THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BEAN LLC d/b/a FUSION GPS Plaintiff, v. DEFENDANT BANK, Defendant, and PERMANENT SELECT COMMITTEE ON INTELLIGENCE OF THE U.S. HOUSE OF REPRESENTATIVES, Defendant-Intervenor.	Civil Action 1:17-cv-2187-TSC

PLAINTIFF'S REPLY IN SUPPORT OF ITS EMERGENCY APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND UNOPPOSED MOTION FOR A PRELIMINARY INJUNCTION

Nothing in the House Permanent Select Committee on Intelligence's ("Intervenor" or "Committee" or "HPSCI") Opposition raises any doubt as to Plaintiff's entitlement to the Temporary Restraining Order it seeks. Plaintiff's Application and the declarations and exhibits in support of it, along with the declarations and exhibits filed herewith, amply satisfy the four requirements for such an Order. To the extent Intervenor's pleading raises questions concerning the application of the First Amendment to the subpoena in question or the nature of harm caused by such a demonstrably overbroad subpoena, they merely add to the compelling need for an order preserving the status quo pending an ultimate and orderly resolution of the merits.

Plaintiff seeks to restrain its bank from producing all of its bank records to a congressional committee which claims to be investigating certain questions relating to Russian

interference in a U.S. political campaign. The subpoena contains no mention of the subjects of its so-called investigation and it is undisputed the subpoenaed records will include material not remotely pertinent to any investigation. This Court is empowered, as Intervenor concedes, to enjoin such an unambiguous and overbroad subpoena in order to prevent intrusions on constitutional rights. Nothing in Intervenor's lengthy opposition explains how the records it seeks to compel—all of the records of Fusion's account at the Defendant Bank over more than two years—will further the legitimate legislative purpose it claims. Instead, Intervenor argues that this Court can trust Intervenor, which has already leaked both the name of the Defendant Bank and the otherwise confidential assertions of constitutional privileges by Fusion's principals to a prior subpoena, to protect the banking records. As we demonstrate below, the facts demonstrate otherwise and the law demonstrates that Plaintiff faces extreme irreparable harm if Defendant Bank complies with the subpoena and has more than a likelihood of success on the merits. Accordingly, this Court should grant the relief requested.

I. BACKGROUND

a. Fusion cooperated with the Committee.

As the Second Declaration of Fusion's counsel Joshua A. Levy attests, Plaintiff has respectfully asserted privileges in the course of the congressional investigations but has attempted to be cooperative with the Committee's investigation. See Ex. 4 (Second Levy Decl. ¶¶ 2, 4, 5, 9, 10 & Exs. A, B, F). The Intervenor's claim that Fusion has obstructed the Committee's investigation is not only refuted by Mr. Levy's Declaration, but by Intervenor's outlandish claim that the assertion of constitutional privileges by Messrs. Fritsch and Catan to questions posed at their depositions—facts that the Committee promised would remain confidential, but that Intervenor are now spread across the media and its public filing—represent

recalcitrance and bad faith misconduct. As this Court well knows, Congress, as well as the courts, must honor and not denigrate as Intervenor has done, the exercise of one's constitutional rights.

b. Mr. Nunes's *ultra vires* subpoena is not authorized or legitimate.

Mr. Nunes, as chair of the House Permanent Select Committee on Intelligence ("HPSCI"), is bound by Committee rules, among other legal authorities. When he issued the subpoena at issue here, he did not follow those rules – in particular, Committee Rules 10(a), 10(c) and 10(e). In an effort to come to Mr. Nunes' rescue, Intervenor failed to quote Rules 10(a) and 10(c) in full to the Court. They are as follows:

> (a) Generally. All subpoenas shall be authorized by the Chair of the full Committee, upon consultation with the Ranking Minority Member, or by vote of the full Committee.
>
> …
>
> (c) Signing of Subpoena. A subpoena authorized by the Chair of the full Committeeor by the full Committee may be signed by the Chair or by any member of the Committee designated to do so by the full Committee.
>
> Comm. Rules 10(a) & (c) (emphasis added).

First, the subpoena was not authorized. It was not "authorized" because it is undisputed that no "vote of the full Committee" occurred, and Intervenor likewise concedes that neither the Chair nor the full Committee consulted with the Ranking Minority Member. *See* Rule 10(a). Rather, a majority staff member, through a declaration, stated that he provided notice, via e-mail, to a minority staff member just moments before the subpoena was issued. See Stewart Decl. ¶ 15. Notifying minority staff a few minutes before hitting send on a subpoena is not tantamount to "consultation with the Ranking Minority Member." Thus, the subpoena was not authorized.

Second, under Rule 10(c), only "authorized" subpoenas can be signed. This subpoena was not "authorized" because Rule 10(a) was not followed. Thus, Mr. Nunes signed an unauthorized subpoena.

