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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

IN RE SPRINGFIELD GRAND JURY INVESTIGATION.	)	Case No. 15-MC-3005

RESPONSE OF THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES AS *AMICUS CURIAE* TO THE DEPARTMENT OF JUSTICE'S MOTION TO RECONSIDER

Kerry W. Kircher, General Counsel
William Pittard, Deputy General Counsel
Todd B. Tatelman, Senior Assistant Counsel
Eleni M. Roumel, Assistant Counsel
Isaac B. Rosenberg, Assistant Counsel
Kimberly Hamm, Assistant Counsel

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700 (telephone)
(202) 226-1360 (facsimile)

Counsel for Amicus Curiae the Bipartisan Legal Advisory Group of the U.S. House of Representatives

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Pursuant to this Court's July 28, 2015 Minute Order, *amicus curiae* the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("House") respectfully responds to the [Department of Justice's] Motion to Reconsider (# 63) (Aug. 6, 2015) ("Motion to Reconsider").

INTRODUCTION

The House understands that, on July 28, 2015, this Court ruled that former Congressman Aaron Schock, and/or his office, is not a "collective entity," and, therefore, the former Congressman is entitled to assert a Fifth Amendment act-of-production privilege with respect to some or all records created or received by him and/or his staff during the course of his service in the U.S. House of Representatives ("Schock Personal Office Congressional Records").[1]

In now asking the Court to reverse itself, the Department advances three incorrect arguments which the House largely addressed earlier, *see* Mem. of the [House] as *Amicus Curiae* (July 27, 2015) (# 50) ("House Amicus"), but each of which the House again addresses in turn below.[2]

First, the Department says that the former Congressman's exclusive ownership of the Schock Personal Office Congressional Records does not matter for act-of-production purposes. This argument rests on: (i) an incomplete quotation from *Bellis v. United States*, 417 U.S. 85 (1974), which omits a key word and ignores the factual context of that case; (ii) a misplaced

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[1] We have not seen, and do not have access to, a transcript of the July 28 hearing at which, we understand, the Court so ruled. Accordingly, we do not know exactly what the Court said in so ruling.

[2] Less than one week elapsed between July 22, 2015, when the House General Counsel first obtained the sealed materials that are relevant to this issue, and July 27, 2015, when the House lodged its *amicus* memorandum with the Court. Accordingly, the Department's suggestion that the House did not act promptly in briefing this issue is not well taken. *See, e.g.*, Mot. to Reconsider ¶ 32 (House's claims "belated"); *id.* ¶ 38 (House acted "belatedly").

Moreover, the House could not have been clearer in its first memorandum that it "takes no position on the application of the act-of-production privilege to any particular record(s)." House Amicus at 3; *but see* Mot. to Reconsider ¶ 25 (suggesting that House argues privilege applies to "financial records sought by the grand jury subpoenas that reflect the expenditure of taxpayer and campaign funds").

suggestion that the former Congressman did once have, but no longer has, an ownership interest in the Schock Personal Office Congressional Records; and (iii) a similarly misplaced suggestion that because the House might, in the future, change its rules regarding Member ownership of personal office congressional records, the former Congressman's ownership of the Schock Personal Office Congressional Records is therefore now irrelevant for Fifth Amendment purposes. *See infra*, Argument Part I; *see also* House Amicus at 5-8.

Second, the Department asserts that a congressional "office" is a "collective entity." This argument rests on (i) a demonstrably false presumption that congressional "offices" are pre-existing legal entities, and (ii) a series of inapt observations regarding Members of Congress and the manner in which they conduct their representative responsibilities. *See infra* Argument, Part II; *see also* House Amicus at 11-16.

Third, the Department suggests that, even if its "collective entity" analysis fails, former Congressman Schock still has no act-of-production privilege with respect to the Schock Personal Office Congressional Records because he was a public official and those are public records. This argument founders on the Department's incorrect contention that personal office congressional records are equivalent to certain Executive Branch records that, *by statute*, are required to be maintained, are owned by the United States, and are subject to public inspection. *See infra* Argument, Part III; *see also* House Amicus at 8-11.

ARGUMENT

I. The Department Is Still Wrong That Ownership Does Not Matter for Fifth Amendment Act-of-Production Purposes.

We explained earlier that, under the Rules, practices, and customs of the House, Members are the *exclusive* owners of their personal office congressional records, and argued that, under applicable case law, that should be the end of the analysis. *See* House Amicus at 5-8.

