ORAL ARGUMENT NOT YET SCHEDULED

No. 22-5290

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

ROBERT SCHILLING,

Plaintiff-Appellant,

v.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia

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DEFENDANTS-APPELLEES' BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Defendants-Appellees respectfully submit this certificate as to parties, rulings, and related cases.

A. Parties and Amici

Plaintiff-Appellant is Robert Schilling.

Defendants-Appellees are the U.S. House of Representatives; Kevin Owen McCarthy, Speaker of the U.S. House of Representatives; the Committee on Oversight and Accountability of the U.S. House of Representatives;[*] Cheryl L. Johnson, Clerk of the U.S. House of Representatives; and Catherine Szpindor, Chief Administrative Officer of the U.S. House of Representatives, all sued in their official capacities.

No amici or intervenors appeared in the district court, and none have appeared in this Court to date.

B. Rulings Under Review

The ruling under review is an order issued by the district court (McFadden, J.) on October 3, 2022. *See* JA117. The opinion accompanying that order (JA97-116) is available on Westlaw at 2022 WL 4745988.

[*] The Committee was previously called the Committee on Oversight and Reform of the U.S. House of Representatives.

C. Related Cases

The case on review has not previously been before this Court. Defendants-Appellees are unaware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

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GLOSSARY

Br.	Plaintiff-Appellant's brief
DOJ	U.S. Department of Justice
FOIA	Freedom of Information Act
JA	Joint Appendix

INTRODUCTION

Plaintiff-Appellant Robert Schilling claims a right that this Court has never recognized: a common law right of access to confidential Congressional materials. And he asks for relief that this Court has never provided: an injunction requiring the U.S. House of Representatives (House) to publicly release a committee's confidential investigatory materials. The district court rejected this extraordinary request, and this Court should affirm that decision.

This dispute stems from a Congressional investigation conducted by the House Committee on Oversight and Reform (Committee or Oversight Committee) during the 117th Congress. Schilling alleges that, as part of this investigation, the Committee relied on assistance from private individuals in a way that violated the Rules of the House of Representatives (House Rules) and federal law. Claiming a common law right of access, Schilling requested communications and recordings of meetings among these private individuals, Committee Members, and Committee staff.

As the district court recognized, "Schilling's request implicates a core legislative activity—conducting investigative hearings." JA111. Thus, when his request was rejected and he sought judicial relief, the district court correctly concluded that his lawsuit is barred by the Constitution's Speech or Debate Clause, which absolutely immunizes the Congressional Defendants from claims that are

predicated on legislative acts. Investigative work is central to the legislative process, and committees gathering information through informal means—by, for example, talking to subject-matter experts—is essential to that work. As a result, the requested materials are absolutely protected by the Clause.

Sovereign immunity separately bars this suit. Congress, its committees, its Members, and its employees generally cannot be sued in their official capacities unless a statute clearly waives sovereign immunity. There is none here. Schilling primarily relies on the *Larson-Dugan* exception, a sovereign immunity exception that permits official-capacity suits when an official allegedly contravenes a statute or acts unconstitutionally, but he doesn't seek judicial relief based on any alleged statutory or constitutional violation. His claim that the Congressional Defendants contravened a common law right of access, of course, does not demonstrate any statutory or constitutional violation. The *Larson-Dugan* exception therefore does not apply.

If the Court reaches the merits, it should still affirm because Schilling fails to state a claim upon which relief can be granted. The Constitution—by giving Congress the exclusive authority to manage its own documents and materials and thus displacing any common law right of access—forecloses the Court from applying the right to Congress. Beyond that, disclosure under that right would be unwarranted here because the materials that Schilling requested are informal

communications that do not document any final, official decision and thus are not public records. Nor does the public's interest in these materials outweigh Congress's significant confidentiality interest in them because they could reveal investigative sources and techniques. For these reasons, the Congressional Defendants are not obligated under the common law to disclose these materials.

STATEMENT OF JURISDICTION

The district court concluded that the Speech or Debate Clause's absolute immunity applied and dismissed this case for lack of subject matter jurisdiction. *See* JA111, 116.

STATEMENT OF THE ISSUES

1. Whether the Speech or Debate Clause bars Schilling's lawsuit seeking, under the common law right of access, confidential Congressional materials that, to the extent they exist, were generated as part of a Congressional committee's investigation.

2. Whether sovereign immunity bars Schilling's suit, which names as Defendants the House itself, the Committee, a Member, and House employees in their official capacities.

3. Whether the common law right of access applies to Congressional materials, and, if it does, whether the materials here, to the extent they exist, are public records that must be disclosed because the public's interest in disclosure outweighs the House's interest in confidentiality.

STATEMENT OF THE CASE

I. BACKGROUND

This case emanates from an investigation related to climate change that the Committee undertook during the 117th Congress. *See, e.g.*, JA10, ¶ 10 (quoting from the Committee's press release that announced the investigation); *see also id.* at 12, ¶ 14; 13, ¶ 16 (describing hearings the Committee held as part of its investigation). As Schilling tells it, the Committee worked with subject-matter expert consultants during its investigation. *Id.* at 14, ¶ 18; 15-16, ¶ 23; 17, ¶ 30; 18-19, ¶ 36. Use of these outside consultants, Schilling claims, violated House Rules and federal laws regarding the acceptance of certain voluntary services and the procedures committees must follow to obtain the services of consultants. *Id.* at 23-26, ¶¶ 52-59.

Schilling requested certain communications and recordings of meetings between these outside consultants, Members of the Committee, and Committee staff. *Id.* at 28-29, ¶ 68. As relevant here, he sent the request to the Chief Administrative Officer of the House, the Clerk of the House, the Speaker of the House, and the Committee. *Id.* at 29, ¶¶ 68-71; 30-31, ¶ 78. The Congressional Defendants refused to release these materials (to the extent they exist), stating that they "would all relate to preparations for a Committee hearing or other information-gathering on the topic of" the investigation. *Id.* at 31-32, ¶ 84.

II. PROCEDURAL HISTORY

Schilling then sued the House, the Committee, the Speaker, the Clerk, and the Chief Administrative Officer, all in their official capacities. *Id.* at 9-12, ¶¶ 8-13. He alleged that the materials he sought were subject to the common law right of access, and he asked the district court to compel the Congressional Defendants to release them. *Id.* at 33, ¶ 88; 40 (prayer for relief). The Congressional Defendants moved to dismiss, arguing that the court lacked subject matter jurisdiction because both the Speech or Debate Clause and the doctrine of sovereign immunity barred the suit. *See* ECF No. 13 at 5-16. The Congressional Defendants also argued that Schilling failed to state a claim because the common law right of access does not apply to Congress. *Id.* at 16-23. And even if it did, Schilling was not entitled to the materials because, to the extent they exist, they are not public records and because the House's interest in confidentiality outweighs the public's interest in disclosure. *Id.* at 23-26.

The district court held that the Speech or Debate Clause deprived it of jurisdiction over Schilling's lawsuit and granted the motion to dismiss. JA116. It explained that "Schilling's request implicates a core legislative activity—conducting investigative hearings on potential legislation." *Id.* at 111. "Compelling disclosure of those documents would impede Congress's long-recognized investigatory function," and, the court noted, "[t]he Speech or Debate

Clause prohibits that kind of inquiry." *Id.* The district court rejected Schilling's argument that the Speech or Debate Clause does not apply because he named administrative and ministerial parties, explaining that such a rule "would swallow the immunity rule whole" and calling it "untenable." *Id.* at 113.

The district court also rejected Schilling's claim that immunity should not apply because the Congressional Defendants allegedly acted unlawfully when working with the consultants to pursue a supposedly improper objective. *Id.* at 113-14. "Legislators' motives do not matter," the court concluded, because the court's "inquiry is objective, focused on whether a suit implicates 'an integral part of the deliberative and communicative process[].'" *Id.* (alteration in original) (citation omitted). Finally, the district court refused to balance the Congressional Defendants' Speech or Debate Clause immunity against the common law right of access, pointing out that any such balancing would "subvert" the Clause's "absolute jurisdictional bar." *Id.* at 115; *see also id.* at 114 ("The Constitution structurally precludes balancing—to the extent a common law right conflicts with an express provision in the Constitution, the common law is void.").

The district court did not reach the Congressional Defendants' other arguments and dismissed the case for lack of subject matter jurisdiction. *Id.* at 111, 116 n.3.

SUMMARY OF THE ARGUMENT

I. THE SPEECH OR DEBATE CLAUSE BARS THIS SUIT

The Speech or Debate Clause's protection is absolute, and it immunizes the Congressional Defendants from litigation related to all "legislative acts" that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings." *Gravel v. United States*, 408 U.S. 606, 625 (1972).

