IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT SCHILLING
502 Berwick Court
Charlottesville, VA 22901

Plaintiff,

v.

UNITED STATES HOUSE OF REPRESENTATIVES
Washington, DC 20515

NANCY PELOSI, in her official capacity as SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES
U.S. Capitol, Room H-232,
Washington, DC 20515,

UNITED STATES HOUSE COMMITTEE ON OVERSIGHT & REFORM
5140 O'Neill House Office Building
Washington, D.C. 20515-6532

CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, CHERYL L. JOHNSON
U.S. Capitol, Room H-154
Washington, DC 20515–6601,

CHIEF ADMINISTRATIVE OFFICER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, CATHERINE SZPINDOR
The Capitol
Washington, D.C. 20515,

Defendants.

Case No. 1:22-cv-00162 (TNM)

FIRST AMENDED PETITION[1] FOR A WRIT OF MANDAMUS AND FOR DECLARATORY RELIEF

Plaintiff Robert Schilling ("Schilling") brings this action against the United States House of Representatives, the Speaker of the United States House of Representatives Nancy Pelosi, Clerk of the United States House of Representatives Cheryl L. Johnston, Chief Administrative Officer of the United States House of Representatives Catherine Szpindor, and the House Committee on Oversight & Reform to compel compliance with the Plaintiff's common law right of access to certain records pertaining to the use of outside private donations, funds, or in-kind goods or services to conduct and support the activities of, or pay the expenses of, a congressional office in violation of House Rules, including the use of privately provided consultants performing work typically performed by congressional staff.

INTRODUCTION

Under the common-law right of public access, members of the public have the right to examine government records when the public interest in disclosure is greater than that in government secrecy. The United States Court of Appeals for the District of Columbia Circuit has held that the common law right of access extends beyond judicial records to the "'public records' of all three branches of government." *Ctr. For Nat'l Sec. Studies v. U.S. DOJ*, 356 U.S. App. DC 333, 351, 331 F.3d 918, 936 (2003), citing *Washington Legal Found. v. United States Sentencing Commission*, 319 U.S. App. D.C. 256, 89 F.3d 897, 903-04 (D.C. Cir. 1996). The legislative branch is subject to the common-law right of public access. *Washington Legal Foundation v. U.S. Sentencing Commission*, 89 F.3d 897 (D.C. Cir. 1996)(hereinafter "WLF II").

[1] This Amendment is filed pursuant to Fed. R. Civ. P. 15 (a)(2), with the consent of opposing counsel.

The D.C. Circuit has "conclude[d], as a matter of federal common law, that 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. *Id.,* at 905 (1996). When determining whether public records are subject to release under the common law right of access, "the court should focus upon 'the specific nature of the governmental and public interests as they relate to the document itself, as well as the general public interest in the openness of governmental processes'." *Washington Legal Found. v. United States Sentencing Comm'n*, 17 F.3d 1446, 1452 (D.C. Cir. 1994) (hereinafter "WLF I").

Plaintiff's requests under the Common Law Right of Access pertain to the revealed practice of providing donor-financed services to congressional offices of the kind typically performed by congressional staff, purportedly to help compensate for staff lost due to Congress reducing its and its offices' staff budget but elsewhere admittedly to help plan a congressional investigation of private parties. This is a practice that was the subject of great public interest and past ethics complaints filed against, e.g., then-Speaker of the House Newt Gingrich under Rule 24's predecessor, House Rule 45. In those cases, a non-profit's employees provided basic office functions for Mr. Gingrich in apparent violation of the prohibition against the use of unofficial resources for official purposes. In this current case, the staff work being performed is that of professional staff planning investigative hearings of shared political opponents, with compelled testimonies and subpoenas of private parties. There also is reason to believe this privately-aided, non-legislative investigation is not being undertaken to achieve legitimate legislative purposes but instead seeks to engineer a referral to the Department of Justice to assist third-party litigants and the Executive branch.

The common law right of access is of heightened importance when an element of adjudication is at play, as with particular instances such as the case here, in which sworn testimony has been compelled and subpoenas have been issued (with more likely forthcoming according to the relevant congressional leadership) in a manner that suggests the legislative oversight process is being hijacked by privately-financed and privately-motivated parties.

The D.C. Circuit has recognized, at the urging of the Executive Branch, that the common law right of access is especially important with respect to documents "central to the process of adjudication." *WLF* II, 89 F.3d at 901. In that case, the D.C. Circuit explained that the policy supporting the right "is, according to the Government, that of ensuring open legal proceedings and promoting public confidence in the legal process." *Id.* As detailed, *infra*, the recent and promiscuous use of privately-funded or provided professional staff in prosecutorial and purportedly adjudicative or investigatory proceedings adds ever further gravity to the public importance of these public records.

Recently, in response to a request from Buzzfeed News, a constituent part of the House of Representatives recognized the longstanding common law right of access by making records available to journalists and the public, specifically certain congressional records which are currently the subject of the Select Committee investigating the events of January 6, 2021. See, e.g., Jason Leopold, BuzzFeed News, "The Capitol Police Granted Permits For Jan. 6 Protests Despite Signs That Organizers Weren't Who They Said They Were," Sept. 9, 2021, accessible at: https://www.buzzfeednews.com/article/jasonleopold/the-capitol-police-said-jan-6-unrest-on-capitol-grounds) ("The release of the documents also marks a significant victory for BuzzFeed News, which filed a lawsuit last February after the Capitol Police declined a request for the permits. Attorney Jeffrey Light cited the 'common law right of access' to public records, which maintains that the public has a basic right to

review the records of its government that are exempt [sic] from the Freedom of Information Act. The Capitol Police opted not to fight the case.")

However, with respect to Mr. Schilling's requests for access to records, the Defendants have reverted to their initial stance in the BuzzFeed matter, denying that any of the requested information is subject to public access and denying the requests in full.

In this case, Mr. Schilling seeks relief in the form of mandamus and a judicial declaration of his right to access the records in question. As grounds for his petition, Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, because this is a civil action which arises under the Constitution and common law of the United States, and 28 U.S.C. § 1361, because this is an action for mandamus compelling various governmental officials to perform their nondiscretionary duties.

2. Further, this Court has jurisdiction pursuant to 2 U.S.C. § 4301(i)(3) and 22 U.S.C. 2201, *et seq*. because there is an actual controversy between the Plaintiff, who seeks records, and the Defendants, who have failed to provide such records or to acknowledge Plaintiff's right to obtain or view copies of such records.

3. As the D.C. Circuit held in *Lovitky v. Trump*, 445 U.S. App. D.C. 186, 192, 949 F.3d 753, 759 (2020):

> "A court may grant mandamus relief only if: (1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff." *Baptist Mem'l Hosp. v. Sebelius*, 603 F.3d 57, 62, 390 U.S. App. D.C. 251 (D.C. Cir. 2010) (internal quotation omitted). "These three threshold requirements are jurisdictional; unless all are met, a court must dismiss the case for lack of jurisdiction." *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189, 421 U.S. App. D.C. 123 (D.C. Cir. 2016). In other words, "mandamus jurisdiction under § 1361 merges with the merits." *In re Cheney*, 406 F.3d at 729; *see also* 14 Helen Hershkoff, *Federal Practice &*

Procedure § 3655 (4th ed. 2019) ("As many lower courts have recognized, whether jurisdiction exists under Section 1361 'is intertwined with the merits' because the existence of a legal duty owed to the plaintiff is critical to whether adjudicative power is present.")