Third, under the present circumstances, Mr. Nunes cannot act alone as chair to authorize and sign subpoenas. Whether or not Mr. Nunes invoked the precise word "recusal," any reasonable person reading his April 6, 2017, statement can see that he effectively recused himself and certainly should have done so, given that he fell under investigation by the House Ethics Committee for alleged misconduct tied to this investigation. Intervenor knows that the proper procedure here should have been for Mr. Conaway to authorize Mr. Nunes to issue a subpoena, as seen in its multiple references in its papers to a contention that such a "request" from Mr. Conaway occurred, see Mot. to Intervene at 4, 7-8; Opp. 17; however, Intervenor can produce no documented proof of such a written communication. In fact, the best document Intervenor can conjure, in support of this aspirational assertion, is a reported leak to CNN, which does not necessarily mean it is true. *See* Intervenor Resp. Br. at 17 (citing a news article). Knowing full well Mr. Nunes lacked written authorization for this subpoena, Intervenor suggests that the Court simply ignore it. Opp. 15 n.10 ("Even assuming everything Plaintiff intends the Court to infer about the nature of the Ethics Committee investigation is correct, it is irrelevant to the Chairman's power pursuant to House and Committee Rule."). Surely, such conduct is not "legitimate" legislative activity.

II. ARGUMENT

a. Compliance with the Subpoena Will Cause Plaintiff Irreparable Harm.

Intervenor argues that no harm occurs to a bank customer from the disclosure of its private records of all of its transactions, including those with clients who engaged the customer

to do confidential work or with contractors who assisted the bank's customer in performing its otherwise confidential work. It asserts moreover that there need be no fear of chilling Fusion or its clients from their constitutionally protected activity because the records will be kept confidential. Opp. 33, 42. Both arguments flatly miss the mark. When an invalid and overbroad subpoena, such as the one in this case, seeks bank records which contain the kind of information described in the Second Declaration of Peter Fritsch (filed herewith as Exhibit 3), without limitation to any relevant subject of inquiry, Intervenor cannot credibly suggest that Fusion suffers no judicially cognizable harm. Furthermore, as to the assurance that the records will be maintained in confidence, Intervenor's conduct gives no comfort in such a notion. *See* Ex. 4 (Second Levy Decl. ¶¶ 7, 11, 12 & Exs. E, H) (setting forth that Intervenor leaked the identity of Defendant Bank to the media before the Court had an opportunity to rule on the request that it not be identified and promptly announced to the media the proceedings of their purportedly confidential executive session interviews in which Messrs. Fritsch and Catan asserted constitutional privileges).

Compliance with this subpoena will in fact do grave and potentially fatal damage to Plaintiff as a going concern and will chill the First Amendment rights of Plaintiff and many others engaging in opposition research on political candidates. Moreover, that harm is irreversible and will occur the moment that Defendant Bank complies with the subpoena.

1. Compliance with the Subpoena Will Irreparably Damage Plaintiff's Business.

Compliance with the subpoena poses an existential threat to Plaintiff's business because disclosure of every single one of its banking transactions, for over two years, will destroy Plaintiff's relationships with many of its clients, contractors, and vendors. In short, compliance with this subpoena will not only harm Plaintiff's business, it has a high likelihood of ruining it.

See Nat'l Prisoners Reform Ass'n v. Sharkey, 347 F. Supp. 1234, 1237 (D.R.I. 1972) (holding that, because the association may not be able to survive the challenged ban on meeting and thus faced an "existential injury," and because the court would not be able to provide any meaningful relief at a later time if the association ceased to exist, the plaintiff association had shown irreparable harm necessitating a TRO).

The information contained within these bank records is private and confidential. Plaintiff conducts confidential investigations, due diligence and public records searches for clients in litigation and other settings, in which those clients have legitimate interests in confidentially contracting such work. Compliance with the subpoena will result in the disclosure of several thousand financial transactions and the revelation of Plaintiff's relationship with approximately 25 clients and approximately 30 contractors. Ex. 3 (Second Fritsch Decl. ¶¶ 3-5). Disclosure of those relationships will cause grave (and potentially fatal) harm to Plaintiff's business, and would also cause significant injury to Plaintiff's clients and its contractors. A number of Plaintiff's clients and contractors have said as much. *See* Exs. 5-13 (Client and Contractor Declarations).

