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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Dr. Michael P. Ward, D.O., *et al.*;

Plaintiffs,

v.

Bennie G. Thompson, *et al.*;

Defendants.

Case No. 3:22-cv-08015-DJH

MOTION FOR INJUNCTION OR ADMINISTRATIVE INJUNCTION PENDING APPEAL

PLAINTIFFS' MOTION FOR INJUNCTION OR ADMINISTRATIVE INJUNCTION PENDING APPEAL

In response to the Court's September 22, 2022, Memorandum Opinion ("Order"), Plaintiffs, Drs. Kelli Ward and Michael Ward, on behalf of themselves and Mole Medical Services, PC ("Mole Medical"), move pursuant to Fed. R. Civ. P. 62(d) and Fed. R. App. P 8(a)(1)(a) for an order enjoining enforcement of the subpoena served on Defendant T-Mobile by Defendant Select Committee (ECF 1-1) pending appeal while the Ninth Circuit considers the important constitutional and patient privacy questions presented in

this case. In the alternative, Plaintiffs ask that the Court enter an administrative injunction to allow Plaintiffs sufficient time to seek an emergency injunction in the Ninth Circuit. For the reasons set forth in the Memorandum below, this Motion should be granted.

INTRODUCTION

This is an unprecedented case where a Select Committee of the United States Congress has subpoenaed the telephone records of the state chair of the rival political party for a period encompassing one of the most contentious political periods in American history. As if that alone were not egregious enough, the state chair and her husband are also practicing physicians and the disclosure of their telephone records would reveal the identities of some of their patients (all of whom are being treated or counseled for weight loss issues) to the prying eyes of Congressional investigators known to be cooperating with the Department of Justice in the largest criminal investigation in the history of the United States. If the Wards' telephone records are disclosed, congressional investigators and/or federal government law enforcement agents are going to contact every number on that list and query each subscriber as to what they were discussing with Dr. Kelli Ward, the Chair of the Arizona Republican Party. That is not speculation, it is a certainty.[1] There is no other reason for the Select Committee to seek this information.

The potential chilling effect on public participation in partisan politics in Arizona is palpable. The message is that if you involve yourself in a political fight, and the other side wins, then expect a call or visit from government agents and who knows where things

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[1] The September 25, 2022 edition of the *Washington Post* reports on a new book by former Select Committee investigator Denver Riggleman. The article discusses how Riggleman's team focused on linking names to the telephone numbers and text messages of former White House Counsel Mark Meadows and others. Riggleman called the messages a "road map" that allowed the Select Committee to "structure the investigation." https://www.washingtonpost.com/politics/2022/09/25/ex-staffers-unauthorized-book-about-jan-6-committee-rankles-members/ (last accessed September 25, 2022).

will go from there. That is standard operating procedure in totalitarian states, but the criminalization of politics has never been tolerated in America.

There is also a serious and unwarranted danger of unnecessarily damaging the Wards professionally and harming their patients' health. It is hard for many patients to muster enough courage to seek medical help for certain ailments and then to be completely candid once treatment is sought. If the Wards' weight-loss patients are contacted by congressional or law enforcement investigators, they are less likely to continue treatment with the Wards and they may abandon further treatment once they realize that the physician-patient privilege and HIPAA are not obstacles to congressional or federal government curiosity. The important and substantial First Amendment and patient privacy questions presented in this case warrant an injunction prohibiting enforcement of the subpoena pending resolution Plaintiffs' appeal. Alternatively, the Court should enter a brief administrative injunction to allow Plaintiffs sufficient time to seek an injunction in the Ninth Circuit.

Argument

I. Standard.

The Court "has the authority to issue an injunction pending appeal, notwithstanding its denial of preliminary injunctive relief, pursuant to Federal Rule of Civil Procedure 62([d])."[2] *See Beverage Ass'n v. City & Cnty. of San Francisco*, Case No. 15-cv-3415, 2016 U.S. Dist. LEXIS 74261, *2 (N.D. Cal. June 7, 2016).[3] The factors for determining a motion for injunction pending appeal are:

(1) whether "the appeal raises serious and difficult questions of law where the law is somewhat unclear";

(2) whether the applicant will be irreparably injured unless a stay is granted;

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[2] Fed. R. App. Proc. 8 also dictates that a motion to stay should first be decided by the district court even if, as here, a notice of appeal has already been filed.

[3] Rule 62 was reorganized in 2018, so some cases refer to subsection (c) instead of (d).

(3) whether the grant of a stay will substantially injure other interested parties; and

(4) where the public interest lies.

Overstreet v. Thomas Davis Medical Centers, P.C., 978 F. Supp. 1313, 1314 (D. Ariz. 1997) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (applying same factors). Although the above criteria must be applied individually to the facts of each case, the Court's decision must be made based on all the criteria. *Overstreet*, 978 F. Supp. at 1314 (citation omitted).

