NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 22-5222

In the United States Court of Appeals for the District of Columbia Circuit

TAYLOR BUDOWICH
PLAINTIFF-APPELLANT

and

CONSERVATIVE STRATEGIES, INC.,
PLAINTIFF

v.

NANCY PELOSI, IN HER OFFICIAL CAPACITY AS SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.
DEFENDANTS-APPELLEES

and

J.P. MORGAN CHASE BANK, N.A.,
DEFENDANT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (CIV. NO. 21-3366) (THE HONORABLE JAMES E. BOASBERG, J.)

REPLY IN SUPPORT OF MOTION FOR SUMMARY AFFIRMANCE OF APPELLEE J.P. MORGAN CHASE BANK, N.A., AND RESPONSE IN OPPOSITION TO APPELLANT TAYLOR BUDOWICH'S MOTION FOR "ASSIGNMENT TO RNC MATTER PANEL"

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INTRODUCTION

In his opposition to Chase's motion for summary affirmance, Budowich makes no effort to address any of Chase's arguments, let alone the district court's reasoning in its careful and thorough opinion dismissing Budowich's claims. Instead, Budowich simply recycles his filing in the district court—proving why further briefing on appeal would be of no benefit. As Chase explained in its motion for summary affirmance, Budowich's non-statutory federal claims are moot and do not state a claim; his claim under the Right to Financial Privacy Act fails because, by its plain terms, the Act does not apply to congressional inquiries; and his remaining claims do not allege any violation of the California Constitution or the California Unfair Competition Law.

Budowich's filing also includes a request that this appeal be assigned to the panel that presided over the appeal in *Republican National Committee* v. *Pelosi*, No. 22-5123, dismissed as moot last month before oral argument. Budowich provides no cogent reason for departing from the default rule of random assignment. And there is none. The *Republican National Committee* appeal not only did not involve substantially the same parties or the same or similar issues as this case, but also is no longer pending before this Court.

Budowich's appeal so clearly lacks merit that further briefing and oral argument are unnecessary. This Court should affirm the district court's order and deny Budowich's motion for assignment to a particular merits panel.

ARGUMENT

I. THIS COURT SHOULD DENY BUDOWICH'S REQUEST FOR ASSIGNMENT TO A PANEL THAT RESOLVED AN APPEAL INVOLVING DIFFERENT CLAIMS AND DIFFERENT PARTIES

Attempting to secure the assignment of a particular panel to his appeal, Budowich incorrectly argues that this case is "related" to *Republican National Committee* v. *Pelosi*, No. 22-5123. *See* Resp. 4. In support of his request, Budowich cites this Court's Rule 28(a)(1)(C), which merely requires that briefs on appeal contain a "statement" disclosing "any other related cases currently pending in this [C]ourt or in any other court of which counsel is aware." For purposes of that rule, "[t]he phrase 'any other related cases' means any case involving substantially the same parties and the same or similar issues." *Id.* Budowich's filing, however, makes clear that this case does not meet the Court's guidelines for related-case treatment: (1) the *Republican National Committee* appeal is not "currently pending" before this Court; (2) it did not involve "substantially the same parties"; and (3) it did not involve "the same or similar issues." Budowich's threadbare arguments to the contrary lack merit. This Court should deny his request.

First, as a threshold matter, Budowich fails to point to any "currently pending" related appeal before this Court. The reason is simple: there is none. This Court already granted the unopposed motion to dismiss as moot the appeal in *Republican National Committee* v. *Pelosi*, No. 22-5123. *See* 2022 WL

4349778, at *1 (Sept. 16, 2022) (per curiam). There is thus no risk, contrary to Budowich's conclusory assertions, of any "inconsistent adjudications" or "duplication of efforts" here. Resp. 4.