Once the records are released to HPSCI, the damage to Plaintiff is done, and "the very rights [Plaintiff] seeks to protect will have been destroyed." *Council on Am.-Islamic Relations v. Gaubatz*, 667 F. Supp. 2d 67, 76 (D.D.C. 2009) (issuing TRO to enjoin former intern of non-profit corporation from using or disclosing confidential business records, including confidential donor lists, because of the irreparable harm to the corporation that would ensue); *see also Morgan Stanley DW Inc. v. Rothe*, 150 F. Supp. 2d 67, 77-78 (D.D.C. 2001) (entering a TRO upon a finding that the plaintiff financial services firm would suffer irreparable harm from disclosure of confidential client information because of "the concomitant loss of customer trust

and goodwill" and the fact that clients will not trust the firm if they "begin to feel that their personal information is not safe with the plaintiff.").

Moreover, as discussed above and in the Second Declaration of Joshua Levy (Ex. 4), the Court must assume that if Defendant Bank produces the records, they will become public. HPSCI staff has systematically disclosed confidential and prejudicial information about Plaintiff at least three times in recent weeks. First, on Friday, in *the hours* between the time Plaintiff filed its motion for Defendant Bank to proceed under a pseudonym and the Court's granting of that motion, HPSCI leaked the bank's name to the *Washington Examiner*. *See* Byron York, "Byron York: In dossier probe, Fusion GPS asks court to stop House from seeing bank records," Oct. 20, 2017, THE WASHINGTON EXAMINER, *available at* http://www.washingtonexaminer.com/byron-york-in-dossier-probe-fusion-gps-asks-court-to-stop-house-from-seeing-bank-records/article/2638187; *see also* Ex. 4 (Second Levy Decl. ¶ 12). Second, two weeks ago, Plaintiff's counsel received calls from the press asking about the existence of a HPSCI subpoena served on Defendant Bank, indicating that HPSCI leaked the existence of the subpoena to the media, *see* Ex. 4 (Second Levy Decl. ¶ 7 & Ex. E). Third, and perhaps most egregiously, HPSCI leaked to the *Wall Street Journal* discussions from the confidential deposition proceedings for two of Plaintiff's members Peter Fritsch and Thomas Catan. *Id.*; *see also id* ¶ 11 & Ex. H (Kimberly A. Strassel, "The Fusion Collusion," WALL ST. J., Oct. 19, 2017). Such bad faith leaks render laughable any assurances of confidentiality.

2. Compliance with the Subpoena Will Irreparably Harm the First Amendment Rights of Plaintiff, Its Clients and Others.

Mr. Nunes, who advised the Trump campaign last year, has used this bank subpoena to intrude upon and compel the disclosure of confidential political work that Plaintiff conducted in

opposition to Mr. Trump, during that same campaign.[1] Judicial endorsement of such an abuse of power would be chilling. Enforcement of this subpoena will chill any person or entity from conducting opposition research on President Trump or, frankly, any candidate. Individuals and companies must be permitted to conduct *confidential* opposition research during a political campaign in a free manner without interference from competing campaigns or the government, so that candidates and voters alike can be better informed. This is not an investigation by the Federal Election Committee of unreported or excessive campaign contributions. It is a poorly disguised effort to harm persons and a business who have had the courage to assert rights not to disclose confidential and privileged information, out of their duty to both the client who retained it to investigate Candidate Trump and other clients whose confidential association with Fusion cannot possibly fall within the scope of this so-called "investigation."

The Memorandum of Points and Authorities in Support of Plaintiff's Unopposed Motion for a Temporary Restraining Order and Preliminary Injunction, *Bean LLC v. Defendant Bank*, No. 17-mc-0271, ECF No. 2-1 (Oct. 20, 2017), contains controlling judicial precedent for the conclusion that the harm that will surely flow from Defendant Bank's compliance with the subpoena entitles Plaintiff to a permanent injunction. As we have previously said, if the bank produces the records, the subpoena escapes review altogether and Fusion never has the chance for a full and complete hearing on its claims.

III. Plaintiff Is Substantially Likely to Succeed on the Merits.

[1] Notably, President Trump himself has been Tweeting about this controversy in the past week. *See* Donald J. Trump, @realDonaldTrump, Oct. 19, 2017, 4:56 am, https://twitter.com/realDonaldTrump/status/920981920787386368 ("Workers of firm involved with the discredited and Fake Dossier take the 5th. Who paid for it, Russia, the FBI or the Dems (or all)?"); Donald J. Trump, @realDonaldTrump, Oct. 21, 2017, 12:59 pm, https://twitter.com/realDonaldTrump/status/921828280998744066 ("Officials behind the now discredited 'Dossier' plead the Fifth. Justice Department and/or FBI should immediately release who paid for it.")

Due to the constitutional rights implicated, the subpoena at issue is subject to judicial review. This matter is not *Eastland*, where a member of Congress or staff was being sued. Rather, Plaintiff is moving this Court, unopposed, to enjoin a bank from complying with an overbroad and intrusive subpoena that, if permitted by this Court, would violate the constitutional and statutory rights of Plaintiff, including its rights under the First Amendment to free speech and free association. The Court can review this subpoena and should enjoin compliance with it because a denial would chill Plaintiff, its clients and anyone else from endeavoring to engage in confidential opposition research into any political candidate supported by a congressional committee chairman.

