[NOT YET SCHEDULED FOR ORAL ARGUMENT]

Case No. 22-5123

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

Republican National Committee,
Plaintiff-Appellant,

v.

Nancy Pelosi, et al.,
Defendants-Appellees.

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

Appellant's Emergency Motion for Administrative Injunction and Injunction Pending Appeal

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INTRODUCTION

For the first time, a congressional committee dominated by the political party in power leveraged its subpoena authority to compel the disclosure of the minority party's First Amendment protected internal party deliberative material. Not only did the committee subpoena the information of a political foe, but it directed its subpoena to a third-party vendor that hosts the political party's electoral and fundraising activities. Per the committee, that the subpoena was issued to the third-party vendor—rather than the party directly—forecloses any constitutional challenge to the subpoena.

The U.S. House Select Committee to Investigate the January 6th Attack on the U.S. Capitol ("Select Committee") issued a broad subpoena to Salesforce.com ("Salesforce"), one of the Republican National Committee's ("RNC") digital vendors that hosts its electoral and fundraising activities. The Subpoena demands granular data, including log-in data for the RNC's employees and email metrics and analytics (including proprietary metrics developed by the RNC) for *all* messages during a two-month period, down to send and open rates, click rates, click-to-open rates, time attributes, and message attributes. For many reasons, none more significant than the associational protections afforded such information under the First Amendment, the RNC sued the Select Committee, its Members (together with the Committee,

"Congressional Defendants"), and Salesforce to enjoin any disclosure of the RNC's constitutionally protected information.

While typically Congress defends its subpoenas in court, *see Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020), here the Congressional Defendants invoked the Speech or Debate Clause, claiming that, because the Subpoena supposedly serves a "legitimate legislative purpose," they are immune from suit.

The Congressional Defendants, however, conceded that legislative immunity did not bar the RNC's claims against Salesforce, a concession that apparently perplexed the district court. On this, the court ordered supplemental briefing and introduced a host of new "jurisdictional" concerns, all of which questioned whether the RNC could protect its constitutional and statutory interests by seeking relief *against Salesforce*. The issues included whether the RNC had standing to bring its claims against Salesforce; whether Federal Rule of Civil Procedure 19 required dismissal of the entire case because, if the Congressional Defendants are immune from suit, they are "absent," required parties that are otherwise "indispensable" to the case; and whether the Speech or Debate Clause "in some way" required dismissal of the RNC's claims against Salesforce, a non-congressional defendant.

Ultimately, the district court bypassed most of this "thicket" of procedural issues and decided other questions in the RNC's favor to reach the RNC's claims on the merits. For the First Amendment claim,

the court recognized that the RNC's claim against the "disclosure of [its] confidential, strategic information" has "force" and could run afoul of associational protections, especially "given that the Select Committee is dominated by members of the Democratic Party, whose candidates compete with RNC-backed candidates in almost every federal election." Nonetheless, the court wrongly held the Subpoena—as improperly narrowed after the RNC filed suit—satisfied "exacting scrutiny" because it found the harm to the RNC's associational interests from the release of its proprietary and confidential data to be too "logically attenuated" and "speculative."

The district court's conclusion is not supportable under this Circuit's precedent. Among the data to be disclosed under subpoena are the identities of RNC employees (mostly low-level employees responsible for digital messaging) and their login sessions for Salesforce's Marketing Cloud platform, and the RNC's email metrics and analytics, which are the building blocks for the RNC's digital communications and fundraising strategy. This is precisely the type of information protected under *American Federation of Labor & Congress of Industrial Organizations v. FEC*, 333 F.3d 168, 178 (D.C. Cir. 2003) ("*AFL-CIO*"), because public disclosure would "seriously interfere[]" with the political organization's "effectiveness." The district court's failure to defend this constitutionally protected information will

weaponize congressional subpoenas for use by political foes—here, by the majority party against the minority party.

The severity of the district court's error is made more dire by the harm that will befall the RNC if Salesforce produces its protected information, harm the district court recognized "without doubt" would be irreparable. Production is currently foreclosed by an administrative injunction, which will expire on May 25, 2022. As the court noted, this Court's precedent prevents any remedy for dissemination and disclosure of the subpoenaed material once it is in the hands of Congress. So, without an injunction pending appeal to prevent Salesforce from producing on or after May 25, there will be no remedy, even if this Court finds the Subpoena is unlawful. Despite this, and despite recognizing that the RNC presented "serious legal questions," the district court declined an injunction pending appeal, reasoning "[t]he Circuit is better positioned" to make the call.

