No. 22A350

IN THE

Supreme Court of the United States

DR. MICHAEL P. WARD, D.O. AND DR. KELLI WARD, D.O., AND MOLE MEDICAL SERVICES, P.C. AN ARIZONA PROFESSIONAL CORPORATION,
Applicants,

v.

BENNIE G. THOMPSON, ET AL.,
Respondents.

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

OPPOSITION TO EMERGENCY APPLICATION FOR A STAY

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

The House of Representatives Select Committee to Investigate the January 6th Attack on the United States Capitol (Select Committee) and Chairman Bennie G. Thompson (collectively, the Congressional Respondents) respectfully file this memorandum in opposition to Kelli and Michael Ward's application for an injunction pending the completion of appellate review or, in the alternative, an injunction pending the filing of a writ of mandamus in this Court.

INTRODUCTION

Kelli and Michael Ward's application for emergency relief should be denied because they have raised no legal issue of continuing broad significance, and there is no conflict within the lower courts about the extremely narrow issue at stake here—which is ultimately a fact-bound question, given that the court of appeals rejected their claim even under the legal standard that they propose.

Because of the actions by former President Trump, those who physically attacked the United States Capitol, and people like Kelli Ward (who played a significant role in attempting to overturn the 2020 election), the events of January 6, 2021, were a national tragedy. That Dr. Ward was not present at the U.S. Capitol on January 6th is of no moment. She coordinated with President Trump and his allies to pressure local and state officials in Arizona to alter the ballot tallies. She and other fake electors convened, voted, and transmitted fake electoral votes

for President Trump, creating what she claimed was a challenge sufficient to justify throwing out the valid electoral votes from Arizona on January 6th.

The Select Committee's investigation of those events and their causes is of immense importance, and the Select Committee is only authorized to exist until January 3, 2023, when the 117th Congress ends. Dr. Ward's insistence that this Court take the highly unusual step of becoming involved now on an emergency basis is deeply flawed both because the rulings by the courts below are correct and because there is no legal issue warranting this Court's action.

STATEMENT

On January 6, 2021, rioters seeking to stop the peaceful transfer of power following the 2020 Presidential election launched a violent assault on the United States Capitol. *See* H. Res. 503, 117th Cong., Preamble (2021). These rioters impeded the constitutionally mandated counting of electoral college votes transmitted from the states, which reflected the results of the 2020 Presidential election. *See* U.S. Const., Amend. XII. "The rampage left multiple people dead, injured more than 140 people, and inflicted millions of dollars in damage to the Capitol." *Trump v. Thompson*, 20 F.4th 10, 15 (D.C. Cir. 2021), *inj. denied*, 142 S. Ct. 680 (2022), *cert. denied*, 142 S. Ct. 1350 (2022).

In response to the unprecedented January 6th attack, the House of Representatives adopted House Resolution 503, "establish[ing] the Select Committee to Investigate the January 6th Attack on the United States Capitol" ("Select Committee"). H. Res. 503 § 1. This resolution authorizes the Select

Committee to: (1) "investigate the facts, circumstances, and causes relating to the domestic terrorist attack on the Capitol" "and relating to the interference with the peaceful transfer of power"; (2) "identify, review, and evaluate the causes of and the lessons learned from the domestic terrorist attack on the Capitol"; and (3) "issue a final report to the House containing such findings, conclusions, and recommendations for corrective measures … as it may deem necessary." *Id.* §§ 3(1), 4(a)(1)-(3).

The Select Committee held eight public hearings this year laying out evidence of a multi-part effort to overturn the 2020 Presidential election and obstruct the peaceful transfer of power. Much of the Select Committee's most probative evidence has come from witnesses who were directly appointed to their positions by then-President Trump, worked on his behalf, or communicated directly with him. This included testimony from witnesses such as President Trump's Attorney General William Barr, Acting Attorney General Jeff Rosen, Counsel to Vice President Pence Greg Jacob, aide to former Chief of Staff Mark Meadows, Cassidy Hutchinson Georgia Secretary of State Brad Raffensperger, and Speaker of the Arizona House of Representatives Rusty Bowers. Mr. Bowers spoke directly about some of the channels President Trump and his allies used to pressure state and local officials in Arizona.[1]

[1] *See Here's Every Word from the Fourth Jan. 6 Committee Hearing on its Investigation*, NPR (June 21, 2022), https://perma.cc/2FYF-QE4T.

Through this and other evidence, the Select Committee has identified various examples of this multi-part effort, including (but not limited to): attempts to change or influence ongoing ballot tallies; pressuring state and local election officials to change certified results; disseminating unsupported or demonstrably false allegations of election fraud; and convening Trump electors who submitted to Congress unauthorized and illegitimate Electoral College votes. The false narrative of a stolen election motivated violence on January 6th, and publicly available evidence shows that Dr. Ward played an important role in many of these actions.

First, in the days after the election, Dr. Ward reportedly told officials in Maricopa County, the most populous county in Arizona, to stop counting ballots.[2] *Second*, she reportedly tried to organize a call in the days after the election between President Trump and Maricopa County Board of Supervisors Chairman Clint Hickman, and encouraged four out of the five members of that Board (including Chairman Hickman) to contact President Trump's lawyer Sidney Powell, who was promoting a wide range of falsehoods about the election.[3] When Dr. Ward found out that the Board had planned a meeting to certify the election result, she texted a Republican member of that Board and accused that individual of playing for the

[2] Brahm Resnik, *'Stop the counting': Records show Trump and allies pressured top Maricopa County officials over election results*, 12NEWS (July 2, 2021), https://perma.cc/AY9D-DQJZ (quoting Ms. Ward's text messages and one voicemail).

