No. 21-5289

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA 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, ET AL.
Intervenors for Defendant-Appellants.

On Appeal from the United States District Court
for the District of Columbia, No. 1:19-cv-01974
Before the Honorable Trevor N. McFadden

THE COMMITTEE'S REPLY IN SUPPORT OF ITS MOTION FOR IMMEDIATE ISSUANCE OF THE MANDATE AND OPPOSITION TO CROSS-MOTION TO STAY THE MANDATE

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The Trump Parties' opposition to the Committee's motion for immediate issuance of the mandate is premised on mischaracterization. Contrary to the Trump Parties' assertion, the Committee did not "ask[] a panel of this Court to *deliberately moot* this dispute." Opp.2. Rather, the Committee said that to ensure that the case would not become prematurely moot, "[t]his Court could stay the effect of its mandate for ten days to allow the Supreme Court to stay the mandate pending a petition for certiorari if the Trump Parties seek such relief at that time." Mot.7.

Indeed, the Committee's proposal is one of the "possible options" that the *Trump Parties* deem "*[]acceptable*": "grant the Committee's motion, but issue the mandate 7-14 days after its order (rather than instantaneously)." Opp.24; *see also* Opp.5, 21-23. Therefore, the Court should grant the Committee's motion while, if appropriate, staying its order's effect for up to ten days to allow for Supreme Court action.

The Trump Parties' preferred alternative of staying the mandate until after disposition of their rehearing petition or a yet-unfiled certiorari petition fails to account for: (i) the low probability that either of those petitions will succeed—especially low given the alignment between this Court's decision here and its recent decision in *Trump v. Mazars USA, LLP*, 39 F.4th 774 (D.C. Cir. 2022); (ii) Congress's compelling interest in expeditiously receiving the documents at issue

so that it can resume its important legislative business during this Congress; and (iii) the Supreme Court's instruction that matters of this nature be "given the most expeditious treatment," *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 511 n.17 (1975).

Between this Court's decisions here and in *Mazars*, rehearing by this panel or the en banc Court appears highly unlikely, and the possible ten-day stay would leave it up to the Supreme Court to decide whether the Trump Parties' ability to obtain Supreme Court review is worth preserving. Accordingly, this Court should grant the Committee's motion for immediate issuance of the mandate and deny the Trump Parties' cross-motion.

ARGUMENT

As the Committee noted (Mot.4), issuance of its mandate is warranted for "good cause." Order, #1958453 (Aug. 9, 2022). That includes showing that the Court "would not change its decision upon [re]hearing" or hear the case en banc, and that "there is no reasonable likelihood that the Supreme Court would grant review." *Johnson v. Bechtel Assocs. Prof'l Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986) (per curiam). A party seeking to stay the mandate pending disposition of a certiorari petition "must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a

likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *see* Fed. R. App. P. 41(d)(1); Cir. R. 41(a)(2). Thus, the considerations bearing on the Committee's motion and the Trump Parties' cross-motion overlap substantially, and therefore we address them together.

In short, there are compelling reasons to issue the mandate now, subject to a possible delay of ten days to allow for Supreme Court action, rather than to withhold issuance of the mandate until after disposition of the rehearing petition or a certiorari petition (if filed).

I. THE COMMITTEE'S MOTION IS NOT MOOT OR IMPROPER

Citing Federal Rule of Appellate Procedure ("FRAP") 41(b) and Circuit Rule 41(a)(1), the Trump Parties assert that the filing of their rehearing petition "stays the mandate" and "effectively moots the Committee's request to expedite the mandate." Opp.2, 7. That contention reflects a misunderstanding of the meaning and role of those rules.

First, FRAP 41(b) expressly defines a default rule, while permitting "[t]he court [to] shorten … the time by order." Fed. R. App. P. 41(b). The remark from *Missouri v. Jenkins* quoted by the Trump Parties (Opp.7) merely reflects that default, nothing more. 495 U.S. 33, 48-49 & n.17 (1990). This Court's rule makes that structure even clearer, stating that, although the Court "ordinarily will" instruct

the clerk to withhold the mandate until seven days after the disposition of a timely rehearing petition, the Court "retain[s] discretion to direct immediate issuance of its mandate in an appropriate case" and its ordinary "instruction is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown." Cir. R. 41(a)(1).

Second, in any event, what governs here is this Court's order pursuant to Circuit Rule 41(a)(1). And that order instructs the clerk to "withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc," but goes on to state that the instruction is "without prejudice to the right of any party to move for expedited issuance of the mandate for good cause shown." Order, #1958453.

