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 J.P. MORGAN CHASE BANK, N.A. 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) ("RNC Matter Panel").

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 J.P. Morgan Chase Bank, N.A. ("JPMorgan") (Dkt. No. 1967290) and Motion for Assignment to the RNC Matter Panel and states as follows:

INTRODUCTION

JPMorgan, a private financial institution, acted in concert with the Select Committee to Investigate the January 6th Attack on the United States Capitol ("Select Committee") to intentionally thwart a private individual's right to seek review of an unconstitutional and *ultra vires* Congressional Subpoena. JPMorgan attempted to prevent the District Court from performing its constitutional duty to review a motion to restrain the production of Budowich's private financial records by producing Budowich's private financial records to the Select Committee despite notice he was imminently challenging the subpoena for those same records. JPMorgan's reasoning for refusing to withhold its production despite notice of Budowich's forthcoming legal challenge: he did not have a court order. But a court order, of course, was impossible to secure by the arbitrary Christmas Eve deadline intentionally selected by JPMorgan because the District Court, JPMorgan—and all U.S. financial institutions for that matter—as well as Congress were all closed. Now JPMorgan argues the District Court properly dismissed Budowich's claims despite

directly creating the circumstances it now avers precluded the District Court from granting meaningful relief in this action.

Taken to its logical conclusion, JPMorgan's argument is that no Court may interfere with the administration of a Congressional Subpoena and consequently the legislature is entitled to subpoena whomever it chooses for whatever documents it desires without any limitation, supervision, or interference. Not just this, but JPMorgan argues by implication financial institutions may produce financial records of a private citizen totally unrelated to any public office or position held within the administration of any Government authority—and they can do so surreptitiously—because: (a) financial institutions such as JPMorgan do not constitute a state actors in the Congressional Subpoena context; and (b) any right to judicial review is mooted by production. See Motion for Summary Affirmance by JPMorgan (Dkt. No. 1967290) ("JPMorgan MSA") pp. 9-14.

Additionally, the Select Committee and JPMorgan again argue The Right to Financial Privacy Act, 12 U.S.C. §§ 3401-23 ("RFPA") does not apply to Congress. See JPMorgan MSA pp. 14-17. By application, JPMorgan argues the Select Committee can subpoena financial records carte blanche, regardless of whether it complies with the Constitution, federal statutes, or its own governing Resolution. JPMorgan further alleges, at the time it enacted RFPA upon determining a need to

expand privacy rights of financial customers, Congress provided itself a wholesale exemption for its own subpoenas because acts of Congress are above the law.

* * *

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, 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 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, RNC members were likely to suffer irreparable harm in the absence of preliminary relief, the balance of equities tipped in the RNC's favor, and 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") 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 Budowich demanding notice of any Congressional Subpoena, JPMorgan sent correspondence to Budowich at an address in Sacramento, California, advising 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 Budowich 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 their notice Budowich "intend[ed] to exercise his legal rights in court" and 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 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 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) 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 seeks meaningful redress from this Court.

II. PROCEDURAL HISTORY.

On December 24, 2021, Budowich 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) 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 the District Court lacked subject matter jurisdiction and/or 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 an 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 MOOTNESS DOCTRINE DOES NOT PRECLUDE REVIEW.

A. Budowich Seeks Damages and Proper Injunctive Relief and Challenges an Ongoing Policy and Practice of the Select Committee.

Article III limits federal courts to deciding cases or controversies. See U.S. Const. art. III, § 2. A case becomes moot if "events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." Reid, 920 F.3d at 832 (quotations omitted) (quoting Clarke v. United States, 915 F.2d 699, 701 (D.C. Cir. 1990). "In considering possible mootness [the court] assume[s] that the plaintiffs would be successful on the merits." Jud. Watch, Inc. v. Kerry, 844 F.3d 952, 955 (D.C. Cir. 2016). The burden is on the party asserting such jurisdictional bar to establish mootness. Reid, 920 F.3d at 832. Of course, "it is impossible for a plaintiff, when she initially files a Complaint, to make plausible allegations supporting a mootness exception." Id. at 833. Therefore, the district court can focus on legal theories in addition to the facts alleged. Id.

