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11 **UNITED STATES DISTRICT COURT**  
12 **CENTRAL DISTRICT OF CALIFORNIA**  
13 **SOUTHERN DIVISION**

14 JOHN C. EASTMAN

15 Plaintiff,

16 vs.

17 BENNIE G. THOMPSON, *et al.*,

18 Defendants.

Case No. 8:22-cv-00099-DOC-DFM

**DEFENDANTS’ MEMORANDUM OF  
LAW IN OPPOSITION TO  
PLAINTIFF’S EMERGENCY MOTION  
FOR A TEMPORARY RESTRAINING  
ORDER**

Date: January 24, 2022

Time: 2:00 p.m.

Location: Courtroom 9D

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**INTRODUCTION**

1  
2 Defendants the House Select Committee to Investigate the January 6th Attack on  
3 the U.S. Capitol and Bennie Thompson, in his official capacity as Chairman of the Select  
4 Committee, (collectively, “Congressional Defendants”) submit this memorandum of law  
5 in opposition to Plaintiff’s Application for Temporary Restraining Order (“Motion”).

6 Plaintiff asks the Court to enjoin Chapman University from disclosing documents  
7 and communications *on its own email system*. Plaintiff seeks this injunction even though  
8 Chapman made clear that the University reserves the right to review what is placed on  
9 that system, that users have no expectation of privacy regarding the system, and that the  
10 contents of that system may be disclosed to third parties. Moreover, the records at issue  
11 here are being sought by the Select Committee because they are highly relevant to its  
12 investigation of the January 6, 2021 attack on the U.S. Capitol. For multiple independent  
13 reasons, Plaintiff’s motion is flawed under governing principles of law. Therefore,  
14 Plaintiff’s complaint should also now be dismissed.<sup>1</sup>

15 *First*, Plaintiff’s contention that the Select Committee is invalidly constituted fails  
16 because the Rulemaking Clause protects the House’s right to make and interpret its own  
17 rules. And Plaintiff’s specific contentions—that “consultation” with the Minority Leader  
18 requires his approval, and that the Republican Steering Committee and Republican House  
19 Conference were entitled to select Members of the Select Committee—are both belied by  
20 the text of the House’s governing resolution, the applicable House Rules, and the  
21 indisputable facts surrounding the appointments.

22 *Second*, Plaintiff’s argument that the Select Committee lacks a valid legislative  
23 purpose is likewise fatally flawed. The Supreme Court has instructed that Congressional  
24 committees are not required to identify a specific piece of legislation in advance of  
25 conducting an investigation of the pertinent facts. It is sufficient that a committee’s  
26 investigation concerns a subject on which legislation “could be had.” *Trump v. Mazars*

27 <sup>1</sup> In considering an application for injunctive relief, if a court determines that the  
28 “injunction rests on a question of law and it is plain that the plaintiff cannot prevail ...  
the defendant is entitled to judgment.” *Munafv. Geren*, [553 U.S. 674, 691](#) (2008).

1 *USA, LLP*, [140 S. Ct. 2019, 2031-32](#) (2020). The D.C. Circuit has recently held that the  
2 Select Committee has such a valid purpose. *Trump v. Thompson*, [20 F.4th 10, 41-42](#)  
3 (D.C. Cir. 2021). The Supreme Court recently denied a request for an injunction pending  
4 review of that decision, leaving in place the D.C. Circuit’s determination of a valid  
5 legislative purpose. In any event, Plaintiff cannot show that the subpoena issued to him  
6 lacks a legislative purpose, given the legitimate scope of the Select Committee’s inquiry  
7 and his admitted role in the events leading up to and on January 6.

8 *Third*, Plaintiff’s claim that the records sought are protected by the attorney-client  
9 privilege is unavailing. Plaintiff has failed to identify any particular communication that  
10 could be privileged, or even who the clients are with whom he had privileged  
11 communications, and has instead simply made a blanket assertion of the privilege, which  
12 is inadequate under governing law. Moreover, to the extent any communication is  
13 privileged, such privilege has been waived by Plaintiff’s use of Chapman University’s  
14 email system and by Plaintiff’s various public statements that former President Trump  
15 authorized him to discuss their confidential communications. The records sought  
16 similarly have no protection under the work product doctrine.

17 *Finally*, Plaintiff has failed to demonstrate he is likely to suffer irreparable harm in  
18 the absence of a temporary restraining order. His claim of harm is speculative and falls  
19 far short of outweighing the Select Committee and the public’s immense interest in the  
20 investigation of the events of January 6.

21 For these and the other reasons set forth below, Plaintiff’s motion for emergency  
22 relief must be denied, and this case should be dismissed.

## 23 **BACKGROUND**

### 24 **A. The January 6 Attack**

25 On January 6, 2021, rioters seeking to stop the peaceful transfer of power from  
26 President Trump to President Joseph Biden following the Presidential election of  
27 November 2020 launched an assault on the United States Capitol. H. Res. 503, 117th  
28 Cong. (2021), Preamble. As Plaintiff describes the event, a large group “entered the

1 Capitol building. Some of the individuals who entered the Capitol committed criminal  
2 acts, including assault and property damage.” Compl. ¶ 3. This attack resulted in  
3 multiple deaths, physical harm to over 140 members of law enforcement, and terror and  
4 trauma among government employees, press, and Members of Congress. *See* H. Res.  
5 503, Preamble.

6 **B. The Formation of the Select Committee**

7 In response to the attack, the House of Representatives adopted House Resolution  
8 503, “Establish[ing] the Select Committee to Investigate the January 6th Attack on the  
9 United States Capitol.” This resolution authorizes the Speaker of the House to appoint  
10 up to thirteen Members to the Select Committee, five of whom “shall be appointed after  
11 consultation with the minority leader.” H. Res. 503, § 2(a). Speaker Pelosi appointed  
12 seven Democrats and two Republicans to the Select Committee. Compl. ¶ 4. Pursuant to  
13 the requirements of House Resolution 503, the Speaker consulted with House Minority  
14 Leader Kevin McCarthy, who recommended five Republicans for appointment to the  
15 Select Committee. *Id.* ¶ 40. The Speaker “spoke[]” with Minority Leader McCarthy and  
16 stated her intention to appoint three of the Members he had recommended. Press  
17 Release, Nancy Pelosi, Speaker, House of Representatives, Pelosi Statement on  
18 Republican Recommendations to Serve on the Select Comm. to Investigate the Jan. 6  
19 Attack on the U.S. Capitol (July 21, 2021), <https://www.speaker.gov/newsroom/72121-2>.  
20 However, the Speaker asked that Minority Leader McCarthy recommend two other  
21 Republicans to serve on the Select Committee in place of Reps. Jordan and Banks. *Id.*  
22 Minority Leader McCarthy declined and instead withdrew all five recommendations.  
23 Press Release, Kevin McCarthy, House of Representatives, McCarthy Statement about  
24 Pelosi’s Abuse of Power on January 6th Select Committee (July 21, 2021),  
25 [https://republicanleader.house.gov/mccarthy-statement-about-pelosis-abuse-of-power-on-](https://republicanleader.house.gov/mccarthy-statement-about-pelosis-abuse-of-power-on-january-6th-select-committee/)  
26 [january-6th-select-committee/](https://republicanleader.house.gov/mccarthy-statement-about-pelosis-abuse-of-power-on-january-6th-select-committee/). House Resolution 503 authorizes the Select Committee  
27 to: (1) “investigate the facts, circumstances, and causes relating to the domestic terrorist  
28 attack on the Capitol”; (2) “identify, review, and evaluate the causes of and the lessons

1 learned from the domestic terrorist attack on the Capitol”; and (3) “issue a final report to  
2 the House containing such findings, conclusions, and recommendations for corrective  
3 measures described in subsection (c) as it may deem necessary.” H. Res. 503, § 4(a)(1)-  
4 (3).<sup>2</sup>

