

**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

REPLY IN SUPPORT OF MOTION TO STAY MANDATE

The Committee refuses to give the Court a straight answer. It has moved the Court to “immediately issue the mandate.” Cmte.Mot.8. That motion, if granted, would moot the case before Intervenors can obtain full review, even while their petition for en banc rehearing remains pending

before the Court. Confronted with these obvious consequences, the Committee offers a noncommittal suggestion that the Court could “potentially” give Intervenors enough time before the case is mooted to seek emergency relief from the Supreme Court. Cmte.Opp.11. The Committee cannot say whether it *supports* even the briefest of stays, even though its motion would illegitimately subvert Intervenors’ rights without one.

The correct course is the one Intervenors have proposed: a full stay pending the filing and disposition of a petition for writ of certiorari. Int’r.Mot.25. Such a stay would protect Intervenors from the irreparable harm of disclosure of confidential information before their rights can be fully determined. It would allow the Supreme Court to resolve, on a non-emergency basis, a petition presenting novel and important questions of law. And it would not prejudice the Committee, whose request would still be quickly fulfilled if the Supreme Court denied certiorari. The Court should accordingly grant the Intervenors’ motion.

I. Intervenors will suffer irreparable harm without a stay.

Without a stay, Intervenors’ private tax information will be disclosed to the Committee before Intervenors have a chance even to ask

the Supreme Court for review. Int’r.Mot.14. This disclosure is the “quintessential type of irreparable harm,” and courts “routinely” preserve the status quo under such circumstances, lest disclosure “moot the losing party’s right to appeal.” *Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 499 (S.D.N.Y. 2019); *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). The Committee’s counsel has conceded as much in a similar case. See *Trump v. Deutsche Bank, AG*, CA2 Doc. 37 at 105:24-25, No. 19-1540 (2d Cir.) (Mr. Letter: “Obviously I concede that if the documents are out, it is then irreparable.”).

In opposition, the Committee only answers that the Court *could* avert irreparable harm—by staying issuance of the mandate. Cmte.Opp.10-11. But the Committee carefully refuses to support a stay

of any length of time. Instead, it repeatedly mentions the possibility of stay, but always without endorsement. *Id.* at 2 (“[T]he 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.” (emphasis added)); *id.* (asking Court “to issue the mandate *now*, subject to a *possible* delay of ten days” (emphasis added)); *id.* at 10 (noting that “this Court *could, if appropriate*, provide a ten-day delay” (emphasis added)); *id.* at 11 (“The Court should order that the mandate issue *immediately, potentially* subject to a stay of up to ten days.” (emphasis added)). The Court should reject the Committee’s waffling and grant a full stay pending certiorari.

II. Intervenors’ petition will present substantial legal issues with a reasonable probability of certiorari.

A stay pending certiorari is warranted where 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 case meets that standard: arising from the Committee’s unprecedented request for a President’s tax returns, it “implicates a number of difficult questions of first impression” concerning the separation of powers. *Trump v. Mazars USA, LLP*, 39 F.4th 774, 812

(D.C. Cir. 2022) (Rogers, J., concurring). It sets an important precedent for future relations between the political branches, in the circuit in which most conflicts over congressional demands for information must be litigated. And although the Committee highlights recent denials of certiorari to cast doubt on the probability of a grant here, Cmte.Opp.9, the Supreme Court has already granted review of a case—*Mazars*—presenting questions more similar to those here than any of the cases the Committee cites. *See Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2029 (2020).

Everyone but the Committee seems to agree. The Government told the district court that this case “implicate[s] important institutional principles” and presents “novel and complex questions about the privileges and authority of all three branches of the federal government.” Doc. 134 at 2. The panel opinion raised *sua sponte* “the possibility of further appellate review in ... this case.” Op.14. And for its part, the district court noted that “[w]e are in uncharted territory.” Doc. 148 at 4.

The Committee’s opposition misrepresents Intervenors’ argument on this point. According to the Committee, Intervenors believe they can obtain a stay if they have “at least ... *a shot*” at successfully petitioning

for certiorari. Cmte.Opp.8. In fact, Intervenors' motion said that the issues in this case "are substantial enough to at least give the Supreme Court *a shot* at considering further review," before the case is irrevocably mooted. Int'r.Mot.13-14. In any case, Intervenors have shown under the correct standard a reasonable probability of obtaining certiorari.

Otherwise, the Committee primarily rests on its agreement with the rulings of the panel and the district court. Cmte.Opp.8. But those opinions cannot be dispositive here. *See 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"). Any 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). Instead, the Court need only find that, whatever its own conclusions might be, the issues in the case remain sufficiently important and "highly debatable" to create a reasonable possibility of Supreme Court review. *AMMIC v. Am. Broad.-Paramount Theatres, Inc.*, 87 S. Ct. 1, 2 (1966) (Harlan, J., in chambers).

III. The balance of the equities favors a stay.

The Committee does not dispute in its opposition that balancing the equities is unnecessary for a stay, if the movant has shown a reasonable probability of further review and irreparable harm. *See* Cmte.Opp.7-8. Nevertheless, because the Committee asserts a “compelling interest” in immediate disclosure of Intervenors’ information, Intervenors reiterate that the balance of the parties’ interests favors a stay.

Without a stay, Intervenors face certain, clear-cut harm. *See supra* Part I. But with a stay, the Committee faces at most a modest delay in the fulfillment of its request. It would be dwarfed by the length of time—over 1,100 days, across two Congresses—that this case has already been stayed, often either with the Committee’s consent or upon its own motion. And the Committee *agrees* that no amount of delay would moot its request. Cmte.Opp.5-6 (citing *Mazars*, 39 F.4th at 786). Moreover, even if the Committee’s request were not fulfilled by the end of the current Congressional term, it would carry over into subsequent terms (as it already has) and inform the Committee’s work then.

Although the Committee argues that immediate disclosure is necessary to “*this* Committee’s and *this* Congress’s ... work,” Cmte.Opp.6,

this Court and the Supreme Court already rejected that argument in *Mazars*. After the Supreme Court ruled in the case, the House sought immediate issuance of the judgment, citing the impending expiration of the House's current term. Application at 3-4, *Comms. of U.S. House of Rep. v. Trump*, No. 20A15 (July 13, 2020). On remand from the Supreme Court, the House again cited the end of its term to argue that any further delay "significantly interfere[d] with Congress's function as a coordinate branch." *Mazars*, Doc. #1859172 at 36, No. 19-5142. Neither court agreed. The Supreme Court denied the House's application to issue the judgment forthwith. *See Comms. of U.S. House of Rep.*, 141 S. Ct. 197 (2020). This Court then remanded the case to the district court over the House's objections, regardless of "whether the case [would] become moot when the subpoena expires" at the end of the House's term. *Mazars*, Doc. #1877778. Here, too, the Court should reject the Committee's pleas for needless expedition and stay the case pending a petition for a writ of certiorari.

Finally, the Committee represented in its opposition that a bare-minimum stay to seek emergency relief from the Supreme Court was "[a]cceptable" to Intervenor. Cmte.Opp.1. Not so. To be sure, out of all possible courses, the Committee's proposal to immediately moot the case

is uniquely “*unacceptable*” and “illegitimate.” Int’r.Mot.24. It would deliberately obviate Intervenors’ right to seek review and obstruct the Supreme Court’s jurisdiction. *Id.* But as Intervenors have consistently argued, the course which would correctly balance all parties’ rights is a full stay pending certiorari.

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 30, 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 1,587 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 30, 2022

s/ Cameron T. Norris

CERTIFICATE OF SERVICE

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

Dated: August 30, 2022

s/ Cameron T. Norris