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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Michael P Ward, et al.,

10 Plaintiffs,

11 v.

12 Bennie G Thompson, et al.,

13 Defendants.
14

No. CV-22-08015-PCT-DJH

ORDER

15 Pending before the Court is Plaintiffs Michael P. Ward and Kelli Ward's
16 ("Plaintiffs") Motion to Quash a Congressional Subpoena *Duces Tecum* issued by the
17 United States House of Representatives Select Committee ("Select Committee") in
18 furtherance of its investigation into the January 6th attack on the United States Capitol
19 (Doc. 2). Defendant T-Mobile USA Inc. filed a Response (Doc. 48), and Plaintiffs filed a
20 Reply (Doc. 52).

21 Also pending is Defendants Bennie G. Thompson and the Select Committee's
22 ("Congressional Defendants") Motion to Dismiss, which includes arguments responsive to
23 those made in Plaintiffs' Motion to Quash (Doc. 46).¹ Plaintiffs filed a Response in
24

25 ¹ Plaintiffs note the Congressional Defendants failed to comply with LRCiv 12.1(c).
26 (Doc. 51 at 5). The purpose of the meet and confer is to cure alleged deficiencies in the
27 Complaint. Plaintiffs say they would have added T-Mobile as a Defendant to the remaining
28 Courts had they been notified in advance of the alleged deficiencies. (*Id.* at 4 n.3). The
Court, however, finds this proposed amendment would not resolve the subject matter
jurisdiction deficiencies alleged in the Motion to Dismiss. *See Bonin v. Calderon*, 59 F.3d
815, 845 (9th Cir. 1995) ("Futility of amendment can, by itself, justify the denial of a
motion for leave to amend."). Under these circumstances, the Court will excuse
Defendants' failure to meet and confer.

1 Opposition (Doc. 51), and Congressional Defendants filed a Reply (Doc. 53).²

2 **I. Background³**

3 This case arises out of the Select Committee’s investigation into the January 6, 2021,
4 attack on the United States Capitol.

5 The parties include three Plaintiffs: Dr. Kelli Ward (“Ward”), her husband Dr.
6 Michael Ward (“M. Ward”), both of whom are practicing physicians, and Mole Medical
7 Services, PC (“Mole Medical”), an Arizona Professional Corporation (Doc. 1 at ¶¶ 6–8).
8 Plaintiff Kelli Ward is Chair of the Arizona Republican party and was a Republican
9 nominee for Arizona’s presidential electors for the 2020 General Election. (Docs. 1, 1-2
10 at ¶¶ 7, 19). Three Defendants are named: Bennie G. Thompson, a Representative from
11 Mississippi and Chairman of the Select Committee (“Thompson”), the Select Committee,
12 and T-Mobile USA, Inc. (“T-Mobile”) (*Id.* at ¶¶ 9–11).

13 On June 30, 2021, the U.S. House of Representatives adopted House Resolution
14 503, which established the Select Committee and tasked the Committee with
15 “investigat[ing] and reporting upon the facts, circumstances, and causes relating to the
16 January 6, 2021, domestic terrorist attack upon the United States Capitol Complex . . . and
17 relating to the interference with the peaceful transfer of power.” H.R. Res. 503 § 3(1). The
18 Select Committee is authorized to recommend “corrective measures,” including “changes
19 in law, policy, procedures, rules, or regulations that could be taken.” *Id.* § 4(c).

20 ² On September 7, 2022, Plaintiffs filed a Notice of Supplemental Authority regarding the
21 status of the Republican National Committee’s (“RNC”) appeal of a D.C. District Court’s
22 dismissal of the RNC’s objections relating to a subpoena issued by the Select Committee
23 to one of the RNC’s vendors. (Doc. 54 citing *Republican National Committee v. Pelosi*,
24 2022 WL 1294509 (D.D.C. May 1, 2022)). After the parties briefed the issues on appeal,
25 but before oral argument, the Select Committee withdrew the subpoena at issue. (*Id.*) On
26 September 16, 2022, the D.C. Circuit Court dismissed the appeal and vacated the district
27 court’s judgment. *Republican Nat’l Comm. v. Pelosi, et al.*, 2022 WL 4349778, at *1 (D.C.
28 Cir. Sept. 16, 2022). The D.C. Circuit Court found vacatur necessary because by
withdrawing the subpoena, the Committee precluded the appellate court from reviewing
“the important and unsettled constitutional questions that the appeal would have
presented.” *Id.* As a result of that recent order, the D.C. district court decision holds no
persuasive or precedential value.

³ Unless otherwise noted, these facts are taken from Plaintiffs’ Complaint (Doc. 1). The
Court will assume the Complaint’s factual allegations are true, as it must in evaluating a
motion to dismiss. See *Lee v. City of L.A.*, 250 F.3d 668, 679 (9th Cir. 2001).