JPMorgan has failed to establish mootness, both before the District Court and presently. Reid, 920 F.3d at 832. "The burden of demonstrating mootness 'is a heavy one.'" Los Angeles Cnty. v. Davis, 440 U.S. 625, 631 (1979); Doe v. Harris,

696 F.2d 109, 112 (D.C. Cir. 1982) ("We conclude . . . that defendant-appellees have not shouldered the heavy burden of demonstrating mootness . . . .").

JPMorgan ignores that Budowich seeks monetary damages and return of his private financial records. See Off. of Thrift Supervision Dep't of Treasury v. Dobbs, 931 F.2d 956, 958 (D.C. Cir. 1991) ("[W]here the government retains property obtained through a subpoena, the controversy remains open as to the government's continued right to custody of those documents."); LaRouche v. Fowler, 152 F.3d 974, 977 (D.C. Cir. 1998) (stating mooting of requests for injunctive relief does not moot a case in which claims for damages remain). These are future acts for which the District Court could have afforded meaningful relief and presently affect Budowich's rights.

Additionally, this case is not moot because Budowich challenges an ongoing policy: the Select Committee's issuance of unnoticed, overbroad subpoenas exceeding any valid legislative purpose and are issued by a committee not duly formed. See Super Tire Eng'g Co. v. McCorkle, 416 U.S. 115, 124 (1974); Better Gov't Ass'n v. Dep't of State, 780 F.2d 86, 91 (D.C. Cir. 1986). More specifically, Budowich challenges the legality of the Select Committee's authority to issue subpoenas despite not being formed in accordance with its authorizing charter; issuing subpoenas to third parties without notice to the individual whose information is sought violates the Fifth Amendment; the Select Committee's law enforcement

purpose violates the separation of power's doctrine and the Fourth Amendment; the Select Committee's targeting of former President Trump's supporters violates the First Amendment; along with other claims related to practices and conduct of the Select Committee. Ultimately, these are all ongoing policies of the Select Committee being challenged and for which there is a live controversy concerning their constitutionality. See McCorkle, 416 U.S. at 124; Better Gov't Ass'n, 780 F.2d at 91.

B. The Select Committee's Conduct and Actions are Capable of Repetition Yet Evading Review.

Additionally, this case fits into the mootness exception for cases capable of repetition yet evading review. "This exception 'applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" Cierco v. Lew, 190 F. Supp. 3d 16, 27 (D.D.C. 2016), aff'd Cierco v. Mnuchin, 857 F.3d 407 (D.C. Cir. 2017) (quoting FEC v. Wis. Right To Life, Inc., 551 U.S. 449, 462 (2007)). "To evade review, the challenged action must be incapable of surviving long enough to undergo Supreme Court review." J. T. v. D.C., 983 F.3d 516, 523–24 (D.C. Cir. 2020) (quoting United Bhd. of Carpenters & Joiners of Am. v. Operative Plasterers' & Cement Masons' Int'l Ass'n of the U.S. & Can., 721 F.3d 678, 688 (D.C. Cir. 2013)). "As a rule of thumb, 'agency actions of less than two years' duration cannot be fully litigated prior to

cessation or expiration, so long as the short duration is typical of the challenged action." Ralls Corp. v. Comm. on Foreign Inv. in U.S., 758 F.3d 296, 321 (D.C. Cir. 2014) (quoting Del Monte Fresh Produce Co. v. United States, 570 F.3d 316, 322 (D.C. Cir. 2009)).

The Select Committee's issuance of unlawful third-party subpoenas satisfies the "evading review" prong because the mere two-week response time is too short to fully adjudicate the issue. This is particularly true where the third-party, such as JPMorgan here, would require a court order—not just a legal challenge—to refuse to produce documents. Because these subpoenas typically provide a response time of merely two weeks, see Am. Compl. Ex. B (R.30-4) (providing two weeks to respond to subpoena); Harris v. U.S. House Select Cmte. to Investigate the Jan. 6th Attack on the U.S. Capitol, 1:21-cv-03290-CJN (ECF No. 1) (alleging two-week response time violates due process), a challenge to the subpoena cannot be fully litigated before the production of documents, see, e.g., Ralls Corp., 758 F.3d at 323 (finding fifty-seven day response time evaded review despite party withdrawing its motion for TRO and preliminary injunction); J. T., 983 F.3d at 524 (finding one-year is short enough to satisfy the "evading review" prong).

