NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 22-5222

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TAYLOR BUDOWICH,

Plaintiff-Appellant,

v.

NANCY PELOSI, *et al.*,

Defendants-Appellees.

On Appeal from a Final Order of the U.S. District Court
for the District of Columbia in Case No. 1:21-cv-03366
(Honorable James E. Boasberg, U.S. District Judge)

COMBINED RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY AFFIRMANCE BY SELECT COMMITTEE APPELLEES AND MOTION FOR ASSIGNMENT TO RNC MATTER PANEL[1]

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[1] Republican Nat'l Comm. v. Pelosi, *et al.*, No. 22-5123 (D.C. Cir.) ("RNC Matter") (presided over by United States Circuit Judges Gregory G. Katsas, Neomi Rao, and Justin R. Walker)

Appellant Taylor Budowich, in accordance with Federal Rules of Appellate Procedure 27(a)(3)(A)-(B) and D.C. Circuit Rule 27(c), respectfully submits this Combined Response in Opposition to the Motion for Summary Affirmance by the Select Committee to Investigate the January 6th Attack on the United States Capitol ("Select Committee") (Dkt. No. 1967194) and Motion for Assignment to the RNC Matter Panel and states as follows:

INTRODUCTION

This case concerns the intersection of: (1) an individual's constitutionally protected rights to freedom of speech and association, against unreasonable search and seizure, and entitlements to privacy under both common law and legislative authority; (2) against the backdrop of the weighty public interest in investigating the causes and circumstances of the January 6, 2021, events at the Capitol; (3) as conducted by a Select Committee that lacks the requisite number of Members pursuant to its authorizing Resolution, has expanded the breadth of its investigation beyond any legitimate legislative purpose, and which seeks to conduct its affairs absent any judicial oversight or supervision. This aggregation of factors strongly suggests the Select Committee—itself a lawmaking entity component—has abrogated its own rules, which necessarily makes its acts and authority *ultra vires*.

The Select Committee would have this Court believe that the Constitution—except for the Speech or Debate Clause—does not apply to Congress. The Select

Committee argues that it can subpoena records carte blanche, regardless of whether it complies with the Constitution, federal statutes, or its own governing Resolution. Not only does the Select Committee argue that it can subpoena whomever for whatever documents without any limitation, supervision, or interference, it contends it can do so surreptitiously.

Our constitutional system of government does not allow for such unfettered, unrestrained, and unlimited governmental authority. Nor should it tolerate the specific intrusions complained of here, which seem to inevitably flow from neglect of the principle that "power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it." James Madison, The Federalist No. 48, p. 276 (C. Rossiter ed. 1961).

* * *

As a threshold point, in accordance with D.C. Circuit Rule 28(a)(1)(C), the instant matter is related to Republican Nat'l Comm. v. Pelosi, *et al.*, No. 22-5123 (D.C. Cir.) ("RNC Matter") (presided over by United States Circuit Judges Gregory G. Katsas, Neomi Rao, and Justin R. Walker) inasmuch as it involves "substantially the same parties and the same or similar issues." Both the instant and RNC Matter involve common questions of law and fact, to wit: whether the Speech or Debate Clause immunizes the Select Committee's actions or its individual members' conduct; whether the Select Committee was properly constituted; whether the Select

Committee and its Subpoena at issue in the proceedings below serve a legitimate legislative purpose; and whether the Select Committee and JPMorgan's actions violated First, Fourth, and Fifth Amendment rights and the Separation of Powers doctrine, among other commonalities.

In light of the common issues of law and fact involved, the interests of judicial economy, disfavor for duplication of efforts, and avoidance of inconsistent adjudications will best be served by assignment of this appeal to the same panel that presided over the RNC Matter.

* * *

In the RNC Matter, this Court granted a motion for injunction pending appeal and enjoined the release of records requested by the Select Committee upon finding that Appellants "satisfied the stringent requirements for an injunction pending appeal." See Order dated May 25, 2022 (Dkt. No. 1948112), Republican Nat'l Comm. v. Pelosi, No. 22-5123 (D.C. Cir.) (citing Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2021)). In so doing, this Court necessarily determined the RNC was likely to succeed on the merits, that RNC members were likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tipped in the RNC's favor, and that an injunction was in the public interest. See Winter, 555 U.S. at 20.