Second, Budowich's argument that these cases involve "common questions of law and fact," Resp. 4, is incorrect. While some legal issues do overlap, the vast majority do not, and the facts are not common, either. Here, the Select Committee issued a subpoena to Chase for financial records as part of an investigation into payments for an "advertising campaign to encourage people to attend the rally held on the Ellipse in Washington, D.C. on January 6, 2021." Dkt. 30-1, at 4. Budowich claimed that the bank's compliance with that subpoena violated the Right to Financial Privacy Act; the First, Fourth, and Fifth Amendments to the U.S. Constitution; the California Constitution; and California Unfair Competition Law. *See* Resp. 11. The vast majority of those legal and factual issues did not arise in *Republican National Committee*. That case involved a subpoena to a vendor (Salesforce) that provided cloud-based services to the RNC for information "regarding whether and how the Trump campaign used Salesforce's platform to disseminate false statements about the 2020 election in the weeks leading up to the January 6th attack." House Br. 13. The RNC argued that the subpoena to Salesforce violated the Stored Communications Act and the First and Fourth Amendments to the U.S. Constitution. RNC Br. 9. The few overlapping legal issues that Budowich flags, *see* Resp. 4,

are simply insufficient to render related two cases that otherwise involve entirely different factual predicates and federal and state claims.

Third, that lack of commonality is underscored by Budowich's complete failure to argue that these cases involve "substantially the same parties," which is another factor that this Court considers for related-case designations under Rule 28(a)(1)(C). And the parties are not substantially the same. In *Republican National Committee*, the RNC sued the Select Committee and its nine members, the Speaker of the House of Representatives, and Salesforce. *See* House Br. 15. Neither Budowich nor Chase was a party. Indeed, no plaintiff there was an individual, and no defendant was a financial institution. In other words, all of the commonality of parties starts and ends with the congressional defendants. But that can hardly be sufficient to establish that the parties are "substantially the same" under Circuit Rule 28(a)(1)(C).

In short, it would not be in the interest of judicial economy to depart from the norm of random panel assignment and assign this appeal to the *Republican National Committee* panel. That appeal is no longer pending before this Court, and there is only minimal overlap between the two cases in terms of parties and issues. Budowich's request should be denied.

II. THE MERITLESS NATURE OF BUDOWICH'S APPEAL IS SO CLEAR THAT THIS COURT SHOULD SUMMARILY AFFIRM

A. The District Court Correctly Dismissed The Constitutional And Non-Statutory Federal Claims Because They Are Moot And, In Any Event, Fail To State A Claim

1. It is "impossible for a court to grant any effectual relief whatever" to Budowich on his claims against Chase alleging violations of the First, Fourth, and Fifth Amendments, as well as his claims against Chase for supposed defects in the Select Committee's formation and policies. *Chafin* v. *Chafin*, 568 U.S. 165, 172 (2013) (quoting *Knox* v. *Service Employees International Union, Local 1000*, 567 U.S. 298, 307 (2012)). Chase has already produced the records responsive to the Select Committee's subpoena, and "[o]nce the records are produced[,] the substance of the controversy disappears and becomes moot." *Crooker* v. *State Department*, 628 F.2d 9, 10 (D.C. Cir. 1980). Even if Budowich prevailed on his non-statutory federal claims against Chase, no judicial remedies would be available. Chase can hardly be enjoined to withhold documents it already produced, and it is "undisputed" that Chase "has no present intention to produce additional documents pursuant to the subpoena." Op. 17; *see also* Dkt. 28 at 2. As a result, Budowich's claims are moot.

Budowich insists that none of his constitutional claims against Chase are moot because he "seeks monetary damages and return of his private financial records." Resp. 14-15. But Budowich's say-so does not make it so. Budowich seeking damages for *other* claims and purporting to request injunctive relief

against *other* parties does not make his constitutional and non-statutory federal claims against Chase any less moot. *See* Chase Mot. 9-12. Courts assess mootness for individual claims and individual requests for relief, not entire litigations. *See Powell* v. *McCormack*, 395 U.S. 486, 498-500 (1969); *see also Better Government Association* v. *Department of State*, 780 F.2d 86, 91 (D.C. Cir. 1986). Here, Budowich's amended complaint expressly does *not* seek damages from Chase on his constitutional and non-statutory federal claims. *See* Dkt. 30 at 35-36. Moreover, any request for injunctive relief in the amended complaint, seeking the return of the financial records that Chase produced to the Select Committee in response to the subpoena, is expressly addressed to the Select Committee, not Chase. *Id.* The constitutional and non-statutory federal claims against Chase are clearly moot.