4. As the U.S. Supreme Court held in *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288, 115 S. Ct. 2137, 2143 (1995), "By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver…"

5. In this suit, Mr. Schilling respectfully submits that the exercise of this Court's discretionary declaratory judgment power is especially important because the Defendants are agents of Congress and Congress itself has armed this Court to vindicate Mr. Schilling's rights.

6. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because a substantial portion of the events and/or omissions giving rise to this claim took place in the District of Columbia and because the records that are the subject of this action are also likely located in the District of Columbia. Further, the named Defendants undertook the actions complained of in their capacity as officers and/or employees of the United States government.

PARTIES

7. Plaintiff Robert Schilling hosts The Schilling Show radio program and a podcast. The show and podcast are also streamed online. As the founder and editor of a news, analysis, and commentary web site, SchillingShow.com, Mr. Schilling has launched multiple national news stories, several of which have appeared on prominent national and international media outlets, and his reporting and investigative journalism has been awarded multiple times by the Associated Press and the Virginia Association of Broadcasters, including two "Superior Awards for Best Investigative Reporting" from the Associated Press. Mr. Schilling's interest in the documents that are at issue in this case springs both from his active role as a citizen and from his role as a journalist, with a general and a public proprietary interest in obtaining and

disseminating information. See, e.g., *Nixon v. Warner Commc'ns*, 435 U.S. 589, 597-598 (1978) (noting that English cases conditioned the right of public access on an individual's proprietary interest in information, but that the American cases recognize a citizen's interest in keeping a watchful eye on his government.).

8. Defendant the U.S. House of Representatives is one of two bodies of the United States Congress established by Article I, Section 2 of the U.S. Constitution with enumerated powers and specific Constitutional powers and obligations. Under Art. 1, Sec. 2, "The House of Representatives shall chuse their Speaker and other Officers," who exercise powers of the House which are delegated to them.

9. Defendant Speaker of the U.S. House of Representatives Nancy Pelosi is the presiding officer of the House and is charged with numerous duties and responsibilities by law and by the House rules. As the presiding officer of the House, the Speaker maintains order, manages its proceedings, and governs the administration of its business. The Speaker manages the content of the House's Journal, as provided in Rule I of the House of Representatives. Pursuant to the House Rules, she appoints all committee members and signs all subpoenas issued by the House. Pursuant to Rule VI, the Speaker controls the conduct of all official reporters of the House, in conjunction with the Clerk. As such, and due to the appointment powers of the Speaker over inferior officers and various committees, and due to her general supervisory powers, Plaintiff states on information and belief that the Speaker of the House has constructive possession, custody, and control of the public records Plaintiff seeks, or alternatively that the Speaker or her appointees or subordinates are lawfully charged with having actual or constructive possession, custody, and control of such records in order to carry out her official duties. Plaintiff requested the records described herein from this

Defendant, in a written request sent by certified mail.

10. Defendant "Committee on Oversight and Reform ("the Committee) is the main investigative committee in the U.S. House of Representatives. It has authority to investigate the subjects within the Committee's legislative jurisdiction as well as "any matter" within the jurisdiction of the other standing House Committees." https://oversight.house.gov/about. In 2021 the Committee announced, "Oversight Committee Launches Investigation of Fossil Fuel Industry Disinformation on Climate Crisis," https://oversight.house.gov/news/press-releases/oversight-committee-launches-investigation-of-fossil-fuel-industry. To help guide this enterprise, the Chairman of the Committee's Subcommittee on the Environment, Rep. Ro "Khanna said the committee has enlisted the aid of 'a lot of people' involved in planning the Waxman hearings for advice and planning." Zack Burdyk, "Democrats call for oil company executives to testify on disinformation campaign," *The Hill*, September 16, 2021, https://thehill.com/policy/energy-environment/572612-democrats-call-for-oil-company-executives-to-testify-on. As such and as further detailed herein, the Committee and or its Subcommittee, professional staff and/or Chairwoman and/or Subcommittee on the Environment Chairman are lawfully charged with and/or have actual or constructive possession, custody, and control of such records as a part of carrying out Committee business. This suit does not challenge the Committee's lawful powers or exercise of those powers, but seeks records relating to the weaponization of the Committee to perform extra-legislative duties aided by and at the behest of outside actors.

11. Defendant Clerk of the U.S. House of Representatives Cheryl L. Johnson is an administrative officer within the legislative branch. According to the House Rules II and VII, the Clerk of the U.S. House of Representatives is an administrative office within the

legislative branch whose head, *inter alia*, "Acts as custodian of all noncurrent records of the House." According to the House Rules, the Clerk manages official reports of the House in conjunction with the Speaker, and is further required to retain in the official House Library a permanent set of the books and documents generated by the House. Under House Rule II, the Capitol Library operates under the Clerk's management. Further, pursuant to the U.S. Constitution, the House of Representatives is required to keep a journal of its proceedings. Art. I, § 5, and pursuant to 44 U.S.C. §901 *et seq*. and 44 U.S.C. § 713 *et seq*., the legislature has imposed a statutory obligation to maintain and publish journals of the proceedings of the house. As such, Plaintiff states on information and belief that the Clerk of the House has actual or constructive possession, custody, and control of the public records Plaintiff seeks in her official capacity for the purposes of carrying out her duties under the aforementioned legal authorities, or alternatively that she is lawfully required to have actual or constructive custody and possession of such records for said purposes. Plaintiff requested the records described herein both directly from the Defendant Clerk and from the Clerk's constituent Office of the Capitol Librarian, in written requests sent by certified mail.

12. Defendant Chief Administrative Officer of the U.S. House of Representatives Catherine Szpindor is an administrative officer within the legislative branch. According to the House Rules, including but not limited to Rule II, the Defendant Chief Administrative Officer has operational responsibility for functions as assigned by the Committee on House Administration. As such, and because the administration of the House necessarily includes the maintenance of the official records of the House, Plaintiff states on information and belief that Defendant has possession, custody, and control of the public records Plaintiff seeks, or alternatively that she is lawfully required to have custody and possession of such records for

said purposes. Plaintiff requested the records described herein from the Defendant Chief Administrative Officer, in a written request sent by certified mail.

13. All individual defendants are sued as individuals in their official capacities only. Pursuant to *Fornaro v. James*, 367 U.S. App. D.C. 401, 407, 416 F.3d 63, 69 (2005), "No separate waiver of sovereign immunity is required to seek a writ of mandamus to compel an official to perform a duty required in his official capacity." Further, pursuant to *WLF II*, 89 F.3d 897, 901 (1996), "If a plaintiff seeks a writ of mandamus to force a public official to perform a duty imposed upon him in his official capacity… no separate waiver of sovereign immunity is needed." None of the defendants are sued for *legislative* activities, but all are sued for ministerial activities relating to their use or abuse of the powers of Congress as set forth elsewhere herein.

