No. 20-1738

IN THE
Supreme Court of the United States

JANET L. YELLEN, SECRETARY OF THE TREASURY, *ET AL.*,

Petitioners,

v.

UNITED STATES HOUSE OF REPRESENTATIVES,

Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION

Carter G. Phillips
Virginia A. Seitz
Joseph R. Guerra
Christopher A. Eiswerth
SIDLEY AUSTIN
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidleyaustin.com

Douglas N. Letter
Counsel of Record
Todd B. Tatelman
Eric R. Columbus
Stacie M. Fahsel
OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
5140 O'Neill House
Office Building
Washington, D.C. 20515
(202) 225-9700
douglas.letter@mail.house.gov

QUESTION PRESENTED

Whether, pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), this Court should vacate the court of appeals' judgment that the House of Representatives had Article III standing to bring claims alleging that the Executive Branch violated the Appropriations Clause of the Constitution by spending funds to construct a border wall in an amount that the House had specifically refused to appropriate for that purpose.

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INTRODUCTION

Citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), the Executive Branch petitioners seek vacatur of the D.C. Circuit's decision that the House had Article III standing to pursue its claims that the former Administration violated the Appropriations Clause of the Constitution. Although this Court has recently vacated decisions in several other cases that became moot after President Biden took office and terminated policies and programs of the former Administration, this case is fundamentally different from those. Here, the court of appeals issued a narrow decision that addressed only standing, arose out of unprecedented circumstances, and was tied to a particular clause of the Constitution. As a consequence, the Executive Branch has failed to show that the decision will cause it any harm. Vacatur is thus unwarranted and the petition should be denied.

As this Court has explained, it is the "burden" of the party seeking vacatur to demonstrate "equitable entitlement" to that "extraordinary remedy." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). The equities in this case weigh heavily against vacating the decision and depriving the court of appeals and the public of the opinion below. Crucially, in the other decisions that this Court recently vacated, the lower courts' holdings prejudiced the Executive Branch through preclusive effect in litigation or substantive constraints on policy discretion. Here, by contrast, the Executive Branch has failed to show the essential element of prejudice. The limited holding of the court of appeals has no *res judicata* or other preclusive effect in any ongoing litigation between the parties. And the Executive Branch has failed to identify any way in which the decision below will restrict

or even affect its conduct or freedom of action in the future, as this Court's cases require for vacatur.

The precedential impact of the decision below is necessarily limited. The court of appeals issued an interlocutory decision holding only that the House has Article III standing to bring its Appropriations Clause claims. The court did not address the numerous other merits and jurisdictional arguments that the Executive Branch has raised, such as whether a cause of action for such a claim exists.

Critically, future courts deciding their jurisdiction are unlikely to read the court of appeals' decision as unmoored from its express limits and the facts that precipitated this suit, and those facts are extraordinary and unlikely to recur. In particular, the dispute arose only after the House specifically refused to appropriate the huge sum demanded by then-President Trump to build a southern border wall, and instead appropriated far less money for construction than the President had sought. The same day that President Trump signed an appropriations bill into law providing a specific and limited appropriation for border-wall construction, he nevertheless announced that he would spend billions of additional dollars on construction that had been appropriated for other purposes. Under these remarkable circumstances—unique in our Nation's history—the House sued the Executive Branch under the Appropriations Clause, and the court of appeals grounded its conclusion that the House had standing in that particular constitutional claim and the extraordinary facts of this case.

The Executive Branch provides no reason to think that anything like the scenario here is likely to play out again. Indeed, the petition acknowledges that the decision below was the first appellate decision to adju-

dicate a case involving an Appropriations Clause challenge between the political Branches since the Constitution was ratified. *See* Pet. 6. It is thus wholly speculative whether another suit would arise in which the decision below would govern the standing analysis, and that remote possibility is plainly inadequate to warrant vacatur.

The Executive Branch's failure to show meaningful prejudice is alone sufficient reason to deny the petition based on the equities here. But there is more: the public interest counsels in favor of preserving the court of appeals' narrow opinion—the product of an exceptional expenditure of judicial and party resources—and the Executive Branch is the party responsible for the mootness of this case. All of the equities thus strongly disfavor vacatur, and the petition should be denied.

