No. 22A-

IN THE

Supreme Court of the United States

DR. MICHAEL P. WARD, D.O. and DR. KELLI WARD, D.O., and MOLE MEDICAL SERVICES, P.C., an Arizona Professional Corporation,

Applicants,

v.

BENNIE G. THOMPSON, *et al.*,

Respondents.

TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE OF THE NINTH CIRCUIT

EMERGENCY APPLICATION FOR STAY

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

The parties to the proceeding below are:

Applicants, Dr. Michael P. Ward, Dr. Kelli Ward, and Mole Medical Services, P.C., were Plaintiffs in the district court and Appellants in the court of appeals.

In the district court, Applicants moved for and were denied a motion for injunction pending appeal or, in the alternative, an administrative injunction. Applicants filed an emergency motion for an injunction pending appeal in the appellate court, which was denied by a split-panel decision dated October 22, 2022.[1] Judge Ikuta wrote a ten-page dissent.

Respondents are Rep. Bennie G. Thompson, in his official capacity as Chairman of the House Select Committee to Investigate the January 6th Attack on the United States Capitol, the Select Committee to Investigate the January 6th Attack on the United States Capitol, a committee of the House of Representatives, and T-Mobile USA, Inc., a Delaware corporation. Applicants were Defendants in the district court and are the Appellants in the appellate court.

[1] The Ninth Circuit issued its decision in a very unusual Saturday evening ruling at 7:37 p.m., Eastern time.

The related proceedings below are:

1. *Dr. Michael P. Ward, D.O, et al v. Bennie G. Thompson, et al*, No. 22-16473 (9th Cir.) – Emergency Motion for Injunction Pending Appeal Denied on October 22, 2022.

2. *Dr. Michael P. Ward, D.O, et al v. Bennie G. Thompson, et al*, Case No. 3:22-cv-08015-PCT-DJH (D. Ariz.) – Motion for Injunction Pending Appeal Denied on October 7, 2022.

CORPORATE DISCLOSURE STATEMENT

Per Supreme Court Rule 29, Applicant Mole Medical Services, P.C. states that it is a privately held Arizona professional corporation and has no parent or subsidiary.

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TO THE HONORABLE ELENA KAGAN,
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

This is an unprecedented case with profound precedential implications for future congressional investigations and political associational rights under the First Amendment. In a first-of-its-kind situation, a select committee of the United States Congress, dominated by one political party, has subpoenaed the personal telephone and text message records of a state chair of the rival political party relating to one of the most contentious political events in American history—the 2020 election and the Capitol riot of January 6, 2021.

The subpoena was served on Applicants' mobile telephone service provider, T-Mobile, in January 2022. Applicant immediately filed suit and moved to quash the subpoena. The Select Committee, however, sought and obtained **four** stipulated extensions to respond to the motion to quash. In late July 2022, however, the district court refused to grant any further extensions and forced the Select Committee to brief the issue.

Applicant, Dr. Kelli Ward ("Dr. Ward"), is a practicing physician and the Chairwoman of the Arizona Republican Party. Dr. Ward's role in the 2020 election in Arizona and its aftermath is a matter of public record. The Select Committee has not alleged that she was in or even near the Capitol on January 6, 2021.

If Dr. Ward's telephone and text message records are disclosed, congressional investigators are going to contact every person who communicated with her during and immediately after the tumult of the 2020 election. That is not speculation, it is a certainty.[2] There is no other reason for the Committee to seek this information. *See* Exh. A, Dissent Op. p. 5. There can be no greater chill on public participation in partisan politics than a call, visit, or subpoena, from federal investigators. S. Sinnar, *Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews*, 77 Brooklyn L. Rev. 41, 67 (Fall 2011) ("Perhaps the most common harm . . . resulting from law enforcement investigations into political and religious expression is the chilling impact on such expression . . . .").

This Application pertains to the substantial uncertainty, which is evidenced by the decision of a split panel in the Ninth Circuit below, over how to determine whether a plaintiff has adequately stated a claim for infringement of core political associational rights under this Court's holding in *Americans for Prosperity Foundation v. Bonta* ("*Bonta*"), 141 S. Ct. 2373 (2021). **Specifically, does *Bonta* require a presumption that any compelled disclosure of the identity of persons**

[2] *See* Jacqueline Alemany and Josh Dawsey, *Ex-staffer's unauthorized book about Jan. 6 committee rankles members*, THE WASHINGTON POST (available at: https://www.washingtonpost.com/politics/2022/09/25/ex-staffers-unauthorized-book-about-jan-6-committee-rankles-members/) (last updated Sept. 25, 2022) (last accessed Sept. 25, 2022). Former Congressman Riggleman's book details exactly what the Select Committee does with telephone and text message metadata, which is to create a web of contacts that the Committee can then investigate.

who have communicated with each other over their political views burdens associational rights under the First Amendment, and that the compelled disclosure must therefore be subjected to exacting scrutiny?

The panel majority found this case to be distinguishable from *Bonta* on grounds that "the subpoena does not target any organization or association" since the investigation "is not about Ward's politics" but "her involvement in the events" leading up to January 6 – as if any such involvement would have been unrelated to her role as chair of the Republican Party of Arizona. Ex. A, Maj. Op. at 4. Accordingly, the panel majority found no "reason to think that compliance with the subpoena will burden association." *Id*. at 4-5. Thus, the majority concluded that Appellants have not raised a serious question of associational rights under the First Amendment. *Id*.

Applying the outdated Ninth Circuit standard in *Perry v. Schwartzenegger*, 591 F.3d 1147 (9th Cir. 2010) (which predated *Bonta* by over a decade), the majority found that "the party resisting disclosure must make a *prima facie* showing that enforcement *will result* in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or chilling of, the members associational rights." Maj. op. at 3-4 (quoting *Perry* at 1160) (citation omitted) (cleaned up). The majority held that "before subjecting a compelled disclosure to heightened scrutiny under the First

Amendment," the Court "must determine that 'disclosure of the information *will have* a deterrent effect on the exercise of protected activities.'" Maj. Op. at 4 (quoting *Perry* at 1162) (emphasis added). Proving what will happen in the future is a high burden that very few litigants have ever met.

The majority rejected the notion that the subpoena is about Dr. Ward's "politics" while, at the same time, acknowledging that "some of the people with whom Ward communicated may be members of a political party[.]" *Id*. The majority raised the proposition that not every subpoena for records implicates First Amendment rights, otherwise '[n]arcotics traffickers, or anyone else who might face such subpoenas, would be well advised to make at least a few calls to their preferred political party." *Id*. at 5-6.

The majority nevertheless concluded that, even if exacting scrutiny were to apply, the Committee's subpoena "would satisfy it." *Id*. at 6[3]. The majority held that "[t]he subpoena is substantially related to the important government interest in investigating the causes of the January 6 attack and protecting future elections from similar threats." *Id*. The essence of that holding is that the importance of the Select Committee's investigation trumps any First Amendment political associational concerns raised by Applicant. That holding flies in the face of an

[3] That ruling must be viewed as dicta. The question of whether the subpoena could survive exacting analysis was not properly before the panel on a motion for a stay.

unbroken line of precedent since this Court's unanimous landmark decision in *NAACP v. Alabama*, 357 U.S. 449, 342 (1958) (protecting the identities of members of the Alabama chapter of the NAACP and holding that such governmental inquiries should be subject to the "closest scrutiny"); *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) (holding that the First Amendment protects anonymous speech). The Committee's investigative interests do not automatically wipe away all countervailing constitutional considerations when a partisan congressional committee is demanding access to the records and contacts of their political opponents.

Judge Ikuta correctly construed *Bonta* in her dissent as mandating that *any* compelled disclosure of political association, such as in this case, must be greeted with a *presumption* that it burdens First Amendment rights and therefore "must be reviewed with exacting scrutiny." Dissent Op. at 3 (citing *Bonta*, 141 S. Ct. at 2383). The dissent noted the Supreme Court's admonition that "'[w]hen it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals,' but also by the mere 'risk of a chilling effect on association.'" Dissent Op. at 1 (quoting *Bonta*, 141 S. Ct. at 2389). The Committee's subpoena, the dissent opined, is the very sort of inquiry that would

"discourage citizens from exercising rights protected by the Constitution. *Id*. (quoting *Bonta*, 141 S. Ct. at 2384).[4]

The dissent concluded that the panel's majority opinion conflicts with *Bonta*. *Id*. The dissent construed *Bonta* to mean that "*whenever* the government compels disclosure of members' identities, it burdens the First Amendment right of expressive association." *Id*. at 2 (citing *Bonta* at 2382). Judge Ikuta cited to Justice Sotomayor's dissent in *Bonta,* in which Your Honor joined. *Id*. (citing *Bonta* at 2395 (Sotomayor, J., dissenting) (stating that, in *Bonta*, the Court "presumes . . . that all disclosure requirements impose associational burdens")). By way of example, Judge Ikuta pointed to the First Amendment's protection of a reporter's phone records from a government subpoena. *Id*. (citing *New York Times Co. v. Gonzales*, 459 F.3d 160, 168 (2d Cir. 2006)). The telephone and text message records of the state chair of a major political party should enjoy at least as much First Amendment protection as the identities of a journalist's confidential sources.

[4] The dissent also points out that, "by denying the Wards' motion for an injunction pending appeal, the majority likely prevents the Wards from raising serious questions regarding [Appellant] Kelli Ward's constitutional rights, because once T-Mobile produces her phone records," this appeal may be moot. Dissent Op. at 1-2. This was tacitly acknowledged by the majority where it "assume[d], without deciding, that the balance of hardships tips sharply in the Wards' favor," Maj. Op. at 2, but the majority provided no explanation as to how the Wards are to overcome the irreparable harm of disclosure absent an injunction pending appeal.

Judge Ikuta pointed out that *Bonta* represented a departure from the Supreme Court's prior decisions, in that it "subjected disclosure requirements to exacting scrutiny without first requiring plaintiffs to establish that the disclosure will actually subject them to threats, harassment, or reprisal." Dissent Op. at 3. This sharply contrasts with the majority's invocation of *Perry*, a Ninth Circuit opinion that pre-dated *Bonta* by over a decade. *Bonta*, thus, established the presumption that First Amendment rights are chilled, *which should have shifted the burden in this case to the Select Committee to establish otherwise.* Thus, the analytical framework under which the panel majority analyzed the issue was incorrect and imposed the burden on the wrong party.

The dissent pointed out that the only logical purpose for the subpoena is that Dr. Ward's phone records will "reveal information about other party members," which may expose those persons to public scrutiny. *Id*. at 5. Communications among members of a political party "implicate a core associational right protected by the First Amendment." *Id*. (citing *Buckley v. Valeo*, 424 U.S. 1, 15 (1976)). Thus, under a proper reading of *Bonta*, "exacting scrutiny applies without any showing of harassment or other consequences to" Dr. Ward. *Id*. at 6. Applying exacting scrutiny, Judge Ikuta concluded that the Committee has not carried its burden of showing "a substantial relation between the disclosure requirement and a

sufficiently important governmental interest, and that the subpoena is narrowly tailored to that interest." *Id*. (citing *Bonta* at 2385).

Judge Ikuta readily dispensed with the majority's analogy of a criminal or civil subpoena by pointing out that, obviously, not every individual can raise a First Amendment defense to the compelled disclosure of records. *Id*. at 8. The First Amendment protects only expressive association, not commercial or social associations. *Id*. (citations omitted). "Indeed," Judge Ikuta correctly noted, "this may be why the Wards sensibly did not raise a First Amendment claim with regard to the subpoena's compelled production of phone records concerning Ward's patients, family, and friends." *Id*.

One hopes that the Committee's object is not to banish those who hold controversial views from the public square, but that may well be the effect of this action by the Committee if it remains unchecked. As Judge Ikuta concluded, the exercise of vigilance in the defense of First Amendment rights is critical, "even when raised by an individual alleged to have engaged in a nefarious 'scheme,'—because "[t]he weakening of constitutional safeguards in order to suppress one obnoxious group is a technique too easily available for the suppression of other obnoxious groups to expect its abandonment when the next generally hated group appears." *Id*. at 10 (quoting *Communist Party of the U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 166 (1961) (Black, J., dissenting)). In other words, this

case, if not quickly corrected, will set a precedent that future Congresses and political partisans may soon live to regret.

The panel majority's decision is, as Judge Ikuta wrote in her dissent, in conflict with *Bonta*. *Id*. at 1. A lengthy and well-reasoned dissent outlining a departure from recent Supreme Court precedent is reason enough to conclude that the issue presented here is substantial and important and likely to raise the interest of at least four Justices on this Court.

If Your Honor and the other dissenting Justices are correct, *Bonta* requires that any compelled disclosure of information pertaining to political association gives rise to a *presumption* that it burdens First Amendment rights, and that the compelled disclosure is therefore subject to exacting scrutiny. *Bonta* at 2394-95 (Sotomayor, J., dissenting). That is a reasonable interpretation of the majority's holding in *Bonta*, but the Ninth Circuit panel majority's ruling below suggests that confusion lingers over who may bring a facial challenge to a compelled disclosure, and under what circumstances. Is a subpoena requiring disclosure of political affiliations, for example, to be treated different than a regulation mandating disclosure of the Schedule B tax form at issue in *Bonta*?

The concurrences of justices Thomas, Alito and Gorsuch in *Bonta* also pose the lingering question of whether exacting scrutiny or some more onerous form of scrutiny (such as the "closest scrutiny" standard referenced in *NAACP v. Alabama*)

is the appropriate standard to be applied when core First Amendment political associational rights are at stake. This case presents an ideal vehicle for deciding that unresolved issue.

The panel majority's decision also made an alarming and completely improper appellate-level factual finding that further warrants a stay. Even though there was no request from the Select Committee to do so, the panel majority drew an adverse factual inference against Applicant to supplement a record the Select Committee failed to make based on Dr. Ward's invocation of her Fifth Amendment right not to be compelled to be a witness against herself when testifying at a deposition before the Select Committee. Panel Op. at 7.