A. The Nunes subpoena is subject to judicial review.

Intervenor does not contest that this Court has the authority to review congressional subpoenas implicating the First Amendment.[2] In its motion to intervene, HPSCI wrote: "This Court may grant the relief that the Committee seeks—namely, an order confirming … that the Committee's subpoena in no way offends Plaintiff's First Amendment rights." HPSCI Mot. to Intervene, Dkt. No. 7, at 13 (*citing Senate Permanent Subcomm. v. Ferrer*, 199 F. Supp. 3d 125, 138 (D.D.C. 2016), *vacated as moot sub nom. Senate Permanent Subcomm. on Investigations v. Ferrer*, 856 F.3d 1080 (D.C. Cir. 2017)). Even when Intervenor protests that the role of the Court should be "narrow and limited," Opp. 14, it must concede that the "Bill of Rights is applicable to investigations as to all forms of governmental action," including Congressional investigations, and it is the role of courts to ensure that Congressional investigations do not abridge those rights. *Watkins v. United States*, 354 U.S. 178, 188, 197-99 (1957).

[2] This Court also has the authority to enjoin this subpoena to the extent that it encompasses banking records reflecting purely personal financial matters of Fusion's members and its employees, which the Nunes subpoena does. Ex. 3 (Second Fritsch Decl. ¶¶ 3-7). *See Bergman v. Senate Special Comm. on Aging*, 389 F. Supp. 1127, 1130-31 (S.D.N.Y. 1975).

This is, of course, not a controversial statement of the Court's authority. As Justice Marshall wrote in *Eastland*, "meaningful review of constitutional objections to a [congressional] subpoena" cannot be avoided "simply because the subpoena is served on a third party." 421 U.S. at 515 (Marshall, J., concurring).[3] Courts can review and have reviewed congressional subpoenas and other legislative activity in a number of contexts, *see, e.g, Watkins v. United States*, 354 U.S. 178, 187-88, 196-200 (1957) (recognizing the need for courts to protect the constitutional rights of individuals in congressional investigations); *Kilbourn v. Thompson*, 103 U.S. 168 (1880) (protecting citizens from legislative arrest); *Senate Permanent Subcomm. on Investigations v. Ferrer*, 856 F.3d 1080 (D.C. Cir. 2017) (reviewing First Amendment objections to congressional subpoena).

Intervenor spends many pages trying to assure the Court of the legitimacy of the Nunes subpoena. Even if Intervenor were right and the subpoena was issued properly pursuant to valid Committee action (which it most certainly was not), its constitutional infirmities render it reviewable (and unenforceable). That said, this is an easier case for the Court because Mr. Nunes' *ultra vires* behavior pierces the veil of any purported "legitimate" legislative activity. Contrary to Intervenor's assertions, Mr. Nunes lacked the authority to issue the bank subpoena. *See supra* at 3-4 (discussing Mr. Nunes' violations of Committee Rule 10 when signing and issuing the subpoena). Mr. Nunes acted pursuant to no formal resolution that defined the investigation. In both the bank subpoena and Intervenor's pleadings, Intervenor relies not on a formal HPSCI resolution available to the public, but rather on an excerpt from a HPSCI press release. *See* HPSCI Mot. to Intervene at 3; Levy Decl., Ex. A, Dkt. No. 2-3. Even Intervenor

[3] The *Eastland* majority did not address the issue presented by this case, as Plaintiff does not seek to enjoin Congressman Nunes from issuing the subpoena, but rather Defendant Bank's compliance with the subpoena. Contrary to Intervenor's assertion that Plaintiff sued Defendant Bank to avoid *Eastland*, Plaintiff properly sued the bank because its compliance with the Nunes subpoena would cause irreparable harm to Plaintiff.

cites only to a press release. *See* HPSCI Mot. to Intervene, Dkt. No. 7, at 3. These material failures on the part of the Chair of the Committee rendered the bank subpoena invalid and in violation of HPSCI Rules 10(a) and (c), *see* Pl. Mem., Dkt. No. 2-1, at 6-7,[4] such that the bank subpoena does not fall within the "sphere of *legitimate* legislative activity." *Eastland*, 421 U.S. at 506 (emphasis added).[5]

B. The Nunes subpoena is overbroad and violates the First Amendment.

a. The subpoena is overbroad on its face.