Schilling's request, as the district court explained, "implicates a core legislative activity." JA111. He asks for confidential materials that, if they exist at all, would have been generated during the Committee's investigation related to climate change. A long line of this Court's precedent—recently reiterated in *Judicial Watch*—holds that investigative methods, and the information gleaned from those methods, are protected legislative acts. *See Judicial Watch, Inc. v. Schiff*, 998 F.3d 989, 991-93 (D.C. Cir. 2021). Because Speech or Debate Clause immunity is absolute, Schilling cannot evade the Clause by claiming the materials will reveal unlawful activity or an improper legislative purpose; rather, the Court's legislative-act analysis is objective. JA114. Likewise, given the absolute nature of the Clause's immunity, the Court should affirm the district court's dismissal without balancing Speech or Debate Clause immunity with any purported common law right of access.

II. SOVEREIGN IMMUNITY BARS THIS SUIT

Under the doctrine of sovereign immunity, the House, its committees, its Members, and its employees generally cannot be sued in their official capacities without Congress's consent, and that consent must be "unequivocally expressed in statutory text." *See Lane v. Pena*, 518 U.S. 187, 192 (1996). Schilling points to no statute that unequivocally waives sovereign immunity here.

He instead relies primarily on the *Larson-Dugan* exception to sovereign immunity, which permits official-capacity suits when an officer allegedly acts unconstitutionally or beyond his or her statutory authority. *See Pollack v. Hogan*, 703 F.3d 117, 120 (D.C. Cir. 2012). But Schilling fails to show that the Congressional Defendants exceeded their statutory authority by rejecting Schilling's request for materials; his lawsuit is based on a purported common law right that does not flow from any statute.

To be sure, this Court has concluded—in a case that did not involve Congress—that in the context of a court action involving a claimed common law right of access, the *Larson-Dugan* analysis merges with the merits of a plaintiff's claim. *Wash. Legal Found. v. U.S. Sent'g Comm'n*, 89 F.3d 897, 901-02 (D.C. Cir. 1996). But that case relied on the mandamus statute (28 U.S.C. § 1361) to trigger the *Larson-Dugan* exception, and the mandamus statute does not apply to Congress.

III. SCHILLING FAILS TO STATE A CLAIM

If this Court reaches the merits, the district court's dismissal order still must be affirmed because Schilling's common law right of access claim fails as a matter of law. That right does not apply to Congress at all. The Constitution gives the House exclusive authority to manage its documents and materials as it sees fit, *see* U.S. Const. art. I, § 5, cls. 2, 3, and that constitutional authority displaces any common law right of access.

Beyond that fundamental flaw, Schilling has not plausibly alleged that the relevant two-part test is met. *See Wash. Legal Found. v. U.S. Sent'g Comm'n*, 17 F.3d 1446, 1451-52 (D.C. Cir. 1994). Schilling must first show that the requested materials are "public records," which means they document an official decision or action. *Id.* at 1451; *Wash. Legal Found.*, 89 F.3d at 905. But these materials (if they even exist) are, at best, pre-decisional materials that the Committee gathered during its investigation. There is nothing final about them. Nor does Schilling satisfy the second part of the test, which requires a demonstration that the public's interest in disclosure outweighs the House's interest in confidentiality. *Wash. Legal Found.*, 17 F.3d at 1451-52. Accordingly, the Congressional Defendants have no common law duty to disclose the materials.

STANDARD OF REVIEW

This Court reviews the district court's dismissal based on Speech or Debate

Clause immunity *de novo*. *Rangel v. Boehner*, 785 F.3d 19, 22 (D.C. Cir. 2015). The district court did not reach the sovereign immunity issue, but this Court could affirm the court's dismissal on that ground as well. *See Danielsen v. Burnside-Ott Aviation Training Ctr., Inc.*, 941 F.2d 1220, 1230 (D.C. Cir. 1991) ("[A]n appellate court can affirm a correct decision even if on different grounds than those assigned in the decision under review."). Because Speech or Debate Clause immunity and sovereign immunity are both jurisdictional, *see Rangel*, 785 F.3d at 22; *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994), the Court may "address them in any order," *Rangel*, 785 F.3d at 22. If the Court reaches the merits, it could affirm on that basis, too; whether a plaintiff fails to state a claim upon which relief can be granted is "a pure question of law which [the Court] review[s] *de novo*." *See Danielsen*, 941 F.2d at 1230.

ARGUMENT

I. THE SPEECH OR DEBATE CLAUSE BARS SCHILLING'S SUIT

A. The Clause Provides Absolute Immunity for Claims Based on Legislative Acts

The Speech or Debate Clause states that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. The "central object of the … Clause is to protect the 'independence and integrity of the legislature.'" *McCarthy v. Pelosi*, 5 F.4th 34, 38 (D.C. Cir. 2021) (citation omitted). The Clause is intended, among other

purposes, to prevent litigation distractions that may "disrupt the legislative function," *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975), and it protects Members and Congressional staff "not only from the consequences of litigation's results but also from the burden of defending themselves," *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). The Clause thus "reinforc[es] the separation of powers" that is so critical to the country's constitutional framework. *See Eastland*, 421 U.S. at 502 (citation omitted).

"The Supreme Court has consistently read the Speech or Debate Clause 'broadly' to achieve its purposes." *Rangel*, 785 F.3d at 23 (quoting *Eastland*, 421 U.S. at 501). It is "long settled" that the Clause's protections apply "not just to speech and debate in the literal sense, but to all 'legislative acts.'" *McCarthy*, 5 F.4th at 38-39 (quoting *Doe v. McMillan*, 412 U.S. 306, 311-12 (1973)).

"Legislative acts" are those that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings." *Gravel*, 408 U.S. at 625. These acts "include both (i) matters pertaining 'to the consideration and passage or rejection of proposed legislation,' and (ii) 'other matters which the Constitution places within the jurisdiction of either House.'" *McCarthy*, 5 F.4th at 40 (quoting *Gravel*, 408 U.S. at 625); *see also Gravel*, 408 U.S. at 617 ("[P]rior cases have plainly not taken a literalistic

approach in applying the privilege. … Committee reports, resolutions, and the act of voting are equally covered.").

When the Clause applies, it's an "absolute bar" to suit, including when a plaintiff alleges that the legislative act is unlawful. *See Eastland*, 421 U.S. at 503, 509-10; *Rangel*, 785 F.3d at 24.

B. Schilling Seeks Materials that Are Part of the Committee's Investigative Work—a Core Legislative Activity—that the Clause Absolutely Protects from Disclosure

1. Congress's investigative work plays a fundamental role in nearly all the work that it does. *See, e.g.*, *Barenblatt v. United States*, 360 U.S. 109, 111 (1959) ("The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."). Indeed, "[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." *Eastland*, 421 U.S. at 504 (alteration in original) (citation omitted).

Congress employs both informal and formal tools to gather information as part of its investigative work. For example, Congressional committees may (1)

engage in staff-level communications and contacts with third parties, (2) request the voluntary production of documents or information, (3) hold briefings, (4) conduct voluntary transcribed interviews, (5) subpoena witnesses or documents, and (6) hold public hearings.

This makes sense. Information that committees gather through informal means often informs their formal actions. Committee staff need at least a base level of knowledge as they decide how to structure a hearing, who to call as a witness, what documents to subpoena, and the like. *See, e.g.*, *McSurely v. McClellan*, 553 F.2d 1277, 1286-87 (D.C. Cir. 1976) (en banc) (per curiam) ("A congressman cannot subpoena material unless he has enough threshold information to know where, to whom, or for what documents he should direct a subpoena. The acquisition of knowledge through informal sources is a necessary concomitant of legislative conduct and thus should be within the ambit of the [Speech or Debate Clause] privilege so that congressmen are able to discharge their constitutional duties properly.").

Given the fundamental role that investigations play in Congressional business, it's unsurprising that the means Congress uses to gather information are treated as protected legislative acts. *See, e.g.*, *Eastland*, 421 U.S. at 504 (noting "[t]he power to investigate … plainly falls within th[e] definition" of legislative act); *McMillan*, 412 U.S. at 313 ("The acts of authorizing an investigation pursuant

to which the subject materials were gathered, holding hearings where the materials were presented, preparing a report where they were reproduced, and authorizing the publication and distribution of that report were all [protected legislative acts]."); *Judicial Watch*, 998 F.3d at 992-93 (holding that committee subpoenas and corresponding responses were protected legislative acts).

2. The materials that Schilling requested, to the extent they exist, were generated as part of an investigation. Schilling requested emails among Members, staff, and third parties, as well as any recordings of meetings among those parties. JA28-29, ¶ 68. These communications and recordings, to the extent they exist, were part of the Committee's investigation related to climate change, including preparations for a hearing. *See id.* at 10, ¶ 10 (quoting from the Committee's press release announcing the investigation and quoting the Subcommittee Chair as saying "the committee ha[d] enlisted the aid of 'a lot of people' involved in planning" a previous Congressional committee hearing); *id.* at 14, ¶ 17 (describing the "legislative purpose behind" the investigation and quoting from the Committee's press release).

Although Schilling questions the Members' true motive in conducting the investigation (an argument we address below), the allegations in his amended complaint and the arguments in his brief demonstrate that the materials he requested, to the extent they exist, were generated as part of the Committee's

investigative work. *See, e.g.*, *id.* at 17, ¶ 30 ("Barnett and Schiliro [who are both listed in Schilling's requests] are among the outside parties brought in as consultants to help plan this quasi-judicial pursuit of private parties, with and on behalf of outside parties but *conducted under the purported authority of the Congress*." (emphasis added)); Br. at 23 (arguing that the materials Schilling requested "arise out of what he alleges is an improper use of the Oversight Committee's hearing and subpoenas procedures").