The Select Committee's subpoena (the timing of which was likely not coincidental) forced upon Dr. Ward a Hobson's Choice. On January 26, 2022 (which coincided with when the Committee issued its subpoena), CNN reported that Deputy Attorney General Lisa Monaco had announced that the Department of Justice were investigating "fake electoral college certifications" and that the Justice Department was "going to follow the facts and the law, wherever they lead, to address conduct of any kind and at any level that is part of an assault on our democracy." https://www.cnn.com/2022/01/25/politics/fake-trump-electoral-certificates-justice-department/index.html (last accessed October 23, 2022). The veracity of that reporting was confirmed five months later when a federal grand

jury in the District of Columbia issued subpoenas to several 2020 Arizona Republican electors, including Dr. Ward.

The panel majority's reasoning was misplaced for at least four reasons. First, Dr. Ward moved to quash the subpoena long before she invoked her Fifth Amendment right and the motion should have been decided based on the state of the facts at the time of filing. Second, in its briefing, the Select Committee never mentioned Dr. Ward's invocation of her Fifth Amendment rights and never sought an adverse inference. Third, while it is sometimes appropriate for to permit a fact finder in a civil proceeding to draw an adverse inference from a litigant's assertion of Fifth Amendment rights, the panel majority should not have been acting as a fact finder. The issue before the Ninth Circuit was whether the First Amendment question presented was substantial and important. Whether Dr. Ward acted in a certain way or had a specific intent was not relevant to that inquiry. Similarly, the issue of whether the subpoena could survive exacting scrutiny was also not properly before the panel.

Fourth, as Judge Ikuta noted in her dissent, the panel majority made an impermissible leap that there was any connection between sending an alternate slate of electors to Washington in mid-December of 2020 and the January 6, 2021 assault on the Capitol. That leap of logic had the result of supplementing a record concerning the importance of the investigation that the Select Committee failed to

make or even argue. In short, the panel majority conflated allegations of political disagreement with potential criminality, which was a factor that should have played no role in its decision regarding the stay. Dissent Op. at 9.

If this Court declines to stay the subpoena, and T-Mobile produces the requested records, Applicants will be irreparably harmed by the disclosure. **Applicants respectfully ask for a stay or injunction pending the completion of appellate review or, alternatively, a stay or injunction pending the filing of an application for a writ of mandamus in this Court**.

OPINIONS BELOW

The district court issued two orders that pertain to this Application. First, the district court granted the Committee's motion to dismiss on several grounds. Exh. B. The district court then denied Applicants' motion for an injunction pending appeal or for an administrative injunction to allow them the opportunity to bring a motion in the appellate court. Exh. C. Applicants promptly filed an emergency motion for injunction pending appeal in the appellate court, which was denied in a split-panel decision. Exh. A.

JURISDICTION

This Court has jurisdiction over this Application. *See e.g.*, 28 U.S.C. §§ 1253, 1254(1), and 1651(a). Applicants have sought the relief requested herein in the district court and in the Ninth Circuit, both of which were denied. Exh. A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Application concerns core political associational rights under the First Amendment to the United States Constitution.

BACKGROUND AND PROCEDURAL HISTORY

This Application and the underlying appeal relate to the Select Committee's investigation of the Capitol riot of January 6, 2021. Applicants are practicing physicians. *See* Declarations of Dr. K. Ward, Exh. D, and Dr. M. Ward, Exh. E. Dr. Kelli Ward has also been the Chairwoman of the Arizona Republican Party since 2019. Decl. K. Ward, Exh. D at ¶ 8. Due to the controversy surrounding her service as a Republican nominee for alternate elector and AZGOP Chairwoman in the aftermath of the 2020 election, she has received numerous death threats, harassing letters, and phone calls. *Id*. at ¶ 19.

On January 25, 2022, Mole Medical received a letter dated January 24, 2022, from the T-Mobile Legal and Emergency response team, informing the Wards that T-Mobile had "received a subpoena for records related to a phone number associated with" Mole Medical's T-Mobile account from the Committee. *See* Subpoena, Exh. F.[5]

[5] Paragraph 1 of the subpoena would have also encompassed the telephone numbers for Dr. Michael Ward and the Wards' children. The Committee has agreed to limit the scope of the subpoena only to records pertaining to Dr. Kelli Ward's telephone number on the account.

The subpoena seeks in pertinent part:

> Connection Records and Records of Session Times and Durations: All call, message (SMS & MMS), Internet Protocol, ("IP"), and data-connection detail records associated with the Phone Numbers, including all phone numbers, IP addresses, or devices that communicated with the Phone Number via delivered and undelivered inbound, outbound, and routed calls, messages, voicemail, and data connections.

Id. at ¶ 2.

The effect of this subpoena would be to gather the telephone numbers (and via reverse look-up directories the identities) of every person who was in contact with Dr. Ward during one of the most contentious periods in our political history. It is no secret what the Committee intends to do with this data. In a recent appearance on *60 Minutes* on September 25, 2022, former Congressman Denver Riggleman detailed his contact tracing activities on behalf of the Committee and showed a graphic that he created, called "The Monster" [Fig 1], which purportedly depicts the connections between certain partisan political actors and the White House. Congressman Riggleman confirmed what congressional investigators will do with the information they seek. "The thread that needs to be pulled identifying all the White House numbers and why we have certain specific people, why they were talking to the White House," he told 60 Minutes.[6] The

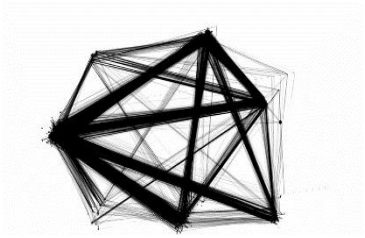

Figure 1

[6] Areeba Shah, *"The Monster": Ex-Jan. 6 investigator sounds alarm over*

precedent set here will be applied in the opposite direction if control of the House changes and Republicans initiate their own investigations or refocus the Committee itself for their own purposes.

Shortly after receiving notice of the subpoena, counsel for Applicants advised T-Mobile that Applicants would seek an order quashing the subpoena. T-Mobile agreed not to respond to the subpoena until resolution of this case. Applicants filed their Complaint and Motion to Quash on February 1, 2022. (Dist. Dkt. 1, 2). Counsel for the Committee did not appear until April 14, 2022, and promptly sought and obtained a stipulation for extension of time. (Dist. Dkt. 29, 30, 31). The Committee submitted further stipulations for extension of time on May 17, 2022 (Dist. Dkt. 32), June 27, 2022 (Dist. Dkt. 35), and July 27, 2022. (Dist. Dkt. 40). The district court only partially granted the latter request, giving the Committee until August 8, 2022, to respond to the complaint. (Dist. Dkt. 43).

The Committee moved to dismiss on August 8, 2022. (Dist. Dkt. 46). After briefing and argument, the district court granted the motion to dismiss. (Dist. Dkt. 55). Applicants filed a timely motion for injunction pending appeal or, in the alternative, for an administrative injunction to allow them to bring the relief sought

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mysterious WH call — here's what we know, SALON (available at: https://www.salon.com/2022/09/26/the-monster-ex-jan-6-investigator-sounds-alarm-over-mysterious-wh-call--heres-what-we-know/ (Sept. 26, 2022).

herein. (Dist. Dkt. 57). The district court denied the motion in full on October 7, 2022. (Dist. Dkt. 68).

As noted above, Applicants sought an injunction pending appeal in the Ninth Circuit by emergency motion filed on October 10, 2022. The motion was denied by the panel's split decision on October 22, 2022. Exh. A.

ARGUMENT

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (*per curium*). Such stays are available where the appeal is still before the Circuit Court provided that the "weightiest considerations" are present. *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994). All factors are present here.

Similarly, and alternatively, "[t]o obtain a stay pending the filing and disposition of a petition for a writ of mandamus, an applicant must show a fair prospect that a majority of the Court will vote to grant mandamus and a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth*, 558 U.S. at 190. In circumstances where a party seeks the issuance of a writ directly to a

federal district court a "question of public importance" or of "such a nature that it is peculiarly appropriate that such action by this court should be taken" should be involved." *Id*.; *see also Mohawk Indus. v. Carpenter*, 558 U.S. 100, 111, 130 S. Ct. 599, 607-08, 175 L.Ed.2d 458, 469 (2009) (mandamus relief serves as a "useful safety valve for promptly correcting serious errors" with respect to disclosure orders) (cleaned up).

The other portions of this Application are incorporated into this section as if fully set forth herein.

I. THERE IS A REASONABLE PROBABILITY THAT FOUR JUSTICES WILL CONSIDER THE ISSUE SUFFICIENTLY MERITORIOUS TO GRANT CERTIORARI.

Although there has never been a situation in American history where a congressional committee dominated by one party has subpoenaed the telephone and text message records of the state chairwoman chair of a rival party, the facts and procedural history of this case strongly resemble those of *Republican National Committee ("RNC") v. Pelosi*, which likewise involved a First Amendment challenge to a subpoena issued by the Committee to a third-party communications vendor seeking, *inter alia*, metadata related to RNC employees and partners. *See* Civil Action No. 22-659 (TJK), 2022 U.S. Dist. LEXIS 78501, at *9-10 (D.D.C. May 1, 2022).

In *Pelosi*, the district court's ruling on the question of associational rights heavily focused on the application of *Bonta*. *Republican Nat'l Comm. v. Pelosi*, *Civil Action* No. 22-659 (TJK), 2022 U.S. Dist. LEXIS 78501, at *56-71 (D.D.C. May 1, 2022). The D.C. Circuit, unlike the Ninth Circuit, granted an injunction pending appeal. *See Republican Nat'l Comm. v. Pelosi v. Pelosi, et al*, Case No. 22-5123 (D.C. Cir.) (Order of May 25, 2022); Sup Ct. R. 10(a) (certiorari appropriate where a "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter[.]"). Immediately before oral arguments in *Pelosi*, the Committee withdrew its subpoena and the D.C. Circuit then lamented that the case presented "important and unsettled constitutional questions" which it was now unable to resolve. *Republican Nat'l Comm. v. Pelosi*, No. 22-5123, 2022 U.S. App. LEXIS 26068, at *4 (D.C. Cir. Sep. 16, 2022).

Along those same lines, Judge Ikuta's dissent in this case notes that:

> The majority's view … is in conflict with the Supreme Court's recent landmark ruling, *Americans for Prosperity Foundation*, 141 S. Ct. at 2389. By denying the Wards' motion for an injunction pending appeal, the majority likely prevents the Wards from raising serious questions regarding Kelli Ward's constitutional rights, because once T-Mobile produces her phone records, the Wards' appeal may be moot.

Exh. A at 8-9; *see also* Sup. Ct. R. 10(c) (certiorari appropriate where a "United States court of appeals has … decided an important federal question in a way that conflicts with relevant decisions of this Court.").

Given the Committee's ongoing investigation, as well as the Justice Department's parallel national criminal investigation, these distinguished jurists are right to note that this an issue of the highest importance – it cries out for a national resolution.

It is not only jurists who have noted the importance of the issues presented by this case. Professor Jonathan Turley, of the George Washington University Law School, quickly observed with respect to the panel's ruling that its "impact on political speech could be not just chilling but glacial[.]"[7] Professor Turley also criticized its "sweeping" nature and the "the dismissive character of the analysis over legitimate concerns raised by the forced disclosure of political associations under the First Amendment." *Id.*

This Court was eager to take up another case concerning other important constitutional issues implicated by the Committee's subpoenas. *See, e.g., Trump v.*

[7] Jonathan Turley, *The Ninth Circuit Rules That There is no Chilling Effect in Forcing GOP Leaders to Hand Over Phone Records to Democrats* (available at: https://jonathanturley.org/2022/10/23/chilling-or-glacial-the-ninth-circuit-rules-that-there-is-no-chilling-effort-in-forcing-republican-leaders-to-hand-over-phone-records-to-democrats/) (last accessed Oct. 23, 2022).

Mazars USA, LLP, 140 S. Ct. 2019, 2034 (2020). The panel majority's opinion is that "[t]he investigation . . . is not about Ward's politics; it is about her involvement in the events leading up to the January 6 attack[.]" Exh. A, Dissent Op. at 4. As this Court noted in *Mazars*, the courts below have been far too cavalier in making this type of assessment:

> We would have to be "blind" not to see what "[a]ll others can see and understand": that the subpoenas do not represent a run-of-the-mill legislative effort but rather a clash between rival branches of government over records of intense political interest for all involved.

Mazars, 140 S. Ct. at 2034. This Court also found such issues sufficiently weighty to justify staying the decisions below, including a decision denying preliminary injunctive relief. *Id*. at 2028-29.

Although there is ample reason to afford this Court the opportunity to decide such an important Constitutional question concerning the application of *Bonta*, it cannot do so if every such case results in mootness, whether because the Committee withdraws its subpoena when a case is not going its way; because the courts below deny a stay in cases where they are inclined to the Committee's position; or because federal investigators simply kick down the door of a politician or political operative to seize his or her cell phone rather than even issuing a subpoena.[8] Thus, if this Court were to somehow find that this case was not likely to

[8] *See, e.g.*, Michelle Rindels, Jackie Valley, and Riley Snyder, *Report: Nevada GOP chairman served FBI search warrant over 'alternate elector' actions*, THE NEVADA

come before it on certiorari, the entry of writ of mandamus compelling the district court to stay its judgment prior to the completion of the appellate process would be appropriate since it would then be the case that "no other adequate means [exist] to attain the relief" Appellants are seeking. *See Hollingsworth*, 558 U.S. at 190.

II. THERE IS A FAIR PROSPECT THAT A MAJORITY OF THE COURT WOULD VOTE TO REVERSE THE ORDER BELOW OR, ALTERNATIVELY, A FAIR PROSPECT THAT THE COURT WOULD GRANT A PETITION FOR A WRIT OF MANDAMUS.