Intervenor defends the subpoena because "the Committee seeks to understand all facets of the 'Trump Dossier' which include: *Who paid for it? Who received it? What steps were taken to corroborate the information contained therein? Did the FBI rely on the 'Trump Dossier' as part of its counterintelligence investigation that was initiated in July 2016, as publicly announced by former FBI Director James Comey on March 20, 2017?* The key to answering many of these question lies with information in the possession of Plaintiff, as well as records of one or more Fusion accounts at Defendant Bank." Opp. 7. Further, "[t]he records sought by the subpoena will allow the Committee to fully understand and perhaps conclusively determine not only who paid for the 'Trump Dossier' but also reveal the amount of funds that Plaintiff paid to

[4] The subpoena also violated HPSCI Rule 10(e) because it did not include a copy of the HPSCI Rules. *See* Pl. Mem., Dkt. No. 2-1, at 7.

[5] Intervenor's reliance on *Senate Perm. Subcomm. on Investigations v. Ferrer*, 199 F. Supp. 3d 125, 143 (D.D.C. 2016), *vacated as moot*, 856 F.3d 1080, 1089 (D.C. Cir. 2017), is misplaced. Mr. Ferrer misused the First Amendment to prevent Congress from seeking *specific* documents about his involvement in the promotion of sex trafficking, which of course was inextricably linked to criminal activity and is not afforded First Amendment protection, *see id.* at 140 (quoting *Conant v. McCaffrey*, 172 F.R.D. 681, 698 (N.D.Cal. 1997) ("The First Amendment does not protect speech that is itself criminal because it is too intertwined with illegal activity."). By contrast, Plaintiff is seeking to enjoin compliance with an extraordinarily overbroad subpoena demanding pages of irrelevant information that, if not enjoined, would chill Plaintiff from engaging in opposition research on behalf of the president's political opponents.

Mr. Steele for the performance of his work, as well as determine whether Plaintiff engaged in other Russia-related work within the scope of the Committee's pending investigation." *Id.*[6]

Yet, despite this purpose, the subpoena does not contain the words "dossier," "Russia," "Steele" or any other that would tie the subpoena to the "understanding" the Committee supposedly seeks. Instead it demands all records that the bank has, including those that concededly can have no possible bearing on the Trump Dossier or any other pertinent subject. As noted in the telephonic hearing, the subpoena seeks the "transaction history" for all of Fusion's accounts since August 2015. *See* First Decl. of Joshua A. Levy in support of Compl. (Dkt. No. 2-3), Exhibit A (Nunes Subpoena). Curiously it also seeks to learn about "advisory investment banking capital markets commercial banking or other financial services" provided by the bank to Fusion and documents concerning other "services" including services as "agent, broker dealer underwriter, trading agent, asset manager etc." provided by the bank to Fusion. Intervenor has yet to provide an explanation for any of these or for refusing to narrow the subpoena to relevant subjects.

The subpoenaed records will reveal names not only of clients and contractors associated with Fusion GPS, but additional private information about 401(k) plan participants, staff salaries, and transactions with vendors. *See* Ex. 3 (Second Fritsch Decl. ¶¶ 3-6). The breadth of the subpoena will cause harm to the businesses of Fusion's clients and contractors and also subject those clients and contractors to harassment, fear of cyberattacks and hacking attempts, and, in some instances, danger to their physical safety. *See* Exs. 5-10 (Client Decls.); Ex. 11-13 (Contractor Decls.); *see also, e.g.*, Ex. 12 ("In particular, my work is carried out in jurisdictions

[6] Intervenor also bizarrely asserts that "information sought by the subpoena will assist the Committee in determining whether the FBI relied on the 'Trump Dossier' as part of its counterintelligence investigation in July 2016." Opp. 7. It is unclear how the disclosure of bank records would tell the Committee anything about the FBI's reliance or lack thereof on the Trump Dossier.

with a high level of physical security risk and any relevation of my work with Fusion GPS could put me, and my partners and employees, at risk of bodily harm."). For law firm clients of Fusion, the disclosure could reveal attorney work product and do damage to ongoing case matters and controversies. *See, e.g.*, Ex. 5 ¶ 6; Ex. 6 ¶¶ 6-7.

Even though Intervenor has stated its primary interest in the identification of the clients who paid Plaintiff to contract with a former British intelligence official, who researched and wrote the document known as "the Trump Dossier," such information is but a microscopic subset of the overwhelmingly broad and burdensome subpoena on Defendant Bank. This Court can and should enjoin compliance because the subpoena is overbroad and encompasses requests totally unrelated to Intervenor's purported investigation into the Trump Dossier. *Bergman v. Senate Special Comm. on Aging*, 389 F. Supp. 1127, 1130-31 (S.D.N.Y. 1975) (enjoining bank from complying with subpoena "to the extent that [the subpoena] encompasses documents totally unrelated" to the subcomittee's investigation into plaintiff's nursing home activities).

b. The subpoena's overbroad requests violate the First Amendment.