This is so because, as the exclusive owners, Members hold their personal office congressional records in a necessarily *personal* capacity – not as agents, custodians, or "representatives" of some other person or entity owning those records. *See Braswell v. United States*, 487 U.S. 99, 109-10, 113 (1988); *contra* Mot. to Reconsider ¶¶ 30, 32. The Department has three principal responses, all flawed.

A. The Department first contends that the Supreme Court has "expressly rejected" the House's argument. Mot. to Reconsider ¶¶ 27, 38. This contention is predicated on a selective quote from a footnote in *Bellis*. *See id.* ¶ 27 ("'mere existence of . . . an ownership interest [in records or documents] is not in itself sufficient to establish a claim of privilege'" (quoting *Bellis*, 417 U.S. at 97 n.8)). The problem here is that the Department has omitted from the quote the word "such." The quote, in full, reads: "The Court's decision in [*United States v. White*, 322 U.S. 694 (1944)] clearly established that the mere existence of *such* an ownership interest is not in itself sufficient to establish a claim of privilege." *Bellis*, 417 U.S. at 97 n.8 (emphasis added). The Department's omission of the word "such" is very significant, as we now explain.

The defendant in *Bellis* – an individual partner in a three-member partnership – invoked the Fifth Amendment to withhold "financial books and records of the partnership" which he claimed to "co-own[]" by virtue of his stake in the partnership. *Id.* at 97-98 & n.8. The Court determined that the defendant "ha[d] no *direct* ownership interest in the records," but instead only "a *derivative* interest subject to significant limitations" imposed by state partnership law. *Id.* at 98 (emphases added). As a result, the Court rejected the defendant's privilege assertion, explaining that "*such* an ownership interest [i.e., an indirect and derivative interest] [wa]s not itself sufficient to establish a claim of privilege." *Id.* at 97 n.8 (emphasis added).

By omitting the word "such" from the *Bellis* quote, and by failing to articulate the factual context in which the privilege issue arose in that case, the Department has left a false impression. Far from being "damning or fatal," Mot. to Reconsider ¶ 27, *Bellis* supports the House's contention that because former Congressman Schock is the *exclusive* owner of the Schock Personal Office Congressional Records, that in and of itself should dispatch the "collective entity" analysis. *See, e.g., In re Grand Jury Proceedings*, 727 F.2d 941, 944 (10th Cir. 1984) (*Bellis* "repeated[ly] emphasi[zed] . . . the absence of an ownership interest" in the documents, which were "not subject to the exclusive control of the person to whom the subpoena was issued").[3]

It is noteworthy that the Department – prior to the passage of the Presidential Records Act of 1978 – took the position that "[t]he papers and other historical materials which

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[3] *See also* Lawrence H. Greaves, Note, *Criminal Law Fifth Amendment Privilege – Taxpayer Claiming Privilege Against Disclosure of Accountant's Work Papers Must Show Invasion of His "Private Inner Sanctum."* United States v. Beattie, *522 F.2d 267 (2d Cir. 1975)*, 54 Tex. L. Rev. 432, 439 (1976) ("Both of the *Bellis* guidelines reflect a cautious policy against denying the fifth amendment privilege to individuals on an equal footing with the owner of the documents.").

The other cases the Department cites for the proposition that "ownership or title to documents is not determinative" in the Fifth Amendment act-of-production context, Mot. to Reconsider ¶ 48 (citing five cases), are also not on point. *Wheeler v. United States*, 226 U.S. 478, 482, 486 (1913), and *Grant v. United States*, 227 U.S. 74, 77, 79, 80 (1913), rejected the argument that the subpoenaed individuals obtained a Fifth Amendment interest in corporate records as a result of their obtaining some interest in those records *after* the corporations dissolved. Former Congressman Schock did not acquire anything from any dissolved entity because (i) there never was an "entity" that owned the Schock Personal Office Congressional Records, *see infra* Argument, Part II; House Amicus at 11-16; and (ii) he owned those records as of the time they first were created and/or obtained. *See generally* House Amicus at 5-8.