[3] *See id*; Kelli Ward, Justified: The Story of America's Audit 93-94, 99-101 (2022) (reproducing texts).

"wrong team," saying that "people will remember."[4] *Third*, Dr. Ward promoted Ms. Powell's false and unfounded allegations of election interference by Dominion Voting Systems.[5]

Finally—and of great significance—although the Governor of Arizona had certified that Joseph Biden won Arizona's electoral votes in the Presidential election, Dr. Ward and other Trump electors nevertheless convened as Arizona's purported electors, voted, and sent a set of unauthorized and illegitimate Electoral College votes to Congress that Dr. Ward inaccurately described as "represent[ing] the legal voters of Arizona[.]"[6] Privately, Dr. Ward reportedly expressed concern about the legality of this effort to representatives of President Trump.[7] The preparation and submission of purported "alternate" slates of electors was a key part of President Trump's effort to overturn the election.[8] Even while Congress was

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[4] Ward, *supra* note 3, at 112.

[5] *See* Republican Party of Arizona (@AZGOP), Twitter (Dec. 2, 2020, 5:41 P.M.), https://perma.cc/T6YQ-227L (six-minute video of Dr. Ward); Ward, *supra* note 3, at 109 (sending a text transmitting a message "[f]rom a team of fraud investigators: 'Our belief is the Dominion software strategically added democratic votes to these naturally strong republican precinct … It would take people like the ones who work for Dominion who have the expertise used here to be able to pull this off.'").

[6] Dr. Kelli Ward (@kelliwardaz), Twitter (Dec. 14, 2020, 4:26 PM), https://perma.cc/K5NF-W6JG.

[7] *See* Maggie Haberman & Luke Broadwater, *Arizona Officials Warned Fake Electors Plan Could 'Appear Treasonous,'* N.Y. Times (Aug. 2, 2022), https://perma.cc/67E8-CHCU.

[8] *See* Order Re Privilege of 599 Docs. Dated Nov. 3, 2020 – Jan.20, 2021 at 24, *Eastman v. Thompson*, No. 8:22-cv-0099 (C.D. Cal. Jun. 7, 2022), ECF 356 (noting emails describing the January 6 plan requiring legislators to "determine the manner of choosing electors, even to the point of adopting a slate of electors

recessed due to the mob's violent attack on the Capitol, Dr. Ward continued to advocate for overturning the results of the election.[9] And in the wake of January 6th, she continued to falsely maintain that the illegitimate document purporting to transmit Arizona's Electoral College votes for Donald Trump contained "the rightful & true Presidential electors for 2020."[10] In her recent book, she claimed that "[a]t least seven of those states including Arizona were contested and those votes should not have been counted."[11]

Dr. Ward appeared before the Select Committee on March 16, 2022, but invoked the protections of the Fifth Amendment rather than answer substantive questions. *See* Mot. Hr'g Tr. at 21, *Ward v. Thompson*, No. 3:22-cv-08015 (D. Ariz. Oct. 4, 2022).

In furtherance of its duty to "investigate the facts, circumstances, and causes" of the January 6th attack, the Select Committee issued a subpoena to T-Mobile USA, Inc. ("T-Mobile"), for call detail records relating to Dr. Ward's account (Emergency Application for Stay ("Appl.") Ex. F at 3) for the period from November

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themselves" and concluding that "Dr. Eastman's actions in these few weeks indicate that his and President Trump's pressure campaign to stop the electoral count did not end with Vice President Pence—it targeted every tier of federal and state elected officials.").

[9] *See* Dr. Kelli Ward (@kelliwardaz), Twitter (Jan. 6, 2021, 3:30 PM), https://perma.cc/3CQA-JSHB.

[10] Dr. Kelli Ward (@kelliwardaz), Twitter (Jan. 12, 2022, 12:07 PM), https://perma.cc/H5LB-598J (replying to a comment on her original tweet).

[11] Ward, *supra* note 3, at 177.

1, 2020, to January 31, 2021.[12] These records will shed light on how Dr. Ward contributed to the multi-part effort to interfere with the peaceful transition of power and the attack on the U.S. Capitol. They include, for a specified telephone number, limited information such as when a call was made or message was sent, its duration (if a call), and which phone numbers were involved.

The call detail records sought by the Select Committee from T-Mobile do *not* include the *content* of any communications or any location information. *See* Appl. Ex. F at 3 (the subpoena "does not call for the production of the content of any communications or location information"). Thus, the records will reflect, for the specified phone number, any calls or texts between Dr. Ward and other participants

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[12] As noted in Congressional Respondents' memorandum accompanying their motion to dismiss, the Select Committee has voluntarily withdrawn its demand for call detail records associated with the phone numbers pertaining to plaintiff Michael Ward and to the Wards' children. *See* Motion to Dismiss at 4 n.8, ECF 46. Accordingly, this brief alternates between "Dr. Ward" (referring to Kelli Ward) and "Applicants" as appropriate.

In response to Dr. Ward's claims below purporting to represent her patients' interests, the Select Committee has consistently maintained that it has no investigative interest in Dr. Ward's patients' information, and so informed the district court at oral argument. Mot. Hr'g Tr. at 5-6, *Ward v. Thompson*, No. 3:22-cv-08015 (D. Ariz. Oct. 4, 2022). However, the Select Committee has not narrowed the subpoena any further, because neither it nor T-Mobile has any way of knowing which phone numbers in Dr. Ward's call detail records pertain exclusively to her patients.