Nowhere does FRAP 41(b), Circuit Rule 41(a)(1), or this Court's order explicitly or implicitly preclude issuance of the mandate once a rehearing petition has been filed. On the contrary, the Trump Parties' position contravenes the rules' and order's plain text, which contemplate immediate issuance of the mandate notwithstanding the pendency of a rehearing petition.

II. THE COMMITTEE AND THE PUBLIC HAVE A COMPELLING INTEREST IN THE COMMITTEE EXPEDITIOUSLY COMPLETING ITS LEGISLATIVE WORK

The Trump Parties assert (Opp.9-10) that the Committee has "not explain[ed] why it cannot wait a short time for the mandate to issue." That contention is wrong. As the Committee's motion details (Mot.5-6), delaying the

mandate as the Trump Parties request would leave the Committee (let alone Congress) little or no time to complete its important legislative work, in which the public has a strong interest. This work necessarily depends on the documents at issue.

As the Committee's motion explained, and as the Supreme 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 v. Daugherty*, 273 U.S. 135, 175 (1927). That is, in fact, why the Committee requested the Trump Parties' tax information. And once the Committee receives the documents, it will need time to study them, craft appropriate legislation, and move that bill through committee, and then the full House and Senate would need time to consider and vote on the bill. But Congress's time is dwindling: the term ends in 134 days. It is highly unlikely the Supreme Court would dispose of a certiorari petition by the Trump Parties before the end of this Congress, let alone early enough for this Congress to act on the information received.[1] Although, as the Trump Parties note (Opp.3), this

[1] A certiorari petition is due 90 days after disposition of the rehearing petition, but that deadline can be extended by up to 60 days. 28 U.S.C. § 2101(c). The certiorari opposition must be filed about 32 days later (30 days after docketing), S. Ct. R. 15.3, although a respondent can file earlier. The Supreme Court takes at least another 14 days to distribute the case, S. Ct. R. 15.5, and then at least another

Congress's expiration would "not moot" this case, *Mazars*, 39 F.4th at 786, that is because the new Committee "*can* act as the successor," *id.*(emphasis added). The Trump Parties entirely disregard, however, *this* Committee's and *this* Congress's prerogative to complete their work.

The Trump Parties contend (Opp.9) that the "delay in a judicial proceeding does not constitute good cause" (quotation marks omitted). Even if true in some cases, it cannot always be true—otherwise there could never be grounds for expediting issuance of the mandate—and it is false here. As the Supreme Court recognized, "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," the Supreme Court has instructed that challenges to legislative investigations "be given the most expeditious treatment." *Id*. At bottom, the Trump Parties' resistance reflects a dismissive view of the Committee's investigation (*see* Opp.18), but this Court has already recognized the Committee's legitimate need for the requested documents, Op.12-13, 19-23, #1958452 (Aug. 9, 2022); *see Eastland*, 421 U.S. at 509.

Yet, the Trump Parties contend that those interests are inapt because *Eastland* involved a dispute "between Congress and purely private parties," and

16 days to consider the petition at conference, *see* Case Distribution Schedule – October Term 2022, https://perma.cc/F2PP-FT9B.

"[t]he public has a strong interest in avoiding the dangers of intrusion on the authority and functions of the Executive Branch." Opp.20 (quotation marks omitted). But Mr. Trump *is* a private party, the Executive Branch is ready and willing to comply with the Committee's request, and this Court has already determined that "any burden to the sitting President or the Executive Branch as a whole is tenuous at best," Op.25.

Finally, the Trump Parties note (Opp.18-19) that the Committee agreed to stay the judgment below pending this appeal. *See* Mot.2. But the Committee did so in exchange for expedited briefing in an appeal that the Trump Parties could take by right. *See* Joint Mot. to Expedite, #1928118 (Dec. 23, 2021); Mot. to Continue Stay, Dist. Ct. ECF No. 154 (Dec. 20, 2021). The question now is whether to continue the stay pending the Trump Parties' effort to obtain *discretionary* review. The answer is "no," given the limited remaining legislative time and, as discussed below, the very low probability of such discretionary review.

III. CONTINUING TO WITHHOLD THE MANDATE FOR REHEARING OR CERTIORARI IS NOT WARRANTED

Delaying issuance of the mandate would be inappropriate. There is no reasonable prospect that this Court will grant rehearing, and Supreme Court review and reversal is also unlikely. Nor would the Trump Parties be irreparably harmed

under the Committee's proposal because it would afford the Supreme Court sufficient time to grant a stay if appropriate.