Budowich also satisfies the second prong of this exception because there is a reasonable probability he will be subject to the same action again. This prong does not require the exact same facts, but rather looks at "the legal questions it presents

for decision." J. T., 983 F.3d at 524 (quoting PETA v. Gittens, 396 F.3d 416, 422–23 (D.C. Cir. 2005)). This prong "is not to be applied with excessive 'stringency'" and "a controversy need only be '*capable* of repetition,' not 'more probable than not.'" Ralls Corp., 758 F.3d at 324 (quoting Honig v. Doe, 484 U.S. 305, 318 n.6 (1988)). "Moreover, when a complaint identifies official conduct as wrongful and the legality of that conduct is vigorously asserted by the officers in question, the complainant may justifiably project repetition, albeit in a different setting, and involving different official actors." Doe, 696 F.2d at 113.

It is likely the Select Committee will issue unnoticed subpoenas to additional third-parties maintaining Budowich's private information. The Select Committee routinely issues third-party subpoenas without notice to impacted individuals. see Am. Compl. (R.30) ¶¶ 67, 69; see also, e.g., Pl.'s Mot. for Preliminary Injunction, Republican Nat'l Comm. v. Pelosi, *et al.*, No. 1:22-cv-00659-TJK (ECF No. 8-1 at 4) ("The Select Committee provided no notification to the RNC that it had subpoenaed Salesforce and demanded RNC information."); Compl., Harris, 1:21-cv-03290-CJN (ECF No. 1) (explaining Select Committee subpoenaed Verizon for the plaintiff's records without notice to the plaintiff). The Select Committee has issued at least eighty-nine subpoenas. Thus, Budowich will likely be subject to additional unnoticed subpoenas directed to third-parties maintaining his private information.

Additionally, the Select Committee's repeated assertions its process was lawful, despite allegations to the contrary, allows Budowich to "justifiably project repetition, albeit in a different setting, and involving different official actors." See Doe, 696 F.2d at 111, 113-15 (reversing upon finding the plaintiff's declaratory judgment action concerning an executed subpoena remained a live controversy because the United States Attorney's Office adamantly argued its conduct was lawful and the VA "supplied no indication in either forum that the VA would not again, upon official request, release Doe's files without affording him notice and opportunity to object").

In this instance, the Select Committee has vigorously defended its actions, repeatedly asserting they are lawful and authorized. See generally Am. Compl. (R.30); see also Doe, 696 F.2d at 113 ("Defendant-appellees' insistence . . . that their conduct was lawful indicates a risk we cannot dismiss as negligible that Doe may encounter repetition of the official conduct that gave rise to this suit."). Additionally, JPMorgan has refused to provide Budowich with ten (10) days prior notice if it intends to produce additional documents to the Select Committee. See Opposition to Motion to Compel Notice (R.35); Doe, 696 F.2d at 113 (because VA provided no indication it would not release plaintiff's records without notice and an opportunity to object, "asserted apprehension concerning further VA disclosure of his existing or future records cannot be dismissed as fanciful."). Given the Select Committee's

past conduct and actions, along with public comments by its Members regarding their investigation, it is likely the Select Committee will subpoena other third-parties maintaining Budowich's private information. Therefore, the Court should find Appellees' actions are likely to recur and consequently Budowich's claims were not moot before the District Court or presently before this Court.

II. THE RFPA APPLIES TO JPMORGAN'S PRODUCTION OF PRIVATE FINANCIAL RECORDS TO THE SELECT COMMITTEE.

The RFPA provides for liability of agencies or departments of the United States or financial institutions upon violation of RFPA provisions, including fines, actual damages, punitive damages for "willful or intentional" violations, and an award of costs and reasonable attorney's fees as determined by the Court. See 12 U.S.C. § 3417(a). RFPA also provides for disciplinary action by agents or employees of departments or agencies where "an officer or employee acted willfully or intentionally with respect to the violation." See id. § 3417(b). Finally, "in addition to any other remedy," RFPA provides for injunctive relief, which "shall be available to require that the procedures of this chapter are complied with." See id. § 3418.