In the context of an injunction pending appeal, the courts have interpreted the substantial likelihood of success on the merits prong as requiring that the movant show that "the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear." *Id.* (citing *Mamula v. Satralloy, Inc.*, 578 F. Supp. 563, 580 (S.D. Ohio 1983)). "This is so because a literal reading [of the likelihood of success prong] would seem to require a district court to determine that it had erred in its original ruling, and such a requirement would probably lead to consistent denials of motions to stay." *Mamula*, 578 F. Supp. at 580 (citing *Evans v. Buchanan*, 435 F. Supp. 832, 843 (D. Del. 1977)).

Thus, an injunction pending appeal may be appropriate even if the Court believes that its analysis in denying the motion was correct. *Beverage Ass'n*, 2016 WL 9184999 at *4-5 (citing *Protect Our Water v. Flowers*, 377 F. Supp. 2d 882, 884 (E.D. Cal. 2004)). "[D]istrict courts properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained." *Flowers*, 377 F. Supp. 2d at 884 (cleaned up) (citing *Washington Metro. Area v. Holiday Tours*, 559 F.2d 841, 844 (D.C. Cir. 1977)). "An injunction is frequently issued where the trial court is charting a new and unexplored ground and the court determines that a novel interpretation of the law may succumb to appellate review." *Id.*

(cleaned up) (citation omitted). *See also MediNatura, Inc. v. FDA*, Case No. 20-cv-2066, 2021 WL 1025835, *6 (D.D.C. March 16, 2021) (noting that the stay pending appeal standard is "more flexible than a rigid application of the traditional four-part injunction standard.").

II. The Appeal Raises Serious and Difficult Questions of Law Where the Law Is Unclear.

A. Plaintiffs' First Amendment Arguments Raise Substantial and Difficult Questions in an Area of the Law That Is Unsettled.

Plaintiffs alleged that the Select Committee Subpoena infringes their core First Amendment right to associate with others for political purposes. When such core political associational rights are at stake, courts must apply the "exacting scrutiny" standard. Exacting scrutiny requires that there be "a substantial relation between the disclosure requirement and a sufficiently important governmental interest, and that the disclosure be narrowly tailored to the interest it promotes." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2385 (2021).

In their Opposition to the Select Committee's Motion to Dismiss, Plaintiffs argued, relying heavily on the analogous facts presented in *NAACP v. Alabama*, 357 U.S. 449, 462 (1958), that the Select Committee's Subpoena could not withstand exacting scrutiny analysis in this situation. Investigators from a rival political party are seeking to create a map of Chair Ward's political contacts and use this map to expand the investigation of political opponents. That is similar to what Alabama was seeking to do back in 1958.

B. Exacting Scrutiny Analysis Is an Unsettled and Rapidly Developing Area of the Law.

The phrase "exacting scrutiny" first appeared in Supreme Court jurisprudence in *NAACP v. Alabama*, which dates from early in the civil rights era, but it has been

infrequently and inconsistently applied by the courts since. One scholar described exacting scrutiny as follows:

> Exacting scrutiny is a standard constitutional test that has, curiously, received little critical attention. Some murkiness and ambiguity most assuredly attach to the idea of exacting scrutiny.

R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. Rev. 207 (Fall 2016).

The exacting scrutiny analysis has been most frequently – but not exclusively – applied to disclosure requirements in the electoral context. *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010) (collecting authority). Since *NAACP v. Alabama*, most compelled disclosure rules have not survived exacting scrutiny. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (invalidating a ceiling on campaign expenditures); *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 204 (1999) (holding that Colorado statute requiring that petition circulators be registered voters violated First Amendment; Colorado statute requiring that petition circulators wear identification badges bearing the circulator's name violated First Amendment; Colorado statute requiring that proponents of an initiative report names and addresses of all paid circulators and amount paid to each circulator violated First Amendment) (Ginburg, J.); *Citizens United v. FEC*, 558 U.S. 310,365-66 (2010) (federal law barring independent corporate expenditures for electioneering communications violated First Amendment).

C. The First Amendment Arguments in this Case Closely Parallel the Arguments Raised in *NAACP v. Alabama* and *RNC v. Pelosi* and the D.C. Circuit Found That Such Arguments Raised Important and Unsettled Constitutional Questions.

In their Opposition to the Select Committee's Motion to Dismiss, Plaintiff argued in detail the similarities between this case and *NAACP v. Alabama*. That discussion, therefore, is not repeated here but incorporated by reference.