5 **C. The Select Committee’s Subpoenas to Plaintiff and Chapman University**

6 In furtherance of its duty to “investigate the facts, circumstances, and causes” of  
7 the attack on January 6, the Select Committee issued subpoenas to certain government  
8 agencies, companies, and individuals, including Plaintiff and his former employer,  
9 Defendant Chapman University. On November 8, 2021, the Select Committee issued a  
10 subpoena to Plaintiff. In an accompanying cover letter, Chairman Thompson explained  
11 that the Select Committee had “credible evidence” that he knew about and “may have  
12 participated in, attempts to encourage the Vice President of the United States to reject the  
13 electors from several states, or, at the very least, to delay the electoral college results to  
14 give states more time to submit different slates of electors.” Nov. 8, 2021 Select  
15 Committee Cover Letter to Eastman at 1.<sup>3</sup> Specifically, Chairman Thompson reported  
16 that Plaintiff wrote “two memoranda offering several scenarios for the Vice President to  
17 potentially change the outcome of the 2020 Presidential election.” *Id.* Chairman  
18 Thompson also noted that Plaintiff had “participated in a briefing for nearly 300 state  
19 legislators from several states regarding purported election fraud,” “testified to Georgia  
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21 <sup>2</sup> Subsection 4(c) describes three categories of corrective measures: “changes in law,  
22 policy, procedure, rules or regulations that could be taken” (1) “to prevent future acts of  
23 violence, domestic terrorism, and domestic violent extremism, including acts targeted at  
24 American democratic institutions”; (2) “to improve the security posture of the United  
25 States Capitol Complex while preserving accessibility of the Capitol Complex for all  
26 Americans”; and (3) “to strengthen the security and resilience of the United States and  
27 American democratic institutions against violence, domestic terrorism, and domestic  
28 violent extremism.” H. Res. 503, § 4(c).

27 <sup>3</sup> Available at  
28 <https://january6th.house.gov/sites/democrats.january6th.house.gov/files/20211108%20Eastman.pdf>.

1 state senators regarding alleged voter fraud and reportedly sharing a paper that argued  
2 that that the state legislature could reject election results and directly appoint electors,”  
3 was “at the Willard Hotel ‘war room’ with Steve Bannon and others on the days leading  
4 up to January 6 where the focus was on delaying or blocking the certification of the  
5 election,” and “on January 6, [he] spoke at the rally at the White House Ellipse.” *Id.* at 2.

6 In the ensuing weeks, the Select Committee sent emails to Eastman’s counsel,  
7 attempting to reach an accommodation with Eastman regarding emails from his Chapman  
8 account, including an offer to connect Eastman with the General Counsel of Chapman so  
9 that Eastman could review and produce responsive emails along with a privilege log.  
10 Counsel for Eastman did not respond to those efforts at accommodation. On December 1,  
11 Plaintiff sent a letter to the Select Committee declining to produce any documents  
12 responsive to the subpoena. The letter asserted that the act of production itself—and  
13 even the provision of a log explaining his basis for withholding documents—was  
14 protected by his Fifth Amendment right against self-incrimination. *See* Dec. 1, 2021  
15 Eastman Letter to the Honorable Bennie G. Thompson, Chair at 1.<sup>4</sup> Likewise, at his  
16 deposition on December 9, Eastman declined to answer any questions except those  
17 regarding biographical information, again invoking the Fifth Amendment 146 separate  
18 times.

19 On January 18, 2022, the Select Committee issued a subpoena to Chapman for  
20 certain documents in its possession “attributable to Dr. John Eastman, that are related in  
21 any way to the 2020 election or the January 6, 2021 Joint Session of Congress.” Pl.’s  
22 Mem. Ex. B at 4. The subpoena requests documents during the period of November 3,  
23 2020 to January 20, 2021. *Id.* The Select Committee provided to Chapman a list of  
24 suggested search terms to assist in the identification of relevant documents. The deadline  
25 to produce the subpoenaed documents was January 21, 2022. *Id.* at 3.

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27  
28 <sup>4</sup> Available at <https://www.politico.com/f/?id=0000017d-811e-dac5-abff-a11f4c830000>.

1 **D. Procedural History**

2 On January 20, Plaintiff filed this action and sought a temporary restraining order  
3 (“TRO”) to enjoin Chapman from producing the records in response to the subpoena.  
4 Plaintiff did not include an affidavit or declaration with his submission. On the same  
5 day, the Court granted Plaintiff’s request for an *ex parte* TRO until the parties appear for  
6 a hearing scheduled for January 24. *See* Jan. 20, 2022 Civil Minutes, [ECF 12](#).

7 **ARGUMENT**

8 **I. APPLICABLE LEGAL STANDARD**

9 A preliminary injunction is “an extraordinary remedy that may only be awarded  
10 upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Natural Res.*  
11 *Def. Council, Inc.*, [555 U.S. 7, 22](#) (2008). A party seeking a TRO must satisfy the same  
12 test required for the issuance of a preliminary injunction. *See Stuhlberg Int’l Sales Co. v.*  
13 *John D. Brush & Co.*, [240 F.3d 832, 839 n.7](#) (9th Cir. 2001); *Franklin v. Scribner*, No.  
14 CIV. 07-0438BTMLSP, [2007 WL 1491100](#), at \*3 (S.D. Cal. May 21, 2007). Plaintiff  
15 must show that: (1) he is likely to succeed on the merits; (2) he is likely to suffer  
16 irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in  
17 his favor; and (4) an injunction is in the public interest. *See Winter*, [555 U.S. at 20](#). “The  
18 Ninth Circuit applies a ‘sliding scale’ approach to preliminary injunctions such that a  
19 preliminary injunction can issue ‘where the likelihood of success is such that serious  
20 questions going to the merits were raised and the balance of hardships tips sharply in  
21 [plaintiff’s] favor.’” *Doe v. San Diego Unified Sch. Dist.*, [19 F.4th 1173, 1176-77](#) (9th  
22 Cir. 2021), *reh’gen banc denied*, No. 21-56259, [2022 WL 130808](#) (9th Cir. Jan. 14,  
23 2022) (quoting *All. for the Wild Rockies v. Cottrell*, [632 F.3d 1127, 1131](#) (9th Cir. 2011)).

24 **II. PLAINTIFF CANNOT DEMONSTRATE A SUBSTANTIAL LIKELIHOOD  
25 OF SUCCESS ON THE MERITS**

26 Plaintiff is exceedingly unlikely to succeed on the merits of his challenge to the  
27 Select Committee’s subpoena. Notably, just yesterday a district court denied from the  
28 bench a similar motion for a temporary restraining order challenging a subpoena issued

1 by the Select Committee, rejecting many of the very same arguments raised by Plaintiff  
2 here. Minute Entry, *Budowich, et al. v. Pelosi, et al.*, No. 1:22-cv-00005-CJN (D.D.C.  
3 Jan. 20, 2022).<sup>5</sup> As an initial matter, and as the D.C. Circuit recently reaffirmed, the  
4 “[i]ssuance of subpoenas ... has long been held to be a legitimate use of Congress of its  
5 power to investigate.” *Judicial Watch, Inc. v. Schiff*, 998 F.3d 989, 992 (D.C. Cir. 2021)  
6 (citations omitted). The Supreme Court has long recognized that Congress’s “power of  
7 inquiry—with process to enforce it—is an essential and appropriate auxiliary to the  
8 legislative function.” *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

9 Indeed, investigations and subpoenas are “indispensable ingredient[s] of  
10 lawmaking.” *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 505  
11 (1975). “Without information, Congress would be shooting in the dark, unable to  
12 legislate ‘wisely or effectively.’” *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031  
13 (2020) (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)). The authority of a  
14 court to interfere with Congress’s critical investigative function is thus extremely  
15 limited. The Constitution’s Speech or Debate Clause reflects an understanding that “that  
16 the legislative function” must be “performed independently” of a potentially “hostile  
17 judiciary,” and it “reinforc[es] the separation of powers so deliberately established by the  
18 Founders.” *Eastland*, 421 U.S. 502; see also *Senate Permanent Subcomm. on*  
19 *Investigations v. Ferrer*, 856 F.3d 1080, 1086-88 (D.C. Cir. 2017). Plaintiff has provided  
20 no valid reason for this Court to interfere with the Select Committee’s ongoing  
21 investigation here.