In pertinent part, RFPA provides: "No financial institution, or officers, employees or agent of the financial institution, may provide to any Government authority access to or copies of, or the information contained in, the financial records of any customer except in accordance with the provision of this chapter." Id.

§ 3403(a). RFPA additionally mandates "[a] financial institution shall not release the financial records of a customer until the Government authority seeking such records *certifies in writing* to the financial institution that it has complied with the applicable provisions of this chapter." Id. § 3403(b) (emphasis added); see also § 3411 ("deliver the records to the Government authority *upon receipt of the certificate required* under section 3402(b) of this title" (emphasis added)). Thus, contrary to the JPMorgan's arguments, RFPA does impose an obligation on financial institutions. See ECF No. 34 at 11.

RFPA also provides:

> [N]o Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the financial records are reasonably described and . . . such financial records are disclosed in response to an administrative subpoena or summons which meets the requirements of section 3405 of this title . . . [or] such financial records are disclosed in response to a formal written request which meets the requirements of section 3408 of this title.

§§ 3402(2), (5). Both §§ 3405 (administrative subpoena or summons) and 3408 (formal written request) require a copy of the subpoena or request be "served upon the customer or mailed to his last known address on or before the date on which the subpoena or summons was served on the financial institution." Additionally, the subpoena or request must be accompanied by a formal statutory notice, within ten (10) days from the date or service or fourteen (14) days from the date of mailing the required notice, allowing the customer to challenge the request for records. See

§§ 3405, 3408. Additional provisions of RFPA establish the right of a financial institution customer to challenge a request for their financial records in an appropriate United States District Court with proceedings completed or decided within seven (7) calendar days of the filing of any Government response. See § 3410(a)-(b).

A. RFPA Applies to the Select Committee Subpoena.

RFPA applies to any "Government authority," which is broadly defined as "any agency or department of the United States, or any officer, employee, or agent thereof . . . ." § 3401(c). JPMorgan's argument RFPA does not apply to Congress is inconsistent with the plain and unambiguous statutory text.

First, by its express terms, RFPA applies to "any Government authority" which is defined as "any agency or department of the United States . . . ." §§ 3403(a), 3401(3). As the United States Supreme Court has opined, "the phrase *any* . . . suggests a broad meaning . . ." that when "[r]ead naturally . . . has an expansive meaning, that is, one or some indiscriminately of whatever kind." Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 219 (2008) (internal citations and quotations omitted).

As the "cardinal canon" of statutory construction, courts must "presume that a legislature says in a statute what it means and means in a statute what is says there . . . [and] when the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." Public Citizen, Inc. v. Rubber Manufacturers

Ass'n, 533 F.3d 810, 816 (D.C. Cir. 2008) (citing Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992)). When the words of a statute are unambiguous, the courts have "no need to employ, nor any legitimate purpose in employing, canons of construction designed to reconcile confusing language." Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335, 1341 (D.C. Cir. 1998); see also United States v. Hunt, 526 F.3d 739, 744 (11th Cir. 2008) ("When the text of a statute is plain . . . [the Court] need not concern [itself] with contrary intent or purpose revealed by the legislative history.").

The terminology "any Government authority" defined as "any agency or department of the United States, or any officer, employee, or agent thereof" is so categorically plain and unambiguous Supreme Court Associate Justice Ketanji Brown Jackson, while still a member of this Court, without hesitation or comment noted: "RFPA provides that a *federal government entity* may subpoena a bank to obtain financial records . . . ." Nicksolat v. U.S. Dep't of Trans., 277 F. Supp. 3d 122, 124 (D.D.C. 2017). This Court should conclude the same.

Another "fundamental canon of statutory construction" is that words should be "interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute." Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018). In accordance with the record and this authority, the term "Government authority" cannot be narrower than its ordinary meaning. The

Legislative Branch is both an agency and department of the United States Government.