Because the Executive Branch has failed to make the essential showing of equitable entitlement to vacatur, there is no need to consider whether it has established another prerequisite for vacatur: that the decision below would have warranted certiorari if the case had not become moot. But on that score, too, the Executive Branch's arguments are unpersuasive.

The interlocutory decision below would not have satisfied the Court's traditional criteria for certiorari. The Executive Branch argues only that the court of appeals' standing decision would have warranted review because it was wrong. But the petition's arguments rest on a serious distortion of the careful opinion written by Judge Sentelle. Contrary to the Executive Branch's dramatic prophecy, the decision will by no means "open the courthouse doors" to "a variety of suits" against the Executive Branch. Pet. 11. Rather, the court of appeals issued a narrow opinion resolving

the Article III standing of the House to bring an Appropriations Clause challenge. The court carefully limited its decision to the claim at issue, and expressly distinguished the very suits that the Executive Branch is now asserting the opinion will authorize.

Beyond its exaggerations of the court of appeals' opinion, the Executive Branch has little to say. The petition contends that the decision below is contrary to this Court's precedents, but the court of appeals correctly analyzed those decisions in reaching its conclusion. The decision involved a correct application of this Court's case law and Article III standing doctrine in the context of the Appropriations Clause, a provision of the Constitution that the Founders understood to place the power over the purse in the hands of Congress, and to serve as a crucial check on the Executive Branch.

In short, the Executive Branch fails at every turn to carry its burden to show that the remedy of vacatur is warranted here. The Executive Branch's petition for a writ of certiorari accordingly should be denied.

STATEMENT

Prior to the last Administration, Presidents had largely respected Congress's funding limits for federal activities. Indeed, when the Civil War broke out during a lengthy Congressional recess, President Lincoln reluctantly decided to spend federal funds to defend the country against the insurrection without an express appropriation—but then quickly sought legislative ratification when Congress reconvened.[1]

President Trump followed a starkly different path. After Congress specifically rejected his demand for

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[1] *See*, *e.g.*, David J. Barron, *Waging War* 133-35 (2016).

massive funds to construct a southern border wall, President Trump precipitated the longest government shutdown in U.S. history to try to force the House of Representatives to agree to provide more funds. When the House nonetheless refused to appropriate the funds the President wanted, he ended the shutdown but, in signing the ensuing appropriations bill, announced that he would spend billions more on the border wall than Congress had provided. Pet. App. 3a. The heads of various Departments and their subordinates then proceeded to do just that. As President Trump's Acting White House Chief of Staff explained at the time, the Administration was determined to build the border wall "with or without Congress."[2]

The House filed this suit in the U.S. District Court for the District of Columbia, alleging that the Trump Administration violated the Appropriations Clause of the Constitution and the Administrative Procedure Act (APA) by transferring funds appropriated for military spending to build the border wall, in clear defiance of the funding limits Congress had set. Pet. App. 3a-4a. The House moved for a preliminary injunction, which the district court denied on the ground that the House lacked standing because it had not been injured. *Id.* at 26a-56a. The district court therefore dismissed the suit. *Id.* at 55a-56a.

Extensive appellate proceedings followed. Initially, a panel of the D.C. Circuit heard oral argument on February 18, 2020. Before any decision was issued, the case was set for rehearing *en banc* together with *Committee on the Judiciary of the U.S. House of Representatives v. McGahn*, 968 F.3d 755 (D.C. Cir. 2020),

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[2] Andrew O'Reilly, *Mulvaney Says Border Wall Will Get Built, 'With Or Without' Funding From Congress*, Fox News (Feb. 10, 2019), https://perma.cc/97EA-VXKH.

to consider "the common issue of Article III standing presented in" the two cases. Pet. App. 60a. In that proceeding, the Executive Branch argued that neither a single chamber nor Congress as a whole ever has standing to sue the Executive Branch for constitutional violations. The *en banc* D.C. Circuit rejected those arguments in *McGahn*. 968 F.3d at 775-78. The court then remanded this case to the original panel for resolution in light of *McGahn*, and the parties provided the court with supplemental briefing on the question of standing.