FACTUAL BACKGROUND AND PUBLIC INTEREST IN INFORMATION SOUGHT

14. On October 28, 2021, the United States House of Representatives Committee on Oversight & Reform ("the Oversight Committee" or "the Committee") held a hearing it titled "Fueling the Climate Crisis: Exposing Big Oil's Disinformation Campaign to Prevent Climate Action" (https://oversight.house.gov/legislation/hearings/fueling-the-climate-crisis-exposing-big-oil-s-disinformation-campaign-to), after having requested records from the entities whose executives were called to testify. News reports state that in the week prior to the hearing, Subcommittee Chairman and co-leader of the hearing California Representative Ro Khanna, and full Committee Chair Carolyn Maloney of New York, informed activists this was the first in a year-long series of events and expressed the prospect of the Committee pursuing "perjury" charges against witnesses. ("Maloney and Khanna, whose perjury warning came during a call this week with the political action group Our Revolution, will face

challenges from the unusual nature of the event." Corbin Hilar, "Lawmakers study Big Tobacco perjury before Big Oil showdown," October 27, 2021, E&E News, https://www.eenews.net/articles/lawmakers-study-big-tobacco-perjury-before-big-oil-showdown-2/.)

15. At that first hearing in October, reading from prepared remarks, Chairwoman Maloney stepped outside the realm of acting as a legislator or performing legitimate legislative oversight when she condemned the witnesses for refusing that day to promise no further funding of disfavored political speech or associations, including but not limited to industry trade associations; to stop engaging in disfavored public speech; or to produce "internal documents or internal communications" about their public speech (video at https://www.youtube.com/watch?v=xchA94oDXmI), which refusal purportedly justified the Chair to then "announce[] her intent to issue subpoenas to" the witnesses for internal records to "the Committee's investigation into the fossil fuel industry's climate disinformation campaign." https://oversight.house.gov/news/press-releases/at-historic-hearing-fossil-fuel-executives-admit-climate-crisis-is-an-urgent.

16. Subsequent to this, the Committee scheduled a second hearing, and expressed an interest in issuing subpoenas to the witnesses called thereto. See, e.g., Maxine Joselow, "House panel broadens probe into climate disinformation by Big Oil," *Washington Post*, January 21, 2022, https://www.washingtonpost.com/climate-environment/2022/01/21/house-panel-broadens-probe-into-climate-disinformation-by-big-oil/). ("Maloney added that she is prepared to subpoena the directors if they refuse to testify at the hearing, which is scheduled for Feb. 8, after ExxonMobil and Chevron have reported their fourth-quarter earnings. The panel has already wielded its subpoena power to demand thousands of pages of documents

regarding the fossil fuel companies' internal communications about climate change.")

17. The Committee has offered one disconnected, *non sequitur* attempt, in its original announcement, at purporting a legislative purpose behind investigating private parties for their opposition to a particular policy agenda (the "climate" agenda) and/or refusal to cease funding political speech, that being that "**one of Congress's top legislative priorities is combating the increasingly urgent crisis of a changing climate," the Chairs added. "To do this, Congress must address pollution caused by the fossil fuel industry and curb troubling business practices that lead to disinformation on these issues."** https://oversight.house.gov/news/press-releases/oversight-committee-launches-investigation-of-fossil-fuel-industry (bold in original).

18. But there is no legitimate legislative purpose or legislative activity at play in the Committee's decision to bring in-house outside parties who provide congressional offices with "consulting services" underwritten by activist donors who desire the pursuit of certain congressional oversight, and in certain ways. See, *infra*. Similarly, there is no legitimate legislative purpose or activity when a committee takes those services, and takes affirmative steps toward fulfilling those objectives. This is further still less a legitimate legislative pursuit when, as appears to be the case here, those uses of House resources are to assist third-party litigants, and the Executive branch in fulfilling a political vow.

19. Plaintiff states on information and belief, including without limitation information cited herein, that this investigation is the latest in a series of public-private collaborations to deploy judicial or quasi-judicial functions of government against political opponents of the "climate" agenda, to assist private and governmental tort, "consumer fraud", and other litigation targeting private parties' climate-related speech and association and, at least in part, to pretextually instigate or assist a criminal referral, probe or probes of political opponents of the "climate" policy agenda.

20. The public record affirms that the campaign described herein began with state attorneys

general then extended beyond this to calls by elected officials for, and inquiry by the U.S. Department of Justice into, use of the Racketeer Influenced and Corrupt Organizations ("RICO") Act against opponents of the "climate" agenda. See, e.g., March 2016 colloquy between Sen. Sheldon Whitehouse (D-RI) of the Senate Judiciary Committee and then-Attorney General Loretta Lynch at https://www.c-span.org/video/?c4584506/user-clip-lynch-doj-discussed-lnvestigating-big-oils-climate-denial.

21. Subsequently, the Biden-Harris presidential campaign promised that, if elected, "Biden will instruct the Attorney General to… strategically support ongoing plaintiff-driven climate litigation against polluters". https://joebiden.com/environmental-justice-plan/.

22. Mr. Schilling has a colorable belief that the objective of this use of Committee resources by Members and staff, including but not limited to the engagement of outside parties to perform work typically performed by congressional staff, is to assist a campaign vow to use the resources of the government to facilitate certain litigation. (See, e.g., Lesley Clark, "Biden fails to fulfill pledge on climate lawsuits," E&E News, January 19, 2022 https://www.eenews.net/articles/biden-fails-to-fulfill-pledge-on-climate-lawsuits/). Plaintiff states on information and belief that the Department of Justice seizing on such a referral is one of the very few options remaining for the proponents of this campaign, given the climate plaintiffs' current position, taken all the way to the United States Supreme Court, that these suits themselves which were originally filed in federal court in fact are purely local matters about which no federal court ought to concern itself.

23. Relevant to this, and to principals in and public interest in these records set forth, *infra*, is an October 31, 2020 email, released under California's Public Records Act, sent from one of the parties who has acknowledged advising the Committee investigation, Phil Barnett, to a law professor serving on the climate-plaintiffs' legal team. Specifically, three days before the 2020 elections, on Saturday October 31, 2020, Barnett wrote to UCLA Law School's Ann Carlson, "If Tuesday [Nov. 3, 2020] goes

well we should find a time to talk so I can give you an update on some recent positive developments". https://govoversight.org/wp-content/uploads/2022/02/Barnett-has-news-to-tell-Carlson-if-2020-elections-go-well.pdf.

24. Plaintiff states on information and belief that Barnett was referencing plans for this congressional investigation into his correspondent's legal team's litigation targets, which he would help plan if Democrats maintained their congressional majority.

25. Plaintiff states on information and belief that the counsel at the time to Mr. Barnett's organization " Co-Equal," Margaret Goodlander (see the Wayback Machine at https://web.archive.org/web/20201029103836/https://www.co-equal.org/team), soon moved from that position into the Department of Justice in January 2021 as counsel to the Attorney General, in which position she likely would receive any referral to the Department from the Oversight Committee.

26. Whether or not the new round of hearings described, *supra*, is aimed at engineering referrals to the Department of Justice as part of that intervention by the Attorney General promised by the Biden-Harris campaign, Plaintiff states on information and belief that the records sought in this case reflect an expansion to the federal legislative branch of those previous "Lawfare"[2] initiatives targeting disfavored, protected speech, and those who engage in it.

27. The above, and the admissions of having brought in certain consultants (*infra*), are evidence that although this effort takes place in the halls of the legislative branch and on the thinnest claimed legislative pretext, it cannot properly be characterized as legislative in nature, but is more accurately described as (improperly) engineering Executive action and assisting a third-party tort

[2] See, e.g., Memorandum Opinion by Justice Kerr, *San Francisco, et al., V. Exxon Mobil Corp,* Court of Appeals for the Second Appellate District (TX), No.02-18-00106-CV, at p. 48, https://eidclimate.org/wp-content/uploads/2020/06/1284000-1284588-02-18-00106-cv-majority-opinion-kerr.pdf, now pending as *Exxon Mobil Corp. v. City of San Francisco, et al.*, Tx. Sup. Ct. 20-0558.

litigation campaign.