1 On or around January 25, 2022, Mole Medical received a letter from T-Mobile
2 informing Mole Medical that T-Mobile had received a subpoena *duces tecum* from the
3 Select Committee to investigate the January 6th attack. (Doc. 1 at ¶ 1). The subpoena
4 required T-Mobile to produce information related to account 4220, including incoming and
5 outgoing phone call records, their duration and associated phone numbers, and information
6 about the callers.⁴ (*Id.* at ¶ 2). The subpoena seeks information from November 1, 2020,
7 to January 31, 2021, and required production by February 4, 2022.⁵ (*Id.*) The subpoena
8 states “[t]his schedule does not call for the production of the content of any
9 communications or location information.” (Doc. 1-1 at 3). The information to be
10 produced, as set forth in the subpoena, is as follows:

11 1. Subscriber Information: All subscriber information for the Phone Number,
12 including:

- 13 a. Name, subscriber name, physical address, billing address, e-mail
14 address, and any other address and contact information;
- 15 b. All authorized users on the associated account;
- 16 c. All phone numbers associated with the account;
- 17 d. Length of service (including start date) and types of service utilized;
- 18 e. Telephone or instrument numbers (including MAC addresses),
19 Electronic Serial Numbers (“ESN”), Mobile Electronic Identity
20 Numbers (“MEIN”) Mobile Equipment Identifier (“MEID”), Mobile
21 Identification Numbers (“MIN”), Subscriber Identity Modules
22 (“SIM”), Mobile Subscriber Integrated Services Digital Network
23 Number (“MSISDN”), International Mobile Subscriber Identifiers
24 (“MSI”), or International Mobile Equipment Identities (“IMEI”)
associated with the accounts;
- 25 f. Activation date and termination date of each device associated with
the account;
- 26 g. Any and all number and/or account number changes prior to and
27 after the account was activated;
- 28 h. Other subscriber numbers or identities (including temporarily

25 ⁴ Plaintiff Ward notes three other lines are associated with the 4220 account: one belonging
26 to her husband and the other two belonging to her children. (Doc. 1-2 at ¶ 17). In their
27 Motion to Dismiss, Congressional Defendants represent that “to the extent call detail
records for [Dr. Michael Ward and his two children’s] phone numbers are considered
covered by the Subpoena, the Select Committee has voluntarily withdrawn such a demand
and has notified T-Mobile accordingly.” (Doc. 46 at 11 n.8).

28 ⁵ The parties agreed to extend the production date several times. (Docs. 26, 31, 33, 37, 39,
43, 50).

1 assigned network addresses and registration Internet Protocol ("IP")
2 addresses); and

3 2. Connection Records and Records of Session Times and Durations: All call,
4 message (SMS & MMS), Internet Protocol ("IP*"), and data-connection
5 detail records associated with the Phone Numbers, including all phone
6 numbers, IP addresses, or devices that communicated with the Phone
7 Number via delivered and undelivered inbound, outbound, and routed calls,
8 messages, voicemail, and data connections.

9 (*Id.* at 3).

10 Plaintiffs claim production of the information sought in the subpoena would violate
11 their rights under the First and Fourteenth Amendments of the U.S. Constitution. (*Id.* at ¶
12 4). Plaintiffs therefore seek declaratory judgment and injunctive relief, and ask this Court
13 to quash the subpoena and enjoin Defendants from enforcing it or producing any
14 documents in compliance of its demands. (*Id.* at ¶ 5).

15 Plaintiffs' Complaint contains four causes of action. (*Id.* at 10–19). Count I, against
16 all Defendants, seeks declaratory judgment and injunctive relief, alleging the subpoena is
17 an *ultra vires* action by the Select Committee and thus invalid; Count II, against
18 Congressional Defendants, alleges a violation of the First Amendment; Count III, against
19 Congressional Defendants, alleges a violation of state and federal statutory privilege
20 protections; and Count IV, against Congressional Defendants, alleges a violation of the
21 Rules of the House of Representatives. (*Id.*) Plaintiffs assert no "wrongdoing on the part
22 T-Mobile" and note "they are named herein only insofar as is necessary to ensure that they
23 will be bound by this Court's judgment." (*Id.* at ¶ 11).

24 Congressional Defendants move to dismiss the Complaint under Federal Rule of
25 Civil Procedure 12(b)(1) and (6), arguing the Court lacks subject matter jurisdiction to
26 consider Plaintiffs' claims because sovereign immunity bars those claims. (Doc. 46 at 12).
27 Congressional Defendants further argue the Complaint fails to state a claim upon which
28 relief can be granted. (*Id.* at 13).

II. Legal Standards

Under Federal Rule of Civil Procedure ("Rule") 12(b)(1), a defendant may seek to

1 dismiss a complaint for lack of jurisdiction over the subject matter. A federal court is one
2 of limited jurisdiction. *See Gould v. Mut. Life Ins. Co. v. New York*, 790 F.2d 769, 774 (9th
3 Cir. 1986). It therefore cannot reach the merits of any dispute until it confirms its own
4 subject matter jurisdiction. *See Steel Co. v. Citizens for a Better Environ.*, 523 U.S. 83, 95
5 (1998). Plaintiff, as the party seeking to invoke jurisdiction, has the burden of establishing
6 that jurisdiction exists. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377
7 (1994).