In *Couch v. United States*, 409 U.S. 322, 323 (1973), an individual taxpayer attempted to assert an act-of-production privilege "to prevent the production of her business and tax records in the possession of *her accountant*." Here, the former Congressman is not asserting an act-of-production privilege with respect to records in the hands of a third party. In *In re Sealed Case (Government Records)*, 950 F.2d 736, 740 (D.C. Cir. 1991), the records at issue "belong[ed] . . . to the government agency," not to the agency employee seeking to assert privilege, as we previously explained, *see* House Amicus at 11. And in *United States v. MacKey*, 647 F.2d 898, 901 (9th Cir. 1981), the court concluded that a corporate executive's diary and calendar belonged to the corporation as "entity records" because the executive used them "to record business meetings and transactions that he conducted as an executive of [a corporation]." Here, as we have suggested before, there simply is no "entity" that owned or owns the Schock Personal Office Congressional Records. *See infra* Argument, Part II; House Amicus at 11-16.

accumulate in the White House during the tenure of a President are the property of that President when his tenure ends." 43 Op. Att'y Gen. 11, 11 (1974). And the Department's view was that the President's ownership was exclusive. *See id.* at 18-19 ("the Government is . . . not the owner" of those materials). Given that the President's ownership interest – similar to the ownership interest enjoyed by Members of Congress in their personal office congressional records – was grounded in "[h]istory, custom, and usage," *Nixon v. United States*, 978 F.2d 1269, 1277, 1284 (D.C. Cir. 1992), it is impossible to reconcile the Department's position then with its position here.[4]

B. The Department also suggests that former Congressman Schock lost his ownership interest in the Schock Personal Office Congressional Records because (i) he did not take copies of them with him when he resigned on March 31, 2015, *see* Mot. to Reconsider ¶¶ 15, 32, 38, and (ii) he "asserted no personal or private interest in [them]" when he left office, *id.* ¶ 15, or at a hearing shortly thereafter, *see id.* ¶ 17. The first suggestion is belied by the factual record, and the second lacks any legal basis.

1. On April 7, 2015, one week after former Congressman Schock resigned, counsel for the Clerk of the House sought from former Congressman Schock's counsel "directions . . . regarding the disposition of [the former Congressman's] records and personal effects which he left behind in his former office space in Washington, D.C. and Illinois." Letter from Kirk D. Boyle, Legal Counsel, to William J. McGinley, Esq. (Apr. 7, 2015), attached as Ex. A. The

[4] Not surprisingly, none of the privilege asserters in the other Supreme Court's "collective entity" cases that the Department cites could claim direct and exclusive ownership of the records that they sought to withhold. *See, e.g., Braswell v. United States*, 487 U.S. 99, 100-01 (1988) (asserter was sole shareholder of corporations to which business records belonged); *United States v. White*, 322 U.S. 694, 696-97 (1944) (asserter was "'assistant supervisor' of [a] union," i.e., merely an employee and not even member of entity to which business records belonged); *Wilson v. United States*, 221 U.S. 361, 367 (1911) (asserter was officer of corporation to which business records belonged); *Dreier v. United States*, 221 U.S. 394, 399 (1911) (similar).

former Congressman's counsel responded that "the Clerk [should] preserve the records in [former Congressman Schock's] former offices," "in light of the [grand jury] subpoena on Mr. Schock," and should send his "personal effects" back "to him in Peoria." Letter from George J. Terwilliger, III, Esq., to Kirk D. Boyle, Legal Counsel (May 1, 2015), attached as Ex. B. As a result, former Congressman Schock effectively was given the opportunity to "disavow his ownership interest in his congressional records," but he "declined" to do so. Letter from Kerry W. Kircher, General Counsel, to George J. Terwilliger, III, Esq., at 2 (May 18, 2015), attached as Ex. C.

In 1992, the D.C. Circuit rejected a similar argument that former President Nixon had abandoned his presidential papers when he resigned his office and left Washington, D.C., in 1974. *See Nixon*, 978 F.2d at 1270-71, 1287. The Court found the former President's actions "in no way remarkable," and concluded that "nothing [could] be inferred from [his] having left the materials in the White House" because: (i) the materials were voluminous, *id.* at 1287; (ii) he had made arrangements with "his staff" to organize and ship the materials back "to his California destination," *id.*; and (iii) he temporarily had entrusted possession of the materials to the Administrator of General Services (before the materials could be shipped), thereby retaining "title and control of his papers" while "guarantee[ing] the full integrity and completeness of the materials so that valid legal process might be satisfied" (i.e., in the event that the Watergate Special Prosecutor issued a subpoena for the materials), *id.* at 1271, 1287. *Cf. Bellis*, 417 U.S. at 99-100 (expressing skepticism of defendant's "belatedly discovered personal interest in [the records]" insofar as he left "these records with the other members of the partnership at their principal place of business for more than *three years* after he left the firm" (emphasis added)).