The facts and procedural history of this case also strongly resemble those of *Republican National Committee ("RNC") v. Nancy Pelosi, et al*, Case No. 22-cv-659 (D.D.C.), wherein the Select Committee sought to obtain confidential records and communications from Salesforce.com, Inc., a third-party customer relationship information management vendor for the RNC. The RNC filed a complaint against members of the Select Committee and Salesforce seeking to enjoin enforcement of the subpoena. *See RNC*, __ F. Supp. 3d __, 2022 U.S. Dist. LEXIS 78501, *2-18 (D.D.C. May 1, 2022). As here, the RNC sought relief based, *inter alia*, on grounds that the subpoena violated its right to maintain the confidentiality of its member relationship information under the First Amendment. *Id*. at *16.

The district court acknowledged that the RNC stated a valid First Amendment claim based on its interest in the confidentiality of the materials sought by the subpoena. *Id*. at *58-60. The district court was particularly troubled by the Select Committee's failure to promise to keep the membership relationship information confidential (*id*. at 59), but "perhaps more importantly," the court found that "the RNC's information need not be leaked to the media to impact its First Amendment interests." *Id*. at *60. This was simply a matter of recognizing the "political realities" of the situation. *Id*. (citing *United States v. Rumely*, 345 U.S. 41, 44 (1953)). Applying exacting scrutiny, the district court nevertheless found that the RNC's burden was not on the same level as that found in *AFL-CIO v. FEC*, 333 F.3d 168, 176-77 (D.C. Cir. 2003), and that the subpoenas were sufficiently narrowly tailored to the Select Committee's interest. *See RNC*, 2022 U.S. Dist. LEXIS 78501 at *68-71.

It was noteworthy that during oral argument on RNC's motion for preliminary injunction, counsel for the Select Committee acknowledged that, in the event that the district court denied the RNC's request for a preliminary injunction, the district court would have the discretion to enjoin compliance with the subpoena pending appeal. *See RNC*, Case No. 22-cv-659 (D.D.C.), Transcript (ECF 24) at 112:22 – 113:6. As a result,

recognizing that the RNC's claims could be moot if forced to comply with the subpoena before having an opportunity to seek an injunction on appeal, the district court entered an administrative injunction to preserve the status quo. *RNC*, 2022 U.S. Dist. LEXIS 78501 at *74-76. On a subsequent motion, the district court denied an injunction pending appeal but granted a further administrative injunction to allow the RNC an opportunity to seek an injunction pending appeal in the circuit court. *See RNC*, 2022 U.S. Dist. LEXIS 91503 (D.D.C. May 20, 2022).

What happened next is of particular interest.

The RNC promptly filed an emergency motion for injunction pending appeal in the D.C. Circuit. *See RNC v. Pelosi, et al*, Case No. 22-5123 (D.C. Cir.) (attached as Exhibit "A"). On the likelihood of success on the merits prong, the RNC emphasized the district court's equivocal treatment of its First Amendment concerns (which the district court had acknowledged were unprecedented), and its failure properly to apply the exacting scrutiny standard to those concerns. Ex. "A" at 12-16. The RNC argued that it "deserve[d] the opportunity to test the district court's decision on the importance of the information demanded—and its weight versus the interests of the Select Committee's—on appeal." *Id*. at 16.

The D.C. Circuit granted the RNC's motion, finding that the RNC "satisfied the stringent requirements for an injunction pending appeal." Order of May 25, 2022 (attached as Exhibit "B"). While the court did not elaborate on its reasons, one may assume by its ruling that the D.C. Circuit found the RNC's arguments persuasive enough to warrant an injunction.

This Court has acknowledged the subsequent procedural history in RNC. After the Select Committee withdrew the subpoena, the D.C. Circuit dismissed the case as moot and vacated the judgment of the district court. *See RNC*, Case No. 22-5123, 2022 U.S. App. LEXIS 26068 (D.C. Cir. Sept. 16, 2022) (noted in Order of Dismissal (ECF 55) at 2, n.2). The D.C. Circuit specifically noted that vacatur was necessary "[b]ecause the

Committee caused the mootness and thereby deprived [the circuit court] of the ability to review the district court's decision, and **given the important and unsettled constitutional questions that the appeal would have presented**. . . ." 2022 U.S. App. LEXIS 26068 at *4 (per *curiam*) (quoted in Order of Dismissal (ECF 55) at 2, n. 2) (emphasis added). This provides an important clue as to why the D.C. Circuit had granted the injunction pending appeal.

Here, the circumstances are even more compelling. First, unlike the district court in *RNC*, here the Court found that Plaintiffs failed to assert a viable First Amendment claim at all. Order (ECF 55) at 13-14. While Plaintiffs do not expect this Court to reverse itself, there can be no doubt that the First Amendment concerns raised by this case present "important and unsettled constitutional questions[.]" *RNC*, 2022 U.S. App. LEXIS 26068 at *4. *See also Overstreet*, 978 F. Supp. at 1314 (citations omitted); *Mamula*, 578 F. Supp. at 580; *Evans*, 435 F. Supp. at 843.