The RNC now requests an injunction to maintain the status quo during its appeal. Without an injunction, the RNC will have no opportunity to obtain relief on appeal, as Salesforce has indicated it will respond to the Subpoena and the Congressional Defendants claim the Court is without authority to award relief once Salesforce produces.

The Congressional Defendants oppose the RNC's requested relief and pressed that time is of the essence. To allay this concern, the RNC

does not object to expediated merits briefing, and the parties propose the following agreed upon schedule[1]:

- Opening Brief, May 31;
- Answer Brief, June 7; and
- Reply Brief, June 10.

BACKGROUND

1. On February 23, 2022, the Select Committee served Salesforce with a subpoena. (Addendum ("Add.") 499–500, 528–29.) The Subpoena is sweeping in its breadth, including demanding the RNC's records hosted by Salesforce in support of its electoral and fundraising activities. The subpoenaed information includes

- All performance metrics and analytics related to any RNC email campaign between November 3, 2020 and January 6, 2021, to include send rates, bounce rates, open rates, click rates, click-to-open rates, time attributes, and message attributes.
- All records related to login sessions to Salesforce's Marketing Cloud platform between November 3, 2020 and January 6, 2021, by any person associated with the RNC.
- All communications between the RNC and Salesforce between November 3, 2020 and January 31, 2021, related to the RNC's use of Salesforce platforms.

(*Id.* at 531.) Despite the RNC working cooperatively with the Select Committee during its investigation of the events surrounding January 6th, the Select Committee did not notify the RNC of the Subpoena. (*Id.*

[1] The Court granted similar relief in *Trump v. Thompson*. *See* Order, No. 21-5254 (D.C. Cir. Nov. 11, 2021).

at 499–501, 560.) The RNC learned of the Subpoena from Salesforce. (*Id.* at 560.)

2. The RNC filed this lawsuit on March 9, 2022, to enjoin production in response to the Subpoena. The RNC originally named only the Congressional Defendants because Salesforce agreed it would not produce any information in response to the Subpoena before the district court ruled on the RNC's objections. (*Id.* at 549.) After the complaint was filed, on March 10, 2022, Salesforce notified the RNC that, after meeting with the Select Committee's staff, it was no longer willing to withhold production during the lawsuit and intended to comply with the Subpoena on its return date of March 16, 2022. (*Id.*)

In response, on March 15, 2022, the RNC filed an amended complaint naming both the Congressional Defendants and Salesforce. (*Id.* at 551–52.) The RNC alleged the Subpoena is unlawful and therefore unenforceable because it (1) violates of the First Amendment; (2) violates the Fourth Amendment; (3) is not in service of a legitimate legislative purpose; (4) was issued without proper authorization; (5) is excessively broad and unduly burdensome; and (6) violates the Stored Communications Act ("SCA"). (*Id.* at 567–79.)

3. At the same time, the RNC moved for a preliminary injunction to enjoin Salesforce from producing information, or sitting for a deposition, in response to the Subpoena. (*Id.* at 525.) The parties agreed to an expediated briefing schedule and participated in a hearing on

April 1, 2022. (*Id.* at 190.) For their part, the Congressional Defendants claimed legislative immunity under the Speech or Debate Clause, arguing the only relevant question under *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975), was whether the Subpoena served a valid legislative purpose. (*Id.* at 416–22.) If so, the Congressional Defendants maintained they are immune from any claim challenging the Subpoena, including constitutional claims. (*Id.* at 422.)

But the Congressional Defendants conceded the Speech or Debate Clause did not shield Salesforce. (*Id.* at 274–75.) In fact, the district court confirmed no less than seven times at the hearing that legislative immunity did not apply to Salesforce and that an "injunction could still run against Salesforce." (*See id.*) Salesforce took no position on the RNC's claims. (*Id.* at 487–88.) Rather, Salesforce argued that it "d[id] not wish to comply with the subpoena," but, if the district court found the Subpoena was enforceable, it would comply. (*Id.* at 306.)

