Case No. 22-16473

In the

United States Court of Appeals

for the

Ninth Circuit

MICHAEL P. WARD, Dr., D.O., husband; KELLI WARD, Dr., D.O., wife; MOLE MEDICAL SERVICES PC, an Arizona Professional Corporation,,
Plaintiffs-Appellants,

v.

BENNIE G. THOMPSON, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the District of Arizona (Prescott), Case No. 3:22-cv-08015-PCT-DJH · Honorable Diane J. Humetawa District Judge
EMERGENCY MOTION UNDER CIRCUIT RULE 27-3;
RELIEF IS NEEDED BY OCTOBER 19, 2022

PLAINTIFFS-APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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STATEMENT REGARDING RELIEF SOUGHT BELOW

Pursuant to Fed. R. App. P. 8(a)(2)(A)(ii), Plaintiffs-Appellants move this Court for an injunction pending resolution of their appeal. Plaintiffs-Appellants previously sought the relief requested herein in the district court or, in the alternative, an administrative injunction that would allow sufficient time to bring a motion in this Court, pursuant to Fed. R. App. P. 8(a)(1)(A). (Dkt. 57, 63, 65). Following an October 4, 2022 hearing, on October 7, 2022, the district court denied Plaintiffs' motion for an injunction pending appeal and Plaintiffs' alternate request for an administrative injunction. Order (Dkt. 68).

CIRCUIT RULE 27-3 CERTIFICATE

I, Laurin H. Mills, certify the following:

1. **Identification of Plaintiff-Appellants' Counsel:**

Plaintiffs-Appellants are Drs. Kelli and Michael Ward and Mole Medical Services, P.C., an Arizona professional corporation. Appellants are represented by Laurin H. Mills (laurin@samek-law.com) of Samek | Werther | Mills, LLC, 2000 Duke Street, Suite 300, Alexandria, VA 22314, whose telephone number is 703-547-4693, Alexander Kolodin (akolodin@davillierlawgroup.com) of Davillier Law Group, LLC, 4105 North 20th Street, Suite 10, Phoenix, AZ 85016, whose telephone number is (602) 730-2985, and Brant C. Hadaway, B.C.S. (bhadaway@davillierlawgroup.com), Special Counsel to the Davillier Law Group,

whose address is Hadaway, PLLC, 2425 Lincoln Avenue, Miami, FL 33133, and whose telephone number is (305) 389-0336.

2. **Identification of Defendants-Appellees' Counsel:**

Defendants-Appellees are Rep. Bennie G. Thompson, in his official capacity as Chairman of the House Select Committee to Investigate the January 6th Attack on the United States Capitol; Select Committee to Investigate the January 6th Attack on the United States Capitol, a committee of the U.S. House of Representatives; and T-Mobile USA, Inc., a Delaware Corporation. Appellees Thompson and the Select Committee (collectively, the "Committee") are represented by Douglas N. Letter (Douglas.Letter@mail.house.gov), Todd B. Tatelman, and Eric R. Columbus, Office of General Counsel, U.S. House of Representatives, 5140 O'Neill House Office Building, Washington, D.C. 20515, whose telephone number is 202-225-9700. Appellee T-Mobile is represented by Brett William Johnson (bwjohnson@swlaw.com) and Tracy Alice Olson (tolson@swlaw.com), Snell & Wilmer, One Arizona Center, 400 East Van Buren Street, Phoenix, AZ 85004-2202, and whose telephone number is 602-382-6000.

3. **Emergency Relief Requested in Motion:**

The relief requested in the emergency motion that accompanies this certificate is an injunction pending appeal ("IPA") restraining and enjoining T-Mobile, during the pendency of the above-captioned appeal, from responding to a

subpoena served on T-Mobile on or about January 24, 2022 (Dkt. 1-1),[1] a copy of which is appended to this emergency motion as Exhibit "A". T-Mobile has stated that, absent a stay, it will produce the subpoenaed information on October 19, 2022.

4. **Facts Justifying Emergency Relief:**

a. Appellants brought the action below on February 1, 2022 to quash the above-referenced subpoena, in part, to protect the First Amendment associational rights of persons who contacted Appellant Dr. Kelli Ward (who is the Chair of the Arizona Republican Party) during one of the most contentious political times in our nation's history (from November 1, 2020 to January 31, 2021) and to protect the confidentiality of the identities of patients of her weight-loss clinic with whom she spoke or messaged by telephone during that period. After multiple delays – all occasioned by the Committee's repeated requests for extensions – the Committee moved to dismiss on August 8, 2022 (Dkt. 46). The district court granted the motion to dismiss on September 22, 2022 (Dkt. 55). Order of Dismissal, attached as Exhibit "B".

b. Appellants noticed their appeal and filed a timely motion for injunction pending appeal in the district court, or for an administrative injunction, to allow Appellants sufficient time to bring motion for injunction before this Court.

[1] Docket numbers refer to the docket in the Arizona District Court, Case No. 3:22-cv-08015.

Motion for Injunction Pending Appeal (Dkt. 57), attached as Exhibit "C". The district court denied both requests on October 7, 2022. The district court's Order (Dkt. 68) is appended to this emergency motion as Exhibit "D".

c. **Because the district court denied any kind of relief at all, including a brief administrative injunction or stay, Appellants' appeal to this Court is in imminent peril of becoming moot**. *See Ahlman v. Barnes*, 20 F.4th 489, 493 (9th Cir. 2021) (citation omitted). As a consequence, this Court will be deprived of an opportunity deliberately to consider the important associational rights under the First Amendment, as well as the proper application of HIPAA to securing the privacy of patient information, raised by this first-of-its-kind appeal.

5. **Timeliness:**

Appellants could not have filed this motion sooner because IPA relief must first be sought in the district court, Fed. R. App. P. 8(a)(1), and the district court denied Appellants' motion for injunction pending appeal by Order issued on Friday October 7, 2022 at 5:10 PM PDT. Ex. D.

6. **Conference with Opposing Counsel:**

Prior to filing this motion, counsel for Appellants informed counsel for Appellees of the motion, and that upon filing Appellants would serve a true and correct copy on Appellees by electronic mail (in addition to service effectuated by

the Court's ECF system). Counsel for the Committee advised that they oppose the motion. Counsel for T-Mobile takes no position on the motion.

7. **Notification of Court:**

Immediately upon the filing of the Emergency Motion, counsel for Plaintiffs-Appellants notified the Clerk's emergency contact email informing the Court of the filing of the instant motion.

Dated: October 10, 2022

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), Plaintiffs-Appellants Drs. Kelli and Michael Ward are individuals. Plaintiff-Appellant Mole Medical Services, P.C. is a privately held professional corporation incorporated under the laws of the State of Arizona, and has no parents or subsidiaries.

Dated: October 10, 2022

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I. INTRODUCTION

This is an unprecedented case in which a Select Committee of the United States Congress has subpoenaed the telephone records of a state chair of the rival political party relating to one of the most contentious political periods in American history. As if that were not egregious enough, the state chair is also a practicing physician and the disclosure of her telephone records would reveal the identities of some of her patients (all of whom are being treated or counseled for weight loss issues) to the prying eyes of congressional investigators known to be cooperating with the Department of Justice in the largest criminal investigation in the history of the United States. If Dr. Kelli Ward's telephone records are disclosed, congressional investigators are going to contact every number on that list and query each subscriber as to what they were discussing with the Chair of the Arizona Republican Party. That is not speculation, it is a certainty.[2] There is no other reason for the Select Committee to seek this information.

The Committee's actions also risk harming the privacy of Dr. Ward's patients. If Dr. Ward's weight-loss patients are contacted by congressional investigators, they are less likely to continue treatment and they may abandon

[2] *See* https://www.washingtonpost.com/politics/2022/09/25/ex-staffers-unauthorized-book-about-jan-6-committee-rankles-members/ (last accessed September 25, 2022).

further treatment once they realize that the physician-patient privilege and HIPAA are not obstacles to congressional curiosity.

These important and substantial First Amendment and patient privacy questions warrant an injunction prohibiting enforcement of the subpoena pending resolution of this appeal. Absent an injunction, Dr. Ward and others will not only suffer the above-mentioned irreparable harms, but Plaintiffs' very ability to obtain a meaningful remedy from this Court will be nullified.

II. FACTS AND PROCEDURAL HISTORY

This motion and the underlying appeal relate to the Committee's investigation of the Capitol riot of January 6, 2021.

Appellants are practicing physicians. Declarations of Dr. K. Ward (Dkt. 1-2), attached as Exhibit "E", and M. Ward (Dkt. 1-3), attached as Exhibit "F". Dr. Kelli Ward ("Dr. Ward") practices medicine exclusively in the field of medical weight loss. Ex. E at ¶¶ 5, 8. Since the COVID-19 pandemic, Dr. Ward has almost exclusively seen her patients via telemedicine, but sometimes needs to speak to them over the phone. *Id*. at ¶¶ 9, 12-16. For many of her patients, the mere fact that they are seeing a doctor for weight loss is a sensitive issue, and patients share other information about sensitive topics. *Id*. at ¶¶ 10-11.

Dr. Michael Ward practices emergency medicine under the business, Mole Medical. Ex. F at ¶¶ 7-8. He also gives his phone number to patients for follow up. *Id*. at ¶¶ 8-9.

Dr. Ward has been the Chairwoman of the Arizona Republican Party since 2019. Ex. E at ¶ 8. The position is unpaid, so treating her weight-loss patients allows her to continue to earn an income. *Id*. Due to the controversy surrounding her service as a Republican nominee for alternate elector and AZGOP Chairwoman in the aftermath of the 2020 election, she has received numerous death threats, harassing letters, and phone calls. *Id*. at ¶ 19. Her husband has also received numerous threatening and harassing messages on social media. Ex. F at ¶ 17.

On January 25, 2022, Mole Medical received a letter dated January 24, 2022, from the T-Mobile Legal and Emergency response team, informing the Wards that T-Mobile had "received a subpoena for records related to a phone number associated with" Mole Medical's T-Mobile account from the Committee. Ex. A (Dkt. 1-1) at 1.[3]

The subpoena seeks in pertinent part:

> Connection Records and Records of Session Times and Durations: All call, message (SMS & MMS), Internet Protocol, ("IP"), and data-connection detail records associated with the Phone Numbers,

[3] Paragraph 1 of the subpoena would have also encompassed the phone numbers for Dr. Michael Ward and the Wards' children. The Committee has agreed to limit the scope of the subpoena only to records pertaining to Dr. Kelli Ward's phone number on the account. *See* MTD (Dkt. 46) at 4, fn. 8.

> including all phone numbers, IP addresses, or devices that communicated with the Phone Number via delivered and undelivered inbound, outbound, and routed calls, messages, voicemail, and data connections.

Ex. A (Dkt. 1-1) at 2, ¶ 2.

The effect of this subpoena would be to gather the telephone numbers (and via reverse look-up directories the identities) of every person who was in contact with Dr. Ward during one of the most contentious periods in our political history, as well as contact information for weight loss patients with whom she spoke by phone during the same period. *See* Ex. E at ¶¶ 13-14.

It is no secret what the Committee intends to do with this data. In a recent appearance on *60 Minutes* on September 25, 2022, former Congressman Denver Riggleman detailed his contact tracing activities on behalf of the Committee and showed a graphic that he created, called "The Monster" [Fig 1], which purportedly depicts the connections between certain partisan political actors and the White House. Congressman Riggleman confirmed what congressional investigators will do with the information they seek. "The thread that needs to be pulled identifying all the White House numbers and why we have certain specific people, why they were talking to the White House,"

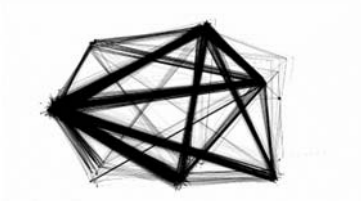

Figure 1

he told 60 Minutes.[4] The precedent set here will be applied in the opposite direction if control of the House changes and Republicans initiate their own investigations or refocus the Committee itself for their own purposes.

Counsel for Plaintiffs-Appellants advised T-Mobile that Plaintiffs would seek an order quashing the subpoena. T-Mobile agreed not to respond to the subpoena until resolution of this case. Plaintiffs filed their Complaint and Motion to Quash on February 1, 2022. (Dkt. 1, 2). Counsel for the Committee did not appear until April 14, 2022, and promptly sought and obtained a stipulation for extension of time. (Dkt. 29, 30, 31). The Committee submitted further stipulations for extension of time on May 17, 2022 (Dkt. 32), June 27, 2022 (Dkt. 35), and July 27, 2022. (Dkt. 40). The district court only partially granted the latter request, giving the Committee until August 8, 2022 to respond to the complaint. (Dkt. 43).

The Committee moved to dismiss on August 8, 2022. (Dkt. 46). After briefing and argument, the district court granted the motion to dismiss. Ex. B (Dkt. 55). Plaintiffs-Appellants filed a timely motion for injunction pending appeal or, in the alternative, for an administrative injunction to allow them to bring the relief

[4] Areeba Shah, *"The Monster": Ex-Jan. 6 investigator sounds alarm over mysterious WH call — here's what we know*, SALON (available at: https://www.salon.com/2022/09/26/the-monster-ex-jan-6-investigator-sounds-alarm-over-mysterious-wh-call--heres-what-we-know/ (Sept. 26, 2022).

sought herein. Ex. C (Dkt. 57). The district court denied the motion in full on October 7, 2022. Ex. D (Dkt. 68).

III. STANDARD FOR INJUNCTION PENDING APPEAL.

The standard for a preliminary injunction generally requires a showing that the movant is "is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). However, this Court has applied an alternative "sliding scale" or "serious questions" test, which this Court has held to be consistent with *Winter*. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-35 (9th Cir. 2011). "That is, serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Id*. at 1135 (cleaned up). This Court treats the "serious questions" test as being interchangeable with the likelihood of success prong for granting a stay pending appeal. *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012).

The Court's serious questions test has likewise been applied by the district courts of this circuit in the context of an injunction pending appeal. *See Beverage Ass'n v. City & Cnty. of San Francisco*, Case No. 15-cv-3415, 2016 U.S. Dist.

LEXIS 74261, *4-5 (N.D. Cal. June 7, 2016) (citing *Protect Our Water v. Flowers*, 377 F. Supp. 2d 882, 884 (E.D. Cal. 2004)); *Overstreet v. Thomas Davis Medical Centers, P.C.*, 978 F. Supp. 1313, 1314 (D. Ariz. 1997) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). "[D]istrict courts properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained." *Flowers*, 377 F. Supp. 2d at 884 (cleaned up) (citing *Washington Metro. Area v. Holiday Tours*, 559 F.2d 841, 844 (D.C. Cir. 1977)). Said differently, "[a]n injunction is frequently issued where the trial court is charting a new and unexplored ground and the court determines that a novel interpretation of the law may succumb to appellate review." *Id*. (cleaned up). *See also MediNatura, Inc. v. FDA*, Case No. 20-cv-2066, 2021 WL 1025835, *6 (D.D.C. March 16, 2021) (noting that the stay pending appeal standard is "more flexible than a rigid application of the traditional four-part injunction standard.").

IV. ARGUMENT

A. THIS CASE RAISES SERIOUS AND DIFFICULT QUESTIONS OF LAW.

1. The District Court's ruling implicates serious questions under the First Amendment.

a. The need for clarity on the application of exacting scrutiny to infringements of associational rights.

Appellants alleged below, *inter alia*, that the Select Committee Subpoena infringes their core First Amendment right to associate with others for political purposes. When such core political associational rights are at stake, courts must apply the "exacting scrutiny" standard. Exacting scrutiny requires that there be "a substantial relation between the disclosure requirement and a sufficiently important governmental interest, and that the disclosure be narrowly tailored to the interest it promotes." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2385 (2021). Appellants will show the Court in this appeal that the district court erred in finding that they had "failed to demonstrate a cognizable First Amendment claim," Ex. B (Dkt. 55) at 12-14, and should instead have applied the exacting scrutiny analysis required by *Bonta* and other Supreme Court decisions governing associational rights under the First Amendment.

The phrase "exacting scrutiny" stems from *NAACP v. Alabama*, 357 U.S. 449 (1958), which used the term "closest scrutiny" when analyzing the alleged infringement of the NAACP's associational rights. *Id*. at 460-61 ("state action

which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny"). The proper application of exacting scrutiny remains an unsettled and developing area of the law. *See* R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. Rev. 207 (Fall 2016).