Moreover, upon the unopposed motion by the Select Committee to dismiss on the grounds of mootness in the RNC Matter, this Court vacated the District Court's judgment, "given the important and unsettled constitutional questions that the appeal would have presented . . . ." See Order dated Sept. 6, 2022 (Dkt. No. 1964512) at p. 2, Republican Nat'l Comm. v. Pelosi, No. 22-5123 (D.C. Cir.). In the proceedings below, the District Court relied upon the now-vacated order in the RNC matter. See Motion for Summary Affirmance by Select Committee (Dkt. No. 1967194) ("Select Committee MSA") at Ex. 1, pp. 9-10.

Against this backdrop and because the same "important and unsettled constitutional questions" are presented in this appeal, it is unfathomable why the Select Committee and JPMorgan would move this Court for Summary Affirmance. Regardless, this Court should not countenance the Select Committee's continued attempts to evade judicial review in this action. Rather, this Court should: (a) deny the Select Committee's Motion for Summary Affirmance; (b) assign this appeal to the RNC Matter panel; and (c) direct plenary briefing on the merits.

FACTS & BACKGROUND

I. THE SELECT COMMITTEE SUBPOENAS.

On or about November 22, 2021, the Select Committee to Investigate the January 6th Attack on the United States Capitol ("Select Committee") served Budowich with a Congressional Subpoena for production of documents and testimony at a deposition. See Am. Compl. Ex. A (R.30-1). This came as no surprise as Budowich is a current spokesperson for President Trump.

The Congressional Subpoena requested, *inter alia*, identification of all financial accounts for which Budowich was the direct or indirect beneficial owner, or over which he exercised control, into which funds were transferred or withdrawn for any purpose in connection with the Ellipse Rally, along with documents sufficient to identify all account transactions for the time period December 19, 2020, to January 31, 2021, in connection with the Ellipse Rally. Id. at pp. 5-6.

The Select Committee set December 6, 2021, as Budowich's deadline for production of documents and December 16, 2021, as the date of Budowich's deposition. Id. at p. 1. However, per the request of counsel for Budowich, the Select Committee subsequently agreed to extend its deadline for production of documents to December 13, 2021, and rescheduled Budowich's deposition for December 22, 2021. See Am. Compl. Ex. C (R.30-3).

On or about December 14, 2021, counsel for Budowich produced to the Select Committee three-hundred ninety-one (391) documents responsive to the Congressional Subpoena, including all financial account transactions for the period December 19, 2020, to January 31, 2021, in connection with the Ellipse Rally. See Am. Compl. Ex. D (R.30-4). Counsel for Budowich made supplemental production of forty-nine (49) additional documents on December 17, 2021. Id. at p. 5. Additionally, Budowich traveled to Washington, D.C. and sat for a four (4) hour deposition before the Select Committee on December 22, 2021.

In an abundance of caution, on December 16, 2021, counsel for Budowich transmitted correspondence to JPMorgan noting Budowich objected to the production of any private financial records pursuant to any Congressional Subpoena and requesting immediate notification should JPMorgan be served with a Congressional Subpoena. See Am. Compl. Ex. E (R.30-5). That correspondence was received by JPMorgan at 5:41 a.m. EST on December 22, 2021. Id. at p. 2.

Unbeknownst to Budowich, on or about November 23, 2021, the Select Committee served JPMorgan with a Congressional Subpoena for production of documents, at least in part requiring production of private financial records belonging to Budowich. See Am. Compl. Ex. B (R.30-2). The Select Committee initially set December 7, 2021, as Appellee JPMorgan's deadline for production of documents. Id. at p. 1. However, prior to December 7, 2021, the Select Committee

extended Appellee JPMorgan's production deadline until December 24 2021, a date specifically requested by JPMorgan. See Am. Compl. Ex. C (R.30-3).

