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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

IN RE SPRINGFIELD GRAND JURY	)	
	)	
	)	Misc. 15-mc-3005
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	)	
	)	

GOVERNMENT'S REPLY

The United States of America, by its attorneys, James A. Lewis, United States Attorney for the Central District of Illinois, and Timothy A. Bass, Assistant United States Attorney, respectfully submits its reply. The government states the following:

I.Introduction

1. Members of Congress are not "super-citizens, immune from criminal responsibility." *United States v Brewster*, 408 U.S. 501, 516 (1972). In its original motion to enforce grand jury subpoenas seeking the production of only *publicly-funded, non-private, Congressional and campaign records*, which reflect the expenditure of *public and campaign funds*,[1] and now in its motion to reconsider and reply, the government requests only that the Court apply the uncontroversial and established principle that a *public official* "cannot seal his official records and withhold them from the prosecuting

[1] The government again attaches the subpoena to Schock's Congressional Office in Washington, DC, and requests that it be filed under seal, to emphasize that the grand jury is seeking only *non-private, non-personal, official Congressional and campaign records created as part of Schock's official duties* and reflecting the expenditure of *public and campaign funds.* (*See* Attachment A) As the government has acknowledged, Schock has asserted a Fifth Amendment privilege against producing his personal records in his personal possession and against providing personal testimony to the grand jury. The government respects that assertion.

authorities on a plea of constitutional privilege against self-crimination." *Wilson v. United States*, 221 U.S. 361, 380 (1911).

2. Schock and Amicus BLAG, however, dismiss this settled and dispositive principle and instead assert that "public and official records are mine" and that therefore "ownership" is synonymous with "personal and private," which, in turn, is dispositive of a "Fifth Amendment privilege," thereby transforming that which are "public or official records" into "private records" and that which is "not privileged" into "privileged." Although buried in more than 100 pages of semantics, there should be no doubt about what Schock and Amicus BLAG are asking this Court to do. They ask this Court to be the first court to recognize that Schock *and every other current and future Member of Congress* have a Fifth Amendment act-of-production privilege against compulsory production of *public or official* documents and records within their *official Congressional offices*, reflecting the expenditure of public funds, thereby effectively screening them from public scrutiny. The government respectfully submits that this argument is repugnant to the fundamental principle that "[n]o man is above the law," *Texas v. Corrigan*, 257 U.S. 312, 332 (1921), and that it should therefore be rejected.

II.Restatement of the Issue: Whether a Member of Congress May Assert the Purely Personal Privilege Under the Fifth Amendment to Prohibit the Compelled Production of Publicly-Funded Public and Official Records Within His Congressional Office

3. Schock and Amicus BLAG advance the extraordinary claim that a *public* official, namely a Member of the U.S. House of Representatives, who is created by the public in the Constitution and "chosen . . . by the People," U.S. Const. art I, § 2 cl. 2, to be a "Representative" of the public, *id.* § 2 cl. 2., "for the benefit of the people," House Ethics Manual at p.2 (Attachment B), who "hold[s] office to represent the interests of [his or her] constituents and the public at large," *id.* at 23, who is exclusively paid by the public "from United States Treasury Funds, *id.*, who is a steward of public funds, *see generally id.*, and who is subject to the "guiding principle" that "public office is a public trust," *id.* at 2, may nonetheless assert the "purely personal privilege" under the Fifth Amendment to prohibit the compelled production of *public and official* records within what the House itself defines as an "official congressional office." *Id.* at 16.

