No. 22-16473

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL P. WARD, et al.

Plaintiffs-Appellants,

v.

BENNIE G. THOMPSON, et al.

Defendants-Appellees.

On Appeal from a Final Order of the U.S. District Court for the District of Arizona (No. 3:22-cv-08015) (Hon. Diane J. Humetewa, U.S. District Judge)

DEFENDANTS-APPELLEES' OPPOSITION TO PLAINTIFFS-APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

Dr. Kelli Ward[1] continues to try to impede the important work of the United States House Select Committee to Investigate the January 6th Attack on the United States Capitol ("Select Committee") by asking this Court to enter an injunction to block the timely investigation of her efforts to undermine the 2020 Presidential election, after the district court rejected her request for just such relief. But she cannot meet any of the requirements to obtain such an extraordinary remedy—much less all of them. *First*, she cannot demonstrate any serious questions warranting appellate review. *Second*, she fails to establish that any harm, much less irreparable injury, would flow from T-Mobile's compliance with the subpoena. *Finally*, the balance of the equities and the public interest overwhelmingly favor the Select Committee, which is investigating an unprecedented assault on American democracy. Dr. Ward does not merit an injunction pending appeal, and this Court should deny her motion.

[1] As noted in Congressional Defendants' memorandum accompanying their motion to dismiss, the Select Committee has voluntarily withdrawn its demand for call detail records associated with the phone belonging to plaintiff Michael Ward. *See* ECF 46 at 4 n.8. Accordingly, this brief alternates between "Dr. Ward" and "Plaintiffs" as appropriate.

FACTUAL BACKGROUND

On January 6, 2021, rioters seeking to stop the peaceful transfer of power following the 2020 Presidential election launched a violent assault on the United States Capitol. H. Res. 503, 117th Cong. (2021). These rioters impeded the constitutionally mandated counting of electoral college votes transmitted from the states, which reflected the results of the 2020 Presidential election. *See* U.S. Const., Amend. XII. "The rampage left multiple people dead, injured more than 140 people, and inflicted millions of dollars in damage to the Capitol." *Trump v. Thompson*, 20 F.4th 10, 15 (D.C. Cir. 2021), *inj. denied*, 142 S. Ct. 680 (2022), *cert. denied*, 142 S. Ct. 1350 (2022).

Dr. Ward participated in multiple aspects of these attempts to interfere with the electoral count on January 6th. *First*, in the days after the election, she told officials in Maricopa County, the most populous county in Arizona, to stop counting ballots.[2] *Second*, she reportedly tried to organize a call in the days after the election between President Trump and Maricopa County Board of Supervisors Chairman Clint Hickman, and encouraged Mr. Hickman to contact President Trump's lawyer Sidney Powell, who was promoting a wide range of falsehoods

[2] Brahm Resnik, *'Stop the counting': Records show Trump and allies pressured top Maricopa County officials over election results*, 12NEWS (July 2, 2021), https://perma.cc/AY9D-DQJZ (quoting Ms. Ward's text messages and one voicemail).

about the election.[3] *Third*, like Ms. Powell, Dr. Ward promoted false allegations of election interference by Dominion Voting Systems.[4]

Finally, although the Governor of Arizona had certified that Joseph Biden carried Arizona and that the Biden electors would represent the state, Dr. Ward and other Trump electors nevertheless convened as Arizona's purported electors, voted, and sent a set of unauthorized and illegitimate Electoral College votes to Congress that she misdescribed as "represent[ing] the legal voters of Arizona[.]"[5] This fake elector scheme was a key part of President Trump's effort to overturn the election. Privately, Dr. Ward reportedly expressed concern about the legality of this effort to representatives of President Trump.[6] Nevertheless, while Congress was recessed due to the mob's violent attack on the Capitol, Dr. Ward continued to advocate for overturning the results of the election.[7] And in the wake of January 6th, she continued to falsely maintain that the illegitimate document purporting to transmit

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[3] *See id.*

[4] *See* Republican Party of Arizona (@AZGOP), Twitter (Dec. 2, 2020, 5:41 PM), https://perma.cc/T6YQ-227L (six-minute video of Dr. Ward).