22 **A. Plaintiff’s Challenges to the Select Committee’s Authority to Issue the**  
23 **Subpoena Fail**

24 Plaintiff’s challenges to the validity of the Select Committee and its authority to  
25 issue the subpoena to Chapman University also fail on the merits. Plaintiff argues (1)  
26

27 <sup>5</sup> The transcript of the hearing at which the district court issued its ruling was  
28 requested but was not available at the time of this filing. The transcript will be provided  
to this court as soon as it is received.

1 that the Committee is not properly constituted pursuant to House Resolution 503 and (2)  
2 that it lacks a valid legislative purpose. Both arguments are badly flawed.

3 **1. The Select Committee Is Validly Constituted Under House Rules**

4 By way of background, the House utilizes four distinct kinds of Committees, each  
5 of which are established and governed by various House Rules, statutes, House  
6 resolutions, or on an *ad hoc* basis. *See, e.g.*, Rules of the House of Representatives, Rule  
7 X, 117th Cong. (2021) (rules governing standing Committees); [26 U.S.C. §§ 8001-8005](#)  
8 (establishing the Joint Committee on Taxation); H. Res. 503 (establishing the Select  
9 Committee). Apart from standing Committees, the House Rules state that “[t]he Speaker  
10 shall appoint all select, joint, and conference committees ordered by the House.” House  
11 Rule I.11. Further, by unanimous consent, on January 4, 2021, the House expressly  
12 authorized the Speaker to “make appointments authorized by law or by the House.” *See*  
13 167 Cong. Rec. H37, 117th Cong. (daily ed. Jan. 4, 2021).

14 The Rulemaking Clause provides that “Each House may determine the Rules of its  
15 Proceedings.” [U.S. Const. art. I, § 5](#), cl. 2. The Clause has long been construed to give  
16 broad discretion to Congress to establish—and interpret—its own rules, so long as those  
17 rules do not “ignore constitutional restraints or violate fundamental rights.” *United*  
18 *States v. Ballin*, [144 U.S. 1, 5](#) (1892). For example, in *Ballin*, faced with the question of  
19 how to interpret the Quorum Clause of Article I, section 5, the Supreme Court held that,  
20 because the Constitution does not specify how to determine when a majority is present to  
21 constitute a quorum, “it is therefore within the competency of the house to prescribe any  
22 method which shall be reasonably certain to ascertain the fact.” *Id.* at 6.

23 Numerous courts have likewise emphasized the deference owed to Congress in  
24 determining its own rules. While “the Rulemaking Clause is not an absolute bar to  
25 judicial interpretation of the House Rules,” *United States v. Rostenkowski*, [59 F.3d 1291,](#)  
26 [1305](#) (D.C. Cir. 1995), “judicial interpretation of an ambiguous House Rule runs the risk  
27 of the court intruding into the sphere of influence reserved to the legislative branch under  
28 the Constitution.” *Id.* at 1306. Thus, a court may interpret internal rules of a House of



1 Congress *only* where such interpretation “requires no resolution of ambiguities.” *United*  
2 *States v. Durenberger*, [48 F.3d 1239, 1244](#) (D.C. Cir. 1995). “Where, however, a court  
3 cannot be confident that its interpretation is correct, there is too great a chance that it will  
4 interpret the Rule differently than would the Congress itself; in that circumstance, the  
5 court would effectively be making the Rules—a power that the Rulemaking Clause  
6 reserves to each House alone.” *Rostenkowski*, [59 F.3d at 1306-07](#); *accord Metzenbaum*  
7 *v. FERC*, [675 F.2d 1282, 1287](#) (D.C. Cir. 1982) (“To decide otherwise would subject  
8 Congressional enactments to the threat of judicial invalidation on each occasion of  
9 dispute over the content or effect of a House or Senate rule.”); *Randolph v. Willis*, [220 F.](#)  
10 [Supp. 355, 358](#) (S.D. Cal. 1963) (stating that in analyzing a House rule “all matters of  
11 method are open to the determination of the house, and it is no impeachment of the rule  
12 to say that some other way would be better, more accurate or even more just”).

13 Plaintiff advances several arguments for his view that the composition of the  
14 Select Committee does not comport with House Resolution 503. As discussed below,  
15 they read the Resolution incorrectly and misapply the applicable House rules. But to the  
16 extent there is any ambiguity, the reasonable interpretation by the House of its own rules  
17 and procedures governs. *See Barker v. Conroy*, [921 F.3d 1118, 1130](#) (D.C. Cir. 2019).

18 In light of the foregoing principles, Plaintiff’s arguments that the Select Committee  
19 is not validly constituted under House Resolution 503 are incorrect.

20 *First*, Plaintiff complains that “the committee was not formed with “5 [of the 13  
21 members who] must be appointed after consultation with the minority leader.” Pl.’s  
22 Mem. at 7. But as explained above, the power to appoint Members to select Committees  
23 rests exclusively with the Speaker. *See* House Rule I.11 (“The Speaker shall appoint all  
24 select, joint, and conference committees ordered by the House.”); 167 Cong. Rec. H37,  
25 117th Cong. (daily ed. Jan. 4, 2021) (authorizing Speaker to “accept resignations and to  
26 make appointments authorized by law or by the House”). House Resolution 503 is not to  
27 the contrary. Had the House intended a binding role for the Minority Leader, it could  
28 have provided for such a requirement. For instance, in the 116th Congress, the House

1 created two Select Committees, both of which required that a portion of the Members be  
2 appointed by the Speaker “on the recommendation of the Minority Leader.” *See* H. Res.  
3 6, § 104(f)(1)(B), 116th Cong. (2019) (Select Committee on the Climate Crisis); *id.* at  
4 § 201(b)(3) (Select Committee on the Modernization of Congress). Similarly, had the  
5 House wanted to delegate appointment power directly to the Minority Leader, it knew  
6 how to do so. *See, e.g.*, H. Res. 24, § 2(a), 110th Cong. (2007) (creating the House  
7 Democracy Assistance Commission and allowing nine Members to “be appointed by the  
8 Minority Leader of the House of Representatives”).

9 In contrast, when creating the Select Committee, the House did neither, instead  
10 deliberately selecting the phrase “after *consultation* with the Minority Leader,” H. Res.  
11 503, § 2(a) (emphasis added), which plainly allows the Speaker greater authority and  
12 opportunity regarding the appointment of minority party Members. “Consultation”  
13 means to “seek[] advice or information of.” *United Keetoowah Band of Cherokee*  
14 *Indians in Okla. v. FCC*, [933 F.3d 728, 750](#) (D.C. Cir. 2019) (internal quotation marks  
15 omitted). The term itself does not explain how and to what extent such advice or  
16 information need be considered, nor whether it must be accepted. And this language is  
17 entirely consistent with House practice and precedent: the same language was used in the  
18 resolutions that created both the Hurricane Katrina select committee, *see* H. Res. 437,  
19 § 2(a), 109th Cong. (2005), as well as the Select Committee on the Events Surrounding  
20 the 2012 Terrorist Attack in Benghazi, *see* H. Res. 567, § 2(a), 113th Cong. (2014). No  
21 points of order or other procedural objections were raised as to the filing of either select  
22 committee’s final report. *See* H. Rep. No. 109-377, 109th Cong. (2006); H. Rep. No.  
23 114-848, 114th Cong. (2016).

24 Here, there can be no serious contention that House Resolution 503 was not  
25 followed: the Minority Leader *was* consulted. The Minority Leader made several  
26 suggestions to the Speaker regarding minority party Members to serve on the Select  
27 Committee, and the Speaker even announced her intention to appoint three of the five  
28 minority party Members that the Minority Leader recommended. That the Speaker—

1 using the authority provided to her by the House Rules, the January 4, 2021 Order of the  
2 House, and House Resolution 503—made different selections as to two of the Members,  
3 and that the Minority Leader subsequently withdrew his recommendations, does not  
4 make the Select Committee improperly constituted, nor does it invalidate any of its  
5 actions.

