**[NOT YET SCHEDULED FOR ORAL ARGUMENT]**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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| REPUBLICAN NATIONAL COMMITTEE,<br>*Plaintiff/Appellant*,<br>v.<br>NANCY PELOSI, *et al.*,<br>*Defendants/Appellees*. | No. 22-5123 |

# OPPOSITION BY U.S. HOUSE OF REPRESENTATIVES DEFENDANTS/APPELLEES TO PLAINTIFF'S MOTION FOR AN INJUNCTION PENDING APPEAL

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## INTRODUCTION

The U.S. House of Representatives Defendants/Appellees hereby oppose the motion by the Plaintiff/Appellant Republican National Committee (the "RNC") for an injunction pending appeal in this case and for an administrative injunction pending appeal.[1]

In seeking an injunction pending appeal, the RNC requests an "exceptional remedy." *John Doe Co. v. Consumer Fin. Prot. Bureau*, 849 F.3d 1129, 1131 (D.C. Cir. 2017). In an 11-page decision, the district court correctly denied the RNC's request, and the House Defendants principally rely here on the district court's ruling and its reasoning, as well as on the district court's ruling on the merits in this case. *Republican National Comm. v. Pelosi*, 2022 WL 1294509 (May 1, 2022).

Significantly, the Supreme Court has instructed that **"***[a] stay is not a matter of right, even if irreparable injury might otherwise result*. . . . It is instead 'an exercise of judicial discretion,' and 'the propriety of its issue is dependent upon the circumstances of the particular case.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (emphasis added) (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672-72 (1926)). In addition, the moving party seeking an injunction or stay pending

[1] The House Defendants/Appellees here are all of the Defendants other than Salesforce.com Inc.

appeal bears the burden of showing that this exceptional remedy is warranted. *See McCammon v. United States*, 588 F. Supp. 2d 43, 47 (D.D.C. 2008).

Moreover, when an injunction pending appeal is sought against a coordinate branch of the Government, the three factors other than the likelihood of success on the merits become more important. *Republican National Comm. v. Pelosi*, No. 22-659, at 5. "After all, 'courts must take care not to unnecessarily halt the functions of a coordinate branch." *Id.* (quoting *Trump v. Thompson*, 20 F.4th 10, 48 (D.C. Cir. 2021), *injunction denied*, 142 S. Ct. 680 (2022), *cert. denied*, 142 S. Ct. 1350 (2022).

The district court here assumed that the RNC had shown that its appeal would present a serious legal question regarding the First Amendment, and that the RNC will suffer irreparable injury absent an injunction pending appeal. But the court emphasized that it was ***not*** finding that the RNC was "likely to succeed on any of its claims." *Id.* at 6. And, most important, the district court denied the RNC's motion for an injunction pending appeal because the RNC "has not shown that the merged balance-of-equities and public-interest factors tip sharply in its favor." *Id.* at 5.

In denying the requested injunction pending appeal, the district court understood that, absent an injunction, Defendant Salesforce will comply with the Select Committee's subpoena, and this case will then be moot. Nevertheless, the

district court denied the injunction pending appeal because delay in this matter will "further interfere with the Select Committee's investigation, which is at a 'critical juncture' as it 'approaches public hearings and is attempting to promptly complete its investigative efforts.'" *Id.* at 10.

The district court went on in its ruling to emphasize for a second time that "[e]ven under ordinary circumstances, there is a strong public interest in Congress carrying out its lawful investigations, requiring courts to take care not to unnecessarily halt the functions of a coordinate branch. . . . That already-strong public interest is heightened for the Select Committee's urgent and weighty investigation." *Id.* (citations omitted).

The district court concluded by pointing out that the "balance of equities" and "public interest" do not here tip sharply in the RNC's favor, and the court's balancing of the equities, depending upon its "reflective and attentive appraisal as to the outcome on the merits," warranted denial. *Id.* at 10, and fn. 7.

The district court's carefully considered determination calls for denial of an injunction pending appeal by this Court as well. The Select Committee is in the midst of an essential investigation "into the single most deadly attack on the Capitol by domestic forces," and an evaluation of the need for legislation to "ensur[e] the safe and uninterrupted conduct of [Congress's] constitutionally assigned business." *Trump v. Thompson*, 20 F.4th at 35. That investigation is right

now at a critical stage, with public hearings scheduled to begin just several weeks away. An injunction pending appeal would deprive the Select Committee of key information relevant to its investigation, its public hearings, and its consideration of legislation. Further delay in obtaining the materials sought by the subpoena could obscure key facts and affect Congress' efforts to prevent January 6th from recurring in our rapidly approaching next election cycle, or in the future.