[5] Dr. Kelli Ward (@kelliwardaz), Twitter (Dec. 14, 2020, 4:26 PM), https://perma.cc/K5NF-W6JG.

[6] *See* Maggie Haberman & Luke Broadwater, *Arizona Officials Warned Fake Electors Plan Could 'Appear Treasonous,'* N.Y. Times (Aug. 2, 2022), https://perma.cc/67E8-CHCU.

[7] Dr. Kelli Ward (@kelliwardaz), Twitter (Jan. 6, 2021, 3:30 PM), https://perma.cc/3CQA-JSHB.

Arizona's Electoral College votes for Donald Trump contained "the rightful & true Presidential electors for 2020."[8] Even so, Dr. Ward has refused to answer questions posed by the Select Committee, instead invoking the protections of the Fifth Amendment.

In response to the unprecedented January 6th attack, the House of Representatives adopted House Resolution 503, "establish[ing] the Select Committee to Investigate the January 6th Attack on the United States Capitol" ("Select Committee"). H. Res. 503 § 1. This resolution authorizes the Select Committee to (1) "investigate the facts, circumstances, and causes relating to the domestic terrorist attack on the Capitol" "and relating to the interference with the peaceful transfer of power"; (2) "identify, review, and evaluate the causes of and the lessons learned from the domestic terrorist attack on the Capitol"; and (3) "issue a final report to the House containing such findings, conclusions, and recommendations for corrective measures … as it may deem necessary." *Id.* §§ 3(1), 4(a)(1)-(3).

In furtherance of its duty to "investigate the facts, circumstances, and causes" of the January 6th attack, the Select Committee has issued a subpoena to T-Mobile USA, Inc. ("T-Mobile"), for call detail records relating to Dr. Ward's

[8] Dr. Kelli Ward (@kelliwardaz), Twitter (Jan. 12, 2022, 12:07 PM), https://perma.cc/H5LB-598J (replying to a comment on her original tweet).

account (Compl. Ex. A at 3, ECF 1-1) for the period from November 1, 2020, to January 31, 2021. These records include, for a specified telephone number, limited information such as when a call was made or message was sent, its duration (if a call), and which phone numbers were involved. Significantly for this case, these records do not include the names or addresses of people with whom a specified phone number communicated and do not include any communications content or location information. *See* Subpoena Schedule, Appx-4 (the subpoena "does not call for the production of the content of any communications or location information"). The Select Committee has subpoenaed and received such records for hundreds of other individuals' phone numbers as part of its investigation.

PROCEDURAL HISTORY

On February 1, 2022, Plaintiffs filed their Complaint. After seeking and obtaining, with Plaintiffs' consent, extensions to reply to the Complaint due to the Select Committee's investigative and litigation priorities at the time, Congressional Defendants filed their motion to dismiss on August 8. ECF 46. On September 22, the district court granted the motion. Appx-11-28. The court rejected Plaintiffs' First Amendment associational claim, finding their argument "highly speculative" and noting 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." Appx-23. The court also

rejected Plaintiffs' Health Insurance Portability and Accountability Act ("HIPAA") claim because HIPAA does not provide a private cause of action and because T-Mobile is not a covered entity under HIPAA. Appx-26-27. The court further rejected claims that the Select Committee lacks a valid legislative purpose, that it is improperly constituted, and that the subpoena violates Arizona's physician-patient privilege. Appx-17-22, Appx-24-26.

Plaintiffs appealed and filed a Motion for Injunction or Administrative Injunction Pending Appeal. Appx-30-43. After hearing oral argument, the district court denied that motion on October 7, because Plaintiffs failed to present a serious legal question, show irreparable injury, or demonstrate that the balance of hardships tips sharply in their favor. Appx-45-52. Plaintiffs now seek an injunction pending appeal before this Court.