The exacting scrutiny analysis has been most frequently – but not exclusively – applied to disclosure requirements in the electoral context. *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010) (collecting authority). Most compelled disclosure rules have not survived exacting scrutiny. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (invalidating a ceiling on campaign expenditures); *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 204 (1999) (Ginsburg, J.); *Citizens United v. FEC*, 558 U.S. 310, 365-66 (2010).

Appellants will show that, as in *NAACP v. Alabama*, the subpoena cannot withstand exacting scrutiny. Investigators from a rival political party seek to create a map of Dr. Ward's political contacts and use this map to expand the investigation of the partisan Committee's political opponents. That is similar to what Alabama was seeking to do back in 1958 and what California sought to do via the requirement to disclose the identities of large donors in *Bonta*. It is hard to imagine an act more directly intended to chill the associational rights of persons who bother to involve themselves in the political issues than a call or visit from federal investigators.

In its decision denying an injunction, the district court dismissed these concerns as "speculative" and "dubious" because Dr. Ward posted a video on YouTube of the alternate Arizona electors and then discussed the episode in a recent book. Dkt. 68 at 4. In the district court's view, those actions belie her concern that her communications with party activists would be chilled by disclosure of when and with whom she was in contact. *Id.* Plaintiffs-Appellants could not disagree more with that reasoning.

In *NAACP v. Alabama*, everyone in Alabama knew that NAACP members were likely espousing and working on a civil rights agenda that was at odds with interests of the Jim Crow regime then in power in Alabama. Alabama wanted to know who was involved to "chill" (if not far worse) those activities. Similarly, in *Bonta*, everyone knew that the Americans for Prosperity organization was an organization devoted to supporting a certain political agenda. The Supreme Court ruled in both cases to protect the associational rights of the members of those organizations because the fact that an organization's goals and actions were known has nothing to do with whether disclosure of member names or large contributor identities will chill participation in partisan (and often unpopular) political activities.

It is not speculation to conclude that partisan activists who are contacted by federal investigators about their political activities will think twice about

participating in political activities in the future. That is the unconstitutional chill at issue in this case. Congressional investigators already know what Dr. Ward did because she has made no secret of it. The whole purpose of the subpoena is to strike fear into those with whom she was in contact.

The facts and procedural history of this case strongly resemble those of *Republican National Committee ("RNC") v. Pelosi*, Case No. 22-cv-659 (D.D.C.), wherein the Select Committee sought to obtain confidential records and communications from Salesforce.com, Inc., a third-party customer relationship information management vendor for the RNC. The RNC filed a complaint against members of the Committee and Salesforce seeking to enjoin enforcement of the subpoena. *See RNC*, __ F. Supp. 3d __, 2022 U.S. Dist. LEXIS 78501, *2-18 (D.D.C. May 1, 2022). As here, the RNC sought relief based, *inter alia*, on grounds that the subpoena violated its right to maintain the confidentiality of its member relationship information under the First Amendment. *Id*. at *16.

The district court acknowledged that the RNC stated a valid First Amendment claim based on its interest in the confidentiality of the materials sought by the subpoena. *Id*. at *58-60. The district court was particularly troubled by the Committee's failure to promise to keep the membership relationship information confidential (*id*. at 59), but "perhaps more importantly," the court found that "the RNC's information need not be leaked to the media to impact its

First Amendment interests." *Id*. at *60. This was simply a matter of recognizing the "political realities" of the situation. *Id*. (citing *United States v. Rumely*, 345 U.S. 41, 44 (1953)). Applying exacting scrutiny, the district court nevertheless found that the RNC's burden was not on the same level as that found in *AFL-CIO v. FEC*, 333 F.3d 168, 176-77 (D.C. Cir. 2003), and that the subpoenas were sufficiently narrowly tailored to the Select Committee's interest. *See RNC*, 2022 U.S. Dist. LEXIS 78501 at *68-71.

Recognizing that the RNC's claims could be moot if forced to comply with the subpoena before having an opportunity to seek an injunction on appeal, the district court denied an injunction pending appeal but granted an administrative injunction to allow the RNC an opportunity to seek an injunction pending appeal in the circuit court. *See RNC*, 2022 U.S. Dist. LEXIS 91503 (D.D.C. May 20, 2022).

What happened next is of particular interest.

The RNC promptly filed an emergency motion for injunction pending appeal in the D.C. Circuit. *See RNC v. Pelosi, et al*, Case No. 22-5123 (D.C. Cir.) (attached as Exhibit "G"). On the likelihood of success on the merits prong, the RNC emphasized the district court's equivocal treatment of its First Amendment concerns (which the district court had acknowledged were unprecedented), and its failure properly to apply the exacting scrutiny standard to those concerns. Ex. "G" at 12-16. The RNC argued that it "deserve[d] the opportunity to test the district

court's decision on the importance of the information demanded—and its weight versus the interests of the Select Committee's—on appeal." *Id*. at 16.

The D.C. Circuit granted the RNC's motion, finding that the RNC "satisfied the stringent requirements for an injunction pending appeal." Order of May 24, 2022 (attached as Exhibit "H"). While the court did not elaborate on its reasons, the case's subsequent procedural history provides a clue.

The Select Committee later withdrew the RNC subpoena, and the D.C. Circuit dismissed the case as moot and vacated the judgment of the district court. *See RNC*, Case No. 22-5123, 2022 U.S. App. LEXIS 26068 (D.C. Cir. Sept. 16, 2022) (noted in Order of Dismissal (Dkt. 55) at 2, n.2). The D.C. Circuit specifically noted that vacatur was necessary "[b]ecause the Committee caused the mootness and thereby deprived [the circuit court] of the ability to review the district court's decision, and **given the important and unsettled constitutional questions that the appeal would have presented**. . . ." 2022 U.S. App. LEXIS 26068 at *4 (per *curiam*) (emphasis added).

This Court should follow the D.C. Circuit's reasoning and grant an injunction pending appeal.

b. The *Perry* Rule *v. Citizens United.*

The district court's ruling also highlights the need for this Court to reconcile an important question of law concerning the standard for pleading associational

chilling in light of *Citizens United*. In *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010), this Court held that a party seeking to quash a subpoena must plead and prove that enforcement of the subpoena "**will result** in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights[.]" 591 F.3d at 1160 (emphasis added).

But just weeks after *Perry* was decided, the Supreme Court noted in *Citizens United* that it is sufficient to plead a "**reasonable probability**" that compelled disclosure of donor identities would "subject them to threats, harassment, or reprisals from either Government officials or private parties" to support an "as applied" First Amendment challenge. *Citizens United*, 558 U.S. at 367 (emphasis supplied) (citation omitted). The district court erred in applying the *Perry* Rule, finding that Appellants had failed to show that "enforcement of the subpoena *will result* in harassment." Ex. B (Dkt. 55) at 12 (emphasis in the opinion).

This raises an additional serious and difficult question of law as to Plaintiffs-Appellants' First Amendment claims. Namely, does the district court's application of the *Perry* Rule—i.e., requiring a party challenging a government subpoena on First Amendment grounds to plead and prove a future harm to a certainty—contradict *Citizens United*?

2. The District Court's Opinion Gives Rise to a Split of Authority in this Circuit as to the Proper Application of HIPAA to Questions of Patient Confidentiality.

Appellants alleged below that compliance with the subpoena would disclose the telephone numbers of Dr. Ward's weight loss patients, and that this would constitute a violation of the doctor-patient privilege under federal law. Complt. (Dkt. 1) at ¶¶ 66-73. Because Dr. Ward's patients are all seeing her for weight loss, there can be no doubt that identifying the individual patients who spoke with her during the relevant period would be revealed as weight loss patients. Appellants argued below that the applicable standard for patient confidentiality is governed by HIPAA and its implementing regulations. *See* Plaintiffs' Opp. to MTD (Dkt. 52) at 11-16.

The district court rejected Appellants' arguments on grounds that (1) HIPAA does not create a private right of action; and (2) the patient telephone numbers do not constitute protected health information ("PHI") because T-Mobile is not a covered entity under HIPAA. Ex. B (Dkt. 55) at 16-18. The district court's ruling is out of step with other district courts in this circuit, thus creating a split that should be reconciled by this Court.

In *Nat'l Abortion Fed'n v. Ashcroft*, the Southern District of New York held that HIPAA, through its implementing regulations, preempts Federal Rule of Evidence 501 and governs the patient confidentiality under federal common law.

Id. Case No. 03-cv-8695, 2004 U.S. Dist. LEXIS 4530, *19-22 (S.D.N.Y. March 18, 2004). HIPAA requires that **the party serving the subpoena** either (1) obtain patient consent; or (2) seek a qualified protective order. *Id.* at *21-22 (citing 45 C.F.R. § 164.512(e)). Other district courts in this circuit have essentially reached the same conclusion. *See, e.g.*, *Montoya v. Arizona*, No. CV 18-08025-PCT-DGC (ESW), 2019 U.S. Dist. LEXIS 172561, at *2-3 (D. Ariz. Oct. 4, 2019); *Pyankovska v. Abid*, No. 2:16-cv-02942-JCM-PAL, 2018 U.S. Dist. LEXIS 233418, at *17-18 (D. Nev. Oct. 16, 2018); *Crenshaw v. Mony Life Ins. Co.*, 318 F. Supp. 2d 1015, 1028-29 (S.D. Cal. 2004); *Orthoflex, Inc. v. ThermoTek, Inc.*, No. 12-MC-00013-PHX-JAT, 2012 U.S. Dist. LEXIS 42417, at *4 (D. Ariz. Mar. 28, 2012) (litigants may still assert their privileges in situations where subpoenas have been served to third-parties). Although the district court here noted that "HIPAA does not preclude production of PHI where an adequate protective order is in place," it declined to find that the Committee's failure to seek a protective order was fatal to the enforceability of its subpoena and declined even to enter a protective order. Ex. D (Dkt. 55) at 17-18. The district court reasoned that "the judiciary must refrain from slowing or otherwise interfering with the legitimate investigatory functions of Congress." *Id.* at 18. HIPAA, however, is a law passed by Congress. A serious and difficult question of law thus arises – are

Congressional subpoenas exempt from HIPAA's requirements governing other sorts of subpoenas? Put another way, is Congress above its own laws?

B. Appellants Will Be Irreparably Harmed Absent an Injunction.

This Court has noted that "the justiciability of disputes concerning the disclosure of sensitive information may well turn on whether preliminary relief is granted at an action's inception." *ProtectMarriage.com – Yes on 8 v. Bowen*, 752 F.3d 827, 837-38 (9th Cir. 2014). Consistent with that view, this Court "advise[d] courts to exercise the utmost caution at the early stages of actions concerning the disclosure of sensitive information, and to consider this 'mootness Catch-22' when assessing whether the denial of preliminary relief will likely result in irreparable harm." *Id*. at 838.

This case presents precisely such a Catch-22. Unless this Court intervenes, T-Mobile will have no choice but to comply with the subpoena, and this appeal will become moot. *See Ahlman v. Barnes*, 20 F.4th 489, 493-94 (9th Cir. 2021). Appellants will be left without any remedy. The district court clearly erred in not recognizing that the denial of a meaningful right to appeal constitutes irreparable harm.

C. The Balance of Equities and Public Interest Favor an Injunction.

The party seeking injunctive relief must show that the balance of equities (or balance of harms) favors an injunction, and that "an injunction is in the public

interest." *Winter*, 555 U.S. at 20. "When the government is a party, these last two factors merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). As noted above, the injury to Appellants in the absence of an injunction will be irreparable.

By contrast, the Committee, which is the only Appellee here in a position to argue injury, cannot credibly contend that it has an **immediate** need for the requested information. The Committee issued the subpoena on January 24, 2022; waited six weeks to appear in Appellants' action below (Dkt. 30); and then requested four extensions in which to respond to the Complaint (Dkt. 30, 32, 35 & 40). It was only due to the district court's order of July 29 (Dkt. 43) that the Committee responded at all. On this record, the Committee cannot credibly contend that it has an urgent need for this information or that it will be injured in any way by an injunction.

The Committee played the same game of *hurry-up-and-wait* in *RNC v. Pelosi*, much to the obvious exasperation of the D.C. Circuit. *See RNC*, 2022 U.S. App. LEXIS 26068 at *3-4. The Committee initially claimed that even a modest delay would prejudice its investigation. *Id*. at *3-4. However, after the circuit court granted an injunction pending appeal, the Committee moved to lengthen the briefing schedule. *Id*. at *3. Then, on September 2, 2022, the Committee filed a motion to dismiss the case as moot, informing the court that it had "determined that

it no longer ha[d] a need to pursue the specific information requested in the Salesforce subpoena," and that it had withdrawn the subpoena as a result. *See RNC*, Case No. 22-5123, Doc. #1962096 at 3-4 (D.C. Cir.).

Here, an injunction would only preserve the status quo that existed before the district court intervened in late July to force the Committee to respond. The six-month pattern of extensions, and its conduct in *RNC*, suggests that the Committee would have been content to extend this case indefinitely. Because the Committee's actions have shown that it can easily wait for the Ninth Circuit to resolve the important First Amendment and patient privacy issues that are the central questions to be raised on appeal, the Committee has no plausible injury argument.

On the other side of the ledger is the fact that "speech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–759 (1985) (citations omitted); *see also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (holding that it is always in the public interest to protect constitutional rights). The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). That is because "speech concerning public affairs is more than self-expression; it is the essence of

self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted).

This case will set a precedent for future investigations in which a different political party may be in control. It is important to give these First Amendment questions a carefully considered appellate resolution.

CONCLUSION

Plaintiffs-Appellants respectfully request that this Court grant this motion and enjoin Appellee T-Mobile from complying with the Select Committee's subpoena until this Court resolves the substantial and difficult questions raised in this appeal.

Dated: October 10, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPE-FACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) and 9th Cir. Rule 27-1(d). This document is proportionally spaced and, not counting the items excluded from the length by Fed. R. App. P. 32(f), contains 4,453 words which when divided by 280 does not exceed the 20-page limit of 9th Cir. R. 27-1(d) as calculated under 9th Cir. R. 32-3.

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/s/Laurin H. Mills
Lauren H. Mills

APPENDIX OF EXHIBITS

APPENDIX OF EXHIBITS

INDEX

EXHIBIT A

Via UPS Overnight Service

January 24, 2022

MOLE MEDICAL SERVICES PC
[redacted]
LAKE HAVASU CITY, AZ

Dear Sir or Madam,

T-Mobile USA, Inc. ("T-Mobile") received a subpoena for records related to a phone number associated with your T-Mobile account from the U.S. House Select Committee to Investigate the January 6th Attack on the United States Capitol. A copy of the relevant portions of the subpoena is included with this letter.

T-Mobile intends to produce records associated with your account in response to the subpoena on February 4, 2022, unless you or your representative provide the company with documentation no later than February 2, 2022, confirming that you have filed a motion for a protective order, motion to quash, or other legal process seeking to block compliance with the subpoena. Please direct any motion, legal process or question to T-Mobile's Legal and Emergency Response Team at LERCustomerNotifications@T-Mobile.com.

Sincerely,

Legal and Emergency Response Team

SUBPOENA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To T-Mobile

You are hereby commanded to be and appear before the

Select Committee to Investigate the January 6th Attack on the United States Capitol

of the House of Representatives of the United States at the place, date, and time specified below.

☑ **to produce the things identified on the attached schedule** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: 1540A Longworth House Office Building, Washington, DC 20515

Date: February 2, 2022 Time: 10:00 a.m.

☐ **to testify at a deposition** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time: _____

☐ **to testify at a hearing** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time _____

To any authorized staff member or the United States Marshals Service

_____ to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, D.C. this 19 day of January, 2022.

Bennie G. Thompson

Chairman or Authorized Member

Attest:

Clerk

SCHEDULE

In accordance with the attached definitions and instructions, you, T-Mobile, are hereby required to produce the documents and records ("Records") listed in Section A, below, **for the time period November 1, 2020, to January 31, 2021**, concerning the phone numbers listed in Section B, below (the "Phone Numbers"). This schedule does not call for the production of the content of any communications or location information.