28. According to news reports, the lead public spokesman on the Committee's investigation, "[Rep.] Khanna said the committee has enlisted the aid of 'a lot of people' involved in planning the Waxman hearings for advice and planning." Zack Burdyk, "Democrats call for oil company executives to testify on disinformation campaign," *The Hill*, September 16, 2021. "The Waxman hearings" are 1994 tobacco hearings after which the Committee leadership are publicly quoted as patterning their "climate disinformation" hearings.

29. As detailed herein, this description of those individuals and other information in the public domain indicate that these people include certain parties whose own website and promotional media describes them as providing donor-financed services to congressional offices of the kind typically performed by congressional staff, in order to help compensate for staff lost due to Congress reducing its and its offices' staff budget. This is further supported, as detailed herein, by public statements made by donor groups plainly stating that they have given hundreds of thousands of dollars to finance the provision of assistance to "congressional investigations."

30. Plaintiff states on information and belief, including based upon Chairman Khanna's admissions, other materials in the public domain including statements to the media and a previous written offer by Messrs. Phil Barnett and Phil Schiliro to provide free services to other elected officials to advance the "climate" agenda, that Messrs. Barnett and Schiliro 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.

31. Plaintiff states on information and belief that Messrs. Barnett and Schiliro provided these services through and as part of a group called Co-Equal.

32. The group's own website and a profile in the *New York Times* describes the group as

making these former staff available as in-kind contributions to congressional offices (https://www.co-equal.org/team), "to consult" on oversight and investigations (Carl Hulse, "Congressional Veterans Pitch In to Rebuild Oversight Muscle," *New York Times*, June 22, 2019, https://www.nytimes.com/2019/06/22/us/politics/congress-oversight-muscle.html).

33. Co-Equal's Phil Barnett and Phil Schiliro informed the media earlier this year that their advice to the Committee on this investigation was provided wearing a "different hat" than this group which they founded for the purpose of providing advice to congressional offices to replace that lost by staff budget cuts, and whose website describes precisely the services Rep. Khanna described as does the *Times* coverage announcing the group's and its staff's influence on Capitol Hill in providing these consulting services to congressional offices (*infra*).

34. The 2019 *Times* story acknowledged that, while this organization is unable to "replace 1,000" staff, it is doing what it can by offering "less than a dozen former staff members" for the purpose by "volunteer[ing] their skill set to the House and Senate as Congress rebuilds its oversight muscle." The story includes comments from interviews with Messrs. Barnett and Schiliro and is complete with a posed 'team photo' of Co-Equal staff on the steps of the Capitol.

35. Privately replacing even one staff position lost to budget cuts, or otherwise, is impermissible under House Rules and federal statute. It cannot be regarded as legislative activity to circumvent legislative enactments, including but not limited to duly-enacted statutes and appropriations bills.

36. Public records show Messrs. Barnett and Schiliro explaining a previous offer, to different elected officials (state governors), of free consulting services on the "climate" issue as something they do, professionally. Untitled June 15, 2017, Memorandum and associated correspondence released under Washington State's Public Information Act available at https://climatelitigationwatch.org/wp-

content/uploads/2021/12/The-Phils-Pitching-Their-Influence.pdf.

37. An email from one of those governors' aides to peers in the other governors' offices, also released under Washington State's Public Information Act, show that aide justifying to colleagues the pursuit of private, off-books staffing of elected officials' climate campaigning with a claim that "it can't always be us staff" staffing elected officials. (Email available at https://climatelitigationwatch.org/wp-content/uploads/2018/09/It-cant-always-be-us-staff-copy.pdf). Those same governors' aides praised the offer as "Phil's offer of help is a big deal. He is very effective and connected." https://climatelitigationwatch.org/wp-content/uploads/2021/12/The-Phils-Pitching-Their-Influence.pdf.

38. Co-Equal's website boasts that the entity was established by Messrs. Barnett and Schiliro — as a project of what media reports describe as a "Democratic Dark Money Juggernaut," "the 'mothership' behind a network of Democratic dark money nonprofit groups" — to provide consulting services to burnish the staffs of congressional allies. https://www.co-equal.org/need ("Co-Equal can help balance the scales… It can provide strategic advice on the legislative process and oversight. And it can connect congressional offices with experts who can level the information playing field.")

39. This *Times* story described it as "funded by donors …to consult with congressional aides seeking guidance on messaging or how to move ahead with inquiries." Hulse, "Congressional Veterans Pitch In to Rebuild Oversight Muscle," *New York Times*, June 22, 2019.

40. Specifically, Co-Equal's website acknowledges it operates under the umbrella of Arabella Advisors ("Co-Equal is a project of the Hopewell Fund, a 501(c)(3) public charity. Co-Equal Action, is a project of the Sixteen Thirty Fund, a 501(c)(4) social welfare organization", and Sixteen Thirty Fund is a part of Arabella (see https://www.arabellaadvisors.com/expertise/fiscal-sponsorship/).

41. According to the public record, donors who are underwriting provision of Co-Equal's services to congressional offices include significant financiers of activist campaigns designed to direct

or otherwise influence governmental policy, including, e.g., George Soros and eBay founder Pierre Omidyar. For example, a 2018 document shows a grant of $300,000 from Soros's 501(c)(4) Open Society Policy Center (https://www.influencewatch.org/non-profit/open-society-policy-center/) to Co-Equal Action via Sixteen Thirty Fund to "support work to enhance congressional effectiveness and oversight" by Co-Equal. See https://www.influencewatch.org/app/uploads/2022/01/open-society-policy-institute-2018-grants.pdf. Omidyar's Democracy Fund Voice reported another grant of $282,000 in 2019 "to provide… advice that helps members of Congress …conduct effective oversight." https://www.influencewatch.org/non-profit/democracy-fund-voice/ (See also https://www.influencewatch.org/app/uploads/2022/01/democracy-fund-voice-2019-grant-to-co-equal-action.pdf).

42. Both of these grants to Co-Equal match Rep. Khanna's description of the work performed by the parties he also described as having been brought in to assist in planning his climate investigation; that work also is consistent with Messrs. Barnett's and Schiliro's 2017 memorandum offering to similarly donate such services to other elected officials (who are not covered by House Rules or, e.g., 31 U.S.C. § 1342); it also is consistent with the services Messrs. Barnett's and Schiliro assert on Co-Equal's website that they now also offer to congressional offices, and further is consistent with reporting by *the New York Times*, with the assistance and input of Messrs. Barnett's and Schiliro, of what Co-Equal is providing to congressional offices.

43. Nonetheless, when asked by Real Clear Politics about these facts:

> Schiliro told RealClearPolitics this week. "We don't lobby. We're just there to help people who want to advance good legislation or effective oversight."…
>
> Schiliro told RCP he had conversations with the committee leading up to the hearing, but he was working with an environmental nonprofit at the time, not acting in his Co-Equal role.
>
> Schiliro reiterated that he and Barnett were not advising the committee in their Co-Equal capacity.