4. Schock and Amicus BLAG ignore the gravity of this multi-part assertion, presumably because its absurdity is self-evident, and instead strain to redefine the question presented by inventing the phrase "Schock Personal Office Congressional Records," (BLAG Resp. at i; BLAG Brief at i), asserting that the House, under its rulemaking authority, has determined that Schock is the "*exclusive owner[]*," (BLAG Resp. at 2), of his "Personal Office Congressional Records," and that therefore "[t]he Fifth Amendment Act-of-Production Privilege Turns on Ownership" (BLAG Brief at i),

and they then sound the alarm that the government's attempt to compel production of publicly-funded, public and official records somehow "intrude[s] into the House's authority." (BLAG Resp. at 7)

5. "The only issue in this case[, however,] relates to the nature and scope of the constitutional privilege against self-incrimination[,]" *United States v. White*, 322 U.S. 694, 697 (1944), and not the House's rulemaking authority under Article I of the Constitution to regulate "*its Proceedings*." U.S. Const. art. I, § 5 cl. 2. ("Each House may determine the Rules of its Proceedings") (emphasis added). Specifically, the sole issue is whether a *public official* (in this case a U.S. Representative) is akin to a *sole proprietorship* and therefore has a Fifth Amendment act-of-production privilege against compulsory production of *public or official* documents and records, reflecting the expenditure of *public funds*, within his *official office*. The Supreme Court has made clear that the answer to that question is not found in the "ownership" of the documents or who the public official or a public body declares the "exclusive owner" to be, but rather in "the nature of the documents and the capacity in which they are held." *Wilson*, 221 U.S. at 380.

6. The government readily acknowledges and without question respects that the House has the exclusive right, under its rulemaking authority, to regulate "its Proceedings," U.S. Const. art. I, § 5 cl. 2, and determine the "ownership" of records for purposes of those "Proceedings." *Id.* But the Rulemaking Clause of Article I is quite obviously not a "Fifth-Amendment-Privilege-Conferring Clause," and the House has no right to confer a constitutional privilege where none exists. The scope of the House's

exclusive rulemaking authority is therefore properly confined to where it was expressly limited in the Constitution and to where it belongs – within (and not outside) the "Proceedings" of the "House." *Id.*; *see Brewster*, 408 U.S. at 517 (holding that the Speech or Debate Clause "does not extend beyond what is necessary to preserve the integrity of the legislative process").

7. Thus, the House has no exclusive authority, and surely may not cede to itself such authority, to go beyond the regulation of "its Proceedings," U.S. Const. art. I, § 5, cl. 2, and unilaterally determine for its Members the entirely separate and unrelated question as to "the nature and scope of the constitutional privilege against self-incrimination," *White*, 322 U.S. at 694, regarding the compelled production of *public or official* documents and records within the *office of a public official*. On that constitutional question, which has nothing to do with the House's rulemaking authority and which is the only issue presented in this matter, "it is emphatically the province and duty of the judicial department to say what the law is." *United States v. Nixon*, 418 U.S. 683, 703-04 (1974) (quoting *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 and rejecting President's motion to quash subpoena "for confidential Presidential communications" on the basis of an absolute executive privilege). This Court's role as the "ultimate interpreter of the Constitution," *Baker v. Carr,* 369 U.S. 186, 211 (1962), is a role that cannot be shared with the other branches any more than the President can share his veto power or Congress can share its power to override vetoes. *See Nixon,* 418 U.S. at 704–05.

III. A Public Official Has No Fifth Amendment Right to Resist Compelled Production of Publicly-Funded, Non-Private, Public or Official Records Regardless of Their Ownership

8. No court has recognized that a public official (specifically a U.S. Representative) has a constitutional right under the Fifth Amendment to avoid the compelled production of publicly-funded, non-private, public or official records within his official (specifically his official congressional) office. As the government noted in its motion to reconsider, that question is one of first impression. But the legal principles directly applicable to and dispositive of that question are long settled, no matter how hard Schock and Amicus BLAG attempt to avoid them. The Supreme Court has repeatedly made clear that "the public . . . has a right to every man's evidence, except for those persons protected by a constitutional, common-law, or statutory privilege." *Nixon*, 418 U.S. at 709. The privileges, such as the Fifth Amendment, "recognized in law . . . against forced disclosure," are "exceptions to the demand for every man's evidence[,]" but they "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Id.* at 709-10.