Second, unlike in *RNC,* the Committee here seeks access to information that will lead to the disclosure of the identities of patients of two practicing physicians. Plaintiffs are unaware of any precedent for such a request from a congressional committee. While the Court disagreed with Plaintiffs' position on the important patient information privacy issues, the unprecedented nature of this sort of intrusion into business affairs and patient information that are completely irrelevant to the Select Committee's purpose must be taken into account in deciding whether to grant the requested injunction.

III. The Irreparable Harm That Plaintiffs Will Suffer Absent an Injunction Cannot Be Reasonably Disputed.

Unless this Court issues an injunction prohibiting enforcement of the subpoena, T-Mobile will have no choice but to comply. Once the Select Committee gets the information, nothing can be done to protect Plaintiffs' rights as both a practical and legal matter. The proverbial toothpaste will all be out of the tube, and there will be no way for any court to undo the disclosure of political contact and patient telephone numbers. Once

the disclosure is made, this case will be moot. Even if there were a practical way to hit the reset button after a successful appeal (which there is not), the Constitution's Speech or Debate Clause immunizes Members of Congress from civil or criminal liability arising from "actions falling within the legislative sphere." *Senate Permanent Subcommittee on Investigations v. Ferrer*, 856 F.3d 1080, 1086 (D.C. Cir. 2017) (cleaned up). A federal court would, thus, be powerless to order the Select Committee to return the information, let alone award Plaintiffs any other remedy.

IV. The Select Committee Has No Immediate Need for the Requested Information.

One prong of the Rule 62 test is whether an injunction will substantially injure another interested party. The Select Committee, which is the only party in position to argue injury, cannot credibly contend that it has an immediate need for the requested information. The timeline below reveals why:

January 29, 2022:	The Select Committee issues its subpoena to T-Mobile.
February 1, 2022:	Plaintiffs file Complaint and Motion to Quash. Dkt. 1 & 2.
February 25, 2022:	T-Mobile requests an extension. Dkt. 25.
April 14, 2022:	The Select Committee requests an extension. Dkt. 30.
May 17, 2022:	The Select Committee makes another extension request. Dkt. 32.
June 27, 2022:	The Select Committee requests another extension. Dkt. 35.
June 30, 2022:	T-Mobile requests another extension. Dkt. 38.
July 27, 2022:	The Select Committee makes yet another request for extension. Dkt. 40.
July 29, 2022:	The Court issues an Order granting an extension to August 8 and denying future extensions. Dkt. 43.

The six-month timeline shows – undeniably – that but for the Court's intervention in late July, this matter would not yet be fully briefed, much less decided.[4] On this record, the Select Committee cannot credibly contend that it has an urgent need for this information or that it will be injured in any way by an injunction.

The Select Committee played this very same game of *hurry-up-and-wait* in *RNC*, much to the obvious exasperation of the D.C. Circuit. *See RNC*, 2022 U.S. App. LEXIS 26068 at *3-4. The Select Committee initially claimed that even a modest delay would prejudice its investigation. *Id*. at *3-4. However, after the circuit court granted an injunction pending appeal, the Select Committee moved to postpone the briefing schedule. *Id*. at *3. Then, on September 2, 2022 the Select Committee filed a motion to dismiss the case as moot, informing the court that it had "determined that it no longer has a need to pursue the specific information requested in the Salesforce subpoena," and that it had withdraw the subpoena as a result. *See RNC*, Case No. 22-5123, Doc. #1962096 at 3-4 (D.C. Cir.).

An injunction would only preserve the status quo that existed before the Court intervened in late July to force the Select Committee to respond. But for the Court's intervention, the six-month pattern of extensions suggests that the Select Committee was perfectly content with requesting extensions indefinitely. In short, the Select Committee can easily wait for the Ninth Circuit to resolve the important First Amendment and patient privacy issues that are the central questions to be raised on appeal. There is no plausible injury argument.

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[4] During this six-month period, the Select Committee deposed or interviewed hundreds of other witnesses, and conducted eight televised hearings without feeling the need to respond to Plaintiffs' complaint and motion to quash. https://www.latimes.com/politics/story/2022-06-13/what-is-the-tv-schedule-for-the-next-jan-6-committee-hearings (last accessed September 23, 2022). The Select Committee is televising its ninth hearing on September 27, 2022.

V. The Public Interest Favors an Injunction.

"[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–759 (1985) (citations omitted). The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). That is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted).

The essence of self-government is free and fair elections. The election in Arizona was so close that most major national news outlets – NBC, ABC, CBS and CNN – did not call Arizona for now-President Biden until November 12, 2022, which was nine days after the polls closed. https://www.npr.org/2020/11/19/936739072/ap-explains-calling-arizona-for-biden-early-before-it-got-very-close (last accessed September 24, 2022). Chair Ward was at the center of a heated debate as whether the presidential election results in Arizona were accurate and fair. If core First Amendment rights have a core, such a debate is certainly at the core of core First Amendment rights.