4. During briefing and at the hearing, the Congressional Defendants claimed to have narrowed the scope of the Subpoena in response to the RNC's claims. The district court "credited th[e] negotiations," which the court found "significantly reduced the [S]ubpoena's potential overbreadth." (*Id.* at 72.) To the court, this proved dispositive: "[T]he RNC identified important First Amendment interests … that would have presented a much different question for the Court had the materials at issue not been narrowed after

discussions between the Select Committee and Salesforce." (*Id.* at 68; *see also id.* at 72.)

5. Four days after the hearing the district court requested supplemental briefing. (Id. at 351–52.) All the court's questions assumed a finding of legislative immunity and asked how the court should proceed with the RNC's claims directly against Salesforce. This is the first time the court (or any party) mentioned several theories limiting review, including whether the RNC had standing to bring claims against Salesforce; whether Rule 19 required dismissal of the entire case; and whether the Speech or Debate Clause "in some way" required dismissal of the RNC's claims against Salesforce, a non-congressional defendant. (*Id.*)

Surprisingly, the Congressional Defendants latched onto the district court's Rule 19 overture. (*Id.* at 333–38, 137–48.) In other cases involving congressional subpoenas issued to third parties, the congressional parties intervened "as a matter of right" for the purpose of protecting their interests. (*Id.* at 121 n.1.) Yet here, the Congressional Defendants claimed immunity under the Speech or Debate Clause and contended their hypothetical "absence" meant the court could not adjudicate the RNC's claims against Salesforce. (*Id.* at 333–38, 137–48.)

6. On Sunday, May 1, 2022, the district court issued its 53-page decision. (*Id.* at 56.) As to the RNC's claims against the Congressional

Defendants, the court held they were immune under the Speech or Debate Clause. (*Id.* at 67.) Applying *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975), and relying on *Trump v. Thompson*, 20 F.4th 10 (D.C. Cir. 2021), the court found the Select Committee has a "valid legislative purpose" and that the Subpoena "may fairly be deemed within [the Select Committee] province." (*Id.* at 69–70.)

As to the RNC's claims against Salesforce, while the district court found the RNC had standing to sue, it entered summary judgment against the RNC on the merits. In doing so, the court "assume[d] without deciding" that Rule 19 was inapplicable and that the RNC's claims were proper against Salesforce. (*Id.* at 80.)

On the merits, applying a misguided "deferential" standard, the court concluded that: (1) the Select Committee had congressional authorization to issue the Subpoena (*id.* at 85–88); (2) the Subpoena advanced a "valid legislative purpose" (*id.* at 85–93); (3) the Subpoena survived exacting scrutiny and, as narrowed by the Congressional Defendants during litigation, was narrowly tailored and thus did not violate the First Amendment (*id.* at 93–103); (4) the Subpoena's breadth did not violate the Fourth Amendment (*id.* at 103–105); (5) the Subpoena was not overbroad and unduly burdensome (*id.* at 105); and (6) the RNC's claim under the SCA was mooted by the Congressional Defendants' concessions during litigation (*id.* at 105–06).

7. Recognizing that Salesforce's production in response to the Subpoena would moot the RNC's claims under this Court's precedent, and that return date was Monday, May 2, 2022, the district court entered an "'administrative injunction' to ensure the RNC has time to seek relief from this Court." (*Id.* at 107.) That administrative injunction expired upon the district court's denial of the RNC's motion for injunction pending appeal, and the court entered limited further administrative injunction, which expires on Wednesday, May 25, 2022.

ARGUMENT

The Court should enjoin Salesforce's compliance with the Subpoena during the pendency of this appeal. In considering whether to grant an injunction pending appeal, a court must balance four factors: (1) the applicant's likelihood of success on the merits; (2) whether the applicant will suffer irreparable injury; (3) the balance of hardships to other parties interested in the proceeding; and (4) the public interest. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020).

Here, the RNC is likely to establish that the district court erred in enforcing a first-of-its-kind congressional subpoena, which the court characterized as "highly unusual," prompted by "exceedingly rare spectacle," and issued by a committee dominated by members of the Democratic Party, against constitutional challenge. And, absent an injunction, the RNC will be irreparably injured by Salesforce's disclosure of its constitutionally protected information in response to

the court's erroneous order. The Congressional Defendants admit as much: once the information is turned over to Congress the courts lack authority to redress any constitutional violation. *See Hearst v. Black*, 87 F.2d 68, 71 (D.C. Cir. 1936). An injunction would maintain the status quo and preserve the RNC's right to protect its constitutional interests through appeal, an interest of the highest public importance.