8 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a claim. *Cook*
9 *v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011). Complaints must make a short and plain
10 statement showing that the pleader is entitled to relief for its claims. Fed. R. Civ. P. 8(a)(2).
11 This standard does not require “‘detailed factual allegations,’ but it demands more than an
12 unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S.
13 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). There
14 must be “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* While
15 courts do not generally require “heightened fact pleading of specifics,” a plaintiff must
16 allege facts sufficient to “raise a right to relief above the speculative level.” *See Twombly*,
17 550 U.S. at 555. A complaint must “state a claim to relief that is plausible on its face.” *Id.*
18 at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows
19 the court to draw the reasonable inference that the defendant is liable for the misconduct
20 alleged.” *Iqbal*, 556 U.S. at 678. In addition, “[d]etermining whether a complaint states a
21 plausible claim for relief will . . . be a context-specific task that requires the reviewing court
22 to draw on its judicial experience and common sense.” *Id.* at 679.

23 Dismissal of a complaint for failure to state a claim can be based on either the “lack
24 of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable
25 legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). In
26 reviewing a motion to dismiss, “all factual allegations set forth in the complaint ‘are taken
27 as true and construed in the light most favorable to the plaintiffs.’” *Lee v. City of L.A.*, 250
28 F.3d 668, 679 (9th Cir. 2001) (quoting *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140

1 (9th Cir. 1996)). But courts are not required “to accept as true a legal conclusion couched
2 as a factual allegation.” *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S.
3 265, 286 (1986)).

4 **III. Discussion**

5 Congressional Defendants move to dismiss Plaintiffs’ Complaint under Rules
6 12(b)(1) and 12(b)(6), arguing the Court lacks subject matter jurisdiction to consider
7 Plaintiffs’ claims under the doctrine of sovereign immunity and because the Complaint
8 fails to state a claim upon which relief can be granted. (Doc. 46 at 12–13).

9 **A. Subject Matter Jurisdiction**

10 The Court must dismiss claims and parties over which it lacks subject matter
11 jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). The Court must therefore address this issue first.

12 **i. Sovereign Immunity**

13 “[T]he United States may not be sued without its consent and . . . the existence of
14 consent is a prerequisite for [subject matter] jurisdiction.” *United States v. Mitchell*, 463
15 U.S. 206, 212 (1983). Consent must be “unequivocally expressed” for Congress to waive
16 its sovereign immunity. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992).
17 Sovereign immunity “forecloses . . . claims against the House of Representatives and
18 Senate as institutions, and Representative[s] . . . and Senator[s] . . . as individuals acting
19 in their official capacities.” *Rockefeller v. Bingaman*, 234 F. App’x 852, 855 (10th Cir.
20 2007) (internal citations omitted).

21 The Supreme Court, however, has recognized two narrow exceptions to the general
22 bar against suits seeking relief from the United States. *See Wyoming v. United States*, 279
23 F.3d 1214, 1225 (10th Cir. 2002). “A court may regard a government officer’s conduct as
24 so ‘illegal’ as to permit a suit for specific relief against the officer as an individual if (1)
25 the conduct is not within the officer’s statutory powers or, (2) those powers, or their
26 exercise in the particular case, are unconstitutional.” *Id.* (citing *Larson v. Domestic &*
27 *Foreign Commerce Corp.*, 337 U.S. 682, 702 (1949)).

28 Here, Plaintiffs sue Defendant Thompson in his official capacity, and they sue the

1 Select Committee as a committee of the House of Representatives. (Doc. 1 at ¶¶ 9, 10).
2 Plaintiffs fail to identify a waiver that is “unequivocally expressed” and thus sovereign
3 immunity plainly bars Plaintiffs’ claims against the Select Committee. *Nordic Vill. Inc.*,
4 503 U.S. at 33. Likewise, an official capacity suit seeking injunctive relief against a federal
5 employee is “treated as a suit against a government entity” and therefore Defendant
6 Thompson, acting in his official capacity, is protected by Congress’s sovereign immunity.
7 *Id.* (citing to *Travelers Ins. Co. v. SCM Corp.*, 600 F. Supp. 493, 497 (D.D.C. Dec. 21,
8 1984) (holding that “[i]t is clear that a claim against a federal employee in his or her
9 ‘official capacity’ is in effect a claim against the government. The sovereign immunity
10 doctrine cannot be evaded by changing the label on the claims or the parties.”); *see also E.*
11 *V. v. Robinson*, 906 F.3d 1082, 1094 (9th Cir. 2018) (holding where a suit is “in substance”
12 a suit against the government, a court has no jurisdiction in the absence of consent)). The
13 Court accordingly finds no waiver here. Unless Plaintiffs can show one of the narrow
14 exceptions in which sovereign immunity does not apply to government conduct, Plaintiffs’
15 claims are barred.

16 **ii. Exceptions to Sovereign Immunity**

17 Finding no applicable waiver, Plaintiffs seek to invoke the first exception to
18 sovereign immunity by arguing the actions taken by the Select Committee are *ultra vires*
19 because the subpoena does not relate to a legitimate Congressional task and is in violation
20 of House Rules. (Doc. 2 at 13). Plaintiffs further contend the subpoena violates their
21 associational rights under the First Amendment. (Doc. 2 at 11–13). Plaintiffs’ arguments
22 are unpersuasive.