Plaintiffs argue that if T-Mobile complies with the Select Committee Subpoena, then investigators will contact every party member in touch with Chair Ward during this overheated period of political debate. That act, when it occurs, will necessarily chill public participation on one of the most important political issues of our times, which is the integrity of elections. If citizens are not convinced that elections are fair, then the very legitimacy of our democratic institutions is lost.

Core First Amendment political speech and patient privacy rights are at stake on this appeal and the Select Committee's actions in this case demonstrate that the Select

Committee has no urgent need for this information. The public interest strongly favors a stay until these important questions receive appellate review.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully ask that the Court enter an order enjoining enforcement of the Select Committee's subpoena and/or T-Mobile compliance with same pending Plaintiffs' appeal to the Ninth Circuit. In the alternative, Plaintiffs ask that the Court enter a temporary administrative injunction to allow Plaintiffs sufficient time to seek injunctive relief in the Ninth Circuit.

Respectfully submitted this 26th day of September 2022

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CERTIFICATE OF SERVICE

I certify that on September 26, 2022, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing, which electronically sends a copy to be served on all registered parties.

/s/ Arno T. Naeckel

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

Case No. 22-5123

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

Republican National Committee,
Plaintiff-Appellant,

v.

Nancy Pelosi, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia
Case No. 1:22-cv-00659-TJK
The Honorable Timothy J. Kelly

Appellant's Reply in Support of Emergency Motion for Administrative Injunction and Injunction Pending Appeal

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This congressional subpoena case is novel. A congressional committee dominated by the majority political party issued a subpoena seeking the internal party deliberative material of the minority political party. Rather than subpoena the RNC directly, the Select Committee targeted a third party, Salesforce, which holds some of the RNC's most sensitive data. This raises First Amendment concerns unique to political parties. And, by targeting a third party instead of the RNC directly, the Select Committee is attempting to evade judicial review of these First Amendment violations by depriving the RNC of the ability to press its claims in court—a right it would unquestionably have if subpoenaed directly.[1]

Even more, the Congressional Defendants have used the artifice of Salesforce as the Subpoena's target as a basis to decline direct negotiation with the RNC as to the scope of the Subpoena and any production in response to it.[2] In opposing the RNC's request for an injunction pending appeal—which is unquestionably necessary to preserve the ability of this Court to hear the case—the Congressional

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[1] It is the use of a third-party target to hamper the RNC's right to challenge the Subpoena in court that makes the Subpoena here different than those issued during Congress's investigation into the avoidance of campaign-finance laws during the 1990s.

[2] Indeed, when the district court asked counsel for the Congressional Defendants whether they would negotiate directly with the RNC, the Congressional Defendants declined. (Add. 321–22.) This is despite the RNC continued cooperation with the Select Committee.

Defendants engage in more of the same. This Court should not permit the questions raised by this case to escape appellate review.

REPLY IN SUPPORT

I. The RNC is Likely to Succeed on the Merits.

Make no mistake, the Congressional Defendants know how unique the Subpoena is: they begin their argument against the RNC's chances of success on the merits by attempting to leverage their decision to subpoena Salesforce, instead of the RNC itself. They incorrectly maintain that Salesforce must be adjudicated a "state actor" for the RNC to be able to prevail on its claims. Beyond this, the Congressional Defendants parrot the district court's order without making any substantive argument for why the RNC is unlikely to prevail *before this Court*. Because the district court's analysis was based on an incorrect equivocation of the nature of the material demanded by the Congressional Defendants and colored by improper deference to the Congressional Defendants' view of the constitutional issues at issue, the RNC is likely to prevail on the merits of its appeal.

The RNC has standing irrespective of state-actor principles. The Congressional Defendants casually argue that this Court would need to find Salesforce is a "state actor" for the RNC to prevail on its claims. Even assuming for the moment that legislative immunity shields the Congressional Defendants from the RNC's claims—which requires that the Select Committee be properly constituted and issue

the Subpoena in service of a legitimate legislative purpose—courts routinely allow lawsuits against third-party custodians or service providers even though they played no role in issuing the subpoena that occasioned the action. In *Bean LLC v. John Doe Bank*, the court allowed a research firm's claims against the firm's bank to enjoin the enforcement of a congressional subpoena even though the bank played no role in the subpoena's issuance. 291 F. Supp. 3d 34, 41 (D.D.C. 2018). In *United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977) ("*AT&T II*"), the court allowed the Justice Department's claims against AT&T to enjoin the enforcement of a congressional subpoena even though AT&T played no role in the subpoena's issuance. 567 F.2d at 125. In *Bergman v. Senate Special Committee on Aging*, the court in part enjoined the individual plaintiffs' bank from responding to a congressional subpoena even though the bank played no role in the subpoena's issuance. 389 F. Supp. 1127, 1131 (S.D.N.Y. 1975). And in *Pollard v. Roberts*, a three-judge district court (including then-Judge Blackmun) enjoined the Republican Party of Arkansas's bank from responding to a civil investigative subpoena even though the bank played no role in the subpoena's issuance and was unwilling "to divulge [the state political party's] records." 283 F. Supp. 248, 260 (E.D. Ark. 1968), *summarily aff'd*, 393 U.S. 14 (1968).