6 *Second*, Plaintiff complains that the minority party members on the Select  
7 Committee were not nominated by the Republican Steering Committee or voted on by  
8 the full Republican House Conference. *See* Pl.’s Mem. at 3 (citing House GOP Rule  
9 14(a)(1)). As discussed above, membership on House committees varies by the type of  
10 committee. Plaintiff wrongly attempts to apply the rules and practices for standing  
11 committees of the House to a select committee. For standing committees, Members must  
12 be formally elected by the full House within seven calendar days of the start of a new  
13 Congress. *See* House Rule XI.5(a)(1). Assignments to the House’s standing committees  
14 are also governed by rules established by political parties’ respective conferences—the  
15 Democratic Caucus and the Republican Conference—which each impose additional  
16 restrictions on standing committee service. *See* Michael Greene, Cong. Rsch. Serv.,  
17 R46786, *Rules Governing House Committee and Subcommittee Assignment Procedures*,  
18 3 (2021).<sup>6</sup>

19 Contrary to Plaintiff’s claim, membership on all other types of House committees,  
20 including the Select Committee here, is not obtained by election and, thus, does not  
21 require participation of the political party conferences. Rather, the appointment  
22 mechanism is expressly established by the House Rules, which states that “[t]he Speaker  
23 shall appoint all select, joint, and conference committees ordered by the House.” House  
24 Rule I.11; *see also* 167 Cong. Rec. H37, 117th Cong. (daily ed. Jan. 4, 2021) (providing  
25 the Speaker authority to “accept resignations and to make appointments authorized by  
26 law or by the House.”).

27  
28 <sup>6</sup> Available at <https://crsreports.congress.gov/product/pdf/R/R46786>.

1 Accordingly, because all the Members were appointed by the Speaker, in  
2 accordance with the applicable House Rules and precedents, the Select Committee is  
3 validly constituted.<sup>7</sup>

## 4 2. The Select Committee Has a Valid Legislative Purpose

5 Contrary to Plaintiff's argument, the Select Committee's subpoena is supported by  
6 a valid legislative purpose. A Congressional request for information must "concern a  
7 subject on which legislation could be had." *Mazars*, 140 S. Ct. at 2031-32 (quoting  
8 *Eastland*, 421 U.S. at 506). It is "certainly not necessary," however, that the applicable  
9 resolution "declare in advance" what a committee "meditate[s] doing when the  
10 investigation conclude[s]." *In re Chapman*, 166 U.S. 661, 670 (1897). Even if a  
11 resolution does not expressly state its legislative purpose, such a purpose is presumed to  
12 exist so long as Congress has jurisdiction over the subject matter of the resolution.  
13 *McGrain*, 273 U.S. at 177; see also *Comm. on Ways & Means, U.S. House of Reps. v.*  
14 *U.S. Dep't of Treasury*, No. 1:19-CV-01974 (TNM), 2021 WL 5906031, at \*5 (D.D.C.  
15 Dec. 14, 2021) (summarizing relevant Supreme Court precedent and concluding that "the  
16 legitimate legislative purpose bar is a low one, and the purpose need not be clearly  
17 articulated").

18 Courts must "presume that the committees of Congress will exercise their powers  
19 responsibly and with due regard for the rights of affected parties." *Exxon Corp. v.*  
20 *F.T.C.*, 589 F.2d 582, 589 (D.C. Cir. 1978). Accordingly, when Congress is investigating  
21 a subject matter "on which legislation could be had," *Mazars*, 140 S. Ct. at 2031 (internal  
22 quotation marks omitted), "the presumption should be indulged" that the legislation is  
23 "the real object" of the investigation, *McGrain*, 273 U.S. at 178; see also *Watkins v.*  
24 *United States*, 354 U.S. 178, 200 (1957) (stating that the motives of committee Members

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27 <sup>7</sup> Plaintiff's arguments in his Complaint regarding the House Rules regarding  
28 depositions, see, e.g., Compl. ¶¶ 48-55, fail for the same reasons. In any event, those  
arguments are entirely misplaced for the additional reason that this case is about a  
subpoena for records, not a deposition.

1 in conducting their investigation “would not vitiate an investigation which had been  
2 instituted by a House of Congress if that assembly’s legislative purpose is being served”).

3 Here, the Select Committee plainly has a valid legislative purpose. The Select  
4 Committee is operating pursuant to a House Resolution that expressly authorizes the  
5 Select Committee to investigate specified topics and to propose legislative measures. *See*  
6 H. Res. 503, § 4(a), (c). Indeed, as noted above, the D.C. Circuit recently rejected a  
7 similar challenge to the Select Committee’s legislative purpose, and the Supreme Court  
8 then denied Mr. Trump’s application for an injunction pending further review, thereby  
9 leaving in place the D.C. Circuit’s determination on this point. *See Trump v. Thompson*,  
10 20 F.4th 10 (D.C. Cir. 2021), *application for stay of mandate and injunction pending*  
11 *review denied*, No. 21A272 (U.S. Jan. 19, 2022). There, the D.C. Circuit held that the  
12 Select Committee “plainly has a ‘valid legislative purpose’ and its inquiry ‘concern[s] a  
13 subject on which legislation could be had.’” *Id.* at 41 (quoting *Mazars*, 140 S. Ct. at  
14 2031-32).

15 As the D.C. Circuit recognized, the Select Committee’s investigation could lead  
16 Congress to, for example: (1) “pass laws imposing more serious criminal penalties on  
17 those who engage in violence to prevent the work of governmental institutions;” (2)  
18 “amend the Electoral Count Act to shore up the procedures for counting electoral votes  
19 and certifying the results of a presidential election;” (3) “allocate greater resources to the  
20 Capitol Police and enact legislation to ‘elevat[e] the security posture of the United States  
21 Capitol Complex,’”; or (4) “revise the federal government’s ‘operational plans, policies,  
22 and procedures’ for ‘responding to targeted violence and domestic  
23 terrorism[.]’” *Thompson*, 20 F.4th at 42 (quoting H. Res. 503 § 4(a)(2)(B), (D)). To  
24 name but a few more examples, Congress could pass laws that mandate better  
25 cooperation between Congressional security offices and the Federal Bureau of  
26 Investigation and the Department of Defense, impose structural reforms on Executive  
27 Branch agencies to prevent their abuse for antidemocratic ends, or prevent campaign  
28 fundraising based on knowing misrepresentations regarding election fraud. *See also* 167

1 Cong. Rec. E1151, 117th Cong. (Oct. 27, 2021) (remarks by Vice Chair Cheney adopted  
2 by Chairman Thompson identifying other potential legislation).<sup>8</sup>

3 Plaintiff nonetheless argues that the Select Committee is using the Chapman  
4 subpoena to pursue an invalid law enforcement purpose. Pl.’s Mem. at 6. This is  
5 incorrect. The fact that the Select Committee has acknowledged the potential for  
6 criminal referrals to the Department of Justice as it engages in its investigate work does  
7 not demonstrate that the Committee is, pursuing an invalid law enforcement purpose. As  
8 the Supreme Court instructed, it is not “a valid objection to the investigation that it might  
9 possibly disclose crime or wrongdoing.” *McGrain v. Daugherty*, 273 U.S. 135, 180  
10 (1927). Rather, “[t]o find that a committee’s investigation has exceeded the bounds of  
11 legislative power it must be *obvious* that there was a usurpation of functions exclusively  
12 vested in the Judiciary or the Executive.” *Tenney v. Brandhove*, 341 U.S. 367, 378  
13 (1951) (emphasis added). No such usurpation exists here, let alone an obvious one.

14 Plaintiff also argues that, although the Select Committee has a valid legislative  
15 purpose, the subpoena issued to Chapman is not relevant to that purpose. Pl.’s Mem. at  
16 7-8. Again, Plaintiff is incorrect. “In determining the proper scope of a legislative  
17 subpoena, this Court may only inquire as to whether the documents sought by the  
18 subpoena are not plainly incompetent or irrelevant to any lawful purpose [of the Select  
19

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20 <sup>8</sup> Congressional investigations into attacks against the United States are solidly  
21 grounded in historical precedent. In 1814, the House initiated an investigation “into the  
22 causes of the success of the enemy”—the British—“in his late enterprises,” including  
23 burning the Capitol, 28 Annals of Congress 310 (1814). Similarly, after the attack on  
24 Pearl Harbor, Congress authorized a ten-member joint committee to investigate “the facts  
25 relating to the events and circumstances leading up to or following the attack made by  
26 Japanese armed forces upon Pearl Harbor.” *Joint Committee on the Investigation of the*  
27 *Pearl Harbor Attack, Pearl Harbor Attack: Hearings before the Joint Committee on the*  
28 *Investigation of the Pearl Harbor Attack*, 79th Cong. 4 (1945) (text of authorizing  
resolution). And in recent times, Congress established the National Commission on  
Terrorist Attacks Upon the United States in the wake of Sept. 11 to “examine and report  
upon the facts and causes relating to the terrorist attacks of Sept. 11, 2001.” Intelligence  
Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, § 602(1), 116 Stat. 2383,  
2408 (2002).