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

The district court's decision upholds an unprecedented congressional subpoena. Not only is the Subpoena unprecedented, but the court, by its own admission, resolved a trove of first-impression issues defining the enforceability of congressional subpoenas issued to third-party vendors or custodians. Indeed, at the hearing on this matter, the district court pressed both parties on how best to preserve the right to appeal its determination of these issues noting, "I've been doing this long enough now to know that I'm not the final word on any of this … that you-all will want to appeal." (*Id.* at 194.) The RNC is likely to prevail on the issues presented. The most glaring issues are the district court's equivocation on the nature of the First Amendment protection for the internal and deliberative materials of the RNC, its impermissible paring back of the Subpoena's demands at the invitation of the Select Committee, and its flat refusal to confront the fact that the Select Committee's authorizing legislation requires it "shall" have 13 members—not nine.

A. The First Amendment protects the RNC's information compelled by the Subpoena.

The First Amendment protects "a political party's discretion in how to organize itself, conduct its affairs, and select its leaders." *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 230 (1989); *see also Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986) ("The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution."). This Court has expressly recognized that political parties' First Amendment right to association includes security in their internal materials and documents. In *AFL-CIO*, the Court held that the FEC's regulation compelling public disclosure of Democratic National Committee and AFL-CIO internal planning materials obtained in an investigation violated the First Amendment rights of the political party and the labor union. 333 F.3d at 179. The court expressly accepted that, while compelled disclosure requirements are less direct restrictions on a party's rights than the regulation of political group leadership or structure, compelled disclosure similarly frustrates a group's decisions as to "how to organize themselves, conduct their affairs, and select their leaders," as well as their selection of a "message and the best means to promote that message." *Id.* (quoting *Eu*, 489 U.S. at 230–31 & n.21) (internal brackets omitted). In so holding, the Court also noted that the compelled disclosure of

information revealing the identities and jobs of junior staffers may—by making recruitment for these positions more difficult—impair a political party's associational rights. *Id.* at 176.

In *American for Prosperity Foundation v. Bonta*, the Supreme Court confirmed that where a compelled disclosure requirement implicates First Amendment associational interests, the disclosure requirement must meet exacting scrutiny. 141 S. Ct. 2373, 2383 (2021). Such review requires that the proposed disclosure bears a substantial relationship to a sufficiently important governmental interest. *Id.* (citing *Doe v. Reed*, 561 U.S. 186, 196 (2010)). Here, the district court purported to hold that exacting scrutiny applies to the RNC's First Amendment claims (*id.* at 98), but failed to properly apply such scrutiny in at least three ways.

First, and as argued below, the district court impermissibly credited the Congressional Defendants' narrowing of the Subpoena. The Court accepted the Congressional Defendants' representations that they did not seek all the materials and data the Subpoena plainly demands. In so doing, the district court violated the separation of powers between Congress and the judiciary and opened the door for future judicial shaping of congressional investigations.

Second, the district court equivocated as to whether the data still at issue after its improper narrowing of the Subpoena—data detailing the RNC's strategy for digital engagement of the RNC with tens of

millions of people who have chosen to associate with the Republican Party—is of the same nature as the internal memoranda at issue in *AFL-CIO*. The data demanded here is the 21st century version of the documents at issue in that case, including at least four metrics developed by the RNC whose very existence is confidential. (*Id.* at 252–53.) The court incorrectly held that the compelled disclosure of the RNC's digital data was permissible "mainly because disclosure of the material at issue is not nearly as burdensome for the RNC as disclosure of the 'detailed descriptions of training programs, member mobilization campaigns, polling data, and state-by-state strategies' was for the AFL-CIO and Democratic National Committee in *AFL-CIO*." (*Id.* at 101.) The court recognized that "[p]ublic disclosure of that kind of information would obviously 'seriously interfere[]' with a political organization's 'effectiveness.'" (*Id.* at 102.) The court further recognized that the RNC represented that the information demanded by the Subpoena "'could' be used to create a 'mosaic' of its email outreach strategy that its political rivals could then use to better compete with the RNC in the digital arena." (*Id.*) And the court acknowledged that, even crediting the Committee's post-litigation narrowing of the Subpoena's demands, "some of the internal names of the RNC's email campaigns could reveal some of its strategic decisions, such as the general audiences to which the RNC targets certain communications. And obviously, information that shows which email campaigns attracted more attention, and which

attracted less, has some strategic value." (*Id.*) Nevertheless, the court found that associational harm from the release of this data was too "logically attenuated" and "speculative" to defeat the interest of the Select Committee. (*Id.*) The harm of disclosure is anything but speculative or attenuated. The uncontroverted declarations of the RNC's Chief Digital Officer demonstrated, among other things, that only three employees at the RNC have the sort of all-encompassing access to data demanded by the Subpoena.