Please email the records to SELECT_CLERKS@MAIL.HOUSE.GOV or, in the alternative, send them by mail to 1540A Longworth House Office Building, Washington, DC 20515, care of Jacob Nelson, Select Committee to Investigate the January 6th Attack on the U.S. Capitol.

Section A – Records to Be Produced for Each Phone Number

1. Subscriber Information: All subscriber information for the Phone Number, including:

    a. Name, subscriber name, physical address, billing address, e-mail address, and any other address and contact information;

    b. All authorized users on the associated account;

    c. All phone numbers associated with the account;

    d. Length of service (including start date) and types of service utilized;

    e. Telephone or instrument numbers (including MAC addresses), Electronic Serial Numbers ("ESN"), Mobile Electronic Identity Numbers ("MEIN") Mobile Equipment Identifier ("MEID"), Mobile Identification Numbers ("MIN"), Subscriber Identity Modules ("SIM"), Mobile Subscriber Integrated Services Digital Network Number ("MSISDN"), International Mobile Subscriber Identifiers ("IMSI"), or International Mobile Equipment Identities ("IMEI") associated with the accounts;

    f. Activation date and termination date of each device associated with the account;

    g. Any and all number and/or account number changes prior to and after the account was activated;

    h. Other subscriber numbers or identities (including temporarily assigned network addresses and registration Internet Protocol ("IP") addresses); and

2. Connection Records and Records of Session Times and Durations: All call, message (SMS & MMS), Internet Protocol ("IP"), and data-connection detail records associated with the Phone Numbers, including all phone numbers, IP addresses, or devices that communicated with the Phone Number via delivered and undelivered inbound, outbound, and routed calls, messages, voicemail, and data connections.

Section B – Phone Numbers

[redacted]-4220

DOCUMENT PRODUCTION DEFINITIONS AND INSTRUCTIONS

1. In complying with this request, produce all responsive documents, regardless of classification level, that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. Produce all documents that you have a legal right to obtain, that you have a right to copy, or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party.

2. Requested documents, and all documents reasonably related to the requested documents, should not be destroyed, altered, removed, transferred, or otherwise made inaccessible to the Select Committee to Investigate the January 6th Attack on the United States Capitol ("Committee').

3. In the event that any entity, organization, or individual denoted in this request is or has been known by any name other than that herein denoted, the request shall be read also to include that alternative identification.

4. The Committee's preference is to receive documents in a protected electronic form (i.e., password protected CD, memory stick, thumb drive, or secure file transfer) in lieu of paper productions. With specific reference to classified material, you will coordinate with the Committee's Security Officer to arrange for the appropriate transfer of such information to the Committee. This includes, but is not necessarily limited to: a) identifying the classification level of the responsive document(s); and b) coordinating for the appropriate transfer of any classified responsive document(s).

5. Electronic document productions should be prepared according to the following standards:

   a. If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

   b. All electronic documents produced to the Committee should include the following fields of metadata specific to each document, and no modifications should be made to the original metadata:

      BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH, PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE, SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM, CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD, INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION, BEGATTACH.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, zip file, box, or folder is produced, each should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers, or identifying markers with which they were associated when the request was served.

8. When you produce documents, you should identify the paragraph(s) or request(s) in the Committee's letter to which the documents respond.

9. The fact that any other person or entity also possesses non-identical or identical copies of the same documents shall not be a basis to withhold any information.

10. The pendency of or potential for litigation shall not be a basis to withhold any information.

11. In accordance with 5 U.S.C.§ 552(d), the Freedom of Information Act (FOIA) and any statutory exemptions to FOIA shall not be a basis for withholding any information.

12. Pursuant to 5 U.S.C. § 552a(b)(9), the Privacy Act shall not be a basis for withholding information.

13. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production, as well as a date certain as to when full production will be satisfied.

14. In the event that a document is withheld on any basis, provide a log containing the following information concerning any such document: (a) the reason it is being withheld, including, if applicable, the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author, addressee, and any other recipient(s); (e) the relationship of the author and addressee to each other; and (f) the basis for the withholding.

15. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (by date, author, subject, and recipients), and explain the circumstances under which the document ceased to be in your possession, custody, or control. Additionally, identify where the responsive document can now be found including name, location, and contact information of the entity or entities now in possession of the responsive document(s).

16. If a date or other descriptive detail set forth in this request referring to a document

is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, produce all documents that would be responsive as if the date or other descriptive detail were correct.

17. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data, or information not produced because it has not been located or discovered by the return date shall be produced immediately upon subsequent location or discovery.

18. All documents shall be Bates-stamped sequentially and produced sequentially.

19. Upon completion of the production, submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control that reasonably could contain responsive documents; and
(2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of classification level, how recorded, or how stored/displayed (e.g. on a social media platform) and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, data, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, communications, electronic mail (email), contracts, cables, notations of any type of conversation, telephone call, meeting or other inter-office or intra-office communication, bulletins, printed matter, computer printouts, computer or mobile device screenshots/screen captures, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape, or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, mail, releases, electronic message including email (desktop or mobile device), text message, instant message, MMS or SMS message, message application, through a social media or online platform, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information that might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neutral genders.

4. The term "including" shall be construed broadly to mean "including, but not limited to."

5. The term "Company" means the named legal entity as well as any units, firms, partnerships, associations, corporations, limited liability companies, trusts, subsidiaries, affiliates, divisions, departments, branches, joint ventures, proprietorships, syndicates, or other legal, business or government entities over which the named legal entity exercises control or in which the named entity has any ownership whatsoever.

6. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; (b) the individual's business or personal address and phone number; and (c) any and all known aliases.

7. The term "related to" or "referring or relating to," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is pertinent to that subject in any manner whatsoever.

8. The term "employee" means any past or present agent, borrowed employee, casual employee, consultant, contractor, de facto employee, detailee, assignee, fellow, independent contractor, intern, joint adventurer, loaned employee, officer, part-time employee, permanent employee, provisional employee, special government employee, subcontractor, or any other type of service provider.

9. The term "individual" means all natural persons and all persons or entities acting on their behalf.

EXHIBIT B

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Michael P Ward, et al.,

Plaintiffs,

v.

Bennie G Thompson, et al.,

Defendants.

No. CV-22-08015-PCT-DJH

ORDER

Pending before the Court is Plaintiffs Michael P. Ward and Kelli Ward's ("Plaintiffs") Motion to Quash a Congressional Subpoena *Duces Tecum* issued by the United States House of Representatives Select Committee ("Select Committee") in furtherance of its investigation into the January 6th attack on the United States Capitol (Doc. 2). Defendant T-Mobile USA Inc. filed a Response (Doc. 48), and Plaintiffs filed a Reply (Doc. 52).

Also pending is Defendants Bennie G. Thompson and the Select Committee's ("Congressional Defendants") Motion to Dismiss, which includes arguments responsive to those made in Plaintiffs' Motion to Quash (Doc. 46).[1] Plaintiffs filed a Response in

[1] Plaintiffs note the Congressional Defendants failed to comply with LRCiv 12.1(c). (Doc. 51 at 5). The purpose of the meet and confer is to cure alleged deficiencies in the Complaint. Plaintiffs say they would have added T-Mobile as a Defendant to the remaining Counts had they been notified in advance of the alleged deficiencies. (*Id.* at 4 n.3). The Court, however, finds this proposed amendment would not resolve the subject matter jurisdiction deficiencies alleged in the Motion to Dismiss. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend."). Under these circumstances, the Court will excuse Defendants' failure to meet and confer.

Opposition (Doc. 51), and Congressional Defendants filed a Reply (Doc. 53).[2]

I. Background[3]

This case arises out of the Select Committee's investigation into the January 6, 2021, attack on the United States Capitol.

The parties include three Plaintiffs: Dr. Kelli Ward ("Ward"), her husband Dr. Michael Ward ("M. Ward"), both of whom are practicing physicians, and Mole Medical Services, PC ("Mole Medical"), an Arizona Professional Corporation (Doc. 1 at ¶¶ 6–8). Plaintiff Kelli Ward is Chair of the Arizona Republican party and was a Republican nominee for Arizona's presidential electors for the 2020 General Election. (Docs. 1, 1-2 at ¶¶ 7, 19). Three Defendants are named: Bennie G. Thompson, a Representative from Mississippi and Chairman of the Select Committee ("Thompson"), the Select Committee, and T-Mobile USA, Inc. ("T-Mobile") (*Id.* at ¶¶ 9–11).

On June 30, 2021, the U.S. House of Representatives adopted House Resolution 503, which established the Select Committee and tasked the Committee with "investigat[ing] and reporting upon the facts, circumstances, and causes relating to the January 6, 2021, domestic terrorist attack upon the United States Capitol Complex . . . and relating to the interference with the peaceful transfer of power." H.R. Res. 503 § 3(1). The Select Committee is authorized to recommend "corrective measures," including "changes in law, policy, procedures, rules, or regulations that could be taken." *Id.* § 4(c).

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[2] On September 7, 2022, Plaintiffs filed a Notice of Supplemental Authority regarding the status of the Republican National Committee's ("RNC") appeal of a D.C. District Court's dismissal of the RNC's objections relating to a subpoena issued by the Select Committee to one of the RNC's vendors. (Doc. 54 citing *Republican National Committee v. Pelosi*, 2022 WL 1294509 (D.D.C. May 1, 2022)). After the parties briefed the issues on appeal, but before oral argument, the Select Committee withdrew the subpoena at issue. (*Id.*) On September 16, 2022, the D.C. Circuit Court dismissed the appeal and vacated the district court's judgment. *Republican Nat'l Comm. v. Pelosi, et al.*, 2022 WL 4349778, at *1 (D.C. Cir. Sept. 16, 2022). The D.C. Circuit Court found vacatur necessary because by withdrawing the subpoena, the Committee precluded the appellate court from reviewing "the important and unsettled constitutional questions that the appeal would have presented." *Id.* As a result of that recent order, the D.C. district court decision holds no persuasive or precedential value.

[3] Unless otherwise noted, these facts are taken from Plaintiffs' Complaint (Doc. 1). The Court will assume the Complaint's factual allegations are true, as it must in evaluating a motion to dismiss. *See Lee v. City of L.A.*, 250 F.3d 668, 679 (9th Cir. 2001).

On or around January 25, 2022, Mole Medical received a letter from T-Mobile informing Mole Medical that T-Mobile had received a subpoena *duces tecum* from the Select Committee to investigate the January 6th attack. (Doc. 1 at ¶ 1). The subpoena required T-Mobile to produce information related to account 4220, including incoming and outgoing phone call records, their duration and associated phone numbers, and information about the callers.[4] (*Id.* at ¶ 2). The subpoena seeks information from November 1, 2020, to January 31, 2021, and required production by February 4, 2022.[5] (*Id.*) The subpoena states "[t]his schedule does not call for the production of the content of any communications or location information." (Doc. 1-1 at 3). The information to be produced, as set forth in the subpoena, is as follows:

> 1. Subscriber Information: All subscriber information for the Phone Number, including:
>
> > a. Name, subscriber name, physical address, billing address, e-mail address, and any other address and contact information;
> > b. All authorized users on the associated account;
> > c. All phone numbers associated with the account;
> > d. Length of service (including start date) and types of service utilized;
> > e. Telephone or instrument numbers (including MAC addresses), Electronic Serial Numbers ("ESN"), Mobile Electronic Identity Numbers ("MEIN") Mobile Equipment Identifier ("MEID"), Mobile Identification Numbers ("MIN"), Subscriber Identity Modules ("SIM"), Mobile Subscriber Integrated Services Digital Network Number ("MSISDN"), International Mobile Subscriber Identifiers ("MSI"), or International Mobile Equipment Identities ("IMEI") associated with the accounts;
> > f. Activation date and termination date of each device associated with the account;
> > g. Any and all number and/or account number changes prior to and after the account was activated;
> > h. Other subscriber numbers or identities (including temporarily

[4] Plaintiff Ward notes three other lines are associated with the 4220 account: one belonging to her husband and the other two belonging to her children. (Doc. 1-2 at ¶ 17). In their Motion to Dismiss, Congressional Defendants represent that "to the extent call detail records for [Dr. Michael Ward and his two children's] phone numbers are considered covered by the Subpoena, the Select Committee has voluntarily withdrawn such a demand and has notified T-Mobile accordingly." (Doc. 46 at 11 n.8).

[5] The parties agreed to extend the production date several times. (Docs. 26, 31, 33, 37, 39, 43, 50).

> assigned network addresses and registration Internet Protocol ("IP") addresses); and
>
> 2. Connection Records and Records of Session Times and Durations: All call, message (SMS & MMS), Internet Protocol ("IP*"), and data-connection detail records associated with the Phone Numbers, including all phone numbers, IP addresses, or devices that communicated with the Phone Number via delivered and undelivered inbound, outbound, and routed calls, messages, voicemail, and data connections.

(*Id.* at 3).

Plaintiffs claim production of the information sought in the subpoena would violate their rights under the First and Fourteenth Amendments of the U.S. Constitution. (*Id.* at ¶ 4). Plaintiffs therefore seek declaratory judgment and injunctive relief, and ask this Court to quash the subpoena and enjoin Defendants from enforcing it or producing any documents in compliance of its demands. (*Id.* at ¶ 5).

Plaintiffs' Complaint contains four causes of action. (*Id.* at 10–19). Count I, against all Defendants, seeks declaratory judgment and injunctive relief, alleging the subpoena is an *ultra vires* action by the Select Committee and thus invalid; Count II, against Congressional Defendants, alleges a violation of the First Amendment; Count III, against Congressional Defendants, alleges a violation of state and federal statutory privilege protections; and Count IV, against Congressional Defendants, alleges a violation of the Rules of the House of Representatives. (*Id.*) Plaintiffs assert no "wrongdoing on the part T-Mobile" and note "they are named herein only insofar as is necessary to ensure that they will be bound by this Court's judgment." (*Id.* at ¶ 11).

Congressional Defendants move to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(1) and (6), arguing the Court lacks subject matter jurisdiction to consider Plaintiffs' claims because sovereign immunity bars those claims. (Doc. 46 at 12). Congressional Defendants further argue the Complaint fails to state a claim upon which relief can be granted. (*Id.* at 13).

II. Legal Standards

Under Federal Rule of Civil Procedure ("Rule") 12(b)(1), a defendant may seek to

dismiss a complaint for lack of jurisdiction over the subject matter. A federal court is one of limited jurisdiction. *See Gould v. Mut. Life Ins. Co. v. New York*, 790 F.2d 769, 774 (9th Cir. 1986). It therefore cannot reach the merits of any dispute until it confirms its own subject matter jurisdiction. *See Steel Co. v. Citizens for a Better Environ.*, 523 U.S. 83, 95 (1998). Plaintiff, as the party seeking to invoke jurisdiction, has the burden of establishing that jurisdiction exists. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a claim. *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011). Complaints must make a short and plain statement showing that the pleader is entitled to relief for its claims. Fed. R. Civ. P. 8(a)(2). This standard does not require "'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). There must be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* While courts do not generally require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *See Twombly*, 550 U.S. at 555. A complaint must "state a claim to relief that is plausible on its face." *Id.* at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. In addition, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

Dismissal of a complaint for failure to state a claim can be based on either the "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). In reviewing a motion to dismiss, "all factual allegations set forth in the complaint 'are taken as true and construed in the light most favorable to the plaintiffs.'" *Lee v. City of L.A.*, 250 F.3d 668, 679 (9th Cir. 2001) (quoting *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140

(9th Cir. 1996)). But courts are not required "to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

III. Discussion

Congressional Defendants move to dismiss Plaintiffs' Complaint under Rules 12(b)(1) and 12(b)(6), arguing the Court lacks subject matter jurisdiction to consider Plaintiffs' claims under the doctrine of sovereign immunity and because the Complaint fails to state a claim upon which relief can be granted. (Doc. 46 at 12–13).

A. Subject Matter Jurisdiction

The Court must dismiss claims and parties over which it lacks subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). The Court must therefore address this issue first.

i. Sovereign Immunity

"[T]he United States may not be sued without its consent and . . . the existence of consent is a prerequisite for [subject matter] jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Consent must be "unequivocally expressed" for Congress to waive its sovereign immunity. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992). Sovereign immunity "forecloses . . . claims against the House of Representatives and Senate as institutions, and Representative[s] . . . and Senator[s] . . . as individuals acting in their official capacities." *Rockefeller v. Bingaman*, 234 F. App'x 852, 855 (10th Cir. 2007) (internal citations omitted).