STANDARD

"To determine whether to grant an injunction pending appeal, this court applies the test for preliminary injunctions." *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1176 (9th Cir. 2021). "A plaintiff seeking a preliminary injunction must establish that [she] is likely to succeed on the merits, that [she] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [her] favor, and that an injunction is in the public interest." *Id.* (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)) (alterations

in *Doe*). Where, as here, the injunction is sought against the Government, the balance of the equities and public interest factors merge. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

This Court further applies "an alternative 'serious questions' standard, also known as the 'sliding scale' variant of the *Winter* standard." *Fraihat v. U.S. Immigr. & Customs Enf't*, 16 F.4th 613, 635 (9th Cir. 2021) (quoting *Ramos v. Wolf*, 975 F.3d 872, 887 (9th Cir. 2020) and *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011)). "Under that formulation, '"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 show[s] that there is a likelihood of irreparable injury and that the injunction is in the public interest.'" *Id.* (quoting *All. for the Wild Rockies*, 632 F.3d at 1135). "To the extent prior cases applying the 'serious questions' test have held that a preliminary injunction may issue where the plaintiff shows only that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor, without satisfying the other two prongs, they are superseded by *Winter*, which requires the plaintiff to make a showing on all four prongs." *All. for the Wild Rockies*, 632 F.3d at 1135.

Finally, "[s]erious questions are 'substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.'" *Senate of Cal. v. Mosbacher*, 968 F.2d 974, 977-78 (9th Cir. 1992) (quoting *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir.1991)).

ARGUMENT

I. Plaintiffs Cannot Establish a "Serious Legal Question" Regarding Their First Amendment Claim

In Congressional investigations, "the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances." *Barenblatt v. United States*, 360 U.S. 109, 126 (1959). In such cases, courts must balance the "competing private and public interests at stake in the particular circumstances shown." *Id.* Some government interests, especially those involving the "free functioning of our national institutions" are "sufficiently important to outweigh the possibility of infringement" of First Amendment rights. *Buckley v. Valeo*, 424 U.S. 1, 66 (1976); *see also Senate Permanent Subcomm. v. Ferrer*, 199 F. Supp. 3d 125, 138, 143 (D.D.C. 2016) (holding that Congressional investigation interests "substantially outweigh[ed]" any intrusion on subpoena recipient's "incidental" First Amendment rights), *vacated as moot*, 856 F.3d 1080 (D.C. Cir. 2017).

The Select Committee is investigating the deadliest attack on the Capitol "in the history of the United States" to make "legislative recommendations" to prevent future acts of such violence. *Trump v. Thompson*, 20 F.4th at 16, 35. The Select Committee's interest in obtaining call detail records pertaining to a person who was involved in multiple aspects of the unprecedented effort to overturn the election—including the fake elector scheme—necessarily involves the "free functioning of our national institutions" and would substantially outweigh any theoretical, incidental harm to the Plaintiffs. It is not plausible that Dr. Ward—Chair of the Arizona Republican Party, former state legislator, and two-time U.S. Senate candidate—would be chilled from further participation in partisan politics due to a Congressional investigation. Furthermore, Dr. Ward is already enmeshed in investigations related to her role in subverting the 2020 election. She testified at a deposition before the Select Committee, and she has disclosed to this Court that she received a federal grand jury subpoena, to which she objected, in connection with her role as a fake elector. *See* Dkt. 2 at 2.

Even accepting for purposes of argument the questionable assertion that Dr. Ward's First Amendment rights include a right to have *others* want to associate with *her*, she fails to provide any legally cognizable, non-speculative explanation of how the subpoena here does so. Her Complaint suggests that providing call detail records would "provide[] the Committee with the means to chill the First

Amendment associational rights not just of the Plaintiffs but of the entire Republican Party in Arizona." Compl. ¶ 52, ECF 1. She alleges that she has received threats and harassing letters, but does not explain why (or even allege that) such communications would increase if T-Mobile complies with the subpoena. *Id.* ¶ 55.