2. With respect to the second proposition – that the former Congressman lost his ownership interest in the Schock Personal Office Congressional Records because he did not immediately declare a "personal or private interest in [them]," Mot. to Reconsider at ¶¶ 15, 17 – we are aware of no authority, and the Department cites none, requiring such a declaration by Members as the price of retaining their ownership interest in such records. Moreover, the imposition of such a requirement on Members could create a constitutional issue by intruding into the House's authority to make its own rules pursuant to Article I, section 5, clause 2. *See* House Amicus at 6-8 (explaining that Members own their personal office congressional records as a matter of House Rules, practices, and customs; no requirement that Members affirmatively declare "personal or private interest" in such records).

C. Finally, while the Department rightly concedes that the House, through its Rules, has the power to recognize Members' exclusive ownership of their personal office congressional records – something the House has done, *see* House Amicus at 5-8 – the Department wrongly contends that the existence of such power renders a Member's ownership meaningless for Fifth Amendment purposes. *See* Mot. to Reconsider ¶ 49 ("[I]t is the existence of this authority, not the particular exercise of it, that is significant and distinguishes Congressional Offices from sole proprietorships.").

As we explained earlier, the House Rules draw a clear distinction between the records of House committees and officers, on the one hand, and Members' personal office congressional records, on the other. *See* House Amicus at 5-6. The House presumably could do away with this dichotomy by a majority vote of its membership – just as Congress divested presidents from President Reagan onward of ownership of their presidential papers. *See* Presidential Records Act of 1978, Pub. L. No. 95-591, § 3, 92 Stat. 2523 (1978) (law applies to "any Presidential

records . . . created during a term of office of the President beginning on or after January 20, 1981").

But the mere fact that the House's Rules regarding Member ownership of their personal office congressional records *could* be changed does not alter the significance of those Rules as they exist today. *See* House Amicus at 5-8. In both *Bellis* and *Wilson*, the two cases on which the Department relies, *see* Mot. to Reconsider ¶ 49, the state *already* had regulated ownership and control of records belonging to partnerships and corporations, respectively, to preclude any claim of exclusive ownership and control by the subpoenaed individuals. *See Bellis*, 417 U.S. at 98 ("Petitioner holds these records subject to the rights granted to the other partners by state partnership law: Petitioner has no direct ownership interest in the records; rather, under state law, they are partnership property, and petitioner's interest in partnership property is a derivative interest subject to significant limitations."); *Wilson*, 221 U.S. at 385 ("When the appellant became president of the corporation, and as such held and used its books for the transaction of its business committed to his charge, he was at all times subject to its direction, and the books continuously remained under its control."). That obviously is not the case here.

II. The Department Is Still Wrong in Contending That Some "Collective Entity" Controls the Schock Personal Office Congressional Records.

As discussed above and earlier, former Congressman Schock is the exclusive owner of the Schock Personal Office Congressional Records. Under applicable case law, this Court need go no further. *See supra* Argument, Part I; House Amicus at 11.

However, because the Department continues to maintain that those records are controlled by some "collective entity" – now identified by the Department as "Schock's Congressional Office," Mot. to Reconsider ¶ 32 – we explain (again) why the Department is still wrong.

A. The principal question here is whether a "collective entity" known as a "congressional office" even exists. The Department answers that question by *simply presuming* that such an entity exists (and then proceeding from there to argue that a congressional office is unlike a sole proprietorship). *See, e.g., id.* ¶ 32 ("The sole question . . . is whether Schock's Congressional Office is akin to a sole proprietorship . . . ."); *id.* ("If the Office is not a sole proprietorship, . . . Schock holds the records . . . in a representative capacity . . . ."); *id.* ¶ 36 ("[A] Congressional Office is not properly viewed or treated as the equivalent of a sole proprietorship."); *id.* ("[T]he Office exists solely to represent and forward the interests and goals of the public . . . ."); *id.* ("The Office is . . . created by and for the benefit of the public . . . ."); *id.* ¶ 46 ("Congressional Offices exist to aid Congressmen in performing their duties as Members of the House . . . .").

The Department is correct in its tacit acknowledgement that (i) a "collective entity" cannot be conjured up for the sole purpose of end-running a natural person's Fifth Amendment rights, and (ii) the "collective entity" doctrine presupposes a pre-existing legal entity as of the time of the demand for records.[5] However, the presumption that is the linchpin of the Department's argument in this case – that there existed, at the time the subpoenas were issued, a legal entity known as "Schock's Congressional Office" – is demonstrably false. There is not now, and never was, such a legal entity.