There is every reason to believe that, at a minimum, the same six Justices who decided *Bonta* would vote to reverse the decision in this case. First, as Judge Ikuta noted in her dissent, *Bonta* rejected prior decisions in that it "subjected disclosure requirements to exacting scrutiny without first requiring plaintiffs to establish that the disclosure will actually subject them to threats, harassment, or reprisal." Dissent Op. at 3. As the dissent in *Bonta* righty pointed out, the Court held "that reporting and disclosure requirements must be narrowly tailored even if a plaintiff demonstrates no burden at all." *Bonta* at 2392 (Sotomayor, J., Breyer J. and Kagan, J. dissenting). "In so holding, the Court discards its decades-long requirement that, to establish a cognizable burden on their associational rights, plaintiffs must plead and prove that disclosure will likely expose them to objective

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INDEPENDENT (available at: https://thenevadaindependent.com/article/report-nevada-gop-chairman-served-fbi-search-warrant-over-alternate-elector-actions) (published June 22, 2022) (last accessed Oct. 23, 2022).

harms, such as threats, harassment, or reprisals." *Id*. This observation of the ramifications of *Bonta* simply cannot be squared with the panel's holding, on the basis of superseded Ninth Circuit precedent, that "before subjecting a compelled disclosure to heightened scrutiny under the First Amendment, we must determine that "disclosure of the information will have a deterrent effect on the exercise of protected activities." Op. at 4. The dissent observed as much. Dissent Op. at 1.

As well, three of the Justices who concurred in the result in *Bonta*—Justices Thomas, Alito, and Gorsuch—may have applied the more exacting standard of strict scrutiny to compelled disclosures of private political associations. 141 S. Ct. at 2389-92.

And, even were *Bonta* not the law, the panel's conclusion that though the "Wards have received threatening and harassing messages because of their political activities[,]" Appellants failed to demonstrate that there was a "reasonable probability" that others exposed as having associated with them to carry out those activities would face such threats and harassment, would be absurd. Op. at 4, 6.

Bonta also noted that the Court has previously held "that the freedom of association may be violated where . . . individuals are punished for their political affiliation[.]" 141 S. Ct. at 2382 (citing *Elrod v. Burns*, 427 U.S. 347, 355 (1976)). There could hardly be a starker example of seeking to punish people for having ties to political views regarding the outcome of the 2020 presidential election that

many Americans regard as "dissiden[t][.]" Exh. A, Dissenting Op. at 9. While the Committee does not mete out punishment in a formal sense, "Such identifying information may expose these members to congressional investigation, perhaps federal criminal investigation, and related public criticism." *Id*. at 5. In a case like this *the punishment is the process*; the harm comes from the fear that your views will be exposed, that you can be the next person to expect a knock on your door from government investigators, and that you may be required to face the disastrous personal and financial consequences of having to retain counsel and appear before the Committee to answer for your political affiliations and opinions. This sets a terrible precedent for the future of public participation in American politics.

III. APPLICANTS WILL BE IRREPARABLY HARMED ABSENT A STAY.

A failure to grant a stay will result in this case becoming moot, thus leaving Applicants without any remedy for the disclosure on their appeal in the Ninth Circuit. That easily constitutes irreparable harm. *See, e.g., 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); *see also New York v. Kleppe*, 429 U.S. 1307, 1310, 97 S. Ct. 4, 6, 50 L.Ed.2d 38, 42 (1976) (Marshall, J., in chambers) ("Perhaps the most compelling justification for a Circuit Justice to upset an interim decision by a court of appeals would be to

protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals.").

IV. THE BALANCE OF THE EQUITIES AND RELATIVE HARMS FAVOR A STAY.

"In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190. Here, the Committee requested, and was granted, extensions for seven months prior to filing its Motion to Dismiss. *See Ward v. Thompson*, No. CV-22-08015-PCT-DJH, 2022 U.S. Dist. LEXIS 184204, at *12 (D. Ariz. Oct. 7, 2022) ("The Court is mindful that the Congressional Defendants have extended the phone records production date numerous times, which does raise questions about their immediate need for these records. (Docs. 26, 31, 33, 37, 39, 43, 50)."). Even then, the Committee would not have filed its Motion to Dismiss when it did had the district court not forced it to respond. (Doc. 41). To the extent there is any urgency now, it is urgency entirely of the Committee's making and does not justify depriving the Wards of the right to meaningful appellate review in one of the most important First Amendment cases in history.

CONCLUSION

Based on the foregoing, Applicants respectfully ask that the ruling of the panel of the Ninth Circuit be stayed, and that Respondent T-Mobile be temporarily enjoined from complying with the Select Committee's subpoena.

Dated: October 24, 2022

Respectfully submitted,

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EXHIBIT A

FILED

OCT 22 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL P. WARD, Dr., D.O., husband; et al.,

Plaintiffs-Appellants,

v.

BENNIE G. THOMPSON, in his official capacity as Chairman of the House Select Committee to Investigate the January 6th Attack on the United States Capitol; et al.,

Defendants-Appellees.

No. 22-16473

D.C. No. 3:22-cv-08015-DJH
District of Arizona,
Prescott

ORDER

Before: SILVERMAN, IKUTA, and MILLER, Circuit Judges.

Order by Judges SILVERMAN and MILLER, Dissent by Judge IKUTA

Appellants, Dr. Kelli Ward et al., brought this action to quash a subpoena issued by the House Select Committee to Investigate the January 6th Attack that directs T-Mobile USA, Inc., to release call records from Ward's phone for the period of November 1, 2020 through January 31, 2021. The records include metadata such as the time and duration of incoming and outgoing calls and the numbers involved; they do not include content or location information. The district court denied the motion to quash, and Ward now seeks an injunction pending appeal barring T-Mobile from complying with the subpoena. We deny the injunction.

In *Winter v. NRDC, Inc.*, the Supreme Court held that a party seeking a preliminary injunction must establish four things: "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, *and* that an injunction is in the public interest." 555 U.S. 7, 20 (2008) (emphasis added). Despite the language of *Winter*, we have held that an injunction does not necessarily require that the party seeking it be "likely to succeed on the merits." Rather, "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011).

We assume, without deciding, that the balance of hardships tips sharply in Ward's favor. Under *Alliance for the Wild Rockies*, we therefore ask whether Ward has raised "serious questions going to the merits." 632 F.3d at 1132. Ward's claims rest on the First Amendment and on the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936. The latter claim is insubstantial, so we focus on the First Amendment claim. As to that claim, we conclude that Ward has not raised serious questions on the merits—and, a fortiori, that she is not likely to succeed on the merits.

The First Amendment protects a right to anonymous association. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958); *cf. McIntyre v. Ohio*

Elections Comm'n, 514 U.S. 334, 342 (1995) (holding that the First Amendment protects the freedom to publish anonymously). Thus, "before requiring that organizations reveal sensitive information about their members and supporters," we must ask whether the compelled disclosure satisfies exacting scrutiny. *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021). A compelled disclosure meets the exacting scrutiny standard if (1) there is "a substantial relation between the disclosure requirement and a sufficiently important governmental interest," and (2) the requirement is narrowly tailored. *Id.* at 2383 (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)).

But the exacting scrutiny test does not apply to *all* compelled disclosures of information, regardless of the nature of the information sought. Instead, the Supreme Court has explained that courts should apply the exacting scrutiny test "before requiring that *organizations* reveal *sensitive information about their members and supporters*." *Americans for Prosperity Found.*, 141 S. Ct. at 2384 (emphasis added). And we have previously held that, for any kind of heightened scrutiny to apply to a compelled disclosure, the party resisting disclosure must make a "*prima facie* showing . . . that enforcement . . . will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160

(9th Cir. 2010) (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F.2d 346, 349–50 (9th Cir. 1988)). In short, before subjecting a compelled disclosure to heightened scrutiny under the First Amendment, we must determine that "disclosure of the information will have a deterrent effect on the exercise of protected activities." *Id.* at 1162; *see also Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 370 (2010) (explaining that an as-applied challenge to a disclosure requirement can succeed only where there is a "reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed").

Here, there is little to suggest that disclosing Ward's phone records to the Committee will affect protected associational activity. Unlike the regulation at issue in *Americans for Prosperity Foundation*, which required organizations to reveal their major donors, this subpoena does not target any organization or association. The investigation, after all, is not about Ward's politics; it is about her involvement in the events leading up to the January 6 attack, and it seeks to uncover those with whom she communicated in connection with those events. That some of the people with whom Ward communicated may be members of a political party does not establish that the subpoena is likely to reveal "sensitive information about [the party's] members and supporters." *Americans for Prosperity Found.*, 141 S. Ct. at 2384. Grand juries—and, for that matter, civil litigants—routinely

employ subpoenas for phone records, and any such subpoena necessarily reveals something about a person's associations. We do not read *Americans for Prosperity Foundation* as establishing that all of those subpoenas are subject to First Amendment scrutiny.

To prevail, Ward must therefore identify some reason to think that compliance with this subpoena will burden association. The district court found that there is "no evidence to support [the] contention that producing the phone numbers . . . will chill the associational rights of Plaintiffs or the Arizona GOP," and it determined that Ward's arguments to the contrary are "highly speculative." We review that factual finding for clear error. *Feldman v. Arizona Sec'y of State's Off.*, 843 F.3d 366, 380 & n.11 (9th Cir. 2016).

The district court's finding is amply supported by the record. In their declarations, the Wards say that they use their phones to communicate with patients in their medical practices, to talk to family and friends, and to "make and receive calls of a political nature" and "to and from people in the political world." Those vague statements do not show that disclosing the phone numbers involved would reveal anyone's private organizational membership, much less that the people involved in the calls would be reluctant to associate with any organization or political party if their identities were revealed. If declarations like these were sufficient, it would mean that anyone could raise a First Amendment objection to

any subpoena for records of calls that included discussions of politics—or, presumably, of "social, economic, religious, [or] cultural" matters. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). (Narcotics traffickers, or anyone else who might face such subpoenas, would be well advised to make at least a few calls to their preferred political party.) But that is not the law. And although the declarations also state that the Wards have received threatening and harassing messages because of their political activities, it does not follow that anyone known to have called them would face similar harassment.

Because there is no indication that the compelled disclosure in this case would deter protected associational activity, the exacting scrutiny standard does not apply. But even if that standard did apply, this subpoena would satisfy it. The subpoena is substantially related to the important government interest in investigating the causes of the January 6 attack and protecting future elections from similar threats. *Cf. Trump v. Thompson*, 20 F.4th 10, 41 (D.C. Cir. 2021) (noting that "the January 6th Committee plainly has a 'valid legislative purpose'" (quoting *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031–32 (2020))), *cert. denied*, 142 S. Ct. 1350 (2022). Ward participated in a scheme to send spurious electoral votes to Congress, a scheme that the Committee describes as "a key part" of the "effort to overturn the election" that culminated on January 6. Although Ward asserts that "[c]ongressional investigators already know what [she] did," the

Committee explains that that is untrue: When the Committee sought to question her about those activities, she invoked the Fifth Amendment and refused to answer. In this civil proceeding, it is appropriate to draw adverse inferences from her assertion of the Fifth Amendment privilege—namely, that Ward's conduct during the period in question went beyond simple discussions with her political associates, and that those with whom she communicated might have the information about her activities that she refused to provide. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

Having attempted the less intrusive method of asking Ward directly, the Committee has a strong interest in pursuing its investigation by other means. The subpoena is a narrowly tailored mechanism for doing so because it seeks only Ward's phone records, only from the critical window of November 1, 2020 through January 31, 2021, and only metadata, not content or location information. *Cf.* Stipulation of Voluntary Dismissal at 1, *Eastman v. Thompson*, No. 1:21-cv-03273-CJN (D.D.C. June 28, 2022) (dismissing challenge to similar subpoena after the Committee clarified that it was "not seeking the content of any of Plaintiff's communications").

The temporary injunction entered on October 18, 2022 is lifted. The motion for injunctive relief (Docket Entry No. 5) is **DENIED**.

The existing briefing schedule remains in effect.

"First Amendment freedoms need breathing space to survive." *Americans for Prosperity Found. v. Bonta (APF)*, 141 S. Ct. 2373, 2389 (2021) (citation and quotation marks omitted). Therefore, "[w]hen it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals," but also by the mere "risk of a chilling effect on association." *Id.* Here, a House Select Committee (the Committee) is attempting to obtain the names of the Arizona Republican Party (the Party) members who spoke to Kelli Ward, the Party's chair, during a period of contentious political upheaval. But the Committee has not provided any explanation as to why the phone records are relevant to its investigation. Because such government inquiries "discourage citizens from exercising rights protected by the Constitution," *id.* at 2384 (citation and quotation marks omitted), the Wards' challenge to the Committee's subpoena raises at least "serious questions going to the merits" of their First Amendment claim, *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). The majority's view to the contrary is in conflict with the Supreme Court's recent landmark ruling, *Americans for Prosperity Foundation*, 141 S. Ct. at 2389. By denying the Wards' motion for an injunction pending appeal, the majority likely prevents the Wards

from raising serious questions regarding Kelli Ward's constitutional rights, because once T-Mobile produces her phone records, the Wards' appeal may be moot. Therefore, I dissent.

I

The First Amendment right of expressive association protects individuals' freedom "to associate with others for the common advancement of political beliefs and ideas." *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973). As *Americans for Prosperity Foundation* made clear, *whenever* the government compels disclosure of members' identities, it burdens the First Amendment right of expressive association. 141 S. Ct. at 2382; *see also id.* at 2395 (Sotomayor, J., dissenting) (stating that the Court's opinion "presumes . . . that all disclosure requirements impose associational burdens"). This is because "[w]hen it comes to a person's beliefs and associations, [b]road and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution." *Id.* at 2384 (citation and quotation marks omitted) (alterations in original). The particular means employed by the government to compel disclosure of members' identities does not change the analysis. A court order or subpoena compelling disclosure may burden First Amendment rights just as much as legislation. *See, e.g.*, *NAACP v. Patterson*, 357 U.S. 449, 453 (1958) (considering Alabama's

motion for production of the NAACP's records and papers in litigation); *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 542 (1963) (considering an order by a committee of the Florida Legislature to the president of the NAACP's Miami branch to appear before it and bring the branch's membership records). For example, to the extent a First Amendment right of expressive association protects reporters from a government subpoena, it also protects their phone records held by third party telephone providers. *New York Times Co. v. Gonzales*, 459 F.3d 160, 168 (2d Cir. 2006).