The district court correctly rejected these arguments as barred by sovereign immunity and, to the extent that the sovereign immunity analysis merges with the merits, "highly speculative." Appx-17, 23. "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." *Id.* (quoting *Brock v. Loc. 375, Plumbers Int'l Union of Am., AFL-CIO*, 860 F.2d 346, 350 (9th Cir. 1988)). The district court further noted that "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." *Id.* (quoting *Exxon Corp. v. FTC*, 589 F.2d 582, 589 (D.C. Cir. 1978)). Accordingly, the district court concluded that Plaintiffs did not demonstrate a "prima facie showing or arguable first amendment infringement," Appx-22 (quoting *Brock*, 860 F.2d at 350), and did not even need to reach the Government's interests.

Another district court in this Circuit came to a similar conclusion in rejecting a similar First Amendment claim by another person involved in efforts to overturn the 2020 election. In *Eastman v. Thompson*, Judge Carter rejected a First Amendment associational claim by John Eastman, who was attempting to quash a Select Committee subpoena to his former employer, Chapman University, seeking his emails from a specified time range. No. 22-cv-99, 2022 WL 1407965, at *8 (C.D. Cal. Jan. 25, 2022). Although Eastman alleged that the subpoena "would work a massive chilling of the associational and free speech rights of citizens," Compl. ¶ 87, *Eastman*, ECF 1, the district court rejected his claim, noting that "[t]he public interest here is weighty and urgent. Congress seeks to understand the causes of a grave attack on our nation's democracy and a near-successful attempt to subvert the will of the voters." *Eastman*, 2022 WL 1407965, at *8. On the other side of the ledger, however, Eastman failed to identify "any particular harm likely to result" from production of his emails. *Id.*

Dr. Ward's insinuations about the subpoena are unavailing. This subpoena is substantively no different from subpoenas that the Select Committee has sent to hundreds of persons, including other political actors.[9] She claims incorrectly that "[t]he whole purpose of the subpoena is to strike fear into those with whom she

[9] To be sure, there are also many people the Select Committee has learned about during the course of its investigation for which it did not seek such records.

was in contact" because "Congressional investigators already know what Dr. Ward did because she has made no secret about it." Mot. 11. In fact, at her deposition before the Select Committee, Dr. Ward invoked her Fifth Amendment right against self-incrimination to decline to answer all substantive questions. *See* Tr. Oral. Arg. 21, Oct. 4, 2022. In any event, her baseless allegation about the motivation for the Select Committee's subpoena is not one that courts may entertain: where a Congressional committee is acting within its power, "the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power." *Barenblatt*, 360 U.S. at 132; *see also Eastman*, 2022 WL 1407965, at *8.

Dr. Ward also claims that "[i]t is no secret what the Committee intends to do with this data," and quotes a former Select Committee staffer stating that "[t]he 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." Mot. 4-5. But the quotation from the former staffer—who does not speak for the Select Committee and left his position in April—referenced communications with *the White House*, which obviously is particularly relevant given President Trump's involvement in the events leading up to, and on, January 6th. This has no bearing on Dr. Ward's communications with anyone who did not work for, or themselves communicate with, the White House at the time.

To the extent Plaintiffs argue that the subpoena would violate the First Amendment associational rights of Arizona Republican Party members, that claim fails for the reasons stated above—and for multiple additional reasons.

First, Plaintiffs lack standing to assert such claims. A "plaintiff generally must assert h[er] own legal rights and interests, and cannot rest h[er] claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). An exception to this rule has been recognized in cases involving organizations asserting the First Amendment interests of their members or donors. *See id.* at 511 ("[I]n attempting to secure relief from injury to itself the association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties."). But unlike the organizations in the cases that Plaintiffs cite—*NAACP v. Alabama*, 357 U.S. 449 (1958), *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021), and *Republican National Committee ("RNC") v. Pelosi*, --- F. Supp. 3d ---, 2022 WL 1294509 (D.D.C. May 1, 2022), *appeal dismissed as moot and judgment vacated*, No. 22-5123, 2022 WL 4349778 (D.C. Cir. Sept. 16, 2022) (per curiam)—the Arizona Republican Party is not a party in this case, which unlike those cases involves records pertaining to Dr. Ward specifically, rather than to the organization.