At 2:33 p.m. EST on December 21, 2021, while Budowich was in Washington, D.C. for his deposition before the Select Committee, and *before* receiving correspondence from counsel for Appellant demanding notice of any Congressional Subpoena, JPMorgan sent correspondence to Budowich at an address in Sacramento, California, advising that it received a Congressional Subpoena for his private financial records and would produce them on December 24, 2021 at 5:00 p.m. See Am. Compl. Ex. F (R.30-6). Related to his travel from Washington, D.C., Budowich did not receive this correspondence from JPMorgan until 7:00 p.m. EST on December 23, 2021. He immediately informed his counsel of the JPMorgan letter. Counsel for Appellant then immediately contacted JPMorgan to object to any production of his private financial records and request an extension of time for JPMorgan's production to the Select Committee. See Am. Compl. Ex. G (R.30-7).

On December 24, 2021, counsel for Budowich – via telephone conversation and in writing to both the Select Committee and JPMorgan – requested an extension of JPMorgan's production deadline until January 3, 2021, in light of the long holiday weekend and federal government closures in order to seek judicial relief. See Am. Compl. Ex.s H, I, J (R.30-8, 9, 10). Despite prior extensions freely granted by the Select Committee related to document production by both Budowich and JPMorgan,

the Select Committee and JPMorgan refused to extend the production deadline of 5:00 p.m. EST on December 24, 2021, notwithstanding notice that Budowich "intend[ed] to exercise his legal rights in court" and that refusing to allow an extension of time would make JPMorgan "complicit in preventing its customer, who it promised to treat with equity and fairness . . . from having his day in court," in light of federal government and national public holidays in the United States as designated at 5 U.S.C. § 6103. See Am. Compl. Ex. I (R.30-9) at p. 1.

JPMorgan then proceeded to produce private financial records of Budowich to the Select Committee and later argue along with the Select Committee at a hearing before the District Court that Budowich's request to enjoin production of their private financial records was now moot given that it had already produced the financial records at issue, even though it had itself directly created the circumstances it now avers precluded the District Court from granting meaningful relief in this action. See Transcript of 1/20/2022 Proceedings (R.27).

Incredibly, JPMorgan doubled-down on its argument that this action was moot and contended that the District Court could not properly review the lawfulness of the subpoena at issue and its unlawful acts after-the-fact because it already produced Budowich's private financial records. See Motion to Dismiss (R.33) at p. 16. In other words, in collusion with the Select Committee, JPMorgan attempted to evade judicial review, accountability, and consequences concerning its improper conduct

by reliance on a timeline and scenario it purposefully created to deny Budowich his day in court.

Considering this timeline and egregious conduct by the Select Committee and JPMorgan, Budowich's only hope for meaningful redress was a determination on the merits of his claims by the District Court after the benefit of full civil discovery among the Parties. This, of course, did not happen, and Budowich now seeks meaningful redress from this Court.

II. PROCEDURAL HISTORY.

On December 24, 2021, Appellant filed a Complaint for Declaratory and Injunctive Relief and Emergency Motion for Temporary Restraining Order ("TRO"). See Complaint & TRO Motion (R.1, 2). On December 29, 2021, the Court denied without prejudice Budowich's TRO Motion. On January 4, 2022, Budowich filed an Amended Emergency Motion for TRO. See Amended TRO Motion (R.14). The Court heard arguments by the Parties on the Amended TRO Motion on January 20, 2022, and denied the same. See Transcript of 1/20/2022 Proceedings (R.27) at 32:9 to 35:1. However, the District Court declined to grant the Select Committee's oral motion to dismiss the matter entirely. Id. at 36:16-21.

On February 18, 2022, Budowich filed an Amended Complaint for Declaratory and Injunctive Relief, alleging six (6) declaratory judgment counts applicable to all Appellees—concerning the improper constitution of the Select

Committee, lack of any valid legislative purpose, Constitutional violations, and The Right to Financial Privacy Act, 12 U.S.C. §§ 3401-23—along with claims under California law solely against JPMorgan. See Am. Compl. (R.30) ¶¶ 115-195. Both the Select Committee and JPMorgan then filed Motions to Dismiss averring that the District Court lacked subject matter jurisdiction and/or that Budowich failed to state claims upon which relief can be granted. See Motions to Dismiss (R.33, 34).