Third, the district court's analysis mentions, but otherwise wholly ignores, another category of information demanded by the Subpoena: the identities of lower-level RNC staffers who logged into the Salesforce platform. (*Id.* at 63.) Precisely this sort of information was at issue in *AFL-CIO*. There, this Court credited declarations asserting that the disclosure of lower-level staffers' identities was likely to harm the associational interests and rights of the Democratic National Committee by making recruitment for these sorts of positions more difficult. *AFL-CIO*, 333 F.3d at 176. At argument, the RNC pointed out that this harm is on all fours with the facts of AFL-CIO. (*Id.* at 246–58.)

In the end, the RNC deserves the opportunity to test the district court's decision on the importance of the information demanded—and its weight versus the interests of the Select Committee's—on appeal. This is only possible if the Court enters an injunction.

B. Myriad other errors plague the district court's decision and require reversal.

Crediting the Congressional Defendants' litigation narrowing was improper. Per the district court, this case would have presented "a much different question" if it had not permitted the Congressional Defendants' to "narrow" the Subpoena during litigation. (*Id.* at 68; *see also id.* at 72.) This narrowing allowed the district court to avoid some obvious problems with the Subpoena's constitutionality.

Under this Court's rule in *United States v. Patterson*, "[t]he burden is on the court to see that [a congressional] subpoena *is good in its entirety*." 206 F.2d 433, 434 (D.C. Cir. 1953) (emphasis added) (quoting *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221 (1951)). This rule ensures that Congress, which no doubt may be tempted to draft overbroad subpoenas, carefully "narrow[s] the scope of possible conflict" at the drafting stage, *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2036, 2034 (2020)[2]; it avoids placing the onus on the target of the subpoena "to cull the good from the bad," *Patterson*, 206 F. 2d at 434 (quoting *Bowman Dairy*, 341 U.S. at 221), particularly when the subject is a neutral third-party custodian and the true target does not receive notice of the subpoena; and it promotes "separation of powers" and

[2] In *Mazars*, the Supreme Court reminded that Congress must tailor its subpoenas accordingly to adhere to separation-of-powers concerns. *Id.* at 2036 (citing *Watkins v. United States*, 354 U.S. 178, 201, 204–05, 204–05, 214–15 (1957)).

respect for "legislative independence," *see Jewish War Veterans of the U.S. of Am., Inc. v. Gates*, 506 F. Supp. 2d 30, 62 (D.D.C. 2007).

The Congressional Defendants' near-immediate walking back of the scope of the Subpoena after the RNC challenged it in court proves the Subpoena was, at least, partially "bad." Upon such a finding, the district court should have declared the Subpoena invalid, at which point the Congressional Defendants would have had a choice: withdraw the Subpoena entirely or issue one that complies with the Constitution. While this order of operations may seem inefficient, separation-of-powers restraints "are not known—and were not chosen—for their efficiency or flexibility." *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2207 (2020).

Instead, in response to the RNC's challenges, the district court allowed the Congressional Defendants to negotiate with Salesforce—without notice to or participation by the RNC—and rewrite the scope of the Subpoena on the fly during litigation. This "subpoena broadly first, narrow second" approach is problematic for the reasons explained and incentivizes overbroad requests that are sure to invade liberty interests. *See United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) (separation of powers functions to protect individual liberty). Because the Subpoena cannot be part good and part bad, the district court should have found the as-issued Subpoena invalid and let the Select Committee try again.

The Select Committee's composition violates H.R. Res. 503 ("H. Res. 503"). H. Res. 503 states that Speaker Pelosi "*shall* appoint 13 Members to the Select Committee, 5 of whom *shall* be appointed after consultation with the minority leader." § 2(a) (emphasis added). No party disputes that the Select Committee fails to strictly comply with subsection 2(a)'s composition requirements. Nor did the district court find otherwise.