In any event, even if Budowich had pleaded those remedies with respect to his non-statutory federal claims against Chase, those forms of relief would not have been available to Budowich as a matter of law. *First*, Budowich cannot recover damages from a private party for alleged constitutional violations. *See Correctional Services Corp.* v. *Malesko*, 534 U.S. 61, 66 (2001). *Second*, Budowich is wrong that he can maintain a claim against a bank so long as the government retains the records that the bank produced, pursuant to *Office of Thrift Supervision* v. *Dobbs*, 931 F.2d 956 (D.C. Cir. 1991). Reliance on *Dobbs* is misplaced. In that case, which held that a plaintiff's compliance with a

subpoena moots his challenge to it, this Court merely observed that a party with a possessory interest in records could maintain a live controversy against a government custodian while seeking the return of those records. *See* 931 F.2d at 958. But that is of no help to Budowich. The Supreme Court has held that bank customers do not have a constitutional interest in records held by a bank. *See Carpenter* v. *United States*, 138 S. Ct. 2206, 2216 (2018) (discussing *United States* v. *Miller*, 425 U.S. 435 (1976)).

2. The "capable of repetition, yet evading review" exception to mootness does not apply here, either. *Federal Election Commission* v. *Wisconsin Right To Life, Inc.*, 551 U.S. 449, 462 (2007). Budowich has not met his burden of showing that there is a "reasonable degree of likelihood" that "the same parties will engage in litigation over the same issues in the future." *J.T.* v. *District of Columbia*, 983 F.3d 516, 524 (D.C. Cir. 2020) (citation omitted). Rather, the opposite is true. The Select Committee has stated that it has no plan to issue further subpoenas to Chase concerning Budowich, and Chase has stated that it has no plan to produce any additional documents pursuant to the subpoena at issue. Dkt. 28, at 1-2. "Based on [those] express representations," Budowich's non-statutory federal claims have "become moot." *Republican National Committee*, 2022 WL 4349778, at *1.

To be sure, Budowich speculates that the Select Committee purportedly has an "ongoing policy" under which it is "likely" that the Committee will issue

subpoenas not to Chase, but to "additional third-parties." Resp. 14, 17. But, again, none of those speculative claims concerns Chase. No declaration or injunction directed at Chase could change any ongoing policy of the Select Committee or affect subpoenas to other third parties. Budowich's recycled arguments in his response only underscore that "no benefit will be gained from further briefing and argument" on the mootness of Budowich's constitutional and non-statutory federal claims. *Taxpayers Watchdog, Inc.* v. *Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987).

3. As a separate and independent ground for dismissal, Budowich also failed to state a claim that Chase's conduct violated the First, Fourth, or Fifth Amendment to the U.S. Constitution. Constitutional claims can only be brought against "a person who may fairly be said to be a state actor," and compliance with a subpoena clearly does not constitute state action. *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Budowich's arguments on this score, too, lack merit.

A private party's conduct amounts to state action only if the government "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982). There is no question that a subpoena creates "a legally enforceable procedural obligation to produce or provide documents or testimony." *Committee on Judiciary* v.

McGahn, 415 F. Supp. 3d 148, 166 (D.D.C. 2019), *aff'd in relevant part*, 968 F.3d 755 (D.C. Cir. 2020). But none of the factors that courts have used to discern the existence of "coercive power" or "significant encouragement" transforming private conduct into state action is present here. There are no allegations in the amended complaint that Chase, for example, "depend[s] on the [government] for funds"; performs a "public function"; or has a "symbiotic relationship" with the government. *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 841-843 (1982) (citations omitted); *see also Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 621-622 (1991). It is thus no surprise that courts have repeatedly held that banks are not state actors. *See* Op. 21 (listing cases).

Budowich theorizes that Chase "either acted under compulsion or as a willful joint participant." Resp. 28. But those arguments bear scant resemblance to law or reality. As for his willful-participant theory, Budowich musters no support for the argument that the mere fact that Chase requested and received an extension somehow meant that it "colluded" with the Select Committee. Resp. 28. As for his compulsion theory, Budowich similarly fails to identify any court adopting his unprecedented view that a private bank becomes a state actor merely by complying with a congressional subpoena. *See* Resp. 27; Op. 21. Instead, he cites a case concerning a private party's use of a state's prejudgment attachment procedures, *see Lugar*, 457 U.S. at 924-925, 932-934, and a case involving a regulation mandating that railroads adopt a

comprehensive toxicological testing system, *see Skinner* v. *Railway Labor Executives' Association*, 489 U.S. 602, 614-616 (1989). Resp. 28-29. Those cases are far afield from a bank's compliance with a subpoena.