In its brief on remand, the Executive Branch argued that only Congress as a whole can sue for a violation of the Appropriations Clause. *See* Supp. Br. for Appellees on Remand From Rehearing En Banc 2-10, No. 19-5176 (D.C. Cir. Aug. 21, 2020). The Executive Branch also argued that the House asserted a "generalized grievance" and that accepting the House's standing here would "open the courthouse doors to a sweeping range" of interbranch confrontations. *Id.* at 10-11. In the Executive Branch's view, the House should instead use its political tools to address spending by the Executive in violation of the Appropriations Clause. *Id.* at 12-15.

In response, the House objected to the Executive Branch's categorical argument that a single chamber of Congress can never have standing to sue for a violation of the Appropriations Clause. The House pointed out that this extreme position would allow the Senate, by simply declining to join the House's suit, to acquiesce in Executive Branch spending for a purpose for which the House had expressly considered and rejected funds. Focusing on the particular features of the Appropriations Clause and the Trump Administration's extraordinary actions, the House argued that its

injury was concrete and particularized because the Administration's actions interfered with the House's power of the purse—arguably its most potent constitutional power—and because the Constitution grants each chamber of Congress independent power to limit spending by the Executive Branch. As the House explained, in light of that unique context, a recognition of the House's standing to sue for an Appropriations Clause violation would *not* entitle it to bring other claims, such as a claim that the Executive Branch has exceeded its statutory authority. *See* Supp. Br. of Appellants on Remand From Rehearing En Banc 8-9, No. 19-5176 (D.C. Cir. Aug. 21, 2020).

On September 25, 2020, Judge Sentelle, joined by Judges Millett and Wilkins, held that the House had standing to bring its claims under the Appropriations Clause. As required in an appeal of a dismissal for lack of standing, the court assumed without deciding that the House was correct on the merits of its claims. The court of appeals concluded that the House had asserted a concrete and particularized injury "belonging to the House and the House alone" where the Trump Administration was spending billions of dollars on border-wall construction "in the face of [the House's] specific disapproval." Pet. App. 21a, 24a.

In so holding, the court of appeals relied on the nature and history of the Appropriations Clause, noting that "the ability to appropriate funds was frequently cited during the founding era as the premier check on the President's power." Pet. App. 11a-12a. After carefully surveying this Court's case law, the court of appeals concluded that the House had asserted an institutional injury because the Appropriations Clause is "an express constitutional prohibition that protects each congressional chamber's unilateral authority to

prevent expenditures." *Id.* at 21a. In other words, because appropriations are necessary to ensure that the federal government can function, and because both chambers together must reach agreement on any appropriations, the disapproving chamber has critical leverage that it lacks with respect to other legislation, where inaction is an acceptable option. *See id.* at 9a. Thus, "unlike the situation in which one chamber of Congress seeks to enforce a law that it could not have enacted on its own, a suit to enforce a spending limit vindicates a decision to block or limit spending that each chamber of Congress could have effectively imposed—and, in this case, the House did impose—unilaterally." *Id.* at 10a.

Further, the court of appeals emphasized the extraordinary facts underlying this dispute. Specifically, after losing a political fight over border-wall spending that caused the longest Federal Government shutdown in American history, President Trump opted to spend billions of dollars that the House had "refused to allow." Pet. App. 21a. In these circumstances, the court of appeals explained, the House demonstrated a concrete and particularized injury because the President "cut[] the House out of the appropriations process, rendering for naught its vote withholding the Executive's desired border wall funding." *Id.*

Turning to the House's claims under the APA, the court of appeals held that the House lacked standing to pursue those claims. The court reasoned that the House's APA allegations did not set forth an injury distinct to the House, and "Congress does not have standing to litigate a claim that the President has exceeded his statutory authority." Pet. App. 24a.

The court of appeals vacated the district court's judgment dismissing the constitutional claims and remanded for further proceedings. The court of appeals

did not address any other threshold issues, such as whether a cause of action exists. Nor did the court opine in any way on the merits of the House's constitutional claims—that is, whether the Executive Branch's expenditure of funds beyond those authorized by Congress in fact violated the Appropriations Clause. The court left those questions for remand. Pet. App. 25a.