Second, and relatedly, there is no reason to believe that Dr. Ward's communications about election-related activities during the relevant period were

limited to or even predominantly involved Arizonans or were in her capacity as chair of the Arizona Republican Party. In the declaration she submitted to accompany her Complaint, she stated only that, in addition to communicating on the subpoenaed phone line with patients, family, and friends, "I also make and receive calls of a political nature on the line as well." Appx-55.

Third, even if the calls did involve, as Plaintiffs' brief states, "party activists" (Mot. 10), there is no reason to assume—unlike the NAACP members in Jim Crow-era Alabama and major donors to conservative nonprofits in *Bonta*—that they would experience any harm by disclosure. Virtually by definition, "party activists" are open about their involvement in partisan politics. Furthermore, party registration is a matter of public record in Arizona. *See* Ariz. Rev. Stat. § 16-168(E), (F).

For all these reasons, this is not a case in which "exacting scrutiny" as applied to disclosure requirements for political parties or nonprofit organizations should apply. Regardless, this subpoena meets that standard: it is narrowly tailored in that it seeks only one person's call detail records over the limited period in which that person was admittedly involved in trying to overturn a Presidential election. And unlike the subpoena for John Eastman's emails, which survived First Amendment scrutiny, the call detail records at issue here include no content whatsoever.

Plaintiffs' comparison of this case to *RNC*, in which a party sued to enjoin one of its vendors from complying with a Select Committee subpoena, is fundamentally misplaced, given the vast differences between the two cases. In that case, the RNC failed in its effort to obtain both a preliminary injunction stopping compliance with the subpoena and an injunction pending appeal from the district court, before ultimately convincing the court of appeals to grant an injunction pending appeal. *See RNC*, 2022 WL 1294509; *RNC*, No. 22-cv-659, 2022 WL 1604670 (D.D.C. May 20, 2022); Order, *RNC*, No. 22-5123 (D.C. Cir. May 25, 2022). Dr. Ward emphasizes (Mot. 8-9; Appx-30-42) the D.C. Circuit's indication that the RNC's appeal, had it not been mooted, would have presented "important and unsettled constitutional questions." *RNC*, 2022 WL 4349778, at *1. Congressional Defendants respectfully disagree with the D.C. Circuit on that point. More importantly, however, no such questions are present here.

First, as discussed above, *RNC* involved an organization, not an individual.

Second, the records sought in *RNC* differ significantly from the call detail records sought here—which include only limited, non-content connection information such as when a call was made or text message was sent, its duration (if a call), and which phone numbers were involved. By contrast, the subpoena at issue in *RNC* sought a variety of data regarding the performance of the RNC's email campaigns, as well as communications between the RNC and its email

vendor, and the vendor's internal documents and communications regarding the RNC's email campaigns. *See RNC*, 2022 WL 1294509, at *3. Obviously, Congressional Defendants agree with the district court's holding in *RNC* that the subpoena was consistent with the First Amendment. But even assuming *arguendo* that it was not, there would be no basis to extend such logic to a request for mere call detail records, which neither reveal communications content nor provide data regarding the effectiveness of a political party's messaging.

Third, Dr. Ward has made no effort to articulate any cognizable First Amendment harm that would befall her upon T-Mobile's subpoena compliance. The RNC, however, had submitted declarations purporting to articulate First Amendment harm that it claimed it would experience following compliance. *See* Decl. of Christian Schaeffer in Supp. of Pl.'s Mot. for Prelim. Inj., *RNC*, No. 22-cv-659 (D.D.C. Mar. 15, 2022), ECF 8-2; Suppl. Decl. of Christian Schaeffer in Supp. of Pl.'s Mot. for Prelim. Inj., *RNC*, No. 22-cv-659 (D.D.C. Mar. 29, 2022), ECF 21-1. Dr. Ward, by contrast, has not done so, nor has she articulated any non-speculative theory of harm in her complaint. This failure, as the district court correctly held, is fatal to her claim.