9. In the specific context of the Fifth Amendment, the Supreme Court has also made clear that "the privilege against self-incrimination [is] limited to its historic function of protecting only the *natural individual*," *White*, 322 U.S. at 701 (emphasis added), and only "to natural individuals *acting in their own private capacity*." *Id.* at 700 (emphasis added). The privilege also "applies to the business records of the sole proprietor or sole practitioner as well as to *personal documents* containing more intimate

information about the individual's *private* life." *Bellis v. United States*, 417 U.S. 85, 87-88 (1974) (emphasis added). The scope of the privilege, however, stops there. "Were the cloak of the privilege to be thrown around *impersonal records and documents*, effective enforcement of many federal and state laws would be impossible." *White,* 322 U.S. at 700 (emphasis added).

10. Applying these principles to the question presented here, the answer begins and ends with the Supreme Court's statement in *Wilson*, 221 U.S. at 380, that a public official *may not* claim a Fifth Amendment privilege against compulsory *production* of documents and records created as part of his official duties:

> [P]hysical custody of incriminating documents *does not of itself protect the custodian against their compulsory production*. The question still remains with respect to the *nature of the documents and the capacity in which they are held* . . . Thus, in the case of *public records and official documents, made or kept in the administration of public office*, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal dereliction. *If he has embezzled the public moneys and falsified the public accounts, he cannot seal his official records and withhold them from the prosecuting authorities on a plea of constitutional privilege against self-incrimination.* The ***principle*** applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established. There the privilege which exists as to private papers cannot be maintained.

Id. (emphasis added).

11. The Supreme Court's statement could not be more conclusively applicable to Schock's and Amicus BLAG's belated attempt to assert an act-of-production privilege

as to public and official records within Schock's "official congressional office." House Ethics Manual at 16. As the grand jury subpoenas and this Court's enforcement order make clear, the grand jury seeks Schock's "*public records and official documents, made or kept in the administration of [his] public office*." *Wilson*, 221 U.S. at 380 (emphasis added). He therefore "*cannot seal his official records and withhold them from the prosecuting authorities on a plea of constitutional privilege against self-incrimination." Id. (*emphasis added).

12. Unable to distinguish the settled "principle," *id.*, in *Wilson* and the obvious conclusion that a "public office," *id.*, includes what the House itself calls an "official congressional office," House Ethics Manual at 16, Amicus BLAG, after failing to mention *Wilson* at all in its initial brief, now relegates *Wilson* to the end of its response and unilaterally declares the principle as "*dicta*, and not binding here." (BLAG Resp. at 16). Similarly, Schock, true to form, treats *Wilson* and other controlling Supreme Court precedent, like this Court's orders and authority, as nothing more than minor inconveniences to be ignored.

13. The Supreme Court's statement in *Wilson*, however, was most certainly not dicta. To the contrary, the Supreme Court itself, as part of the holding of the case, referred to its statement as a "principle that applies . . . to public documents in public offices," 221 U.S. at 300, which are precisely what the grand jury subpoenas here seek, and what this Court has ordered, and Schock has deceptively refused, to produce.

Moreover, the Supreme Court and other courts have consistently repeated this principle of constitutional law.

14. More than 30 years after *Wilson*, the Supreme Court repeated the prohibition against a public official asserting a Fifth Amendment privilege concerning the compelled production of public and official records within a public office. *See Davis v. United States*, 328 U.S. 582, 589-90 (1946). Thirty years after *Davis*, in *Fisher v. United States*, Justice Brennan again quoted *Wilson* and expressly referred to the Court's statement as part of the holding of the case:

> In *Wilson*, . . . the Court *held*:
>
> > They are of a character which subjects them to the scrutiny demanded . . . . This was clearly implied in the Boyd Case, where the fact that the papers involved were the Private papers of the claimant was constantly emphasized. Thus, in the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal dereliction.