> "There are lots of people in Washington who wear multiple hats – whether they're in one firm and they have a lot of different clients, whether they participate in four or five different entities … I don't see where the confusion is," he said. Susan Crabtree, "Dark Money Link to Democrats' Climate Probes," Real Clear Politics, February 11, 2022, https://www.realclearpolitics.com/articles/2022/02/11/dark_money_link_to_democrats_climate_probes_147172.html

44. Plaintiff states on information and belief that this acknowledgement of not being lobbyists and of advising the Committee, while insisting they were not doing so wearing the "hat" of the group whose website self-describes and the *New York Times* reports, in a piece written with the group's assistance, as offering just these services to congressional offices, may be an effort to remove Co-Equal's host organization and funders from scrutiny but, however unsupported or plausible, has no bearing on the propriety of or great public interest Rep. Khanna's assertions of bringing in the Waxman veterans to help plan and guide his investigation which credibly describes violations by at least his and his committee offices of House Rules and federal law. This is of immense public interest.

45. The *2019* Times story, produced with the assistance of Messrs. Barnett and Schiliro as well as Hill staff praise of their impact, asserts that Co-Equal's consultants were "volunteer[ing] their skill set to the House and Senate as Congress rebuilds its oversight muscle" and that this was a "unique approach." Hulse, "Congressional Veterans Pitch In to Rebuild Oversight Muscle," *New York Times*, June 22, 2019.

46. Under House Rules, "volunteer" is a specifically defined term, which is used to describe parties seeking educational benefit and who serve "without compensation from any source." See, e.g., House Committees' Congressional Handbook, Volunteers, pp. 7-8, House Ethics Manual at p. 288. This does not match any plausible reading of Co-Equal's work.

47. As documented by Plaintiff, joined by another party in two detailed complaints filed before the House Inspector General and Office of Congressional Ethics, available at

https://govoversight.org/wp-content/uploads/2022/01/Complaint-to-House-Inspector-General.pdf and https://govoversight.org/wp-content/uploads/2022/01/Complaint-to-Office-of-Congressional-Ethics.pdf, respectively, this is not the first "investigation" pursued with the assistance of donor-provided "staff". Previous, similar investigations by state and territorial officials, like the Committee's investigation, were prompted and assisted by outside activists.[3]

48. For this and other reasons, Plaintiff states on information and belief that this effort launched by a congressional committee represents a relocation and resumption of at least one former effort which was launched and then abandoned by state and territorial prosecutors.

49. The interest of the public and Mr. Schilling in the records at issue in this case is heightened by media reports quoting Oversight Committee leadership and outside activists acknowledging that certain of the professional staff work executing this investigation is apparently being performed by consultants, and that these consultants appear to have been provided to the Committee for this purpose by private donors.

50. As referenced in ¶ 20, *supra*, public records show a similar operation by which at least eleven state attorneys general offices also have brought in at least eighteen privately hired and paid attorneys to conduct "climate" investigations and litigation against political opponents and under the auspices of those offices' authorities, to, *inter alia*, assist private tort litigation.

51. When these privately financed and privately arranged "investigations" take place under the auspices of state governors' offices or state attorneys general offices where the public record amply documents this is occurring, the propriety of these arrangements is governed by state- and office-specific law and regulations.

[3] Plaintiff incorporates by reference the history of a substantively previous, identical and apparently related investigation by state attorneys general, also staffed by privately-supplied attorneys privately supplied by activist donors from its original Complaint, at ¶¶ 21, 24, 30-31, 43-47.

52. However, House Rule 24 covering Unofficial Office Accounts (Limitations on Use of Official Funds), prohibits "outside private donations, funds, or in-kind goods or services" to cover the expenses of a congressional office, in order to prevent private interests from gaining untoward influence over public affairs.

https://www.govinfo.gov/content/pkg/CPRT-117HPRT43153/pdf/CPRT-117HPRT43153.pdf

53. The "primary objective" of adopting Rule 24 was "eliminating private support of the public's business". Select Committee on Ethics Advisory Opinion No. 6, available at https://govoversight.org/wp-content/uploads/2022/02/Ethics-Advisory-Opinion-No-6.pdf. This prohibition is affirmed in 31 U.S.C. § 1342, Limitation on voluntary services.

54. The House Committee on Ethics interprets the prohibition on accepting privately provided consultants, staff or similar services or in-kind gifts in Laws, Rules, and Standards of Conduct, House Committee on Ethics, which states in pertinent part:

> "Proper Performance of Congressional Duties… the provisions of the House Rules prohibiting unofficial office accounts generally preclude Members from accepting privately financed or unpaid services (as well as other in-kind support) for the performance of official House business (House Rule 24, cl. 1). Accordingly, a staff person should not perform congressional duties during time for which the individual is being compensated by a private outside employer, and should not use any resources of a private outside employer for the performance of congressional duties."

Laws, Rules, and Standards of Conduct, House Committee on Ethics, https://ethics.house.gov/outside-employment-income/laws-rules-and-standards-conduct.

55. The House Ethics Committee also writes: "House Rule 24 prohibits 'unofficial office accounts.' Accordingly, outside private donations, funds, or in-kind goods or services may not be used to support the activities of, or pay the expenses of, a congressional office. Only appropriated funds or Members' personal funds may be used for this purpose. House Rule 24 has been in effect since 1977. Congress codified this rule into law governing both

Chambers as part of the Legislative Branch Appropriations Act, 1991." https://ethics.house.gov/official-allowances/unofficial-office-accounts.

56. That explanation also cites to 31 U.S.C. § 1342, Limitation on voluntary services, prohibiting acceptance of voluntary services without specific authorization (augmentation of appropriations), which reads in pertinent part:

> An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government….

57. About that statutory provision, the House Ethics Committee assessment of limitations on the use of outside accounts writes, "An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property."

Also, House Ethics Gift Guidance provides, *inter alia*:

> **X. General Gift Rule Provisions**
>
> The Gift Rule starts with the premise that you may not accept a gift ***unless*** it meets an exception to the Gift Rule.
> [Cites to House Rule 25, cl. 5(a)(1)(A)(i).] …
>
> **A Warning**. You are responsible for complying with the Gift Rule and any other authority allowing you to accept gifts. Before entering into any arrangement where you are not paying full fair market value, and especially for expensive arrangements such as legal services, the Committee strongly recommends you have a full understanding of what is being offered and who would be providing the gift. You may not solicit for pro bono legal services. The Committee and the Office of General Counsel are available to review any retainer agreements. https://ethics.house.gov/house-ethics-manual/gifts

58. The U.S. House of Representatives' Rules are also interpreted and applied by the House Committee on Administration. This interpretation, in addition to the House Rules and U.S. Code provisions prohibiting the free provision of professional staff services, defines roles and capacities such as volunteer and detailee (https://cha.house.gov/member-

services/handbooks/committees-congressional-handbook#committee%20staff_volunteers),

none of which match the instant facts available in the public record.