Likewise, Plaintiffs' distinction (Mot. 13-14) between the standards set forth in *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010), and *Citizens United v. FEC*, 558 U.S. 310 (2010), provides no reason to grant an injunction—Plaintiffs

would lose handily under either standard. For reasons stated above, even under Plaintiffs' preferred *Citizens United* standard, they plainly cannot show—and have made minimal effort to show—any "reasonable probability" that subpoena compliance would subject anyone "to threats, harassment, or reprisals from either Government officials or private parties." Mot. 14 (quoting *Citizens United*, 558 U.S. at 367).

Finally, under any plausible standard, the Select Committee's interest in obtaining these records—which the district court did not even reach due to the weakness of Plaintiffs' showing of harm—would outweigh any conceivable First Amendment infringement here. Dr. Ward participated in several efforts to subvert the will of the American people as expressed at the ballot box, culminating in a fake electors scheme that was instrumental in leading to the January 6th attack.

Dr. Ward's argument amounts to a claim that she has an absolute right to attempt to overturn a Presidential election, yet at the same time Congress cannot take reasonable steps to learn more about that plan. There is no serious legal question warranting this Court's review that would justify an injunction.

II. Plaintiffs Cannot Establish a "Serious Legal Question" Regarding Their HIPAA Claim

For several reasons, HIPAA plainly does not apply here.

First, as the district court correctly held, Appx-26, HIPAA does not provide a private cause of action. *See Webb v. Smart Document Sols.*, 499 F.3d 1078, 1081 (9th Cir. 2007).

Second, as the district court also correctly held, Appx-27, regulations promulgated under HIPAA require only "covered entit[ies]" to maintain certain medical records in confidence. *See* 45 C.F.R. § 164.502. HIPAA's disclosure restrictions do not apply to this subpoena because neither the entity from which the records were sought—T-Mobile, a telecommunications carrier—nor the Select Committee or its Members fit within HIPAA's definition of "covered entity." *See* 45 C.F.R. § 160.103.

A "covered entity" under the HIPAA regulations is a "health plan," a "health care clearinghouse," or a "health care provider who transmits any health information in electronic form in connection with a transaction covered by" the HIPAA regulations. *Id.* (further defining "health care provider" as (1) hospitals, nursing, and rehabilitation facilities; (2) providers of "medical or health services;" and (3) any other person "who furnishes, bills, or is paid for health care in the

normal course of business"). T-Mobile does not fit this definition, nor does any Congressional entity or person.[10]

Third, the call detail records are not covered under HIPAA because they do not contain "protected health information" as defined by the regulations, *see* 45 C.F.R. § 160.103, and they are not transactions covered by the regulations, *see, e.g.*, 42 U.S.C. § 1320d-2(a)(2); 45 C.F.R. § 160.103 (listing covered transactions); *see also* 45 C.F.R. §§ 162.1101-162.1901 (providing definitions of all covered transactions except "first report of injury" and "health claims attachments").

For all three independent reasons, plaintiffs' HIPAA claim must fail. For a "serious legal question" to be presented, the question whether plaintiffs could

[10] Plaintiffs assert that "[t]he 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." Mot. 15. But none of the four such cases they cite provide any reason to question that ruling. *See Montoya v. Arizona*, No. 18-cv-08025, 2019 WL 4918119 (D. Ariz. Oct. 4, 2019) (addressing HIPAA in context of a motion to suppress evidence, and noting that private plaintiffs cannot enforce it); *Pyankovska v. Abid*, No. 2:16-cv-02942, 2018 WL 10322414 (D. Nev. Oct. 16, 2018) (addressing application of HIPAA in discovery dispute); *Crenshaw v. MONY Life Ins. Co.*, 318 F. Supp. 2d 1015, 1028-29 (S.D. Cal. 2004) (sanctioning lawyer and expert witness for violating HIPAA); *Orthoflex, Inc. v. ThermoTek, Inc.*, No. 12–MC–00013, 2012 WL 1038801 (D. Ariz. Mar. 28, 2012) (noting, in a non-HIPAA case that a party to an existing lawsuit may move to quash a subpoena issued to a third party where the party has a privacy interest). Plaintiffs claim that "HIPAA requires that the party serving the subpoena either (1) obtain patient consent; or (2) seek a qualified protective order." Mot. 16. Even if correct, that is irrelevant here, given that (as the district court correctly held) HIPAA provides no private right of action and neither the issuer nor the recipient of the subpoena is a covered entity.

prevail on their HIPAA claim—*i.e.*, whether *all three* arguments above are wrong—would need to be "substantial, difficult, and doubtful." It is not.