H. Res. 503 unambiguously uses the mandatory term *shall* and it is within the province of the courts to enforce the resolution's plain terms. The district court disagreed; it shied from the issue by making a molehill out of a mountain. The court bypassed H. Res. 503's clear text by leaning on what it described as the "semantic mess" around the term *shall* (*id.* at 65 (presumably referencing, Antonin Scalia & Bryan Garner, Reading Law 113 (2012) ("*Shall*, in short, is a semantic mess.")), and found that even though "the resolution states that Speaker Pelosi 'shall' appoint thirteen members … [it] is not conclusive as to whether thirteen members are required for [the Select Committee] to lawfully operate." Respectfully, this is judicial avoidance.

That the term *shall* may be semantically challenged in some uses does not mean it is problematic in subsection 2(a). "[W]hen the word shall can reasonably be read as mandatory, it ought to be so read." Reading Law, *supra*, at 114. And when "[t]he grammatical subject is charged with the duty imparted by" the shall-phrase at issue, it denotes

a "correct" use of the mandatory term. *Id.* at 113 (Exemplar: "Each party shall bear its own expenses. []The grammatical subject is charged with the duty imparted by the very phrase shall bear … . The usage is [therefore] correct."[]). In H. Res. 503, the grammatical subject (i.e., the Speaker) is unambiguously charged with the duty imparted by the phrase "shall appoint." H. Res. 503, § 2(a).

The district court committed other errors. On appeal, the RNC will raise other issues, including, at a minimum, that the Subpoena violates the Fourth Amendment and the subpoena was not issued in service of a valid legislative purpose.

II. The RNC Will Suffer Irreparable Injury Without an Injunction Pending Appeal.

The district court found "without doubt" the RNC "will suffer … irreparable harm absent an injunction pending appeal." (*Id.* at 5.) Without an injunction, Salesforce has indicated it will comply with the Subpoena. (*Id.* at 306.) And, if Salesforce produces in response to the Subpoena, the Congressional Defendants have argued no court would have the authority to order relief. (*Id.* at 421, 479.) Put directly, once the Select Committee is in possession of the RNC's confidential and protected information, per the Congressional Defendants immunity bars this Court from ordering relief. *See Senate Permanent Subcomm. on Investigations v. Ferrer*, 856 F.3d 1080, 1086 (D.C. Cir. 2017). The Select Committee has leveraged this argument in other cases:

> **THE COURT:** Let's go back to the jurisdictional issue. So for Speech or Debate, … your argument … is that once Congress is in possession of documents, that it is not for the Court to tell them to disgorge such documents.
>
> But do you take the position that, even if a committee did not have a proper legislative purpose, or that a subpoena at issue was plainly invalid or overbroad or otherwise defective, that no one could challenge a committee's ability to use those documents?
>
> **MR. LETTER:** Yes, Your Honor. …

(*Id.* at 465.)

The Congressional Defendants' embrace of legislative immunity makes the RNC's harm unmistakably irreparable. Unless the RNC's motion is granted, the RNC faces "perhaps the most compelling" form of irreparable injury: its appeal may be dismissed as "moot." *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers); *see also Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers). Courts "routinely … stay the status quo when" events might "moot the losing party's right to appeal." *John Doe Co. v. CFPB*, 235 F. Supp. 3d 194, 206 (D.D.C. 2017); *see also MediNatura, Inc. v. Food & Drug Admin.*, No. CV 20-2066 (RDM), 2021 WL 1025835, at *6 (D.D.C. Mar. 16, 2021) (stating injunctions pending appeal are "especially appropriate where, in the absence of such an injunction, the subject matter of the dispute will be destroyed or otherwise altered in a way that moots the pending appeal"); *Ctr. For Int'l Env't L. v. Off. of U.S. Trade Representative*, 240 F. Supp. 2d 21,

22–23 (D.D.C. 2003) (explaining that movants make "a strong showing of irreparable harm" where disclosure would moot any appeal).

The need for an injunction pending appeal is bolstered by the rights at issue. "'[A] prospective violation of a constitutional right constitutes irreparable injury for ... purposes' of 'seeking equitable relief.'" *Karem v. Trump*, 960 F.3d 656, 667 (D.C. Cir. 2020) (quoting *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013)). When a plaintiff seeks only equitable relief for prospective violations of its constitutional rights, the resulting constitutional harm constitutes irreparable injury. *See, e.g.*, *Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 385 (D.D.C. 2020) (existing and prospective violation of First Amendment rights "are sufficient to demonstrate irreparable harm"); *C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 217–18 (D.D.C. 2020) ("Plaintiffs who have shown a likelihood of success on their Fifth Amendment claims … have also established irreparable harm."); *Brown v. FEC*, 386 F. Supp. 3d 16, 34 (D.D.C. 2019) (showing a likelihood of success on the merits of First Amendment claim "typically" results in irreparable injury). Because the RNC is likely to succeed on its constitutional claims, irreparable harm necessarily follows.