59. Instead, Plaintiff states on information and belief, these in-kind personnel as described by Co-Equal and elsewhere in the public domain are *de facto* and *de jure* Consultants. The Committee on Administration makes clear in its House Committees' Congressional Handbook, Consultants, pp. 13-14, that Consultants may not perform duties of professional staff, that they must be contracted for, and that those contracts must be subject to an open approval process and public scrutiny (emphases added):

> **Consultants**
>
> Pursuant to 2 U.S.C. § 4301, each Committee is authorized, **with the prior approval of the Committee on House Administration**, to obtain *temporary or intermittent services of individual consultants or organizations, to advise the Committee with respect to matters within its jurisdiction*. …
>
> 2. The consultant is to act as an independent contractor and is not an employee of the Committee. The Committee on House Administration will not approve a contract if the services to be provided by the consultant are the regular and normal duties of Committee staff.…
>
> 6. Pursuant to House Rule XXIII, clause 18(b), consultants are subject to certain provisions of the House Code of Official Conduct, including the gift rule, the prohibition against use of one's official position for private gain, and the requirement to conduct oneself at all times in a manner that reflects creditably on the House. For information relative to the House Rules, contact the Committee on Ethics at x57103.
>
> 7. **Committee Chair must submit a letter requesting approval of the Committee on House Administration along with a signed contract agreement and resume of the proposed consultant**, including, but not limited to, details of federal service either as an employee or pursuant to contract agreement with any Committee of the Congress.
>
> 8. **The letter must specify that the proposed contract has been approved by a majority of the Members of the requesting Committee and that no services pursuant to the proposed contract will commence prior to approval of the contract by the Committee on House Administration**.
>
> *The Committee on House Administration will make available for public inspection a copy of the qualifications of each consultant.*

https://cha.house.gov/member-services/handbooks/committees-congressional-handbook#employment%20law_consultants; full Handbook available at https://cha.house.gov/sites/democrats.cha.house.gov/files/documents/116th%20Committee%20Congressional%20Handbook_1.pdf.

60. Whatever the role of these outside, private operatives in executing quasi-judicial pursuits of opponents through public institutions and performing work typically performed by congressional staff, they have a status which should be definable within the applicable rules and, in part given those rules, should be known to the public, for whom the consultants are unofficially but nonetheless *de facto* working.

61. Plaintiff Schilling requested from the Committee on House Administration all requests for approval and contracts for consultants by the House Committee on Oversight & Reform in the current Congress. Plaintiff wrote, in pertinent part:

> Pursuant to 2 U.S.C. § 4301(i), and the House Committees; Congressional Handbook, Consultants, p. 14, The Committee on House Administration will make available for public inspection a copy of the qualifications of each consultant" engaged by a House Committee, or its subcommittees, "to obtain intermittent services of individual consultants or organizations, to advise the Committee with respect to matters within its jurisdiction."
>
> Pursuant to those same authorities I request copies of or an appointment to publicly inspect all qualifications for each consultant for or to the House Committee on Oversight & Reform or any of its subcommittees during the 117th Congress. It appears that this information is the information described in the House Committees' Congressional Handbook, Consultants, p. 14 ¶¶ 7-8: (text of ¶¶ 7-8, *supra*, omitted).

62. On January 10, 2022, the Majority Counsel of the House Committee on Administration wrote to Plaintiff stating, *in toto*, "[w]e do not have any such documents."[4]

[4] Plaintiff also alleges on information and belief that any claim by Defendants that the above-described parties are not consultants for the reason that the Oversight Committee elected to not comply with these requirements for engaging consultants is circular logic with no impact on these parties' actual status. In the event Defendants claim the consultants referenced herein and who are the subject of the requests at issue in this matter are merely extraordinarily successful

63. As such, Plaintiff states on information and belief that the Oversight Committee has engaged these consultants without following the lawful process for doing so set forth in House Rule 24, the process set forth in the House Committees' Congressional Handbook, Consultants, p. 14 ¶¶ 7-8, and 2 U.S.C. § 4301.

64. Despite Plaintiff having requested records which would document the approval of consultants to work on the aforementioned issues, both under 2 U.S.C. § 4301and the Freedom of Information Act, Defendants have refused or otherwise failed to provide any such record.

65. The record of these machinations is of heightened public interest. Mr. Schilling seeks information that the public record suggests is behavior in violation of House rules and federal law by and in the House of Representatives. As a citizen Mr. Schilling is troubled by the body of evidence including admissions by Members of Congress and the parties they have brought in to assist them, and as a journalist he is duty-bound to make the full record known to the American people

66. As with the Federal Bureau of Investigations' now infamous Operation "Crossfire Hurricane" (See, Office of the Inspector General, U.S. Department of Justice, "Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation," December 2019 (Revised), https://www.justice.gov/storage/120919-examination.pdf), here the public has an intense interest in records illuminating the role that

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lobbyists, Plaintiff notes that none of the parties whom Plaintiff states on information and belief are serving in this capacity, or the organizations providing these staff, are registered as lobbyists according to late December 2021 searches of the House Clerk's website (https://lobbyingdisclosure.house.gov/lookup.asp). See also, "One requirement of participating is that the staff cannot be engaged in any lobbying." Hulse, "Congressional Veterans Pitch In to Rebuild Oversight Muscle," *New York Times*, June 22, 2019.

privately afforded consultants played as *de facto* staff in engineering compelled testimony and subpoenas to private parties, in the latest in a series of such endeavors targeting political opponents partially with staffing by outside, donor-provided consultants, possibly without properly contracting with and disclosing the relationship between such parties and the Congress as required by law, or, alternately, neither obtaining approval of nor posting the required consultant agreements.

67. The public – including Mr. Schilling, in his role as an active citizen and journalist — has a great interest in seeing the record of the use of outside consultants in this effort to perform work of the sort typically performed by congressional staff, in any scenario but particularly in the face of such a weak rationalization to pursue political opponents and failure to even nominally ground a "year-long" investigation into private parties in a "valid legislative purpose."[5] *Quinn v. United States*, 349 U.S. 155, 161 (1955)(see also, e.g., *Watkins v. United States*, 354 U.S. 178, 200 (1957) ("the mere semblance of legislative purpose would not justify an inquiry in the face of the Bill of Rights."). The history of these political investigations affirms this interest.

PLAINTIFF'S REQUESTS AND PROCEDURAL HISTORY OF THIS MATTER

68. On November 18, 2021, Plaintiff submitted a request for the following records to one of the Clerk of the House's constituent offices, the Office of the Capitol Librarian (also known as the House Librarian), for copies of the same records. This request was also sent via certified mail.

> 1. Email communications between i) Aria Kovalovich, Chairwoman Carolyn Maloney, and/or Rep. Rho Khanna that ii) also include as a party (to, from, cc: or bcc) a) Geoffrey Supran, Naomi Oreskes, Phil Barnett, Phil Schiliro, and/or

[5] Plaintiff incorporates by reference the discussion of pretextual claims to pursuing this investigation in the name of a valid legislative purpose from its original Complaint, ¶¶ 16-18.

> Robert Brulle, and/or b) any email address ending with @sheredling.com, @ag.ny.gov, or .edu.
>
> In addition to email correspondence this also includes but is in no way limited to Zoom, Teams, Skype or other meeting- and/or scheduling-related messages.
>
> 2. Recordings of any Zoom, Teams, Skype or other video meetings which included Aria Kovalovich, Chairwoman Carolyn Maloney, and/or Rep. Rho Khanna and also include Geoffrey Supran, Naomi Oreskes, Phil Barnett, Phil Schiliro, and/or Robert Brulle, and/or any party using an email address ending with @sheredling.com, @ag.ny.gov, or .edu.
>
> The timeframe of both requests is from September 1, 2021, through November 8, 2021.

69. On November 18, 2021, Plaintiff submitted a request to Defendant Chief Administrative Officer of the House Catherine Szpindor for copies of the same records by certified mail.

70. On December 1, 2021, by certified mail Plaintiff submitted a request to Defendant Clerk of the House Cheryl L. Johnson for copies of the same records.

71. On December 1, 2021, by certified mail, Plaintiff submitted a written request to Defendant Speaker of the House of Representatives Nancy Pelosi for copies of the same records.