425 U.S. 391, 424 (1976) (Brennan, J., concurring in the judgment) (emphasis added). And finally, other courts have consistently quoted the Court's holding in *Wilson*. *See, e.g., In re Sealed Case (Government Records)*, 950 F.2d 736, 739 (D.C. Cir. 1991) (quoting *Wilson* and referring to the Court's "state[ment]"); *United States v. Kempe*, 59 F. Supp. 905, 909 (D. Iowa 1945). Indeed, in *In re Grand Jury Proceedings*, 119 B.R. 945, 949 (E.D. Mich. 1990), the court, in quoting *Wilson*, referred to "the well-settled law that a public

official has no Fifth Amendment right to withhold public records from grand jury review even if the records tend to incriminate the official in a specific crime."

15. So, again, it is difficult to conceive of something more damning or fatal to Amicus BLAG's and Schock's argument than the fact that the Supreme Court has expressly rejected it. Application of this "well-settled law," *id.*, should therefore truly be the end of this months-long matter.

16. Amicus BLAG and Schock nonetheless persist in their declarations that, notwithstanding the public or official nature of Congressional Office records, "ownership" is synonymous with "personal or private" and the existence of a Fifth Amendment privilege against the compelled production of "public or official records," even records reflecting the expenditure of public funds. To support this claim, they invent the phrase "Schock Personal Office Congressional Records," (BLAG Resp. at i; BLAG Brief at i), and assert that the House, under its rulemaking authority, has determined that "Congressman Schock is the exclusive owner of the Schock Personal Office Congressional Records," (BLAG Resp. at 8), and that therefore "[t]he Fifth Amendment Act-of-Production Privilege Turns on Ownership" (BLAG Brief at i) They further argue that "'the collective entity' doctrine presupposes a pre-existing legal entity," and that there is no such thing as "a legal entity known as 'Schock's Congressional Office.'" (BLAG Resp. at 9)

17. This is nothing more than unserious argument about semantics. Amicus BLAG and Schock even contradict and argue with themselves and each other in

developing this argument. Specifically, Amicus BLAG's invented phrase: "Schock Personal Office Congressional Records," (BLAG Resp. at i; BLAG Brief at i), is inherently contradictory (Personal v. Congressional), appears nowhere but in Amicus BLAG's briefs, and is flatly contradicted by the House's own reference to an "official congressional office," House Ethics Manual at 16, and to the House's current definition (as of the date of filing this reply): "Office of the Eighteenth Congressional District of Illinois[,] Formerly the Office of *Representative* Aaron Schock." *See* clerk.house.gov/member_info/vacancies_pr.aspx?pr=house&vid=93 (emphasis added).

18. Similarly, although now claiming that "there is no actual, existent congressional office entity separate from Mr. Schock," (Schock Resp. at 15), Schock and his counsel have repeatedly represented to this Court the exact opposite. At the outset of this litigation in April 2015, Schock and his counsel, in their motion to quash, said this:

> The Subpoena appears to assume that records of entities such as Mr. Schock's campaign committee, his former congressional office and several political committees, *all of which are separate legal entities*, are or should be in Mr. Schock's personal possession or custody.

(Schock Mot. to Quash at p.2 n.2) (emphasis added).

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> The Subpoena here seeks documents and information likely held by Mr. Schock's former congressional office, his campaign, his Political Action Committee, or his joint fundraising committees . . .

(*id.* at 13)

***

> Mr. Schock does not physically possess the records and documents held by *these distinct entities*. Thus, he is not the proper subject of a subpoena to produce them . . . Mr. Schock is no longer in office and clearly would not physically possess the records held by his former congressional office (which continues to serve Illinois's Eighteenth Congressional District), his former district office, his campaign, his PAC or his fundraising committees. *Simply put, they are separate entities*, no matter how much the government insists they are one-and-the-same.

(*id.* at 13 n.6) (emphasis added).