The Executive Branch sought rehearing *en banc*. The court of appeals denied the petition for rehearing without any recorded dissent. Pet. App. 57a-58a.

Shortly after his inauguration, President Biden announced that he would not expend funds on further border-wall construction. 86 Fed. Reg. 7225 (Jan. 20, 2021). On June 11, 2021, the Department of Defense and the Department of Homeland Security announced that they had completed their plans for the redirection of funds that had been made available for border-wall construction. Pet. 10. The Executive Branch then filed this petition for a writ of certiorari asking the Court to grant the petition, simply for the purpose of vacating the judgment of the court of appeals as moot.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS' NARROW STANDING DECISION WOULD NOT HAVE WARRANTED REVIEW

As the Executive Branch acknowledges, it is not entitled to vacatur unless it can show that this case would have warranted the Court's review had it not become moot. Pet. 16; *see also Camreta v. Greene*, 563 U.S. 692, 712 (2011). This case does not meet the Court's traditional criteria for certiorari. There is no conflict among the courts of appeals, and the "interlocutory posture" of the decision below "counsel[s] against

this Court's review." *NFL v. Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (statement of Kavanaugh, J., respecting the denial of certiorari) (stating that the interlocutory nature of the court of appeals' standing holding weighed against review); *see also, e.g., Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (statement of Roberts, C.J., respecting the denial of certiorari) (stating that, where a case is "in an interlocutory posture, having been remanded for further consideration … [t]he issues will be better suited for certiorari review" after such consideration).

The Executive Branch thus spends the majority of its petition arguing that the court of appeals' opinion would have been worthy of certiorari because it conflicts with this Court's precedents and principles of Article III standing. But those arguments rely on a mischaracterization of the opinion: they overlook the careful way that the court of appeals limited its ruling to an Appropriations Clause violation. And the opinion is entirely consistent with this Court's case law, as the court of appeals painstakingly explained.

A. As a preliminary matter, the Executive Branch grossly overstates the breadth of the court of appeals' opinion. The Executive Branch repeatedly claims, as it did below, that the decision will "open the courthouse doors" to a "variety" (or a "sweeping range") of suits by one House of Congress against the Executive Branch. Pet. 11, 29. But the Executive Branch's fears find no support in the opinion that Judge Sentelle actually wrote.

In unanimously ruling that the House had standing to bring its suit, the court of appeals carefully cabined its holding to the Appropriations Clause claim at issue. It relied on the unique nature of that Clause and the House's appropriations power, the specific events that brought about this lawsuit (including the House's clear

refusal to appropriate the amount of funds that the Executive Branch demanded for border-wall construction), and the Founding-era history and understanding of the Appropriations Clause.

1. As the court explained, "[t]he ironclad constitutional rule" set forth in the Appropriations Clause "is that the Executive Branch cannot spend until both the House and the Senate say so." Pet. App. 22a. "However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned." *Id.* (quoting *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1850)). The court thus recognized that the Constitution gives each chamber an "ongoing power" to "veto certain Executive Branch decisions" that each chamber can "exercise independent of any other body." Pet. App. 23a.

Likewise, the court of appeals stressed that the Appropriations Clause is an express prohibition on spending rather than an affirmative authority to enact legislation. Compare U.S. Const. Art. I, § 9 (enumerating constitutional prohibitions, including the Appropriations Clause) with *id.* Art. I, § 8 (enumerating Congress's affirmative powers). "Because the clause is phrased as a limitation, it means that 'the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.'" Pet. App. 11a (quoting *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (plurality opinion)). The Appropriations Clause thus gives each chamber of Congress independent power to prevent federal expenditures—even expenditures the Executive and the other chamber may favor. *See* Pet. App. 11a-13a.