In its order denying Applicants' motion for an injunction pending appeal, the district court stated that the Select Committee was "no longer seeking" Applicants' "patient phone numbers." Appl. Ex. C at 2; *see also* Appl. Ex. A at 12. This is correct to the extent that the Select Committee has no investigative interest in those numbers, but incorrect to the extent it suggests that the subpoena has been narrowed to exclude those numbers. In any event, this question does not bear on the issues before this Court, as Applicants press no First Amendment claim regarding Dr. Ward's patients.

in the scheme during the relevant timeframe, and provide the Select Committee with important details regarding the timing and frequency of such communications. But the records will not provide any information regarding what the participants spoke or texted about.

The Select Committee has issued subpoenas for and received such records for many individuals whose conduct is relevant to its investigation. When combined with the more than one thousand interviews the Select Committee has conducted, it may be that many of the people Dr. Ward communicated with in her effort to obstruct the peaceful transfer of power have either already been contacted or attempts to contact them have already occurred. As discussed above, the primary investigative value of Dr. Wards' call detail records likely will be establishing when and with what frequency she communicated with individuals known to be relevant to the Select Committee's investigation. Such information will be useful in furthering the Select Committee's investigative and legislative objectives.

On February 1, 2022, Applicants filed their Complaint. After seeking and obtaining, with Applicants' consent, extensions of time to reply to the Complaint due to the Select Committee's investigative and litigation priorities at the time, Congressional Respondents filed their motion to dismiss on August 8. ECF 46 (No. 3:22-cv-08015). On September 22, the district court granted the motion. Appl. Ex. B. The court rejected Applicants' First Amendment associational claim, finding their argument "highly speculative" and noting that Applicants "provided no evidence to support their contention that producing the phone numbers associated

with this account will chill the associational rights of [Applicants] or the Arizona GOP." *Id.* at 13. The court further rejected claims that the Select Committee lacks a valid legislative purpose, that it is improperly constituted, that the subpoena violates Arizona's physician-patient privilege, and that it violates the Health Insurance Portability and Accountability Act. *See id.* at 7-11, 14-18.

Applicants appealed and filed a Motion for Injunction or Administrative Injunction Pending Appeal. After hearing oral argument, the district court denied that motion on October 7, because Applicants failed to present a serious legal question, show irreparable injury, or demonstrate that the balance of hardships tips sharply in their favor. *See* Appl. Ex. C.

Applicants then filed an emergency motion with the Ninth Circuit for an injuncting pending appeal. The panel denied that motion, with Judges Silverman and Miller in the majority, and Judge Ikuta dissenting. Appl. Ex. A. Assuming without deciding that the balance of hardships tipped sharply in Applicants' favor, the majority held that they had not raised "serious questions going to the merits." *Id.* at 2 (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011)). The panel majority rejected Applicants' argument that the "exacting scrutiny" standard from *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2372 (2021) applied to any governmental subpoena for a limited period of an individual's phone records. *See* Ex. A at 4-5; *id.* at 7 (describing the subpoena as a "narrowly tailored mechanism"). Unlike the plaintiffs in *Bonta*, Applicants were not an organization representing its donors' interests. *See id.* at 4. Furthermore,

"[t]he investigation ... is not about [Kelli] Ward's politics; it is about her involvement in the events leading up to the January 6 attack, and it seeks to uncover those with whom she communicated in connection with those events." *Id.*

The Ninth Circuit went on to hold that, although "exacting scrutiny" was not required, even were that the operative standard, "[t]he subpoena would satisfy it." *Id.* at 6.

Judge Ikuta, in dissent, disagreed that Applicants had failed to raise "serious questions going to the merits." *Id.* at 8. She believed the majority erred by reading *Bonta* too narrowly, and that serious questions remained about whether the Select Committee had met *Bonta*'s "exacting scrutiny" test. *See id.* at 10, 13.

Applicants then filed with this Court the instant emergency application for a stay or injunction pending the completion of appellate review, or, alternatively, a stay or injunction pending the filing of an application for a writ of mandamus.

ARGUMENT

The Wards have styled their motion (Appl. at 12) as a request for either a "stay or injunction pending the completion of appellate review." Because there is no order from any court below for this Court to stay, the Wards presumably seek an injunction preventing T-Mobile from complying with the Select Committee's subpoena and producing the call detail records.

An injunction from this Court is extraordinary relief that "demands a significantly higher justification than a request for a stay" because an injunction "does not simply suspend judicial alteration of the status quo but grants judicial

intervention that has been withheld by lower courts." *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (internal quotation marks omitted). Such relief is granted "only in the most critical and exigent circumstances." *Brown v. Gilmore*, 533 U.S. 1301, 1301 (2001) (Rehnquist, J., in chambers).

To receive an injunction pending certiorari, the "applicant must demonstrate that the legal rights at issue are indisputably clear." *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (cleaned up). And, as with any injunction, Applicants must demonstrate they are likely to succeed on the merits—*i.e.*, that this Court is likely to grant certiorari and reverse the court of appeals' judgment—and that the remaining traditional injunction factors favor relief. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). In evaluating the likelihood of success on the merits when an applicant seeks an injunction pending review from this Court, the proper analysis requires "not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review in the case." *Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring).