19. And in the hearing on the government's motion to enforce grand jury subpoenas and Schock's motion to quash, Schock referred to the records in his Congressional Office as his "official office records, many of which I would note are available as a matter of public information on-line." (4/9/15 Tr. at 14)

20. After ignoring these contradictions and controlling Supreme Court precedent, Schock and Amicus BLAG ultimately come together in reliance on the House's rulemaking authority and the argument that "what's yours (the public) is now mine (the Representative)," and they engage in the impossible task of transforming that which are "public or official records" (even records reflecting the expenditure of public funds) into "private records" and converting that which is "not privileged" into "privileged." Declaring something that is "public or official" to be "personal" does not make it so, nor does declaring a privilege establish a privilege, no matter how many times such declarations are repeated or capitalized. Simply put, there is nothing personal or privileged within the meaning of the Fifth Amendment about the *official*

records of a "public office" that the House itself says "is a public trust." House Ethics Manual at 2.

21. In any event, the Supreme Court has never stated that the "[t]he Fifth Amendment Act-of-Production Privilege Turns on Ownership" (BLAG Brief at i) or that "'the collective entity' doctrine presupposes a pre-existing legal entity." (BLAG Resp. at 9). Instead, it has repeatedly refused to do so. Even assuming the existence of an ownership interest in documents or records, or in this case the assignment of "ownership" by the House in "its Proceedings," U.S. Const. art. I, § 5 cl. 2, the Supreme Court has held that it is "the *nature of the documents and the capacity in which they are held*," *Wilson*, 221 U.S. at 380 (emphasis added), that is determinative, and that "in the case of *public records and official documents, made or kept in the administration of public office*, the fact of actual possession or of lawful custody [which naturally includes "ownership"] would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal dereliction." *Id.* (emphasis added).

22. Similarly, in *United States v. White*, 322 U.S. 694 (1944), the Supreme Court expressly refused to consider ownership or the existence of a legal entity as dispositive of the existence of a Fifth Amendment privilege. There, a grand jury subpoena was served on the president of an unincorporated labor union for the production of the union's records. When the assistant supervisor appeared before the grand jury and refused to produce the records due to the assertion of a Fifth Amendment privilege on

his behalf and that of the union, he was held in contempt. In reversing the contempt finding, the court of appeals "held that the records of an unincorporated labor union were the property of all its members" and that therefore the assistant supervisor, if he were a union member, could properly assert the privilege and refuse to produce the records. *Id.* at 696-97.

23. In addressing the issue presented, the Supreme Court stated:

> The only issue in this case relates to the nature and scope of the constitutional privilege against self-incrimination. We are not concerned here with a complete delineation of the legal status of unincorporated labor unions. We express no opinion as to the legality or desirability of incorporating such unions or as to the necessity of considering them as separate entities apart from their members for purposes other than the one posed by the narrow issue in this case. Nor do we question the obvious fact that business corporations, by virtue of their creation by the state and because of the nature and purpose of their activities, differ in many significant respects from unions, religious bodies, trade associations, social clubs and other types of organizations, and accordingly owe different obligations to the federal and state governments. Our attention is directed solely to the right of an officer of a union to claim the privilege against self-incrimination under the circumstances here presented.

Id. at 697-98.

24. Applying the collective or representative entity doctrine, the Supreme Court held that the union official could not assert a privilege against the production of the union records notwithstanding any ownership interest of the union members in the union's records or its unincorporated status. *Id.* at 698-705. The Court explained that because "the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of

any organization, such as a corporation." *Id.* at 699 (emphasis added) (citing Wilson, 221 U.S. at 361). The Court further held that:

> the papers and effects which the privilege protects must be the *private property* of the person claiming the privilege, or at least in his possession in a purely personal capacity. . . But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination. And the official records and documents of the organization that are held by them in a *representative rather than in a personal capacity* cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally.

Id. at 699.

25. In *Bellis v. United States*, 417 U.S. 85 (1974), the Court expanded the collective entity rule to cover a three-person law firm partnership that had previously been dissolved. There, "[t]he documents which petitioner ha[d] been ordered to produce [we]re merely the financial books and records of the partnership[,]" that "reflect[ed] the receipts and disbursements of the entire firm, including income generated by and salaries paid to the employees of the firm, and the financial transactions of the other partners." *Id.* at 97-98. The Court held that the critical factor in a privilege claim is not the size of the organization, but rather the nature of the capacity – either personal or representative – with which the financial records were held. *Id.* at 100-01. Despite the small size of the partnership, the Court ruled that Bellis held the

partnership's financial records in "a representative capacity" and, therefore, "his personal privilege against compulsory self-incrimination [wa]s inapplicable." *Id.* at 101.