Under *Americans for Prosperity Foundation*, compelled disclosure requirements of any sort must be reviewed with "exacting scrutiny."[1] 141 S. Ct. at 2383. In a departure from its past cases, the Court subjected disclosure requirements to exacting scrutiny without first requiring plaintiffs to establish that the disclosure will actually subject them to threats, harassment, or reprisal. Following *Americans for Prosperity Foundation*, courts must presume that a disclosure requirement burdens First Amendment rights without any showing of specific deterrence of individual members. *Id.* In other words, the inherent

[1] A majority of justices in *Americans for Prosperity Foundation* agreed that exacting scrutiny or a more rigorous standard of review is applicable. *See* 141 S. Ct. at 2383 (plurality opinion); *id.* at 2390 (Thomas, J., concurring in part and concurring in the judgment); *id.* at 2391 (Alito, J., concurring in part and concurring in the judgment).

"deterrent effect of disclosure" is sufficient to establish a First Amendment burden. *Id.* at 2382 (citation and quotation marks omitted). And "[e]xacting scrutiny is triggered by state action" alone, so long as that action "*may* have the effect of curtailing the freedom to associate." *Id.* (citation and quotation marks omitted).[2] In applying exacting scrutiny to a disclosure requirement, a court must determine whether the government has shown "a substantial relation between the disclosure requirement and a sufficiently important governmental interest, and that the disclosure requirement [is] . . . narrowly tailored to the interest it promotes." *Id.* at 2385 (cleaned up); *see also id.* at 2390 (Thomas, J. concurring in part and concurring in the judgment); *id.* at 2391 (Alito, J., concurring in part and concurring in the judgment); *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010).

II

In this case, Kelli Ward, as the chair of the Republican Party of Arizona, is responsible for contacting and coordinating with members of her Party about elections. She plays a heightened role "when there is public controversy

[2] Because *Americans for Prosperity Foundation* held that a court must presume that a disclosure requirement burdens First Amendment rights and start its analysis by determining whether the disclosure requirement is narrowly tailored, it supersedes *Perry v. Schwarzenegger*, which held that a plaintiff challenging a disclosure requirement must first demonstrate that the compelled disclosure will result in actual harassment or other consequences that will have a chilling effect. 591 F.3d 1147, 1160–61 (9th Cir. 2010). **Maj. op. at 3–4.**

concerning the outcome of an election." During the period from November 1, 2020 to January 31, 2021 (the period targeted by the Committee's subpoena), the legitimacy of the 2020 presidential election was in dispute, and Ward used her phone to communicate with Party members about the election. Contrary to the majority's view that "this subpoena does not target any organization or association," **Maj. op. at 4**, the subpoena on its face compels the disclosure of identifying information of Party members with whom Ward had contact. Moreover, because the Committee is "no longer seeking . . . [Ward's] patient phone numbers," and it is unlikely that the duration of Ward's calls with her children and parents, would provide the Committee with useful information about the events surrounding January 6, the only plausible explanation for the Committee's interest in Ward's phone records is that they reveal information about other Party members. **Maj. op. at 5.** Such identifying information may expose these members to congressional investigation, perhaps federal criminal investigation, and related public criticism.

The communications at issue here between members of a political party about an election implicate a core associational right protected by the First Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 15 (1976) ("[T]he First . . . Amendment[] guarantee[s] freedom to associate with others for the common

advancement of political beliefs and ideas, a freedom that encompasses the right to associate with the political party of one's choice." (cleaned up)). Therefore, under *Americans for Prosperity Foundation*, the Committee's subpoena constitutes a disclosure requirement that is presumed to burden Ward's First Amendment right of expressive association. 141 S. Ct. at 2382–84, 2388. As such, exacting scrutiny applies without any showing of harassment or other consequences to Ward. **Maj. op. at 4–5**. Under this standard of review, the burden is on the Committee to establish that there is a substantial relation between the disclosure requirement and a sufficiently important governmental interest, and that the subpoena is narrowly tailored to that interest. *See APF*, 141 S. Ct. at 2385.

The Committee has not carried that burden. Even assuming that the government's interest in investigating the events of January 6, 2021, is sufficiently important, the Committee has not provided any evidence or plausible reason to believe that Ward's contacts (whether political associates, family, or friends) were involved in the events of January 6 or explain why information about her communications has any bearing on the Committee's investigation. Trying to fill this gap, the majority speculates that Ward's invocation of the Fifth Amendment before the Committee warrants "adverse inferences" that she was engaged in criminal conduct with her political associates and that those associates "might have

the information about her activities that she refused to provide."[3] **Maj. op. at 7.** But the Committee itself did not offer this rationale.[4] And it is improper for the majority to hold there is a substantial relationship between the Committee's subpoena and its investigation of the events of January 6 based solely on its own speculation. Because the Committee does not provide any actual explanation for its inquiry other than its general investigative interests, and therefore has not shown that there is a substantial relationship between the disclosure requirement and an important governmental interest, the Wards have shown at least "serious questions going to the merits" of their First Amendment claim, *All. for the Wild Rockies*, 632 F.3d at 1135, if not a likelihood of success, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

In holding to the contrary, the majority relies primarily on the policy concern that applying the exacting scrutiny test required by *Americans for Prosperity Foundation* would lead to absurd results of allowing persons engaged in narcotic trafficking "or anyone else" to raise a First Amendment objection to subpoenas of

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[3] The subpoena issued on January 19, 2022, and Ward did not invoke the Fifth Amendment until October 4, 2022. So the "adverse inferences" the majority draws are post-hoc rationalizations that cannot justify the Committee's issuance of the subpoena.

[4] Perhaps the Committee would make this argument in response to the Wards' arguments on appeal. But because the majority denies the Wards' motion for injunctive relief pending appeal, we will likely never know.

telephone records. **Maj. op. at 6.** This concern is unfounded.

First, it is obvious that not every individual can raise a First Amendment claim to protect compelled disclosure of phone records. **Maj. op. at 5–6**. The First Amendment protects only those individuals engaged in expressive association, meaning that they have joined together to collectively express and pursue the "views that brought them together" on "political, social, economic, religious, and cultural" matters. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622–23 (1984). By contrast, the First Amendment does not protect commercial or social associations because those relationships are not formed to collectively express and pursue shared beliefs. *See City of Dallas v. Stanglin*, 490 U.S. 19, 24–25 (1989); *IDK, Inc. v. Clark County*, 836 F.2d 1185, 1195 (9th Cir. 1988). Indeed, this may be why the Wards sensibly did not raise a First Amendment claim with regard to the subpoena's compelled production of phone records concerning Ward's patients, family, and friends.

Moreover, if the requirement that the association be *expressive* does not assuage the majority's fears, the exacting scrutiny standard should. A properly tailored subpoena, seeking (for example) a narcotics trafficker's phone records with regard to known criminal associates, would not be blocked by exacting scrutiny. When an investigation is based on probable cause that particular

individuals are engaging in criminal activity, the government should have no problem showing a substantial relationship between the disclosure requirement and a sufficiently important governmental interest, or to show narrow tailoring regardless of a "few calls" by those individuals to a political party. **Maj. op. at 6.** But where a subpoena broadly seeks information about political association and the government makes no effort to explain why such information is helpful to its wide-ranging investigation, exacting scrutiny protects core constitutional rights.

Finally, comparing Ward's coordination of her Party's activities during a national election—a core First Amendment activity, *Buckley*, 424 U.S. at 15—to the criminal (and commercial) acts of a narcotics trafficker—decidedly non-expressive activities, *IDK, Inc.*, 836 F.2d at 1195—conflates political dissidence with criminality. **Maj. op. at 6**. It was precisely that unconstitutional conflation that led the Supreme Court to first recognize the right of expressive association. *NAACP*, 357 U.S. at 462; *see also NAACP v. Button*, 371 U.S. 415, 438 (1963) ("[T]he State's attempt to equate the activities of the NAACP and its lawyers with common-law barratry, maintenance and champerty, and to outlaw them accordingly, cannot obscure the serious encroachment worked by [a state anti-solicitation law] upon protected freedoms of expression.").

III

Regardless of Ward's position regarding the 2020 election, her right to engage in discussions with her political associates remains entitled to First Amendment protection against the government's compelled disclosure of her political affiliations. **Maj. op. at 6–7**. We must be vigilant to protect First Amendment rights—even when raised by an individual alleged to have engaged in a nefarious "scheme," **Maj. op. at 6**—because "[t]he weakening of constitutional safeguards in order to suppress one obnoxious group is a technique too easily available for the suppression of other obnoxious groups to expect its abandonment when the next generally hated group appears," *Communist Party of the U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 166 (Black, J., dissenting). Because the majority has applied an erroneous legal framework, and the Wards' claim that the Committee's subpoena burdens Kelli Ward's First Amendment rights at least raises a serious question on the merits, I dissent.

EXHIBIT B

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Michael P Ward, et al.,

Plaintiffs,

v.

Bennie G Thompson, et al.,

Defendants.

No. CV-22-08015-PCT-DJH

ORDER

Pending before the Court is Plaintiffs Michael P. Ward and Kelli Ward's ("Plaintiffs") Motion to Quash a Congressional Subpoena *Duces Tecum* issued by the United States House of Representatives Select Committee ("Select Committee") in furtherance of its investigation into the January 6th attack on the United States Capitol (Doc. 2). Defendant T-Mobile USA Inc. filed a Response (Doc. 48), and Plaintiffs filed a Reply (Doc. 52).

Also pending is Defendants Bennie G. Thompson and the Select Committee's ("Congressional Defendants") Motion to Dismiss, which includes arguments responsive to those made in Plaintiffs' Motion to Quash (Doc. 46).[1] Plaintiffs filed a Response in

[1] Plaintiffs note the Congressional Defendants failed to comply with LRCiv 12.1(c). (Doc. 51 at 5). The purpose of the meet and confer is to cure alleged deficiencies in the Complaint. Plaintiffs say they would have added T-Mobile as a Defendant to the remaining Counts had they been notified in advance of the alleged deficiencies. (*Id.* at 4 n.3). The Court, however, finds this proposed amendment would not resolve the subject matter jurisdiction deficiencies alleged in the Motion to Dismiss. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend."). Under these circumstances, the Court will excuse Defendants' failure to meet and confer.

Opposition (Doc. 51), and Congressional Defendants filed a Reply (Doc. 53).[2]

I. Background[3]

This case arises out of the Select Committee's investigation into the January 6, 2021, attack on the United States Capitol.

The parties include three Plaintiffs: Dr. Kelli Ward ("Ward"), her husband Dr. Michael Ward ("M. Ward"), both of whom are practicing physicians, and Mole Medical Services, PC ("Mole Medical"), an Arizona Professional Corporation (Doc. 1 at ¶¶ 6–8). Plaintiff Kelli Ward is Chair of the Arizona Republican party and was a Republican nominee for Arizona's presidential electors for the 2020 General Election. (Docs. 1, 1-2 at ¶¶ 7, 19). Three Defendants are named: Bennie G. Thompson, a Representative from Mississippi and Chairman of the Select Committee ("Thompson"), the Select Committee, and T-Mobile USA, Inc. ("T-Mobile") (*Id.* at ¶¶ 9–11).

On June 30, 2021, the U.S. House of Representatives adopted House Resolution 503, which established the Select Committee and tasked the Committee with "investigat[ing] and reporting upon the facts, circumstances, and causes relating to the January 6, 2021, domestic terrorist attack upon the United States Capitol Complex . . . and relating to the interference with the peaceful transfer of power." H.R. Res. 503 § 3(1). The Select Committee is authorized to recommend "corrective measures," including "changes in law, policy, procedures, rules, or regulations that could be taken." *Id.* § 4(c).

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[2] On September 7, 2022, Plaintiffs filed a Notice of Supplemental Authority regarding the status of the Republican National Committee's ("RNC") appeal of a D.C. District Court's dismissal of the RNC's objections relating to a subpoena issued by the Select Committee to one of the RNC's vendors. (Doc. 54 citing *Republican National Committee v. Pelosi*, 2022 WL 1294509 (D.D.C. May 1, 2022)). After the parties briefed the issues on appeal, but before oral argument, the Select Committee withdrew the subpoena at issue. (*Id.*) On September 16, 2022, the D.C. Circuit Court dismissed the appeal and vacated the district court's judgment. *Republican Nat'l Comm. v. Pelosi, et al.*, 2022 WL 4349778, at *1 (D.C. Cir. Sept. 16, 2022). The D.C. Circuit Court found vacatur necessary because by withdrawing the subpoena, the Committee precluded the appellate court from reviewing "the important and unsettled constitutional questions that the appeal would have presented." *Id.* As a result of that recent order, the D.C. district court decision holds no persuasive or precedential value.

[3] Unless otherwise noted, these facts are taken from Plaintiffs' Complaint (Doc. 1). The Court will assume the Complaint's factual allegations are true, as it must in evaluating a motion to dismiss. *See Lee v. City of L.A.*, 250 F.3d 668, 679 (9th Cir. 2001).

On or around January 25, 2022, Mole Medical received a letter from T-Mobile informing Mole Medical that T-Mobile had received a subpoena *duces tecum* from the Select Committee to investigate the January 6th attack. (Doc. 1 at ¶ 1). The subpoena required T-Mobile to produce information related to account 4220, including incoming and outgoing phone call records, their duration and associated phone numbers, and information about the callers.[4] (*Id.* at ¶ 2). The subpoena seeks information from November 1, 2020, to January 31, 2021, and required production by February 4, 2022.[5] (*Id.*) The subpoena states "[t]his schedule does not call for the production of the content of any communications or location information." (Doc. 1-1 at 3). The information to be produced, as set forth in the subpoena, is as follows:

> 1. Subscriber Information: All subscriber information for the Phone Number, including:
>
> a. Name, subscriber name, physical address, billing address, e-mail address, and any other address and contact information;
> b. All authorized users on the associated account;
> c. All phone numbers associated with the account;
> d. Length of service (including start date) and types of service utilized;
> e. Telephone or instrument numbers (including MAC addresses), Electronic Serial Numbers ("ESN"), Mobile Electronic Identity Numbers ("MEIN") Mobile Equipment Identifier ("MEID"), Mobile Identification Numbers ("MIN"), Subscriber Identity Modules ("SIM"), Mobile Subscriber Integrated Services Digital Network Number ("MSISDN"), International Mobile Subscriber Identifiers ("MSI"), or International Mobile Equipment Identities ("IMEI") associated with the accounts;
> f. Activation date and termination date of each device associated with the account;
> g. Any and all number and/or account number changes prior to and after the account was activated;
> h. Other subscriber numbers or identities (including temporarily

[4] Plaintiff Ward notes three other lines are associated with the 4220 account: one belonging to her husband and the other two belonging to her children. (Doc. 1-2 at ¶ 17). In their Motion to Dismiss, Congressional Defendants represent that "to the extent call detail records for [Dr. Michael Ward and his two children's] phone numbers are considered covered by the Subpoena, the Select Committee has voluntarily withdrawn such a demand and has notified T-Mobile accordingly." (Doc. 46 at 11 n.8).