3.a. Decisions from this Court indicate that the materials Schilling requested, to the extent they exist, are protected by the Speech or Debate Clause. In fact, the Court recently affirmed the dismissal of a nearly identical case, *Judicial Watch, Inc. v. Schiff*, 998 F.3d 989 (D.C. Cir. 2021), on Speech or Debate Clause grounds. There, the plaintiff sued a House committee and its chairman after they refused to release certain subpoenas (and responses) that were issued as part of an impeachment inquiry. *Id.* at 990. Like here, the plaintiff in that case argued that the failure to release the requested materials violated the common law right of access and asked the court to compel production. *Id.* at 991; *Judicial Watch, Inc. v. Schiff*, 474 F. Supp. 3d 305, 309 (D.D.C. 2020). This Court held that issuing the subpoenas as part of an investigation was a protected legislative act and that the

case therefore should be dismissed for lack of subject matter jurisdiction. 998 F.3d at 992-93.[1]

Judicial Watch is the latest decision in a long line of precedent where this Court has held that committees' investigative activities—and the fruits of those activities—are protected by the Speech or Debate Clause. *See, e.g.*, *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 411-12, 423 (D.C. Cir. 1995) (explaining that "[t]he Speech or Debate Clause bars" a claim "to a right to engage in a broad scale discovery of documents in a congressional file that comes from third parties" and holding that the Clause protected a subcommittee from having to produce documents related to a Congressional investigation); *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 857 (D.C. Cir. 1988) ("We conclude that the subcommittee may refuse discovery of all materials relating to statements taken in the course of an official investigation, irrespective of alleged irregularities."); *McSurely*, 553 F.2d at 1286, 1296-98 (noting "that information gathering … is essential to informed deliberation over proposed legislation" and holding that a subcommittee's inspection and use of materials were protected

[1] The Court explained that it was unnecessary "to decide whether the Speech or Debate Clause bars disclosure of public records subject to the common-law right of access in all circumstances" because "[t]he parties did not raise, and [the Court's] precedent does not address th[at] issue[]." *Id.* at 993. As we explain below, if the Court finds that the underlying act is legislative, the Clause's immunity is absolute, and that should be the end of the Court's analysis.

legislative acts, even though the materials came to the subcommittee through unlawful means).[2]

The same analysis applies here, and Schilling's lawsuit, which is predicated on a legislative act, is therefore barred by the Speech or Debate Clause. *See Judicial Watch*, 998 F.3d at 992 ("[T]he Committee's issuance of subpoenas … was a legislative act protected by the Speech or Debate Clause."); *Brown & Williamson*, 62 F.3d at 421 ("A party is no more entitled to compel congressional testimony—or production of documents—than it is to sue congressmen.").

b. Schilling tries to avoid this straightforward conclusion by arguing that he is challenging "ministerial actions relating to record-keeping," not legislative acts. *See* Br. at 17, 21, n.6. But this relabeling does not change the nature of his request. Schilling's amended complaint and brief make clear that he is seeking access to materials created as part of the Committee's investigation (to the extent they exist). Ignoring that context—including why, how, and for what purpose the materials were created—by instead focusing on how he believes those documents must be stored misses the point entirely. *Cf. MINPECO*, 844 F.2d at 858 (explaining that

[2] *See also Pentagen Techs. Int'l, Ltd. v. Comm. on Appropriations of U.S. House of Representatives*, 20 F. Supp. 2d 41, 44 (D.D.C. 1998) ("The protections of the Speech or Debate Clause extend to congressional use of records and documents. … Defendants thus argue persuasively that since the reports [generated as part of an investigation] are documents that were used by the Committee in the course of its official business, the reports are protected from compulsory disclosure by the Speech or Debate Clause.").

the district court "rejected the [plaintiffs'] argument that the purportedly ministerial act of recording testimony is unprotected by the Clause" and "noted that the proper inquiry is not whether an act can be labelled ministerial or discretionary, but whether the act falls within the legislative sphere"). Taken to its logical extreme, this argument would allow almost any plaintiff to force Congress to release nearly any document by simply pointing to recordkeeping duties or the like while ignoring the nature of the materials and the investigative context in which they were created. Schilling cites no case that endorses this misguided approach.

Forcing Congress to release investigative materials that it has chosen to keep confidential—which is the relief Schilling ultimately seeks—would threaten legislative independence and chill Congress's work. The Clause is meant to protect Congress from precisely this sort of interference. *See, e.g.*, *Judicial Watch*, 998 F.3d at 991, 992 (explaining that the Clause is meant "to preserve [legislative] independence," which is "'imperiled' when a 'civil action … creates a distraction and forces [congressmen] to divert their time, energy, and attention from their legislative tasks to defend the litigation'" (second and third alterations in original) (first quoting *United States v. Brewster*, 408 U.S. 501, 524 (1972); and then quoting *Eastland*, 421 U.S. at 503)); *Brown & Williamson*, 62 F.3d at 419 ("[I]f that were so [and a person could discover the source of documents that Congress

had obtained], any person facing the prospect of testimony before Congress could initiate discovery proceedings to reach documents that Congress had not prepared itself. That certainly would 'chill' any congressional inquiry; indeed, it would cripple it.").

4. Once the legislative-act test is met, "that is the end of the matter" for the courts. *See MINPECO*, 844 F.2d at 861. That test is met here, and Schilling's efforts to avoid the Clause's absolute immunity fail.

a. Schilling claims that the requested materials are not protected by the Clause because they will show that a Committee Member and staff violated House Rules or a federal statute, *see* Br. at 18-19, but this Court has rejected that argument many times, *see, e.g.*, *Rangel*, 785 F.3d at 24 ("An act does not lose its legislative character simply because a plaintiff alleges that it violated the House Rules, … or even the Constitution …. Such is the nature of absolute immunity, which is—in a word—absolute."); *Judicial Watch*, 998 F.3d at 992 ("Judicial Watch's contention that the Committee's subpoenas 'are outside the ambit of the Speech or Debate Clause because they were issued contrary to the rules of both the House and [the Committee]' also fails." (alteration in original) (citation omitted)).

"The privilege of absolute immunity 'would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader ….'" *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998)

(first alteration in original) (citation omitted). The claim that the Congressional Defendants' "conduct cannot be 'legislative' because it was … illegal" is thus a "'familiar' argument—made in almost every Speech or Debate Clause case—[and] has been rejected time and again." *Rangel*, 785 F.3d at 24 (citing *Eastland*, 421 U.S. at 510). Schilling's argument fares no better.

b. Nor does Schilling's argument that the Committee's investigation had an improper purpose change the analysis. *See* Br. at 19 (speculating about the true objective and purpose of the Committee's investigation). As the district court explained, when analyzing Speech or Debate Clause immunity, "[l]egislators' motives do not matter." JA113 (citing *Bogan*, 523 U.S. at 54-55). Rather, courts assess the "nature of the act" to determine "whether, stripped of all considerations of intent and motive … [the challenged] actions [a]re legislative." *Bogan*, 523 U.S. at 54-55.

Here, stripped of intent and motive, Schilling requests materials, to the extent they exist, that were generated when the Committee relied on informal information-gathering techniques as it pursued an investigation. Schilling's arguments about the true purpose of the investigation or the Committee's purported use of the materials he requested are "irrelevant." *See Brown & Williamson*, 62 F.3d at 419 ("Contrary to appellant's reading, the purposes behind the subpoenas—or their potential for embarrassment, if enforced—were irrelevant to the holding in

[*MINPECO*, 844 F.2d 856, and *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 526 (9th Cir. 1983)].").

c. Schilling's related argument that the materials he seeks were "generated when certain Members and staff specifically chose to step outside of the legislative arena to assist private litigants … and … to use their respective office and investigatory power for impermissible purposes," *see* Br. at. 20, fails for similar reasons. At bottom, he questions the Committee's true motive and argues that the Committee's investigation had a purpose different from the one it gave publicly. *See* JA10, ¶ 10; 14, ¶ 17 (citing to and quoting from the Committee's public statements).

The argument falls flat because the court's assessment of the act is "objective," *id.* at 114, and it is "bound to presume that the action of the legislative body was with a legitimate object, if it is capable of being so construed," *McGrain v. Daugherty*, 273 U.S. 135, 178 (1927) (citation omitted). These acts—informal information-gathering activities involving third parties—are techniques that nearly every committee uses when investigating potential legislative reforms; they are thus easily construed as having a legitimate object, and courts "have no right to assume that the contrary was intended." *See id.* (citation omitted); *see also MINPECO*, 844 F.2d at 860 ("The issue, therefore, is not whether the information sought might reveal illegal acts, but whether it falls within the legislative sphere.").