Even if this motion is reviewed under the more forgiving standard applicable to an application for a stay, Applicants are not entitled to relief. A stay pending the filing and disposition of a petition for a writ of certiorari, requires an applicant to show "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable

harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

Regardless of the standard applied, Applicants have not carried their burden of showing that the extraordinary remedy of either an injunction or a stay pending review is justified here, and the application should be denied.

I. The Court Of Appeals' Decision Is Correct

A. The Lower Court Correctly Analyzed And Applied The First Amendment

In Congressional investigations, "the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances." *Barenblatt v. United States*, 360 U.S. 109, 126 (1959). In such cases, courts must balance the "competing private and public interests at stake in the particular circumstances shown." *Id.* Certain government interests, especially those involving the "free functioning of our national institutions," are "sufficiently important to outweigh the possibility of infringement" of First Amendment rights. *Buckley v. Valeo*, 424 U.S. 1, 66 (1976); *see also Senate Permanent Subcomm. v. Ferrer*, 199 F. Supp. 3d 125, 138, 143 (D.D.C. 2016) (holding that Congressional investigation interests "substantially outweigh[ed]" any intrusion on subpoena recipient's "incidental" First Amendment rights), *vacated as moot*, 856 F.3d 1080 (D.C. Cir. 2017).

The Select Committee is investigating the deadliest attack on the Capitol "in the history of the United States" to make "legislative recommendations" to prevent

future acts of such violence. *Trump v. Thompson*, 20 F.4th at 16, 35. The Select Committee's interest in obtaining call detail records pertaining to a person who was involved in multiple aspects of the unprecedented effort to overturn the election—including the fake elector scheme—necessarily involves the "free functioning of our national institutions" and would substantially outweigh any theoretical, incidental harm.

Applicants provide no reason to suspect such harm will occur—either to them, or to anyone who communicated with Dr. Ward. It is not plausible that Dr. Ward herself—Chair of the Arizona Republican Party, former state legislator, two-time U.S. Senate candidate, and author of a recent book reiterating her false claims about the 2020 election—would be chilled from further participation in partisan politics due to T-Mobile's compliance with this Congressional subpoena. Moreover, Dr. Ward is already involved in investigations related to her role in subverting the 2020 election. She appeared for a deposition before the Select Committee (albeit refusing to answer questions because of her Fifth Amendment right against forced self-incrimination), and she disclosed to the court of appeals that she received a federal grand jury subpoena, to which she objected, in connection with her role as a fake elector. *See* Ninth Cir. Dkt. 2 at 2.

Next, even accepting for purposes of argument the questionable assertion that Dr. Ward's First Amendment rights include a right to have *others* not dissuaded from associating with *her*, Applicants fail to provide any legally cognizable, non-speculative explanation of how the subpoena here does so. Their

Complaint suggests that providing call detail records would "provide[] the Committee with the means to chill the First Amendment associational rights not just of the Plaintiffs but of the entire Republican Party in Arizona." Compl. ¶ 52, ECF 1. They allege that Dr. Ward has received threats and harassing letters, but curiously do not explain why (or even allege that) such communications would increase if T-Mobile complies with the subpoena at issue. *Id.* ¶ 55.

Attempting to avoid having to show at least a reasonable probability that harm will occur, Applicants assert that this claim is governed by *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021), in which this Court invalidated a requirement that, to solicit contributions in California, charitable organizations must disclose to the state Attorney General's Office the identities of their major donors. The Court applied "exacting scrutiny," which requires "a substantial relation between the disclosure requirement and a sufficiently important governmental interest, and that the disclosure requirement be narrowly tailored to the interest it promotes," *id.* at 2385 (cleaned up), "even if it is not the least restrictive means of achieving that end," *id.* at 2384. But for several reasons, *Bonta* does not govern this case—and even if it did, this subpoena should be upheld under exacting scrutiny, as the court of appeals held here in the alternative.

First, *Bonta* involved a statewide regulatory regime applicable to a broad class—all charities—not a Congressional subpoena issued for third-party records pertaining to one person.

Second, *Bonta* relied on the fact that California had imposed a "blanket demand" on all charities to disclose the names of their major donors—regardless of whether there was any reason to believe the charity had engaged in misconduct. 141 S. Ct. at 2385. The Court noted that California had declined to use "less intrusive alternatives" such as a "targeted request" to specific charities under investigation, "such as a subpoena or audit letter." *See id.* at 2386. Here, by stark contrast, the Select Committee issued precisely such a targeted request, in the form of a subpoena, for records pertaining to Dr. Ward—based on specific reasons to believe that such records would advance the Select Committee's work. Furthermore, after Applicants sued to enjoin compliance with the subpoena, the Select Committee took the even-more-targeted step of deposing Dr. Ward. But she refused to answer substantive questions.

Third, *Bonta* involved a facial challenge to a disclosure regime, and did not purport to alter the rule that as-applied challenges require a threshold showing of a "reasonable probability" that the disclosure of information pertaining to the specific plaintiff will lead to "threats, harassment, or reprisals from either Government officials or private parties." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 367 (2010) (internal quotation marks omitted); *see also* Appl. Ex. A at 4. Indeed, Applicants seemed to recognize this before the court of appeals, where they argued that the panel should apply the "reasonable probability" standard set forth most recently in *Citizens United*. Pl.-Appellants' Emergency Mot. for Inj. Pending Appeal at 12-14, Dkt. 5.