[5] The parties agreed to extend the production date several times. (Docs. 26, 31, 33, 37, 39, 43, 50).

> assigned network addresses and registration Internet Protocol ("IP") addresses); and
>
> 2. Connection Records and Records of Session Times and Durations: All call, message (SMS & MMS), Internet Protocol ("IP*"), and data-connection detail records associated with the Phone Numbers, including all phone numbers, IP addresses, or devices that communicated with the Phone Number via delivered and undelivered inbound, outbound, and routed calls, messages, voicemail, and data connections.

(*Id.* at 3).

Plaintiffs claim production of the information sought in the subpoena would violate their rights under the First and Fourteenth Amendments of the U.S. Constitution. (*Id.* at ¶ 4). Plaintiffs therefore seek declaratory judgment and injunctive relief, and ask this Court to quash the subpoena and enjoin Defendants from enforcing it or producing any documents in compliance of its demands. (*Id.* at ¶ 5).

Plaintiffs' Complaint contains four causes of action. (*Id.* at 10–19). Count I, against all Defendants, seeks declaratory judgment and injunctive relief, alleging the subpoena is an *ultra vires* action by the Select Committee and thus invalid; Count II, against Congressional Defendants, alleges a violation of the First Amendment; Count III, against Congressional Defendants, alleges a violation of state and federal statutory privilege protections; and Count IV, against Congressional Defendants, alleges a violation of the Rules of the House of Representatives. (*Id.*) Plaintiffs assert no "wrongdoing on the part T-Mobile" and note "they are named herein only insofar as is necessary to ensure that they will be bound by this Court's judgment." (*Id.* at ¶ 11).

Congressional Defendants move to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(1) and (6), arguing the Court lacks subject matter jurisdiction to consider Plaintiffs' claims because sovereign immunity bars those claims. (Doc. 46 at 12). Congressional Defendants further argue the Complaint fails to state a claim upon which relief can be granted. (*Id.* at 13).

II. Legal Standards

Under Federal Rule of Civil Procedure ("Rule") 12(b)(1), a defendant may seek to

dismiss a complaint for lack of jurisdiction over the subject matter. A federal court is one of limited jurisdiction. *See Gould v. Mut. Life Ins. Co. v. New York*, 790 F.2d 769, 774 (9th Cir. 1986). It therefore cannot reach the merits of any dispute until it confirms its own subject matter jurisdiction. *See Steel Co. v. Citizens for a Better Environ*., 523 U.S. 83, 95 (1998). Plaintiff, as the party seeking to invoke jurisdiction, has the burden of establishing that jurisdiction exists. *See Kokkonen v. Guardian Life Ins. Co. of Am*., 511 U.S. 375, 377 (1994).

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a claim. *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011). Complaints must make a short and plain statement showing that the pleader is entitled to relief for its claims. Fed. R. Civ. P. 8(a)(2). This standard does not require "'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). There must be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* While courts do not generally require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *See Twombly*, 550 U.S. at 555. A complaint must "state a claim to relief that is plausible on its face." *Id.* at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. In addition, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

Dismissal of a complaint for failure to state a claim can be based on either the "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). In reviewing a motion to dismiss, "all factual allegations set forth in the complaint 'are taken as true and construed in the light most favorable to the plaintiffs.'" *Lee v. City of L.A.*, 250 F.3d 668, 679 (9th Cir. 2001) (quoting *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140

(9th Cir. 1996)). But courts are not required "to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

III. Discussion

Congressional Defendants move to dismiss Plaintiffs' Complaint under Rules 12(b)(1) and 12(b)(6), arguing the Court lacks subject matter jurisdiction to consider Plaintiffs' claims under the doctrine of sovereign immunity and because the Complaint fails to state a claim upon which relief can be granted. (Doc. 46 at 12–13).

A. Subject Matter Jurisdiction

The Court must dismiss claims and parties over which it lacks subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). The Court must therefore address this issue first.

i. Sovereign Immunity

"[T]he United States may not be sued without its consent and . . . the existence of consent is a prerequisite for [subject matter] jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Consent must be "unequivocally expressed" for Congress to waive its sovereign immunity. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992). Sovereign immunity "forecloses . . . claims against the House of Representatives and Senate as institutions, and Representative[s] . . . and Senator[s] . . . as individuals acting in their official capacities." *Rockefeller v. Bingaman*, 234 F. App'x 852, 855 (10th Cir. 2007) (internal citations omitted).

The Supreme Court, however, has recognized two narrow exceptions to the general bar against suits seeking relief from the United States. *See Wyoming v. United States*, 279 F.3d 1214, 1225 (10th Cir. 2002). "A court may regard a government officer's conduct as so 'illegal' as to permit a suit for specific relief against the officer as an individual if (1) the conduct is not within the officer's statutory powers or, (2) those powers, or their exercise in the particular case, are unconstitutional." *Id.* (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 702 (1949)).

Here, Plaintiffs sue Defendant Thompson in his official capacity, and they sue the

Select Committee as a committee of the House of Representatives. (Doc. 1 at ¶¶ 9, 10). Plaintiffs fail to identify a waiver that is "unequivocally expressed" and thus sovereign immunity plainly bars Plaintiffs' claims against the Select Committee. *Nordic Vill. Inc.*, 503 U.S. at 33. Likewise, an official capacity suit seeking injunctive relief against a federal employee is "treated as a suit against a government entity" and therefore Defendant Thompson, acting in his official capacity, is protected by Congress's sovereign immunity. *Id.* (citing to *Travelers Ins. Co. v. SCM Corp.*, 600 F. Supp. 493, 497 (D.D.C. Dec. 21, 1984) (holding that "[i]t is clear that a claim against a federal employee in his or her 'official capacity' is in effect a claim against the government. The sovereign immunity doctrine cannot be evaded by changing the label on the claims or the parties."); *see also E. V. v. Robinson*, 906 F.3d 1082, 1094 (9th Cir. 2018) (holding where a suit is "in substance" a suit against the government, a court has no jurisdiction in the absence of consent)). The Court accordingly finds no waiver here. Unless Plaintiffs can show one of the narrow exceptions in which sovereign immunity does not apply to government conduct, Plaintiffs' claims are barred.

ii. Exceptions to Sovereign Immunity

Finding no applicable waiver, Plaintiffs seek to invoke the first exception to sovereign immunity by arguing the actions taken by the Select Committee are *ultra vires* because the subpoena does not relate to a legitimate Congressional task and is in violation of House Rules. (Doc. 2 at 13). Plaintiffs further contend the subpoena violates their associational rights under the First Amendment. (Doc. 2 at 11–13). Plaintiffs' arguments are unpersuasive.

a. Valid Legislative Purpose

The Court's role is limited in reviewing Congress's investigative power. Although Congress has no enumerated investigative power, the Supreme Court has recognized that each house of Congress has the power "to secure needed information" to legislate. *See Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (internal citation omitted). Congressional subpoenas, issued in furtherance of Congress's investigative power, must

have a "valid legislative purpose." *Id.* at 2031. This means the subpoena must be "related to, and in furtherance of, a legitimate task of the Congress" such as pursuing a "subject on which legislation could be had." *Id.* at 2033. An investigation conducted to "expose for the sake of exposure" is therefore "indefensible." *Id.* at 2032.

Congressional committees may execute this investigative power when a relevant institution delegates it to them. *See McGrain v. Daugherty*, 273 U.S. 135, 177 (1927). To issue a valid subpoena, however, a committee must conform to the resolution that established its investigative powers. *See Exxon Corp. v. FTC*, 589 F.2d 582 (D.C. Cir. 1978). A committee's conformity to its authorizing resolution or governing rules is "political in nature" and therefore "nonjusticiable." *Metzenbaum v. Fed. Energy Reg. Comm'n*, 675 F.2d 1282, 1287 (D.C. Cir. 1982).

The Court's review of whether an investigative act has a valid legislative purpose is deferential. *McGrain*, 273 U.S. at 177–80. Indeed, the "purpose need not be clearly articulated" and the "legitimate legislative purpose bar is a low one." *Id.* The Court must "presume that the action" has a "legitimate object" if "it is capable of being so construed." *Id.* When the Court considers the valid legislative purpose in the scope of a subpoena, "the Court's review is limited to 'whether the documents sought . . . are not plainly incompetent or irrelevant to any lawful purpose' of the committee 'in the discharge of [its] duties.'" *Senate Select Comm. on Ethics v. Packwood*, 845 F. Supp. 17, 20–21 (D.D.C. 1994) (quoting *McPhaul v. United States*, 364 U.S. 372, 381 (1960)). Thus, for the Court to find a subpoena invalid based on an improper purpose, the subpoena must be rooted in exposing for exposure's sake. *Mazars*, 140 S. Ct. at 2032.

Plaintiffs argue the Congressional Defendants' subpoena must be quashed because it is an *ultra vires* action that does not relate to a legitimate Congressional task. (*Id.* at 13). To support this claim, Plaintiffs contend the subpoena (1) does not concern a subject on which legislation may be had, (2) does not comport with the Committee's enabling resolution because it was issued in aid of a criminal investigation or for the purpose of harassing and threatening Plaintiffs, (3) and is overboard. (Doc. 2 at 13).

Notably, the D.C. Circuit Court in *Trump v. Thompson* rejected similar arguments as to the legitimacy of the Select Committee. *See Trump v. Thompson*, 20 F.4th 10, 41 (D.C. Cir. 2021), cert. denied, —— U.S. ——, 142 S. Ct. 1350, 212 (2022) (finding the Select Committee's investigation into the January 6th attack on the Capitol has a "valid legislative purpose" and the Committee's inquiry contained in the authorizing resolution concerned "a subject on which legislation could be had.") (quoting *Mazars*, 140 S. Ct. at 2031–32)). This Court does as well. House Resolution 503 plainly authorizes the Select Committee to propose legislative measures based on its findings. H.R. Res. 503 § 4(a)(3). Indeed, the Select Committee's purpose is to "issue a final report to the House containing such findings, conclusions, and recommendations" for such "changes in law, policy, procedures, rules, or regulations" as the Committee "may deem necessary[.]" *Id.* § 4(a)(3),(c). The Court therefore finds the Select Committee's investigation into the January 6th attack on the Capitol has a "valid legislation purpose." *Trump*, 20 F.4th at 41.

To impeach the Select Committee's otherwise valid legislative purpose Plaintiffs must overcome a "formidable bar." *Comm. on Ways & Means, U.S. House of Representatives v. U.S. Dep't of the Treasury*, 575 F. Supp. 3d 53, 65 (D.D.C. Dec. 14, 2021) (finding that "while Congress need clear only a low bar to establish a valid purpose, [plaintiffs] face a formidable bar to impeach that purpose"). Plaintiffs argue Deputy Attorney General Monaco stated the Select Committee's investigation concerned whether Plaintiffs "committed a crime by sending fake Electoral College certifications that declared former President Donald Trump the winner of states he lost." (Doc. 2 at 14). Plaintiffs say it is "public knowledge that Republicans sent a competing slate of electors for Arizona" and that "no investigation is necessary to confirm this," thus the subpoena was issued to harass them for exercising their First Amendment rights. (*Id.*)

The Court finds this evidence falls short of the formidable bar Plaintiffs must overcome to show an invalid legislative purpose. In *Watkins*, a defendant refused to answer questions before a House committee about whether certain individuals were members of the Communist Party because he doubted the relevance of those questions to the

committee's work. *Watkins v. United States*, 354 U.S. 185 (1957). The Court found the defendant had "marshalled an impressive array of evidence that" exposure of Communists motivated the committee. *Id.* at 199. This evidence included an official committee publication which stated the committee "believed itself" called "to expose people and organizations attempting to destroy this country." *Id.* Even considering the "impressive array of evidence," the Court found it did not invalidate the committee's inquiry. *Id.* at 200. "[A] solution to our problem is not to be found in testing the motives of committee members." *Id.* "Their motives alone would not vitiate an investigation . . . if that assembly's legislative purpose is being served." *Id.*

Plaintiffs' evidence of an illegitimate purpose is nowhere close to the evidence in *Watkins*. First, Deputy Attorney General Monaco is not a member of the Select Committee, and it is unclear to the Court how her comments implicate the Committee's motives. Second, Plaintiffs appear to argue Deputy Attorney General Monaco's statement shows the Select Committee's purpose is motivated by a criminal investigation. The Court is unpersuaded. Indeed, the D.C. Circuit rejected that the Select Committee has an "improper law enforcement purpose," finding "[t]he mere prospect that misconduct might be exposed does not make the Committee's request prosecutorial" and that "[m]issteps and misbehavior are common fodder for legislation." *Trump*, 20 F.4th at 42. The Court therefore rejects Plaintiffs' claims that the Select Committee's subpoena was issued to harass them or is otherwise for an improper law enforcement purpose. *See Barenblatt v. United States*, 360 U.S. 109, 132 (1959) (finding that if "Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power.").

Last, Plaintiffs argue the subpoena is overbroad because it does not set forth with "undisputable clarity" how its request for data relates to an authorized and lawful purpose of the Committee's investigation. (Doc. 2 at 14–15). But the Court's role is limited to whether the requested records "are not plainly incompetent or irrelevant to any lawful purpose' of the committee 'in the discharge of [its] duties.'" *Packwood*, 845 F. Supp. at

20–21 (quoting *McPhaul v. United States*, 364 U.S. 372, 381 (1960). The Select Committee's information request relates to phone calls records from November 1, 2020, to January 31, 2021, from an account associated with a Republican nominee to serve as elector for former President Trump. (Doc. 1-1 at 3; Doc. 1-2 at ¶ 19). That three-month period is plainly relevant to its investigation into the causes of the January 6th attack. The Court therefore has little doubt concluding these records may aid the Select Committee's valid legislative purpose. *McGrain*, 273 U.S. at 177.

b. House of Representatives Rule Violations

Plaintiffs also allege the Select Committee lacks authorization because it has only nine members and the authorizing resolution states that the Speaker shall appoint thirteen members. (Doc. 1 at ¶ 81). It is undisputed that the composition of the Select Committee includes nine members.