The Supreme Court, however, has recognized two narrow exceptions to the general bar against suits seeking relief from the United States. *See Wyoming v. United States*, 279 F.3d 1214, 1225 (10th Cir. 2002). "A court may regard a government officer's conduct as so 'illegal' as to permit a suit for specific relief against the officer as an individual if (1) the conduct is not within the officer's statutory powers or, (2) those powers, or their exercise in the particular case, are unconstitutional." *Id.* (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 702 (1949)).

Here, Plaintiffs sue Defendant Thompson in his official capacity, and they sue the

Select Committee as a committee of the House of Representatives. (Doc. 1 at ¶¶ 9, 10). Plaintiffs fail to identify a waiver that is "unequivocally expressed" and thus sovereign immunity plainly bars Plaintiffs' claims against the Select Committee. *Nordic Vill. Inc.*, 503 U.S. at 33. Likewise, an official capacity suit seeking injunctive relief against a federal employee is "treated as a suit against a government entity" and therefore Defendant Thompson, acting in his official capacity, is protected by Congress's sovereign immunity. *Id.* (citing to *Travelers Ins. Co. v. SCM Corp.*, 600 F. Supp. 493, 497 (D.D.C. Dec. 21, 1984) (holding that "[i]t is clear that a claim against a federal employee in his or her 'official capacity' is in effect a claim against the government. The sovereign immunity doctrine cannot be evaded by changing the label on the claims or the parties."); *see also E. V. v. Robinson*, 906 F.3d 1082, 1094 (9th Cir. 2018) (holding where a suit is "in substance" a suit against the government, a court has no jurisdiction in the absence of consent)). The Court accordingly finds no waiver here. Unless Plaintiffs can show one of the narrow exceptions in which sovereign immunity does not apply to government conduct, Plaintiffs' claims are barred.

ii. Exceptions to Sovereign Immunity

Finding no applicable waiver, Plaintiffs seek to invoke the first exception to sovereign immunity by arguing the actions taken by the Select Committee are *ultra vires* because the subpoena does not relate to a legitimate Congressional task and is in violation of House Rules. (Doc. 2 at 13). Plaintiffs further contend the subpoena violates their associational rights under the First Amendment. (Doc. 2 at 11–13). Plaintiffs' arguments are unpersuasive.

a. Valid Legislative Purpose

The Court's role is limited in reviewing Congress's investigative power. Although Congress has no enumerated investigative power, the Supreme Court has recognized that each house of Congress has the power "to secure needed information" to legislate. *See Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (internal citation omitted). Congressional subpoenas, issued in furtherance of Congress's investigative power, must

have a "valid legislative purpose." *Id.* at 2031. This means the subpoena must be "related to, and in furtherance of, a legitimate task of the Congress" such as pursuing a "subject on which legislation could be had." *Id.* at 2033. An investigation conducted to "expose for the sake of exposure" is therefore "indefensible." *Id.* at 2032.

Congressional committees may execute this investigative power when a relevant institution delegates it to them. *See McGrain v. Daugherty*, 273 U.S. 135, 177 (1927). To issue a valid subpoena, however, a committee must conform to the resolution that established its investigative powers. *See Exxon Corp. v. FTC*, 589 F.2d 582 (D.C. Cir. 1978). A committee's conformity to its authorizing resolution or governing rules is "political in nature" and therefore "nonjusticiable." *Metzenbaum v. Fed. Energy Reg. Comm'n*, 675 F.2d 1282, 1287 (D.C. Cir. 1982).

The Court's review of whether an investigative act has a valid legislative purpose is deferential. *McGrain*, 273 U.S. at 177–80. Indeed, the "purpose need not be clearly articulated" and the "legitimate legislative purpose bar is a low one." *Id.* The Court must "presume that the action" has a "legitimate object" if "it is capable of being so construed." *Id.* When the Court considers the valid legislative purpose in the scope of a subpoena, "the Court's review is limited to 'whether the documents sought . . . are not plainly incompetent or irrelevant to any lawful purpose' of the committee 'in the discharge of [its] duties.'" *Senate Select Comm. on Ethics v. Packwood*, 845 F. Supp. 17, 20–21 (D.D.C. 1994) (quoting *McPhaul v. United States*, 364 U.S. 372, 381 (1960)). Thus, for the Court to find a subpoena invalid based on an improper purpose, the subpoena must be rooted in exposing for exposure's sake. *Mazars*, 140 S. Ct. at 2032.

Plaintiffs argue the Congressional Defendants' subpoena must be quashed because it is an *ultra vires* action that does not relate to a legitimate Congressional task. (*Id.* at 13). To support this claim, Plaintiffs contend the subpoena (1) does not concern a subject on which legislation may be had, (2) does not comport with the Committee's enabling resolution because it was issued in aid of a criminal investigation or for the purpose of harassing and threatening Plaintiffs, (3) and is overboard. (Doc. 2 at 13).

Notably, the D.C. Circuit Court in *Trump v. Thompson* rejected similar arguments as to the legitimacy of the Select Committee. *See Trump v. Thompson*, 20 F.4th 10, 41 (D.C. Cir. 2021), cert. denied, —— U.S. ——, 142 S. Ct. 1350, 212 (2022) (finding the Select Committee's investigation into the January 6th attack on the Capitol has a "valid legislative purpose" and the Committee's inquiry contained in the authorizing resolution concerned "a subject on which legislation could be had.") (quoting *Mazars*, 140 S. Ct. at 2031–32)). This Court does as well. House Resolution 503 plainly authorizes the Select Committee to propose legislative measures based on its findings. H.R. Res. 503 § 4(a)(3). Indeed, the Select Committee's purpose is to "issue a final report to the House containing such findings, conclusions, and recommendations" for such "changes in law, policy, procedures, rules, or regulations" as the Committee "may deem necessary[.]" *Id.* § 4(a)(3),(c). The Court therefore finds the Select Committee's investigation into the January 6th attack on the Capitol has a "valid legislation purpose." *Trump*, 20 F.4th at 41.

To impeach the Select Committee's otherwise valid legislative purpose Plaintiffs must overcome a "formidable bar." *Comm. on Ways & Means, U.S. House of Representatives v. U.S. Dep't of the Treasury*, 575 F. Supp. 3d 53, 65 (D.D.C. Dec. 14, 2021) (finding that "while Congress need clear only a low bar to establish a valid purpose, [plaintiffs] face a formidable bar to impeach that purpose"). Plaintiffs argue Deputy Attorney General Monaco stated the Select Committee's investigation concerned whether Plaintiffs "committed a crime by sending fake Electoral College certifications that declared former President Donald Trump the winner of states he lost." (Doc. 2 at 14). Plaintiffs say it is "public knowledge that Republicans sent a competing slate of electors for Arizona" and that "no investigation is necessary to confirm this," thus the subpoena was issued to harass them for exercising their First Amendment rights. (*Id.*)

The Court finds this evidence falls short of the formidable bar Plaintiffs must overcome to show an invalid legislative purpose. In *Watkins*, a defendant refused to answer questions before a House committee about whether certain individuals were members of the Communist Party because he doubted the relevance of those questions to the

committee's work. *Watkins v. United States*, 354 U.S. 185 (1957). The Court found the defendant had "marshalled an impressive array of evidence that" exposure of Communists motivated the committee. *Id.* at 199. This evidence included an official committee publication which stated the committee "believed itself" called "to expose people and organizations attempting to destroy this country." *Id.* Even considering the "impressive array of evidence," the Court found it did not invalidate the committee's inquiry. *Id.* at 200. "[A] solution to our problem is not to be found in testing the motives of committee members." *Id.* "Their motives alone would not vitiate an investigation . . . if that assembly's legislative purpose is being served." *Id.*

Plaintiffs' evidence of an illegitimate purpose is nowhere close to the evidence in *Watkins*. First, Deputy Attorney General Monaco is not a member of the Select Committee, and it is unclear to the Court how her comments implicate the Committee's motives. Second, Plaintiffs appear to argue Deputy Attorney General Monaco's statement shows the Select Committee's purpose is motivated by a criminal investigation. The Court is unpersuaded. Indeed, the D.C. Circuit rejected that the Select Committee has an "improper law enforcement purpose," finding "[t]he mere prospect that misconduct might be exposed does not make the Committee's request prosecutorial" and that "[m]issteps and misbehavior are common fodder for legislation." *Trump*, 20 F.4th at 42. The Court therefore rejects Plaintiffs' claims that the Select Committee's subpoena was issued to harass them or is otherwise for an improper law enforcement purpose. *See Barenblatt v. United States*, 360 U.S. 109, 132 (1959) (finding that if "Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power.").

Last, Plaintiffs argue the subpoena is overbroad because it does not set forth with "undisputable clarity" how its request for data relates to an authorized and lawful purpose of the Committee's investigation. (Doc. 2 at 14–15). But the Court's role is limited to whether the requested records "are not plainly incompetent or irrelevant to any lawful purpose' of the committee 'in the discharge of [its] duties.'" *Packwood*, 845 F. Supp. at

20–21 (quoting *McPhaul v. United States*, 364 U.S. 372, 381 (1960). The Select Committee's information request relates to phone calls records from November 1, 2020, to January 31, 2021, from an account associated with a Republican nominee to serve as elector for former President Trump. (Doc. 1-1 at 3; Doc. 1-2 at ¶ 19). That three-month period is plainly relevant to its investigation into the causes of the January 6th attack. The Court therefore has little doubt concluding these records may aid the Select Committee's valid legislative purpose. *McGrain*, 273 U.S. at 177.

b. House of Representatives Rule Violations

Plaintiffs also allege the Select Committee lacks authorization because it has only nine members and the authorizing resolution states that the Speaker shall appoint thirteen members. (Doc. 1 at ¶ 81). It is undisputed that the composition of the Select Committee includes nine members.

The Rulemaking Clause of Article I, Section 5 of the Constitution "reserves to each House of the Congress the authority to make its own rules," and a court's different interpretation of a congressional rule is tantamount to "*making* the Rules—a power that the Rulemaking Clause reserves to each House alone." *Barker v. Conroy*, 921 F.3d 1118, 1130 (D.C. Cir. 2019) (emphasis in original) (internal citation omitted). The Court may intervene only if doing so "requires no resolution of ambiguities." *See United States v. Durenberger*, 48 F.3d 1239, 1244 (D.C. Cir. 1995). A "sufficiently ambiguous House Rule," however, "is non-justiciable." *United States v. Rostenkowski*, 59 F.3d 1291, 1306 (D.C. Cir. 1995). Further, the Court "must give great weight to the [House's] present construction of its own rules." *See United States v. Smith*, 286 U.S. 6, 33 (1932). Relevant here, House Resolution 503 states that "[t]he Speaker shall appoint 13 Members to the Select Committee, 5 of whom shall be appointed after consultation with the minority leader." H. Res. 503 § 2(a).

The Court rejects Plaintiffs' argument that the subpoena was unauthorized because it was issued by nine members of the Select Committee and will defer to the House's

"construction of its own rules."[6] *Smith*, 286 U.S. at 33. The House has already empowered the Select Committee to act under its authorizing resolution, despite its composition. Indeed, the House adopted the Select Committee's recommendations to find witnesses in contempt of Congress for refusals to comply with subpoenas and thus its composition has been implicitly ratified by the body that created it. *See* 167 Cong. Rec. H5748, H5768–69 (Oct. 21, 2021) (Steve Bannon); 167 Cong. Rec. H7667, H7794, H7814–15 (Dec. 14, 2021) (Mark Meadows). Here, Plaintiffs ask this Court to interpret the resolution in a different manner than the House's own reading of the authorizing resolution. But the Rulemaking Clause reserves this power to the House and the Court will not interpret the resolution in a manner contrary to the authorizing body. *Barker*, 921 F.3d at 1130.

c. First Amendment Associational Rights

Although not expressly stated, Plaintiffs appear to argue the issuance of the subpoena is an unconstitutional act that does not bar this suit under sovereign immunity principles. To that end, Plaintiffs argue the subpoena violates their associational rights under the First Amendment. (Doc. 2 at 11). Plaintiffs contend the Court must apply "exacting scrutiny" to the subpoena because "political associational rights are at stake." (*Id.* at 12). Plaintiffs further claim the subpoena provides the Select Committee with "the means to chill the First Amendment associational rights not just of the [Plaintiffs] but of the entire Republican Party in Arizona. (*Id.* at 13).

To escape lawful government investigation, plaintiffs must demonstrate a "prima facie showing of arguable first amendment infringement . . . ." *Brock v. Loc. 375, Plumbers Int'l Union of Am., AFL-CIO*, 860 F.2d 346, 350 (9th Cir. 1988). This requires plaintiffs show that "enforcement of the subpoena will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Id.* Plaintiffs must provide "objective and articulable facts, which go beyond broad allegations

[6] Plaintiffs' quorum and delegation of authority allegations, contained under the same Count in their Complaint, are also based on the Select Committee's nine-member composition and the Court therefore rejects these arguments for the same reasons. (Doc. 1 at ¶¶ 85–91).

or subjective fears." *Id.* at n1. A "subjective fear of future reprisals is an insufficient showing of infringement of associational rights." *Id.* "The existence of a prima facie case turns not on the type of information sought, but on whether disclosure of the information will have a deterrent effect on the exercise of protected activities." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010).

Plaintiffs argue their production of records "risks" those people who called or texted Plaintiff Kelli Ward to be contacted by the Committee and to "become implicated in the largest criminal investigation in U.S. history." (Doc. 51 at 9). Having already found that the subpoenaed information may aid the Committee in its function, this argument fails. Plaintiffs also assert the Committee is controlled by members of a rival political party and thus raises concerns that the Committee will use the information it obtains "to harass or persecute political rivals by inquiring into their dealings with the party Chair." (*Id.*) Plaintiffs say "[i]f the Select Committee prevails, it will get a list of who, when, and for how long the Chair of the AZGOP was in contact with party members at a sensitive time . . . [which] may 'induce members to withdraw' from the AZGOP 'and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.'" (*Id.*)

The Court finds these arguments highly speculative. First, the Court "must presume" that the Select Committee "will exercise [its] powers responsibly and with due regard for the [Plaintiffs'] rights" in handling the information. *Exxon Corp.*, 589 F.2d at 589. Second, apart from these broad allegations, Plaintiffs have provided no evidence to support their contention that producing the phone numbers associated with this account will chill the associational rights of Plaintiffs or the Arizona GOP. Absent "objective and articulable facts" otherwise, the Court finds Plaintiffs' arguments constitute "a subjective fear of future reprisal" that the Ninth Circuit has held as insufficient to show an infringement of associational rights. *Brock*, 860 F.2d at 350.

Last, the law requires plaintiffs show that "enforcement of the subpoena *will result* in harassment . . ." *Id.* (emphasis added). Although Plaintiffs allege that they have

"received death threats, harassing letters, phone calls, and threatening and sexually explicit comments," because of the January 6th attack and Plaintiff Ward's associational status with the Arizona GOP, the Court notes these incidents have already occurred. *Id.* (Doc. 1 at ¶¶ 55–56). Plaintiffs do not otherwise explain how compliance with the subpoena would result in harassment. Plaintiffs allege that the subpoena "must be declared violative of Plaintiffs' First Amendment associational rights," but beyond conclusory allegations, they do not demonstrate how the Select Committee's enforcement of the subpoena and subsequent possession of the phone numbers "will have a deterrent effect on the exercise of protected activities." (*Id.* at ¶ 57). The Court therefore finds Plaintiffs failed to demonstrate a cognizable First Amendment claim.

Because Plaintiffs failed to show an applicable exception to the sovereign immunity doctrine, Plaintiffs' claims against the Congressional Defendants are barred.

