Case No. 22-16473

In the

United States Court of Appeals

for the

Ninth Circuit

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

v.

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

Appeal from the United States District Court for the District of Arizona (Prescott), Case No. 3:22-cv-08015-PCT-DJH · Honorable Diane J. Humetawa District Judge

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3; RELIEF IS NEEDED BY OCTOBER 19, 2022

PLAINTIFFS-APPELLANTS' REPLY TO SELECT COMMITTEE'S OPPOSITION TO EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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I. WHETHER THE COMMITTEE'S IMMEDIATE INVESTIGATIVE DESIRES SUBSTANTIALLY OUTWEIGH THE CORE FIRST AMENDMENT RIGHTS AT STAKE IS A SERIOUS AND DIFFICULT QUESTION.

The first question presented is whether the Committee's **immediate** investigative needs supersede the core First Amendment political associational rights at stake? For part one of the injunction analysis, the Court need only determine that this question is substantial, unsettled, and and/or important. *See Fraihat v. ICE*, 16 F.4th 613, 635 (9th Cir 2021); *WMATA v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) (stating that an injunction pending appeal may be warranted in situations where, as here, there exists "a fair ground for litigation and thus for more deliberative investigation"). If the issues presented here do not satisfy that standard, no issues ever will.

The Committee contends that its investigative needs are so important that they override any of the Wards' First Amendment political associational concerns. The Wards argued – relying on *NAACP v. Alabama*, 357 U.S. 449 (1958) (subpoena seeking disclosure of identity of group members); *Americans for Prosperity v. Bonta*, 141 S. Ct. 2373 (2021) (statute requiring disclosure of names of large donors), and the *Pelosi* line of cases (which the Committee abandoned after the D.C. Circuit determined that the similar questions presented there were substantial and important) – that the subpoena to T-Mobile infringed on the core

First Amendment rights of Chairwoman Ward (and Arizona Republicans in telephone contact with her) and the claimed infringement could not survive the "exacting scrutiny" analysis mandated by the Supreme Court. Wards' Br. 8-13. While the parameters of exacting scrutiny analysis have not been laid down with precision by the courts, few governmental actions have withstood exacting scrutiny analysis and the judicial scrutiny that is required to be applied here is an additional reason to grant the injunction. *See also ACLU v Clapper* 785 F.3d 787, 821-25 (2d Cir. 2015) (balancing First Amendment associational and privacy concerns of government metadata collection from third-party communication providers against anti-terrorism needs presents "most difficult" and "weighty" constitutional questions).

In order to plead a "plausible" First Amendment claim, Plaintiffs were not required to demonstrate more than a reasonable probability that the metadata itself will be collected absent relief. *See Clapper* 802-03 ("When the government collects appellants' metadata, appellants' members' interests in keeping their associations and contacts private are implicated, and any potential "chilling effect" is created at that point."). But, though not required, the Wards also easily showed that there was a "reasonable probability" that political associational rights would actually be chilled because it was a certainty that Committee investigators would reach out to those in contact with Chairwoman Ward as part of their investigation.

There is no other reason to seek the information. Chairwoman Ward has made no secret of her support for Donald Trump; her concerns about the integrity of the 2020 election; or her role in sending an alternate slate of electors to Washington.

The only reason to subpoena Chairwoman Ward's telephone records is to get at those with whom she associated and to question them about their communications with Chairwoman Ward. "When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995).

It is hard to imagine a greater chill on public participation in partisan politics than an inquiry from federal investigators brought about by partisan advocacy. *See, e.g.*, *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (stating that "[t]he investigation by the HUD officials unquestionably chilled the plaintiffs' exercise of their First Amendment rights"). Indeed:

> Perhaps the most common harm . . . resulting from law enforcement investigations into political and religious expression is the chilling impact on such expression. . . . [T]he overt nature of interviews actually makes them more likely to directly and immediately influence behavior than covert investigative methods[.]

S. Sinnar, *Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews*, 77, Brooklyn L. Rev. 41, 67 (Fall 2011) (further noting the historical use of investigations to disrupt the operations of political

opponents); *see also* L.E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 Ariz. L. Rev. 621, 646 (2004) ("There can be practically no clearer violation of the constitutional right of association than intentional government interference with the peaceful functioning of an intermediate association.").

The Committee tacitly concedes that *Pelosi* would not have been resolved in their favor but argues that it was a case about different sorts of documents. Opp'n 15-16. The Committee then discusses every category of document subpoenaed in *Pelosi* **except** for the one most relevant – metadata related to login sessions by individuals associated with the Trump Campaign or RNC. *Republican Nat'l Comm. v. Pelosi* 2022 U.S. Dist. LEXIS 78501, at *10 (D.D.C. May 1, 2022). If anything, the records at issue here are **more** expansive – this metadata requested is not limited to employees of a presidential campaign or the GOP but includes Dr. Ward's patients and rank-and-file volunteers for conservative candidates and causes.