The irreparable harm here cannot be disputed. Absent an injunction during this appeal, the RNC could win on the merits of its constitutional claims but nonetheless lose its protected information. This result is precisely what an injunction pending appeal avoids.

III. The Remaining Factors Favor an Injunction.

The balance of the equities and public interest strongly favor the RNC. This Court has made clear that "[t]he Constitution does not permit Congress to prioritize any policy goal over" constitutional rights, *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013), no matter the national import of the congressional investigation. "'[T]he Constitution is the ultimate expression of the public interest,' and consequently, government actions in contravention of the Constitution are 'always contrary to the public interest.'" *Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 386 (D.D.C. 2020) (quoting *Gordon*, 721 F.3d at 653), *appeal dismissed*, 2021 WL 2201669 (D.C. Cir. May 17, 2021).

Absent preliminary relief, the RNC's constitutional rights, including significant First Amendment rights, will be lost. The Congressional Defendants have claimed that, once the Select Committee possesses the subpoenaed information, this Court would lack authority to redress any constitutional violation. It is hard to imagine a greater imbalance of the equities, particularly considering throughout this litigation the Congressional Defendants have not articulated any specific harm they might suffer nor placed into the record any evidence to support a finding of such a harm. Even more, "[t]here is generally no public interest in the perpetuation of unlawful [government] action." *League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). "Put simply, '[t]he Constitution

does not permit [the government] to prioritize any policy goal over' constitutional rights." *Turner*, 502 F. Supp. 3d at 386 (quoting *Gordon*, 721 F.3d at 653). The balance of the equities and public interest therefore weigh decidedly in favor of the RNC.

CONCLUSION

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

Dated: May 23, 2022

Respectfully submitted,

s/ Christopher O. Murray

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains **5,197** words.

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

Dated: May 23, 2022.

s/ Christopher O. Murray
Christopher O. Murray

CERTIFICATE OF SERVICE

I certify that on May 23, 2022, I electronically filed the Emergency Motion for Administrative Injunction and Expediated Briefing Schedule with the Clerk of the Court for the U.S. Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Dated: May 23, 2022.

s/ Christopher O. Murray
Christopher O. Murray

CORPORATE DISCLOSURE STATEMENT

Under D.C. Circuit Rule 26.1, the undersigned counsel certifies:

The Republican National Committee ("RNC") has no parent corporation, and no corporation owns 10% or more of its stock. No publicly traded company or corporation has an interest in the outcome of this case or appeal. The RNC is a national political party. In addition to managing the Republican Party's business affairs at the national level, the RNC represents over 35 million registered Republicans in all 50 states, the District of Columbia, and the U.S. territories. It is comprised of 168 voting members representing state and territorial Republican Party organizations.

Dated: May 23, 2022.

s/ Christopher O. Murray
Christopher O. Murray

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Under D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies:

1. **Parties and Amici.** Plaintiff-Appellant is the Republican National Committee. Defendants-appellees are Nancy Pelosi, Bennie G. Thompson, Elizabeth L. Cheney, Adam B. Schiff, Jamie B. Raskin, Susan E. Lofgren, Elaine G. Luria, Peter R. Aguilar, Stephanie Murphy, Adam D. Kinzinger, the Select Committee to Investigate the January 6th Attack on the U.S. Capitol, and Salesforce.com, Inc.

The National Republican Senatorial Committee participated as amicus curiae before the district court. The undersigned is currently unaware of any amici in this Court.

2. **Rulings Under Review.** The ruling under review is *Republican Nat'l Comm. v. Pelosi*, --- F. Supp. 3d ----, 2022 WL 1294509 (D.D.C. 2022), issued by Judge Timothy J. Kelly on May 1, 2022. The decision under review is located at Addendum 56–108.

3. **Related Cases.** This case has not previously been before this Court, and there are no related cases.

Dated: May 23, 2022.

s/ Christopher O. Murray
Christopher O. Murray