23 **a. Valid Legislative Purpose**

24 The Court’s role is limited in reviewing Congress’s investigative power. Although
25 Congress has no enumerated investigative power, the Supreme Court has recognized that
26 each house of Congress has the power “to secure needed information” to legislate. *See*
27 *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (internal citation omitted).
28 Congressional subpoenas, issued in furtherance of Congress’s investigative power, must

1 have a “valid legislative purpose.” *Id.* at 2031. This means the subpoena must be “related
2 to, and in furtherance of, a legitimate task of the Congress” such as pursuing a “subject on
3 which legislation could be had.” *Id.* at 2033. An investigation conducted to “expose for
4 the sake of exposure” is therefore “indefensible.” *Id.* at 2032.

5 Congressional committees may execute this investigative power when a relevant
6 institution delegates it to them. *See McGrain v. Daugherty*, 273 U.S. 135, 177 (1927). To
7 issue a valid subpoena, however, a committee must conform to the resolution that
8 established its investigative powers. *See Exxon Corp. v. FTC*, 589 F.2d 582 (D.C. Cir.
9 1978). A committee’s conformity to its authorizing resolution or governing rules is
10 “political in nature” and therefore “nonjusticiable.” *Metzenbaum v. Fed. Energy Reg.*
11 *Comm’n*, 675 F.2d 1282, 1287 (D.C. Cir. 1982).

12 The Court’s review of whether an investigative act has a valid legislative purpose is
13 deferential. *McGrain*, 273 U.S. at 177–80. Indeed, the “purpose need not be clearly
14 articulated” and the “legitimate legislative purpose bar is a low one.” *Id.* The Court must
15 “presume that the action” has a “legitimate object” if “it is capable of being so construed.”
16 *Id.* When the Court considers the valid legislative purpose in the scope of a subpoena, “the
17 Court’s review is limited to ‘whether the documents sought . . . are not plainly incompetent
18 or irrelevant to any lawful purpose’ of the committee ‘in the discharge of [its] duties.’”
19 *Senate Select Comm. on Ethics v. Packwood*, 845 F. Supp. 17, 20–21 (D.D.C. 1994)
20 (quoting *McPhaul v. United States*, 364 U.S. 372, 381 (1960)). Thus, for the Court to find
21 a subpoena invalid based on an improper purpose, the subpoena must be rooted in exposing
22 for exposure’s sake. *Mazars*, 140 S. Ct. at 2032.

23 Plaintiffs argue the Congressional Defendants’ subpoena must be quashed because
24 it is an *ultra vires* action that does not relate to a legitimate Congressional task. (*Id.* at 13).
25 To support this claim, Plaintiffs contend the subpoena (1) does not concern a subject on
26 which legislation may be had, (2) does not comport with the Committee’s enabling
27 resolution because it was issued in aid of a criminal investigation or for the purpose of
28 harassing and threatening Plaintiffs, (3) and is overboard. (Doc. 2 at 13).

1 Notably, the D.C. Circuit Court in *Trump v. Thompson* rejected similar arguments
2 as to the legitimacy of the Select Committee. *See Trump v. Thompson*, 20 F.4th 10, 41
3 (D.C. Cir. 2021), cert. denied, — U.S. —, 142 S. Ct. 1350, 212 (2022) (finding the
4 Select Committee’s investigation into the January 6th attack on the Capitol has a “valid
5 legislative purpose” and the Committee’s inquiry contained in the authorizing resolution
6 concerned “a subject on which legislation could be had.”) (quoting *Mazars*, 140 S. Ct. at
7 2031–32)). This Court does as well. House Resolution 503 plainly authorizes the Select
8 Committee to propose legislative measures based on its findings. H.R. Res. 503 § 4(a)(3).
9 Indeed, the Select Committee’s purpose is to “issue a final report to the House containing
10 such findings, conclusions, and recommendations” for such “changes in law, policy,
11 procedures, rules, or regulations” as the Committee “may deem necessary[.]” *Id.* §
12 4(a)(3),(c). The Court therefore finds the Select Committee’s investigation into the January
13 6th attack on the Capitol has a “valid legislation purpose.” *Trump*, 20 F.4th at 41.

14 To impeach the Select Committee’s otherwise valid legislative purpose Plaintiffs
15 must overcome a “formidable bar.” *Comm. on Ways & Means, U.S. House of*
16 *Representatives v. U.S. Dep’t of the Treasury*, 575 F. Supp. 3d 53, 65 (D.D.C. Dec. 14,
17 2021) (finding that “while Congress need clear only a low bar to establish a valid purpose,
18 [plaintiffs] face a formidable bar to impeach that purpose”). Plaintiffs argue Deputy
19 Attorney General Monaco stated the Select Committee’s investigation concerned whether
20 Plaintiffs “committed a crime by sending fake Electoral College certifications that declared
21 former President Donald Trump the winner of states he lost.” (Doc. 2 at 14). Plaintiffs say
22 it is “public knowledge that Republicans sent a competing slate of electors for Arizona”
23 and that “no investigation is necessary to confirm this,” thus the subpoena was issued to
24 harass them for exercising their First Amendment rights. (*Id.*)