B. The Purpose, Context, Structure, and Internal Provisions of RFPA Demonstrate the Act Applies to Congress.

Even if this Court were to look beyond the plain and unambiguous statutory text of § 3401(3), it should apply "the familiar interpretative canon *noscitur a sociis*," which means "a word is known by the company it keeps" and dictates the Court should "look to the context in which the words appear." McDonnell v. U.S., 136 S. Ct. 2355, 2368 (2016) (citing Yates v. United States, 135 S. Ct. 528, 1085 (2015).

The term "any Government authority" is defined as "any agency or department of the United States . . . ." See 12 U.S.C. §§ 3403(a), 3401(3). This provision is broad and expansive. It was also enacted in response to the United States Supreme Court decision in United States v. Miller, 425 U.S. 435, 440 (1976), which held a bank customer had no Fourth Amendment right to prevent a bank from disclosing his financial records in response to a grand jury subpoena. Nicksolat v. U.S. Dep't of Transp., 277 F. Supp. 3d 122, 124 (D.D.C. 2017) (Jackson, J.).

RFPA was designed to strike a balance between customers' right of privacy and the need for law enforcement agencies to obtain financial records pursuant to legitimate investigations. See H. Rep. No. 95-1383, at 33 (1978). The impetus behind RFPA was to protect a customer's right of privacy concerning disclosure of

financial records without qualification as to what character of federal government entity was seeking the records.

If Congress wanted to exempt itself from RFPA, it had the chance and declined to do so. A draft bill submitted by the United States Department of Justice and the Treasury Department would have explicitly covered access to financial records by Congress and distinguished Congress from "any agency or department of the United States." See Electronic Funds Transfer & Financial Privacy: Hrgs. on S. 2096, S. 2293, & 1460 Before the Subcomm. On Fin. Insts. of the S. Comm. on Banking, Housing & Urban Affairs, 95th Cong. 397 (1978). However, given the already broad and expansive definition of Government authority at § 3401(3), Congress apparently felt no need to state the obvious.

Further, at § 3413(j), RFPA specially exempts circumstances where "financial records are being sought by the Government Accountability Office." § 3413(j). The United States Government Accountability Office ("GAO") is a Legislative Branch government agency providing auditing, evaluation, and investigative services for Congress. See Bowsher v. Synar, 478 U.S. 714, 731 (1986); Cause of Action v. NARA, 753 F.3d 210, 213-14 (D.C. Cir. 2014) (GAO is among the "legislative agencies"); see also U.S. Government Accountability Office (available at https://www.gao.gov/about) (last visited Oct. 13, 2022). If RFPA was limited to the Executive Branch, then there would be no need to provide an exemption for the

GAO, let alone a partial one. It follows Congress appreciated RFPA applied to its activities, given it specifically exempted certain of its authorities from the Act's coverage. But Congress did not intend to exclude itself from RFPA's modest protections.

JPMorgan argues RFPA's definition of "Government authority" extends only to the Executive Branch and not more broadly to Congress. See ECF No. 33-1 at 13. That reading does not work. To begin, the Select Committee and JPMorgan would ask this Court to read an implied exception into the statutory scheme. Although RFPA contains a number of specific exemptions, see, e.g., §§ 3413(c) (tax proceedings); 3413(g) (certain law-enforcement inquiries); 3413(i) (grand jury subpoenas), it does not provide a general exemption for congressional subpoenas. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." United States v. Smith, 499 U.S. 160, 167 (1991).

Moreover, the statutory context confirms Congress expected RFPA to apply beyond the Executive Branch. Notably, the statute specifically addresses the one circumstance where Congressional inquiries are *not* subject to RFPA's procedures: when the records request is from "a duly authorized committee or subcommittee of Congress" to "any officer or employee of a supervisory agency." § 3412(d). If congressional subpoenas were never intended to come within RFPA's scope, there

would be no reason to include this provision; any other interpretation would render this provision superfluous. See Duncan v. Walker, 533 U.S. 167, 167 (2001) (stating the judiciary must avoid "treat[ing] statutory terms as surplusage"); see also Nat'l Ass'n Manufacturers v. Dep't of Defense, 138 S. Ct. 617, 632 (2018) (stating the judiciary is "obliged to give effect, if possible, to every word Congress used . . . .").