Fourth, *Bonta* involved an organization, not an individual. To the extent Applicants are attempting to advance the associational rights of persons with whom Dr. Ward communicated, serious questions of third-party standing arise. A "plaintiff generally must assert h[er] own legal rights and interests, and cannot rest h[er] claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

This Court has recognized an exception to that rule in cases where organizations assert the First Amendment interests of their members or donors. *See id.* at 511 ("[I]n attempting to secure relief from injury to itself the association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties."). Dr. Ward attempts to make this case about the Arizona Republican Party, but that organization has elected not to participate in this case, which (unlike *Bonta*) involves records specifically pertaining to an individual, rather than to an organization.

Indeed, in the sworn declaration accompanying her Complaint, Applicants do not even claim that the phone line in question is tied to Dr. Ward's role as Chairwoman of the Arizona Republican Party. Rather, she states that the line belongs to her medical practice, Mole Medical. Appl. Ex. D ¶ 6. She further asserts that she uses the line to communicate with patients, family, and friends, adding that "I also make and receive calls of a political nature on the line as well." *Id.* ¶ 18; *see also id.* ¶¶ 12, 16. As the court of appeals concluded, the "vague statements" in her declaration "do not show that disclosing the phone numbers involved would

reveal anyone's private organizational membership, much less that the people involved in the calls would be reluctant to associate with any organization or political party if their identities were revealed." Appl. Ex. A at 5.

Fifth, the call detail records do not provide a list of phone numbers of Arizona Republican Party members—but rather a list of people with whom Dr. Ward communicated. Obviously, the two categories will overlap. But the government interest here is not in information regarding persons who had key ties to an *organization*, as in *Bonta*. Rather, the interest is in information regarding persons who had key ties to *the unprecedented effort to overturn the Presidential election*. This category includes, of course, persons outside of Arizona. The Select Committee has reason to believe Dr. Ward communicated with such people, and learning more about such conversations will help the Select Committee understand "the facts, circumstances, and causes" relating to the January 6th attack. H. Res. 503 § 3(1).

Unlike the State of California's asserted interest in charities' major donors—which extended to *every* major donor—the Select Committee has no interest in obtaining information about state party members *qua* party members. And as the court of appeals noted, "[t]hat some of the people with whom Ward communicated may be members of a political party does not establish that the subpoena is likely to reveal 'sensitive information about [the party's] members and supporters.'" Appl. Ex. A at 4 (quoting *Bonta*, 141 S, Ct. at 2384). At any rate, the names of party

members are publicly available under Arizona law. *See* Ariz. Rev. Stat. § 16-168(E), (F).[13]

For all the above reasons, this is not a case in which "exacting scrutiny" as applied to disclosure requirements for political parties or nonprofit organizations should apply. Regardless, as the court of appeals correctly held, this subpoena meets that standard anyway. *See* Appl. Ex. A at 6-7. The subpoena is "substantially related to the important government interest in investigating the causes of the January 6 attack and protecting future elections from similar threats." *Id.*

B. The Select Committee's Interest In Obtaining These Records Is Strong

The governmental interest here is plain. As the D.C. Circuit has held, Congress has a "uniquely weighty interest in investigating the causes and circumstances of the January 6th attack so that it can adopt measures to better protect the Capitol Complex, prevent similar harm in the future, and ensure the peaceful transfer of power." *Trump v. Thompson*, 20 F.4th at 35**.**

Dr. Ward's relation to that governmental interest is evident in the many ways in which she sought to overturn the Presidential election, culminating in participation in a fake elector scheme that—regardless of whether she intended it—helped lay the groundwork for the January 6th attack on the Capitol. Dr. Ward

[13] According to the National Conference of State Legislatures, Arizona and eleven other states currently provide public access to the names of political party members. *See* Nat'l Conf. of State Legislatures, *Access To and Use of Voter Registration Lists* (Sept. 28, 2022), https://perma.cc/9MX3-G44B.

claims that the subpoena is not necessary to advance the Select Committee's goals because her "role in the 2020 election in Arizona and its aftermath is a matter of public record." Appl. at 1. Yet she withheld answers about that role during her Select Committee deposition on the basis of the Fifth Amendment. *See* Mot. Hr'g Tr. at 21 (No. 3:22-cv-08015).

Moreover, the subpoena here is narrowly tailored: it seeks only one person's call detail records over the limited period in which she was admittedly involved in trying to overturn a Presidential election.

C. Dr. Wards' Arguments To The Contrary Are Unavailing

Dr. Ward claims that "it is a certainty" that "congressional investigators are going to contact every person who communicated with her during and immediately after the tumult of the 2020 election." Appl. at 2. ***This statement is categorically false.*** The Select Committee has no interest in contacting persons simply because they communicated with Dr. Ward during that period. Rather, the Select Committee has accumulated a set of names and phone numbers of people who were involved in various aspects of the multi-pronged plot to overturn the 2020 election. The Select Committee will use that information, as it has with other call detail records it has received, to understand better how the effort to overturn the election was planned and effectuated and what corrective measures to recommend to prevent another such effort.

Applicants quote a former Select Committee staffer stating that "[t]he thread that needs to be pulled [is] identifying all the White House numbers and why we

have certain specific people, why they were talking to the White House." Appl. at 14. But the quotation from the former staffer—who does not speak for the Select Committee and left his position in April—referenced communications with *the White House*, which obviously are particularly relevant given President Trump's involvement in the events leading up to, and on, January 6th. This has no bearing on Dr. Ward's communications with anyone who did not work for, or themselves communicate with, the White House at the time.