25 The Court finds this evidence falls short of the formidable bar Plaintiffs must
26 overcome to show an invalid legislative purpose. In *Watkins*, a defendant refused to answer
27 questions before a House committee about whether certain individuals were members of
28 the Communist Party because he doubted the relevance of those questions to the

1 committee's work. *Watkins v. United States*, 354 U.S. 185 (1957). The Court found the
2 defendant had "marshalled an impressive array of evidence that" exposure of Communists
3 motivated the committee. *Id.* at 199. This evidence included an official committee
4 publication which stated the committee "believed itself" called "to expose people and
5 organizations attempting to destroy this country." *Id.* Even considering the "impressive
6 array of evidence," the Court found it did not invalidate the committee's inquiry. *Id.* at
7 200. "[A] solution to our problem is not to be found in testing the motives of committee
8 members." *Id.* "Their motives alone would not vitiate an investigation . . . if that
9 assembly's legislative purpose is being served." *Id.*

10 Plaintiffs' evidence of an illegitimate purpose is nowhere close to the evidence in
11 *Watkins*. First, Deputy Attorney General Monaco is not a member of the Select Committee,
12 and it is unclear to the Court how her comments implicate the Committee's motives.
13 Second, Plaintiffs appear to argue Deputy Attorney General Monaco's statement shows the
14 Select Committee's purpose is motivated by a criminal investigation. The Court is
15 unpersuaded. Indeed, the D.C. Circuit rejected that the Select Committee has an "improper
16 law enforcement purpose," finding "[t]he mere prospect that misconduct might be exposed
17 does not make the Committee's request prosecutorial" and that "[m]issteps and
18 misbehavior are common fodder for legislation." *Trump*, 20 F.4th at 42. The Court
19 therefore rejects Plaintiffs' claims that the Select Committee's subpoena was issued to
20 harass them or is otherwise for an improper law enforcement purpose. *See Barenblatt v.*
21 *United States*, 360 U.S. 109, 132 (1959) (finding that if "Congress acts in pursuance of its
22 constitutional power, the Judiciary lacks authority to intervene on the basis of the motives
23 which spurred the exercise of that power.").

24 Last, Plaintiffs argue the subpoena is overbroad because it does not set forth with
25 "undisputable clarity" how its request for data relates to an authorized and lawful purpose
26 of the Committee's investigation. (Doc. 2 at 14–15). But the Court's role is limited to
27 whether the requested records "are not plainly incompetent or irrelevant to any lawful
28 purpose' of the committee 'in the discharge of [its] duties.'" *Packwood*, 845 F. Supp. at

1 20–21 (quoting *McPhaul v. United States*, 364 U.S. 372, 381 (1960)). The Select
2 Committee’s information request relates to phone calls records from November 1, 2020, to
3 January 31, 2021, from an account associated with a Republican nominee to serve as
4 elector for former President Trump. (Doc. 1-1 at 3; Doc. 1-2 at ¶ 19). That three-month
5 period is plainly relevant to its investigation into the causes of the January 6th attack. The
6 Court therefore has little doubt concluding these records may aid the Select Committee’s
7 valid legislative purpose. *McGrain*, 273 U.S. at 177.

8 **b. House of Representatives Rule Violations**

9 Plaintiffs also allege the Select Committee lacks authorization because it has only
10 nine members and the authorizing resolution states that the Speaker shall appoint thirteen
11 members. (Doc. 1 at ¶ 81). It is undisputed that the composition of the Select Committee
12 includes nine members.

13 The Rulemaking Clause of Article I, Section 5 of the Constitution “reserves to each
14 House of the Congress the authority to make its own rules,” and a court’s different
15 interpretation of a congressional rule is tantamount to “*making* the Rules—a power that the
16 Rulemaking Clause reserves to each House alone.” *Barker v. Conroy*, 921 F.3d 1118, 1130
17 (D.C. Cir. 2019) (emphasis in original) (internal citation omitted). The Court may
18 intervene only if doing so “requires no resolution of ambiguities.” *See United States v.*
19 *Durenberger*, 48 F.3d 1239, 1244 (D.C. Cir. 1995). A “sufficiently ambiguous House
20 Rule,” however, “is non-justiciable.” *United States v. Rostenkowski*, 59 F.3d 1291, 1306
21 (D.C. Cir. 1995). Further, the Court “must give great weight to the [House’s] present
22 construction of its own rules.” *See United States v. Smith*, 286 U.S. 6, 33 (1932). Relevant
23 here, House Resolution 503 states that “[t]he Speaker shall appoint 13 Members to the
24 Select Committee, 5 of whom shall be appointed after consultation with the minority
25 leader.” H. Res. 503 § 2(a).