26. The Supreme Court in *Bellis* again made clear that neither an ownership interest in property, nor the legal status of an organization (even an "artificial organization") were dispositive (or end the matter as Amicus BLAG and Schock erroneously argue) in a Fifth Amendment claim. *Id.* at 90. The Court held that its "decision in *White* clearly established that the mere existence of such an ownership interest [as "co-owner" of partnership records] is not in itself sufficient to establish a claim of privilege." *Id.* at 99 n.8 (rejecting Bellis's argument "that he has a substantial and direct ownership interest in the partnership records, and does not hold them in a representative capacity"). The Court stated that "limiting the scope of the privilege" to "a purely personal one" is a "fundamental policy," that it is "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records," and that "the papers and effects which the privilege protects must be the *private property* of the person claiming the privilege, or at least in his possession in a *purely personal* capacity. *Id.* at 88-90 (emphasis added). The Court further stated that "[t]he "privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life." *Id.* at 87-88.

27. In contrast to "purely personal," the "natural individual" or "personal documents containing more intimate information about the individual's private life,"

id., a "long line of cases has established that an individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a *representative* capacity, even if these records might incriminate him personally." *Id.* (emphasis added). And "any thought that the principle formulated in these decisions was limited to corporate records was put to rest in *United States v. White*." *Id.* Thus, the Supreme Court "had little difficulty in concluding that the demand for production of the official records of a labor union," *id.* at 93, met the collective or representative entity test, and it has "upheld compelled production of the records of a variety of organizations over individuals' claims of Fifth Amendment privilege." *Id.* at 89.[2]

28. In this case, the grand jury subpoenas seek the production only of publicly-funded, official, non-private, Congressional and campaign records, including "the financial books and records," *see Bellis*, 417 U.S. at 97, within Schock's "official congressional office," House Ethics Manual at 16, that "reflect the receipts and disbursements of [*public* (taxpayer) and campaign funds]." *See Bellis*, 417 U.S. at 97, 94 (noting the impersonal nature of financial records). Many, if not most, of these records are required by House rule or federal law to be created and maintained and some of

[2] *See McPhaul v. United States*, 364 U.S. 372, 380 (1960) (applying collective entity rule to an organization, the Civil Rights Congress); *Rogers v. United States*, 340 U.S. 367, 372 (1951) (applying collective entity rule to a political party, the Communist Party of Denver); *United States v. Fleishchman*, 339 U.S. 349, 357-358 (1950) (Joint Anti-Fascist Refugee Committee); *see also Curcio v. United States*, 354 U.S. 118, 125 (1957) (local labor union).

which even Schock says are online. *See* (4/9/15 Tr. at 14; cha.house.gov/ handbooks (attached to government's motion to reconsider) ("Disbursements from the MRA are made on a reimbursement or direct payment basis and *require specific documentation and Member certification as to accuracy and compliance with applicable federal laws, House Rules, and Committee regulations*") (emphasis added); 11 C.F.R. §§ 100.1 – 100.155, 300.1 – 300.72; Federal Election Campaign Guide (also attached to government's motion to reconsider) (requiring campaign committees to maintain a separate bank account, monitor contributions and authorize expenditures, file periodic reports of such contributions and expenditures with the FEC, and maintain required records of receipts and disbursements for three years from the filing date of the report to which they relate.)