Budowich's interpretation gives this provision a logical purpose: when a supervisory agency has already obtained these documents (presumably in compliance with RFPA's procedures), Congress is not required to go through RFPA's notice and certification procedures anew. Of course, the Congressional Subpoena at issue was directed to JPMorgan, and not a supervisory agency; accordingly, § 3412(d) provides no authority for the Select Committee's receipt of private financial records in this instance.

III. BUDOWICH SUFFICIENTLY ALLEGED CONSTITUTIONAL CLAIMS AGAINST JPMORGAN BECAUSE IT OPERATED AS A STATE ACTOR.

A. JPMorgan's Conduct Constitutes State Action.

JPMorgan, in responding to the Select Committee's subpoena and providing Budowich's private financial records, operated as a state actor. In determining whether a private entity's actions can be deemed state action, a court looks to "the specific conduct of which the plaintiff complains," and then asks whether such conduct is "fairly attributable to the state." Brentwood Acad. v. Tenn. Sec. Sch. Athl. Ass'n, 531 U.S. 288, 295 (2001). In making this determination the Court considers

"a host of facts" that "lack rigid simplicity." Id. at 295–96. "[A] challenged activity may be state action when it results from the [government's] exercise of 'coercive power,' when the [government] provides 'significant encouragement, either overt or covert,' or when a private actor operates as a 'willful participant in joint activity with the [government] or its agents[.]'" Id. (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (1982)). The Supreme Court has "consistently held a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." Lugar, 457 U.S. at 941; see also Adickes v. S. H. Kress & Co., 398 U.S. 144, 171 (1970) (private restaurant's discrimination under compulsion of state law was state action).

JPMorgan avers it was required to comply with the subpoena. But this self-professed requirement is exactly what made JPMorgan a state actor. See Adickes, 398 U.S. at 171; Lugar, 457 U.S. at 941. This is because a private actor is considered a state actor where it is "subjected to the 'coercive power' of the state or 'significant encouragement, either overt or covert' by the state . . . ." Simms v. D.C., 699 F. Supp. 2d 217, 224 (D.D.C. 2010) (quoting Brentwood Acad., 531 U.S. at 296). Additionally, the Supreme Court has found state action by private entities effectuate a search under compulsion of federal law. Skinner v. Ry. Lab. Executives' Ass'n, 489 U.S. 602, 614 (1989). In Skinner, 489 U.S. at 614, the Supreme Court found a

railroad's post-accident breath and urine test constituted state-action controlled by the Fourth Amendment because federal regulation required the tests. Id. ("A railroad that complies with the provisions of Subpart C of the regulations does so by compulsion of sovereign authority, and the lawfulness of its acts is controlled by the Fourth Amendment."). Accordingly, JPMorgan's actions constituted state action.

Additionally, JPMorgan was a state actor because it was "a willful participant in a joint activity with the" Select Committee. See Brentwood Acad., 531 U.S. at 296; Am. Compl. (R.30) ¶¶ 68–75. Budowich alleges JPMorgan and the Select Committee acted in concert and colluded to deny him the opportunity to challenge the Congressional Subpoena at issue. See Am. Compl. (R.30) ¶¶ 71–75. This sufficiently demonstrates JPMorgan and the Select Committee acted together to infringe upon Budowich's constitutional rights. Accordingly, JPMorgan's actions constituted state action.

Ultimately, JPMorgan either acted under compulsion or as a willful joint participant. Under either scenario, its actions were state action and JPMorgan is thus liable under Budowich's constitutional claims. See New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (applying Fourteenth Amendment to private parties in First Amendment context); Brentwood, 531 U.S. at 303 (holding private entity was state actor under First Amendment claim); Skinner, 489 U.S. at 614 (finding private

railroad was state actor under Fourth Amendment); Lugar, 457 U.S. at 941 (holding private entity violated due process clause).