Applicants also argue (Appl. at 11) that the court below made an "impermissible leap" in finding a connection between "sending an alternate slate of electors to Washington in mid-December of 2020 and the January 6, 2021 assault on the Capitol." That is plainly wrong. The connection between the two events is readily apparent, as Dr. Ward herself has acknowledged.

So-called "alternate electors" were central to the events of January 6. The Select Committee has established that both the real and "alternate" Electoral College electors met in Arizona and other states on December 14, 2020, cast both real and "alternate" Electoral College votes, and sent competing certificates of votes to Congress to be opened on January 6, 2021, *see* 3 U.S.C. § 15; U.S. Const., Amend. XII. The very existence of "alternate" votes formed the basis for a now-discredited contested election theory espoused by Professor John Eastman and used by President Trump as part of an unprecedented pressure campaign on his own Vice President. In memoranda to President Trump and others, Eastman falsely declared that "7 states have transmitted dual slates of electors to the President of the

Senate."[14] In reality, no State had sent a competing slate of electors to the President of the Senate or Congress. But the fake votes that the "alternate" electors had sent to Congress were used by Dr. Ward and others to publicly claim that the election was "contested," and that Congress could do something about it on January 6th.[15]

President Trump actively promoted the same idea, and some of his supporters believed it. For example, on January 5, 2021, the day before the joint session of Congress, President Trump publicly tweeted: "The Vice President has the power to reject fraudulently chosen electors."[16] On the morning of January 6th, at 1:00 A.M., the President tweeted: "If Vice President @Mike_Pence comes through for us, we will win the Presidency. Many States want to decertify the mistake they made in certifying incorrect & even fraudulent numbers in a process NOT approved by their State Legislatures (which it must be). Mike can send it back!"[17] Then, during his rally on the Ellipse that immediately preceded the attack on the Capitol, President Trump said, "We have come to demand that Congress do the right thing

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[14] *John Eastman's first 'January 6 scenario' memo*, Wash. Post (Oct. 29, 2021), https://perma.cc/LA2Y-Z9V6.

[15] Dr. Ward's own account of these events indicates that she believed that "[i]t was now officially a contested election. And anyone who said that the election was over simply did not know the facts." Ward, *supra* note 3, at 160-61. The "alternate" votes for Trump in states he had lost created a "conflict to be sorted our later by the courts and Congress." *Id.*

[16] *Id.* (Tweet on January 5 at 11:06 A.M.).

[17] Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021 1:00 A.M.), https://perma.cc/8ES6-XKCW.

and only count the electors who have been lawfully slated, lawfully slated" and that "… if Mike Pence does the right thing, we win the election."[18]

Thus, there is no basis to separate the fraudulent slates of electors (such as that pressed by Dr. Ward) from the January 6th attack on the Capitol. The court of appeals was correct in drawing the connection, and it is not the only court to have done so. The District Court for the Central District of California, after reviewing thousands of documents that Dr. Eastman claimed were privileged, drew the same connection. Order Re Privilege of 599 Docs. Dated Nov. 3, 2020 – Jan. 20, 2021 at 24, *Eastman v. Thompson*, No. 8:22-cv-00099 (C.D. Cal. June 7, 2022), ECF 356 (concluding that the Select Committee's interest "extends to the 'facts, circumstances, and causes relating to the January 6, 2021, domestic terrorist attack ... [and] the interference with the peaceful transfer of power.'") (alternations in original).

In sum, Dr. Ward participated in several improper efforts to subvert the will of the American people as expressed at the ballot box, culminating in a fake-elector scheme that was instrumental in leading to the January 6th attack. At best, her arguments amount to a claim that she has an absolute right to attempt to overturn a Presidential election, yet at the same time Congress cannot take reasonable investigative steps to learn more about that plan that had such disastrous consequences for our nation. Applicants' motion must be denied here because there

[18] Brian Naylor, *Read Trump's Jan. 6 Speech, A Key Part Of Impeachment Trial*, NPR (Feb. 10, 2021), https://perma.cc/95CS-73JF.

is no serious legal question warranting this Court's review that would justify the extraordinary remedy of an injunction pending a petition for writ of certiorari.

II. The Court Is Not Likely To Grant A Writ Of Certiorari In This Case

Applicants' plea must be rejected because the lower courts ruled correctly here. In any event, even if there were some legitimate legal question about that, Applicants' motion must still be denied because they cannot show that this Court is likely to grant certiorari here. For several reasons, this case plainly fails this Court's criteria for certiorari review.

First, the court of appeals held that, even if the exacting scrutiny standard in *Bonta* applied, "this subpoena would satisfy it." Appl. Ex. A at 6. The panel held that "[t]he subpoena is substantially related to the important government interest in investigating the causes of the January 6 attack and protecting future elections from similar threats." *Id.* The panel further ruled that the subpoena is "narrowly tailored ... because it seeks only [Dr.] Ward's phone records, only from the critical window of November 1, 2020 through January 31, 2021, and only metadata, not content or location information." *Id.* at 7.

Thus, this case ultimately amounts to not a conflict with the law applied in *Bonta*, but rather a fact-bound dispute over whether the Ninth Circuit majority or dissent correctly applied the standard set forth in that case.

Second, the order issued by the court of appeals is not precedential. In the Ninth Circuit, dispositions styled as orders (as opposed to opinions) are not published except by order of the court, and the court did not so order. *See* Ninth

Cir. Rule 36-1. And unpublished decisions, in turn, are not precedent, with limited exceptions not applicable here. *See* Ninth Cir. Rule 36-3(a).