29. This Court need "not [be] concerned here with a complete delineation of the legal status of [Congressional Offices]." *White*, 322 U.S. at 697 (referring to "unincorporated labor unions."). And it need not "express [any] opinion as to the legality or desirability of incorporating such [Offices] or as to the necessity of considering them as separate entities apart from [the House of Representatives] for purposes other than the one posed by the narrow issue in this case." *Id.* The sole issue here is whether a Member of the U.S. House of Representatives has a Fifth Amendment act-of-production privilege as to publicly-funded, non-personal, Congressional and campaign records in his "official congressional office," House Ethics Manual at 16, and whether, by the House's assignment of ownership of official records within "its

Proceedings" to a U.S. Representative, that Representative may convert that which are public or official records (many of which Schock says are online) into private records and that which is not privileged to privileged. Applying controlling Supreme Court precedent and common sense, and applying the principle that the law disfavors an absurd result, the answer to that question is surely no.

30. As the government stated in its motion to reconsider, the Congressional Office of former U.S. Representative Aaron Schock is most certainly not an extension or embodiment of the pursuit of the *personal* interests and goals of Aaron Schock or in any way akin to a sole proprietorship. It is instead a quintessentially "representative entity," to which its name expressly refers: Congressman Aaron Schock, U.S. *Representative* for the Eighteenth Congressional District of Illinois or, as the Clerk of the U.S. House of Representatives currently refers to it: "Office of the Eighteenth Congressional District of Illinois[,] Formerly the Office of *Representative* Aaron Schock." *See* clerk.house.gov/member_info/vacancies_pr.aspx?pr=house&vid=93 (emphasis added). The government listed the obvious differences between a sole proprietorship and a U.S. Representative in its motion to reconsider, which it will not repeat here. But the most striking difference is in the words of the Constitution and the House itself: a Member of the U.S. House of Representatives is created by the public in the Constitution and "chosen . . . by the People," U.S. Const. art I, § 2 cl. 2, to be a "Representative" of the public, *id.* § 2 cl. 2., "for the benefit of the people," House Ethics Manual at p.2 (Attachment B), who "hold[s] office to represent the interests of [his or her] constituents

and the public at large," *id.* at 23, who is exclusively paid by the public "from United States Treasury Funds, *id.*, who is a steward of public funds, *see generally id.*, who is subject to the "guiding principle" that "public office is a public trust," *id.* at 2, and who holds an "official congressional office." *Id.* at 16. There simply can be nothing more antithetical to "personal" or to a "sole proprietorship" than that.

31. Amicus BLAG and Schock lastly sound the alarm of the Rulemaking Clause and argue that the government's attempt to compel production of publicly-funded, public and official records within Schock's "official congressional office," House Ethics Manual at 16, somehow "intrude[s] into the House's authority." (BLAG Resp. at 7). But it is a false alarm.

32. As noted above, the House has the exclusive right, under its rulemaking authority, to regulate "its Proceedings," U.S. Const. art. I, § 5 cl. 2, and determine the "ownership" of records for purposes of those "Proceedings." *Id.* But the Rulemaking Clause of Article I is quite obviously not a "Fifth-Amendment-Privilege-Conferring Clause," and the House has no right to confer a constitutional privilege where none exists. Thus, a refusal by this Court to confer a constitutional privilege of public officials against the compelled production of their public or official records is simply that – a refusal to confer a privilege that the Supreme Court said more than 100 years ago does not exist. *Wilson*, 221 U.S. at 380. The House's exercise of its rulemaking authority and assignment of "ownership" of official records to its Members remains intact and undisturbed. In that sense, Amicus BLAG's and Schock's argument is no different than

the Supreme Court's rejection of President Nixon's claim of "an absolute privilege of confidentiality for all Presidential communications." *Nixon*, 418 U.S. at 703. Nor is it any different than the Supreme Court's rejection of the notion that the Speech or Debate Clause of the Constitution rendered "Members of Congress super-citizens, immune from criminal responsibility." *Brewster*, 408 U.S. at 516-17 (holding that the Speech or Debate Clause "does not extend beyond what is necessary to preserve the integrity of the legislative process").