C. The Clause Applies to All of the Congressional Defendants, Including the House Itself and the Committee[3]

1. While the Speech or Debate Clause mentions "Senators and Representatives," U.S. Const. art. I, § 6, cl. 1, binding precedent makes clear that the Clause's protection extends more broadly: the Clause shields the House itself, House committees, and House employees when a legislative act is at issue. *See, e.g.*, *Fields v. Off. of Eddie Bernice Johnson*, 459 F.3d 1, 13 n.22 (D.C. Cir. 2006) ("[T]he Supreme Court has held that legislative committees may invoke the Clause. … Precedent in this circuit is to the same effect."); *MINPECO*, 844 F.2d at 859 ("We also note that the scope of the immunity the Speech or Debate Clause affords *the subcommittee*, its members, and staff is a pure question of law that we review de novo." (emphasis added)).[4]

When analyzing Speech or Debate Clause immunity, both the Supreme Court and this Court have treated Congress itself, Congressional committees, and Members identically. *See, e.g.*, *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951)

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[3] In its April 11, 2023 order, the Court directed the parties to address "whether the Committee itself or the House itself, as opposed to its Members, is immune from this lawsuit under the Speech or Debate Clause of the Constitution or under principles of federal sovereign immunity." Doc. 1994233.

[4] *See also Meadows v. Pelosi*, No. 21-cv-03217, 2022 WL 16571232, at *4 (D.D.C. Oct. 31, 2022) ("Although the text of the Clause frames the immunity as belonging to 'Senators and Representatives,' the Court of Appeals has applied the immunity to individual Members of Congress and congressional committees alike." (citation omitted)).

(holding "the individual [Member] defendants and the legislative committee were acting in a field where legislators traditionally have power to act" and were thus entitled to immunity); *Judicial Watch*, 998 F.3d at 991-93 (affirming dismissal on Speech or Debate Clause grounds without distinguishing between the subcommittee and its chairman, both of which were named defendants); *Brown & Williamson*, 62 F.3d at 416 ("The privilege also permits *Congress* to conduct investigations and obtain information without interference from the courts …." (emphasis added)); *Senate Permanent Subcomm. on Investigations v. Ferrer*, 856 F.3d 1080, 1085 (D.C. Cir. 2017) ("[A]s the Subcommittee points out, because it is *Congress* that holds Ferrer's documents, he must contend with the cloak of protection afforded by the Constitution's separation of powers, including the Speech or Debate Clause …." (emphasis added)). Indeed, in *Ferrer*, this Court held that Speech or Debate Clause immunity applied in a case where only a Senate subcommittee, but no Member, was a party. 856 F.3d at 1086-87 (holding that Speech or Debate Clause prevented the Court from ordering the subcommittee to return or destroy documents).

2. Treating the House itself, House committees, and Members identically for Speech or Debate Clause purposes accurately reflects the way that Members discharge their official duties and promotes the Clause's aims.

a. Just as modern legislative practice depends on aides and assistants, who act as Members' "alter egos," *see Gravel*, 408 U.S. at 616-17, it also relies on Congressional committees. For example, the House Rules create numerous standing committees, and "[a]ll bills, resolutions, and other matters relating to subjects within the jurisdiction of the standing committees … shall be referred to" them. Rule X.1, Rules of the U.S. House of Representatives, 117th Cong. (2021) (House Rules).[5] The Rules also charge these committees with various oversight duties and empower them to use investigative methods necessary to discharge those duties. *See, e.g.*, House Rules X.2 (general oversight responsibilities), XI.2(m)(1)(B) (subpoena power). Given the way the House has organized itself, many challenges to Congressional activity involve a committee in some way. *See, e.g.*, *Eastland*, 421 U.S. at 505 (analyzing a subcommittee's investigation).

Carving out the House itself or House committees from the Clause's immunity would directly conflict with the Supreme Court's instruction to read the Clause "broadly to effectuate its purposes," *see id.* at 501, and would undermine legislative independence, protection of which is a "central object" of the Clause, *see McCarthy*, 5 F.4th at 38. Because Congress performs much of its core

[5] The Rules of the 117th Congress were in effect when Schilling filed this lawsuit. *Available at* https://perma.cc/3YHT-QHJX. We thus cite to those rules, which, in relevant part, are substantively identical to the Rules of the 118th Congress.

legislative work through committees, excepting them from the Clause's immunity would place substantial pressure on Congress to significantly change how it conducts official business. The Speech or Debate Clause is meant to protect Congress from such interference. *See Eastland*, 421 U.S. at 502.

b. Refusing to recognize that the House itself or House committees are protected by Speech or Debate Clause immunity would also create a pleading gimmick that would swallow the privilege. A plaintiff could generally name the House itself or a committee when challenging legislative acts that would otherwise be covered by the Clause under longstanding precedent.

Take the Supreme Court's decision in *Eastland*. There, the plaintiffs challenged a subpoena that a subcommittee issued, and, in considering Speech or Debate Clause immunity, the Court focused on the nature of the *subcommittee's investigation*, not on any individual Member's acts. *See generally* 421 U.S. at 503-07. The plaintiffs named as defendants the subcommittee chairman, other Members of the subcommittee, and a subcommittee staffer. *Id*. at 495. The Court held that the subpoena was a legislative act protected by the Speech or Debate Clause. *Id.* at 507. But if the House itself or House committees are removed from the scope of the Clause's immunity, a plaintiff could just name the relevant Congressional chamber or committee as the defendant, and the legislative act—a subpoena that furthers a Congressional investigation—would lose its Speech or

Debate Clause protection. This would essentially open any legislative act up to any challenge under any theory, and Congress, among other things, would constantly find its investigative efforts tied up in legal challenges.

Allowing plaintiffs to easily plead around the Clause would turn the Supreme Court's directive that legislators "should be protected not only from the consequences of litigation's results but also from the burden of defending themselves," *Dombrowski*, 387 U.S. at 85, on its head. As a practical matter, it would eviscerate one of the Clause's central safeguards.

3. Additionally, Schilling argues that the Committee does not enjoy Speech or Debate Clause immunity here because, in the past, courts have "entertained suits by and against the same Congressional Committee." Br. at 11. This argument fails.

a. Schilling's position that the Committee cannot claim immunity here because it has initiated affirmative litigation in the past appears to be a type of waiver argument. *See* Br. at 12. Such an argument is inconsistent with Supreme Court precedent and common sense.

The position of the Congressional Defendants is that the absolute immunity afforded by the Speech or Debate Clause cannot be waived. But even if Speech or Debate Clause immunity could be waived, any waiver could "be found only after explicit and unequivocal renunciation of the protection." *United States v.*

Helstoski, 442 U.S. 477, 491 (1979). The Committee's previous enforcement actions do not in any way renunciate the privilege in a future case (let alone amount to an explicit and unequivocal renunciation), and Schilling cites no case to support that proposition. We are unaware of any case holding a party that enjoys immunity from suit waives that immunity by initiating a different lawsuit involving different parties on a different issue.

This Court's precedent supports this common-sense understanding and undermines Schilling's argument. For example, in *Ferrer*, a Senate subcommittee sued a subpoena recipient to enforce a subpoena. 856 F.3d at 1084. During that litigation, the recipient asked the Court to order the subcommittee to return or destroy the documents that he had produced. *Id.* at 1085. The subcommittee argued that the Speech or Debate Clause prevented the Court from doing so, *id.* at 1085-86, and the recipient argued that the subcommittee could not rely on the Clause because it had "subject[ed] itself to th[e court's] jurisdiction" by suing to enforce the subpoena, *id.* at 1086 (first alteration in original). This Court rejected that argument and held that the subcommittee did not "forfeit[] its constitutional protections by seeking judicial enforcement of a subpoena." *Id.* at 1087; *see also id.* ("[T]he Senate Report accompanying the statute's [28 U.S.C. § 1365] enactment states that '[w]hen Congress petitions the court in a subpoena enforcement action, Congress does not waive its immunity from court interference

with its exercise of its constitutional powers.'" (third alteration in original) (citation omitted)). If the Senate subcommittee was entitled to Speech or Debate Clause immunity *in a case that it filed*, surely the Committee here is entitled to the same protection when it is sued notwithstanding its prior initiation of unrelated litigation.

Nor do the Committee's affirmative enforcement cases show that it is "content with certain distractions," as Schilling claims. *See* Br. at 12. Affirmative cases that enforce subpoenas protect the Committee's investigative interests, just as raising Speech or Debate Clause immunity does here. Committees use subpoena enforcement actions as a tool to advance their investigations. *See, e.g.*, *Ferrer*, 856 F.3d at 1087 ("In ordering compliance with the Subcommittee's subpoena, the district court merely aided the Senate in effectuating its inherent subpoena power. The Subcommittee did not thereby necessarily invite the courts' interference with constitutionally protected legislative activity.").