Third, contrary to Applicants' suggestion (Appl. at 18), there is no circuit split here, even assuming *arguendo* that a nonprecedential order can contribute to a circuit split. Contrary to what Applicants argue, in *Republican National Committee ("RNC") v. Pelosi*, the D.C. Circuit did not rule on any substantive issues. In granting the motion for injunction pending appeal, the D.C. Circuit did not express any claim-specific views on any of the several claims brought by the RNC. *See* Order, *RNC v. Pelosi*, No. 22-5123, (D.C. Cir. May 25, 2022) (per curiam), Doc. #1948112.

Fourth, and relatedly, the legal issues at stake have received almost no percolation in the lower courts. The district court here is the *only* district court to have issued an opinion regarding a Congressional subpoena for call detail records. And while the district court in *RNC* did issue a post-*Bonta* opinion regarding a First Amendment challenge to a Select Committee subpoena not involving call detail records, that opinion has been vacated following the withdrawal of the subpoena. *See* Order, *RNC v. Pelosi*, No. 22-5123, 2022 WL 4349778 (D.C. Cir. Sept. 16, 2022). In light of this *vacatur*, the district court's decision here is the only extant opinion to consider the application of *Bonta* to a Congressional subpoena.

Fifth, this case may well soon become moot. The Select Committee is authorized only for the current Congress, which expires on January 3, 2023. *See, e.g.*, *United States v. American Tel. & Tel. Co.*, 551 F.2d 384, 390 (D.C. Cir. 1976)

("Unlike the Senate which is a continuing body, *McGrain v. Daugherty*, 273 U.S. 135 (1927), this House ends with its adjournment on January 3, 1977.") Even if the Court were to grant *certiorari* at some point soon, it would surely not resolve the case before that date. And if the new Congress were to reauthorize the subpoena, this Court would need to confront the question whether such reauthorization of the subpoena keeps the case alive. *See Trump v. Mazars USA, LLP*, 39 F.4th 774, 785-87 (D.C. Cir. 2022).

Under these circumstances, this case manifestly does not warrant plenary review through grant of a writ of certiorari.

III. Applicants Fail To Establish Any Irreparable Harm From The Denial Of An Injunction Pending Appeal

Applicants have also failed to show that "a likelihood that irreparable harm will result from the denial of a stay," *Hollingsworth*, 558 U.S. at 190. The only factual assertion they make regarding irreparable harm is that a denial of their stay request will result in the case becoming moot. Appl. at 23-24. But mootness is not a harm in and of itself. Applicants had to show some harmful effect, grounded in facts alleged, from the denial of a stay.

The Court of Appeals below did not abuse its discretion when it determined that Applicants failed to show that disclosing the relevant phone numbers would cause people involved in the calls to "be reluctant to associate with any organization or political party if their identities were revealed." Order at 5, *Ward v. Thompson*, No. 22-16473 (9th Cir. Oct. 22, 2022); *see also N.Y. Nat. Res. Def. Council, Inc. v. Kleppe*, 429 U.S. 1307, 1312 (1976) (Marshall, J., in chambers) (applying an abuse of

discretion standard). And Applicants have not even asserted such a reluctance in their Emergency Application.

Applicants suggest that mootness "easily constitutes irreparable harm," Appl. at 23, but that is not always true, and Applicants offer no explanation why it would be so in this case. They cite two in-chambers opinions, but neither supports the proposition that having a case become moot before consideration by the Supreme Court automatically constitutes irreparable harm.

In *McDaniel v. Sanchez*, 448 U.S. 1318 (1980) (Powell, J., in chambers), Justice Powell considered that the case may become moot without issuance of a stay, but it was only that fact combined with his observation that the applicant would be required to "expend substantial money" absent the stay and that "this expenditure [would] be irretrievable," *id.* at 1322, that led him to conclude that the "balance as to the possibility of 'irreparable harm' seems to favor the applicants." *Id.*

Similarly, *N.Y. Nat. Res. Def. Council, Inc. v. Kleppe*, 429 U.S. 1307 (1976) (Marshall, J., in chambers) provides no support to the Wards. Although Justice Marshall did note that one reason for a Circuit Justice to exercise his or her "extraordinary powers" to upset an interim decision by a court of appeals "would be to protect [the Supreme] Court's power to entertain a petition for certiorari," he declined to do so in that case. *Id.* at 1310, 1312. Mootness was not at issue in *Kleppe*, and Justice Marshall declined to provide relief that would have halted the Government's activity. *Id.* at 1313. Applying an abuse-of-discretion standard,

Justice Marshall refused to counter the court of appeals' determination that the applicant would not be irreparably injured. *Id.* at 1312.

Even in the lower courts—where parties are generally permitted an appeal as of right—the fact that a case may be moot before appeal does not always equate to irreparable harm. *See, e.g., In re Baker*, No. 1:05-cv-03487, 2005 WL 2105802, at *9 (E.D.N.Y. Aug. 31, 2005) (collecting cases and stating that "the possibility that an appeal will be rendered moot by a denial of stay does not, in and of itself, constitute irreparable harm"). The notion that irreparable harm automatically flows from mootness makes even less sense in the context of Supreme Court review in a case like this one where there is no appeal as of right.

Because Applicants have not in their application asserted any legally cognizable harm, their request for a stay should be denied.