B. Budowich Alleged Multiple Protectible Interests Supporting His Constitutional Claims.

Budowich asserted several liberty and property interests warranting due process protection. "'[T]he existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law.' In other words, property interests 'attain . . . constitutional status by virtue of the fact that they have been initially recognized and protected by state law.'" Ralls Corp., 758 F.3d at 315 (citations omitted) (quoting Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998), and Paul v. Davis, 424 U.S. 693, 710 (1976)). "[T]hat the property interest is recognized under state law is enough to trigger the protections of the Due Process Clause." Id. at 316. Further, "liberty interests protected by the fifth amendment may arise either from the Constitution or from federal . . . law." Mosrie v. Barry, 718 F.2d 1151, 1159 (D.C. Cir. 1983). Federal law can create a liberty interest, safeguarded by the Fifth Amendment, when the federal law provides special protection for a given interest beyond the general protection of tort law. Cf. id. (explaining D.C. law did not provide special protection to reputation beyond general tort law and therefore injury to reputation was not a protectible liberty interest under the Fifth Amendment). To determine whether a particular statute creates a constitutionally protected property interest, [the court]

asks whether the statute or implementing regulations place 'substantive limitations on official discretion.'" Wash. Legal Clinic for the Homeless v. Barry, 107 F.3d 32, 36 (D.C. Cir. 1997) (quoting Olim v. Wakinekona, 461 U.S. 238, 249 (1983)). For a statute, regulation, or rule to create a protectible liberty interest it must use "'explicitly mandatory language,' in connection with the establishment of 'specified substantive predicates' to limit discretion . . . ." Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 463 (1989).

Budowich alleged multiple protectible interests under the Fifth Amendment's Due Process Clause. First, Budowich alleged a valid First Amendment interest. See Am. Compl. (R.30) ¶¶ 104–14; see also Mosrie, 718 F.2d at 1159 (stating Constitution can give rise to interests protected by Fifth Amendment). The First Amendment creates inherent liberty interests protectible under the Fifth Amendment's Due Process Clause. See Mosrie, 718 F.2d at 1159; Sherrill v. Knight, 569 F.2d 124, 128 (D.C. Cir. 1977) ("[B]ecause the denial of a pass potentially infringes upon first amendment guarantees[,] [s]uch impairment of this interest cannot be permitted to occur in the absence of adequate procedural due process."). Accordingly, Budowich's First Amendment interests warranted an opportunity to challenge the subpoena before the records were turned over. See Eastland v. U.S. Servicemen's Fund, 421 U.S. at 501 n.14 (stating Circuit Court correctly found District Court had jurisdiction to evaluate First Amendment Claim in relation to

legitimate legislative purpose); U.S. Servicemen's Fund v. Eastland, 488 F.2d at 1259–60 (holding plaintiff's assertion of First Amendment right in subpoenaed documents authorized federal court to entertain action challenging congressional subpoena to third party record holder).

Further, Budowich possesses a protectible interest pursuant to RFPA. See 12 U.S.C. § 3402. RFPA was "a congressional response to the Supreme Court decision in United States v. Miller" and "is intended to protect the customers of financial institutions from unwarranted intrusion into their records . . . ." H.R. Rep. No. 95-1383, at 9305–06 (1978). RFPA contains substantive predicates limiting discretion, i.e. the requirements contained in §§ 3404–08. See Thompson, 490 U.S. at 463. Further, RFPA mandates, absent satisfying the substantive predicates, no governmental entity may have access to an individual's financial records. § 3402. Thus, RFPA qualifies as a statute creating a protectible Fifth Amendment interest because it contains "explicitly mandatory language," and "specified substantive predicates to limit discretion . . . ." Thompson, 490 U.S. at 463 (quotations omitted).

Lastly, the Supreme Court has repeatedly emphasized the proper method for challenging congressional subpoenas to third parties—including those holding financial records—is for the individual whose information is sought to sue to challenge the subpoena. See Mazars, 140 S. Ct. at 2035; Eastland, 421 U.S. at 501 n.14. In Eastland, the Supreme Court stated the district court properly entertained

the action because when Congress subpoenas records from a third party, the normal process for challenging the subpoena is unavailable to the individual whose records are at issue. 421 U.S. at 501 n.14. Thus, the only way to challenge whether the subpoena furthers a legitimate legislative purpose is to sue to challenge the subpoena. Id.; see also Eastland, 488 F.2d at 1259–60 (explaining proper process is to sue to challenge the subpoena in court because "plaintiffs have no alternative means to vindicate their rights.").