The Constitution does not create or recognize a legal entity known as a "congressional office" or anything similar. It speaks only in terms of Members, that is, natural persons who are

[5] *See, e.g., Bellis*, 417 U.S. 86 (partnership existed at time subpoena for partnership records issued); *White*, 322 U.S. at 703 (labor union existed at time subpoena issued to union for union records; "Both common law rules and legislative enactments have granted many substantive rights to labor unions as separate functioning institutions."); *Dreier*, 221 U.S. at 399 (corporation existed at time subpoena for corporate records issued); *Wilson*, 221 U.S. at 366 (same).

elected to the high constitutional position of U.S. Representative: "The House of Representatives shall be composed of *Members* chosen every second Year by the People of the several States." U.S. Const. art. I, § 2, cl. 1 (emphasis added); *see also id.* art. I, § 6 ("*The Senators and Representatives* shall receive a Compensation for their Services . . . . They shall [except in certain cases] be privileged from Arrest during their Attendance at the Session of their respective Houses . . . ; and for any Speech or Debate in either House, they shall not be questioned in any other Place." (emphasis added)).

Furthermore, neither state nor federal law creates or recognizes any legal entity known as a "congressional office" or anything similar – with one exception which, as we explained earlier, supports the House's position here.[6]

Finally, the Rules of the House do not create or recognize a legal entity known as a "congressional office" or anything similar. *See generally* Rules of the U.S. House of Representatives, 114th Cong. (2015) ("House Rules"), *available at* http://clerk.house.gov/legislative/house-rules.pdf. To the extent the House Rules use the word "offices," they do so in three unrelated senses.

First, the Rules refer to "offices" in the everyday practical sense of a workplace, that is, a physical office space – with desks, other furniture, and equipment – in buildings in Washington, D.C., and in congressional districts where Members (and individuals employed by Members) work and meet with their colleagues, employees, constituents, and others. *See, e.g.*, House Rule II.2(i)(1) ("The Clerk shall supervise the staff and manage the office of a Member . . . who has died, resigned, or been expelled until a successor is elected."). An "office" in this sense self-evidently is not a legal entity.

[6] The one exception is an "employing office," a legal fiction created by the Congressional Accountability Act for purposes of that statute only. *See* House Amicus at 14-15.

Second, the Rules use the word "office" in the sense of a position. *See, e.g.*, House Rule I.8(b)(3)(A) ("In the case of a vacancy in the Office of Speaker, the next Member on the list described in subdivision (B) shall act as Speaker pro tempore . . . ."); House Rule II.1 ("There shall be elected at the commencement of each Congress, to continue in office until their successors are chosen and qualified, a Clerk, a Sergeant-at-Arms, a Chief Administrative Officer, and a Chaplain."). An "office" in this sense also is not a legal entity.

Third, the Rules create certain support "offices." *See, e.g.*, House Rule II.6(a) ("There is established an Office of Inspector General."); House Rule II.7 ("There is established an Office of the Historian of the House . . . ."); House Rule II.8(a) ("There is established an Office of General Counsel . . . ."). While an "office" as used in this sense in the Rules might be a legal entity for some purposes, the Rules pointedly do not purport to create congressional offices or offices of Members. In stark contrast – and even though the House obviously knows how to create "offices" if it wishes to do so – the Rules treat Members as the individual constitutional officers that they are. *See, e.g.*, House Rule III.1 ("Every Member shall be present within the Hall of the House during its sittings . . . ."); House Rule III.2(a) ("A Member may not authorize any other person to cast the vote of such Member or record the presence of such Member . . . ."); House Rule VII.6 (excluding from definition of House "record" any "record of an individual Member, Delegate, or Resident Commissioner").

Accordingly, the Department's "collective entity" argument – which simply presumes the existence of a legal entity – collapses under its own weight because *there is no pre-existing legal entity* that might usefully be compared with a sole proprietorship on the one hand, and a corporation or other legal entity on the other. There is only the Member: Congressman (now former Congressman) Aaron Schock. Indeed, the Department's presumption that "Schock's

Congressional Office" is a pre-existing legal entity is of very recent vintage. None of the three subpoenas at issue here are directed to "Schock's Congressional Office" or anything similar. Rather, all three are directed – correctly – to individuals: one names "Aaron Schock," and the other two name "Custodian of Records, Congressman Aaron Schock."[7] *See* Grand Jury Subpoenas to Aaron Schock, attached collectively as Ex. D. By the Department's own "collective entity" reasoning, none of these subpoenas has been directed to the proper party.