Raising Speech or Debate Clause immunity when a third party seeks to interfere with committees' investigative processes—like Schilling's efforts to compel the production of confidential materials here—also advances their investigative activities. In such cases, the Clause protects the Committee from distractions and drains on its resources (*e.g.*, time spent responding to a request for documents or litigating a case) that would detract from its investigative work and

threaten its independence. Far from "seek[ing] a status that renders it above the law," Br. at 13, the Committee simply exercises its constitutional protection when it raises Speech or Debate Clause immunity. In doing so, it "reinforc[es] the separation of powers." *See Eastland*, 421 U.S. at 502.

b. Schilling relies on the *Mazars* litigation to support his claim that the Speech or Debate Clause does not deprive the Court of jurisdiction and argues that the Supreme Court decided *Mazars* without raising any Speech or Debate Clause concerns. *See* Br. at 11-12. This argument fundamentally misunderstands that case.

Quite simply, the Supreme Court in *Mazars* did not analyze the Speech or Debate Clause because the committees never invoked the Clause's immunity. *See generally Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020). It is not the case, as Schilling seems to suggest, that the Court considered the issue and ultimately concluded there were no Speech or Debate Clause concerns.[6]

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[6] Schilling also suggests that the district court in *Mazars* considered whether the Speech or Debate Clause barred the suit and ultimately concluded that it did not. *See* Br. at 11 ("In [*Mazars*], this Court and the District Court both took the position that the 'Constitution's Speech or Debate Clause forecloses Plaintiffs from compelling discovery from the Oversight Committee, its Members, or staff.' … But neither court expressed any concern that the Clause barred the suit entirely." (quoting *Trump v. Comm. on Oversight & Reform of U.S. House of Representatives*, 380 F. Supp. 3d 76, 89 (D.D.C. 2019))). That suggestion is wrong and also lacks context. The court mentioned the Clause only as a reason

Moreover, the dispute in *Mazars* was whether particular Congressional subpoenas were enforceable. 140 S. Ct. at 2026-29. Schilling, by contrast, is not the subject of any Congressional action, and *Mazars*, which considered Congress's authority to subpoena certain materials, *id.* at 2029-36, has nothing to do with the issue here: whether the Speech or Debate Clause bars a third party from trying to compel Congress to release its confidential materials. *See Ass'n of Am. Physicians & Surgeons v. Schiff*, 518 F. Supp. 3d 505, 519 (D.D.C. 2021) ("*Mazars* … has no bearing on whether Congressman Schiff's actions are protected legislative acts under the Clause."), *aff'd on other grounds*, 23 F.4th 1028 (D.C. Cir. 2022); *Meadows*, 2022 WL 16571232, at *12 ("*Mazars* thus addressed the underlying merits question of the subpoena's enforceability and appears to have 'no bearing' on whether a congressional defendant's actions are 'protected legislative acts under the Clause.'" (citation omitted)).

4. Beyond protecting the House itself, the Committee, and Members, the Speech or Debate Clause also shields the House Clerk and Chief Administrative Officer from this lawsuit. As explained above, Schilling's claim is predicated on a legislative act. The Clause thus applies, and all of the Congressional Defendants,

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why it consolidated a preliminary injunction motion with a trial on the merits under Rule 65(a)(2) of the Federal Rules of Civil Procedure and expedited the case. *See Trump*, 380 F. Supp. 3d at 89. The committee never raised the issue of immunity, and the district court never considered whether the committee enjoyed Speech or Debate Clause immunity from the suit. *See generally* 380 F. Supp. 3d 76.

including the House Clerk and Chief Administrative Officer, have absolute immunity. *See Rangel*, 785 F.3d at 24. While Schilling argues (Br. at 20) that Speech or Debate Clause immunity doesn't apply because he sued "administrative and ministerial parties," this purported ministerial-defendant exception is inconsistent with binding precedent, and Schilling cites no authority to support his claim.

As this Court recently explained, "[t]he 'key consideration, Supreme Court decisions teach, is the act presented for examination, not the actor.'" *McCarthy*, 5 F.4th at 39; *see also Gravel*, 408 U.S. at 618 ("We have little doubt that we are neither exceeding our judicial powers nor mistakenly construing the Constitution by holding that the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself."); *Eastland*, 421 U.S. at 507 ("We draw no distinction between the Members and the Chief Counsel.").

The district court rightly concluded that allowing a litigant to "evade" Speech or Debate Clause immunity "by simply naming an 'administrative' or 'ministerial' defendant alongside a covered individual" "would be untenable—a plaintiff could obtain congressional records by simply adding a defendant from the House information technology office to a suit against a congressman. That

'administrative defendant' exception would swallow the immunity rule whole." JA113.

D. Schilling's Other Arguments Fail

Schilling's other attempts to avoid the absolute nature of Speech or Debate Clause immunity fall short.

1. Relying on Judge Henderson's concurrence in *Judicial Watch*, Schilling argues that the Court must balance the common law right of access against Speech or Debate Clause immunity. Br. at 7-8. This argument, which relies on a concurring opinion that no other panel member joined, misses the mark.

In *Judicial Watch*, the plaintiff claimed that it had a right to access a committee's subpoenas and the responses to those subpoenas under the common law right of access. 998 F.3d at 991. This Court held that the Speech or Debate Clause barred the suit. *Id.* at 993. Judge Henderson "join[ed] in the judgment only" because she "believe[d], in the right case, the application of the Speech or Debate Clause to a common law right of access claim would require careful balancing." *Id.* (Henderson, J., concurring in the judgment).

Neither Schilling's brief nor Judge Henderson's concurrence explains how a plaintiff in the "right case," *id.*, could establish subject matter jurisdiction. No plaintiff could. This is because the Court has held that "[t]he Speech or Debate Clause operates as a jurisdictional bar when the actions upon which a plaintiff

[seeks] to predicate liability [are] legislative acts.'" *Howard v. Off. of Chief Admin. Officer of U.S. House of Representatives*, 720 F.3d 939, 941 (D.C. Cir. 2013) (alterations in original) (citation omitted). This jurisdictional bar explains why, once the legislative-act test is satisfied, "that is the end of the matter" for the courts. *MINPECO*, 844 F.2d at 861. The concurring opinion doesn't address this aspect of the Speech or Debate Clause analysis.

Furthermore, applying a balancing test would be fundamentally inconsistent with the absolute nature of the immunity. *See Rangel*, 785 F.3d at 24; *see also Eastland*, 421 U.S. at 509 n.16 (concluding that once an "activity is found to be within the legitimate legislative sphere, balancing plays no part"); *United States v. Rayburn House Off. Bldg., Room 2113*, 497 F.3d 654, 662 (D.C. Cir. 2007) (explaining that "the non-disclosure privilege for written materials described in *Brown & Williamson* … is … absolute, and thus admits of no balancing"); *Meadows*, 2022 WL 16571232, at *12 (noting that courts balance executive and legislative interests in certain circumstances "when Speech or Debate Clause immunity is *inapplicable*"). As the district court explained, "[e]ngaging in a 'balancing' of interests would subvert [the Clause's absolute] jurisdictional limitation." JA115.

Despite recognizing that this Court has "never applied the second-step balancing test to a common law right of access claim seeking non-judicial

records," *Judicial Watch*, 998 F.3d at 996 (Henderson, J., concurring in the judgment), the concurring opinion assumed, with no explanation, that the same factors that apply to judicial records would apply to Congressional records. But judicial records and Congressional records do not stand on equal constitutional footing. The Constitution does not protect judicial records with any Speech-or-Debate-Clause-like immunity. Given that key distinction, and the importance of legislative independence to the Framers, there is no reason to think that efforts to require the disclosure of the Congressional materials Schilling seeks here should be subject to the same balancing test applicable to the disclosure of judicial records. *See United States v. Johnson*, 383 U.S. 169, 178 (1966) ("[T]he privilege has been recognized as an important protection of the independence and integrity of the legislature.").

2. Schilling contends that the district court erred by "refus[ing] to conduct any inquiry at all into whether the matters [he] described were 'related to' versus 'part of' the legislature's functioning, or possible 'illegal conduct' outside of such functioning." Br. at 16. This argument ignores the district court's analysis and is inconsistent with this Court's precedent.

The district court properly concluded that the materials Schilling seeks are a core part of the legislative process and not merely related to it. *See, e.g.*, JA111 ("Schilling's request implicates a core legislative activity—conducting

investigative hearings on potential legislation."); *id.* at 112 ("True, the records Schilling requested reflect preparation for an investigative hearing, not the hearing itself. But surely preparation for a hearing is 'an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings.'" (quoting *Gravel*, 408 U.S. at 625)). It is hard to imagine how a legislative act could be "a core legislative activity" without also being "part of the legislature's functioning," and Schilling's brief offers no reason to think otherwise.

Turning to Schilling's allegation of unlawful conduct, the district court correctly refused to probe the lawfulness of the Congressional Defendants' actions. *See MINPECO*, 844 F.2d at 860. Because Schilling's request implicates a core legislative activity—and the legislative-act test is satisfied—the court's objective inquiry ends, and it does not consider the merits of any underlying claim of illegality. *See id.* at 861; JA113-14.

Fields, a case brought under the Congressional Accountability Act that Schilling relies upon, Br. at 16, does not support his argument. There, the Court merely held that the challenged acts—employment actions including an allegedly discriminatory demotion and termination—were not legislative acts. *See Fields*, 459 F.3d at 6, 13.