To the extent state-actor analysis is relevant at all, it is confirmatory. The state action doctrine "assure[s] that constitutional

standards are invoked 'when it can be said that the [government] is *responsible* for the specific conduct of which plaintiff complains.'" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (emphasis in original) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). The "state action requirement is met if 'there is such a close nexus between [the government] and the challenged action that seemingly private behavior may be fairly treated as that of the [government] itself." *NB ex rel. Peacock v. Dist. of Columbia*, 794 F.3d 31, 43 (D.C. Cir. 2015) (quoting *Brentwood Acad.*, 531 U.S. at 295). While the government's "[m]ere approval of or acquiescence in the initiatives of a private party" is not a sufficient nexus for state action, the nexus is met when the government has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice in law must be deemed to be that of [the government]." *Vill. of Bensenville v. FAA*, 457 F.3d 52, 64 (D.C. Cir. 2006).

Salesforce's compelled compliance with the Subpoena unequivocally establishes a "close nexus" between itself and the Congressional Defendants to satisfy state action. The record makes clear that the Select Committee has effectively forced Salesforce's compliance with the Subpoena. *See Vill. of Bensenville*, 457 F.3d at 64. Whether a private party should be deemed an agent of the government for state action purposes "turns on the degree of government participation in the private party's activities." *Skinner v. Ry. Lab.*

Execs.' Ass'n, 489 U.S. 602, 614 (1989). Here, the Select Committee clearly "did more than adopt a passive position toward [Salesforce's] underlying private conduct." *Id.* at 615–16 (concluding that the government's "encouragement, endorsement, and participation" in a private railroad's actions was sufficient to implicate the Fourth Amendment). In the end, the Congressional Defendants cannot coercively outsource their constitutional violations to Salesforce and then argue that Salesforce's status as an ostensibly private party means these constitutional violations must be without remedy.

The RNC is likely to prevail on its First Amendment claim. At the heart of the district court's error is its equivocation regarding the nature of the information demanded by the Subpoena and the resulting burden imposed on the RNC. This equivocation was itself born of the district court's improper deference to Congress's "investigative power" in its review of the substance of the RNC's constitutional claims.

The First Amendment protects against the compelled disclosure of a political party's internal deliberations and strategy. The Subpoena demands precisely this sort of information.[3] At a minimum, the data

[3] Of course, the First Amendment also protects against the compelled disclosure of information regarding a political party's donors, volunteers, and supporters. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (concluding "revelation of the identity of [the NAACP's] rank-and-file members" constituted a violation of the First Amendment). As explained in the uncontroverted declarations of the RNC's Chief Digital Officer, the Subpoena plainly demands this sort of

sought includes information regarding any email the RNC sent over a two-month period, including information detailing the naming conventions for the emails, recipients' interactions with and responses to the emails, and all performance metrics for the emails—including at least four metrics developed by and confidential to the RNC. (Add. at 252–53, 387–88, 528–34.) This information is precisely the sort of data protected against compelled disclosure by a political party under *American Federation of Labor & Congress of Industrial Organizations v. FEC*, 333 F.3d 168 (D.C. Cir. 2003) ("*AFL-CIO*"), because its compelled disclosure "will … frustrate those groups' decisions as to 'how to organize ... [themselves], conduct ... [their] affairs, and select ... [their] leaders,' as well as their selection of a 'message and ... the best means to promote that message.'" 333 F.3d 168, 179 (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 230–31 & n.21).

Respectfully, the district court's analysis distinguishing *AFL-CIO* was not "careful[]" and is inconsistent with this Court's holding in that case. For example, the district court's discussion of *AFL-CIO* ignores that the Subpoena also demands the identities of low-level RNC staffers. The difficulty in recruitment and hiring that may be caused by

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information when it calls for "[a]ll performance metrics and analytics related to email campaigns … ***including but not limited to*** delivery metrics … engagement metrics … time attributes, and message attributes." (Add. 527–34, 587.) The district court avoided this aspect of the Subpoena by improperly crediting the Congressional Defendants' narrowing of the Subpoena's demands during litigation.

the compelled disclosure of low-level staffers' names was one of the burdens to the Democratic National Committee's associational rights credited by the Court in *AFL-CIO*. 333 F.3d at 176. Hence, even if the district court were correct that the compelled disclosure of the RNC's digital data is somehow meaningfully less burdensome to its associational rights than the compelled disclosure of internal memoranda in *AFL-CIO*—and it is not—its failure to grapple with the chilling effect of the compelled disclosure of the RNC's staffer identities renders its order impossible to reconcile with the holding of *AFL-CIO*.