2. Further, in holding that the House alleged a concrete and particularized injury, the court of appeals

emphasized the specific facts that led to this lawsuit. The court reasoned that the House had asserted an institutional injury because the Executive Branch's actions "render[ed] for naught [the House's] vote withholding the Executive's desired border wall funding." Pet. App. 21a. The court explained that, "by spending funds that the House refused to allow," the Executive Branch allegedly "defied an express constitutional prohibition that protects each congressional chamber's unilateral authority to prevent expenditures." *Id.* As the court put it, the Executive Branch "cut the House out of its constitutionally indispensable legislative role." *Id.*

3. The court of appeals also reasoned that historic separation-of-powers principles "reinforce[d] the House's injury in fact." Pet. App. 22a. As the court explained, the "ability to appropriate funds was frequently cited during the founding era as the premier check on the President's power." *Id.* at 11a-12a. Indeed, "the separation of purse and sword was the Federalists' strongest rejoinder to Anti-Federalist fears of a tyrannical president." *Id.* at 12a (quoting Josh Chafetz, *Congress's Constitution, Legislative Authority and the Separation of Powers* 57 (2017)). The Appropriations Clause was critically important to the Framers as they carried forward a limitation placed on the British monarchy following the Glorious Revolution of 1688-89. *See* Chafetz, *supra*, at 45-57. As then-Judge Kavanaugh wrote, the Appropriations Clause is "a bulwark of the Constitution's separation of powers among the three branches of the National Government," and it "is particularly important as a restraint on Executive Branch officers." *U.S. Dep't of Navy v. Fed. Lab. Rels. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012); *see* Pet. App. 22a.

In light of that historical understanding of the Appropriations Clause, the court of appeals recognized that rejecting the House's standing here would "rewrite" the Clause—transforming it from a provision allowing the Executive "to expend funds only as specifically authorized" into a provision allowing the Executive to "freely spend Treasury funds as it wishes unless and until a veto-proof majority of both houses of Congress forbids it." Pet. App. 22a-23a. That transformation, in turn, would "fundamentally alter the separation of powers by allowing the Executive Branch to spend any funds the Senate is on board with, even if the House withheld its authorizations." *Id.* at 24a.

4. Despite the court of appeals' careful and detailed analysis—rooted entirely in the Appropriations Clause and the House's alleged injury here—the Executive Branch contends that the opinion's reasoning has "no limiting principle" and, alternatively, that the opinion's stated limitations are not "meaningful" even when "taken at face value." Pet. 20, 22. According to the Executive Branch, the opinion would allow each chamber to enforce Executive Branch compliance with *any* law—notwithstanding the opinion's express terms. Relatedly, the Executive Branch contends that "virtually any allegation that an agency has exceeded its statutory authority could be recast as an Appropriations Clause claim." Pet. 22.

Those arguments are puzzling and incorrect. The court of appeals expressly disavowed the Executive Branch's contention: in rejecting the House's APA claim, the court held without qualification that "Congress does not have standing to litigate a claim that the President has exceeded his statutory authority." Pet. App. 24a. Further, the court of appeals' conclusion that the House has alleged a concrete and particularized injury was tied specifically to the structure

and history of the Appropriations Clause and the dynamics of the appropriations process. *See* pp. 10-13, *supra*. The court expressly recognized that "[w]hen the injury alleged is to the Congress as a whole, one chamber does not have standing to litigate." Pet. App. 20a. Plainly, that general rule would apply if a complaint alleged only a violation of law or that the Executive Branch exceeded its statutory authority.

There is thus no truth to the Executive Branch's hyperbolic claims that the decision will "open the courthouse doors to a sweeping range" of interbranch confrontations, or allow the House to sue "whenever [the Executive Branch] acts in excess of statutory authority." Pet. 21, 29. Indeed, the particularized nature of the standing holding, together with the duty of courts to make certain of their jurisdiction, ensures that courts will not ignore the express limits of the opinion below. *See* pp. 23-24, *infra*.

B. The Executive Branch's arguments that the court of appeals' opinion conflicts with this Court's precedents are likewise unpersuasive, especially when the express limits of the opinion are properly considered.