72. These requests covered certain Committee correspondence with individuals who have publicly asserted their assistance, and/or been identified by Chairman Khanna as providing their assistance, to the Committee's investigation.

73. According to information in the public domain and as exemplified by the records pertaining to Messrs. Barnett and Schiliro, the records that Plaintiff seeks do not meet any reasonable definition of standard congressional information gathering, but rather pertain to the use of outside professionals provided to congressional offices as in-kind consultants

performing work typically performed by congressional staff, an apparent violation of current House Rule 24 and the subject of ethics complaints filed against, e.g., then-Speaker of the House Newt Gingrich under Rule 24's predecessor, House Rule 45.

74. On January 24, 2022, Plaintiff filed its First Petition for Writ of Mandamus and Declaratory Relief.

75. On March 15, 2022, the General Counsel for the House of Representatives stated to Plaintiff, through counsel, both that none of the defendants have actual or legal custodianship or possession of the requested documents, and also that they have no common law obligation to produce the requested records.

76. Plaintiff disagrees with the aforementioned statements of defense counsel. Nevertheless, seeking to resolve this matter in the most efficient manner possible, through counsel Plaintiff requested that the General Counsel, as counsel to the House as a whole, inform Plaintiff, insofar as the House asserts that the Speaker, Clerk and Chief Administrative Officer are not the custodians of the records that Mr. Schilling seeks, to identify who or what office or other instrumentality of the House would be in the possession of records such as those described. Plaintiff stated that, if the House identified a custodian who is not among the named defendants, Mr. Schilling would consider re-submitting his request to such a custodian.

77. On March 23, 2022, the General Counsel for the House of Representatives asserted to Plaintiff, through counsel, that it is the House's position that the sole custodian of the requested records as described is the House Committee on Oversight & Reform.

78. On March 25, 2022, by agreement with that Office, Plaintiff sent the same request that he had sent to the other Defendants to the Committee on Oversight & Reform, by

electronic mail to the Office of the General Counsel for the House, which Office acknowledged the request.

79. On March 28, 2022, the Parties agreed to a 30-day extension of time to file responsive pleadings in this matter, until May 5, 2022, and agreed to a proposed schedule in the event Plaintiff amends his complaint.

80. On April 1, 2022, Plaintiff filed a Consent Motion for Scheduling Order and Proposed Scheduling Order with this Court (ECF 7).

81. On April 4, 2022, this Court entered a Minute Order granting in part and denying in part the Motion for Scheduling Order, ordering that the Defendant shall file a responsive pleading on or before May 5, 2022, and the Plaintiff's opposition to any motion to dismiss will be due on or before May 26, 2022.

82. On April 4, 2022, this Court entered a Minute Order requiring service on all defendants be effected by April 24, 2022.

83. On April 7, 2022, the parties stipulated that 1) The U.S. Attorney's Office for the District of Columbia received service of process in this matter on February 4, 202, and 2) All defendants named in the original complaint (Speaker, Chief Administrative Officer and Clerk of the House) agree, pursuant to Fed. R. Civ. P. 4(i), that service upon them was made on February 4, 2022. (ECF 11).

84. On April 18, 2022, through the House General Counsel, the Committee denied Schilling's re-submitted request in full, also disputing that the records sought were subject to a common law right of access. The Committee denied that any videos (responding to part one of Schillings request) exist and denied access to the correspondence between the named outside parties and related records arguing, *inter alia*, "The materials requested here, to the

extent any exist, would all relate to preparations for a Committee hearing or other information-gathering on the topic of climate change and the business practices that lead to disinformation on climate change. Accordingly, the requested material would be, without question, part of the due functioning of the legislative process and absolutely protected by the Speech or Debate Clause."

85. On April 29, 2022, Plaintiff wrote to Defendant, through counsel, to note that the records Plaintiff seeks do not reflect activities conducted "in the legislative sphere" that the Speech & Debate clause of the Constitution does not protect the records from disclosure (or render the Defendants immune from an action in this Court).

86. Defendants claim, *inter alia*, that the records are exempt from release as they reflect typical information gathering of Congress; Plaintiff disputes this and note that, according to information in the public domain the records, e.g., pertaining to Messrs. Barnett and Schiliro instead reflect the engagement and then use of outside professionals provided by donors to congressional offices as in-kind consultants in apparent violation of current House Rule 24 which was also the subject of ethics complaints filed against, e.g., then-Speaker of the House Newt Gingrich under Rule 24's predecessor, House Rule 45.

MR. SCHILLING'S COMMON LAW RIGHT OF ACCESS REQUEST FOR RECORDS

87. Because of Mr. Schilling's concerns with the aforementioned congressional hearings which appear to have been convened for improper purposes, and because of Mr. Schilling's knowledge of information in the public domain and from news reports which indicates the troubling possibility that privately-funded staff were being provided to the Congress to support such improper legislative inquiries, Mr. Schilling resolved to request

information which would shed light on the activities of his government and allow him to further educate the public in his role as a journalist.

88. Plaintiff Schilling alleges that he has a common law right of access to the records described herein and is entitled to the herein described relief, for the following alternative reasons, among others:

A. To the extent that the Congress or certain of its members, officers, or employees have acted lawfully and within the bounds of established authority under the Constitution, statutory law, and applicable congressional rules, Mr. Schilling is entitled to view the records because they represent the official proceedings of a branch of the United States government and the Defendants are not entitled to claim sovereign immunity in a suit for mandamus under the "so-called *Larson-Dugan* exception to sovereign immunity." See *Judicial Watch, Inc. v. Schiff*, 474 F. Supp. 3d 305, 311 (D.D.C. 2020).

B. To the extent that the Congress or certain of its members, officers, and/or employees have acted outside the legal boundaries that apply in carrying out the actions described herein, Mr. Schilling is entitled to relief because governmental actors who act unlawfully are not clothed in sovereign immunity to the extent that they have acted outside the confines of their lawful authority or in an *ultra vires* manner. See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690, 69 S. Ct. 1457, 1461 (1949) ("relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power.").

COUNT I

Common Law Right of Access

89. Plaintiff incorporates and realleges the preceding and subsequent paragraphs as if fully stated herein.

90. All Defendants are in violation of their obligations under the common law right of access to public records. Specifically:

a) The Speaker of the House has failed to provide to Mr. Schilling the records he requested, as specifically described elsewhere herein, and otherwise failed to in any way respond to Mr. Schilling. Alternatively and/or additionally, the Speaker has failed to perform her duties under relevant law to accurately compile, archive, and/or maintain the records of the House which Mr. Schilling has requested or to ensure that the Congressional Record and/or the Journal of the House contain the full and accurate details regarding the activity of the House as described herein.

b) The Clerk of the House has failed to provide to Mr. Schilling the records he requested, as specifically described elsewhere herein, and further failed to in any way respond to Mr. Schilling. Alternatively and/or additionally, the Clerk and/or the Clerk's subordinates, including but not limited to the House Librarian, has failed to perform her duties under relevant law to accurately compile, archive, and/or maintain the records of the House which Mr. Schilling has requested.

c) The Chief Administrative Officer of the House has failed to provide to Mr. Schilling the records he requested, as specifically described elsewhere herein. Alternatively and/or additionally, the Chief Administrative Officer has failed to perform her duties under relevant law to accurately compile, archive, and/or maintain the records of the House which Mr. Schilling has requested.