The subpoena constitutes an impermissible inquiry into the constitutionally protected free speech and free association activities of Plaintiff and its clients. The fact that Fusion is a well-known opposition research firm and not a political advocacy organization does not disqualify it from First Amendment protection—particularly where the subpoena is directed, as Intervenor admits, to discovery of facts related to its work during the 2016 presidential election campaign on Candidate Trump's Russia connections.

i. Fusion has First Amendment rights.

Last year, Fusion was engaged to research then-Candidate Donald Trump's qualifications for public office and his ties to Russia—an assignment that is at the heart of protected First

Amendment activity. Intervenor contends that because Fusion is a "for-profit company," it is not entitled to First Amendment protections. Opp. 24, 26. In a post-*Citizens United* era, where corporations and other entities' First Amendment rights are indisputable, such an argument should be rejected out of hand. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010). Fusion is no less entitled to the First Amendment's protections than Citizens United or any other entity engaged in investigating and challenging a presidential candidate's qualifications for office. *See Consolidated Edison Co. v. Public Svc. Comm'n*, 447 U.S. 530 (1980) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").

Intervenor tries to claim that because Fusion engages in activities beyond political campaigns and because its clients include "political organizations and politicians *on both the left and the right*," Opp. 27 (quoting Fritsch Decl. ¶ 6 (emphasis added)), it has no First Amendment rights. But this claim ignores two undisputed truths: First, Fusion's opposition research related to the Trump Dossier and Russian interference in the United States—which are the central subject of the subpoena at issue—are protected by the First Amendment. *Cf. Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("debate on the qualifications of candidates" is one of the "most fundamental First Amendment activities").[7] That Fusion engaged in other activities does not change the fact that the subpoena undeniably implicates First Amendment protected activities. Second, while Fusion's engagement related to the 2016 presidential election had clients "on both the left and the right," those clients shared a First Amendment protected interest—opposing

[7] Intervenor's straw men arguments as to protected activities and privileges not pursued or asserted by Plaintiff should be disregarded. For example, Plaintiff did not assert any journalists' privilege. Opp. 32. When Plaintiff conducted opposition research against a political candidate, in furtherance of clients opposed to that candidate, that is what Plaintiff did – not "something akin to journalism." *Id.*

Donald Trump's becoming president. Thus, compliance with this subpoena would reveal individuals and entities who opposed Donald Trump's election and would therefore clearly implicate First Amendment protected rights.

Intervenors belittle Fusion's First Amendment rights of association. But the fact that Fusion is not the NAACP does not deprive it of a First Amendment protected right of association when it is otherwise engaged in undeniably First Amendment protected activity of investigating a Presidential candidate's fitness for office. As the Supreme Court held in *NAACP v. State of Ala. ex rel. Patterson*, the right of association is "an inseparable aspect of . . . freedom of speech." 357 U.S. 449, 460 (1958). The question of whether the First Amendment right to associate is implicated turns not on the for-profit status of the organization, but whether the government action "is likely to affect adversely the ability of" the entity and those who associate with it "to pursue their collective effort to foster beliefs which they admittedly have the right to advocate." *NAACP*, 357 U.S. at 462-63. Here, compliance with the subpoena is likely to adversely affect those who wish to associate with Plaintiff for purposes of pursuing a collective effort to oppose President Trump and his allies, in that they will be dissuaded from working with Plaintiff "because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." *Id. See also Fed. Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981) (First Amendment associational rights implicated because a federal agency "demand[ed] all materials concerning communications among various groups whose alleged purpose was to defeat the President by encouraging a popular figure from within his party to run against him," not on whether the groups were for-profit or not).

Courts must closely scrutinize a congressional subpoena that implicates the First Amendment. The Supreme Court has held that, in the context of a congressional investigation, "an adequate foundation for inquiry must be laid before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit constitutionally protected activities or seriously interfere with [First Amendment] protected associational rights," and there must be a "compelling" government interest "essential to support direct inquiry into the membership records" of Plaintiff. *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963); *see Bursey v. United States*, 466 F.2d 1059, 1083 (9th Cir. 1972) (holding that government must also show that "the incidental infringement upon First Amendment rights is no greater than is essential to vindicate its subordinating interests").

Such a "compelling" interest does not exist here. Intervenor cannot, and has not, shown a compelling interest in accessing the identities of all of the entities and individuals that have hired, worked with, or worked for Plaintiff over the past two years. This information is not pertinent—let alone essential—to any legitimate legislative activity. Because this showing is Mr. Nunes' burden, and he cannot meet it, Plaintiff has demonstrated a likelihood of success on the merits of its First Amendment claims.