IV. Schock Has Belatedly and Improperly "Invoked" a Fifth Amendment Privilege

33. Finally, Schock argues that the government has offered "factual misstatements, materially incomplete recitations to irrelevant authorities, and illogical argument," (Schock Resp. at 1), that he "did not belatedly raise the privilege claim," (*id.* at 15 (emphasis omitted), and that he has "significant concerns" about "the extraordinary means and manner by which he finds himself targeted by the government." (*Id.* at 17 n.8) He further has publicly asserted that the government's position (and thus this Court's initial rejection of an act-of-production privilege) "flies in the face of 200 years of practice by the House of Representatives." (*See Former Rep. Aaron Schock in legal battle with DOJ over records*, available at www.politico.com).

34. Putting aside the obvious grandstanding and inartful rhetoric, the record, much of which is now public, reflects that following the issuance of the three grand jury subpoenas to Schock's Congressional Offices and Schock personally, he challenged only the subpoena issued to him personally, ignored the other two, and asserted no

act-of-production privilege as to the records in his Congressional Office. In fact, in direct contrast to what he is now representing to the Court, Schock repeatedly stated to the Court that his former Congressional office was a "separate legal entit[y]." (Schock Mot. to Quash at 2 n.2, 13 n.6) (emphasis added) As a result, this Court specifically held that "I've heard no invocation of any privilege," (4/9/15 Tr. at 60), and that "Mr. Schock has not asserted a privilege at this time." (*See* SEALED OPINION at p.16) Two months after this Court "ENFORCED" all three subpoenas, he belatedly asserted, for the first time, a blanket act-of-production privilege." (*See* Schock's Memorandum of Compliance at 4) In addition, after the government filed a motion for an order to show cause, Schock also belatedly and for the first time "invoke[d]" his Speech or Debate Privilege, in a blanket one-sentence statement, in a footnote in his response. (*See* Schock's Response to Government's Motion for Order to Show Cause, at p.21 n.6.)

35. It is well settled that a person who seeks the protection of the "privilege against self-incrimination" is "required to claim it." *Rogers v. United States*, 340 U.S. 367, 371 (1951) (applying collective entity rule). "The privilege is deemed waived unless invoked." *Id.* Moreover, the party asserting the privilege against the production of documents has the burden to show that it is applicable. *See, e.g., Shakman v. Democratic Organization of Cook County,* 920 F.Supp.2d 881, 888 (N.D. Ill. 2013) (Fifth Amendment privilege); *In re Grand Jury Subpoena*, 662 F.3d 65, 71 (1st Cir. 2011) (attorney-client privilege). A "blanket refusal to produce records will not support a Fifth Amendment

claim." *United States v. Argomaniz,* 925 F.2d 1349, 1356 (11th Cir. 1991); *see Shakman*, 920 F.Supp.2d at 888.

36. As the record makes clear, Schock has failed to establish, and even refused to establish, that he has a valid privilege as to the specific public and official, non-personal, financial, Congressional and campaign records sought by the grand jury subpoenas. His representations to this Court to the contrary are simply a continuation of his deceptive defiance and callous disregard of this Court's and the Supreme Court's authority that he has displayed for months and from the outset of this litigation. At the very least, it is the public and representative nature of the financial records within Schock's Congressional Office that are sought by the grand jury subpoenas that "predominates over his belatedly discovered personal interest in them." *Bellis*, 417 U.S. at 100.

V. Conclusion

37. This Court, applying the collective entity doctrine developed more than 100 years ago in *Wilson*, correctly and "specifically" held on June 25, 2015, that "the congressional office is a collective entity," and that therefore Schock could not assert an act-of-production privilege. (6/18/2015 Tr. at p.67; *see also* SEALED OPINION at pp.13-20 ("the Court finds that the Congressional offices are more akin to a corporation than a sole proprietorship"). The government therefore respectfully requests that the Court re-affirm that ruling and reconvene the contempt hearing as soon as practicable.

VI. Request for Oral Argument

38. Given the importance of the issue presented in this grand jury litigation and Schock's and Amicus BLAG's request that this Court recognize a constitutional privilege for Schock and therefore *all* Members of Congress as to the production of official records within their Congressional Offices, the government respectfully requests that the Court allow oral argument on the government's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of August 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following to:

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