For these same reasons, denial of an administrative injunction pending appeal is also appropriate so as not to interrupt and delay the Select Committee's work at this critical juncture.

## ARGUMENT

### I. The RNC Has Not Established a Sufficient Irreparable Injury

The RNC begins (Motion at 1, 11-12) its quest for an injunction pending appeal by dramatically declaring that this case involves the first time that the majority in the House of Representatives exercised its authority to compel production through a subpoena to the minority party of internal party material. This claim is flatly wrong.

For example, in 1998, Rep. Richard Gephardt, when chairing the House Democratic Policy Committee, released a report that catalogued numerous examples of subpoenas from several different Republican majority Committees to Democratic party entities, on both the national and state levels. *See* 144 Cong.

Rec. H5316- H5324 (June 25, 1998). These various subpoenas sought Democratic party internal budgeting, campaign strategies, media buys, issue and advertising strategies, and other political activities, and all DNC phone records for several years. *See id.*

In any event, the RNC's theory of injury fails because it remains contingent on the same mistaken theory of harm that was fatal before the district court. The RNC does not identify any new injury beyond its prior assumption that, if Salesforce produces the requested material and if that material were to become public, the information "could" potentially be used to create a "mosaic" of its email-outreach strategy, which its political rivals might then use to better compete with the RNC in the digital arena. Motion at 15. But, as the district court explained, "whatever competitive harm may come to the RNC from disclosure of the actual material at issue is too 'logically attenuated' and 'speculative' to defeat the Select Committee's weighty interest." Op. at 47.

The RNC argues (Motion 12-20) that it is likely to succeed on its constitutional claims, and thus that irreparable harm necessarily follows. But the district court held that the RNC's constitutional claims lack merit. In any event, even if the RNC had established an irreparable injury, that alone would not be enough. As noted above: "A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if

irreparable injury might otherwise result to the appellant." *Nken*, 556 U.S. at 427 (internal quotation marks and citations omitted).

## II. An Injunction Pending Appeal Would Substantially Injure the Select Committee and Disserve the Public Interest

Regarding the crucial balance of hardship point, as explained above and as the district court recognized, the House Defendants are at a critical juncture, as the Select Committee is rapidly approaching public hearings and is attempting to promptly complete its investigative efforts, given the gravity of the attack on Congress as an institution, the people who sought to protect it, and the Constitutional functions occurring that day. This threat is still real, and the Select Committee has been charged with making recommendations for legislative and other changes that will prevent future, similar attacks.

If the Select Committee cannot promptly receive the requested materials that Salesforce is prepared to provide, the important Constitutional activities with which the Select Committee has been charged will be hampered by a coordinate branch's determination to deny Congress timely access to the information to which it is entitled. Congress would thus be less informed and less able to develop and propose in a timely manner effective remedial legislation and other measures necessary to prevent the erosion of our democratic institutions.

Moreover, this Court has already recognized the vital and pressing nature of the Select Committee's work. *See Trump v. Thompson*, 20 F.4th at 35 ("[T]here

would seem to be few, if any, more imperative interests squarely within Congress's wheelhouse than ensuring the safe and uninterrupted conduct of its constitutionally assigned business."); *see also id.* at 16 (citing the Executive's determination that Congress had a "'compelling need' to investigate 'an unprecedented effort to obstruct the peaceful transfer of power' and 'the most serious attack on the operations of the Federal Government since the Civil War.'").

The House Defendants urge this Court—as the district court did—to give appropriately significant weight to the disruptive effect that the grant of the temporary relief sought by the RNC here is likely to have on the Select Committee's investigation. Continued denial of the requested information is not warranted given the great stakes of this investigation and the ongoing threat to our democracy.

## III. The RNC Did Not Make a "Strong Showing" That The District Court's Judgment Would Be Reversed on Appeal

This district court fully considered each of the RNC's claims and rejected them in a lengthy and well considered ruling. The House Defendants are likely to prevail on appeal in this Court.

The RNC mainly argues (Motion at 12-16) that it is likely to prevail on its First Amendment claim. But to reach that claim, this Court would first have to reach, and resolve in the RNC's favor, the question of whether Salesforce qualifies

as a "state actor" for purposes of these claims. *See* Op. at 25 (assuming without deciding that Salesforce is a state actor in this context).

The district court ruled against the RNC on its First Amendment claims for three reasons. *First*, the Court held that "the Select Committee has a strong—that is, a 'sufficiently important'—interest in the records demanded." Op. at 44 (quoting *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2383 (2021)). *Second*, "the strength of the Select Committee's interest here reflects the seriousness of the 'actual burden' the subpoena imposes on the RNC's First Amendment rights." *Id.* at 45 (quoting *Bonta*, 141 S. Ct. at 2383). *Third*, "the Select Committee's demand is narrowly tailored to its interest." Op. at 47.

