NOT YET SCHEDULED FOR ORAL ARGUMENT

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5290

ROBERT SCHILLING

Appellant,

v.

NANCY PELOSI, *et al*.,

Appellees.

Appeal from the U.S. District Court for the District of Columbia

ROBERT SCHILLING'S OPPOSITION TO MOTION FOR SUMMARY AFFIRMANCE

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NOW COMES the Appellant, Robert Schilling, and opposes the Appellee's Motion for Summary Affirmance.

I. Introduction

This case involves the Common Law Right of Access ("CLRA") and the District Court's determination, following extensive briefing and oral argument, that it had no jurisdiction to entertain a CLRA claim against the legislative branch, its committees, or its officers. As the District Court recognized, this case implicates important issues and the question of whether – and to what degree – the U.S. Constitution might contradict or abrogate the common law. The District Court's analysis was fact-intensive and historical in nature, citing historical debates in the British Parliament and among the U.S. Constitution's framers, and contrasting the role of the legislative branch on both sides of the Atlantic. And the District Court's eventual conclusion was sweeping in scope: the Court "queried" whether the Common Law Right of Access applied to Congress *at all*, *Schilling v. Pelosi*, No. 1:22-cv-162 (TNM), 2022 U.S. Dist. LEXIS 180142, at *19, n. 2 (D.D.C. Oct. 3, 2022) (emphasis in original), despite a string of precedents from the District Court and this Court in which the applicability of the common law right has been assumed. The end result under the District Court's reasoning is that Congress is absolutely immune from suits arising under the Common Law Right of Access.

This Court has expressly left open the issues Mr. Schilling raised in his petition below. In *Judicial Watch, Inc. v. Schiff*, 452 U.S. App. D.C. 308, 312, 998 F.3d 989, 993 (2021), the majority stated that it had "no occasion" to address whether the

Speech or Debate Clause bars disclosure of public records "in all circumstances." One member of the panel went further, however, and flagged important issues for future consideration: Judge Henderson recognized the important implications of the Speech or Debate Clause in weighing how to apply the Common Law Right of Access vis-à-vis the legislative branch. Concurring "in the judgment only," Judge Henderson took a very different view of the Speech or Debate Clause than the District Court employed in this case. Specifically, she stated: "I believe, in the right case, the application of the Speech or Debate Clause to a common law right of access claim would require careful balancing…" The District Court cited Judge Henderson's concurring opinion, but stated only that "The Court respectfully disagrees." *Schilling v. Pelosi*, No. 1:22-cv-162 (TNM), 2022 U.S. Dist. LEXIS 180142, at *26 (D.D.C. Oct. 3, 2022).

Appellant Robert Schilling is a journalist who has taken Judge Henderson's concurrence to heart, and seeks to present "the right case" squarely to this Court. This matter involves critically important issues of which the public has a legitimate right to be concerned, and to know more — specifically, the apparent outsourcing of nominally congressional functions, performed under color of congressional authority, but by non-staff consultants provided by private donors and activists. ECF No. 12, ¶ 18 *inter alia*. Whether this Court ultimately agrees with Judge Henderson or not, it should at least indulge Mr. Schilling in the arguments that one of this Court's judges thought were important enough to flag for another day. To the extent that the District Court "respectfully disagrees" with a decision of one of the Circuit Court's judges, that

disagreement only serves to highlight the importance of resolving this case following a full and fair round of briefing, rather than summarily.

II. Standard of Review

This Court has made clear that "[t]o obtain summary affirmance, an appellee must satisfy a 'heavy burden' of showing that the merits 'are so clear that expedited action is justified.' *Webster v. Del Toro*, 49 F.4th 562, 566 n.1 (D.C. Cir. 2022) citing and quoting *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297, 260 U.S. App. D.C. 334 (D.C. Cir. 1987). This Court "do[es] not grant summary affirmance lightly; many arguments warrant affirmance but not summary affirmance."