The Trump Parties say (Opp.13-14) that their petitions for further review have "at least … *a shot*" of being granted. That simultaneously lowers the applicable bar (*see supra* p.2-3) and overstates their chances. Four judges have rejected the arguments that the Trump Parties now advance as grounds for further review, and three others recently rejected similar arguments in *Trump v. Mazars USA, LLP*, 39 F.4th 774 (D.C. Cir. 2022), *aff'g in part and rev'g in part*, 560 F. Supp. 3d 47 (D.D.C. 2021). No judge has agreed with the Trump Parties' principal arguments. Nothing in the Trump Parties' cross-motion (or rehearing petition) indicates petitions for rehearing or certiorari will yield a reversal.

The Trump Parties stress (Opp.20-21) this case's implications for the separation of powers and assert (Opp.12-13) that this case "will set an important precedent," but actually this case breaks no new ground and raises no momentous separation-of-powers issue. This Court applied the most demanding separation-of-powers standard, announced by the Supreme Court just two Terms ago, and found the burden on the Executive Branch "not substantial." Op.24. To the extent the Trump Parties assert the misapplication of that standard to the facts, *see* Pet. for Reh'g 14-18, #1959917 (Aug. 18, 2022), such a petition is "rarely granted," S. Ct. R. 10; *see also* Fed. R. App. P. 35(a)(1)-(2). Nor does any "'special solicitude'"

for appeals "alleging a threatened breach of essential Presidential prerogatives" (Opp.13) help the Trump Parties. For one, Treasury's compliance with the Committee's request does not threaten any essential Presidential prerogative. For another, any special solicitude is weak in this context, as illustrated by the Supreme Court's repeated denials of Mr. Trump's stay applications involving governmental requests for information, *Trump v. Thompson*, 142 S. Ct. 680 (2022); *Trump v. Vance*, 141 S. Ct. 1364 (2021), not to mention its recent denial of a certiorari petition he filed involving a Congressional request, *Trump v. Thompson*, 142 S. Ct. 1350 (2022).

The Trump Parties also argue that this Court erred in declining to consider statements by the Committee Chair, individual Committee Members, and other Members of Congress that purportedly evince a "purpose" contradicting the Committee's stated purposes. Pet. for Reh'g 9-14. That aspect of this Court's reasoning, however, was *compelled* by Supreme Court precedent, not in conflict with it. Op.9-13 (applying *Eastland*, 421 U.S. at 508, and *Watkins v. United States*, 354 U.S. 178, 200 (1957)); *see also McGrain*, 273 U.S. at 178 (courts are "bound to presume" legislative action serves valid purpose "if it is capable of being so construed"); *cf.* S. Ct. R. 10(c); Fed. R. App. P. 35(a)(1)-(2).

Lastly, the Trump Parties contend that, in finding Section 6103(f) facially constitutional, this Court contravened *United States v. Lopez*, 514 U.S. 549 (1995),

United States v. Morrison, 529 U.S. 598 (2000), and *Gordon v. Holder*, 721 F.3d 645 (D.C. Cir. 2013). Pet. for Reh'g 18-20. That claim, too, is plainly wrong. This Court's conclusion rested on a distinction—that those cases involved "statutes criminalizing private conduct," Op.27—well-supported by those and other Supreme Court decisions. *See McGrain*, 273 U.S. at 178 (holding Congressional subpoena need not state "express avowal" of its "object"). Moreover, Section 6103(f) can be construed to require Treasury's compliance only when the request is constitutionally valid, including in service of a legitimate legislative purpose, *see* Op.27—and therefore the statute must be so construed "to save [it] from unconstitutionality," *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

On the other hand, the Trump Parties will suffer no irreparable harm if the mandate issues promptly as requested. First, they say (Opp.2-3, 14-15) such issuance will "moot" their appeal, but as explained above, the Committee proposed (Mot.7) that the Court could stay for ten days its order issuing the mandate, so that the Supreme Court would have time to act, if it so chose. Second, the Trump Parties assert that "disclosure of confidential information is, by its very nature, irreparable." Opp.8-9; *see also* Opp.15-16. But, as just noted, this Court could, if appropriate, provide a ten-day delay, giving the Supreme Court the opportunity to

ensure that their information is not produced until that Court has examined the matter.

CONCLUSION

The Court should order that the mandate issue immediately, potentially subject to a stay of up to ten days, and should deny the cross-motion for a much longer stay of the mandate.

Respectfully submitted,

/s/ Douglas N. Letter

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2).

1. The motion contains 2,387 words.

2. The motion has been prepared in proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Douglas N. Letter
DOUGLAS N. LETTER

August 22, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Douglas N. Letter
DOUGLAS N. LETTER