26 The Court rejects Plaintiffs’ argument that the subpoena was unauthorized because
27 it was issued by nine members of the Select Committee and will defer to the House’s
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1 “construction of its own rules.”⁶ *Smith*, 286 U.S. at 33. The House has already empowered
2 the Select Committee to act under its authorizing resolution, despite its composition.
3 Indeed, the House adopted the Select Committee’s recommendations to find witnesses in
4 contempt of Congress for refusals to comply with subpoenas and thus its composition has
5 been implicitly ratified by the body that created it. *See* 167 Cong. Rec. H5748, H5768–69
6 (Oct. 21, 2021) (Steve Bannon); 167 Cong. Rec. H7667, H7794, H7814–15 (Dec. 14, 2021)
7 (Mark Meadows). Here, Plaintiffs ask this Court to interpret the resolution in a different
8 manner than the House’s own reading of the authorizing resolution. But the Rulemaking
9 Clause reserves this power to the House and the Court will not interpret the resolution in a
10 manner contrary to the authorizing body. *Barker*, 921 F.3d at 1130.

11 **c. First Amendment Associational Rights**

12 Although not expressly stated, Plaintiffs appear to argue the issuance of the
13 subpoena is an unconstitutional act that does not bar this suit under sovereign immunity
14 principles. To that end, Plaintiffs argue the subpoena violates their associational rights
15 under the First Amendment. (Doc. 2 at 11). Plaintiffs contend the Court must apply
16 “exacting scrutiny” to the subpoena because “political associational rights are at stake.”
17 (*Id.* at 12). Plaintiffs further claim the subpoena provides the Select Committee with “the
18 means to chill the First Amendment associational rights not just of the [Plaintiffs] but of
19 the entire Republican Party in Arizona. (*Id.* at 13).

20 To escape lawful government investigation, plaintiffs must demonstrate a “prima
21 facie showing of arguable first amendment infringement” *Brock v. Loc. 375, Plumbers*
22 *Int’l Union of Am., AFL-CIO*, 860 F.2d 346, 350 (9th Cir. 1988). This requires plaintiffs
23 show that “enforcement of the subpoena will result in (1) harassment, membership
24 withdrawal, or discouragement of new members, or (2) other consequences which
25 objectively suggest an impact on, or ‘chilling’ of, the members’ associational rights.” *Id.*
26 Plaintiffs must provide “objective and articulable facts, which go beyond broad allegations

27 ⁶ Plaintiffs’ quorum and delegation of authority allegations, contained under the same
28 Count in their Complaint, are also based on the Select Committee’s nine-member
composition and the Court therefore rejects these arguments for the same reasons. (Doc.
1 at ¶¶ 85–91).

1 or subjective fears.” *Id.* at n1. A “subjective fear of future reprisals is an insufficient
2 showing of infringement of associational rights.” *Id.* “The existence of a prima facie case
3 turns not on the type of information sought, but on whether disclosure of the information
4 will have a deterrent effect on the exercise of protected activities.” *Perry v.*
5 *Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010).

6 Plaintiffs argue their production of records “risks” those people who called or texted
7 Plaintiff Kelli Ward to be contacted by the Committee and to “become implicated in the
8 largest criminal investigation in U.S. history.” (Doc. 51 at 9). Having already found that
9 the subpoenaed information may aid the Committee in its function, this argument fails.
10 Plaintiffs also assert the Committee is controlled by members of a rival political party and
11 thus raises concerns that the Committee will use the information it obtains “to harass or
12 persecute political rivals by inquiring into their dealings with the party Chair.” (*Id.*)
13 Plaintiffs say “[i]f the Select Committee prevails, it will get a list of who, when, and for
14 how long the Chair of the AZGOP was in contact with party members at a sensitive time .
15 . . [which] may ‘induce members to withdraw’ from the AZGOP ‘and dissuade others from
16 joining it because of fear of exposure of their beliefs shown through their associations and
17 of the consequences of this exposure.’” (*Id.*)

18 The Court finds these arguments highly speculative. First, the Court “must
19 presume” that the Select Committee “will exercise [its] powers responsibly and with due
20 regard for the [Plaintiffs’] rights” in handling the information. *Exxon Corp.*, 589 F.2d at
21 589. Second, apart from these broad allegations, Plaintiffs have provided no evidence to
22 support their contention that producing the phone numbers associated with this account
23 will chill the associational rights of Plaintiffs or the Arizona GOP. Absent “objective and
24 articulable facts” otherwise, the Court finds Plaintiffs’ arguments constitute “a subjective
25 fear of future reprisal” that the Ninth Circuit has held as insufficient to show an
26 infringement of associational rights. *Brock*, 860 F.2d at 350.

27 Last, the law requires plaintiffs show that “enforcement of the subpoena *will result*
28 in harassment . . .” *Id.* (emphasis added). Although Plaintiffs allege that they have

1 “received death threats, harassing letters, phone calls, and threatening and sexually explicit
2 comments,” because of the January 6th attack and Plaintiff Ward’s associational status with
3 the Arizona GOP, the Court notes these incidents have already occurred. *Id.* (Doc. 1 at ¶¶
4 55–56). Plaintiffs do not otherwise explain how compliance with the subpoena would
5 result in harassment. Plaintiffs allege that the subpoena “must be declared violative of
6 Plaintiffs’ First Amendment associational rights,” but beyond conclusory allegations, they
7 do not demonstrate how the Select Committee’s enforcement of the subpoena and
8 subsequent possession of the phone numbers “will have a deterrent effect on the exercise
9 of protected activities.” (*Id.* at ¶ 57). The Court therefore finds Plaintiffs failed to
10 demonstrate a cognizable First Amendment claim.