IV. PLAINTIFF BUDOWICH SUFFICIENTLY STATED CLAIMS UNDER CALIFORNIA LAW.

Budowich stated an invasion of privacy claim under the California Constitution. "A 'party claiming a violation of the constitutional right of privacy established in article I, section 1 of the California Constitution must establish: (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) a serious invasion of the privacy interest.'" Tourgeman v. Collins Fin. Servs., Inc., No. 08-CV-01392 JLS NLS, 2009 WL 6527758, at *2 (S.D. Cal. Nov. 23, 2009) (quoting Int'l Fed'n of Prof'l & Technical Eng'rs v. Superior Court, 165 P.3d 488, 499 (Cal. 2007)).

Budowich "has a legally protected privacy interest in his private financial information." Id. Further, "under California law . . . 'a bank customer has [ ] a reasonable expectation of privacy . . . when his bank records are subpoenaed.'" Lin v. Suavei, Inc., No. 3:20-CV-862-L-AHG, 2021 WL 6077621, at *5 (S.D. Cal. Dec.

23, 2021) (quoting Athearn v. State Bar, 571 P.2d 628, 629 (Cal. 1977)). JPMorgan's actions are "'highly offensive to a reasonable person[,]' requir[ing] a holistic consideration of factors such as the likelihood of serious harm to the victim, the degree and setting of the intrusion, the intruder's motives and objectives, and whether countervailing interests or social norms render the intrusion inoffensive." In re Facebook, Inc. Internet Tracking Litig., 956 F.3d 589, 606 (9th Cir. 2020), cert. denied sub nom. Facebook, Inc. v. Davis, 141 S. Ct. 1684, 209 L. Ed. 2d 464 (2021). This determination is factual and inappropriate for resolution at the pleading stage. Id.

Budowich also alleged violations of California's Unfair Competition Law ("UCL") Unlawful Prong. California's UCL prohibits unlawful, unfair, or fraudulent business acts and practices. Cal. Bus. & Prof. Code § 17200. The UCL was designed to protect consumers, and, therefore, is framed in "broad sweeping language" and "provide[s] courts with broad equitable powers to remedy violations." Kwikset Corp. v. Superior Ct., 246 P.3d 877, 883 (2011) (quotations omitted). Budowich alleged violations of California's UCL Unlawful Prong in Count VIII. See Am. Compl. (R.30) ¶¶ 169-85; see also Cal. Bus. & Prof. Code § 17200. Budowich alleged a violation of the California Financial Information Privacy Act ("CalFIPA") as a predicate offense. Cal. Fin. Code § 4052.5. Additionally, the Gramm-Leach-Bliley Act prohibited JPMorgan's disclosure. 15 U.S.C. § 6802(a).

Finally, JPMorgan's actions violated RFPA, which is also a predicate violation for Budowich's UCL claim.

Finally, Budowich sufficiently alleged a violation of the UCL Unfair Prong. This prong creates a cause of action for unfair business practices even if not proscribed by some other law. In re iPhone Application Litig., 844 F. Supp. 2d 1040, 1072 (N.D. Cal. 2012) (citing Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937, 943 (Cal. 2003)). Budowich alleged California has a strong public policy of restricting disclosure of consumer's private information and cited five different constitutional or statutory provisions demonstrating this strong public policy. See Am. Compl. (R.30) ¶ 188. The precept consumers have reasonable notice of disclosure of their private information underpins this policy. See, e.g., Cal. Fin. Code § 4051 ("The Legislature intends for financial institutions to provide their consumers *notice and meaningful choice* about how consumers' nonpublic personal information is shared or sold by their financial institutions.") (emphasis added). Budowich also alleged JPMorgan's conduct was immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers, and thus a violation of the unfair prong. Budowich alleged JPMorgan intended to preclude any opportunity to challenge the production of their private financial information, Am. Compl. (R.30) ¶¶ 68–75, and intended to violate his First Amendment Rights, id. ¶¶ 104–14. As such, the District Court erred in dismissing Budowich's California law claims.

CONCLUSION

Budowich respectfully requests this Court enter an Order denying JPMorgan'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 7,797 words (excluding excepted matter) according to the count of Microsoft Word and is printed in Times New Roman 14-point font.

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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.

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