B. State and Federal Statutory Privileges

Although Plaintiffs' claims against the Congressional Defendants are barred, T-Mobile is also named a Defendant to this lawsuit. The Court will therefore consider Plaintiffs' state and federal statutory claims, which necessarily relate to T-Mobile's release of the subpoenaed records. Plaintiffs argue the subpoena should be quashed because it infringes on rights protected under state and federal statutory privileges, including Arizona's Physician-Patient Privilege and the Health Insurance Portability and Accountability Act ("HIPAA"). (Doc. 2 at 7–10).

a. Arizona Physician-Patient Privilege

"Arizona has adopted physician-patient privilege statutes for both civil and criminal proceedings." *Samaritan Health Servs. v. City of Glendale*, 714 P.2d 887, 889 (Az. Ct. App. 1986). The statute reads: "Unless otherwise provided by law, all medical records and payment records, and the information contained in medical records and payment records, are privileged and confidential." *See* A.R.S. § 12-2292.

Plaintiffs argue the subpoena improperly seeks telephone "metadata," and that a study from Stanford University shows that a patient's "name or relationship status are

immediately apparent from telephone metadata" as well as "countless other personal details." (Doc. 2 at 8). Plaintiffs therefore contend disclosure of their patients' phone numbers infringes on the physician-patient privilege under A.R.S. § 12-2292.

Congressional Defendants argue the Supremacy Clause of the U.S. Constitution, U.S. Const., Art. VI, cl. 2, overrides Arizona's physician-patient privilege and thus the statute cannot limit information validly sought under a Congressional subpoena. (Doc. 46 at 23). Congressional Defendants further assert a Congressional subpoena is not part of a "civil matter" and therefore Arizona's physician-patient privilege statute does not apply. (*Id.*)

In their Complaint, Plaintiffs allege the subpoena "constitutes a violation of Arizona state law related to medical privilege." (Doc. 1 at ¶ 65). But "[t]his statute codifies the physician-patient privilege and does not create a private right of action." *Skinner v. Tel-Drug, Inc.*, 2017 WL 1076376, at *4 (D. Ariz. Jan. 27, 2017). Accordingly, Plaintiffs' statutory violation claim in Count III cannot plausibly stand, and the Court will dismiss it.

Plaintiffs' argument that the subpoena should be quashed because it is overbroad and sweeps into physician-patient privileged information is equally unsuccessful. The Arizona statute applies to civil and criminal proceedings and, as Congressional Defendants point out, a congressional subpoena involves neither. Instead, the subpoena here is issued under Congress's constitutional power to conduct investigations "on which legislation could be had." *See Mazars*, 140 S. Ct. at 2031. Moreover, even if the statute applied, the Congressional Defendants are not seeking information related to the "confidential contents of the . . . patient's medical records." *Carondelet Health Network v. Miller*, 212 P.3d 952, 956 (Ariz. Ct. App. 2009). "The whole purpose of the privilege is to preclude the humiliation of the patient that might follow disclosure of his ailments." *Id.* (internal citation omitted). As the court in *Miller* clarified, "if the disclosure of the patient's name reveals nothing of any communication concerning the patient's ailments, disclosure of the patient's name does not violate the privilege." *Miller*, 212 P.3d at 956. Here, the records sought by Congressional Defendants "reveal[] nothing of any communication concerning

the patient's ailments." *Id.* Plaintiffs contend that their medical practice focuses "exclusively on weight loss" and that "communication with certain types of doctors can instantly reveal confidential facts about a patient's condition." (Doc. 52 at 4). But the Court finds it implausible that a patient's phone number would "inevitably expose information about the patient's medical history, condition, or treatment, and potentially reveal information the patient had divulged in confidence." *See Miller*, 212 P.3d at 955 (holding trial court's order requiring hospital to disclose the name, address, and telephone number of a hospital patient did not violate the physician-patient privilege).

b. The Health Insurance Portability and Accountability Act

Count III of Plaintiffs' Complaint attempts to bring another cause of action under HIPAA, alleging "the enforcement of the Subpoena must be enjoined until and unless limitations are put in place to protect the [protected health information ("PHI")] of the Plaintiffs' patients." (Doc. 1 at ¶ 72). Plaintiffs allege they are "covered entities" and that "[d]isclosing the phone records and metadata from the Phone Number would provide the PHI of an unknown but quantifiable number of individuals seeking medical treatment from the Plaintiffs to the Committee and potentially to the public at large." (*Id.* at ¶ 67). As an initial matter, it is well established that HIPAA does not provide a private cause of action. *Webb v. Smart Document Sols.*, LLC, 499 F.3d 1078, 1081 (9th Cir. 2007). Thus, under the current Complaint, Plaintiffs' independent HIPAA claim cannot plausibly stand, and the Court will dismiss it.

Nonetheless, the real question appears to be whether the Select Committee's request for information that may otherwise be HIPAA protected is reason to quash the subpoena. To that end, Plaintiffs argue the subpoena violates HIPAA because telephone numbers can be used to identify the Wards' patients and those numbers constitute PHI. (Doc. 2 at 9). Congressional Defendants and T-Mobile argue T-Mobile is not a covered entity and therefore HIPAA's disclosure restrictions do not apply. (Doc. 53 at 13; Doc. 48 at 4).

HIPAA restricts health care entities from disclosure of PHI. Generally, however, HIPAA only applies to covered entities. "A covered entity or business associate may not

use or disclose protected health information, except as permitted or required by [these regulations]." 45 C.F.R. § 164.502(a). Covered entities include health plans, health plan clearinghouses, or health care providers who transmit any health information in electronic form in connection with a transaction covered by HIPAA. 45 C.F.R. §§ 160.102(a), 164.104(a). A business associate is a person or organization that "creates, receives, maintains, or transmits protected health information" for "a covered entity" unless "in the capacity of a member of the workforce of such covered entity." *Id.* § 160.103.

Covered entities and business associates may disclose PHI only with the patient's consent or in response to a court order or discovery request. 45 CFR § 164.512(f)(1)(ii)(A). Disclosure of PHI is permitted in response to a subpoena when the covered entity "receives satisfactory assurance from the party seeking the information that reasonable efforts have been made . . . to ensure that the individual who is the subject of the protected health information . . . has been given notice of the request; or . . . reasonable efforts have been made . . . to secure a qualified protective order." 45 C.F.R. §§ 164.512(e)(1)(ii)(A)–(B). A qualified protective order prohibits the parties from using or disclosing PHI for any purpose other than the litigation at hand and requires the parties to return or destroy the protected information at the end of proceedings. 45 C.F.R. § 164.512(e)(1)(v).

Plaintiffs argue HIPAA applies here because Plaintiffs are the "true parties from whom the information is sought." (Doc. 51 at 16). Plaintiffs cite no case law to support this proposition and the Court accordingly rejects it. The Congressional Defendants plainly issued a subpoena to T-Mobile, not Plaintiffs, and Plaintiffs do not represent that they maintain or could produce the type of records sought in the subpoena. (Doc. 1-1 at 2). T-Mobile is not a covered entity under HIPAA and therefore HIPAA's PHI disclosure requirements do not apply to it.

The Court also notes HIPAA does not preclude production of PHI where an adequate protective order is in place. 45 C.F.R. § 164.512(e); *Lind v. United States*, 2014 WL 2930486, at *2 (D. Ariz. June 30, 2014) (internal citation omitted). Plaintiffs allege the parties have not discussed the prospect of a protective order or the potential PHI the

subpoena could implicate. (Doc. 1 at ¶ 71). The Court therefore encourages the parties to engage in discussions regarding entry of a protective order designed to protect any potential PHI. Given the legitimate purpose underlying the Select Committee's investigation, however, the Court will not quash the subpoena on the grounds that some of the information could potentially be protected under statutes that do not apply to T-Mobile. *See F.T.C. v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980) ("the judiciary must refrain from slowing or otherwise interfering with the legitimate investigatory functions of Congress.").

IV. Conclusion

Plaintiffs bear the burden of establishing that jurisdiction over the Congressional Defendants exists and have failed to do so here. *Kokkonen*, 511 U.S. at 377. Sovereign immunity therefore bars Plaintiffs' claims against the Congressional Defendants. Plaintiffs note in their Complaint that T-Mobile was only added to ensure compliance with the Court's Order. (Doc. 1 at ¶ 11). Because there is no viable claim against T-Mobile, the Court will also dismiss it.

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' Motion to Quash (Doc. 2) is **denied** and the Congressional Defendants' Motion to Dismiss (Doc. 46) is **granted**. The Clerk of the Court is kindly directed to terminate this action.

Dated this 22nd day of September, 2022.

Honorable Diane J. Humetewa
United States District Judge

EXHIBIT C

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Dr. Michael P. Ward, D.O., *et al.*; *Plaintiffs*, v. Bennie G. Thompson, *et al.*; *Defendants*.	Case No. 3:22-cv-08015-DJH **MOTION FOR INJUNCTION OR ADMINISTRATIVE INJUNCTION PENDING APPEAL**

PLAINTIFFS' MOTION FOR INJUNCTION OR ADMINISTRATIVE INJUNCTION PENDING APPEAL

In response to the Court's September 22, 2022, Memorandum Opinion ("Order"), Plaintiffs, Drs. Kelli Ward and Michael Ward, on behalf of themselves and Mole Medical Services, PC ("Mole Medical"), move pursuant to Fed. R. Civ. P. 62(d) and Fed. R. App. P 8(a)(1)(a) for an order enjoining enforcement of the subpoena served on Defendant T-Mobile by Defendant Select Committee (ECF 1-1) pending appeal while the Ninth Circuit considers the important constitutional and patient privacy questions presented in

this case. In the alternative, Plaintiffs ask that the Court enter an administrative injunction to allow Plaintiffs sufficient time to seek an emergency injunction in the Ninth Circuit. For the reasons set forth in the Memorandum below, this Motion should be granted.

INTRODUCTION

This is an unprecedented case where a Select Committee of the United States Congress has subpoenaed the telephone records of the state chair of the rival political party for a period encompassing one of the most contentious political periods in American history. As if that alone were not egregious enough, the state chair and her husband are also practicing physicians and the disclosure of their telephone records would reveal the identities of some of their patients (all of whom are being treated or counseled for weight loss issues) to the prying eyes of Congressional investigators known to be cooperating with the Department of Justice in the largest criminal investigation in the history of the United States. If the Wards' telephone records are disclosed, congressional investigators and/or federal government law enforcement agents are going to contact every number on that list and query each subscriber as to what they were discussing with Dr. Kelli Ward, the Chair of the Arizona Republican Party. That is not speculation, it is a certainty.[1] There is no other reason for the Select Committee to seek this information.

The potential chilling effect on public participation in partisan politics in Arizona is palpable. The message is that if you involve yourself in a political fight, and the other side wins, then expect a call or visit from government agents and who knows where things

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[1] The September 25, 2022 edition of the *Washington Post* reports on a new book by former Select Committee investigator Denver Riggleman. The article discusses how Riggleman's team focused on linking names to the telephone numbers and text messages of former White House Counsel Mark Meadows and others. Riggleman called the messages a "road map" that allowed the Select Committee to "structure the investigation." https://www.washingtonpost.com/politics/2022/09/25/ex-staffers-unauthorized-book-about-jan-6-committee-rankles-members/ (last accessed September 25, 2022).

will go from there. That is standard operating procedure in totalitarian states, but the criminalization of politics has never been tolerated in America.

There is also a serious and unwarranted danger of unnecessarily damaging the Wards professionally and harming their patients' health. It is hard for many patients to muster enough courage to seek medical help for certain ailments and then to be completely candid once treatment is sought. If the Wards' weight-loss patients are contacted by congressional or law enforcement investigators, they are less likely to continue treatment with the Wards and they may abandon further treatment once they realize that the physician-patient privilege and HIPAA are not obstacles to congressional or federal government curiosity. The important and substantial First Amendment and patient privacy questions presented in this case warrant an injunction prohibiting enforcement of the subpoena pending resolution Plaintiffs' appeal. Alternatively, the Court should enter a brief administrative injunction to allow Plaintiffs sufficient time to seek an injunction in the Ninth Circuit.

Argument

I. Standard.

The Court "has the authority to issue an injunction pending appeal, notwithstanding its denial of preliminary injunctive relief, pursuant to Federal Rule of Civil Procedure 62([d])."[2] *See Beverage Ass'n v. City & Cnty. of San Francisco*, Case No. 15-cv-3415, 2016 U.S. Dist. LEXIS 74261, *2 (N.D. Cal. June 7, 2016).[3] The factors for determining a motion for injunction pending appeal are:

(1) whether "the appeal raises serious and difficult questions of law where the law is somewhat unclear";

(2) whether the applicant will be irreparably injured unless a stay is granted;

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[2] Fed. R. App. Proc. 8 also dictates that a motion to stay should first be decided by the district court even if, as here, a notice of appeal has already been filed.

[3] Rule 62 was reorganized in 2018, so some cases refer to subsection (c) instead of (d).

(3) whether the grant of a stay will substantially injure other interested parties; and

(4) where the public interest lies.

Overstreet v. Thomas Davis Medical Centers, P.C., 978 F. Supp. 1313, 1314 (D. Ariz. 1997) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (applying same factors). Although the above criteria must be applied individually to the facts of each case, the Court's decision must be made based on all the criteria. *Overstreet*, 978 F. Supp. at 1314 (citation omitted).

In the context of an injunction pending appeal, the courts have interpreted the substantial likelihood of success on the merits prong as requiring that the movant show that "the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear." *Id.* (citing *Mamula v. Satralloy, Inc.*, 578 F. Supp. 563, 580 (S.D. Ohio 1983)). "This is so because a literal reading [of the likelihood of success prong] would seem to require a district court to determine that it had erred in its original ruling, and such a requirement would probably lead to consistent denials of motions to stay." *Mamula*, 578 F. Supp. at 580 (citing *Evans v. Buchanan*, 435 F. Supp. 832, 843 (D. Del. 1977)).

Thus, an injunction pending appeal may be appropriate even if the Court believes that its analysis in denying the motion was correct. *Beverage Ass'n*, 2016 WL 9184999 at *4-5 (citing *Protect Our Water v. Flowers*, 377 F. Supp. 2d 882, 884 (E.D. Cal. 2004)). "[D]istrict courts properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained." *Flowers*, 377 F. Supp. 2d at 884 (cleaned up) (citing *Washington Metro. Area v. Holiday Tours*, 559 F.2d 841, 844 (D.C. Cir. 1977)). "An injunction is frequently issued where the trial court is charting a new and unexplored ground and the court determines that a novel interpretation of the law may succumb to appellate review." *Id.*

(cleaned up) (citation omitted). *See also MediNatura, Inc. v. FDA*, Case No. 20-cv-2066, 2021 WL 1025835, *6 (D.D.C. March 16, 2021) (noting that the stay pending appeal standard is "more flexible than a rigid application of the traditional four-part injunction standard.").

II. The Appeal Raises Serious and Difficult Questions of Law Where the Law Is Unclear.

A. Plaintiffs' First Amendment Arguments Raise Substantial and Difficult Questions in an Area of the Law That Is Unsettled.

Plaintiffs alleged that the Select Committee Subpoena infringes their core First Amendment right to associate with others for political purposes. When such core political associational rights are at stake, courts must apply the "exacting scrutiny" standard. Exacting scrutiny requires that there be "a substantial relation between the disclosure requirement and a sufficiently important governmental interest, and that the disclosure be narrowly tailored to the interest it promotes." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2385 (2021).

In their Opposition to the Select Committee's Motion to Dismiss, Plaintiffs argued, relying heavily on the analogous facts presented in *NAACP v. Alabama*, 357 U.S. 449, 462 (1958), that the Select Committee's Subpoena could not withstand exacting scrutiny analysis in this situation. Investigators from a rival political party are seeking to create a map of Chair Ward's political contacts and use this map to expand the investigation of political opponents. That is similar to what Alabama was seeking to do back in 1958.

B. Exacting Scrutiny Analysis Is an Unsettled and Rapidly Developing Area of the Law.

The phrase "exacting scrutiny" first appeared in Supreme Court jurisprudence in *NAACP v. Alabama*, which dates from early in the civil rights era, but it has been

infrequently and inconsistently applied by the courts since. One scholar described exacting scrutiny as follows:

> Exacting scrutiny is a standard constitutional test that has, curiously, received little critical attention. Some murkiness and ambiguity most assuredly attach to the idea of exacting scrutiny.

R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. Rev. 207 (Fall 2016).