III. Plaintiffs Cannot Show Irreparable Injury

As the district court correctly held, Plaintiffs' claims "fall[] short of stating the concrete, irreparable injury warranted for a preliminary injunction." Appx-48. Plaintiffs offer only speculation as to possible injury, but this Court has made clear that "[s]peculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction." *Doe*, 19 F.4th at 1181 n.7 (quoting *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988); *see also Winter*, 555 U.S. at 22 ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction."). Neither of the two cases cited by Plaintiffs contains anything to the contrary. *See* Mot. 17-18. That a denial of an injunction pending appeal will moot this case does not exempt Plaintiffs from the need to demonstrate that an actual injury is not merely speculative but likely.

IV. The Balance of Equities and Public Interest Favor the Select Committee

Finally, the merged analysis of equities and public interest also favors the Select Committee. The Select Committee is investigating a grave assault on our Nation's democracy, one whose seeds were planted months before January 6th. The completion of this investigation in a thorough fashion is of great public

interest. As the D.C. Circuit has held, the Select Committee's interest in studying the January 6th attack and proposing remedial measures is "vital" and "uniquely weighty." *Trump v. Thompson*, 20 F.4th at 17, 35.

Dr. Ward aided a coup attempt. She tried to stop the vote count in Maricopa County, tried to arrange contact between President Trump and a top county official, promoted inaccurate allegations of election interference by Dominion Voting Systems, and served as a fake elector as part of Trump's scheme to overturn the election on January 6th by sending Congress spurious electoral slates in contravention of the actual electoral outcome in several states. These matters are of significant interest to the Select Committee, and T-Mobile's compliance with the subpoena will impose no hardships on Dr. Ward, who need not act at all.

Furthermore, the fact that the Select Committee's investigative priorities have dictated its litigation focus over time has no bearing on whether the equities *now* favor Dr. Ward. Arguing to the contrary, Plaintiffs cited before the district court (ECF 65 at 5) a death penalty case, in which this Court found that the district court had "properly weighed undue delay in the balance of equities" where the plaintiff filed *eight days* before his scheduled execution a suit that he could have brought *ten years* earlier. *Cooper v. Rimmer*, 379 F.3d 1029, 1031-32 & n.2 (9th Cir. 2004). *Cooper* bears no resemblance to the present case, in which Congressional Defendants filed their motion to dismiss over two months ago,

causing no burden to the district court nor to Dr. Ward, who consented to every requested extension.

The Select Committee is authorized through the end of the current Congress, which expires on January 3, 2023. *See* H. Res. 503 § 7(a); *see also* U.S. Const., Amend. XX, § 1. Far from (as Dr. Ward suggests) preserving the status quo, any further delay would, practically speaking, make it extremely difficult for the Select Committee to obtain and effectively utilize the subpoenaed records before that date.

Before the district court, Dr. Ward correctly noted (Appx-41) that "[t]he essence of self-government is free and fair elections." The Select Committee is investigating Dr. Ward's role in a catastrophic effort to overturn just such an election. The public interest heavily favors allowing the Select Committee to complete its work.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' emergency motion for an injunction pending appeal.

Respectfully submitted,

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October 14, 2022

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limitations of Fed. R. App. P. 27(d)(2) and 9th Cir. R. 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 5,023 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.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). This document has been prepared using Microsoft Word in 14-point Times New Roman font.

/s/ Douglas N. Letter
Douglas N. Letter

October 14, 2022

CERTIFICATE OF SERVICE

I certify that on October 14, 2022, I filed one copy of the foregoing Opposition to Plaintiffs-Appellants' Emergency Motion for Injunction Pending Appeal via the CM/ECF system of the United States Court of Appeals for the Ninth Circuit, which I understand caused service on all registered parties.

/s/ Douglas N. Letter
Douglas N. Letter