1 Committee] in the discharge of [its] duties.” *McPhaul v. United States*, 364 U.S. 372,  
2 381 (1960) (internal quotation marks omitted).

3 The relevance of the records sought from Chapman is clear. House Resolution 503  
4 explicitly authorizes the Select Committee to investigate “influencing factors that  
5 contributed to the domestic terrorist attack on the Capitol.” H. Res. 503, § 4(a)(1)(B). It  
6 has been publicly reported that in advance of January 6, Plaintiff wrote two memoranda  
7 describing ways in which Vice President Pence could overturn the results of the election  
8 by throwing out electors from several states. Plaintiff does not deny writing these memos  
9 and has called Vice President Pence “spineless” for refusing to go along with his plan.  
10 Luke Broadwater, *Trump Lawyer Blamed Pence for Violence as Rioters Stormed the*  
11 *Capitol*, N.Y. Times, Oct. 30, 2021.<sup>9</sup> The Select Committee’s subpoena to Chapman is  
12 the next logical step for the investigation. It will allow the Committee to determine what  
13 role Plaintiff and his writings played in the events that occurred leading up to and on  
14 January 6. Understanding Plaintiff’s role will help it make informed decisions about  
15 whether and how Congress should legislate to prevent such events from recurring and to  
16 ensure a peaceful transfer of power after future presidential elections. As the Supreme  
17 Court has stated, a subpoena must be enforced “unless the district court determines that  
18 there is *no reasonable possibility* that the category of materials the Government seeks  
19 will produce information relevant to the general subject of the ... investigation.” *United*  
20 *States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991) (emphasis added). Here, it is  
21 reasonable and likely that the records from Chapman will produce information relevant to  
22 the investigation given that Plaintiff was the legal architect of the plan by former  
23 President Trump and his supporters to challenge the election results through the  
24 Congressional certification process on January 6, which, of course, set the stage for the  
25 violence that occurred in the Capitol.

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27  
28 <sup>9</sup> Available at <https://www.nytimes.com/2021/10/30/us/politics/eastman-pence-capitol-riot.html>.

1 Accordingly, in light of the valid legislative purpose of the Select Committee’s  
2 investigation, Plaintiff cannot succeed on the merits of any argument that the Chapman  
3 subpoena was outside the scope of the Select Committee’s authority.

4 **B. The Documents the Subpoena Seeks Are Not Protected by the Attorney-  
5 Client Privilege**

6 Plaintiff next claims that the documents responsive to the Chapman subpoena are  
7 protected by the attorney-client privilege. Pl.’s Mem. at 11-12. He is wrong. “[A] party  
8 asserting the attorney-client privilege has the burden of establishing the relationship *and*  
9 the privileged nature of the communication.” *United States v. Ruehle*, 583 F.3d 600, 607  
10 (9th Cir. 2009) (internal quotation omitted). “The fact that a person is a lawyer does not  
11 make all communications with that person privileged.” *United States v. Martin*, 278 F.3d  
12 988, 999 (9th Cir. 2002). “Because it impedes full and free discovery of the truth, the  
13 attorney-client privilege is strictly construed.” *Id.* (internal quotation omitted); *see also*  
14 *In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973) (“[T]he privilege stands in derogation of  
15 the public’s right to every man’s evidence and as an obstacle to the investigation of the  
16 truth, [and] thus, ... [i]t ought to be strictly confined within the narrowest possible limits  
17 consistent with the logic of its principle.” (cleaned up)).

18 Here, Plaintiff has failed to provide *any* factual support or evidence to demonstrate  
19 that that the communications sought by the Chapman subpoena are between an attorney  
20 and his client or that the communications were made for the purpose of seeking legal  
21 advice. *See Verizon Cal. Inc. v. Ronald A. Katz Tech. Licensing, L.P.*, 266 F. Supp. 2d  
22 1144, 1147 (C.D. Cal. 2003) (“Moreover, an assertion of privilege without evidence to  
23 support it will not prevail.”) (citing, *inter alia*, *Hollins v. Powell*, 773 F.2d 191, 196 (8th  
24 Cir. 1985) and *United States v. Harrelson*, 754 F.2d 1153, 1167 (5th Cir. 1985); *see also*  
25 *Saxholm AS v. Dynal, Inc.*, 164 F.R.D. 331, 333 (E.D.N.Y. 1996) (meeting the burden of  
26 establishing the applicability of the attorney-client privilege “requires the submission of  
27 affidavits or other competent evidence to establish sufficient facts to prove the  
28 applicability of the privilege. Conclusory or ipse dixit assertions are not enough.”).



1 The “party asserting attorney-client privilege has the burden of establishing all of  
2 the elements of the privilege.” *United States v. Munoz*, [233 F.3d 1117, 1128](#) (9th Cir.  
3 2000), *superseded on other grounds by* [18 U.S.C. § 1341](#); *see also United States v. Legal*  
4 *Servs. for N.Y.C.*, [249 F.3d 1077, 1081](#) (D.C. Cir. 2001) (citing *In re Lindsey*, [158 F.3d](#)  
5 [1263, 1270](#) (D.C. Cir. 1998)). That burden attaches to *each* communication for which  
6 the privilege is asserted; “blanket assertions of the privilege are *extremely disfavored*.”  
7 *Clarke v. Am. Commerce Nat’l Bank*, [974 F.2d 127, 129](#) (9th Cir. 1992) (emphasis  
8 added) (internal quotation marks omitted). Instead, “[a] party claiming the privilege must  
9 identify specific communications and the grounds supporting the privilege as to each  
10 piece of evidence over which privilege is asserted.” *Martin*, [278 F.3d at 1000](#). Plaintiff’s  
11 claim of privilege is such an unparticularized, blanket assertion, and therefore is  
12 insufficient to assert the privilege. The Complaint does not contain a single allegation of  
13 any particular communication that may be privileged. It simply says that Plaintiff “is a  
14 practicing attorney.” Compl. ¶ 77. His Motion similarly does not identify any client or  
15 clients, or any communication that is privileged. *See* Pl.’s Mem. at 8-9.

16 Moreover, to the extent there is any valid invocation of the privilege, the privilege  
17 has been waived. The attorney-client privilege is not absolute, *see In re Grand Jury*  
18 *Investigation*, [810 F.3d 1110, 1113](#) (9th Cir. 2016), and can be waived by disclosing  
19 confidential information to a third-party. *United States v. Sanmina Corp.*, [968 F.3d 1107,](#)  
20 [1116–17](#) (9th Cir. 2020). In order for communications sent through email to be  
21 protected by the attorney-client privilege, then, there must be a subjective expectation of  
22 confidentiality that is found to be objectively reasonable. *See, e.g., Doe I v. George*  
23 *Washington Univ.*, [480 F. Supp. 3d 224, 226](#) (D.D.C. 2020); *Convertino v. U.S. Dep’t of*  
24 *Justice*, [674 F. Supp. 2d 97, 110](#) (D.D.C. 2009).