The district court described the RNC's burden arguments as "not unreasonable"—but then concluded that, "upon closer inspection, less is at stake than the RNC represents." Op. at 45. As the district court noted, some of the information that the RNC argued would cause harm upon release is already publicly available, and the RNC has provided no basis for this Court to conclude that its communications with Salesforce would include discussions about any proprietary data related to the performance of its email campaigns. *Id.* at 45-46.

As for the internal information that would be produced, the district court held that "this alleged burden does not outweigh the Select Committee's interest," *id.* at 46. In its ruling, the district court carefully distinguished this Court's

decision in *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003), on which the RNC heavily relies in its motion; that opinion involved an intrusion that was significantly greater than what is at stake here. The district court concluded that here "whatever competitive harm may come to the RNC from disclosure of the actual material at issue is too logically attenuated and speculative to defeat the Select Committee's weighty interest," Op. at 47 (internal quotation marks omitted).

The RNC cites additional issues as warranting reversal on appeal. None does. *First*, the RNC argues (Motion at 17-18) that the district court improperly accepted the House Defendants' representations to that court and to Salesforce that the subpoena does not seek certain categories of records. But as the district court noted, and the RNC does not contest, "courts regularly credit discussion that narrows disputes over congressional subpoenas." Op. at 17 (citing *Bean LLC v. John Doe Bank*, 291 F. Supp. 3d 34, 37 (D.D.C. 2018)). There is simply no reason in logic or law for this Court to refuse to accept the Select Committee's explanation about what it believes its own subpoena covers (an explanation that Salesforce has accepted.)

*Second*, the RNC argues (Motion at 19-20) that the Select Committee's composition violates its authorizing resolution because the Select Committee has only nine members, but its authorizing resolution provided that "The Speaker shall appoint 13 members," H. Res. 503, 117th Cong. § 2(a) (2021). The district court

explained various reasons for why the RNC's position is plainly incorrect, and why the Judiciary should not intrude on the House's interpretation and implementation of its own rules. Op. at 30-31 (noting that the House views the Select Committee as "duly constituted and empowered to act under its authorizing resolution" with nine members; and that, if the Court held otherwise, the Court itself "would effectively be making the Rules," in violation of the Rulemaking Clause (quoting *United States v. Rostenkowski*, 59 F.3d 1291, 1306-07 (D.C. Cir. 1995)). The only two other courts to have considered this issue have also rejected this attack on the House's internal proceedings. *Budowich v. Pelosi*, No. 21-cv-3366 (JEB) (D.D.C. Jan. 20, 2022 Oral Arg. Tr. 34:1–5, 8–10); *Eastman v. Thompson*, 8:22-cv-00099-DOC-DFM (C.D. Cal. Jan. 25, 2022), ECF No. 43 at 9 & n.12.

* * *

The exceptional remedy of an injunction pending appeal is not appropriate here. The district court denied the RNC's motion for a preliminary injunction, dismissed its case, and denied an injunction pending appeal. Such an injunction would enable the RNC to delay and potentially undermine the Select Committee's critical work. The RNC should not be allowed—in the words of another district court in another case seeking to interfere with the Select Committee's work—to "do an end run around the preliminary injunction factors simply because [it] seeks appellate review. Rather, the court maintains 'a considerable reluctance in

granting an injunction pending appeal when to do so, in effect, is to give the appellant the ultimate relief being sought.'" *Trump v. Thompson*, No. 21-cv-2769, Order, ECF 43 at 5 (D.D.C. Nov. 10, 2021) (quoting 11 Wright & Miller, Fed. Prac. & Proc. Civ., § 2904 (3d ed. 2021)). As in *Trump v. Thompson*, "[w]ere the court to grant Plaintiff's motion, the effect would be to give Plaintiff the fruits of victory whether or not the appeal has merit." *Id.* (internal quotation marks and brackets omitted).

## CONCLUSION

The House Defendants respectfully request that this Court deny the RNC's motion for an injunction pending appeal, and for an administrative injunction pending appeal. Doing so will allow the Select Committee's essential work to proceed without further delay.

Respectfully submitted,

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May 23, 2022

**CERTIFICATE OF SERVICE**

I hereby certify that on May 23, 2022, I caused the foregoing document to be filed via the CM/ECF system for the U.S. Court of Appeals for the D.C. Circuit, which I understand caused a copy to be served on all registered parties.

*/s/ Douglas N. Letter*
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