11 Because Plaintiffs failed to show an applicable exception to the sovereign immunity
12 doctrine, Plaintiffs’ claims against the Congressional Defendants are barred.

13 **B. State and Federal Statutory Privileges**

14 Although Plaintiffs’ claims against the Congressional Defendants are barred, T-
15 Mobile is also named a Defendant to this lawsuit. The Court will therefore consider
16 Plaintiffs’ state and federal statutory claims, which necessarily relate to T-Mobile’s release
17 of the subpoenaed records. Plaintiffs argue the subpoena should be quashed because it
18 infringes on rights protected under state and federal statutory privileges, including
19 Arizona’s Physician-Patient Privilege and the Health Insurance Portability and
20 Accountability Act (“HIPAA”). (Doc. 2 at 7–10).

21 **a. Arizona Physician-Patient Privilege**

22 “Arizona has adopted physician-patient privilege statutes for both civil and criminal
23 proceedings.” *Samaritan Health Servs. v. City of Glendale*, 714 P.2d 887, 889 (Az. Ct.
24 App. 1986). The statute reads: “Unless otherwise provided by law, all medical records and
25 payment records, and the information contained in medical records and payment records,
26 are privileged and confidential.” *See* A.R.S. § 12-2292.

27 Plaintiffs argue the subpoena improperly seeks telephone “metadata,” and that a
28 study from Stanford University shows that a patient’s “name or relationship status are

1 immediately apparent from telephone metadata” as well as “countless other personal
2 details.” (Doc. 2 at 8). Plaintiffs therefore contend disclosure of their patients’ phone
3 numbers infringes on the physician-patient privilege under A.R.S. § 12-2292.

4 Congressional Defendants argue the Supremacy Clause of the U.S. Constitution,
5 U.S. Const., Art. VI, cl. 2, overrides Arizona’s physician-patient privilege and thus the
6 statute cannot limit information validly sought under a Congressional subpoena. (Doc. 46
7 at 23). Congressional Defendants further assert a Congressional subpoena is not part of a
8 “civil matter” and therefore Arizona’s physician-patient privilege statute does not apply.
9 (*Id.*)

10 In their Complaint, Plaintiffs allege the subpoena “constitutes a violation of Arizona
11 state law related to medical privilege.” (Doc. 1 at ¶ 65). But “[t]his statute codifies the
12 physician-patient privilege and does not create a private right of action.” *Skinner v. Tel-*
13 *Drug, Inc.*, 2017 WL 1076376, at *4 (D. Ariz. Jan. 27, 2017). Accordingly, Plaintiffs’
14 statutory violation claim in Count III cannot plausibly stand, and the Court will dismiss it.

15 Plaintiffs’ argument that the subpoena should be quashed because it is overbroad
16 and sweeps into physician-patient privileged information is equally unsuccessful. The
17 Arizona statute applies to civil and criminal proceedings and, as Congressional Defendants
18 point out, a congressional subpoena involves neither. Instead, the subpoena here is issued
19 under Congress’s constitutional power to conduct investigations “on which legislation
20 could be had.” *See Mazars*, 140 S. Ct. at 2031. Moreover, even if the statute applied, the
21 Congressional Defendants are not seeking information related to the “confidential contents
22 of the . . . patient’s medical records.” *Carondelet Health Network v. Miller*, 212 P.3d 952,
23 956 (Ariz. Ct. App. 2009). “The whole purpose of the privilege is to preclude the
24 humiliation of the patient that might follow disclosure of his ailments.” *Id.* (internal
25 citation omitted). As the court in *Miller* clarified, “if the disclosure of the patient’s name
26 reveals nothing of any communication concerning the patient’s ailments, disclosure of the
27 patient’s name does not violate the privilege.” *Miller*, 212 P.3d at 956. Here, the records
28 sought by Congressional Defendants “reveal[] nothing of any communication concerning

1 the patient’s ailments.” *Id.* Plaintiffs contend that their medical practice focuses
2 “exclusively on weight loss” and that “communication with certain types of doctors can
3 instantly reveal confidential facts about a patient’s condition.” (Doc. 52 at 4). But the
4 Court finds it implausible that a patient’s phone number would “inevitably expose
5 information about the patient’s medical history, condition, or treatment, and potentially
6 reveal information the patient had divulged in confidence.” *See Miller*, 212 P.3d at 955
7 (holding trial court’s order requiring hospital to disclose the name, address, and telephone
8 number of a hospital patient did not violate the physician-patient privilege).