Even assuming Budowich's claims were not moot (and they are), he has not given this Court any reason to be the first to hold that every bank that complies with a facially valid subpoena is a state actor subject to civil liability. Budowich's constitutional claims thus fail on the merits as well.

B. The District Court Correctly Dismissed The RFPA Claim Because That Act Does Not Apply To Congressional Subpoenas

1. The text, context, and legislative history of the RFPA clearly support affirmance here. The RFPA plainly does not apply to Congress. *See* Op. 22-26; *see also Trump* v. *Deutsche Bank AG*, 943 F.3d 627, 641-645 (2d Cir. 2019), *vacated and remanded on other grounds*, 140 S. Ct. 2019 (2020). The RFPA only applies to requests from a "Government authority," 12 U.S.C. § 3403(a), defined as a "department" or "agency," 12 U.S.C. § 3401(3)—terms that plainly refer to executive or administrative entities, *see* Op. 23-24, not congressional bodies. *See* Chase Mot. 15-16. And it is clear from the statutory context that Congress did not intend to subject itself to the RFPA. The statute applies only to requests for records "authorized by regulations" (which, of course, Congress does not promulgate), *see* 12 U.S.C. § 3408(2), and it directs the Office of Personnel Management (which oversees only Executive Branch employees) to determine whether a violation of the RFPA warrants

disciplinary action, *see* 12 U.S.C. § 3417(b); *see also* Op. 23. If further confirmation of the RFPA's plain meaning were necessary, Congress expressly *rejected* a proposal that would have subjected Congress to the RFPA. Op. 24. In short, every indicium of meaning points in the same direction: the RFPA does not cover congressional subpoenas.

2. Budowich's contrary arguments are unavailing. The text is plain. Congress is not a "department" or "agency," and the RFPA does not apply to congressional subpoenas.

Budowich cites inapposite precedent to override the plain text of the RFPA. He erroneously characterizes *Nicksolat* v. *Department of Transportation*, 277 F. Supp. 3d 122 (D.D.C. 2017), as a decision by "this Court" concluding that the RFPA's text applies to Congress. *See* Resp. 22. But that case involved a bank customer's motion to quash an administrative subpoena by an Executive Branch agency. *Nicksolat*, 277 F. Supp. 3d at 124. What is more, Budowich ignores the Supreme Court's admonition in *Hubbard* v. *United States*, 514 U.S. 695 (1995), that describing each branch of government as a "department" is not "ordinary parlance." *Id.* at 699.

Budowich also seeks to inject ambiguity into the otherwise clear text of the RFPA by misinterpreting other provisions of the Act. For instance, he relies on a few express exceptions to the RFPA. *See* Resp. 24-25 (citing 12 U.S.C. § 3413). But, contrary to Budowich's suggestion, Section 3413(f) merely

clarifies that the only provision of the RFPA that applies to grand juries is Section 3420, concerning record requests not by a "government authority" but "pursuant to a subpoena issued under the authority of a Federal grand jury." 12 U.S.C. § 3420(a). And Section 3413(j) clarifies that, when "a government authority" is subject to investigation or audit by the Government Accountability Office, the RFPA's restrictions on the target "government authority" do not indirectly impose limits on the GAO. 12 U.S.C. § 3413(j). Budowich similarly points to Section 3412(d) of the RFPA, which he characterizes as providing the "one circumstance where Congressional inquiries are not subject to RFPA's procedures." Resp. 25. But that provision merely clarifies that the restrictions on transfers of financial records that administrative agencies have obtained pursuant to the RFPA "shall [not] authorize the withholding of information . . . from a duly authorized committee or subcommittee of the Congress." 12 U.S.C. § 3412(d). Like the other provisions that Budowich highlights, that provision reinforces that the RFPA does *not* apply to Congress; it does not impliedly bring congressional committees within the definition of "agency or department of the United States." 12 U.S.C. § 3401.