B. Even if it were proper for the Court to consider deeming the "Schock Congressional Office" a "collective entity" for the sole purpose of undercutting former Congressman Schock's act-of-production privilege (which it is not), the points the Department marshals in support do not justify the Court's reaching that conclusion.

1. The Department does not dispute that "the operations of the [o]ffice are under a Congressman's direct and personal control, that he alone determines who to hire, how many to hire, and that the [o]ffice is closely identified with and centered around a single individual, namely the Congressman." Mot. to Reconsider ¶ 40. However, the Department says, this does not make a Member "the equivalent of a sole proprietorship" because some "limited liability or sole shareholder corporations[] share some or all of these same characteristics." *Id.* ¶¶ 40-41. But this is beside the point. Limited liability and sole shareholder corporations are "collective

[7] We note that the House routinely takes the position that subpoenas directed to "the Office of Congressman [John Doe]" are not valid because "the Office of Congressman [John Doe]" is not a legal entity capable of being subpoenaed. *See, e.g.*, 153 Cong. Rec. H57 (daily ed. Jan. 4, 2007) (letter from Congressman Curtis Weldon to Speaker: "[I have received a] subpoena for documents . . . addressed to 'Custodian of Records, Office of Congressman Wayne Curtis Weldon' . . . . [T]he 'Office of Congressman Wayne Curtis Weldon' is not a legal entity . . . ."); 143 Cong. Rec. H6720 (daily ed. Sept. 3, 1997) (letter from Congressman John Dingell to Speaker: "I have received a subpoena (for documents and testimony) issued by the U.S. District Court for the Central District of California in the matter of *Oxycal Laboratories, Inc., et al. v. Patrick, et al., No. SA CV–96–1119 AHS (EEx)*. The subpoena was directed to 'The Office of Congressman John D. Dingell.' After consultation with the Office of General Counsel, I have determined that the subpoena appears not to be consistent with the rights and privileges of the House and, therefore, should be resisted.").

entities" because they are created and recognized by law, whatever their operational characteristics. That is, they exist – as a matter of law – separate and apart from the individuals who own them. As we explained above and earlier, neither a Member of Congress, nor the group of employees who work for him/her, nor the physical space out of which they operate, are legal entities. And it is this fact that makes a Member (and his/her "office") the "equivalent of a sole proprietorship." The operational characteristics the Department describes are wholly consistent with, and serve simply to confirm, that fact.[8]

2. The Department also says that Members "are subject to rules and regulations established by a governing body, namely the House of Representatives. . . . [T]hey are . . . part of a larger entity . . . ." Mot. to Reconsider ¶ 42; *see also id.* ¶ 43. That is true, but it also is beside the point, as we explained earlier. *See* House Amicus at 15. Any number of professions (e.g., lawyers, doctors, psychologists, architects, real estate agents, and pharmacists) are governed by rules and regulations established by governing bodies, whether it be the state, a professional body, or both.[9] But that fact simply has no bearing on whether the business *form*

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[8] The Department asserts that salaries of congressional staff of individual Members "do not come from the individual [M]ember but from the U.S. House of Representatives." Mot. to Reconsider ¶ 7. That is not exactly correct. As we explained earlier, staff salaries are paid from the Members' Representational Allowance ("MRA"), a statutorily appropriated allowance which each Member receives annually to run his or her congressional office. *See* 2 U.S.C. §§ 5321, 5341. While the Chief Administrative Officer ("CAO") of the House disburses paychecks (and electronic funds transfers), that is a ministerial function only. It is the individual Members who decide how much to pay their employees, and who authorize the CAO to disburse those amounts from the individual Member's MRA as salaries to their employees. *See* House Amicus at 12.

[9] *See, e.g.*, D.C. Bar, D.C. Rules of Professional Conduct (2007), *available at* http://www.dcbar.org/bar-resources/legal-ethics/amended-rules/; D.C. Code §§ 11-2501 – 11-2504 (regulating attorney admission and discipline in District of Columbia); *id.* § 3-1205.01 (establishing licensing requirements for certain medical professionals); D.C. Mun. Regs. tit. 17, §§ 2600-99 (regulations governing licensing requirements, continuing education, and code of ethics for real estate brokers, real estate salespersons, and property managers).

through which a particular professional chooses to carry on his trade (e.g., sole proprietorship, partnership, corporation) constitutes a "collective entity" for Fifth Amendment purposes.