C. The Nunes subpoena violates federal statutory rights to privacy.

a. Right to Financial Privacy Act

The Right to Financial Privacy Act ("RFPA"), 12 U.S.C. § 3401 et seq., "was enacted by Congress in response to a pattern of government abuse in the area of individual privacy." *Donovan v. Nat'l Bank of Alaska*, 696 F.2d 678, 683 (9th Cir. 1983). Congress passed the RFPA as an expression of its outrage at the "Supreme Court decision in the *United States v. Miller*, which held that a bank customer has no standing under the Constitution to contest government

access to financial records," and the Court's failure to "acknowledge the sensitive nature of these records." H.R. REP. 95-1383, 28, 1978 U.S.C.C.A.N. 9273, 9306. Intervenor argues that neither the House nor the Committee is an "agency or department" for purposes of the statute. It would be unlikely at best, given Congress's purpose in enacting the RFPA, that it would have written itself out of the protections of the law and decided that bank customers did not have cognizable privacy interests when a Member of Congress sought their records. *Cf. Young v. U.S. Dep't of Justice*, 882 F.2d 633, 637 (2d Cir. 1989) ("Congress intended the RFPA to regulate the release of customer information from financial institutions in circumstances where adequate controls did not already exist.").[8]

Furthermore, Congress itself has given the term "department" a far broader definition than the one that Intervenor suggests. *See, e.g.*, 18 U.S.C. § 6 ("The term 'department' means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government."). And *Hubbard v. United States*, 514 U.S. 695 (1995), cited by Intervenor, reviewed whether the word "department" in the criminal statute, 18 U.S.C. § 1001, should apply to a federal court. That case's reasoning was animated by a host of factors that are not at play here, including the need to narrowly interpret criminal statutes, which is simply not dispositive here. The *Hubbard* Court recognized, 514 U.S. at 703, as does Intervenor here, *see* Intervenor's Br. at 21, that Congressional intent informs the scope of the term "department," and Congress's

[8] Moreover, the RFPA itself references Congress. In 12 U.S.C. § 3412(d), the Act states that "[n]othing in this chapter shall authorize the withholding of information by any officer or employee of a supervisory agency from a duly authorized committee or subcommittee of Congress."[8] Such language would be entirely superfluous if the entire Act was not intended to restrict the ability of those in Congress to access customer's financial records. And, contrary to Intervenor's dubious argument that the RFPA has nothing to say whatsoever about Congressional subpoenas, such language suggests that the only mechanism by which Congress may access a customer's financial records is through a supervisory authority (or with the customer's consent).

clear intent in enacting the RFPA was to protect customers' bank records from "unwarranted intrusion" by any government authority into their records, absent the government authority's compliance with the statute's access mechanisms. H.R. REP. 95-1383, 33.

Moreover, Plaintiff, a LLC with four partners, is akin to a limited partnership, and thus qualifies as a "customer" under the RFPA. No basis exists for protecting a limited partnership, but not a limited liability company, under the RFPA. Indeed, courts treat LLCs the same as partnerships for purposes of diversity jurisdiction: "like a partnership, an LLC is a citizen of every state of which its owners/members are citizens." *Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006) (noting that this "treatment is also consistent with the common law presumption that unincorporated associations are not legal entities independent of their members."); *see also GMAC Commercial Credit LLC v. Dillard Dep't Stores, Inc.*, 357 F.3d 827, 828 (8th Cir. 2004) (same).

To answer the statutory interpretation question, the Court may need to examine the morass of legislative history underlying this statute. As best, Intervenor identifies ambiguity in the statute, and the parties should have time to review and brief the Court on such matters. The Court should grant temporary relief and schedule briefing on the question of statutory interpretation if it finds the issue necessary for decision.

b. Gramm-Leach-Bliley Act

The Gramm-Leach-Bliley Act represents "the most comprehensive federal privacy protections ever enacted by Congress," *Am. Bar Ass'n v. F.T.C.*, 430 F.3d 457, 459 (D.C. Cir. 2005) (quoting 145 Cong. Rec. H11,544 (daily ed. Nov. 4, 1999) (statement of Rep. Sandlin)). Citing no authority, Intervenor claims that Plaintiff is not a "consumer" for purposes of the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801 *et seq.* However, nothing in the statute precludes

application to a limited liability company. Furthermore, Intervenor concedes that the required notice and opportunity to opt out was not provided here, and instead argues that the exception in 15 U.S.C § 6802(e)(8) applies. As demonstrated here and in Plaintiff's Memorandum in Support of its Application for a TRO, *see* Pl.'s Br. at 5-8, the bank subpoena at issue is not a "properly authorized" subpoena. 15 U.S.C. § 6802(e)(8). Therefore, the exception relied on does not apply and Plaintiff has shown a substantial likelihood that Defendant Bank's compliance with the subpoena will violate the Gramm-Leach-Bliley Act.