First, relying on the Supreme Court's decision in *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), the Executive Branch contends (Pet. 18) that there is a "mismatch" between the House and the Appropriations Clause authority it seeks to vindicate. But the court of appeals correctly concluded that "this case bears no resemblance to *Bethune-Hill*." Pet. App. 24a. There, the Virginia House of Delegates sought to defend the constitutionality of a redistricting law that could be adopted only with the concurrence of both houses of the Virginia legislature. The "legislative rights" at issue were "vest[ed] solely in the full 'legislature as a whole.'" *Id.* (quoting *Bethune-Hill*, 139 S.

Ct. at 1953-54). By contrast, the House in this case seeks to vindicate its right to veto spending by the Executive—"a legal interest that it possesses completely independently of the Senate, or of the Congress as a whole," *id.*, and a power that it can wield "fully and effectively all by itself," *id.* at 23a.

The Executive Branch attempts to liken this case to *Bethune-Hill* by contending that the House's claim under the Appropriations Clause is no different from a claim "alleging that an agency has acted in excess of any statutory authority." Pet. 20. But the House maintained that the Executive Branch had usurped the House's constitutional power of the purse after that power had been firmly exercised to deny spending authority. That the Executive Branch invoked various statutes as a defense to the House's constitutional claim does not transform that constitutional claim into a statutory one. Indeed, the Executive Branch will *always* claim that its spending is authorized by a statute, because it lacks any inherent authority to spend without one.

The Executive Branch's argument also ignores the plain text of the Appropriations Clause, which, as the court of appeals explained, is a prohibition on spending by the Executive Branch rather than an affirmative authority to enact legislation. This distinction is critical. The House's power to prevent Executive Branch spending is "[u]nlike the affirmative power to pass legislation." Pet. App. 23a. The Appropriations Clause makes clear that the Executive Branch "cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress." *Knote v. United States*, 95 U.S. 149, 154 (1877). The refusal to appropriate funds has constitutional significance and independent legal force that is absent when Congress declines to pass general legislation.

The Executive Branch also suggests (Pet. 19) that the appropriations power belongs only to Congress as a whole because the Constitution does not "explicitly" authorize the House to act alone. That argument, too, is wrong. It ignores the dynamics of the appropriations process, which the Framers understood. *See* p. 12, *supra*. And it conflicts with this Court's precedents recognizing that each chamber possesses its own subpoena power notwithstanding the absence of any "enumerated constitutional power to conduct investigations or issue subpoenas." *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (citing *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927)).

Second, the decision below does not conflict with *Raines v. Byrd*, 521 U.S. 811 (1997), where this Court found that individual legislators—not "authorized to represent their respective Houses of Congress" and indeed opposed by those Houses—suffered no legislative injury because the alleged "diminution of legislative power" was "wholly abstract and widely dispersed" and thus insufficient to establish legislative standing. *Id.* at 821, 829. As the court of appeals noted, this Court has "made clear that *Raines* involves the standing of individual legislators, not of legislative institutions." Pet. App. 15a. The petition's further argument—that *Raines* illustrates the importance of "historical practice" in assessing legislative standing (Pet. 23-25)—does not assist the Executive Branch. Indeed, it is the prior Administration's unprecedented defiance of an express spending limit that explains the absence of historical analogies for the House's claim. *See also McGahn*, 968 F.3d at 776-78 (finding the unprecedented nature of the Administration's stonewalling of Congressional investigations explains the infrequency of subpoena enforcement lawsuits).

Relying on *Raines*, the Executive Branch argues that the House has "adequate remed[ies]" to prevent the Executive Branch from spending funds in excess of its authority. Pet. 25 (quoting *Raines*, 521 U.S. at 829). In the Executive Branch's view, the House should have used its "political tools," such as by passing a law confirming that the President lacks authority to spend funds on a border wall that were not appropriated for that purpose. *Id.* at 25-26.