3. The Department says the House is "mistaken in contending that[,] . . . '[i]n the conduct of their representational and legislative duties, as well as how they choose to carry out those responsibilities (including through whatever staff they choose to hire), Members answer to no one except, perhaps, their constituents if they choose to seek reelection.'" Mot. to Reconsider ¶ 44 (quoting House Amicus at 11-12). According to the Department, "it is . . . artificial to suggest that [Members'] accountability to the citizens is limited to the formal mechanism of elections every two years." Mot. to Reconsider ¶ 44. The Constitution says otherwise, *see* U.S. Const. art. I, § 2, cl. 1, as have the courts, *see, e.g.*, *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 285 (1984) ("Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues. . . . [D]isapproval of officials' responsiveness . . . is to be registered principally at the polls."); *Richards v. Harper*, 864 F.2d 85, 88 (9th Cir. 1988) (affirming lower court conclusion that constituent not entitled to sue for damages simply because representative failed to perform according to constituent's wishes).[10]

[10] *See also, e.g.*, *Liao v. Ashcroft*, No. 08-cv-2776, 2009 WL 1066302, at *5 (N.D. Cal. Apr. 21, 2009) ("A member of Congress' refusal to assist a constituent in response to the constituent's request for help does not create a cognizable claim."); *Nellis v. Gonzales*, No. 06-cv-1704, 2007 WL 1033517, at *2 (D.D.C. Mar. 30, 2007) (plaintiff failed to state claim by "alleg[ing] that he took various grievances to [Members of Congress and their staff] and was dissatisfied with their responses," because "[n]othing in the First Amendment or this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues" (quotation marks omitted)); *Craft v. McNulty*, 875 F. Supp. 121, 124 (N.D.N.Y. 1995) (refusal to assist constituent "do[es] not rise to the level of an actionable wrong," and refusal to hold hearing on constituents' concerns "is neither inappropriate nor actionable under the laws"); *Adams v. Richardson*, 871 F. Supp. 43, 45 (D.D.C. 1994) ("Plaintiff [constituent] has no constitutional right to have Congressman Richardson make particular decisions or take particular actions."); *McDonough v. Ney*, 599 (*Continued* . . .)

4. The Department next faults as "artificial" the House's contention that "the office of an individual Congressman . . . is . . . inseparable from that Congressman and necessarily ceases to exist once he or she is out of the office." Mot. to Reconsider ¶ 45. The House's contention, which is correct, flows directly from the Constitution, which makes the Member – not the people he hires, not the House itself, and certainly not his "office" – the representative of his constituents: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States." U.S. Const. art. I, § 2, cl. 1. What is artificial, and wholly so, is the notion that, "[e]ven though the name over the door may change, the essence and purpose of the [o]ffice – to aid the elected Representative . . . in serving and advancing the interests of the Eighteenth District – continues unabated from Congress to Congress." Mot. to Reconsider ¶ 47. That turns reality upside down: There simply is no legal entity, independent of the Member, that "continues unabated from Congress to Congress." *See* House Amicus at 11-14.[11]

5. The Department also asks the Court to conclude that Members must be "collective entities" because they are Members of the House, and "there can be little doubt that the House . . . itself is a collective entity." Mot. to Reconsider ¶ 46. But that conclusion simply does not follow from that predicate (even assuming, for the sake of argument, that the predicate is correct). That the American Bar Association may be a "collective entity" for Fifth Amendment purposes does not render every lawyer who is a member of that organization a "collective entity."

F. Supp. 679, 683 (D. Me. 1984) (plaintiffs "alleged no act of omission or commission by these Federal defendants [including Members of Congress], except their failure to intervene [in a dispute between plaintiffs and the state of Maine], which was neither inappropriate nor actionable").

[11] The Department's focus on House Rule II.2(i)(1) is misplaced here, as we explained earlier. *See* House Amicus at 15-16.

III. The Department's Reliance on *Wilson v. United States* Is Misplaced.

The Department says this case presents "a question of first impression." Mot. to Reconsider ¶ 33. At the same time, it also says the Supreme Court decided this question over a century ago in *Wilson*. *See id.* ¶¶ 37-38 (*Wilson* "expressly rejected" House's position because it found that "holders of public offices may not resist the production of official documents under the Fifth Amendment"); *see also id.* ¶ 1 (similar). This is incorrect.