The Rulemaking Clause of Article I, Section 5 of the Constitution "reserves to each House of the Congress the authority to make its own rules," and a court's different interpretation of a congressional rule is tantamount to "*making* the Rules—a power that the Rulemaking Clause reserves to each House alone." *Barker v. Conroy*, 921 F.3d 1118, 1130 (D.C. Cir. 2019) (emphasis in original) (internal citation omitted). The Court may intervene only if doing so "requires no resolution of ambiguities." *See United States v. Durenberger*, 48 F.3d 1239, 1244 (D.C. Cir. 1995). A "sufficiently ambiguous House Rule," however, "is non-justiciable." *United States v. Rostenkowski*, 59 F.3d 1291, 1306 (D.C. Cir. 1995). Further, the Court "must give great weight to the [House's] present construction of its own rules." *See United States v. Smith*, 286 U.S. 6, 33 (1932). Relevant here, House Resolution 503 states that "[t]he Speaker shall appoint 13 Members to the Select Committee, 5 of whom shall be appointed after consultation with the minority leader." H. Res. 503 § 2(a).

The Court rejects Plaintiffs' argument that the subpoena was unauthorized because it was issued by nine members of the Select Committee and will defer to the House's

"construction of its own rules."[6] *Smith*, 286 U.S. at 33. The House has already empowered the Select Committee to act under its authorizing resolution, despite its composition. Indeed, the House adopted the Select Committee's recommendations to find witnesses in contempt of Congress for refusals to comply with subpoenas and thus its composition has been implicitly ratified by the body that created it. *See* 167 Cong. Rec. H5748, H5768–69 (Oct. 21, 2021) (Steve Bannon); 167 Cong. Rec. H7667, H7794, H7814–15 (Dec. 14, 2021) (Mark Meadows). Here, Plaintiffs ask this Court to interpret the resolution in a different manner than the House's own reading of the authorizing resolution. But the Rulemaking Clause reserves this power to the House and the Court will not interpret the resolution in a manner contrary to the authorizing body. *Barker*, 921 F.3d at 1130.

c. First Amendment Associational Rights

Although not expressly stated, Plaintiffs appear to argue the issuance of the subpoena is an unconstitutional act that does not bar this suit under sovereign immunity principles. To that end, Plaintiffs argue the subpoena violates their associational rights under the First Amendment. (Doc. 2 at 11). Plaintiffs contend the Court must apply "exacting scrutiny" to the subpoena because "political associational rights are at stake." (*Id.* at 12). Plaintiffs further claim the subpoena provides the Select Committee with "the means to chill the First Amendment associational rights not just of the [Plaintiffs] but of the entire Republican Party in Arizona. (*Id.* at 13).

To escape lawful government investigation, plaintiffs must demonstrate a "prima facie showing of arguable first amendment infringement . . . ." *Brock v. Loc. 375, Plumbers Int'l Union of Am., AFL-CIO*, 860 F.2d 346, 350 (9th Cir. 1988). This requires plaintiffs show that "enforcement of the subpoena will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Id.* Plaintiffs must provide "objective and articulable facts, which go beyond broad allegations

[6] Plaintiffs' quorum and delegation of authority allegations, contained under the same Count in their Complaint, are also based on the Select Committee's nine-member composition and the Court therefore rejects these arguments for the same reasons. (Doc. 1 at ¶¶ 85–91).

or subjective fears." *Id.* at n1. A "subjective fear of future reprisals is an insufficient showing of infringement of associational rights." *Id.* "The existence of a prima facie case turns not on the type of information sought, but on whether disclosure of the information will have a deterrent effect on the exercise of protected activities." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010).

Plaintiffs argue their production of records "risks" those people who called or texted Plaintiff Kelli Ward to be contacted by the Committee and to "become implicated in the largest criminal investigation in U.S. history." (Doc. 51 at 9). Having already found that the subpoenaed information may aid the Committee in its function, this argument fails. Plaintiffs also assert the Committee is controlled by members of a rival political party and thus raises concerns that the Committee will use the information it obtains "to harass or persecute political rivals by inquiring into their dealings with the party Chair." (*Id.*) Plaintiffs say "[i]f the Select Committee prevails, it will get a list of who, when, and for how long the Chair of the AZGOP was in contact with party members at a sensitive time . . . [which] may 'induce members to withdraw' from the AZGOP 'and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.'" (*Id.*)

The Court finds these arguments highly speculative. First, the Court "must presume" that the Select Committee "will exercise [its] powers responsibly and with due regard for the [Plaintiffs'] rights" in handling the information. *Exxon Corp.*, 589 F.2d at 589. Second, apart from these broad allegations, Plaintiffs have provided no evidence to support their contention that producing the phone numbers associated with this account will chill the associational rights of Plaintiffs or the Arizona GOP. Absent "objective and articulable facts" otherwise, the Court finds Plaintiffs' arguments constitute "a subjective fear of future reprisal" that the Ninth Circuit has held as insufficient to show an infringement of associational rights. *Brock*, 860 F.2d at 350.

Last, the law requires plaintiffs show that "enforcement of the subpoena *will result* in harassment . . ." *Id.* (emphasis added). Although Plaintiffs allege that they have

"received death threats, harassing letters, phone calls, and threatening and sexually explicit comments," because of the January 6th attack and Plaintiff Ward's associational status with the Arizona GOP, the Court notes these incidents have already occurred. *Id.* (Doc. 1 at ¶¶ 55–56). Plaintiffs do not otherwise explain how compliance with the subpoena would result in harassment. Plaintiffs allege that the subpoena "must be declared violative of Plaintiffs' First Amendment associational rights," but beyond conclusory allegations, they do not demonstrate how the Select Committee's enforcement of the subpoena and subsequent possession of the phone numbers "will have a deterrent effect on the exercise of protected activities." (*Id.* at ¶ 57). The Court therefore finds Plaintiffs failed to demonstrate a cognizable First Amendment claim.

Because Plaintiffs failed to show an applicable exception to the sovereign immunity doctrine, Plaintiffs' claims against the Congressional Defendants are barred.

B. State and Federal Statutory Privileges

Although Plaintiffs' claims against the Congressional Defendants are barred, T-Mobile is also named a Defendant to this lawsuit. The Court will therefore consider Plaintiffs' state and federal statutory claims, which necessarily relate to T-Mobile's release of the subpoenaed records. Plaintiffs argue the subpoena should be quashed because it infringes on rights protected under state and federal statutory privileges, including Arizona's Physician-Patient Privilege and the Health Insurance Portability and Accountability Act ("HIPAA"). (Doc. 2 at 7–10).

a. Arizona Physician-Patient Privilege

"Arizona has adopted physician-patient privilege statutes for both civil and criminal proceedings." *Samaritan Health Servs. v. City of Glendale*, 714 P.2d 887, 889 (Az. Ct. App. 1986). The statute reads: "Unless otherwise provided by law, all medical records and payment records, and the information contained in medical records and payment records, are privileged and confidential." *See* A.R.S. § 12-2292.

Plaintiffs argue the subpoena improperly seeks telephone "metadata," and that a study from Stanford University shows that a patient's "name or relationship status are

immediately apparent from telephone metadata" as well as "countless other personal details." (Doc. 2 at 8). Plaintiffs therefore contend disclosure of their patients' phone numbers infringes on the physician-patient privilege under A.R.S. § 12-2292.

Congressional Defendants argue the Supremacy Clause of the U.S. Constitution, U.S. Const., Art. VI, cl. 2, overrides Arizona's physician-patient privilege and thus the statute cannot limit information validly sought under a Congressional subpoena. (Doc. 46 at 23). Congressional Defendants further assert a Congressional subpoena is not part of a "civil matter" and therefore Arizona's physician-patient privilege statute does not apply. (*Id.*)

In their Complaint, Plaintiffs allege the subpoena "constitutes a violation of Arizona state law related to medical privilege." (Doc. 1 at ¶ 65). But "[t]his statute codifies the physician-patient privilege and does not create a private right of action." *Skinner v. Tel-Drug, Inc.*, 2017 WL 1076376, at *4 (D. Ariz. Jan. 27, 2017). Accordingly, Plaintiffs' statutory violation claim in Count III cannot plausibly stand, and the Court will dismiss it.

Plaintiffs' argument that the subpoena should be quashed because it is overbroad and sweeps into physician-patient privileged information is equally unsuccessful. The Arizona statute applies to civil and criminal proceedings and, as Congressional Defendants point out, a congressional subpoena involves neither. Instead, the subpoena here is issued under Congress's constitutional power to conduct investigations "on which legislation could be had." *See Mazars*, 140 S. Ct. at 2031. Moreover, even if the statute applied, the Congressional Defendants are not seeking information related to the "confidential contents of the . . . patient's medical records." *Carondelet Health Network v. Miller*, 212 P.3d 952, 956 (Ariz. Ct. App. 2009). "The whole purpose of the privilege is to preclude the humiliation of the patient that might follow disclosure of his ailments." *Id.* (internal citation omitted). As the court in *Miller* clarified, "if the disclosure of the patient's name reveals nothing of any communication concerning the patient's ailments, disclosure of the patient's name does not violate the privilege." *Miller*, 212 P.3d at 956. Here, the records sought by Congressional Defendants "reveal[] nothing of any communication concerning

the patient's ailments." *Id.* Plaintiffs contend that their medical practice focuses "exclusively on weight loss" and that "communication with certain types of doctors can instantly reveal confidential facts about a patient's condition." (Doc. 52 at 4). But the Court finds it implausible that a patient's phone number would "inevitably expose information about the patient's medical history, condition, or treatment, and potentially reveal information the patient had divulged in confidence." *See Miller*, 212 P.3d at 955 (holding trial court's order requiring hospital to disclose the name, address, and telephone number of a hospital patient did not violate the physician-patient privilege).

b. The Health Insurance Portability and Accountability Act

Count III of Plaintiffs' Complaint attempts to bring another cause of action under HIPAA, alleging "the enforcement of the Subpoena must be enjoined until and unless limitations are put in place to protect the [protected health information ("PHI")] of the Plaintiffs' patients." (Doc. 1 at ¶ 72). Plaintiffs allege they are "covered entities" and that "[d]isclosing the phone records and metadata from the Phone Number would provide the PHI of an unknown but quantifiable number of individuals seeking medical treatment from the Plaintiffs to the Committee and potentially to the public at large." (*Id.* at ¶ 67). As an initial matter, it is well established that HIPAA does not provide a private cause of action. *Webb v. Smart Document Sols.*, LLC, 499 F.3d 1078, 1081 (9th Cir. 2007). Thus, under the current Complaint, Plaintiffs' independent HIPAA claim cannot plausibly stand, and the Court will dismiss it.

Nonetheless, the real question appears to be whether the Select Committee's request for information that may otherwise be HIPAA protected is reason to quash the subpoena. To that end, Plaintiffs argue the subpoena violates HIPAA because telephone numbers can be used to identify the Wards' patients and those numbers constitute PHI. (Doc. 2 at 9). Congressional Defendants and T-Mobile argue T-Mobile is not a covered entity and therefore HIPAA's disclosure restrictions do not apply. (Doc. 53 at 13; Doc. 48 at 4).

HIPAA restricts health care entities from disclosure of PHI. Generally, however, HIPAA only applies to covered entities. "A covered entity or business associate may not

use or disclose protected health information, except as permitted or required by [these regulations]." 45 C.F.R. § 164.502(a). Covered entities include health plans, health plan clearinghouses, or health care providers who transmit any health information in electronic form in connection with a transaction covered by HIPAA. 45 C.F.R. §§ 160.102(a), 164.104(a). A business associate is a person or organization that "creates, receives, maintains, or transmits protected health information" for "a covered entity" unless "in the capacity of a member of the workforce of such covered entity." *Id.* § 160.103.

Covered entities and business associates may disclose PHI only with the patient's consent or in response to a court order or discovery request. 45 CFR § 164.512(f)(1)(ii)(A). Disclosure of PHI is permitted in response to a subpoena when the covered entity "receives satisfactory assurance from the party seeking the information that reasonable efforts have been made . . . to ensure that the individual who is the subject of the protected health information . . . has been given notice of the request; or . . . reasonable efforts have been made . . . to secure a qualified protective order." 45 C.F.R. §§ 164.512(e)(1)(ii)(A)–(B). A qualified protective order prohibits the parties from using or disclosing PHI for any purpose other than the litigation at hand and requires the parties to return or destroy the protected information at the end of proceedings. 45 C.F.R. § 164.512(e)(1)(v).

Plaintiffs argue HIPAA applies here because Plaintiffs are the "true parties from whom the information is sought." (Doc. 51 at 16). Plaintiffs cite no case law to support this proposition and the Court accordingly rejects it. The Congressional Defendants plainly issued a subpoena to T-Mobile, not Plaintiffs, and Plaintiffs do not represent that they maintain or could produce the type of records sought in the subpoena. (Doc. 1-1 at 2). T-Mobile is not a covered entity under HIPAA and therefore HIPAA's PHI disclosure requirements do not apply to it.

The Court also notes HIPAA does not preclude production of PHI where an adequate protective order is in place. 45 C.F.R. § 164.512(e); *Lind v. United States*, 2014 WL 2930486, at *2 (D. Ariz. June 30, 2014) (internal citation omitted). Plaintiffs allege the parties have not discussed the prospect of a protective order or the potential PHI the

subpoena could implicate. (Doc. 1 at ¶ 71). The Court therefore encourages the parties to engage in discussions regarding entry of a protective order designed to protect any potential PHI. Given the legitimate purpose underlying the Select Committee's investigation, however, the Court will not quash the subpoena on the grounds that some of the information could potentially be protected under statutes that do not apply to T-Mobile. *See F.T.C. v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980) ("the judiciary must refrain from slowing or otherwise interfering with the legitimate investigatory functions of Congress.").

