoolbook font.

Dated: August 18, 2022 *s/ Cameron T. Norris*

CERTIFICATE OF SERVICE

I filed this document via ECF, which will email all counsel requiring notice.

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