Intervenor falsely claims that "Plaintiff can take comfort from the fact that 'release of information to the Congress does not constitute 'public disclosure.'" Opp. 24. But as demonstrated in this Reply and accompanying declaration, *see* Ex. 4 (Second Levy Decl. ¶ 7, 11, 12), release to HPSCI *is* in fact public disclosure.

IV. The Balance of Equities Is In Plaintiff's Favor.

Intervenor's representations about the prejudice that could befall it if the Court grants a temporary restraint are not credible. *First*, at the October 20, 2017, telephonic hearing, HPSCI counsel stated that HPSCI required production of the bank records by 9 am, Monday, October 23, 2017 (*i.e.*, earlier today) because the information was needed for scheduled HPSCI interviews; within hours of making this representation, however, HPSCI extended the date of compliance with the bank subpoena to Wednesday, October 25, 2017.[9] Additionally, the HPSCI investigation is not subject to a deadline. The only possible deadline is the end of the 115th Congress – more than a year from now. Thus, HPSCI has ample flexibility to postpone interviews or depositions, if the records being demanded through these bank subpoenas is as

[9] Furthermore, given the breadth of the subpoena and the resultant wide swath of information that Defendant Bank was to produce, it was never credible that HPSCI would be able to digest the production immediately in time for interviews on that day.

critical to them as has been represented. *Second*, at the telephonic hearing, HPSCI counsel stated that it needed to obtain records from Defendant Bank because Plaintiff – "for months" – refused to cooperate and produce the same information. That is not true. The very first time that Plaintiff received any specific request or demand for information was when it received a subpoena from Mr. Nunes, on October 4, 2017, *i.e.*, the very same day that Mr. Nunes issued the bank subpoena. *See* Ex. 4 (Second Levy Decl. ¶ 6 & Ex. D) (attaching subpoenas issued to Plaintiff). Prior to that point, HPSCI staff had refused to narrow its request for documents to anything other than the exceedingly broad "parameters" of the entire investigation, which, in any event, HPSCI did not provide to Plaintiff until September 20, 2017, hardly "months" ago. *See id.* (Second Levy Decl. ¶ 3 & Ex. C) (attaching Sept. 20, 2017, correspondence from HPSCI staff to Plaintiff's counsel).

Finally, Intervenor has never demonstrated how information in the bank records has any even marginal relevance to any particular upcoming interview. Records showing payment to Fusion by the client who authorized the work on the Trump Dossier, which is the most that Intervenor can hope to obtain, have no obvious advantage to interviews of unidentified witnesses. Denial of the temporary relief would be irreparably catastrophic for Plaintiff's business and the constitutional rights presented in Plaintiff's papers, and it would deprive the public of a careful briefing by the parties on, and deliberation by the Court of, a novel question of first impression impacting the constitutional relationship between, and functioning of, the Judiciary and Legislature.

V. The Public Interest Will Be Protected by the Court's Entry of a TRO.

The public interest strongly supports the entry of a TRO to ensure that no constitutional rights are violated. A public interest of the highest order attaches to the safeguarding of First

Amendment rights. *See, e.g.*, *Pursuing America's Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 511 (D.C. Cir. 2016) ("[T]here is always a strong public interest in the exercise of free speech rights"). "[E]nforcement of an unconstitutional" legislative act "is *always* contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (emphasis added). *See also Llewelyn v. Oakland Cnty. Prosecutor's Office*, 402 F. Supp. 1379, 1393 (E.D. Mich. 1975) ("[I]t may be assumed that the Constitution is the ultimate expression of the public interest.").

Furthermore, this case presents novel and important questions of constitutional law regarding the interplay between two co-equal branches of government: the Judiciary and the Legislature. Prior to this filing, the courts have never reviewed a private party's civil action *filed against a third party* in order to enjoin that third party's compliance with a congressional subpoena. Indeed, this question was left specifically open in the Supreme Court's 1975 decision of *Eastland v. USSF*, in which Justice Marshall, concurring, wrote: "This case does not present the questions of what would be the proper procedure, and who might be the proper parties defendant, in an effort to get before the court a constitutional challenge to a [congressional] subpoena duces tecum issued to a third party." 421 U.S. 491, 517 (1975) (Marshall, J. concurring). A court has never looked at a subpoena such as this one, with all of its alleged infirmities. While Plaintiff has established a substantial likelihood of success on the merits, *see supra*, no resolution of these novel and significant constitutional questions should be resolved in haste. Were the Court to deny the temporary relief, it would foreclose further review of these legal questions and proper resolution of them is in the public interest.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's Application for a Temporary Restraining Order.

Dated: October 23, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October 2017, the foregoing was filed on the Court's CM/ECF system:

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