The RNC is likely to prevail on its remaining claims. For the reasons argued in its Motion, and as will be more fully briefed on the merits of its appeal, the RNC is likely to prevail on its remaining claims. The Congressional Defendants do not meaningfully dispute the RNC's argument that under this Court's holding in *United States v. Patterson*, the subpoena must be "good in its entirety." 206 F.2d 433, 434 (D.C. Cir. 1953) (quoting *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221 (1951)). By allowing the Congressional Defendants to rewrite the scope of the Subpoena during litigation, the district court violated this rule, which safeguards the separation of powers. Nor do the Congressional Defendants support their request that this Court to accept the district court's conclusion on H. Res. 503's requirement that Speaker Pelosi "shall" appoint 13 members to the Select Committee. (Opp'n at 13.) The Congressional Defendants point to two other district

courts that have concluded similarly (*id.*), but no circuit court has confronted this issue. The word *shall* should be read as mandatory whenever reasonable to do so. Antonin Scalia & Bryan Garner, Reading Law 114 (2012). Because *shall* is unambiguously mandatory in H. Res. 503, it should be read to require the Select Committee to be composed of 13 members.

II. The RNC's Irreparable Harm Is Uncontested.

The Congressional Defendants do not contest that the RNC faces irreparable harm—the mooting of its case by Salesforce's compliance with the Subpoena—absent relief pending appeal. Rather, they argue the wrong inquiry: they dispute whether the RNC will suffer injury from the alleged constitutional violations. (Opp'n at 5.) But even this is wrong. It is well-established that "'a prospective violation of a constitutional right constitutes irreparable injury for ... purposes' of 'seeking equitable relief.'" *Karem v. Trump*, 960 F.3d 656, 667 (D.C. Cir. 2020) (quoting *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013)). Thus, when a plaintiff seeks equitable relief for prospective violations of its constitutional rights, the resulting constitutional harm constitutes irreparable injury. *See, e.g.*, *Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 385 (D.D.C. 2020) (existing and prospective violation of First Amendment rights "demonstrate irreparable harm"); *C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 217–18 (D.D.C. 2020) ("Plaintiffs who have

shown a likelihood of success on their Fifth Amendment claims … have also established irreparable harm.").

To be clear, the Congressional Defendants' legislative immunity defense makes the RNC's irreparable harm plain, a point on which the district court agreed. (Add. 5 ("[T]he RNC has shown that it will suffer one sort of irreparable harm absent an injunction pending appeal.").) Without an injunction pending resolution of the merits, the case would be mooted before this Court has a chance to read the briefs. Salesforce has said it will comply with the Subpoena absent a court order; and, if Salesforce complies, the Congressional Defendants have argued no court can order relief. It is difficult to imagine more compelling *irreparable* harm, and courts "routinely" grant relief pending appeal when events might "moot the losing party's right to appeal," *John Doe Co. v. CFPB*, 235 F. Supp. 3d 194, 206 (D.D.C. 2017).

III. The Equitable Factors Strongly Favor Relief Pending Appeal.

The balance-of-equities and public-interest factors "'merge when,' as here, 'the Government is the opposing party.'" *Karem*, 960 F.3d at 668 (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)). *First*, this Court has repeatedly held that "enforcement of an unconstitutional law is always contrary to the public interest," *see, e.g.*, *Gordon*, 721 F.3d at 653, and "[t]here is generally no public interest in the perpetuation of

unlawful" government action, *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

Second, while the Select Committee may have an interest in furthering its legislative prerogative, that interest must yield to the balance of constitutional interests at issue in this case. *See Karem*, 960 F.3d at 668; *see also Gordon*, 721 F.3d at 653 ("preliminary injunction might temporarily frustrate the federal government's interest" but the court properly gave "greater weight to the possibility that Gordon could suffer an ongoing constitutional violation while this litigation proceeds"). Indeed, the Congressional Defendants are silent on the RNC's constitutional interests, focusing instead on the claimed delay of their legislative investigation. But this gets the standard backwards. "'The Constitution does not permit [the government] to prioritize any policy goal over' constitutional rights." *Turner*, 502 F. Supp. 3d at 386 (quoting *Gordon*, 721 F.3d at 653); *Karem*, 960 F.3d at 668.

Nor do the Congressional Defendants provide any evidence of their claimed "harm." Of course they argue that, without Salesforce's production, the Select Committee's interest in "prompt[] complet[ion]" of "its investigation efforts" will be jeopardized; its "Constitutional activities" might "be hampered"; and it will be "less informed and less able to develop … remedial legislation and other measures." But the Congressional Defendants have made no showing of *specific* and *actual* harm to the completion of their investigation. Not only that, the RNC's

motion only requests a *temporary* delay to a narrow part of the investigation while the Court hears the important constitutional questions presented in this case; and, to minimize any alleged harm, the RNC has agreed to expediate the merits briefing should this Court determine that expediated briefing is warranted.