IV. Conclusion

Plaintiffs bear the burden of establishing that jurisdiction over the Congressional Defendants exists and have failed to do so here. *Kokkonen*, 511 U.S. at 377. Sovereign immunity therefore bars Plaintiffs' claims against the Congressional Defendants. Plaintiffs note in their Complaint that T-Mobile was only added to ensure compliance with the Court's Order. (Doc. 1 at ¶ 11). Because there is no viable claim against T-Mobile, the Court will also dismiss it.

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' Motion to Quash (Doc. 2) is **denied** and the Congressional Defendants' Motion to Dismiss (Doc. 46) is **granted**. The Clerk of the Court is kindly directed to terminate this action.

Dated this 22nd day of September, 2022.

Honorable Diane J. Humetewa
United States District Judge

EXHIBIT C

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Michael P Ward, et al.,

Plaintiffs,

v.

Bennie G Thompson, et al.,

Defendants.

No. CV-22-08015-PCT-DJH

ORDER

Plaintiffs Michael and Kelli Ward and Mole Medical Service PC ("Plaintiffs") sued to challenge a subpoena issued to Defendant T-Mobile by the U.S. House of Representatives Select Committee ("Select Committee") to investigate the January 6th attack on the United States Capitol. On September 22, 2022, the Court denied Plaintiffs' Motion to Quash and granted Chairman Bennie G. Thompson and the Select Committee's ("Congressional Defendants") Motion to Dismiss. (Doc. 55). Plaintiffs now move for an injunction pending appeal or, in the alternative, for an administrative injunction during which Plaintiffs can petition the Ninth Circuit for an injunction pending appeal. (Doc. 57). Congressional Defendants oppose Plaintiffs' Motion. (Doc. 63). The Court will deny both requests.

I. Background

This case arises out of the Select Committee's investigation into the January 6, 2021, attack on the United States Capitol. In its prior Order, the Court dismissed Plaintiffs' claims against the Congressional Defendants because of their immunity from suit under

the doctrine of sovereign immunity. (Doc. 55 at 6).

On September 23, 2022, Plaintiffs filed a notice of appeal. (Doc. 56). Three days later, on September 26, 2022, Plaintiffs moved for an injunction pending appeal or, in the alternative, an administrative injunction "to allow Plaintiffs sufficient time to seek an emergency injunction in the Ninth Circuit." (Doc. 57 at 2). T-Mobile takes no position on the Motion. (Doc. 66). Congressional Defendants oppose both requests for relief. (Doc. 63 at 2).

On October 4, 2022, the Court held oral arguments on the matter. (Doc. 66). During arguments the Congressional Defendants confirmed that they are no longer seeking Dr. Michael Ward's records or Plaintiffs' patient phone numbers. (*Id.*)

II. Legal Standard

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Such a "drastic remedy . . . should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quotation omitted).

Where, as here, a plaintiff seeks an injunction pending appeal, this court applies the test for preliminary injunctions. *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1100 (9th Cir. 2006). To obtain a preliminary injunction, a plaintiff must show: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm if injunctive relief is denied, (3) that the balance of equities weighs in the plaintiff's favor, and (4) that the public interest favors injunctive relief. *Winter*, 555 U.S. at 20. The movant carries the burden of proof on each element of the test. *See Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980). The last two factors merge when the government is a party. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

The Ninth Circuit has adopted a "sliding scale approach under which a preliminary injunction could issue where the likelihood of success is such that 'serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor.'"

All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011) (quoting *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003)). This approach survives the four-element test set forth in *Winter* when applied as part of that test. *Id.* at 1131–32.

III. Discussion

The Court begins with Plaintiffs' request for a preliminary injunction and then considers Plaintiffs' request for an administrative injunction.

1. Preliminary Injunction Pending Appeal

Because it is dispositive, the Court will first address the second element of the preliminary injunction test: whether Plaintiffs have established a likelihood of irreparable harm in the absence of a preliminary injunction. *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (finding that speculative allegations of harm cannot constitute irreparable harm and "a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief").

A. Irreparable Harm

Plaintiffs argue that unless this Court issues an injunction that prohibits enforcement of the subpoena, T-Mobile will have no choice but to comply. (Doc. 57 at 9). Once the Select Committee obtains the phone records, Plaintiffs contend, "[t]he proverbial toothpaste will all be out of the tube, and there will be no way for any court to undo the disclosure of political contacts and patient telephone numbers." (*Id.*) Specifically, Plaintiffs argue that disclosure of Ms. Ward's political contacts will chill them from communicating with her in the future, and that "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." (*Id.* at 2). Plaintiffs also contend that disclosure of Ms. Ward's patient numbers will disclose their identities and, because she only provides one type of treatment, will reveal the patients' sought treatment. (*Id.* at 3). Plaintiffs also note the Constitution's Speech or Debate Clause immunizes the Select Committee and thus the Court would be powerless to order the Select Committee to

return the records. (*Id.* at 10).

For the following reasons, the Court finds these contentions do not constitute the showing of irreparable harm required for the extraordinary relief of a preliminary injunction.

First, as to Plaintiffs' concerns regarding disclosure of patient numbers, the Court has already found that neither the Arizona physician-patient privilege nor the Health Insurance Portability and Accountability Act apply to bar disclosure of the records sought. (Doc. 55 at 14–18). Moreover, the Select Committee clarified at the hearing that it does not seek any of Plaintiffs' patient telephone numbers, thus assuaging any concerns Plaintiffs have asserted regarding their disclosure. (Doc. 66). Second, as to Plaintiffs' concern that disclosure of Ms. Wards' political contacts will chill Republican members' interests in communicating with their Chair, the Court finds this alleged concern speculative—and in light of disclosures made during oral argument—dubious. Indeed, during argument, Plaintiffs' counsel pointed out that Ms. Ward had written a book[1] about how she participated in sending an alternate slate of electors to Washington and filmed videos of this participation and posted them to YouTube. These actions belie Ms. Ward's concern that her communications with her constituents or colleagues will be chilled by T-Mobile's possible disclosure of a record showing Ms. Ward called or received calls from persons during this time.

In sum, the Court finds Plaintiff Wards' claim that she does not want to disclose the identities of her political contacts for fear of chilling her constituents' future communication with her falls short of stating the concrete, irreparable injury warranted for a preliminary injunction.[2] (Doc. 66). *See also Caribbean Marine Servs. Co.*, 844 F.2d at

[1] The Court may take judicial notice of matters that are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). *See* https://www.amazon.com/Justified-Americas-Dr-Kelli-Ward/dp/195725503X

[2] The Court notes that Plaintiffs raised the associational rights of the Arizona GOP for the first time during oral argument. (Doc. 66). Nowhere in Plaintiffs' Complaint, however, did Plaintiffs allege a claim on behalf of the Arizona GOP. The Complaint alleges they "have been injured by this retaliation against *their* First Amendment protected interests . . . ." (Doc. 1 at ¶ 59) (emphasis added). Not only is this argument untimely, but Plaintiffs

674 ("[s]peculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction."). Ms. Ward's own actions undermine her concern that disclosure of these numbers will chill political communications. The burden is on Plaintiffs to make a clear showing of an immediate threatened injury, and Plaintiffs have not done so here. *Lopez v*, 680 F.3d at 1072.

Because irreparable harm is a prerequisite to injunctive relief, and Plaintiffs cannot make the showing, Plaintiffs have not satisfied the second element of the *Winter* test. Plaintiffs are therefore not entitled to an injunction pending appeal. *Protecting Arizona's Res. & Child. v. Fed. Highway Admin.*, 2016 WL 9080879, at *2 (D. Ariz. Oct. 26, 2016).

B. Sliding Scale

The Ninth Circuit's more flexible sliding scale approach does not alter the Court's conclusion. Plaintiffs argue their appeal raises serious legal questions concerning their associational rights under the First Amendment. (Doc. 57 at 5). They say the "exacting scrutiny" standard, which 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," is an unsettled area of the law and thus raises a serious question. (*Id.* at 6). But as discussed below, the Court did not even reach application of this standard because the Court found Defendants immune from such a claim and any alleged constitutional violation too speculative to find a waiver of such immunity.

After consideration of the parties' arguments and in light of its previous Order (Doc. 55), the Court finds Plaintiffs have not presented a serious legal question regarding the merits of Plaintiffs' First Amendment claim. Although Plaintiffs discuss at length the application of the exacting scrutiny standard in their briefing and how this case mirrors *Republican National Committee v. Pelosi*, the Court already found Plaintiffs failed to raise a viable First Amendment claim because of the speculative nature of their alleged harm.[3]

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have not heretofore assessed whether they have standing to allege the associational injury.

[3] Moreover, during arguments, Plaintiffs acknowledged the factual distinction of the records sought in *Pelosi*, and those sought here.

(Doc. 55 at 14). Indeed, the Court noted that Plaintiffs "provided no evidence to support their contention that producing the phone numbers associated with this account will chill the associational rights of Plaintiffs or the Arizona GOP" and that "'absent objective and articulable facts' otherwise, the Court finds Plaintiffs' arguments constitute 'a subjective fear of future reprisal' that the Ninth Circuit has held as insufficient to show an infringement of associational rights." (Doc. 55 at 13). *See also Brock v. Loc. 375, Plumbers Int'l Union of Am., AFL-CIO*, 860 F.2d 346, 350 (9th Cir. 1988). Because Plaintiffs failed to "demonstrate how the Select Committee's enforcement of the subpoena and subsequent possession of the phone numbers [would] have a deterrent effect on the exercise of protected activities," the Court found Plaintiffs "failed to demonstrate a cognizable First Amendment claim" and thus did not even reach the issue of whether exacting scrutiny applied here. (*Id.* at 14). *See also Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010).

In addition, Plaintiffs have not demonstrated that the balance of hardships tips sharply in their favor. To the contrary, "there is a strong public interest in Congress carrying out its lawful investigations" and "[t]he public interest is heightened when, as here, the legislature is proceeding with urgency to prevent violent attacks on the federal government and disruptions to the peaceful transfer of power." *Trump v. Thompson*, 20 F.4th 10, 48 (D.C. Cir. 2021), *cert. denied*, 142 S. Ct. 1350 (2022). Last, the Select Committee is authorized through the end of the current Congress, which is set to conclude on January 3, 2023. An injunction would thus make it impossible for the Select Committee to obtain the subpoenaed records because the Ninth Circuit briefing deadline is not until January 2023. Time Schedule Order at 3, Michael Ward, et al v. Bennie Thompson, et al, No. 22-16473 (9th Cir. Sept. 26, 2022), ECF 1. Thus, even under the more flexible sliding scale approach, the Court finds that Plaintiffs have not met their burden to show the balance of hardships tips sharply in their favor. *All. for the Wild Rockies*, 632 F.3d at 1131. Having failed to make such a showing, and given the Court's determination that Plaintiffs failed to make a clear showing of an immediate threatened injury, Plaintiffs' motion for an

injunction pending appeal will be denied.

2. Administrative Injunction Pending Appeal

In addition to their request for a preliminary injunction, Plaintiffs seek, in the alternative, an administrative injunction pending appeal. (Doc. 57 at 2). During oral arguments, the Court specifically inquired about the relevant legal standards regarding an administrative injunction pending appeal and a preliminary injunction pending appeal. (Doc. 66). Both parties skirted the Court's direct query and instead focused only on the preliminary injunction standard. (*Id.*)

The Ninth Circuit has "definitively resolved which standard applies to administrative stay motions." *Nat'l Urban League v. Ross*, 977 F.3d 698, 702 (9th Cir. 2020) (citing *Doe #1 v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019). "When considering the request for an administrative stay, our touchstone is the need to preserve the status quo." *Id.* In other words, an administrative stay "is only intended to preserve the status quo until the substantive motion for a stay pending appeal can be considered on the merits, and does not constitute in any way a decision as to the merits of the motion for stay pending appeal." *Doe #1*, 944 F.3d at 1223.

During the hearing, neither party addressed how the status quo would be affected if the phone records were released. (Doc. 66). Based on the parties briefing and oral argument record, the Court finds the status quo has shifted since the inception of this case. The Congressional Defendants no longer seek Dr. Michael Ward's or his children's phone records and counsel for the Select Committee clarified at the hearing it does not seek Ms. Ward's patient phone numbers. (Doc. 55 at 3 n.4; Doc. 66). To this end, the Court finds the Congressional Defendants have substantially narrowed the subpoena since its initial issuance, and thus shifted the analysis of what is in fact the "status quo."

Notwithstanding the narrow scope of the current information now sought, Plaintiffs still argue that if the records are produced by T-Mobile, their First Amendment associational rights will be chilled, and this is a harm that cannot be remedied. (Doc. 63 at 7). As noted, the Court finds this alleged concern to be speculative and dubious,

particularly in light of Ms. Ward's book and her YouTube video, which presumably publicized many of the identities of the political contacts she communicated with during that time. (Doc. 66). At the very least, this self-publication does not evidence a true concern for her contacts' privacy. The Court is mindful that the Congressional Defendants have extended the phone records production date numerous times, which does raise questions about their immediate need for these records. (Docs. 26, 31, 33, 37, 39, 43, 50). But given the breadth of the Select Committee's investigation and the numerous parties involved, the Court finds these extensions do not negate the overall need for the phone records. This is particularly true because the Select Committee is only authorized until the end of the current Congress, which concludes on January 3, 2023. (Doc. 66). For these reasons, and because the status quo has been substantially altered by the parties' respective conduct, the Court cannot find an administrative injunction is warranted here. *Nat'l Urban League*, 977 F.3d at 702. Accordingly, the Court will deny Plaintiffs' request for an administrative injunction.

IV. Conclusion

For these reasons, the Court denies Plaintiffs' Motion for an injunction pending appeal and denies Plaintiffs' request for an administrative injunction.

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' Motion for Injunction or Administrative Injunction Pending Appeal (Doc. 57) is **denied**.

Dated this 7th day of October, 2022.