C. The District Court Correctly Dismissed Budowich's Claims Under California Law

Finally, Budowich's allegations do not rise to the level of conduct that is so serious as to amount to an egregious breach of social norms in violation of the right to privacy under Article I of the California Constitution. *See* Chase

Mot. 17-21. Nor do they involve any predicate violation of federal or state law or any conduct by Chase that was immoral, unethical, or contrary to public policy in violation of the California Unfair Competition Law. *See* Chase Mot. 22-23. Budowich does not grapple with any of Chase's arguments for why the district court correctly dismissed Budowich's claims under state law.

On his claim under the California Constitution, Budowich argues only that the district court's determination that Chase's actions were not "highly offensive" was a "factual" determination, which the court had no authority to make on a motion to dismiss. Resp. 33. But the sufficiency of Budowich's pleading is plainly capable of resolution as a matter of law. The district court correctly decided that Budowich had not alleged facts sufficient to explain "how his bank's sharing portions of [financial records] in response to a valid subpoena constitutes an egregious breach of social norms." Op. 29. Budowich has no answer to the district court's conclusion that producing records pursuant to a valid subpoena is not an unconstitutional invasion of privacy. *See* Op. 37-38. As a matter of law, it is not. *See* Chase Mot. 18-21.

Budowich also does not grapple with Chase's arguments regarding the statutes on which his UCL "unlawful" claim was purportedly based. Instead he states, in a conclusory fashion, that he sufficiently "alleged a violation of California Financial Information Privacy Act," that the "Gramm-Leach-Bliley Act prohibited [Chase's] disclosure," and that Chase's "actions violated [the]

RFPA." Resp. 33-34. Budowich's arguments are mere recitals of the UCL's statutory language and general purpose. But as the district court correctly concluded, *see* Op. 32-35, and as Chase discussed in its motion for summary affirmance, *see* Chase Mot. 22-23, those statutes cannot serve as predicate violations of the UCL's "unlawful" prong. The RFPA does not apply to a congressional subpoena, *see supra* at pp. 10-12, and Chase's compliance with that subpoena is expressly exempted from the other two statutes, *see* Chase Mot. 23—an issue that the district court resolved as a matter of law, *see* Op. 35.

Likewise, Budowich fails to support his conclusory assertion that he adequately pleaded the "unfair" prong of California's UCL. All Budowich does is argue, again in a conclusory fashion, that Chase's conduct was "immoral, unethical, [and] oppressive," and that Chase "intended" to prejudice Budowich and violate "his First Amendments Rights." Resp. 34. But any suggestion that it was unfair for Chase not to provide Budowich with greater (voluntary) notice of the Select Committee's subpoena is a non-starter. *See* Chase Mot. 23-24. Financial institutions are not legally obligated to provide *any* notice to their customers of congressional subpoenas, yet they are "unquestionably" obligated "to respond to subpoenas, to respect the dignity of the Congress and its committees." *Watkins* v. *United States*, 354 U.S. 178, 187 (1957). Chase's compliance with the subpoena was *not* immoral or unethical. Regardless, the utility of complying with a valid subpoena—where issuing subpoenas is an

"indispensable ingredient" of Congress's legislative power, *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 505 (1975)—outweighs any alleged injury to Budowich. *See* Chase Mot. 18-21.

CONCLUSION

Appellant's motion for assignment to a particular panel of this Court should be denied, and the judgment of the district court should be affirmed.

Respectfully submitted,

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OCTOBER 24, 2022

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Loretta E. Lynch, counsel for Appellee J.P. Morgan Chase Bank, N.A., and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 32(g)(1), that the attached Reply in Support of Motion for Summary Affirmance and Response in Opposition to Motion for "Assignment to RNC Matter Panel" is proportionately spaced, has a typeface of 14 points or more, and contains 3,451 words.

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CERTIFICATE OF SERVICE

I, Loretta E. Lynch, counsel for Appellee J.P. Morgan Chase Bank, N.A., and a member of the Bar of this Court, certify that, on October 24, 2022, a copy of the attached Reply in Support of Motion for Summary Affirmance and Response in Opposition to Motion for "Assignment to RNC Matter Panel" was filed with the Clerk through the Court's electronic filing system, which sent notice to all counsel of record.

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