Control of Congress changes regularly. The precedent set here will or will not set limits on the scope of future committees' investigations of political opponents. It is an extremely important and difficult issue.

II. SOVEREIGN IMMUNITY IS NO BAR TO AN INJUNCTION.

Recognizing that the Wards raised important and substantial questions in this unprecedented factual scenario, the Committee contends that the motion to quash is barred by sovereign immunity. The Committee is wrong.

State actors have no authority to act unconstitutionally and challenges to unconstitutional state action fall within the *Larson-Dugan* exception to sovereign immunity, which permits courts to enjoin unconstitutional acts even absent a waiver of sovereign immunity. *Pollack v. Hogan*, 703 F.3d 117, 120 (D.C. Cir. 2012) (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689, 693 (1949) and *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963)); *see also Strickland v. United States*, 32 F.4th 311, 365-66 (4th Cir. 2022) (applying exception). Thus, sovereign immunity is no bar to an injunction quashing the T-Mobile subpoena.

III. THE WARDS HAVE STANDING TO ASSERT VIOLATIONS OF FIRST AMENDMENT ASSOCIATIONAL RIGHTS.

The subpoena served on T-Mobile sought only the telephone and text message records of the Wards. Thus, it naturally fell to the Wards to object to the subpoena, and move to quash it, which they did. However, because Dr. Ward is the chairwoman of the AZGOP, the subpoena necessarily implicates the political associational interests of Arizona Republicans (and even non-affiliated voters and activists concerned about the election) in contact with her during the relevant time period.

The Wards clearly have standing to assert violations of their political associational interests (and the Committee does not appear to contend otherwise). That should end the standing inquiry. Chairwoman Ward, however, also has standing to contend that the T-Mobile subpoena tramples on the political associational rights of Arizona Republicans.

To establish associational standing, a plaintiff must plausibly allege that (1) there is at least one member who "would otherwise have standing to sue in [her] own right" (here, Chairwoman Ward); (2) the interests that are being protected are germane to the association's purpose (the integrity of the 2020 election qualifies); and (3) "neither the claim asserted nor the relief requested required the participation of [the] individual members in the lawsuit" (here no one other than Chairwoman Ward is necessary). *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977)

All the *Hunt* factors are present here and the Committee cannot create a standing issue by subpoenaing the chairwoman rather than the party itself. Indeed, associational rights belong to natural persons **alone** and may be asserted on behalf of others even when there is no common organizational membership **at all** but merely collaboration to advance a common political agenda. *See Perry v. Schwarzenegger*, 602 F.3d 976, 981 (9th Cir. 2010), *Aldapa v. Fowler Packing Co.*

2016 U.S. Dist. LEXIS 78791, at *17 (E.D. Cal. June 16, 2016).[1] The participation of the association itself cannot, therefore, be a requirement.

IV. THE PATIENT PRIVACY ISSUES AT STAKE ARE ALSO SUBSTANTIAL AND IMPORTANT.

In its Opposition, the Committee argues that HIPAA does not apply because (1) it does not create a private cause of action; (2) T-Mobile is not a covered entity under HIPAA; and (3) the information sought does not contain protected health information. None of these arguments has merit.

First, the Wards do not claim that HIPAA provides a private right of action, but that, through HIPAA, Congress created the federal common-law standard for asserting a medical records privilege. Mot. at 15-16. The Committee fails to address this point.

Secondly, to find that the use of a third-party communications provider constitutes an effective waiver of physician patient privilege is to find an exception that swallows the rule. Construing the attorney-client and work-product privileges under a similar set of facts, the *Eastman* court first noted the "the public policy implications of a finding that Dr. Eastman waived all attorney-client privilege

[1] Revealingly, the Committee never raised a standing challenge in its Motion to Dismiss though it acknowledged that Plaintiffs had specifically plead that "the subpoena 'provides the [Select] Committee with the means to chill the First Amendment associational rights' of the Wards' and 'the entire Republican Party in Arizona[.]'" (Doc. 46) 22:1-5 (citing Compl. ¶ 52). It relies on the argument for the first time here because it recognizes that its other contentions are unavailing.

through his use of Chapman email" before rejecting the "sweeping proposition that using any email provider that complies with subpoenas" allows Congress to circumvent these privileges. 2022 U.S. Dist. LEXIS 59283, at *29, 44 (C.D. Cal. Mar. 28, 2022). Though the Committee acknowledges that the cases Plaintiffs have cited stand for the contrary proposition, it contends that variations in the procedural posture of those cases limit their value. To the contrary, "the limited caselaw involving legislative subpoenas[,]" *id*. at *62, makes the resolution of this question more difficult and weighty and cuts in favor of a stay.

Most damning of all, the Committee argues that "**significantly for this case**" the subpoenaed metadata does "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." Opp'n 5. Whether the metadata that is the subject of the subpoena reveals this information is indeed **highly** relevant.

