[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 22-5222

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

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 (No. 21-3366)
(Hon. James E. Boasberg, U.S. District Judge)

COMBINED REPLY IN SUPPORT OF MOTION FOR SUMMARY AFFIRMANCE AND RESPONSE IN OPPOSITION TO MOTION FOR ASSIGNMENT TO *RNC* PANEL

INTRODUCTION

Taylor Budowich's response here demonstrates that "[t]he merits of the parties' positions are so clear as to warrant summary action," *Hassan v. FEC*, No. 12-5335, 2013 WL 1164506, at *1 (D.C. Cir. Mar. 11, 2013) (per curiam), and "no benefit will be gained from further briefing and argument of the issues presented." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987) (per curiam). Indeed, key parts of his response are virtually identical to his district court opposition to Congressional Defendants' motion to dismiss. *Compare* Combined Resp. in Opp. to Mot. for Summ. Aff. by Select Comm. Appellees and Mot. for Assignment to RNC Matter Panel ("Resp.") at 18-23 *with* Pls.' Mem. of P. & A. in Opp. to Mot. to Dismiss Am. Compl. by Select Comm. Defs. at 23-25, 27-29, No. 1:21-cv-03366 (D.D.C. Apr. 8, 2022), ECF 38. Because it is clear that no benefit will be gained from further briefing and argument, this Court should grant Congressional Defendants' motion for summary affirmance.

ARGUMENT

Budowich essentially presents two arguments in opposition to summary affirmance. Neither is convincing.

First, he argues that the district court incorrectly dismissed his complaint on Speech or Debate Clause grounds because the subpoena to J.P. Morgan Chase Bank ("JPMorgan") lacked a valid legislative purpose. *See* Resp. at 14-16, 19-20.

Second, he claims that the district court should have denied Speech or Debate Clause immunity because of the "unique and egregious facts of this case." *Id.* at 19, 20-23.

Budowich's legislative purpose argument fails. As the district court noted, in the context of adjudicating a Speech or Debate Clause immunity defense, the courts' inquiry into whether a subpoena has a valid legislative purpose is a narrow one. *See* Mem. Op. ("Op.") at 11, No. 1:21-cv-03366 (D.D.C. June 23, 2022), ECF 46. And as the Supreme Court held in *Eastland v. U.S. Servicemen's Fund*, in determining whether a challenged subpoena falls within the ambit of the Speech or Debate Clause, "[t]he propriety of making [the subpoena target] a subject of the investigation and subpoena is a subject on which the scope of our inquiry is narrow." 421 U.S. 491, 506 (1975). Specifically, "[t]he courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province." *Id.* (quoting *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951)).

As established by House Resolution 503, the purposes of the Select Committee include "[t]o investigate and report upon the facts, circumstances, and causes relating to the January 6, 2021, domestic terrorist attack." H. Res. 503, 117th Cong. § 3(1) (2021). The functions of the Select Committee, in turn, include the investigation of "facts and circumstances relating to," *id.* § 4(a)(1), "how . . .

financing . . . may have factored into the motivation, organization, and execution of the domestic terrorist attack on the Capitol," *id.* § 4(a)(1)(B). As the district court properly concluded:

> [T]he Committee had reason to believe that Budowich had directed significant funds to pay for the Ellipse rally that immediately preceded the attack on the Capitol. It thus logically follows that its decision to subpoena his financial information for the period surrounding January 6, 2021, may fairly be deemed within its province and thus falls within the scope of the [Speech or Debate] Clause.

Op. at 12 (internal quotation marks and citations omitted). Specifically, Chairman Thompson noted, in a cover letter accompanying a subpoena to Budowich, that the Select Committee had "reason to believe" that Budowich had directed $200,000, from a source that was "not disclosed," to pay for an advertising campaign to encourage people to attend the "Stop the Steal" rally on January 6th in support of then-President Trump and his discredited allegations of election fraud. *Id.* at 3-4 (quoting Am. Compl. Ex. A at 3-4, ECF 30-1, attached as Ex. 2 to Cong. Defs.' opening brief).

Budowich offers no response to this. He notes—correctly—that "the content a congressional subpoena seeks must be pertinent to the legislative purpose and functions of the Select Committee." Resp. at 20. But he does not even discuss, much less rebut, the district court's unassailable holding that the subpoena here was well within the Select Committee's province.

Budowich fares no better in arguing that, "[u]nder the unique and egregious facts of this case, the Speech or Debate Clause does not immunize the unlawful acts of the Select Committee." *Id.* at 19. He does not discuss the repeated holdings of this Court that a mere accusation of illegality does not vitiate the character of a legislative act. *See, e.g.*, *Jud. Watch v. Schiff*, 998 F.3d 989, 992-93 (D.C. Cir. 2021); *Rangel v. Boehner*, 785 F.3d 19, 24 (D.C. Cir. 2015). Budowich's "'familiar' argument—made in almost every Speech or Debate Clause case—has been rejected time and again." *Rangel*, 785 F.3d at 24 (quoting *Eastland*, 421 U.S. at 510); *see also* Op. at 13. Even assuming Budowich's characterization of this case as "egregious" is correct (and it is not), that is still of no legal relevance under this Court's precedent. "Such is the nature of absolute immunity, which is—in a word—absolute." *Rangel*, 785 F.3d at 24.