25 To determine whether the subjective expectation of confidentiality in email  
26 communications in a company email account is objectively reasonable, courts generally  
27 look to four factors: (1) “does the corporation maintain a policy banning personal or other  
28 objectionable use,” (2) “does the company monitor the use of the employee’s computer

1 or e-mail,” (3) “do third parties have a right of access to the computer or e-mails,” and  
2 (4) “did the corporation notify the employee, or was the employee aware, of the use and  
3 monitoring policies?” *Doe 1*, 480 F. Supp. 3d at 226.<sup>10</sup> In *Doe 1*, the court applied these  
4 factors to George Washington University’s email policy. *Id.* GW’s policy stated that  
5 “individuals have no right of personal privacy with respect to e-mail messages or  
6 attachments they send or receive using the GW e-mail system.” *Id.* at 227 (internal  
7 quotation marks and alterations omitted). GW also reserved the right to “search, review,  
8 monitor, or copy any e-mail sent to or from a GW e-mail account for approved purposes  
9 only.” *Id.* (internal quotation marks and alterations omitted). The GW policy was silent  
10 as to the right of access of third parties, and as to the fourth factor, all students had  
11 accepted the terms and conditions of GW’s email policy to use its service. *Id.*  
12 Accordingly, the court held that GW students had no reasonable expectation of privacy in  
13 email communications with attorneys sent from their GW email accounts. *Id.*

14 Here, Chapman’s Computer and Network Acceptable Use Policy is materially  
15 indistinguishable from GW’s policy. The policy states that Chapman reserves “the right  
16 to retrieve the contents of University-owned computers and e-mail messages for  
17 legitimate reasons.” *Policies and Procedures: Computer and Network Acceptable Use*  
18 *Policy*, Chapman University, [https://www.chapman.edu/campus-services/information-](https://www.chapman.edu/campus-services/information-systems/policies-and-procedures/acceptable-use-policy.aspx)  
19 [systems/policies-and-procedures/acceptable-use-policy.aspx](https://www.chapman.edu/campus-services/information-systems/policies-and-procedures/acceptable-use-policy.aspx) (last visited Jan. 20, 2022).  
20 “As such,” it goes on to say, “Users should not expect privacy in the contents of  
21 University-owned computers or e-mail messages.” *Id.* (emphasis added). Further, the  
22 privacy policy states that the university may disclose information in accounts if “required  
23 to do so to comply with the law or legal process,” including in response to subpoenas.  
24 *Policies and Procedures: Privacy Policy*, Chapman University,

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28 <sup>10</sup> Although the Ninth Circuit has not expressly adopted this four-factor test, courts within the Circuit have done so, citing the use of the test by courts around the country. See *Almar Ranch, LLC v. Cty. of Boise*, No. CV-09-004-S-BLW, 2009 WL 3669741, at \*3 (D. Idaho Nov. 2, 2009).

1 [https://www.chapman.edu/campus-services/information-systems/policies-and-](https://www.chapman.edu/campus-services/information-systems/policies-and-procedures/privacy-policy.aspx)  
2 [procedures/privacy-policy.aspx](https://www.chapman.edu/campus-services/information-systems/policies-and-procedures/privacy-policy.aspx) (last visited Jan. 20, 2022).

3 Indeed, Chapman’s policy goes beyond GW’s—which did not prohibit the use of  
4 school email addresses for personal use, *see Doe 1*, [480 F. Supp. 3d at 227](#)—by stating  
5 that all university computing and network systems and services are a “University-owned  
6 resource and business tool to be used only by authorized persons for educational  
7 purposes or to carry out the legitimate business of the University.” *Policies and*  
8 *Procedures: Computer and Network Acceptable Use Policy*, Chapman University. As to  
9 the fourth factor—whether Plaintiff was aware of the policy—he served on the faculty  
10 for over twenty years and was previously the *Dean* of Chapman’s law school, *see*  
11 *Federalist Society, Dr. John C. Eastman*, <https://fedsoc.org/contributors/john-eastman>  
12 (last visited Jan. 19, 2022), and thus was almost certainly aware of its email policy.

13 And furthermore, during the time period November 3, 2020 to the end of  
14 Plaintiff’s employment at Chapman, whenever Plaintiff logged on to Chapman’s  
15 network, he received a “splash screen” message stating: “Use of this computer system  
16 constitutes your consent that your activities on, or information you store in, any part of  
17 the system is subject to monitoring and recording by Chapman University or its agents,  
18 consistent with the Computer and Acceptable Use Policy without further notice.” [ECF](#)  
19 [17-1](#), Decl. of Janine P. DuMontelle.

20 Accordingly, to the extent there are any privileged communications at issue here—  
21 and Plaintiff does not identify them with requisite particularity—any claim of privilege  
22 was waived by transmittal of the communication via Plaintiff’s Chapman email account.

23 In addition, with specific reference to Plaintiff’s representation of former President  
24 Trump in Supreme Court litigation during the period covered by the Chapman subpoena,  
25 the Chapman president has stated that the University “has clear policies in place  
26 regarding outside activity.... In fact, when acting privately, Chapman faculty and staff  
27 are not free to use Chapman University’s email address, physical address or telephone  
28 number in connection with the support of a political candidate.” Chapman University,

1 *President Struppa’s Message on Supreme Court Case*, Dec. 10, 2020,

2 [https://news.chapman.edu/2020/12/10/president-struppas-message-on-supreme-court-](https://news.chapman.edu/2020/12/10/president-struppas-message-on-supreme-court-case/)  
3 [case/](https://news.chapman.edu/2020/12/10/president-struppas-message-on-supreme-court-case/). Plaintiff indisputably violated that policy in conjunction with any emails related to

4 the events leading up to January 6.

5 Moreover, Plaintiff has stated publicly that former President Trump authorized  
6 Plaintiff’s discussion of advice relating to the election and the events leading up to  
7 January 6. Two memos that Plaintiff wrote outlining how Vice President Pence could  
8 overturn the results of the Presidential election are already in the public domain. Plaintiff  
9 has himself stated that his client has given permission for him to discuss matters related  
10 to January 6, 2021 publicly. For example, on May 5, 2021, Plaintiff appeared on the  
11 Peter Boyles Show and stated that “I would normally not talk about a private  
12 conversation I have with a client, but I have express authorization from my client, the  
13 president of the United States at the time, to describe what occurred—to truthfully  
14 describe what occurred in that conversation.”<sup>11</sup> Likewise, Plaintiff appeared on a podcast  
15 in which he discussed the advice in his legal memo at length, noting that Plaintiff himself  
16 provided the memo to author Bob Woodward, and saying at the outset that the former  
17 President had “authorized” him “to talk about these things.”<sup>12</sup> And Plaintiff has made  
18 extensive public remarks regarding the events of January 6 and his advice to then-  
19 President Trump on numerous other occasions.<sup>13</sup> Accordingly, even if Plaintiff had

20 \_\_\_\_\_  
21 <sup>11</sup> *Peter Boyles Show*, 710KNUS News/Talk (May 5, 2021) (available at  
22 <https://omny.fm/shows/peter-boyles-show/peter-boyles-may-5-8am-1>).

23 <sup>12</sup> Available at [https://equalcitizens.us/discussing-the-john-eastman-memo-with-john-](https://equalcitizens.us/discussing-the-john-eastman-memo-with-john-eastman/)  
24 [eastman/](https://equalcitizens.us/discussing-the-john-eastman-memo-with-john-eastman/).

25 <sup>13</sup> See, e.g., Michael S. Schmidt and Maggie Haberman, *The Lawyer Behind the*  
26 *Memo on How Trump Could Stay in Office*, N.Y. Times, Oct. 2, 2021, available at  
27 <https://www.nytimes.com/2021/10/02/us/politics/johneastman-trump-memo.html>; John  
28 McCormack, *John Eastman v. the Eastman Memo*, Nat’l Rev., Oct. 22, 2021, available  
at <https://www.nationalreview.com/2021/10/john-eastman-vs-the-eastman-memo/>; John  
C. Eastman, *John Eastman: Here’s the Advice I Actually Gave Vice President Pence on*

1 properly invoked the privilege, the privilege would nonetheless be waived and therefore  
2 not a basis upon which to quash the Chapman subpoena.

3 **C. The Documents Sought from Chapman Are Not Protected by the**  
4 **Attorney Work Product Privilege**

5 For similar reasons, Plaintiff’s Chapman emails are not protected by the work  
6 product privilege. As with his claim of attorney-client privilege, Plaintiff has failed to  
7 make anything more than an unparticularized, blanket assertion that work product  
8 protection applies. Under Rule 26, the party asserting work-product protection has the  
9 burden of first showing that document in question was prepared “in anticipation of  
10 litigation.” Fed. R. Civ. P. 26(b)(3). As Plaintiff has identified no such documents, his  
11 assertion of the privilege is inadequate.