With a patient's phone number it is a "trivial" matter for even a private citizen to find the patient's name.[2] Further, "home locations can often be predicted using imprecise and sparse telephone metadata[.]"[3]

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[2] Jonathan Mayer, et al., *Evaluating the Privacy Properties of Telephone Metadata*, Proceedings of the National Academy of Sciences (2016) p 5536-5541 V 113 N 20 (available at: https://www.pnas.org/doi/epdf/10.1073/pnas.1508081113)

[3] *Id*.

The call detail and text message records the Committee seeks will reveal (without a protective order) patient identities and why they were being treated. That is classic protected health information. *Dinerstein v. Google, LLC*, 484 F. Supp. 3d 561, 585 (N.D. Ill. 2020) (defining PHI as "individually identifiable health information"). "That telephone metadata do not directly reveal the content of telephone calls . . . does not vitiate the privacy concerns" arising out of the collection. *ACLU v. Clapper*, 785 F.3d 787, 794 (2d Cir. 2015). Telephone "[m]etadata can reveal civil, political, or religious affiliations . . . an individual's social status, or whether and when he or she is involved in intimate relationships." *Id*. The mere fact of a call to a single-specialty provider may reveal whether someone is "a victim of domestic violence or rape; a veteran; suffering from an addiction of one type or another; [or] contemplating suicide[.]"). *Id*. Accordingly, "[w]hen the government collects [a party's telephone] metadata [the party and their associates'] interests in keeping their associations and contacts private are implicated, and any potential 'chilling effect' is created at that point." *Id*. 802-03.

For these reasons, a patient phone number associated with a healthcare provider is presumed to be PHI.[4] It does no good to argue that Dr. Ward's phone was also used for other purposes. Patients should not have to choose between the

[4] *See* https://www.hhs.gov/hipaa/for-professionals/privacy/special-topics/de-identification/index.html (last accessed Oct. 16, 2022).

implication they are part of a seditious conspiracy and admitting that they were receiving medical weight-loss treatment. Yet, because all of Dr. Ward's patients are being treated for medical weight loss, this is the choice they will face if the Committee has its way.

V. APPELLANTS WILL BE IRREPRABLY HARMED ABSENT AN INJUNCTION.

The Wards face irreparable harm because their appeal will become moot absent an injunction. Mot. at 17 (citing *ProtectMarriage.com – Yes on 8 v. Bowen*, 752 F.3d 827, 837-38 (9th Cir. 2014); *Ahlman v. Barnes*, 20 F.4th 489, 493-94 (9th Cir. 2021)). *See also Perry* at 1137; *McDaniel v. Sanchez*, 448 U.S. 1318, 1322 (1980) (Powell, J.) (recalling circuit court mandate and granting stay based in part on likely irreparable harm due to mootness).

The Committee concedes that "a denial of an injunction pending appeal will moot this case," but at the same time suggests that the Wards' claim of irreparable harm is "speculative." Opp'n. at 20. Those two propositions cannot be reconciled. If the failure to grant an injunction will moot the case, then the Wards will have no remedy on appeal and will, thus, be irreparably harmed.

VI. THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST FAVOR AN INJUNCTION.

The Wards showed that they will be irreparably harmed and that the public interest favors the protection of First Amendment rights and patient privacy issues

while this Court gives due consideration to the important issues raised in their appeal. Mot. at 17-20. By contrast, the Committee slow-walked this case for seven months and was only prompted to move things forward by a *sua sponte* order of the district court. *Id*. at 18-19. Whether the Committee has need of the subpoenaed materials is not currently the issue. The present question is whether it has an **immediate** need of such intensity as to warrant irrevocably depriving the Wards of their right to appeal.

It is difficult to credit arguments of such urgent need as to justify depriving the Wards of their right of appeal in the face of this undisputed Committee behavior. Any urgency faced by the Committee is self-created. That, for seven months, the Committee had other "investigative priorities," which may "have dictated its litigation focus over time," Opp'n. at 21, cannot now be used to claim that the circumstances are so urgent that the Wards' appeal and constitutional rights must be prejudiced.[5]

Further, members of Congress must allege injury to the prerogatives of the body itself, not their own personal policy preferences. *See Raines v. Byrd*, 521 U.S. 811, 820-21 (1997). Congressional committees naturally terminate every two years, but Congress can and does frequently renew them. This Court should reject

[5] The Wards are also amenable to an expedited briefing schedule, should the Committee wish one.

the proposition that cases must be decided according to the election cycle. However, while the January "deadline" is entirely speculative and is within the power of Congress to control, the important and substantial issues in this case will set a precedent for future congressional committees. Such important issues at the heart of our democracy should be resolved in the deliberative and orderly manner that they deserve.

CONCLUSION

The Committee contends that "[t]he completion of this investigation in a thorough fashion is of great public interest." Opp'n at 20. Thoroughness requires more than steamrolling the substantial and difficult Constitutional questions this case presents. The injunction pending appeal should be GRANTED.

Dated: October 17, 2022 Respectfully submitted,

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> *If an order or rule of this Court sets forth a page limit for a brief or other document, the affected party may comply with the limit by:*
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Lauren H. Mills

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