The District Court granted the Select Committee and JPMorgan's Motions to Dismiss, relying upon the same reasoning applied by Judge Timothy Kelly in his Order dismissing the RNC Matter, which this Court subsequently vacated in light of the "important and unsettled constitutional questions" that decision presented. See Select Committee MSA at Ex. 1 (citing Republican Nat'l Comm. v. Pelosi, No. 22-659, 2022 WL 1294509, at *7–10 (D.D.C. May 1, 2022)); see also Order dated Sept. 6, 2022 (Dkt. No. 1964512) at p. 2, Republican Nat'l Comm. v. Pelosi, No. 22-5123 (D.C. Cir.).

STANDARD FOR SUMMARY DISPOSITION

"A party seeking summary disposition bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified." Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Before summarily affirming a district court's ruling, "this court must conclude that no benefit will be gained from further briefing and argument of the issues presented."

Id. at 297-98. Because the appellant's right to proceed is "so clear," the merits of the case must be "given the fullest consideration necessary to a just determination." Sills v. Bureau of Prisons, 761 F.2d 792, 793-94 (D.C. Cir. 1985); see also Cascade Broad. Group, Ltd. v. FCC, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (summary disposition is appropriate "only where the moving party has carried the heavy burden of demonstrating that the record and the motion papers comprise a basis adequate to allow the fullest consideration necessary to a just determination") (internal quotation marks and citation omitted); D.C. CIR. HANDBOOK OF PRACTICE & INTERNAL PROCEDURES at 35-36 (Mar. 16, 2021).

ARGUMENT

As this Court has already determined in the RNC Matter, the merits of this case are *not* so clear that expedited action is justified.

I. THE SELECT COMMITTEE AND ITS SUBPOENAS ARE *ULTRA VIRES*.

A. The Select Committee is Not Duly Constituted.

The Select Committee is operating *ultra vires*. House Resolution 503, the resolution creating the Select Committee, requires that the Committee be comprised of thirteen (13) members. See H.R. 503, § 2(a) ("The Speaker shall appoint 13 Members to the Select Committee."). The Committee has, and has always had, only nine (9) members. See https://january6th.house.gov/about/membership. Further, Section 2(a) requires that five (5) of the thirteen (13) members "be appointed after

consultation with the minority leader." See H.R. 503, § 2(a). There are only two (2) Republican members on the Select Committee, neither of which were recommended by the minority leader, and only one of which was appointed after the Speaker's purported "consultation with the minority leader." As such, the Select Committee is not duly formed pursuant to its own authorizing charter.

When a subpoena is issued by a single Committee, any legislative purpose is illegitimate unless it falls within that Committee's jurisdiction. "The theory of a committee inquiry is that the committee members are serving as the representatives of the parent assembly in collecting information for a legislative purpose." Watkins v. United States, 354 U.S. 178, 200 (1957). Congress therefore must "spell out that group's jurisdiction and purpose with sufficient particularity . . . in the authorizing resolution," which "is the committee's charter." Id. at 201.

The Select Committee "must conform strictly to [its] resolution." Exxon Corp. v. FTC, 589 F.2d 582, 592 (D.C. Cir. 1978) ("To issue a valid subpoena . . . a committee or subcommittee must conform strictly to the resolution establishing its investigatory powers . . . ."). When an investigation is "novel" or "expansive," the Courts will construe the Committee's jurisdiction "narrowly." Tobin v. United States, 306 F.2d 270, 275 (D.C. Cir. 1962) ("when Congress authorizes a committee to conduct an investigation, the courts have adopted the policy of construing such resolutions of authority narrowly, in order to obviate the necessity of passing on

serious constitutional questions"); see also United States v. Rumely, 345 U.S. 41, 45-46 (1953); Ashland Oil, Inc. v. FTC, 409 F. Supp. 297, 305 (D.D.C. 1976) ("the Court must consider the relevant rules of the House, the authorizing resolution, the full committee's resolution by which the Subcommittee was authorized to proceed, and the nature and context of the legislative proceedings . . . .").

B. The Select Committee's Subpoena Exceeds Any Legitimate Legislative Purpose.

The Select Committee's unauthorized investigation into the finances of private citizens exceeds its authority under the Constitution and violates the separation of powers doctrine. Watkins, 354 U.S. at 178 ("Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government."). Contrary to the statements of several members of the Select Committee, "[i]nvestigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." Id. at 187. Because the Select Committee has acted as a *de facto* law enforcement entity, its actions offend the Constitution.