12 Even if Plaintiff had correctly asserted the privilege, any such protection has been  
13 waived. In the Ninth Circuit, for work product protection to attach, documents must have  
14 two characteristics: (1) they must be ‘prepared in anticipation of litigation or for trial,’  
15 and (2) they must be prepared ‘by or for another party or by or for that other party’s  
16 representative.’” *In re California Pub. Utils. Comm’n*, 892 F.2d 778, 780–81 (9th Cir.  
17 1989) (quoting Fed. R. Civ. P. 26(b)(3)). Although, unlike the attorney-client privilege,  
18 the work product privilege is not automatically waived by any disclosure to a third party,  
19 the Ninth Circuit has held that disclosing work product to a third party can waive  
20 protection if “such disclosure, under the circumstances, is inconsistent with the  
21 maintenance of secrecy from the disclosing party’s adversary” or “conduit to an  
22 adversary.” *Sanmina Corp.*, 968 F.3d at 1121 (citing *United States v. Deloitte LLP*, 610  
23 F.3d 129, 139 (D.C. Cir. 2010); *Rockwell Int’l Corp. v. U.S. Dep’t of Justice*, 235 F.3d  
24 598, 605 (D.C. Cir. 2001)).

25 In determining whether waiver has occurred through disclosure to a conduit of an  
26 adversary, courts perform a “fact-intensive analysis.” *Id.* The “focal point” of the waiver

27 *the 2020 Election*, Sacramento Bee, Oct. 7, 2021, available at  
28 <https://www.sacbee.com/opinion/op-ed/article254812552.html>.

1 inquiry is “whether, under the totality of the circumstances, [claimant] acted in such a  
2 way that is inconsistent with the maintenance of secrecy against its adversary.” *Id.* at  
3 1124. Two factors courts consider when performing this analysis are: (1) whether the  
4 disclosing party has engaged in self-interested selective disclosure by revealing its work  
5 product to some adversaries but not to others, and (2) whether the disclosing party had a  
6 reasonable basis for believing that the recipient would keep the disclosed material  
7 confidential. *Id.* at 1121. But while these two factors are “highly relevant” they are “not  
8 the only considerations at play in assessing whether disclosure is inconsistent with the  
9 maintenance of secrecy.” *Id.* Rather, courts consider “the same principle of fundamental  
10 fairness that underlies much of our common law doctrine on waiver by implication.” *Id.*  
11 at 1122. Thus, a court may find the work-product doctrine waived where the disclosing  
12 party’s conduct has reached a certain point of disclosure such that fairness requires that  
13 the “work-product privilege shall cease, whether [claimant] intended that result or not.”  
14 *Id.*

15 Plaintiff acted with complete disregard to the maintenance of secrecy against an  
16 adversary. As a preliminary matter, Congress is no theoretical future adversary to  
17 Plaintiff, but in fact, “could be [an] adversary in the sort of litigation the [work-product  
18 documents] address.” *Sanmina Corp.*, [968 F.3d at 1121](#). Plaintiff wrote memos detailing  
19 a plan to use the mechanisms of Congress to subvert the outcome of the 2020 election. It  
20 is no surprise that Congress would want to investigate such activities, and accordingly  
21 Plaintiff undoubtedly foresaw the potential of litigation with Congress.

22 Regarding the totality of the circumstances analysis, Plaintiff has “engaged in self-  
23 interested disclosure,” of the kind described in *Sanmina Corp.*, by speaking about his  
24 legal advice to the press. *See id.* at 1123. In order to avoid waiver of the work product  
25 protection, the disclosing party must have had a reasonable basis for believing that the  
26 recipient would keep the disclosed material confidential. *Sanmina Corp.*, [968 F.3d at](#)  
27 [1121](#). Plaintiff had no such basis for belief. By communicating through his Chapman  
28 email account, Plaintiff was aware—under the clear and detailed policies of the

1 University—that his communications would not be kept confidential. And in choosing  
2 to store work product in his Chapman email account, he disclosed that material to a third  
3 party who substantially increased the likelihood that his communications would be  
4 obtained by a subpoenaing party. The increase in likelihood was not just a scant  
5 possibility, but was rather foreseeable to Plaintiff, as Chapman’s policy to disclose emails  
6 in response to subpoenas was broadcast to all faculty, students, and staff on the  
7 University’s website.<sup>14</sup> Thus, in communicating with clients and providing attorney  
8 work product through his Chapman account—knowing full well that such  
9 communications were not confidential—Plaintiff emailed at his own risk.

10 Further, whether Plaintiff “intended the result or not,” work-product protection  
11 should cease because fairness requires it. *Id.* at 1121. When assessing the fairness  
12 principle underlying waivers, “the overriding concern in the work-product context is not  
13 the confidentiality of a communication, but the protection of the adversary process.” *Id.*  
14 at 1124. But Plaintiff “cannot be allowed, after disclosing as much as he pleases, to  
15 withhold the remainder.” *Weil v. Inv./Indicators, Rsch. & Mgmt., Inc.*, 647 F.2d 18, 24  
16 (9th Cir. 1981). Here, Plaintiff’s selective disclosure of information he now contends is  
17 work product weighs heavily against applying the protection.

18 Considering the totality of the circumstances, it is clear that Plaintiff disclosed  
19 communications to a conduit to an adversary. The documents sought by the Chapman  
20 Subpoena are therefore beyond the reach of the protections afforded by the work product  
21 doctrine. *See Sanmina Corp.*, 968 F.3d at 1122.

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22 <sup>14</sup> *See Policies and Procedures: Privacy Policy*, Chapman University (“Third Party  
23 Requests include, but may not be limited to, a search warrant, court order, subpoena,  
24 litigation discovery or legal preservation hold request, other valid legal order, or a written  
25 consent from the student permitting disclosure. If the University receives a Third Party  
26 Request, it may interface with Microsoft or Google to obtain or preserve the requested  
27 records or direct the requestor to contact the Provider or the student directly.”); *see also*  
28 *id.* (“The University reserves the right to retrieve the contents of University-owned  
computers or e-mail messages for legitimate reasons, such as to find lost messages, to  
comply with investigations of wrongful acts, to respond to subpoenas, or to recover from  
system failure.”).

1           **D. Plaintiff Is Unlikely to Succeed on His Constitutional Claims**

2           Although not mentioned in his Memorandum in support of his TRO request,  
3 Plaintiff asserts in his complaint that the Chapman Subpoena also violates his First and  
4 Fourth Amendment Rights. Neither of these claims supports a TRO.

5           First, “[t]he protections of the First Amendment ... do not afford a witness the  
6 right to resist inquiry in all circumstances.” *Barenblatt v. United States*, 360 U.S. 109,  
7 126 (1959). Rather, “[t]o determine whether the First Amendment bars the Committee’s  
8 access to information it seeks through a duly-authorized subpoena depends on a  
9 balancing of “the competing private and public interests at stake in the particular  
10 circumstances shown.” *Id.* Here, the Select Committee’s interest, supported by valid  
11 legislative purpose as described above, is substantial because its investigation is focused  
12 on ensuring “the free functioning of our national institutions.” *See Buckley v. United*  
13 *States*, 424 U.S. 1, 66 (1976) (internal quotation omitted). Plaintiff, by contrast, fails to  
14 assert any significant First Amendment interest that could outweigh the Government’s  
15 substantial interest, alleging only that the Chapman subpoena “intrude[s] on” his “rights  
16 to freedom of association.” Compl. ¶ 30. Plaintiff has not only failed to identify what  
17 specific associational interests the Chapman subpoena threatens, *see N.Y. State Club*  
18 *Ass’n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988) (“This is not to say, however, that  
19 in every setting in which individuals exercise some discrimination in choosing associates,  
20 their selective process of inclusion and exclusion is protected by the Constitution.”), he  
21 fails to allege what harm threatens these amorphous associational interests, *see Brock v.*  
22 *Loc. 375, Plumbers Int’l Union of Am., AFL-CIO*, 860 F.2d 346, 350 (9th Cir. 1988)  
23 (stating that courts have “emphasized in each of those decisions ... the need for objective  
24 and articulable facts, which go beyond broad allegations or subjective fears. ... a merely  
25 subjective fear of future reprisals is an insufficient showing of infringement of  
26 associational rights”). These allegations are insufficient to state a First Amendment  
27 claim.  
28