The Court in *Fields* did not, as Schilling seems to suggest, create an exception to Speech or Debate Clause immunity for suits against a Member's personal office. Indeed, the Court recognized that "[t]he Speech or Debate Clause operates as a jurisdictional bar when 'the actions upon which [a plaintiff] sought to predicate liability were legislative acts.'" *Id.* at 13 (second alteration in original) (citation omitted). The Court simply found that the consolidated lawsuits, as pled, did not "predicate liability on protected conduct." *Id.* The Court also pointed out that the Clause would still bar any inquiry into a legislative act. *Id.* at 14 (noting that the Clause "protect[s] Members from inquiry into legislative acts or the motivation for actual performance of legislative acts" (alteration in original) (citation omitted)); *see also id.* at 17 ("[A] Member's personal office may be liable under the Accountability Act for misconduct provided that the plaintiff can prove his case without inquiring into 'legislative acts or the motivation for legislative acts'" (citation omitted)).

Schilling's claim here, however, is predicated on and involves an inquiry into a legislative act—the core legislative activity of gathering information using informal means as part of the Committee's investigation. *Fields* thus does not support Schilling's argument.

3. Schilling maintains that his lawsuit does not challenge the independence of the legislature, Br. at 18, but that ignores the nature of his claim. The

Committee has exercised its authority not to make public the materials Schilling has requested, should they exist, yet he asks the Court to force the Committee to do so. This goes to the very heart of Congressional independence.

Under the Constitution, the House has the power to determine its own rules and to publish a journal, except for parts that may require secrecy. U.S. Const. art. I, § 5, cls. 2, 3. Accordingly, this Court has recognized the House's constitutional authority to control its records as it sees fit. *Goland v. CIA*, 607 F.2d 339, 346 (D.C. Cir. 1978) ("Congress has undoubted authority to keep its records secret, authority rooted in the Constitution, longstanding practice, and current congressional rules."), *vacated in part on other grounds*, 607 F.2d 367 (D.C. Cir. 1979) (per curiam).

The Oversight Committee, like all House committees, is authorized under House Rules to decide which documents and what information to make publicly available. *See, e.g.*, House Rules XI.2(e)(3), VII.3(b)(3), VII.4(b). Consistent with that authority, this Court has acknowledged that Congress has the right to "insist on the confidentiality of investigative files." *See Brown & Williamson*, 62 F.3d at 420.

Compelling the Committee to release its confidential materials would necessarily encroach upon Congress's independence—independence that is set out in the Constitution, reflected in the House rules, and respected by this Court's

precedent. Schilling's attempt to inject the Judicial Branch into the House's internal affairs also brings into play the Clause's "central role" of "prevent[ing] … accountability before a possibly hostile judiciary." *See Gravel*, 408 U.S. at 617.

* * *

Schilling's suit is premised on a legislative act, and the materials he seeks fall within the coverage of Speech or Debate Clause immunity. His action is therefore barred, and the district court's decision dismissing Schilling's suit for lack of jurisdiction must be affirmed.

II. SOVEREIGN IMMUNITY BARS SCHILLING'S SUIT

In addition to being barred by the Speech or Debate Clause, Schilling's suit is also barred by the doctrine of sovereign immunity.

A. Sovereign Immunity Applies to All of the Congressional Defendants

"The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983). And "sovereign immunity extends to the United States Congress when it is sued as a branch of the government." *McLean v. United States*, 566 F.3d 391, 401 (4th Cir. 2009), *abrogated on other grounds by Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721 (2020); *see also Rockefeller v. Bingaman*, 234 F. App'x 852, 855 (10th Cir. 2007) ("We agree with the district court that '[s]overeign immunity forecloses Rockefeller's claims against the House

of Representatives and Senate as institutions ….'" (first alteration in original) (citation omitted)).

It likewise applies to Congressional committees when they are sued. *See Ward v. Thompson*, No. 22-cv-08015, 2022 WL 4386788, at *4 (D. Ariz. Sept. 22, 2022) ("[S]overeign immunity plainly bars Plaintiffs' claims against the Select [House] Committee."), *appeal dismissed*, No. 22-16473, 2022 WL 18028539 (9th Cir. Nov. 21, 2022); *cf. Albrecht v. Comm. on Emp. Benefits of Fed. Rsrv. Emp. Benefits Sys.*, 357 F.3d 62, 67 (D.C. Cir. 2004) (explaining that "[f]ederal agencies or instrumentalities performing federal functions *always* fall on the 'sovereign' side of [the] fault line; that is why they possess immunity that requires waiver" (alterations in original) (citation omitted)); *Baugh v. U.S. Capitol Police*, No. 22-cv-139, 2022 WL 2702325, at *4 (D.D.C. July 12, 2022) (concluding that sovereign immunity applies to the U.S. Capitol Police).

Sovereign immunity also protects Congressional Members and employees who are sued in their official capacities. *See, e.g.*, *Lewis v. Clarke*, 581 U.S. 155, 163 (2017) ("Defendants in an official-capacity action may assert sovereign immunity."); *Clark v. Libr. of Cong.*, 750 F.2d 89, 102-05 (D.C. Cir. 1984) (holding that monetary claims against the Librarian of Congress in his official capacity were barred by sovereign immunity); *Rockefeller*, 234 F. App'x at 855 ("We agree with the district court that '[s]overeign immunity forecloses

Rockefeller's claims against … Representative Pearce and Senator Bingaman as individuals acting in their official capacities.'" (first alteration in original) (citation omitted)).

Here, Schilling sued the House itself, the Committee, the Speaker, and two House employees in their official capacities. JA11-12. Thus, all of the Congressional Defendants are immune from this lawsuit pursuant to sovereign immunity unless Schilling can establish that it has been waived. *See Tri-State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 575 (D.C. Cir. 2003) (party suing the United States "bears the burden of proving that the government has unequivocally waived its immunity").

B. Schilling Hasn't Demonstrated that Sovereign Immunity Has Been Waived

As the plaintiff, it is Schilling's burden to identify "[a] waiver of the Federal Government's sovereign immunity" that is "unequivocally expressed in statutory text." *See Lane*, 518 U.S. at 192.

1. None of the statutes Schilling cited in his amended complaint waive sovereign immunity. JA7, ¶¶ 1-2. The general federal jurisdiction statute, 28 U.S.C. § 1331, does not. *See, e.g.*, *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996) ("Neither the general federal question statute nor the mandamus statute by itself waives sovereign immunity."). The mandamus statute, 28 U.S.C. § 1361, "does not by itself waive sovereign immunity." *Wash. Legal Found.*, 89 F.3d at

901; *see also Swan*, 100 F.3d at 981. In fact, the mandamus statute does not even apply to Congress; it applies only to the Executive Branch. *See Semper v. Gomez*, 747 F.3d 229, 250 (3d Cir. 2014) ("[I]t appears that Congress, in enacting § 1361 …, 'was thinking solely in terms of the executive branch ….'" (quoting *Liberation News Serv. v. Eastland*, 426 F.2d 1379, 1384 (2d Cir. 1970))); *United States v. Choi*, 818 F. Supp. 2d 79, 84 (D.D.C. 2011) ("[Section] 1361 is only a source of jurisdiction for district courts to exercise writs of mandamus to employees of the *Executive* branch.").

Neither does the statute that sets forth the general rules for the procurement of consultants by House and Senate committees, 2 U.S.C. § 4301(i)(3), have the "unequivocally expressed" waiver that Supreme Court precedent requires. *See Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008). Indeed, it doesn't mention judicial review at all. Likewise, the Declaratory Judgment Act, 28 U.S.C. § 2201, also lacks the necessary waiver of sovereign immunity, *see Benvenuti v. Dep't of Def.*, 587 F. Supp. 348, 352 (D.D.C. 1984), and does not provide an independent grant of jurisdiction when a court otherwise lacks subject matter jurisdiction, *see Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). The same goes for the All Writs Act, 28 U.S.C. § 1651, which Schilling cited in his jurisdictional statement, Br. at 5, despite failing to raise that statute below, *see, e.g.*, *Raiser v.*

Gelmis, No. 22-cv-62, 2023 WL 121222, at *4 (D. Mont. Jan. 6, 2023); *Hall v. Richardson*, No. 95-cv-1907, 1997 WL 242765, at *2 (D. Ariz. Feb. 21, 1997).

2. Schilling attempts to rely on the *Larson-Dugan* exception to sovereign immunity, Br. at 14, which applies to "'suits for specific relief against officers of the sovereign' allegedly acting 'beyond statutory authority or unconstitutionally.'" *Pollack*, 703 F.3d at 120 (citation omitted).

Schilling, however, has not shown that any of the Congressional Defendants have violated any statute that could trigger the exception here. Schilling alleges that the Congressional Defendants failed to comply with the common law right of access, and thus asks the Court to compel them to turn over the requested materials. JA40. But the common law right of access is not a duty imposed by statute, so it does not trigger the exception. *See Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 695 (1949) ("We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law …."); *Maynard v. Architect of the Capitol*, 544 F. Supp. 3d 64, 81 (D.D.C. 2021) ("The Court concludes that the *Larson-Dugan* exception is inapplicable here because the plaintiff has identified no statutory source of authority that limits the defendant's actions …. [T]o the extent that the defendant's human resources manual imposes any duty on the defendant[,] … the duty does not stem from a statute ….").