Budowich's true quarrel is with the Framers of the Constitution, who included the Speech or Debate Clause in the Constitution because they insisted on protecting the legislative process from interference by both the Executive and Judicial Branches. *See, e.g.*, *Schilling v. Speaker of the U.S. House of Representatives*, --- F. Supp. 3d ---, 2022 WL 4745988 at *4-6 (D.D.C. Oct. 3, 2022) (discussing the drafting and inclusion of the Speech or Debate Clause). The district court here merely applied that Clause, as required by numerous decisions of the Supreme Court and this Court.

Moreover, contrary to Budowich's argument, *see* Resp. at 20-23, his (incorrect) allegation that this case involves "unique and egregious facts," *see id.* at 20, provides the district court no authority to order disgorgement and return of records in the Select Committee's possession. As Budowich admits, *Senate Permanent Subcommittee on Investigations v. Ferrer*, 856 F.3d 1080 (D.C. Cir. 2017), *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995), and *Hearst v. Black*, 87 F.2d 68 (D.C. Cir. 1936) "all broadly support the Select Committee's contention that the Court cannot order the return of documents in Congress's possession." Resp. at 23. But Budowich nonetheless asks this Court to fashion an entirely new exception to that settled principle when, as here, a plaintiff alleges that Congress has "thwart[ed] *any* challenge to a congressional subpoena where the Committee *was on actual notice* of a forthcoming legal challenge." *Id.* (emphases in original). Budowich cites no authority in support of his novel proposition, and Congressional Defendants are aware of none. Indeed, this proposed exception is directly contrary to precedent of the Supreme Court and this Court and would substantially undermine the operation of the Speech or Debate Clause, which "permits Congress to conduct investigations and obtain information without interference from the courts." *Brown & Williamson*, 62 F.3d at 416.

Budowich also argues that the Select Committee is improperly constituted, *see* Resp. at 12-14, and that sovereign immunity does not apply, *see id.* at 16-18. But neither issue is relevant to the instant motion for summary affirmance of the district court's judgment. The district court relied entirely on the Speech or Debate Clause for its decision and did not reach either issue.

Finally, Budowich asks that this case be assigned to the panel that heard *Republican National Committee ("RNC") v. Pelosi*, No. 22-5123. But he cannot justify this extraordinary request.

This case and *RNC* are not "related cases," which this Court defines as "any case involving substantially the same parties and the same or similar issues." D.C. Cir. R. 28(a)(1)(C); *cf. Pub. Serv. Comm'n for N.Y. v. Fed. Power Comm'n*, 472 F.2d 1270, 1272 & n.4 (D.C. Cir. 1972) (noting that, in determining whether an "interrelated" proceeding should be transferred to another court of appeals, "the 'interrelated' term refers to an organic relation, in what may fairly be called a single 'total proceeding' and not merely similarity of legal issues"). The Republican National Committee—the sole plaintiff in *RNC*—is obviously not "substantially the same" party as Taylor Budowich. Nor are the defendants "substantially the same"—the RNC sued Salesforce, Inc., whereas Budowich instead sued JPMorgan. Furthermore, although there are some overlapping issues in the two cases, the instant case includes various issues not present in *RNC,*

including: the ability of courts to order disgorgement of records provided to Congress, the applicability of the Right to Financial Privacy Act, the Fifth Amendment's Due Process Clause, and (as to JPMorgan) the California Constitution and two different provisions of the California Unfair Competition Law. *See* Op. at 5-6.

While a case may, "in the interest of judicial economy and consistency of decisions," warrant adjudication by the same panel that adjudicated an earlier case, D.C. Cir. Handbook of Practice and Internal Procedures at 48, these considerations do not justify assignment of this case to the *RNC* panel. *First*, this applies only to cases that are related, which (as discussed above) these cases are not. *Second,* because *RNC* was found to be moot and has been dismissed, *see* No. 22-5123, 2022 WL 4349778 (D.C. Cir. Sept. 16, 2022) (per curiam), assignment of this case to the *RNC* panel would not materially advance "judicial economy." *Third*, contrary to what Budowich claims, there is absolutely no risk of inconsistent decisions, because the *RNC* panel did not even reach the merits of the claims there. Rather, its rulings were limited to granting an administrative injunction, granting a motion for injunction pending appeal, and finally dismissing the appeal as moot while vacating the district court's judgment. *See* Order, No. 22-5123, Doc. #1947814 (D.C. Cir. May 24, 2022) (per curiam); Order, No. 22-5123, Doc. #1948112 (D.C. Cir. May 25, 2022) (per curiam); Order, No. 22-5123, 2022 WL

4349778 (D.C. Cir. Sept. 16, 2022). Regardless, any appellate panel would be fully capable of avoiding inconsistency with a case that already has been dismissed.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our opening brief, the Court should summarily affirm the judgment of the district court and deny the motion for assignment to the *RNC* panel.

Respectfully submitted,

/s/ Douglas N. Letter
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October 24, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I certify that this brief complies with the type-volume limitation of Rule 27(d)(2), as it contains 1,710 words.

/s/ Douglas N. Letter
Douglas N. Letter

October 24, 2022

CERTIFICATE OF SERVICE

I certify that on October 24, 2022, I filed one copy of the foregoing Combined Reply in Support of Motion for Summary Affirmance and Response in Opposition to Motion for Assignment to *RNC* Panel via the CM/ECF system of the United States Court of Appeals for the District of Columbia Circuit, which I understand caused service on all registered parties.

/s/ Douglas N. Letter
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