1 The same is true of Plaintiff’s Fourth Amendment claim. Plaintiff asserts that the  
2 Chapman subpoena is “so broad and indefinite as to exceed the lawfully authorized  
3 purpose” of the Select Committee. Compl. ¶ 98. A subpoena is not impermissibly  
4 overbroad so as to violate the Fourth Amendment as long as its call for documents or  
5 testimony are within the scope of the Congressional inquiry at issue. *See McPhaul*, 364  
6 U.S. at 382. Here, as described above, the Select Committee’s legislative purpose is  
7 broad and includes both examining the events of January 6, 2021 as well as the  
8 “circumstances” and “causes” of the attack. H. Res. § 503(3)(1). In light of that broad  
9 legislative purpose, the documents sought in the subpoenas, though extensive, are not  
10 impermissibly broad. *See Eastland*, 421 U.S. at 509 (“Nor is the legitimacy of a  
11 congressional inquiry to be defined by what it produces. The very nature of the  
12 investigative function—like any research—is that it takes the searchers up some ‘blind  
13 alleys’ and into nonproductive enterprises. To be a valid legislative inquiry there need be  
14 no predictable end result.”).

15 **III. PLAINTIFF HAS FAILED TO DEMONSTRATE A LIKELIHOOD OF**  
16 **IRREPARABLE HARM**

17 Plaintiff argues that he will suffer irreparable harm in the absence of an injunction  
18 based on the same meritless arguments concerning the attorney-client privilege, a claim  
19 that denial of his motion will somehow hurt the ability of law schools to employ  
20 practitioners, and that the separation of powers will be irrevocably harmed if this Court  
21 does not intervene in the affairs of Congress. Pl.’s Mem. at 8-10, 11-12. None of these  
22 arguments has merit. As the Supreme Court has emphasized, the irreparable injury  
23 required for preliminary relief must be “both certain and great; it must be actual and not  
24 theoretical.” *Winter*, 555 U.S. at 22 (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674  
25 (D.C. Cir. 1985) (per curiam)). “Bare allegations of what is likely to occur are of no  
26 value since the court must decide whether the harm will *in fact* occur.” *Wis. Gas*, 758  
27 F.2d at 674. Rather, “[t]he movant must provide proof that the harm has occurred in the  
28

1 past and is likely to occur again, or proof indicating that the harm is certain to occur in  
2 the near future.” *Id.*

3 Plaintiff first argues that will “undoubtedly” face irreparable harm because once  
4 his privileged communications and attorney work product are disclosed, the status quo  
5 cannot be restored. Pl.’s Mem. 8-9. But the Ninth Circuit has held where the “only  
6 relevant evidence” is a party’s statement that privileged communications will be  
7 revealed, “[s]uch conclusory allegations are insufficient to establish irreparable harm.”  
8 *In re Excel Innovations*, [502 F.3d 1086, 1098-99](#) (9th Cir. 2007). For the same reasons  
9 that Plaintiff fails to adequately assert the privilege as to particular communications, he  
10 fails to demonstrate any harm that will occur—let alone irreparable harm—beyond  
11 conclusory allegations. Thus, at most, Plaintiff has identified the mere *possibility* of  
12 harm to the attorney-client privilege, a showing far from adequate to meet the demanding  
13 standard for preliminary relief. *See Arizona Recovery Hous. Ass’n v. Arizona Dep’t of*  
14 *Health Servs.*, [462 F. Supp.3d 990, 997](#) (D. Ariz. 2020) (“Plaintiffs seeking preliminary  
15 relief cannot rely on the mere possibility that irreparable harm will occur but must instead  
16 show such harm is ‘likely in the absence of an injunction.’” (quoting *Winter*, [555 U.S. at](#)  
17 [22](#))).

#### 18 **IV. THE BALANCE OF EQUITIES WEIGHS HEAVILY IN FAVOR OF THE** 19 **SELECT COMMITTEE**

20 For the same reasons, the public interest strongly supports denial of relief.  
21 Plaintiff’s contrary arguments are specious and ignore the clear and compelling public  
22 interest in the speedy and efficient conduct of the Select Committee’s investigation.  
23 Even in the less pressing context of administrative investigations, which derive from  
24 statutory authority (whereas Congress’s power of investigation is derived from the  
25 Constitution itself), courts have “recognized a strong public interest in having” such  
26 “investigations proceed ‘expeditiously and without impediment.’” *Linde Thomson*  
27 *Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, [5 F.3d 1508, 1514](#) (D.C.  
28 Cir. 1993) (quoting *F.T.C. v. TRW, Inc.*, [628 F.2d 207, 210](#) (D.C. Cir. 1980)). *A fortiori*,

1 the public interest in expeditious and unimpeded Congressional investigations is  
2 compelling. *Exxon Corp.*, [589 F.2d at 593](#) (there is a “clear public interest in maximizing  
3 the effectiveness of the investigatory powers of Congress. The welfare of the public is a  
4 factor to be weighed in determining whether or not to issue an injunction, and the  
5 investigatory power is one that the courts have long perceived as essential to the  
6 successful discharge of the legislative responsibilities of Congress.”) (internal citations  
7 omitted).

8 Plaintiff argues in opposition that the practice of law professors and legal clinics  
9 representing clients would be “throw[n] . . . into doubt” in the absence of an injunction.  
10 Pl.’s Mem. 11. This is speculative and assumes that the court determining that under  
11 these specific circumstances, and given Plaintiff’s pleading deficiencies and waiver, the  
12 privilege is not adequately asserted would impact practitioners at law schools across the  
13 country. There is no evidence that any such decision would adversely affect lawyers and  
14 law professors who, unlike Plaintiff, invoke a *valid* attorney-client privilege. Plaintiff’s  
15 claim that an injunction from this Court will advance, rather than intrude upon, the  
16 separation of powers, is similarly misplaced. For all the reasons discussed above, proper  
17 respect for the separation of powers requires denial of the injunction and dismissal of  
18 Plaintiff’s complaint.

19 **V. THE PUBLIC INTEREST SUPPORTS ALLOWING THE SELECT**  
20 **COMMITTEE TO CONDUCT ITS URGENT INVESTIGATION**

21 For the same reasons, the public interest strongly supports denial of relief.  
22 Plaintiff’s contrary arguments are specious and ignore the clear and compelling public  
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24 Even in the less pressing context of administrative investigations, which derive from  
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1 Cir. 1993) (quoting *F.T.C. v. TRW, Inc.*, 628 F.2d 207, 210 (D.C. Cir. 1980)). *A fortiori*,  
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16 claim that an injunction from this Court will advance, rather than intrude upon, the  
17 separation of powers, is similarly misplaced. For all the reasons discussed above, proper  
18 respect for the separation of powers requires denial of the injunction and dismissal of  
19 Plaintiff’s complaint.

20 It is difficult to imagine a Congressional investigation of greater national  
21 significance than this one. The public interest in permitting the Select Committee to  
22 proceed with its investigation is self-evident and compels rejection of Plaintiff’s Motion.  
23  
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26  
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28

**CONCLUSION**

For the reasons set forth above, Plaintiff’s Motion should be denied.

Respectfully submitted,

/s/ Douglas N. Letter

DOUGLAS N. LETTER

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Dated: January 21, 2022

**CERTIFICATE OF SERVICE**

**WASHINGTON, DISTRICT OF COLUMBIA**

I am employed in the aforesaid county, District of Columbia; I am over the age of 18 years and not a party to the within action; my business address is:

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On January 21, 2022, I served the **DEFENDANTS’ MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF’S EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER** on the interested parties in this action:

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**(BY E-MAIL OR ELECTRONIC TRANSMISSION)**

The document was served on the following via The United States District Court – Central District’s CM/ECF electronic transfer system which generates a Notice of Electronic Filing upon the parties, the assigned judge, and any registered user in the case:

**(FEDERAL)** I declare under penalty of perjury that the foregoing is true and correct, and that I am employed at the office of a member of the bar of this Court at whose direction the service was made.

Executed on January 21, 2022 here, at Bethesda, Maryland.

/s/ Douglas N. Letter