The Select Committee simply seeks to collect and "expose" the financial documents of its political opponents "for the sake of exposure," which purpose is illegitimate and provides no authority for the Congressional Subpoena at issue. Watkins, 354 U.S. at 200. Additionally, because Congress must have a legitimate legislative purpose, it cannot use subpoenas to exercise "any of the powers of law

enforcement." Quinn v. United States, 349 U.S. 155, 161 (1955). Those powers "are assigned under our Constitution to the Executive and the Judiciary." Id. Put simply, Congress is not "a law enforcement or trial agency," and congressional investigations conducted "for the personal aggrandizement of the investigators" or "to punish those investigated" are "indefensible." Watkins, 354 U.S. at 187 ("Congress may not constitutionally require an individual to disclose his . . . private affairs except in relation to a valid legislative purpose.") (internal quotations omitted). Our tripartite system of separated powers requires that "any one of the[] branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other." Kilbourn v. Thompson, 103 U.S. 168, 190-91 (1880).

In this instance, the Congressional Subpoena at issue sought financial records of a private citizen totally unrelated to any public office or position held within the administration of any Government authority. Further, there is no declared remedial purpose of the Select Committee investigation except to "investigate" and "report." See H. Res. 503, § 3(1)-(3). Without a legislative purpose to serve, the Congressional Subpoena could not have been calculated to materially aid any investigation in furtherance of a power to legislate. As a result, in issuing the challenged Congressional Subpoena absent any legitimate legislative purpose, the

Select Committee engaged in an impermissible law enforcement inquiry, and it therefore lacked authority to compel production of the private financial records of Budowich and lacks any authorization or basis for their continued possession and use.

II. THE SELECT COMMITTEE AND JPMORGAN ARE NOT IMMUNE FROM REVIEW.

A. Sovereign Immunity is Inapplicable.

Sovereign immunity did not foreclose relief or preclude the District Court's jurisdiction. Sovereign immunity is inapplicable here because the Larson-Dugan exception applies and Congress waived sovereign immunity under the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-23 ("RFPA"). See Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 689 (1949); Dugan v. Rank, 372 U.S. 609, 621–23 (1963).

Under the Larson-Dugan exception, "'suits for specific relief against officers of the sovereign' allegedly acting 'beyond statutory authority or unconstitutionally' are not barred by sovereign immunity." Pollack v. Hogan, 703 F.3d 117, 120 (D.C. Cir. 2012) (quoting Larson, 337 U.S. at 693); see also Dugan, 372 U.S. at 621–22. "The exception is based on the principle that such *ultra vires* action by a federal officer 'is beyond the officer's powers and is, therefore, not the conduct of the sovereign.'" Id. (quoting Larson, 337 U.S. at 690). This exception comports with Supreme Court precedent unequivocally stating that Courts can, and should, review

legislative subpoenas issued to third parties that are resisted by the individuals whose information is sought. See Eastland v. U. S. Servicemen's Fund, 421 U.S. 491, 501 n.14 (1975) ("On this record the Court of Appeals correctly held that the District Court properly entertained this action initially."). More recently, the Supreme Court explained that congressional subpoenas are "subject to several limitations" and that "recipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation." Trump v. Mazars USA, LLP, 140 S.Ct. 2019, 2032 (2020). Of course, this authority necessarily implies applicability of Larson-Dugan to members of Congress who act unconstitutionally or *ultra vires* in connection with a congressional subpoena. See id.; see also Bergman v. Senate Special Comm. on Aging, 389 F. Supp. 1127, 1130 (S.D.N.Y. 1975) (limiting a Congressional subpoena as overbroad).

The determination of whether the Larson-Dugan exception applies often "merges with" the merits. Jud. Watch, Inc. v. Schiff, 474 F. Supp. 3d 305, 314 (D.D.C. 2020), aff'd, 998 F.3d 989 (D.C. Cir. 2021). The same is true here. The Larson-Dugan exception applies if this Court properly finds that the Select Committee acted *ultra vires*—by issuing subpoenas when not validly constituted and unrelated to a legislative purpose, and in violation of Budowich's First, Fourth, and Fifth Amendment rights and the Separation of Powers doctrine. Thus, aside from Congress's express waiver of sovereign immunity in the RFPA, the Larson-Dugan

exception applies because the Select Committee's actions were unconstitutional and *ultra vires*.