IV. The Balance of Equities And Public Interest Favor The Select Committee

Finally, the merged analysis of equities and public interest also favors denial here. The Select Committee is investigating a grave assault on our Nation's democracy, one whose seeds were planted months before January 6th. Completion of this investigation in a thorough fashion is of immense public interest. The Select Committee's interest in studying the January 6th attack and proposing remedial measures is "vital" and "uniquely weighty." *Trump v. Thompson*, 20 F.4th at 17, 35.

Dr. Ward aided a coup attempt. She tried to stop the vote count in Maricopa County, tried to arrange contact between President Trump and a top county official, promoted inaccurate allegations of election interference by Dominion Voting

Systems, and served as a fake elector as part of Trump's scheme to overturn the election on January 6th by sending Congress spurious electoral slates in contravention of the actual electoral outcome in several states. These matters are of significant interest to the Select Committee, and T-Mobile's compliance with the subpoena will impose no hardships on Applicants, who need not act at all.

Furthermore, the fact that the Select Committee's investigative priorities have dictated its litigation focus over time has no bearing on whether the equities now favor Applicants. The Select Committee is authorized through the end of the current Congress, which expires on January 3, 2023. *See* H. Res. 503 § 7(a); *see also* U.S. Const., Amend. XX, § 1. Far from preserving the status quo, any further delay would, practically speaking, make it extremely difficult for the Select Committee to obtain and effectively utilize the subpoenaed records before that date.

Applicants have correctly noted that "[t]he essence of self-government is free and fair elections." Mot. for Inj. or Admin. Inj. Pending Appeal at 12, *Ward v Thompson*, No. 322-cv-08015 (D. Ariz. Sept. 26, 2022), ECF 57. The Select Committee is investigating Dr. Ward's role in a catastrophic effort to overturn just such an election. The public interest heavily favors allowing the Select Committee to complete its work.

V. The Court Is Not Likely To Grant A Writ of Mandamus In This Case

Alternatively, Applicants oddly suggest (Appl. at 16-17) that the Court should grant them relief in the form of a stay pending an application for a writ of mandamus. "To obtain a stay pending the filing and disposition of a petition for a writ of mandamus, an applicant must show a fair prospect that a majority of the

Court will vote to grant mandamus and a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth*, 558 U.S. at 190. This request fails because it is even less likely that Applicants have met the even stricter requirements for issuance of a writ of mandamus here.

A writ of mandamus is an "extraordinary remedy" reserved only for "exceptional circumstances amounting to a judicial 'usurpation of power,' or a 'clear abuse of discretion.'" *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (citing *Will v. United States*, 389 U.S. 90, 95 (1967) and *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953)). Applicants thus must show the following: *First*, that no other adequate means exist to attain the relief the party desires, *see*, *e.g.*, *Cheney*, 542 U.S. at 381; *Hollingsworth*, 558 U.S. at 190. *Second*, that the right to the issuance of the writ is "clear and indisputable." *Cheney*, 542 U.S. at 380-81. And *third*, that issuance of the "writ is appropriate under the circumstances." *Id.* Applicants satisfy none of these conditions.

Applicants have not sought mandamus relief below, as this Court has frequently required. *See* Order in Pending Case at 2-3, *In re United States, et al.*, No. 18A410 (S. Ct. Nov. 2, 2018) ("When mandamus relief is available in the court of appeals, pursuit of that option is ordinarily required."); *see also* Stephen M. Shapiro et al., Supreme Court Practice, 887 (10th ed. 2013) ("The limited power of a court of appeals, whether by way of mandamus or in its supervisory function over trial courts, must be looked to as the primary source of relief[.]"). Because Applicants have not sought such relief below, they cannot demonstrate that

"adequate relief cannot be obtained in *any* other form or from *any* other court." S. Ct. Rule 20.1 (emphasis added).

As the decisions below demonstrate, and as we show in this opposition, Applicants fall far short of meeting the requisite showing that their right to mandamus relief is "clear and indisputable." To the contrary, the existing case law strongly favors the conclusion that the Select Committee acted within its legal authority when it issued the narrowly tailored subpoena here, *see Barenblatt*, 360 U.S. at 126, and there is no contrary case law on point.

Finally, Applicants cannot demonstrate that issuance of a writ of mandamus is appropriate under the circumstances here. Here, Applicants seek to enjoin compliance with a properly issued subpoena by a House Select Committee. Such an injunction would, if granted, constitute judicial intervention into the conduct of the operations of a coordinate branch of government, something this Court has understandably indicated a general reluctance to do, especially when separation of powers concerns are involved. *See Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 617 (2007) (Kennedy, J., concurring) ("The Court has refused to establish a constitutional rule that would require or allow 'permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.'" (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006)).

In sum, Applicants have provided no reason that this Court should deviate from its customary reluctance to grant writs of mandamus. Issuance of a writ in

this case would impede the Select Committee's investigation by depriving it of information important to complete its work and make fully informed legislative recommendations to Congress. *See McGrain*, 273 U.S. at 175 ("A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change[.]"). Separation of powers principles counsel that the Court should avoid such interference with the actions of the coordinate branches. *See, e.g.*, *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) (recognizing doctrines exist to "restrain the Judiciary from inappropriate interference in the business of the other branches of Government");*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (noting that the Constitution requires the branches to "integrate the[ir] dispersed powers into a workable government" and requires not only "autonomy but [also] reciprocity").

CONCLUSION

For all these reasons, the emergency application for a stay should be denied.

Respectfully submitted.

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