Honorable Diane J. Humetewa
United States District Judge

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In Re Subpoena to T-Mobile Issued By Select Committee to Investigate the January 6th Attack on the U.S. Capitol.	)	**Case No. *to be assigned*** **MOTION TO QUASH CONGRESSIONAL SUBPOENA**

Declaration of Kelli Ward in Support of Motion to Quash

1. I am of over 18 years of age and have personal knowledge of the facts set forth herein.
2. I am a resident of Lake Havasu City, Arizona.
3. I obtained my BS in psychology from Duke University in Durham, North Carolina in 1991.
4. I attended medical school at the West Virginia School of Osteopathic Medicine in Lewisburg, West Virginia, where I received my Doctor of Osteopathic Medicine (D.O.) degree in 1996.
5. Since December of 2019, I have practiced exclusively in the field of medical weight loss.
6. My understanding is that the subpoena issued to T-Mobile seeks the production of certain information about all individuals who called, or were called, from the telephone numbers associated with the account 928-486-4220 (Mole Medical) between November 1, 2020 and January 31, 2021.
7. I became aware that this information had been subpoenaed on or around January 25, 2022
8. In 2019, I was elected Chairwoman of the Arizona Republican Party, a position I still hold. However, I still practice medicine part-time. The position of Chairwoman is unpaid, so treating medical weight loss patients allows me to maintain an income stream. I also derive meaning and satisfaction from my work outside of politics as a doctor.
9. Since the COVID-19 pandemic began, I have seen patients almost exclusively via telemedicine.
10. For many of my patients, the mere fact that they are seeing a doctor for medical weight loss is a sensitive issue.
11. Further, my patients sometimes bring up other sensitive topics during their telemedicine visits. Examples include diabetes, high blood pressure, thyroid

issues, psychological problems, anxiety, depression, insomnia, and eating disorders.

12. I use a HIPAA-compliant videoconferencing system during my patients' telemedicine visits. However, sometimes my patients or I will have trouble with the system. In such cases, I call patients from a telephone line associated with Mole Medical and we conduct the visit telephonically. When this occurs, my typical practice is to note it in the medical records for that visit.
13. From November 1, 2020, to January 31, 2021, I worked approximately five shifts.
14. I estimate that I typically see 30-40 patients per shift.
15. To the best of my knowledge, all my patients are located in Arizona. However, many of them have moved to Arizona from other states and have telephone numbers with area codes associated with different states.
16. In general, I call some patients by telephone during a normal shift. Hard confirmation of which patients I called during a given shift and their phone numbers would require me to look through the medical records for each of my patients that I saw on a given day which would be an extraordinarily burdensome task.
17. Other than my line, there are three other active phone lines associated with this account: one belonging to my husband, and two to my children.
18. Besides my patients, I frequently exchange calls and texts with my daughter, son (and his girlfriend), mother, mother-in-law, father-in-law, father, stepfather, friends, etc. on my Mole Medical line. I also make and receive calls of a political nature on the line as well.
19. Because of the controversy associated with my service as Republican nominee for elector and AZGOP Chairwoman in the aftermath of the 2020 election, I have received numerous death threats, harassing letters, and phone calls.

I declare under penalty of perjury under the laws of The United States of America that the foregoing is true and correct and that this declaration was executed on this 1/31/2022, at Salt Lake City (city), Utah (state).

Signature: DocuSigned by: 388CCBD35CF046D... Printed Name: Kelli Ward

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In Re Subpoena to T-Mobile Issued By Select Committee to Investigate the January 6th Attack on the U.S. Capitol.	)	**Case No. *to be assigned*** **MOTION TO QUASH CONGRESSIONAL SUBPOENA**

Declaration of Michael Ward in Support of Motion to Quash

1. I am of over 18 years of age and have personal knowledge of the facts set forth herein.
2. I am a resident of Lake Havasu City, Arizona where my wife Kelli Ward and I own a home.
3. I served in the United States Air Force for over 30 years, both active duty and reserve.
4. I joined the United States Air Force after high school serving first as an Air Force medic for approximately eight years. I then received a direct commission as a medical officer. I served stateside during the first Gulf War. I also participated in Operation Iraqi Freedom, deploying to Kirkuk Iraq in 2004. I retired in 2017 with the rank of Colonel. My last assignment was as State Air Surgeon for the State of Arizona. In that capacity I was the senior medical advisor to the Adjutant General.
5. During my time in the Air Force, I attended medical school at the Kirksville College of Osteopathic Medicine in Kirksville, Missouri, where I received my Doctor of Osteopathic Medicine (D.O.) degree in 1995.
6. After graduating from medical school, I attended a residency in emergency medicine that I completed in 1999. Since that time, I have been in the active practice of emergency medicine in the State of Arizona.
7. I work as a contractor, treating patients in various emergency departments under Mole Medical. Most of these departments are near Lake Havasu City.
8. In certain circumstances, I will give my Mole Medical phone number to patients that I care for in the emergency departments. I do this so that we can follow up, via voice or text, regarding their questions, the status of their condition, and whether they are improving.
9. I estimate that I give my number to patients several times over the course of a normal week. During the COVID pandemic, I have given the number to patients more frequently, in part because COVID patients have many questions about their treatment, needed follow-up, and prescriptions.

10. I also use the line to consult with other physicians about patients.
11. In addition to my medical practice as an emergency physician, I am the medical director for an air ambulance company where I am constantly on call to them for medical advice.
12. My understanding is that the subpoena issued to T-Mobile seeks the production of certain information about all individuals who called, or were called, from the telephone numbers associated with the account 928-486-4220 (Mole Medical) between November 1, 2020 and January 31, 2021.
13. During this date range I was actively practicing medicine.
14. I cannot think of any way to know for certain exactly which incoming and outgoing calls from the date range in question were with patients.
15. Besides my patients, I frequently exchange calls and texts with my daughter, sons (and the girlfriend of one of the sons), my parents, my in-laws, aunts and uncles, friends, etc. on my Mole Medical line. I also make and receive calls to and from people in the political world on the line as well.
16. Although I see all my patients in Arizona, many of my patients have telephone numbers that do not have Arizona area codes.
17. Because of my service as Republican nominee for elector, I have received threatening and harassing messages on social media. For example, some individuals have sent me messages wishing death upon me or stating that my wife had performed sexual acts with President Trump.
18. My daughter has also received threating and harassing messages because of our family's political activities which we have had several conversations about.

I declare under penalty of perjury under the laws of The United States of America that the foregoing is true and correct and that this declaration was executed on this 1/31/2022, at Salt Lake City (city), Utah (state).

Signature: DocuSigned by: 672CA9713A47405... Printed Name: Michael Ward

EXHIBIT F

Via UPS Overnight Service

January 24, 2022

MOLE MEDICAL SERVICES PC
[redacted]
LAKE HAVASU CITY, AZ

Dear Sir or Madam,

T-Mobile USA, Inc. ("T-Mobile") received a subpoena for records related to a phone number associated with your T-Mobile account from the U.S. House Select Committee to Investigate the January 6th Attack on the United States Capitol. A copy of the relevant portions of the subpoena is included with this letter.

T-Mobile intends to produce records associated with your account in response to the subpoena on February 4, 2022, unless you or your representative provide the company with documentation no later than February 2, 2022, confirming that you have filed a motion for a protective order, motion to quash, or other legal process seeking to block compliance with the subpoena. Please direct any motion, legal process or question to T-Mobile's Legal and Emergency Response Team at LERCustomerNotifications@T-Mobile.com.

Sincerely,

Legal and Emergency Response Team

SUBPOENA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To T-Mobile

You are hereby commanded to be and appear before the

Select Committee to Investigate the January 6th Attack on the United States Capitol

of the House of Representatives of the United States at the place, date, and time specified below.

☑ **to produce the things identified on the attached schedule** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: 1540A Longworth House Office Building, Washington, DC 20515

Date: February 2, 2022 Time: 10:00 a.m.

☐ **to testify at a deposition** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time: _____

☐ **to testify at a hearing** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time _____

To any authorized staff member or the United States Marshals Service

_____ to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, D.C. this 19 day of January, 2022.

Bennie G. Thompson

Chairman or Authorized Member

Attest:

Clerk

SCHEDULE

In accordance with the attached definitions and instructions, you, T-Mobile, are hereby required to produce the documents and records ("Records") listed in Section A, below, **for the time period November 1, 2020, to January 31, 2021**, concerning the phone numbers listed in Section B, below (the "Phone Numbers"). This schedule does not call for the production of the content of any communications or location information.

Please email the records to SELECT_CLERKS@MAIL.HOUSE.GOV or, in the alternative, send them by mail to 1540A Longworth House Office Building, Washington, DC 20515, care of Jacob Nelson, Select Committee to Investigate the January 6th Attack on the U.S. Capitol.

Section A – Records to Be Produced for Each Phone Number

1. Subscriber Information: All subscriber information for the Phone Number, including:

    a. Name, subscriber name, physical address, billing address, e-mail address, and any other address and contact information;

    b. All authorized users on the associated account;

    c. All phone numbers associated with the account;

    d. Length of service (including start date) and types of service utilized;

    e. Telephone or instrument numbers (including MAC addresses), Electronic Serial Numbers ("ESN"), Mobile Electronic Identity Numbers ("MEIN") Mobile Equipment Identifier ("MEID"), Mobile Identification Numbers ("MIN"), Subscriber Identity Modules ("SIM"), Mobile Subscriber Integrated Services Digital Network Number ("MSISDN"), International Mobile Subscriber Identifiers ("IMSI"), or International Mobile Equipment Identities ("IMEI") associated with the accounts;

    f. Activation date and termination date of each device associated with the account;

    g. Any and all number and/or account number changes prior to and after the account was activated;

    h. Other subscriber numbers or identities (including temporarily assigned network addresses and registration Internet Protocol ("IP") addresses); and

2. Connection Records and Records of Session Times and Durations: All call, message (SMS & MMS), Internet Protocol ("IP"), and data-connection detail records associated with the Phone Numbers, including all phone numbers, IP addresses, or devices that communicated with the Phone Number via delivered and undelivered inbound, outbound, and routed calls, messages, voicemail, and data connections.

Section B – Phone Numbers

[redacted]-4220

DOCUMENT PRODUCTION DEFINITIONS AND INSTRUCTIONS

1. In complying with this request, produce all responsive documents, regardless of classification level, that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. Produce all documents that you have a legal right to obtain, that you have a right to copy, or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party.

2. Requested documents, and all documents reasonably related to the requested documents, should not be destroyed, altered, removed, transferred, or otherwise made inaccessible to the Select Committee to Investigate the January 6th Attack on the United States Capitol ("Committee').

3. In the event that any entity, organization, or individual denoted in this request is or has been known by any name other than that herein denoted, the request shall be read also to include that alternative identification.

4. The Committee's preference is to receive documents in a protected electronic form (i.e., password protected CD, memory stick, thumb drive, or secure file transfer) in lieu of paper productions. With specific reference to classified material, you will coordinate with the Committee's Security Officer to arrange for the appropriate transfer of such information to the Committee. This includes, but is not necessarily limited to: a) identifying the classification level of the responsive document(s); and b) coordinating for the appropriate transfer of any classified responsive document(s).

5. Electronic document productions should be prepared according to the following standards:

   a. If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

   b. All electronic documents produced to the Committee should include the following fields of metadata specific to each document, and no modifications should be made to the original metadata:

      BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH, PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE, SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM, CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD, INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION, BEGATTACH.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, zip file, box, or folder is produced, each should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers, or identifying markers with which they were associated when the request was served.

8. When you produce documents, you should identify the paragraph(s) or request(s) in the Committee's letter to which the documents respond.

9. The fact that any other person or entity also possesses non-identical or identical copies of the same documents shall not be a basis to withhold any information.

10. The pendency of or potential for litigation shall not be a basis to withhold any information.

11. In accordance with 5 U.S.C.§ 552(d), the Freedom of Information Act (FOIA) and any statutory exemptions to FOIA shall not be a basis for withholding any information.

12. Pursuant to 5 U.S.C. § 552a(b)(9), the Privacy Act shall not be a basis for withholding information.

13. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production, as well as a date certain as to when full production will be satisfied.

14. In the event that a document is withheld on any basis, provide a log containing the following information concerning any such document: (a) the reason it is being withheld, including, if applicable, the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author, addressee, and any other recipient(s); (e) the relationship of the author and addressee to each other; and (f) the basis for the withholding.

15. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (by date, author, subject, and recipients), and explain the circumstances under which the document ceased to be in your possession, custody, or control. Additionally, identify where the responsive document can now be found including name, location, and contact information of the entity or entities now in possession of the responsive document(s).

16. If a date or other descriptive detail set forth in this request referring to a document

is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, produce all documents that would be responsive as if the date or other descriptive detail were correct.

17. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data, or information not produced because it has not been located or discovered by the return date shall be produced immediately upon subsequent location or discovery.

18. All documents shall be Bates-stamped sequentially and produced sequentially.

19. Upon completion of the production, submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control that reasonably could contain responsive documents; and
(2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of classification level, how recorded, or how stored/displayed (e.g. on a social media platform) and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, data, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, communications, electronic mail (email), contracts, cables, notations of any type of conversation, telephone call, meeting or other inter-office or intra-office communication, bulletins, printed matter, computer printouts, computer or mobile device screenshots/screen captures, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape, or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, mail, releases, electronic message including email (desktop or mobile device), text message, instant message, MMS or SMS message, message application, through a social media or online platform, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information that might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neutral genders.

4. The term "including" shall be construed broadly to mean "including, but not limited to."

5. The term "Company" means the named legal entity as well as any units, firms, partnerships, associations, corporations, limited liability companies, trusts, subsidiaries, affiliates, divisions, departments, branches, joint ventures, proprietorships, syndicates, or other legal, business or government entities over which the named legal entity exercises control or in which the named entity has any ownership whatsoever.

6. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; (b) the individual's business or personal address and phone number; and (c) any and all known aliases.

7. The term "related to" or "referring or relating to," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is pertinent to that subject in any manner whatsoever.

8. The term "employee" means any past or present agent, borrowed employee, casual employee, consultant, contractor, de facto employee, detailee, assignee, fellow, independent contractor, intern, joint adventurer, loaned employee, officer, part-time employee, permanent employee, provisional employee, special government employee, subcontractor, or any other type of service provider.

9. The term "individual" means all natural persons and all persons or entities acting on their behalf.