The exacting scrutiny analysis has been most frequently – but not exclusively – applied to disclosure requirements in the electoral context. *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010) (collecting authority). Since *NAACP v. Alabama*, most compelled disclosure rules have not survived exacting scrutiny. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (invalidating a ceiling on campaign expenditures); *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 204 (1999) (holding that Colorado statute requiring that petition circulators be registered voters violated First Amendment; Colorado statute requiring that petition circulators wear identification badges bearing the circulator's name violated First Amendment; Colorado statute requiring that proponents of an initiative report names and addresses of all paid circulators and amount paid to each circulator violated First Amendment) (Ginburg, J.); *Citizens United v. FEC*, 558 U.S. 310,365-66 (2010) (federal law barring independent corporate expenditures for electioneering communications violated First Amendment).

C. The First Amendment Arguments in this Case Closely Parallel the Arguments Raised in *NAACP v. Alabama* and *RNC v. Pelosi* and the D.C. Circuit Found That Such Arguments Raised Important and Unsettled Constitutional Questions.

In their Opposition to the Select Committee's Motion to Dismiss, Plaintiff argued in detail the similarities between this case and *NAACP v. Alabama*. That discussion, therefore, is not repeated here but incorporated by reference.

The facts and procedural history of this case also strongly resemble those of *Republican National Committee ("RNC") v. Nancy Pelosi, et al*, Case No. 22-cv-659 (D.D.C.), wherein the Select Committee sought to obtain confidential records and communications from Salesforce.com, Inc., a third-party customer relationship information management vendor for the RNC. The RNC filed a complaint against members of the Select Committee and Salesforce seeking to enjoin enforcement of the subpoena. *See RNC*, __ F. Supp. 3d __, 2022 U.S. Dist. LEXIS 78501, *2-18 (D.D.C. May 1, 2022). As here, the RNC sought relief based, *inter alia*, on grounds that the subpoena violated its right to maintain the confidentiality of its member relationship information under the First Amendment. *Id*. at *16.

The district court acknowledged that the RNC stated a valid First Amendment claim based on its interest in the confidentiality of the materials sought by the subpoena. *Id*. at *58-60. The district court was particularly troubled by the Select Committee's failure to promise to keep the membership relationship information confidential (*id*. at 59), but "perhaps more importantly," the court found that "the RNC's information need not be leaked to the media to impact its First Amendment interests." *Id*. at *60. This was simply a matter of recognizing the "political realities" of the situation. *Id*. (citing *United States v. Rumely*, 345 U.S. 41, 44 (1953)). Applying exacting scrutiny, the district court nevertheless found that the RNC's burden was not on the same level as that found in *AFL-CIO v. FEC*, 333 F.3d 168, 176-77 (D.C. Cir. 2003), and that the subpoenas were sufficiently narrowly tailored to the Select Committee's interest. *See RNC*, 2022 U.S. Dist. LEXIS 78501 at *68-71.

It was noteworthy that during oral argument on RNC's motion for preliminary injunction, counsel for the Select Committee acknowledged that, in the event that the district court denied the RNC's request for a preliminary injunction, the district court would have the discretion to enjoin compliance with the subpoena pending appeal. *See RNC*, Case No. 22-cv-659 (D.D.C.), Transcript (ECF 24) at 112:22 – 113:6. As a result,

recognizing that the RNC's claims could be moot if forced to comply with the subpoena before having an opportunity to seek an injunction on appeal, the district court entered an administrative injunction to preserve the status quo. *RNC*, 2022 U.S. Dist. LEXIS 78501 at *74-76. On a subsequent motion, the district court denied an injunction pending appeal but granted a further administrative injunction to allow the RNC an opportunity to seek an injunction pending appeal in the circuit court. *See RNC*, 2022 U.S. Dist. LEXIS 91503 (D.D.C. May 20, 2022).

What happened next is of particular interest.

The RNC promptly filed an emergency motion for injunction pending appeal in the D.C. Circuit. *See RNC v. Pelosi, et al*, Case No. 22-5123 (D.C. Cir.) (attached as Exhibit "A"). On the likelihood of success on the merits prong, the RNC emphasized the district court's equivocal treatment of its First Amendment concerns (which the district court had acknowledged were unprecedented), and its failure properly to apply the exacting scrutiny standard to those concerns. Ex. "A" at 12-16. The RNC argued that it "deserve[d] the opportunity to test the district court's decision on the importance of the information demanded—and its weight versus the interests of the Select Committee's—on appeal." *Id*. at 16.

The D.C. Circuit granted the RNC's motion, finding that the RNC "satisfied the stringent requirements for an injunction pending appeal." Order of May 25, 2022 (attached as Exhibit "B"). While the court did not elaborate on its reasons, one may assume by its ruling that the D.C. Circuit found the RNC's arguments persuasive enough to warrant an injunction.

This Court has acknowledged the subsequent procedural history in RNC. After the Select Committee withdrew the subpoena, the D.C. Circuit dismissed the case as moot and vacated the judgment of the district court. *See RNC*, Case No. 22-5123, 2022 U.S. App. LEXIS 26068 (D.C. Cir. Sept. 16, 2022) (noted in Order of Dismissal (ECF 55) at 2, n.2). The D.C. Circuit specifically noted that vacatur was necessary "[b]ecause the

Committee caused the mootness and thereby deprived [the circuit court] of the ability to review the district court's decision, and **given the important and unsettled constitutional questions that the appeal would have presented**. . . ." 2022 U.S. App. LEXIS 26068 at *4 (per *curiam*) (quoted in Order of Dismissal (ECF 55) at 2, n. 2) (emphasis added). This provides an important clue as to why the D.C. Circuit had granted the injunction pending appeal.

Here, the circumstances are even more compelling. First, unlike the district court in *RNC*, here the Court found that Plaintiffs failed to assert a viable First Amendment claim at all. Order (ECF 55) at 13-14. While Plaintiffs do not expect this Court to reverse itself, there can be no doubt that the First Amendment concerns raised by this case present "important and unsettled constitutional questions[.]" *RNC*, 2022 U.S. App. LEXIS 26068 at *4. *See also Overstreet*, 978 F. Supp. at 1314 (citations omitted); *Mamula*, 578 F. Supp. at 580; *Evans*, 435 F. Supp. at 843.

Second, unlike in *RNC,* the Committee here seeks access to information that will lead to the disclosure of the identities of patients of two practicing physicians. Plaintiffs are unaware of any precedent for such a request from a congressional committee. While the Court disagreed with Plaintiffs' position on the important patient information privacy issues, the unprecedented nature of this sort of intrusion into business affairs and patient information that are completely irrelevant to the Select Committee's purpose must be taken into account in deciding whether to grant the requested injunction.

III. The Irreparable Harm That Plaintiffs Will Suffer Absent an Injunction Cannot Be Reasonably Disputed.

Unless this Court issues an injunction prohibiting enforcement of the subpoena, T-Mobile will have no choice but to comply. Once the Select Committee gets the information, nothing can be done to protect Plaintiffs' rights as both a practical and legal matter. The proverbial toothpaste will all be out of the tube, and there will be no way for any court to undo the disclosure of political contact and patient telephone numbers. Once

the disclosure is made, this case will be moot. Even if there were a practical way to hit the reset button after a successful appeal (which there is not), the Constitution's Speech or Debate Clause immunizes Members of Congress from civil or criminal liability arising from "actions falling within the legislative sphere." *Senate Permanent Subcommittee on Investigations v. Ferrer*, 856 F.3d 1080, 1086 (D.C. Cir. 2017) (cleaned up). A federal court would, thus, be powerless to order the Select Committee to return the information, let alone award Plaintiffs any other remedy.

IV. The Select Committee Has No Immediate Need for the Requested Information.

One prong of the Rule 62 test is whether an injunction will substantially injure another interested party. The Select Committee, which is the only party in position to argue injury, cannot credibly contend that it has an immediate need for the requested information. The timeline below reveals why:

January 29, 2022:	The Select Committee issues its subpoena to T-Mobile.
February 1, 2022:	Plaintiffs file Complaint and Motion to Quash. Dkt. 1 & 2.
February 25, 2022:	T-Mobile requests an extension. Dkt. 25.
April 14, 2022:	The Select Committee requests an extension. Dkt. 30.
May 17, 2022:	The Select Committee makes another extension request. Dkt. 32.
June 27, 2022:	The Select Committee requests another extension. Dkt. 35.
June 30, 2022:	T-Mobile requests another extension. Dkt. 38.
July 27, 2022:	The Select Committee makes yet another request for extension. Dkt. 40.
July 29, 2022:	The Court issues an Order granting an extension to August 8 and denying future extensions. Dkt. 43.

The six-month timeline shows – undeniably – that but for the Court's intervention in late July, this matter would not yet be fully briefed, much less decided.[4] On this record, the Select Committee cannot credibly contend that it has an urgent need for this information or that it will be injured in any way by an injunction.

The Select Committee played this very same game of *hurry-up-and-wait* in *RNC*, much to the obvious exasperation of the D.C. Circuit. *See RNC*, 2022 U.S. App. LEXIS 26068 at *3-4. The Select Committee initially claimed that even a modest delay would prejudice its investigation. *Id*. at *3-4. However, after the circuit court granted an injunction pending appeal, the Select Committee moved to postpone the briefing schedule. *Id*. at *3. Then, on September 2, 2022 the Select Committee filed a motion to dismiss the case as moot, informing the court that it had "determined that it no longer has a need to pursue the specific information requested in the Salesforce subpoena," and that it had withdraw the subpoena as a result. *See RNC*, Case No. 22-5123, Doc. #1962096 at 3-4 (D.C. Cir.).

An injunction would only preserve the status quo that existed before the Court intervened in late July to force the Select Committee to respond. But for the Court's intervention, the six-month pattern of extensions suggests that the Select Committee was perfectly content with requesting extensions indefinitely. In short, the Select Committee can easily wait for the Ninth Circuit to resolve the important First Amendment and patient privacy issues that are the central questions to be raised on appeal. There is no plausible injury argument.

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[4] During this six-month period, the Select Committee deposed or interviewed hundreds of other witnesses, and conducted eight televised hearings without feeling the need to respond to Plaintiffs' complaint and motion to quash. https://www.latimes.com/politics/story/2022-06-13/what-is-the-tv-schedule-for-the-next-jan-6-committee-hearings (last accessed September 23, 2022). The Select Committee is televising its ninth hearing on September 27, 2022.

V. The Public Interest Favors an Injunction.

"[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–759 (1985) (citations omitted). The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). That is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted).

The essence of self-government is free and fair elections. The election in Arizona was so close that most major national news outlets – NBC, ABC, CBS and CNN – did not call Arizona for now-President Biden until November 12, 2022, which was nine days after the polls closed. https://www.npr.org/2020/11/19/936739072/ap-explains-calling-arizona-for-biden-early-before-it-got-very-close (last accessed September 24, 2022). Chair Ward was at the center of a heated debate as whether the presidential election results in Arizona were accurate and fair. If core First Amendment rights have a core, such a debate is certainly at the core of core First Amendment rights.

Plaintiffs argue that if T-Mobile complies with the Select Committee Subpoena, then investigators will contact every party member in touch with Chair Ward during this overheated period of political debate. That act, when it occurs, will necessarily chill public participation on one of the most important political issues of our times, which is the integrity of elections. If citizens are not convinced that elections are fair, then the very legitimacy of our democratic institutions is lost.

Core First Amendment political speech and patient privacy rights are at stake on this appeal and the Select Committee's actions in this case demonstrate that the Select

Committee has no urgent need for this information. The public interest strongly favors a stay until these important questions receive appellate review.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully ask that the Court enter an order enjoining enforcement of the Select Committee's subpoena and/or T-Mobile compliance with same pending Plaintiffs' appeal to the Ninth Circuit. In the alternative, Plaintiffs ask that the Court enter a temporary administrative injunction to allow Plaintiffs sufficient time to seek injunctive relief in the Ninth Circuit.

Respectfully submitted this 26th day of September 2022

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CERTIFICATE OF SERVICE

I certify that on September 26, 2022, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing, which electronically sends a copy to be served on all registered parties.

/s/ Arno T. Naeckel

EXHIBIT D

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Michael P Ward, et al.,

Plaintiffs,

v.

Bennie G Thompson, et al.,

Defendants.

No. CV-22-08015-PCT-DJH

ORDER

Plaintiffs Michael and Kelli Ward and Mole Medical Service PC ("Plaintiffs") sued to challenge a subpoena issued to Defendant T-Mobile by the U.S. House of Representatives Select Committee ("Select Committee") to investigate the January 6th attack on the United States Capitol. On September 22, 2022, the Court denied Plaintiffs' Motion to Quash and granted Chairman Bennie G. Thompson and the Select Committee's ("Congressional Defendants") Motion to Dismiss. (Doc. 55). Plaintiffs now move for an injunction pending appeal or, in the alternative, for an administrative injunction during which Plaintiffs can petition the Ninth Circuit for an injunction pending appeal. (Doc. 57). Congressional Defendants oppose Plaintiffs' Motion. (Doc. 63). The Court will deny both requests.

I. Background

This case arises out of the Select Committee's investigation into the January 6, 2021, attack on the United States Capitol. In its prior Order, the Court dismissed Plaintiffs' claims against the Congressional Defendants because of their immunity from suit under

the doctrine of sovereign immunity. (Doc. 55 at 6).

On September 23, 2022, Plaintiffs filed a notice of appeal. (Doc. 56). Three days later, on September 26, 2022, Plaintiffs moved for an injunction pending appeal or, in the alternative, an administrative injunction "to allow Plaintiffs sufficient time to seek an emergency injunction in the Ninth Circuit." (Doc. 57 at 2). T-Mobile takes no position on the Motion. (Doc. 66). Congressional Defendants oppose both requests for relief. (Doc. 63 at 2).

On October 4, 2022, the Court held oral arguments on the matter. (Doc. 66). During arguments the Congressional Defendants confirmed that they are no longer seeking Dr. Michael Ward's records or Plaintiffs' patient phone numbers. (*Id.*)

II. Legal Standard

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Such a "drastic remedy . . . should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quotation omitted).

Where, as here, a plaintiff seeks an injunction pending appeal, this court applies the test for preliminary injunctions. *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1100 (9th Cir. 2006). To obtain a preliminary injunction, a plaintiff must show: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm if injunctive relief is denied, (3) that the balance of equities weighs in the plaintiff's favor, and (4) that the public interest favors injunctive relief. *Winter*, 555 U.S. at 20. The movant carries the burden of proof on each element of the test. *See Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980). The last two factors merge when the government is a party. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

The Ninth Circuit has adopted a "sliding scale approach under which a preliminary injunction could issue where the likelihood of success is such that 'serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor.'"

All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011) (quoting *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003)). This approach survives the four-element test set forth in *Winter* when applied as part of that test. *Id.* at 1131–32.

III. Discussion

The Court begins with Plaintiffs' request for a preliminary injunction and then considers Plaintiffs' request for an administrative injunction.

1. Preliminary Injunction Pending Appeal

Because it is dispositive, the Court will first address the second element of the preliminary injunction test: whether Plaintiffs have established a likelihood of irreparable harm in the absence of a preliminary injunction. *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (finding that speculative allegations of harm cannot constitute irreparable harm and "a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief").

A. Irreparable Harm

Plaintiffs argue that unless this Court issues an injunction that prohibits enforcement of the subpoena, T-Mobile will have no choice but to comply. (Doc. 57 at 9). Once the Select Committee obtains the phone records, Plaintiffs contend, "[t]he proverbial toothpaste will all be out of the tube, and there will be no way for any court to undo the disclosure of political contacts and patient telephone numbers." (*Id.*) Specifically, Plaintiffs argue that disclosure of Ms. Ward's political contacts will chill them from communicating with her in the future, and that "law enforcement agents are going to contact every number on that list and query each subscriber as to what they were discussing with Dr. Kelli Ward, the Chair of the Arizona Republican Party." (*Id.* at 2). Plaintiffs also contend that disclosure of Ms. Ward's patient numbers will disclose their identities and, because she only provides one type of treatment, will reveal the patients' sought treatment. (*Id.* at 3). Plaintiffs also note the Constitution's Speech or Debate Clause immunizes the Select Committee and thus the Court would be powerless to order the Select Committee to

return the records. (*Id.* at 10).

For the following reasons, the Court finds these contentions do not constitute the showing of irreparable harm required for the extraordinary relief of a preliminary injunction.