9 **b. The Health Insurance Portability and Accountability Act**

10 Count III of Plaintiffs’ Complaint attempts to bring another cause of action under
11 HIPAA, alleging “the enforcement of the Subpoena must be enjoined until and unless
12 limitations are put in place to protect the [protected health information (“PHI”)] of the
13 Plaintiffs’ patients.” (Doc. 1 at ¶ 72). Plaintiffs allege they are “covered entities” and that
14 “[d]isclosing the phone records and metadata from the Phone Number would provide the
15 PHI of an unknown but quantifiable number of individuals seeking medical treatment from
16 the Plaintiffs to the Committee and potentially to the public at large.” (*Id.* at ¶ 67). As an
17 initial matter, it is well established that HIPAA does not provide a private cause of action.
18 *Webb v. Smart Document Sols., LLC*, 499 F.3d 1078, 1081 (9th Cir. 2007). Thus, under
19 the current Complaint, Plaintiffs’ independent HIPAA claim cannot plausibly stand, and
20 the Court will dismiss it.

21 Nonetheless, the real question appears to be whether the Select Committee’s request
22 for information that may otherwise be HIPAA protected is reason to quash the subpoena.
23 To that end, Plaintiffs argue the subpoena violates HIPAA because telephone numbers can
24 be used to identify the Wards’ patients and those numbers constitute PHI. (Doc. 2 at 9).
25 Congressional Defendants and T-Mobile argue T-Mobile is not a covered entity and
26 therefore HIPAA’s disclosure restrictions do not apply. (Doc. 53 at 13; Doc. 48 at 4).

27 HIPAA restricts health care entities from disclosure of PHI. Generally, however,
28 HIPAA only applies to covered entities. “A covered entity or business associate may not

1 use or disclose protected health information, except as permitted or required by [these
2 regulations].” 45 C.F.R. § 164.502(a). Covered entities include health plans, health plan
3 clearinghouses, or health care providers who transmit any health information in electronic
4 form in connection with a transaction covered by HIPAA. 45 C.F.R. §§ 160.102(a),
5 164.104(a). A business associate is a person or organization that “creates, receives,
6 maintains, or transmits protected health information” for “a covered entity” unless “in the
7 capacity of a member of the workforce of such covered entity.” *Id.* § 160.103.

8 Covered entities and business associates may disclose PHI only with the patient’s
9 consent or in response to a court order or discovery request. 45 CFR § 164.512(f)(1)(ii)(A).
10 Disclosure of PHI is permitted in response to a subpoena when the covered entity “receives
11 satisfactory assurance from the party seeking the information that reasonable efforts have
12 been made . . . to ensure that the individual who is the subject of the protected health
13 information . . . has been given notice of the request; or . . . reasonable efforts have been
14 made . . . to secure a qualified protective order.” 45 C.F.R. §§ 164.512(e)(1)(ii)(A)–(B). A
15 qualified protective order prohibits the parties from using or disclosing PHI for any purpose
16 other than the litigation at hand and requires the parties to return or destroy the protected
17 information at the end of proceedings. 45 C.F.R. § 164.512(e)(1)(v).

18 Plaintiffs argue HIPAA applies here because Plaintiffs are the “true parties from
19 whom the information is sought.” (Doc. 51 at 16). Plaintiffs cite no case law to support
20 this proposition and the Court accordingly rejects it. The Congressional Defendants plainly
21 issued a subpoena to T-Mobile, not Plaintiffs, and Plaintiffs do not represent that they
22 maintain or could produce the type of records sought in the subpoena. (Doc. 1-1 at 2). T-
23 Mobile is not a covered entity under HIPAA and therefore HIPAA’s PHI disclosure
24 requirements do not apply to it.

25 The Court also notes HIPAA does not preclude production of PHI where an
26 adequate protective order is in place. 45 C.F.R. § 164.512(e); *Lind v. United States*, 2014
27 WL 2930486, at *2 (D. Ariz. June 30, 2014) (internal citation omitted). Plaintiffs allege
28 the parties have not discussed the prospect of a protective order or the potential PHI the

1 subpoena could implicate. (Doc. 1 at ¶ 71). The Court therefore encourages the parties to
2 engage in discussions regarding entry of a protective order designed to protect any potential
3 PHI. Given the legitimate purpose underlying the Select Committee’s investigation,
4 however, the Court will not quash the subpoena on the grounds that some of the information
5 could potentially be protected under statutes that do not apply to T-Mobile. *See F.T.C. v.*
6 *Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980) (“the judiciary must
7 refrain from slowing or otherwise interfering with the legitimate investigatory functions of
8 Congress.”).

9 **IV. Conclusion**

10 Plaintiffs bear the burden of establishing that jurisdiction over the Congressional
11 Defendants exists and have failed to do so here. *Kokkonen*, 511 U.S. at 377. Sovereign
12 immunity therefore bars Plaintiffs’ claims against the Congressional Defendants. Plaintiffs
13 note in their Complaint that T-Mobile was only added to ensure compliance with the
14 Court’s Order. (Doc. 1 at ¶ 11). Because there is no viable claim against T-Mobile, the
15 Court will also dismiss it.

16 Accordingly,

17 **IT IS HEREBY ORDERED** that Plaintiffs’ Motion to Quash (Doc. 2) is **denied**
18 and the Congressional Defendants’ Motion to Dismiss (Doc. 46) is **granted**. The Clerk of
19 the Court is kindly directed to terminate this action.

20 Dated this 22nd day of September, 2022.

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23 
24 Honorable Diane J. Humetewa
25 United States District Judge
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