The Congressional Defendants' unsupported assertions that one narrow aspect of the Select Committee's investigation will be temporarily stalled pales in comparison to real, immediate, and irreparable constitutional hardship the RNC will suffer absent relief.

CONCLUSION

The RNC respectfully requests that the Court enter an administrative injunction to permit full consideration of this Motion. The RNC also requests an injunction pending appeal to preserve the RNC's ability to seek review of the district court's erroneous order, an order sustaining a first-of-its-kind subpoena and blazing a trail that may forever change how congressional subpoenas are leveraged.

Dated: May 24, 2022

Respectfully submitted,

s/ Christopher O. Murray

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains **2,560** words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point font.

Dated: May 24, 2022.

s/ Christopher O. Murray
Christopher O. Murray

CERTIFICATE OF SERVICE

I certify that on May 24, 2022, I electronically filed the Reply in Support of Emergency Motion for Administrative Injunction and Injunction Pending Appeal with the Clerk of the Court for the U.S. Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Dated: May 24, 2022.

s/ Christopher O. Murray
Christopher O. Murray

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5123 **September Term, 2021**

1:22-cv-00659-TJK

Filed On: May 25, 2022

Republican National Committee,

Appellant

v.

Nancy Pelosi, in her official capacity as Speaker of the United States House of Representatives, et al.,

Appellees

BEFORE: Katsas, Rao, and Walker, Circuit Judges

O R D E R

Upon consideration of the emergency motion for injunction pending appeal, the responses thereto, and the reply, it is

ORDERED that the motion for injunction pending appeal be granted and salesforce.com, inc. ("Salesforce") be enjoined from releasing the records requested by the House Select Committee pending further order of the court. Appellant has satisfied the stringent requirements for an injunction pending appeal. See Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2021). It is

FURTHER ORDERED, on the court's own motion, that the administrative injunction entered May 24, 2022, be dissolved. It is

FURTHER ORDERED that the following briefing schedule will apply:

Appellant's Brief	May 31, 2022
Appendix	May 31, 2022
Appellees' Brief	June 7, 2022
Reply Brief	June 10, 2022

The parties are directed to hand deliver the paper copies of their briefs and appendix to the Clerk's office by 4 p.m. on the date due.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5123 **September Term, 2021**

Oral argument will be held before this panel on June 14, 2022 at 9:30 a.m.

While not otherwise limited, the parties are directed to address in their briefs the following issues:

Whether the Select Committee itself, as opposed to its Members, is immune from this lawsuit under the Speech and Debate Clause of the Constitution or under principles of federal sovereign immunity;

Whether Salesforce's compliance with the subpoena constitutes state action for purposes of the First Amendment claim. If so, whether Salesforce is immune from this lawsuit under the Speech and Debate Clause; and

Whether the defendant Members of Congress or the Select Committee were indispensable parties to this lawsuit.

Appellant should raise all issues and arguments in the opening brief. The court ordinarily will not consider issues and arguments raised for the first time in the reply brief.

To enhance the clarity of their briefs, the parties are urged to limit the use of abbreviations, including acronyms. While acronyms may be used for entities and statutes with widely recognized initials, briefs should not contain acronyms that are not widely known. See D.C. Circuit Handbook of Practice and Internal Procedures 43 (2021); Notice Regarding Use of Acronyms (D.C. Cir. Jan. 26, 2010).

All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Dr. Michael P. Ward, D.O. et. al.,

Plaintiffs,

v.

Bennie G. Thompson ,et. al.;

Defendants.

Case No. CV-22-08015-PCT-DJH

[PROPOSED] ORDER ON PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL OR FOR TEMPORARY ADMINISTRATIVE INJUNCTION

THIS CAUSE having come before the Court on Plaintiffs' Motion for Injunction Pending Appeal or for Temporary Administrative Injunction (Doc. __), and the Court having considered the response of Defendants and Plaintiffs' Reply thereto, and being otherwise fully advised in the premises, IT IS HEREBY

ORDERED AND ADJUDGED that Plaintiffs' Motion is GRANTED as follows:

Pending Plaintiffs' appeal to the Ninth Circuit:

1) Defendants Select Committee members are enjoined from enforcing the subject subpoena; and/or
2) Defendant T-Mobile is enjoined from responding to the subject subpoena.

[ALTERNATIVE RELIEF]

The Court administratively enjoins Defendants Select Committee members from enforcing the subpoena, and further enjoins Defendant T-Mobile from responding to the subpoena, for a period of ___ days, or until such time that Plaintiffs are reasonably able to seek injunctive relief in the Ninth Circuit.