Congress expressly waived sovereign immunity in the RFPA. Section 3417(a) of the RFPA, titled "Liability of agencies or departments of United States or financial institutions" states that "[*a*]*ny agency or department of the United States* or financial institution obtaining or disclosing financial records or information contained therein in violation of this chapter *is liable to the customer* to whom such records relate . . . ." 12 U.S.C. § 3417. This language is a clear waiver of sovereign immunity. See Hohman v. Eadie, 894 F.3d 776, 782 (6th Cir. 2018) (stating that Section 3417 "creates a private cause of action for violations of the Act and waives the United States' sovereign immunity for certain claims . . . ."). Accordingly, sovereign immunity presented no constitutional or prudential bar to this action.

B. The Speech or Debate Clause Does Not Preclude Review.

Under the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1, members of Congress are protected from suit for actions within the "legitimate legislative sphere." See Eastland, 421 U.S. at 503 (quoting Doe v. McMillan, 412 U.S. 306, 314 (1973)). Courts have, especially in the District of Columbia Circuit, interpreted the privilege broadly. See, e.g., Rangel v. Boehner, 785 F.3d 19, 23 (D.C. Circuit 2015). But, contrary to the Select Committee's arguments, the clause is not limitless.

The Supreme Court has repeatedly emphasized that "[l]egislative immunity does not, of course, bar all judicial review of legislative acts." Powell v. McCormack, 395 U.S. 486, 503 (1969); see Gravel v. United States, 408 U.S. 606, 624 n.15 (1972) ("This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role."); Kilbourn, 103 U.S. at 199. This is because the Speech or Debate Clause is "designed to preserve legislative independence, not supremacy" and Courts must "apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government." United States v. Brewster, 408 U.S. 501, 508 (1972). Here, the Select Committee, acting in concert with a private financial institution, intentionally thwarted an individual's right to seek review of a congressional subpoena that is patently unconstitutional and *ultra vires*. Under the unique and egregious facts of this case, the Speech or Debate Clause does not immunize the unlawful acts of the Select Committee.

Further, although the issuance of congressional subpoenas has been held to be a "legislative act," Eastland, 421 U.S. at 504, that does not end the analysis. The Select Committee invites this Court to gloss over the details and hold that because a subpoena was issued by a legislative committee it is immune from any review. But this argument ignores Supreme Court precedent. It is elementary that a congressional subpoena must have a valid legislative purpose. Stated differently,

the content a congressional subpoena seeks must be pertinent to the legislative purpose and functions of the Select Committee. See, e.g., Eastland, 421 U.S. at 505–07 (analyzing whether the subpoena was related to a legitimate legislative purpose); Mazars, 140 S. Ct. at 2031–32 ("The subpoena must serve a valid legislative purpose.").

Courts have the power to limit such congressional overreach because, contrary to the Select Committee's arguments, "the [Speech or Debate] Clause does not and was not intended to immunize congressional investigatory actions from judicial review. Congress' investigatory power is not, itself, absolute." United States v. Am. Tel. & Tel. Co., 567 F.2d 121, 129 (D.C. Cir. 1977). Otherwise, drawing out the Select Committee's argument, a legislative committee investigating federal court security, for example, could subpoena individual judges' "information held by schools, archives, internet service providers, e-mail clients, and financial institutions," Mazars, 140 S. Ct. at 2035, all without any legislative purpose or need and without any checks, balances, or recourse.

C. Under the Unique and Egregious Facts of this Case, the District Court Possessed Authority to Order Disgorgement and Return of Private Financial Records Belonging to Budowich.