III. Argument

This Court need not decide whether this case will ultimately be affirmed, reversed, or handled in some other manner. Instead, this Court is called upon only to decide whether this Court will allow Mr. Schilling to make his arguments in a full and fair round of briefing. As this Court has made clear, even if Mr. Schilling's arguments are ultimately turned away, that does not entail turning them away summarily: "many arguments warrant affirmance but not summary affirmance." *Webster v. Del Toro*, 49 F.4th 562, 566 n.1 (D.C. Cir. 2022). Similarly, "[t]o summarily affirm an order of the district court, this court must conclude that *no benefit* will be gained from further briefing and argument of the issues presented." *Taxpayers Watchdog, Inc. v. Stanley*, 260 U.S. App. D.C. 334, 819 F.2d 294, 297-98 (1987) (emphasis added), citing *Sills v. Bureau of Prisons*, 245 U.S. App. D.C. 389,

761 F.2d 792, 793-94 (D.C. Cir. 1985). Mr. Schilling is even entitled to inferences in his favor. *Id*.

Plaintiff also notes the respondents' filing of their Motion for Summary Affirmance seeking "expedited action" comes as an ongoing congressional leadership election delay also delays, by a few, possibly important weeks, the reversal of staffing and legal positions by the incoming House of Representatives' majority.[1]

There is plainly no (other) "need" for expedited action. The District Court's ruling is squarely based upon the Speech or Debate Clause, the import of which the District Court agreed governed the case and on which the District Court admitted it "respectfully disagreed" with a member of the Circuit Court. Specifically, the District Court held:

- "Schilling's suit must be dismissed. His request seeks documents and recordings directly related to a House committee's preparation for hearings on climate legislation. Compelling disclosure of those documents would impede Congress's long-recognized investigatory function. The Speech or Debate Clause prohibits that kind of inquiry."

[1] See, e.g., "House Republicans won't be able to withdraw lawsuits filed under Democratic control that were overseen by current House counsel Doug Letter — because they won't be able to hire his replacement. That means they can't change the House's formal positions on issues like the lawsuit against Donald Trump ally Stephen Bannon and others would remain in effect." Olivia Beavers, Jordain Carney and Sarah Ferris, "McCarthy's ongoing speaker battle paralyzes House," Politico, December 15, 2022, https://www.politico.com/news/2022/12/15/mccarthys-ongoing-speaker-battle-paralyzes-house-00074148

Schilling v. Pelosi, No. 1:22-cv-162 (TNM), 2022 U.S. Dist. LEXIS 180142, at *22 (D.D.C. Oct. 3, 2022).

- "In sum, Schilling's request seeks materials related to ongoing legislative hearings. Requiring Defendants to disclose those materials (if they exist) would chill Congress's investigative function. The Speech or Debate Clause prohibits that kind of inquiry." *Schilling v. Pelosi*, No. 1:22-cv-162 (TNM), 2022 U.S. Dist. LEXIS 180142, at *26 (D.D.C. Oct. 3, 2022).

By contrast, this Court has expressly stated that the Speech or Debate Clause implicates important concerns relating to the balance of powers between branches of the federal government, but this Court has not explicitly stated that the immunity provided by the Speech or Debate clause is absolute in every circumstance. This Court's controlling opinions say only that:

- "[L]egislative independence is imperiled" by cases involving the Common Law Right of Access. *Judicial Watch, Inc. v. Schiff*, 452 U.S. App. D.C. 308, 311, 998 F.3d 989, 992 (2021).
- "[T]he court has no occasion to decide whether the Speech or Debate Clause bars disclosure of public records subject to the common-law right of access in all circumstances." *Judicial Watch, Inc. v. Schiff*, 452 U.S. App. D.C. 308, 312, 998 F.3d 989, 993 (2021).
- "Nor need [this Court] consider whether and how the application of the [Speech or Debate] Clause relates to the two-step inquiry to determine

whether the common-law right of access applies… The parties did not raise, and our precedent does not address those issues." *Judicial Watch, Inc. v. Schiff*, 452 U.S. App. D.C. 308, 312, 998 F.3d 989, 993 (2021).