e) The Committee on Oversight & Reform has failed to provide to Mr. Schilling the records he requested, as specifically described elsewhere herein, by denying his request. Alternatively and/or additionally, the House has failed to perform its duties under relevant law to accurately compile, archive, and/or maintain the records of the House which Mr. Schilling has requested or to ensure that the records of the House contain the full and accurate details regarding the activity of the Committee as a delegated body of the House as described herein. Through all these offices and agents, the House of Representatives as an institution has failed to provide to Mr. Schilling the records he requested, as specifically described elsewhere herein, by denying his request. Alternatively and/or additionally, the House has failed to perform its duties under relevant law to accurately compile, archive, and/or maintain the records of the House which Mr. Schilling has requested or to ensure that the records of the House contain the full and accurate details regarding the activity of the House as described herein.

f) Defendant the House of Representatives is responsible for the acts of its inferior officers, members, Committees, or other agents, for the reasons set forth above

91. The requested communications are public records and government documents because they were created or received by an agency of the legislative branch and/or by legislative branch officials for the purpose of recording official actions including but not limited to the engagement of consultants and use of outside parties to perform services typically performed by congressional staff. In addition, the requested communications pertain to the House exercise of quasi-judicial functions and, as acknowledged in public admissions, represent the collaboration between governmental employees and private-activist consultants

and their funders to deploy quasi-judicial governmental pursuits of political opponents, and are of legal significance.

92. Mr. Schilling's interest and the public interest in the requested communications outweighs Defendants' interest in keeping them secret.

93. The Defendants and each of them have a non-discretionary duty to make these public records available upon request for the reasons cited herein, including, without limitation, under the Common Law Right of Access, under the U.S. Constitution, and under the statutory provisions and House Rules cited above. Indeed, this Court has held that "Should the common-law right of access apply to the requested records, then [Congress's] exercise of discretion … whether to release those records to plaintiff would be cabined… by the legal duty or obligation to fulfill plaintiff's request." *Judicial Watch, Inc. v. Schiff*, 474 F. Supp. 3d 305, 312-13 (D.D.C. 2020).

94. Plaintiff is being irreparably harmed by Defendants' violations, and Plaintiff will continue to be irreparably harmed unless Defendants are compelled to comply with the law.

95. Plaintiff has no adequate remedy at law. Mandamus or an appropriate mandatory injunction is the appropriate remedy because the Defendants are in possession of records to which the Plaintiff is entitled as a citizen, a journalist, or both.

96. "The necessary prerequisites for this court to exercise its mandamus jurisdiction are that '(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff.'" *Swan v. Clinton*, 321 U.S. App. D.C. 359, 100 F.3d 973, 991 (1996).

97. In this case, Mr. Schilling has a clear right to relief both as a citizen and as an interested journalist, for reasons that include but are not limited to the reasons that follow:

a) The records at issue were generated by the legislative branch in carrying out its official functions.

b) The records at issue were generated by the legislative branch in engaging consultants, an activity and the public nature of which are governed by statute and House Rule.

c) The records at issue are quasi-judicial or adjudicative in nature, insofar as they were generated as part of the Congressional oversight process, whether legitimately or pretextually. As such, the common law presumption of access is heightened.

d) In Mr. Schilling's role as a citizen, he has an interest in keeping a watchful eye on his government.

e) In Mr. Schilling's role as a journalist, he has a proprietary interest in obtaining information which can be used to educate the public about the activities of its government.

98. In this case, Defendants have a clear duty to act. Specifically:

a) The Speaker of the House has an obligation under the Rules of the House to ensure that the Journal of the House and the Congressional record are accurate and complete. The Speaker further has the duty, in conjunction with the Clerk of the House, to ensure that the official reporters accurately report the proceedings of the House and its committees. Further, the Speaker of the House has the obligation under the House rules to appoint committee members and to issue subpoenas following only particular protocols set forth in such rules.

b) The Clerk of the House has the duty to maintain the records of the House, to include the Journals of the House and its other records. Further, she has an obligation under the Rules

of the House to ensure that the Journal of the House and the Congressional record are accurate and complete. Through the Librarian of the House, the Clerk has the duty to maintain the records of the house and to make them available for various purposes under the House rules or when required by applicable law, including but not limited to when required by the Common Law Right of Access. The Clerk further has the duty, in conjunction with the Speaker of the House, to ensure that the official reporters accurately report the proceedings of the House and its committees.

c) The Chief Administrative Officer of the House has the duty under the House Rules to administer the administrative affairs of the House both in the general sense and specifically with respect to audits. The Administration of the House necessarily includes maintaining records and providing them when required by the applicable law, including but not limited to the Common Law Right of Access and 2 U.S.C. § 4301.

d) Defendant the Committee on Oversight & Reform has the duty to maintain the records of its proceedings, to seek and obtain approval of its engagement of from, any outside consultants and provide any such agreements to, the House Committee on Administration. Further, the Committee has an obligation as a delegated body of the House to serve and comply with all applicable laws and requirements of the custodian of the record of its proceedings, including but not limited to written agreements with those with whom it consults in any capacity typically served by congressional staff.

e) The House of Representatives as an institution has an obligation under the Rules of the House to ensure that the Journal of the House and the Congressional record are accurate and complete and that it provides the public access to those records subject to the common law right of access. The House further has the duty to ensure that the official reporters accurately

report the proceedings of the House and its committees. Further, the House has the obligation under the House rules to appoint committee members and have its delegated bodies issue subpoenas following only particular protocols set forth in such rules.

99. In this case, Plaintiff Schilling has no other relief available to him. Like the judicial branch, Congress is not subject to the Freedom of Information Act. Yet the materials, which inarguably reflect the official activity of Congress, are not found in the Congressional Record or in the Journal of the House, nor are certain among these records held, as relevant and described, *supra*, by the House Committee on Administration. All but one Defendant has denied they possess and/or have any duty to release the requested records. Absent the relief Mr. Schilling seeks here, Mr. Schilling and the public at large will be left in the dark if not for the issuance of a writ of mandamus under the Common Law Right of Access.

COUNT II
Declaratory Judgment

100. Plaintiff incorporates by reference the foregoing and subsequent paragraphs by reference as if fully set forth herein.

101. Plaintiff asserts that he is entitled to inspect and/or copy the records he requested from the Defendants, as specifically set forth above.

102. Defendants have failed to provide the requested records. As such, Defendants have denied Mr. Schilling's requests for records. Defendants Speaker, Clerk and Chief Administrative Officer have denied they are *de facto* or *de jure* custodians of the requested records, and that they have no real or legal possession of them. Defendant Committee on Oversight & Reform deny it has certain requested records and denied access to others without admitting or denying they exist. Additionally, Defendants have communicated through

counsel their collective and individual belief that they are not bound by any duty to provide the requested records.

103. A dispute and controversy between the parties exists within the meaning of Fed. R. Civ. P. 57, 28 U.S.C. §2201.

104. Mr. Schilling is entitled to a declaration that the documents he seeks are available to him under the common law right of access and that the Defendants are bound to provide him access to such records.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

(a) declare that Defendants'refusal to release the requested public records is a violation of the common law right of access to public records;

(b) issue a writ of mandamus or other mandatory injunction compelling Defendants to carry out their non-discretionary duty to make all of the requested records available;

(c) award Plaintiff its costs and reasonable attorneys' fees in this action; and

(d) grant Plaintiff such other relief as the Court deems just and proper.

JURY TRIAL DEMAND

Plaintiff hereby demands trial by jury of any and all issues which are so triable.

Dated: May 5, 2022

Respectfully submitted,

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