First, *Wilson* did not involve a public official or public documents. Rather, that case concerned a corporate officer who served as the custodian of corporate records. *See* 221 U.S. at 367 ("The books belonged to a corporation of which he [Wilson] was president, and were required to be produced by a subpoena duces tecum."). Accordingly, the *Wilson* language on which the Department relies is *dicta*, and not binding here. *See, e.g.*, *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated."); *United States v. Elliott*, 467 F.3d 688, 690 (7th Cir. 2006) ("That judicial comments lacking the benefit of an adversarial presentation are more likely to be uninformed is a principal reason why dicta are not binding . . . .").[12]

Second, in likening corporate records to "public records and official documents, made or kept in the administration of public office," *Wilson* emphasized the record-keepers' presumptive inability to shield those records from public inspection, even in the absence of a subpoena. *See Wilson*, 221 U.S. at 380. As examples, the Court pointed to (i) a "vestry clerk" required by law to maintain "vestry books"; (ii) an employee of a state-controlled liquor dispensary required by law to keep records subject to legislative oversight; (iii) a state-regulated druggist required by

[12] Tellingly, *Wilson* played no role, nor was it even cited, in the Fourth Circuit's analysis in *In re Grand Jury Subpoena: John Doe, No. 05GJ1318*, 584 F.3d 175 (4th Cir. 2007), where a Member's ability to assert the Fifth Amendment to prevent production of his congressional records likewise was a "question . . . of first impression," *id.* at 184.

law to keep a register of sales, which state law deemed open for public inspection; and (iv) state druggists required by law to retain prescriptions tendered to them and "to produce them in court when required." *Id.* at 380-81. In each example, the public official was required to make and keep records open to public inspection, and, as mere custodians, did not own those records. *See Shapiro v. United States*, 335 U.S. 1, 58 (1948) (Frankfurter, J., dissenting) ("The *Wilson* case was correctly decided. The Court's holding boiled down to the proposition that 'what's not yours is not yours.'").

Accordingly, whatever insight *Wilson* might provide in the context of executive agency records that, by law, must be maintained and "do not belong to the [individual] . . . but [instead] the government agency," *In re Sealed Case (Government Records)*, 950 F.2d 736, 740 (D.C. Cir. 1991), *Wilson* simply has no bearing on whether a Member's personal office congressional records per se fall outside the scope of the Fifth Amendment. As we explained earlier, Members have no obligation to maintain such records; such records are not open to public inspection; and Members own their personal office congressional records exclusively and without limitation. *See* House Amicus at 9-11.[13]

CONCLUSION

The Court should deny the Department's Motion to Reconsider.

[13] To the extent the Department's "public records" theory turns on the notion that Members hold their personal office congressional records in some sort of trust for their constituents – *see, e.g.*, Mot. to Reconsider ¶ 38 ("It is the public and representative nature of the . . . records within Schock's Office that are sought by the grand jury subpoenas that 'predominates over his belatedly discovered personal interest in them.'" (quoting *Bellis*, 417 U.S. at 100)) – the D.C. Circuit already has rejected that contention, as we explained earlier. *See* House Amicus at 9.

Respectfully submitted,

KERRY W. KIRCHER
General Counsel (D.C. Bar No. 386816)
WILLIAM PITTARD
Deputy General Counsel (D.C. Bar No. 482949)
TODD B. TATELMAN (VA Bar No. 66008)
Senior Assistant Counsel
ELENI M. ROUMEL (SC Bar No. 75763)
Assistant Counsel
/s/ Isaac B. Rosenberg
ISAAC B. ROSENBERG (D.C. Bar No. 998900)
Assistant Counsel
KIMBERLY HAMM (D.C. Bar No. 1020989)
Assistant Counsel

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
Telephone: (202) 225-9700
Facsimile: (202) 226-1360
Kerry.Kircher@mail.house.gov
Isaac.Rosenberg@mail.house.gov

August 12, 2015

CERTIFICATE OF SERVICE

I certify that on August 12, 2015, I filed the foregoing Response of the Bipartisan Legal Advisory Group of the U.S. House of Representatives as *Amicus Curiae* to the Department of Justice's Motion to Reconsider via the CM/ECF system of the U.S. District Court for the Central District of Illinois, which I understand caused service on all registered parties.

/s/ Sarah Clouse
Sarah Clouse