At least one Judge of this Court has articulated a nuanced view of the scope of the common law right of access, which plainly remains unresolved. According to Judge Henderson's concurrence in *Judicial Watch, Inc. v. Schiff*, 452 U.S. App. D.C. 308, 318, 998 F.3d 989, 999 (2021):

- "[T]he fundamental importance of the common law right of access to a democratic state — a right 'predat[ing] the Constitution itself' — cautions against the categorical extension of Speech or Debate Clause immunity to the right... Simply put, the Speech or Debate Clause should not bar disclosure of public records subject to the common law right of access in all circumstances. Instead, the Clause should be considered in weighing the interests for and against disclosure as part of the second-step balancing test [from *United States v. Hubbard*, 650 F.2d 293, 317-22, 208 U.S. App. D.C. 399 (D.C. Cir. 1980)]." *Judicial Watch, Inc. v. Schiff*, 452 U.S. App. D.C. 308, 318, 998 F.3d 989, 999 (2021).
- Judge Henderson stated that she did not resolve the tension between Hubbard and the majority opinion in Judicial Watch only because "Judicial Watch did not adequately present the argument resolving the

> Speech or Debate Clause and common law right of access doctrines *inter se*." *Judicial Watch, Inc. v. Schiff*, 452 U.S. App. D.C. 308, 318, 998 F.3d 989, 999 (2021).

This is a case which squarely presents the "fundamental importance" of the Common Law Right of Access. The District Court came to a sweeping conclusion. This Court's precedents do not bolster that conclusion, but instead expressly state that "our precedent does not address" such issues. One of this Court's judges went so far as to expressly flag the appropriate balance between public access and legislative privilege, including with reference to the five-factor test of *Hubbard* and the two-step inquiry of *Washington Legal Found. v. U.S. Sent'g Comm'n*, 17 F.3d 1446, 1451, 305 U.S. App. D.C. 93 (D.C. Cir. 1994). The questions Judge Henderson flagged for future litigants are squarely presented in this case, were argued by the parties below, and are now ripe for a resolution by this Court.

Militating further toward such a course, throughout the case below Mr. Schilling argued that "[t]here 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." ECF No. 12, p. 3 et seq. With the recent admission that the product of the now concluded, private consultant-led "investigation" "acquired by the committee will be handed over to those with more

resources who can act on the information,"[2] it is now much more difficult to escape the conclusion that the weaponization of congressional subpoena authority which Mr. Schilling sought to uncover was indeed — as argued in detail by Mr. Schilling — merely an effort to assist third parties.

This Court need not make up its mind at this stage, but it should recognize the reality that these issues are important, unsettled in binding precedent, and deserving of proper attention in the ordinary course. The instant matter presents a case warranting such attention.

IV. Conclusion

This Court should deny the Motion for Summary Affirmance and allow the parties to develop their respective arguments through the ordinary course of briefing.

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[2] Lucas Thompson, "Oil companies 'could doom global efforts' around climate change, House committee finds," NBC News, December 9, 2022, https://www.nbcnews.com/science/environment/oil-companies-doom-global-efforts-climate-change-house-committee-finds-rcna59443

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I certify that this Motion complies with the type-volume limitation of Rule 27(d)(2), as it contains 1,961 words.

/s/ Matthew D. Hardin Dated: December 19, 2022
Matthew D. Hardin

CERTIFICATE OF SERVICE

I certify that on December 19, 2022, I filed one copy of the foregoing Opposition to the Motion for Summary Affirmance via the CM/ECF system of the United States Court of Appeals for the District of Columbia Circuit, which I understand caused service on all registered parties.

/s/ Matthew D. Hardin
Matthew D. Hardin