First, as to Plaintiffs' concerns regarding disclosure of patient numbers, the Court has already found that neither the Arizona physician-patient privilege nor the Health Insurance Portability and Accountability Act apply to bar disclosure of the records sought. (Doc. 55 at 14–18). Moreover, the Select Committee clarified at the hearing that it does not seek any of Plaintiffs' patient telephone numbers, thus assuaging any concerns Plaintiffs have asserted regarding their disclosure. (Doc. 66). Second, as to Plaintiffs' concern that disclosure of Ms. Wards' political contacts will chill Republican members' interests in communicating with their Chair, the Court finds this alleged concern speculative—and in light of disclosures made during oral argument—dubious. Indeed, during argument, Plaintiffs' counsel pointed out that Ms. Ward had written a book[1] about how she participated in sending an alternate slate of electors to Washington and filmed videos of this participation and posted them to YouTube. These actions belie Ms. Ward's concern that her communications with her constituents or colleagues will be chilled by T-Mobile's possible disclosure of a record showing Ms. Ward called or received calls from persons during this time.

In sum, the Court finds Plaintiff Wards' claim that she does not want to disclose the identities of her political contacts for fear of chilling her constituents' future communication with her falls short of stating the concrete, irreparable injury warranted for a preliminary injunction.[2] (Doc. 66). *See also Caribbean Marine Servs. Co.*, 844 F.2d at

[1] The Court may take judicial notice of matters that are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). *See* https://www.amazon.com/Justified-Americas-Dr-Kelli-Ward/dp/195725503X

[2] The Court notes that Plaintiffs raised the associational rights of the Arizona GOP for the first time during oral argument. (Doc. 66). Nowhere in Plaintiffs' Complaint, however, did Plaintiffs allege a claim on behalf of the Arizona GOP. The Complaint alleges they "have been injured by this retaliation against *their* First Amendment protected interests . . . ." (Doc. 1 at ¶ 59) (emphasis added). Not only is this argument untimely, but Plaintiffs

674 ("[s]peculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction."). Ms. Ward's own actions undermine her concern that disclosure of these numbers will chill political communications. The burden is on Plaintiffs to make a clear showing of an immediate threatened injury, and Plaintiffs have not done so here. *Lopez v*, 680 F.3d at 1072.

Because irreparable harm is a prerequisite to injunctive relief, and Plaintiffs cannot make the showing, Plaintiffs have not satisfied the second element of the *Winter* test. Plaintiffs are therefore not entitled to an injunction pending appeal. *Protecting Arizona's Res. & Child. v. Fed. Highway Admin.*, 2016 WL 9080879, at *2 (D. Ariz. Oct. 26, 2016).

B. Sliding Scale

The Ninth Circuit's more flexible sliding scale approach does not alter the Court's conclusion. Plaintiffs argue their appeal raises serious legal questions concerning their associational rights under the First Amendment. (Doc. 57 at 5). They say the "exacting scrutiny" standard, which requires that there be "a substantial relation between the disclosure requirement and a sufficiently important governmental interest, and that the disclosure be narrowly tailored to the interest it promotes," is an unsettled area of the law and thus raises a serious question. (*Id.* at 6). But as discussed below, the Court did not even reach application of this standard because the Court found Defendants immune from such a claim and any alleged constitutional violation too speculative to find a waiver of such immunity.

After consideration of the parties' arguments and in light of its previous Order (Doc. 55), the Court finds Plaintiffs have not presented a serious legal question regarding the merits of Plaintiffs' First Amendment claim. Although Plaintiffs discuss at length the application of the exacting scrutiny standard in their briefing and how this case mirrors *Republican National Committee v. Pelosi*, the Court already found Plaintiffs failed to raise a viable First Amendment claim because of the speculative nature of their alleged harm.[3]

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have not heretofore assessed whether they have standing to allege the associational injury.

[3] Moreover, during arguments, Plaintiffs acknowledged the factual distinction of the records sought in *Pelosi*, and those sought here.

(Doc. 55 at 14). Indeed, the Court noted that Plaintiffs "provided no evidence to support their contention that producing the phone numbers associated with this account will chill the associational rights of Plaintiffs or the Arizona GOP" and that "'absent objective and articulable facts' otherwise, the Court finds Plaintiffs' arguments constitute 'a subjective fear of future reprisal' that the Ninth Circuit has held as insufficient to show an infringement of associational rights." (Doc. 55 at 13). *See also Brock v. Loc. 375, Plumbers Int'l Union of Am., AFL-CIO*, 860 F.2d 346, 350 (9th Cir. 1988). Because Plaintiffs failed to "demonstrate how the Select Committee's enforcement of the subpoena and subsequent possession of the phone numbers [would] have a deterrent effect on the exercise of protected activities," the Court found Plaintiffs "failed to demonstrate a cognizable First Amendment claim" and thus did not even reach the issue of whether exacting scrutiny applied here. (*Id.* at 14). *See also Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010).

In addition, Plaintiffs have not demonstrated that the balance of hardships tips sharply in their favor. To the contrary, "there is a strong public interest in Congress carrying out its lawful investigations" and "[t]he public interest is heightened when, as here, the legislature is proceeding with urgency to prevent violent attacks on the federal government and disruptions to the peaceful transfer of power." *Trump v. Thompson*, 20 F.4th 10, 48 (D.C. Cir. 2021), *cert. denied*, 142 S. Ct. 1350 (2022). Last, the Select Committee is authorized through the end of the current Congress, which is set to conclude on January 3, 2023. An injunction would thus make it impossible for the Select Committee to obtain the subpoenaed records because the Ninth Circuit briefing deadline is not until January 2023. Time Schedule Order at 3, Michael Ward, et al v. Bennie Thompson, et al, No. 22-16473 (9th Cir. Sept. 26, 2022), ECF 1. Thus, even under the more flexible sliding scale approach, the Court finds that Plaintiffs have not met their burden to show the balance of hardships tips sharply in their favor. *All. for the Wild Rockies*, 632 F.3d at 1131. Having failed to make such a showing, and given the Court's determination that Plaintiffs failed to make a clear showing of an immediate threatened injury, Plaintiffs' motion for an

injunction pending appeal will be denied.

2. Administrative Injunction Pending Appeal

In addition to their request for a preliminary injunction, Plaintiffs seek, in the alternative, an administrative injunction pending appeal. (Doc. 57 at 2). During oral arguments, the Court specifically inquired about the relevant legal standards regarding an administrative injunction pending appeal and a preliminary injunction pending appeal. (Doc. 66). Both parties skirted the Court's direct query and instead focused only on the preliminary injunction standard. (*Id.*)

The Ninth Circuit has "definitively resolved which standard applies to administrative stay motions." *Nat'l Urban League v. Ross*, 977 F.3d 698, 702 (9th Cir. 2020) (citing *Doe #1 v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019). "When considering the request for an administrative stay, our touchstone is the need to preserve the status quo." *Id.* In other words, an administrative stay "is only intended to preserve the status quo until the substantive motion for a stay pending appeal can be considered on the merits, and does not constitute in any way a decision as to the merits of the motion for stay pending appeal." *Doe #1*, 944 F.3d at 1223.

During the hearing, neither party addressed how the status quo would be affected if the phone records were released. (Doc. 66). Based on the parties briefing and oral argument record, the Court finds the status quo has shifted since the inception of this case. The Congressional Defendants no longer seek Dr. Michael Ward's or his children's phone records and counsel for the Select Committee clarified at the hearing it does not seek Ms. Ward's patient phone numbers. (Doc. 55 at 3 n.4; Doc. 66). To this end, the Court finds the Congressional Defendants have substantially narrowed the subpoena since its initial issuance, and thus shifted the analysis of what is in fact the "status quo."

Notwithstanding the narrow scope of the current information now sought, Plaintiffs still argue that if the records are produced by T-Mobile, their First Amendment associational rights will be chilled, and this is a harm that cannot be remedied. (Doc. 63 at 7). As noted, the Court finds this alleged concern to be speculative and dubious,

particularly in light of Ms. Ward's book and her YouTube video, which presumably publicized many of the identities of the political contacts she communicated with during that time. (Doc. 66). At the very least, this self-publication does not evidence a true concern for her contacts' privacy. The Court is mindful that the Congressional Defendants have extended the phone records production date numerous times, which does raise questions about their immediate need for these records. (Docs. 26, 31, 33, 37, 39, 43, 50). But given the breadth of the Select Committee's investigation and the numerous parties involved, the Court finds these extensions do not negate the overall need for the phone records. This is particularly true because the Select Committee is only authorized until the end of the current Congress, which concludes on January 3, 2023. (Doc. 66). For these reasons, and because the status quo has been substantially altered by the parties' respective conduct, the Court cannot find an administrative injunction is warranted here. *Nat'l Urban League*, 977 F.3d at 702. Accordingly, the Court will deny Plaintiffs' request for an administrative injunction.

IV. Conclusion

For these reasons, the Court denies Plaintiffs' Motion for an injunction pending appeal and denies Plaintiffs' request for an administrative injunction.

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' Motion for Injunction or Administrative Injunction Pending Appeal (Doc. 57) is **denied**.

Dated this 7th day of October, 2022.

Honorable Diane J. Humetewa
United States District Judge

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In Re Subpoena to T-Mobile Issued By Select Committee to Investigate the January 6th Attack on the U.S. Capitol.	)	**Case No. *to be assigned*** **MOTION TO QUASH CONGRESSIONAL SUBPOENA**

Declaration of Kelli Ward in Support of Motion to Quash

1. I am of over 18 years of age and have personal knowledge of the facts set forth herein.
2. I am a resident of Lake Havasu City, Arizona.
3. I obtained my BS in psychology from Duke University in Durham, North Carolina in 1991.
4. I attended medical school at the West Virginia School of Osteopathic Medicine in Lewisburg, West Virginia, where I received my Doctor of Osteopathic Medicine (D.O.) degree in 1996.
5. Since December of 2019, I have practiced exclusively in the field of medical weight loss.
6. My understanding is that the subpoena issued to T-Mobile seeks the production of certain information about all individuals who called, or were called, from the telephone numbers associated with the account 928-486-4220 (Mole Medical) between November 1, 2020 and January 31, 2021.
7. I became aware that this information had been subpoenaed on or around January 25, 2022
8. In 2019, I was elected Chairwoman of the Arizona Republican Party, a position I still hold. However, I still practice medicine part-time. The position of Chairwoman is unpaid, so treating medical weight loss patients allows me to maintain an income stream. I also derive meaning and satisfaction from my work outside of politics as a doctor.
9. Since the COVID-19 pandemic began, I have seen patients almost exclusively via telemedicine.
10. For many of my patients, the mere fact that they are seeing a doctor for medical weight loss is a sensitive issue.
11. Further, my patients sometimes bring up other sensitive topics during their telemedicine visits. Examples include diabetes, high blood pressure, thyroid

issues, psychological problems, anxiety, depression, insomnia, and eating disorders.

12. I use a HIPAA-compliant videoconferencing system during my patients' telemedicine visits. However, sometimes my patients or I will have trouble with the system. In such cases, I call patients from a telephone line associated with Mole Medical and we conduct the visit telephonically. When this occurs, my typical practice is to note it in the medical records for that visit.
13. From November 1, 2020, to January 31, 2021, I worked approximately five shifts.
14. I estimate that I typically see 30-40 patients per shift.
15. To the best of my knowledge, all my patients are located in Arizona. However, many of them have moved to Arizona from other states and have telephone numbers with area codes associated with different states.
16. In general, I call some patients by telephone during a normal shift. Hard confirmation of which patients I called during a given shift and their phone numbers would require me to look through the medical records for each of my patients that I saw on a given day which would be an extraordinarily burdensome task.
17. Other than my line, there are three other active phone lines associated with this account: one belonging to my husband, and two to my children.
18. Besides my patients, I frequently exchange calls and texts with my daughter, son (and his girlfriend), mother, mother-in-law, father-in-law, father, stepfather, friends, etc. on my Mole Medical line. I also make and receive calls of a political nature on the line as well.
19. Because of the controversy associated with my service as Republican nominee for elector and AZGOP Chairwoman in the aftermath of the 2020 election, I have received numerous death threats, harassing letters, and phone calls.

I declare under penalty of perjury under the laws of The United States of America that the foregoing is true and correct and that this declaration was executed on this 1/31/2022, at Salt Lake City (city), Utah (state).

Signature: DocuSigned by: 388CCBD35CF046D... Printed Name: Kelli Ward

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In Re Subpoena to T-Mobile Issued By Select Committee to Investigate the January 6th Attack on the U.S. Capitol.	)	**Case No. *to be assigned***
	)	**MOTION TO QUASH**
	)	**CONGRESSIONAL**
	)	**SUBPOENA**

Declaration of Michael Ward in Support of Motion to Quash

1. I am of over 18 years of age and have personal knowledge of the facts set forth herein.
2. I am a resident of Lake Havasu City, Arizona where my wife Kelli Ward and I own a home.
3. I served in the United States Air Force for over 30 years, both active duty and reserve.
4. I joined the United States Air Force after high school serving first as an Air Force medic for approximately eight years. I then received a direct commission as a medical officer. I served stateside during the first Gulf War. I also participated in Operation Iraqi Freedom, deploying to Kirkuk Iraq in 2004. I retired in 2017 with the rank of Colonel. My last assignment was as State Air Surgeon for the State of Arizona. In that capacity I was the senior medical advisor to the Adjutant General.
5. During my time in the Air Force, I attended medical school at the Kirksville College of Osteopathic Medicine in Kirksville, Missouri, where I received my Doctor of Osteopathic Medicine (D.O.) degree in 1995.
6. After graduating from medical school, I attended a residency in emergency medicine that I completed in 1999. Since that time, I have been in the active practice of emergency medicine in the State of Arizona.
7. I work as a contractor, treating patients in various emergency departments under Mole Medical. Most of these departments are near Lake Havasu City.
8. In certain circumstances, I will give my Mole Medical phone number to patients that I care for in the emergency departments. I do this so that we can follow up, via voice or text, regarding their questions, the status of their condition, and whether they are improving.
9. I estimate that I give my number to patients several times over the course of a normal week. During the COVID pandemic, I have given the number to patients more frequently, in part because COVID patients have many questions about their treatment, needed follow-up, and prescriptions.

10. I also use the line to consult with other physicians about patients.
11. In addition to my medical practice as an emergency physician, I am the medical director for an air ambulance company where I am constantly on call to them for medical advice.
12. My understanding is that the subpoena issued to T-Mobile seeks the production of certain information about all individuals who called, or were called, from the telephone numbers associated with the account 928-486-4220 (Mole Medical) between November 1, 2020 and January 31, 2021.
13. During this date range I was actively practicing medicine.
14. I cannot think of any way to know for certain exactly which incoming and outgoing calls from the date range in question were with patients.
15. Besides my patients, I frequently exchange calls and texts with my daughter, sons (and the girlfriend of one of the sons), my parents, my in-laws, aunts and uncles, friends, etc. on my Mole Medical line. I also make and receive calls to and from people in the political world on the line as well.
16. Although I see all my patients in Arizona, many of my patients have telephone numbers that do not have Arizona area codes.
17. Because of my service as Republican nominee for elector, I have received threatening and harassing messages on social media. For example, some individuals have sent me messages wishing death upon me or stating that my wife had performed sexual acts with President Trump.
18. My daughter has also received threating and harassing messages because of our family's political activities which we have had several conversations about.

I declare under penalty of perjury under the laws of The United States of America that the foregoing is true and correct and that this declaration was executed on this 1/31/2022, at Salt Lake City (city), Utah (state).

Signature: DocuSigned by: 672CA9713A47405... Printed Name: Michael Ward

EXHIBIT G

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5123 **September Term, 2021**

1:22-cv-00659-TJK

Filed On: May 25, 2022

Republican National Committee,

Appellant

v.