Nor does the mandamus statute, 28 U.S.C. § 1361, help Schilling for the purposes of the *Larson-Dugan* exception. As explained above, the mandamus statute applies only to the Executive Branch—not Congress—and Schilling does not argue otherwise. That distinguishes this case from *Washington Legal Foundation* (a case that did not involve Congress), where this Court noted that no separate waiver of sovereign immunity is needed when a plaintiff seeks a writ of mandamus "to force a public official to perform a duty imposed upon him in his official capacity." 89 F.3d at 901. Indeed, the Court's conclusion in *Washington Legal Foundation* that the *Larson-Dugan* exception merged the question of sovereign immunity with the merits of the common law right of access depended on whether the defendants owed the plaintiff a non-discretionary legal duty enforceable under the mandamus statute. Because the mandamus statute does not apply to Congress, there is no statutory duty here to trigger the exception.

Schilling's claims that the Committee violated House Rules, the statutory limit on voluntary services (31 U.S.C. § 1342), and the consultant-procurement statute (2 U.S.C. § 4301), *see* Br. at 13-14 (citing JA22-27), do not trigger the exception, either. Neither the House Rules nor those two statutes require the document production that Schilling is seeking. Indeed, he makes no such claim in his brief. Rather, Schilling merely asserts that the materials he is requesting, if

disclosed, would reveal violations of House Rules and those two statutes, an allegation that is irrelevant to whether the *Larson-Dugan* exception applies here.

Nor has Schilling shown that the Congressional Defendants have violated the Constitution. Likely trying to squeeze into the *Larson-Dugan* exception for officers who act unconstitutionally, Schilling makes a passing reference to "grave Due Process concerns." Br. at 14. This fares no better than his other attempts to circumvent sovereign immunity.

Again, this case is based on an alleged violation of the common law right of access that Schilling asks the Court to remedy by compelling the House to release certain materials. He has not alleged that the Congressional Defendants' refusal to disclose these materials constitutes a constitutional due process violation. Nor could he successfully do so. And vague "Due Process concerns" concerning the manner in which the Committee conducted its underlying investigation are not relevant to whether the *Larson-Dugan* exception is triggered here. They do not speak to whether the Congressional Defendants violated the Constitution by refusing to disclose the materials Schilling requested.[7]

[7] In his jurisdictional statement, Schilling cites *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996), as a purported basis for the district court's jurisdiction. Br. at 5. There, this Court held that the *Larson-Dugan* exception to sovereign immunity *did* apply because the plaintiff alleged that the President's action (not Congress's) violated a statutory duty. *See* 100 F.3d. at 981. Because that exception does not apply here, *Swan* does not help Schilling.

* * *

In short, Schilling's suit is barred by sovereign immunity, and this Court may affirm the district court's judgment on this independent basis.

III. SCHILLING FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

The Constitution gives the House exclusive control over its own documents, and that constitutional authority displaces any common law right of access that might otherwise exist. However, even if the common law right of access did apply to Congressional documents, it would not apply here because the materials Schilling seeks, to the extent they exist, are not public records. They do not memorialize any official action and carry no independent legal significance. And even if they were public records, the House's substantial interest in confidentiality outweighs any purported public interest in their disclosure.

A. The Common Law Right of Access Does Not Apply to Congress

1. As explained above, the Constitution expressly gives the House the power to adopt its own rules and to keep and publish a journal of its proceedings, including the power to decide what material to keep confidential and out of the public domain. *See* U.S. Const. art. I, § 5, cls. 2, 3; *see also* House Rule XI.2(k)(7) ("Evidence or testimony taken in executive session, and proceedings conducted in executive session, may be released or used in public sessions only when authorized by the committee …."). These clauses are just two features of a comprehensive

constitutional framework that gives Congress exclusive authority over its operations. For example, Article I grants the House the powers to (1) punish and expel Members for disorderly behavior, (2) judge the election and qualification of its Members, (3) choose the Speaker of the House and other officers, (4) impeach, and (5) override presidential vetoes. *See* U.S. Const. art. I, §§ 2, 5, 7.

Accordingly, this Court has expressly recognized Congress's constitutional right to manage its documents as it sees fit, including the power to maintain the confidentiality of its materials. *Goland*, 607 F.2d at 346; *see also In re Shepard*, 800 F. Supp. 2d 37, 41 (D.D.C. 2011) (denying a request to release Watergate-related Congressional records, when no House or Senate rule permitted access to those records, and explaining that decisions about "public access to congressional records are properly committed to Congress" and that "[t]he judiciary has never asserted the institutional competence to make such decisions"). Congress's express constitutional authority to manage its operations, including its right to decide whether to make materials publicly available, displaces any purported common law right of access. *See* U.S. Const. art. VI, cl. 2 (Supremacy Clause); *cf. In re Motions of Dow Jones & Co.*, 142 F.3d 496, 504 (D.C. Cir. 1998) (recognizing common law rights supplanted by the Federal Rules of Criminal Procedure).

A contrary result where the judiciary is empowered to require Congress to disclose confidential records would raise serious separation of powers concerns. *Cf. Ferrer*, 856 F.3d at 1086 (explaining this Court "held that the separation of powers barred it from enjoining a Senate committee from … '*disclosing*' the contents of telegraphs a Senate committee had unlawfully obtained" and noting that the Court knew "of no case in which it has been held that a court of equity has authority to do" so (citation omitted)); *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 225-26 (D.C. Cir. 2013) (explaining that "requiring the disclosure of documents or information generated by Congress itself" would give rise to "separation-of-powers concerns"); *Hearst v. Black*, 87 F.2d 68, 71 (D.C. Cir. 1936) (noting "the universal rule … is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference").

2. Schilling wrongly suggests this Court has held that the common law right of access applies to Congressional documents. It has not, and he overstates both this Court's and district court decisions.

Schilling contends the district court in *Schwartz* held "that Congress is subject to the common law rule which guarantees the public a right to inspect and copy public records." Br. at 21-22 (quoting *Schwartz v. DOJ*, 435 F. Supp. 1203, 1204 (D.D.C. 1977)). He then claims that "[t]his Court affirmed th[at] ruling" and

therefore maintains that "the District Court [below] effectively overruled this Court." *Id.* at 22. To be sure, this Court did affirm the *Schwartz* judgment in a single-word unpublished opinion, *Schwartz v. DOJ*, 595 F.2d 888 (D.C. Cir. 1979). But that decision did *not* create any common law right of access precedent regarding Congress, and Schilling is flatly wrong to suggest the district court here disregarded this Court's precedent.[8]

Schwartz involved requests to the U.S. Department of Justice (DOJ) (under the Freedom of Information Act (FOIA)) and to Representative Peter Rodino (under the common law right of access). 435 F. Supp. at 1203. By the time *Schwartz* was appealed to this Court, Chairman Rodino had voluntarily turned over the requested documents and was no longer involved in the case. On December 12, 1977, the district court granted Chairman Rodino's summary judgment motion based on his attestation that he provided Schwartz with any responsive documents. *See Rep. of the H. Comm. on the Judiciary Identifying Court Proceedings and Actions of Vital Interest to Cong.*, No. 5, 97th Cong., at 96 (Comm. Print 1979) (H. Print No. 97-5); *Rep. of the H. Select Comm. on Cong. Operations and the S. Comm. on Rules and Administration Identifying Court Proceedings and Actions of*

[8] In fact, per this Court's rules, the Court's 1979 unpublished decision is not even precedential. D.C. Cir. R. 32.1(b)(1)(A) ("Unpublished orders or judgments of this court, including explanatory memoranda and sealed dispositions, entered before January 1, 2002, are not to be cited as precedent.").

Vital Interest to Cong., Part 6, 95th Cong., at 275-76 (Comm. Print 1978) (H. Print No. 95-6).

Later, DOJ separately moved for summary judgment on the documents it withheld under FOIA. H. Print No. 97-5, at 96. On February 9, 1978, the district court ruled in DOJ's favor. *Id.* at 97; H. Print No. 95-6, at 277-81. On March 3, 1978, Schwartz appealed the February 9, 1978 order addressing his claims against DOJ only, and this Court affirmed on April 5, 1979, in the unpublished opinion Schilling cites as "precedent." *Id.* Because the appealed order did not involve House documents, this Court's affirmance in *Schwartz* did not speak to whether the common law right of access applies to Congress.

Finally, as the district court here pointed out (JA115 n.2), there is good reason to doubt the *Schwartz* district court's sweeping statement that "the general rule is that all three branches of government, legislative, executive, and judicial, are subject to the common law right." 435 F. Supp. at 1203. *Schwartz* relied on a 1959 Kentucky Supreme Court case, *Courier-Journal & Louisville Times Co. v. Curtis*, 335 S.W.2d 934, 935 (Ky. 1959), which did not hold that the state legislature—much less Congress—is subject to the common law right of access. Instead, *Curtis* involved judicial records, and the court simply quoted from a treatise that "legislative, executive, and judicial records" may be subject to a right of access. *Id.* at 936 (quoting 45 Am. Jur. § 17, 427-28 (1936)).