The traditional application of the Speech or Debate Clause concerning documents already in Congress's possession is inapplicable here. The Select Committee argues that the Speech or Debate Clause precludes the Court from

ordering the return of documents already in its possession. See Select Committee MSA at 18 (citing Senate Permanent Subcomm. on Investigations v. Ferrer, 856 F.3d 1080, 1086 (D.C. Cir. 2017)). However, extending the Speech or Debate Clause to the facts of this case would unconstitutionally extend the privilege from a protection of the independence of the legislature into a weapon allowing Congress to surreptitiously eliminate any checks on its authority. The Supreme Court has cautioned against such an expansion of the privilege. See Brewster, 408 U.S. at 516 ("We would not think it sound or wise, simply out of an abundance of caution to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process.").

In most situations, individuals have an opportunity to challenge a congressional subpoena without implicating the Speech or Debate Clause, and, thus, allowing the judiciary to remain an appropriate check on the legislature. First, in cases where an individual is subpoenaed directly, the individual can refuse to comply with an unlawful subpoena and challenge it as part of a contempt proceeding. See Watkins, 354 U.S. at 188; Yellin v. United States, 374 U.S. 109, 114 (1963); Gojack v. United States, 384 U.S. 702, 706–09 (1966). The second situation arises where Congress subpoenas an individual's information from a third party. In those situations, the individual can sue the third-party to enjoin compliance with the

subpoena and challenge the subpoena's validity. See Mazars, 140 S. Ct. at 2028, 2035 (stating that constitutional "concerns are no less palpable here because the subpoenas were issued to third parties."); see also United States v. Am. Tel. & Tel. Co., 567 F.2d 121, 129 (D.C. Cir. 1977) ("[T]he fortuity that documents sought by a congressional subpoena are not in the hands of a party claiming injury from the subpoena should not immunize that subpoena from challenge by that party." (citing Eastland, 421 U.S. at 513 (Marshall, J., concurring)).

Here, Budowich was not afforded the opportunity to challenge the subpoena before JPMorgan disclosed his private financial records to the Select Committee despite its actual written and verbal notice that he was bringing an imminent legal challenge to the Congressional Subpoena. Budowich was given less than twenty-four (24) hours to file a complaint and motion for temporary restraining order *and* obtain a court order restraining JPMorgan from releasing the private financial records. This all occurred on a federal holiday—Christmas Eve. The District Court was closed. Congress was closed. Banks were closed. Nonetheless, the Select Committee refused to extend the deadline for compliance and thus prevented Budowich from seeking redress by a Court. This Court should not endorse the Select Committee's intentional actions to "sidestep constitutional requirements . . . . The Constitution does not tolerate such ready evasion; it 'deals with substance, not

shadows.'" Mazars, 140 S. Ct. at 2035 (quoting Cummings v. Missouri, 4 Wall. 277, 325 (1867)).

To be sure, Ferrer, Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 416 (D.C. Cir. 1995), and Hearst v. Black, 87 F.2d 68, 71 (D.C. Cir. 1936) all broadly support the Select Committee's contention that the Court cannot order the return of documents in Congress's possession. See Ferrer, 856 F.3d at 1086; Brown & Williamson, 62 F.3d at 416; Hearst, 87 F.2d at 71. But none of these authorities contemplated Congress using the Speech or Debate Clause as a sword to intentionally thwart *any* challenge to a congressional subpoena where the Committee *was on actual notice* of a forthcoming legal challenge.

CONCLUSION

In these proceedings, the Select Committee continues to argue that their authority knows no bounds. If Congress has unfettered authority, the Select Committee is free to investigate every detail of the personal life of any political opponent or associate with endless subpoenas to his accountants, bankers, lawyers, doctors, family, friends, and anyone else with information the Select Committee finds interesting. This cannot be the case.

Appellant Taylor Budowich respectfully requests this Court enter an Order denying the Select Committee's Motion for Summary Affirmance, assign this appeal to the RNC Matter Panel, and direct this matter proceed to "plenary briefing on the

merits, oral argument, and the traditional collegiality of the decisional process . . . ." including the benefit of briefs by *amici curiae* in due course. Sills, 761 F.2d at 792.

Dated: October 13, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the type-volume limitation of Federal Rules of Appellate Procedure 27(a)(3)(B) and (d)(2)(a) and D.C. Circuit Rule 27(c) because it contains 5,054 words (excluding excepted matter) according to the count of Microsoft Word and is printed in Times New Roman 14-point font.

s/ Christopher W. Dempsey
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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2022, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

s/ Christopher W. Dempsey
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