Nancy Pelosi, in her official capacity as Speaker of the United States House of Representatives, et al.,

Appellees

BEFORE: Katsas, Rao, and Walker, Circuit Judges

O R D E R

Upon consideration of the emergency motion for injunction pending appeal, the responses thereto, and the reply, it is

ORDERED that the motion for injunction pending appeal be granted and salesforce.com, inc. ("Salesforce") be enjoined from releasing the records requested by the House Select Committee pending further order of the court. Appellant has satisfied the stringent requirements for an injunction pending appeal. See Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2021). It is

FURTHER ORDERED, on the court's own motion, that the administrative injunction entered May 24, 2022, be dissolved. It is

FURTHER ORDERED that the following briefing schedule will apply:

Appellant's Brief	May 31, 2022
Appendix	May 31, 2022
Appellees' Brief	June 7, 2022
Reply Brief	June 10, 2022

The parties are directed to hand deliver the paper copies of their briefs and appendix to the Clerk's office by 4 p.m. on the date due.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5123 **September Term, 2021**

Oral argument will be held before this panel on June 14, 2022 at 9:30 a.m.

While not otherwise limited, the parties are directed to address in their briefs the following issues:

Whether the Select Committee itself, as opposed to its Members, is immune from this lawsuit under the Speech and Debate Clause of the Constitution or under principles of federal sovereign immunity;

Whether Salesforce's compliance with the subpoena constitutes state action for purposes of the First Amendment claim. If so, whether Salesforce is immune from this lawsuit under the Speech and Debate Clause; and

Whether the defendant Members of Congress or the Select Committee were indispensable parties to this lawsuit.

Appellant should raise all issues and arguments in the opening brief. The court ordinarily will not consider issues and arguments raised for the first time in the reply brief.

To enhance the clarity of their briefs, the parties are urged to limit the use of abbreviations, including acronyms. While acronyms may be used for entities and statutes with widely recognized initials, briefs should not contain acronyms that are not widely known. See D.C. Circuit Handbook of Practice and Internal Procedures 43 (2021); Notice Regarding Use of Acronyms (D.C. Cir. Jan. 26, 2010).

All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Amy Yacisin
Deputy Clerk

EXHIBIT H

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

Case No. 22-5123

In the United States Court of Appeals
for the District of Columbia Circuit

Republican National Committee,
Plaintiff-Appellant,

v.

Nancy Pelosi, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia
Case No. 1:22-cv-00659-TJK
The Honorable Timothy J. Kelly

Appellant's Reply in Support of Emergency Motion for Administrative Injunction and Injunction Pending Appeal

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Attorney for Appellant Republican National Committee

This congressional subpoena case is novel. A congressional committee dominated by the majority political party issued a subpoena seeking the internal party deliberative material of the minority political party. Rather than subpoena the RNC directly, the Select Committee targeted a third party, Salesforce, which holds some of the RNC's most sensitive data. This raises First Amendment concerns unique to political parties. And, by targeting a third party instead of the RNC directly, the Select Committee is attempting to evade judicial review of these First Amendment violations by depriving the RNC of the ability to press its claims in court—a right it would unquestionably have if subpoenaed directly.[1]

Even more, the Congressional Defendants have used the artifice of Salesforce as the Subpoena's target as a basis to decline direct negotiation with the RNC as to the scope of the Subpoena and any production in response to it.[2] In opposing the RNC's request for an injunction pending appeal—which is unquestionably necessary to preserve the ability of this Court to hear the case—the Congressional

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[1] It is the use of a third-party target to hamper the RNC's right to challenge the Subpoena in court that makes the Subpoena here different than those issued during Congress's investigation into the avoidance of campaign-finance laws during the 1990s.

[2] Indeed, when the district court asked counsel for the Congressional Defendants whether they would negotiate directly with the RNC, the Congressional Defendants declined. (Add. 321–22.) This is despite the RNC continued cooperation with the Select Committee.

Defendants engage in more of the same. This Court should not permit the questions raised by this case to escape appellate review.

REPLY IN SUPPORT

I. The RNC is Likely to Succeed on the Merits.

Make no mistake, the Congressional Defendants know how unique the Subpoena is: they begin their argument against the RNC's chances of success on the merits by attempting to leverage their decision to subpoena Salesforce, instead of the RNC itself. They incorrectly maintain that Salesforce must be adjudicated a "state actor" for the RNC to be able to prevail on its claims. Beyond this, the Congressional Defendants parrot the district court's order without making any substantive argument for why the RNC is unlikely to prevail *before this Court*. Because the district court's analysis was based on an incorrect equivocation of the nature of the material demanded by the Congressional Defendants and colored by improper deference to the Congressional Defendants' view of the constitutional issues at issue, the RNC is likely to prevail on the merits of its appeal.

The RNC has standing irrespective of state-actor principles. The Congressional Defendants casually argue that this Court would need to find Salesforce is a "state actor" for the RNC to prevail on its claims. Even assuming for the moment that legislative immunity shields the Congressional Defendants from the RNC's claims—which requires that the Select Committee be properly constituted and issue

the Subpoena in service of a legitimate legislative purpose—courts routinely allow lawsuits against third-party custodians or service providers even though they played no role in issuing the subpoena that occasioned the action. In *Bean LLC v. John Doe Bank*, the court allowed a research firm's claims against the firm's bank to enjoin the enforcement of a congressional subpoena even though the bank played no role in the subpoena's issuance. 291 F. Supp. 3d 34, 41 (D.D.C. 2018). In *United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977) ("*AT&T II*"), the court allowed the Justice Department's claims against AT&T to enjoin the enforcement of a congressional subpoena even though AT&T played no role in the subpoena's issuance. 567 F.2d at 125. In *Bergman v. Senate Special Committee on Aging*, the court in part enjoined the individual plaintiffs' bank from responding to a congressional subpoena even though the bank played no role in the subpoena's issuance. 389 F. Supp. 1127, 1131 (S.D.N.Y. 1975). And in *Pollard v. Roberts*, a three-judge district court (including then-Judge Blackmun) enjoined the Republican Party of Arkansas's bank from responding to a civil investigative subpoena even though the bank played no role in the subpoena's issuance and was unwilling "to divulge [the state political party's] records." 283 F. Supp. 248, 260 (E.D. Ark. 1968), *summarily aff'd*, 393 U.S. 14 (1968).

To the extent state-actor analysis is relevant at all, it is confirmatory. The state action doctrine "assure[s] that constitutional

standards are invoked 'when it can be said that the [government] is *responsible* for the specific conduct of which plaintiff complains.'" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (emphasis in original) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). The "state action requirement is met if 'there is such a close nexus between [the government] and the challenged action that seemingly private behavior may be fairly treated as that of the [government] itself." *NB ex rel. Peacock v. Dist. of Columbia*, 794 F.3d 31, 43 (D.C. Cir. 2015) (quoting *Brentwood Acad.*, 531 U.S. at 295). While the government's "[m]ere approval of or acquiescence in the initiatives of a private party" is not a sufficient nexus for state action, the nexus is met when the government has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice in law must be deemed to be that of [the government]." *Vill. of Bensenville v. FAA*, 457 F.3d 52, 64 (D.C. Cir. 2006).

Salesforce's compelled compliance with the Subpoena unequivocally establishes a "close nexus" between itself and the Congressional Defendants to satisfy state action. The record makes clear that the Select Committee has effectively forced Salesforce's compliance with the Subpoena. *See Vill. of Bensenville*, 457 F.3d at 64. Whether a private party should be deemed an agent of the government for state action purposes "turns on the degree of government participation in the private party's activities." *Skinner v. Ry. Lab.*

Execs.' Ass'n, 489 U.S. 602, 614 (1989). Here, the Select Committee clearly "did more than adopt a passive position toward [Salesforce's] underlying private conduct." *Id.* at 615–16 (concluding that the government's "encouragement, endorsement, and participation" in a private railroad's actions was sufficient to implicate the Fourth Amendment). In the end, the Congressional Defendants cannot coercively outsource their constitutional violations to Salesforce and then argue that Salesforce's status as an ostensibly private party means these constitutional violations must be without remedy.

The RNC is likely to prevail on its First Amendment claim. At the heart of the district court's error is its equivocation regarding the nature of the information demanded by the Subpoena and the resulting burden imposed on the RNC. This equivocation was itself born of the district court's improper deference to Congress's "investigative power" in its review of the substance of the RNC's constitutional claims.

The First Amendment protects against the compelled disclosure of a political party's internal deliberations and strategy. The Subpoena demands precisely this sort of information.[3] At a minimum, the data

[3] Of course, the First Amendment also protects against the compelled disclosure of information regarding a political party's donors, volunteers, and supporters. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (concluding "revelation of the identity of [the NAACP's] rank-and-file members" constituted a violation of the First Amendment). As explained in the uncontroverted declarations of the RNC's Chief Digital Officer, the Subpoena plainly demands this sort of

sought includes information regarding any email the RNC sent over a two-month period, including information detailing the naming conventions for the emails, recipients' interactions with and responses to the emails, and all performance metrics for the emails—including at least four metrics developed by and confidential to the RNC. (Add. at 252–53, 387–88, 528–34.) This information is precisely the sort of data protected against compelled disclosure by a political party under *American Federation of Labor & Congress of Industrial Organizations v. FEC*, 333 F.3d 168 (D.C. Cir. 2003) ("*AFL-CIO*"), because its compelled disclosure "will … frustrate those groups' decisions as to 'how to organize ... [themselves], conduct ... [their] affairs, and select ... [their] leaders,' as well as their selection of a 'message and ... the best means to promote that message.'" 333 F.3d 168, 179 (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 230–31 & n.21).

Respectfully, the district court's analysis distinguishing *AFL-CIO* was not "careful[]" and is inconsistent with this Court's holding in that case. For example, the district court's discussion of *AFL-CIO* ignores that the Subpoena also demands the identities of low-level RNC staffers. The difficulty in recruitment and hiring that may be caused by

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information when it calls for "[a]ll performance metrics and analytics related to email campaigns … ***including but not limited to*** delivery metrics … engagement metrics … time attributes, and message attributes." (Add. 527–34, 587.) The district court avoided this aspect of the Subpoena by improperly crediting the Congressional Defendants' narrowing of the Subpoena's demands during litigation.

the compelled disclosure of low-level staffers' names was one of the burdens to the Democratic National Committee's associational rights credited by the Court in *AFL-CIO*. 333 F.3d at 176. Hence, even if the district court were correct that the compelled disclosure of the RNC's digital data is somehow meaningfully less burdensome to its associational rights than the compelled disclosure of internal memoranda in *AFL-CIO*—and it is not—its failure to grapple with the chilling effect of the compelled disclosure of the RNC's staffer identities renders its order impossible to reconcile with the holding of *AFL-CIO*.

The RNC is likely to prevail on its remaining claims. For the reasons argued in its Motion, and as will be more fully briefed on the merits of its appeal, the RNC is likely to prevail on its remaining claims. The Congressional Defendants do not meaningfully dispute the RNC's argument that under this Court's holding in *United States v. Patterson*, the subpoena must be "good in its entirety." 206 F.2d 433, 434 (D.C. Cir. 1953) (quoting *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221 (1951)). By allowing the Congressional Defendants to rewrite the scope of the Subpoena during litigation, the district court violated this rule, which safeguards the separation of powers. Nor do the Congressional Defendants support their request that this Court to accept the district court's conclusion on H. Res. 503's requirement that Speaker Pelosi "shall" appoint 13 members to the Select Committee. (Opp'n at 13.) The Congressional Defendants point to two other district

courts that have concluded similarly (*id.*), but no circuit court has confronted this issue. The word *shall* should be read as mandatory whenever reasonable to do so. Antonin Scalia & Bryan Garner, Reading Law 114 (2012). Because *shall* is unambiguously mandatory in H. Res. 503, it should be read to require the Select Committee to be composed of 13 members.

II. The RNC's Irreparable Harm Is Uncontested.

The Congressional Defendants do not contest that the RNC faces irreparable harm—the mooting of its case by Salesforce's compliance with the Subpoena—absent relief pending appeal. Rather, they argue the wrong inquiry: they dispute whether the RNC will suffer injury from the alleged constitutional violations. (Opp'n at 5.) But even this is wrong. It is well-established that "'a prospective violation of a constitutional right constitutes irreparable injury for ... purposes' of 'seeking equitable relief.'" *Karem v. Trump*, 960 F.3d 656, 667 (D.C. Cir. 2020) (quoting *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013)). Thus, when a plaintiff seeks equitable relief for prospective violations of its constitutional rights, the resulting constitutional harm constitutes irreparable injury. *See, e.g.*, *Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 385 (D.D.C. 2020) (existing and prospective violation of First Amendment rights "demonstrate irreparable harm"); *C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 217–18 (D.D.C. 2020) ("Plaintiffs who have

shown a likelihood of success on their Fifth Amendment claims … have also established irreparable harm.").

To be clear, the Congressional Defendants' legislative immunity defense makes the RNC's irreparable harm plain, a point on which the district court agreed. (Add. 5 ("[T]he RNC has shown that it will suffer one sort of irreparable harm absent an injunction pending appeal.").) Without an injunction pending resolution of the merits, the case would be mooted before this Court has a chance to read the briefs. Salesforce has said it will comply with the Subpoena absent a court order; and, if Salesforce complies, the Congressional Defendants have argued no court can order relief. It is difficult to imagine more compelling *irreparable* harm, and courts "routinely" grant relief pending appeal 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).

III. The Equitable Factors Strongly Favor Relief Pending Appeal.

The balance-of-equities and public-interest factors "'merge when,' as here, 'the Government is the opposing party.'" *Karem*, 960 F.3d at 668 (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)). *First*, this Court has repeatedly held that "enforcement of an unconstitutional law is always contrary to the public interest," *see, e.g.*, *Gordon*, 721 F.3d at 653, and "[t]here is generally no public interest in the perpetuation of

unlawful" government action, *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

Second, while the Select Committee may have an interest in furthering its legislative prerogative, that interest must yield to the balance of constitutional interests at issue in this case. *See Karem*, 960 F.3d at 668; *see also Gordon*, 721 F.3d at 653 ("preliminary injunction might temporarily frustrate the federal government's interest" but the court properly gave "greater weight to the possibility that Gordon could suffer an ongoing constitutional violation while this litigation proceeds"). Indeed, the Congressional Defendants are silent on the RNC's constitutional interests, focusing instead on the claimed delay of their legislative investigation. But this gets the standard backwards. "'The Constitution does not permit [the government] to prioritize any policy goal over' constitutional rights." *Turner*, 502 F. Supp. 3d at 386 (quoting *Gordon*, 721 F.3d at 653); *Karem*, 960 F.3d at 668.

Nor do the Congressional Defendants provide any evidence of their claimed "harm." Of course they argue that, without Salesforce's production, the Select Committee's interest in "prompt[] complet[ion]" of "its investigation efforts" will be jeopardized; its "Constitutional activities" might "be hampered"; and it will be "less informed and less able to develop … remedial legislation and other measures." But the Congressional Defendants have made no showing of *specific* and *actual* harm to the completion of their investigation. Not only that, the RNC's

motion only requests a *temporary* delay to a narrow part of the investigation while the Court hears the important constitutional questions presented in this case; and, to minimize any alleged harm, the RNC has agreed to expediate the merits briefing should this Court determine that expediated briefing is warranted.

The Congressional Defendants' unsupported assertions that one narrow aspect of the Select Committee's investigation will be temporarily stalled pales in comparison to real, immediate, and irreparable constitutional hardship the RNC will suffer absent relief.

CONCLUSION

The RNC respectfully requests that the Court enter an administrative injunction to permit full consideration of this Motion. The RNC also requests an injunction pending appeal to preserve the RNC's ability to seek review of the district court's erroneous order, an order sustaining a first-of-its-kind subpoena and blazing a trail that may forever change how congressional subpoenas are leveraged.

Dated: May 24, 2022

Respectfully submitted,

s/ Christopher O. Murray

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Attorney for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains **2,560** words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point font.

Dated: May 24, 2022.

s/ Christopher O. Murray
Christopher O. Murray

CERTIFICATE OF SERVICE

I certify that on May 24, 2022, I electronically filed the Reply in Support of Emergency Motion for Administrative Injunction and Injunction Pending Appeal with the Clerk of the Court for the U.S. Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Dated: May 24, 2022.

s/ Christopher O. Murray
Christopher O. Murray

CERTIFICATE OF SERVICE

I hereby certify that, on October 10, 2022, a copy of the foregoing was filed via the Court's ECF system and therefore service will be effectuated by the Court's electronic notification system upon all parties of record. In addition, and in accordance with Counsel's Rule 27-3 Certification, counsel for Defendants-Appellees have also been served with a true and correct copy of the foregoing via electronic mail.

/s/Laurin H. Mills
Lauren H. Mills