Nor did this Court in *Center for National Security Studies v. DOJ*, 331 F.3d 918 (D.C. Cir. 2003), hold that the common law right of access applies to Congress. *See* Br. at 22. That case involved only Executive Branch documents, *see* 331 F.3d at 922, and it did not create binding precedent that applies to Congressional documents. The Court in *Center for National Security Studies* did say that this Court held in another decision, *Washington Legal Foundation*, "that the common law right of access extends beyond judicial records to the 'public records' of all three branches of government." *Id.* at 936. But as the district court here pointed out, *Washington Legal Foundation* involved a committee "within the judicial branch," not Congress, so any claim that the right applies to the Legislative Branch is *dicta*. *See Wash. Legal Found.*, 89 F.3d at 903; JA115 n.2.

Even if this Court believes it is bound by the language in *Center for National Security Studies*, it need not apply the common law right of access to Congress because the Legislative Branch encompasses entities other than Congress, including the U.S. Capitol Police, the Government Accountability Office, the Library of Congress, the Architect of the Capitol, and other entities and offices that support Congress. *See, e.g.*, *Leopold v. Manger*, No. 21-cv-00465, 2022 WL 4355311, at *4 (D.D.C. Sept. 20, 2022) (the U.S. Capitol Police falls within the purview of the Legislative Branch), *appeal pending*, *Leopold v. Pittman*, No. 22-5304 (D.C. Cir.); *Chennareddy v. Bowsher*, 935 F.2d 315, 319 (D.C. Cir.

1991) ("GAO is a legislative branch agency …."); *Wash. Legal Found.*, 17 F.3d at 1449 (the Library of Congress is part of the Legislative Branch and separate from Congress); *Vanover v. Hantman*, 77 F. Supp. 2d 91, 100 (D.D.C. 1999) ("[T]he Architect of the Capitol is considered part of the legislative branch."). These entities do not possess the same constitutional authority as Congress to manage their own affairs, so the common law right could, in theory, apply to them.

Presumably trying to force this case into *Washington Legal Foundation*'s facts, Schilling argues that the "quasi-judicial role" of the Committee's oversight efforts bolsters his claim that the common law right of access applies here. Br. at 23. But he fails to explain how Congress's investigative activities at all resemble the actions of an advisory committee tasked with recommending sentencing guidelines to the U.S. Sentencing Commission. Rather, the materials here were generated during a Congressional investigation with no connection to the Judicial Branch or judicial proceedings. They involve legislative acts undertaken by Congress.

Finally, Schilling cites *Judicial Watch*, 474 F. Supp. 3d at 314, which applied the common law right of access to Congressional documents. Br. at 21-22. The district court there, though, mistakenly believed that binding precedent required it to do so. *Judicial Watch*, 474 F. Supp. 3d at 314 ("Binding precedent in this Circuit ensures that 'the common law right of access extends beyond judicial

records to the public records of all three branches of government.'" (citation omitted)). The district court relied on *Center for National Security Studies* and *Washington Legal Foundation* for that proposition, but as just explained, neither decision held that the common law right of access applies to *Congress*. The *Judicial Watch* court also cited the district court's decision in *Schwartz*, but as explained above, that is a nonbinding and unpersuasive decision.

This Court ultimately affirmed the decision in *Judicial Watch* on Speech or Debate Clause grounds only and did not "consider whether and how the application of the Clause relates to the two-step inquiry to determine whether the common-law right of access applies." 998 F.3d at 993.

In short, notwithstanding Schilling's broad proclamations, this Court has never held that the common law right of access applies to Congress, and it should decline Schilling's invitation to do so now.

B. The Materials Schilling Requests Are Not "Public Records," and the House's Significant Interest in Non-Disclosure Outweighs Any Public Benefit in Disclosure

Even if the common law right of access applied to the House, it does not cover the materials requested by Schilling because they are not "public records." And even if they were, the public's interest in those documents does not outweigh the House's significant confidentiality interest, so Schilling has no right to their disclosure.

The common law right of access is "not absolute." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978); *see also In re Motions of Dow Jones*, 142 F.3d at 504 ("[T]here is … no right of access to 'documents which have traditionally been kept secret for important policy reasons.'" (citation omitted)); *United States v. El-Sayegh*, 131 F.3d 158, 161 (D.C. Cir. 1997) (not all judicial records fall within the common law right of access).

This Court employs a two-step process for determining whether the common law right of access applies to documents. *Wash. Legal Found.*, 17 F.3d at 1451-52.

1. The right applies only to "public records." *Id.* at 1451. A "public record" "is a government document created and kept for the purpose of memorializing or recording an official action, decision, statement, or other matter of legal significance, broadly conceived." *Wash. Legal Found.*, 89 F.3d at 905. "Public records" do not include "documents that are preliminary, advisory, or, for one reason or another, do not eventuate in any official action or decision being taken," and they do "not encompass the preliminary materials upon which an official relied in making a decision or other writings incidental to the decision itself." *Id.* For example, investigative reports prepared by staff at a committee's request do not "memorialize or record any official action taken by the Committee," so they are not "public records" subject to the common law right of access. *Pentagen Techs.*, 20 F. Supp. 2d at 45. Neither are subpoenas. *See Judicial*

Watch, 474 F. Supp. at 315-16 (issuing subpoenas is "a preliminary step to gather information pertinent to the Committee's task … and thus the subpoenas do not qualify as public records subject to the common-law right of public access").[9]

The materials requested here, to the extent they exist, were an initial part of the Committee's investigation, including gathering information in preparation for a hearing. They do not memorialize or record any official action taken by the Committee. Rather, the materials were "so preliminary to any final recommendation that" their creation "lacks the legal significance to constitute a 'public record' to which the right of public access attaches." *Judicial Watch*, 474 F. Supp. 3d at 316 (citing *Wash. Legal Found.*, 89 F.3d at 906). Indeed, they involved investigative steps that generally would be taken before issuing subpoenas or publishing investigative reports, documents that themselves are not public records. *Cf.* JA10, ¶ 10 (alleging that, in announcing its investigation, the Committee said it had "enlisted the aid" of third parties "for advice and planning").

[9] Judge Henderson disagreed with the district court and believed that the subpoenas at issue in *Judicial Watch* were public records. *Judicial Watch*, 998 F.3d at 995 (Henderson, J., concurring). Her concurring opinion placed significant weight on "[t]he potential consequences" of failing to comply with a subpoena. *Id.* It contrasted the subpoenas with "preliminary drafts and internal investigative memoranda prepared at the request of a government decisionmaker," which "carried no independent legal significance." *Id.* The materials that Schilling requested here, of course, carry no independent legal significance and would not be public records even under the concurrence's analysis.

For this reason alone, Schilling has failed to state a claim upon which relief can be granted.

2. Only if a document qualifies as a "public record" does this Court "proceed to balance the government's interest in keeping the document secret against the public's interest in disclosure." *Wash. Legal Found.*, 17 F.3d at 1451-52. This inquiry is not abstract but instead focuses "on the specific nature of the governmental and public interests" related to the document and "the general public interest in the openness of governmental processes." *Id.* at 1452. The Court has never even applied this part of the test to non-judicial records (let alone applied it and held that the balancing favored disclosure). *See, e.g.*, *Judicial Watch*, 998 F.3d at 996 (Henderson, J., concurring) ("We have never applied the second-step balancing test to a common law right of access claim seeking non-judicial records."); *cf. Leopold*, 2022 WL 4355311, at *9 (denying disclosure of documents from the U.S. Capitol Police because the government's interest in restricting access to sensitive information outweighs any "minimal public interest").

Here, Congress has a significant interest in maintaining the confidentiality of its investigative sources, techniques, methods, and deliberative processes. Disclosure of such material could chill its investigative activity, deter third parties from cooperating with Congressional investigations, and assist those seeking to evade Congressional oversight. This confidentiality interest has been expressly

recognized by this Court. *See Brown & Williamson*, 62 F.3d at 420 (holding Congress may "insist on the confidentiality of investigative files"). And the House's decision to protect these interests by keeping the materials, to the extent they exist, confidential is entitled to deference. *Cf. ACLU v. CIA*, 823 F.3d 655, 662 (D.C. Cir. 2016) (explaining that courts should "accord[] due deference to Congress' affirmatively expressed intent to control its own documents" (citation omitted)).

Schilling, by contrast, has not articulated *any* concrete, tangible public benefit in releasing the requested materials beyond his conclusory allegations regarding the Committee's alleged use of consultants. Accordingly, he cannot plausibly show that the public interest in disclosure of these materials outweighs Congress's significant confidentiality interests, and his claim fails as a matter of law.

CONCLUSION

For these reasons, the Court should affirm the district court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,943 words excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 in 14-point Times New Roman type.

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CERTIFICATE OF SERVICE

I certify that on June 29, 2023, I filed one copy of the foregoing Brief for Appellees via the CM/ECF system of the United States Court of Appeals for the District of Columbia Circuit, which I understand caused service on all registered parties.

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