But this case is unusual precisely because the House *did* wield its political tools, and the former Administration thwarted them by violating the Appropriations Clause. During the longest federal government shutdown in American history, the House employed perhaps its most potent self-help remedy under the Constitution—withholding appropriations—and brokered a compromise with the Trump Administration over border-wall spending. The President then declared that his Administration would nevertheless spend billions of dollars in excess of this compromise. The House joined with the Senate—twice—to pass legislation terminating the national emergency declaration that serves as a predicate for some of the unlawful expenditures, but the President vetoed both attempts.[3] In these remarkable circumstances, where the accommodation process has been exhausted and the President is alleged to have intentionally defied the House's specific refusal to appropriate certain funds, the House is empowered to seek a judicial remedy.

More fundamentally, the Executive Branch's insistence that the House rely on its so-called political remedies misapprehends the Appropriations Clause. The

[3] *See* The White House, *Veto Message to the Senate for S.J. Res. 54* (Oct. 15, 2019), https://perma.cc/4TNS-PYH2.

Clause gives the House independent authority to prevent the Executive from spending funds. But, as the Executive Branch would have it, the House could enforce that prohibition only if veto-proof majorities of both chambers enact a specific statute to override the Executive's spending decision. As the court of appeals recognized, even passing an override statute would not protect the House's prerogatives, because "if the Executive Branch ignored that congressional override, the House would remain just as disabled to sue to protect its own institutional interests." Pet. App. 23a. The court correctly concluded that this result would "turn[] the constitutional order upside down." *Id.*

Third, the petition argues (*e.g.*, Pet. 28) that the decision below conflicts with principles of Article III standing because the House's claim is nothing more than a "generalized grievance" about Executive Branch compliance with the law. But the court of appeals correctly held that the House's interest in enforcing funding limits under the Appropriations Clause is "not a generalized interest in the power to legislate." Pet. App. 21a. As the court explained, the Trump Administration's conduct specifically injured the House by "rendering for naught its vote withholding the Executive's desired border wall funding" and its decision "carefully calibrating what type of border security investments could be made." *Id.* The House's interest cannot seriously be likened to an "undifferentiated public interest in executive officers' compliance with the law." Pet. 28 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992)).

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It is telling that an overwhelming portion of the Executive Branch's petition is devoted to arguing that the court of appeals' decision would have warranted review because it is wrong. Pet. 16-30. Not only is that

argument incorrect, *see* pp. 10-18, *supra*, but this Court has made clear that it is "inappropriate … to vacate mooted cases, in which [it has] no constitutional power to decide the merits, on the basis of assumptions about the merits." *U.S. Bancorp.*, 513 U.S. at 27. The Court should thus decline the Executive Branch's invitation to grant review for the purpose of vacating the standing decision below based solely on its view of the merits.

II. THE EQUITIES HEAVILY WEIGH AGAINST VACATUR OF THE DECISION BELOW

Assuming *arguendo* that the decision below would have been worthy of this Court's review, the Executive Branch has nonetheless failed to make the equitable showing necessary to justify the "extraordinary remedy" of vacatur. *U.S. Bancorp*, 513 U.S. at 26. Vacatur is not automatic when a case becomes moot. As this Court has explained, "not every moot case will warrant vacatur"; rather, vacatur on mootness grounds "is rooted in equity" and "the decision whether to vacate turns on 'the conditions and circumstances of the particular case.'" *Azar v. Garza*, 138 S. Ct. 1790, 1792-93 (2018) (per curiam) (quoting *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 478 (1916)). It is the "burden" of "the party seeking relief from the status quo of the [lower-court] judgment" to demonstrate "equitable entitlement to the extraordinary remedy of vacatur" in the particular case. *U.S. Bancorp*, 513 U.S at 26.

This Court's case law establishes that vacatur may be appropriate where the moot decision will "prejudice[]" the party seeking vacatur, *Munsingwear*, 340 U.S. at 40; where the party seeking vacatur is not primarily responsible for mooting the case, *id.*; and where vacatur is in the public interest, *U.S. Bancorp*, 513

U.S. at 26. In assessing these factors, the Court makes an "equitable" judgment. *Id.* at 29. Here, the Executive Branch has not made the requisite showing for vacatur. Indeed, all of the equities conclusively weigh against such relief, not least because the Executive Branch has utterly failed to demonstrate that it will be prejudiced by the decision below.

A. The Executive Branch Has Failed To Show That The Decision Below Will Cause It Any Prejudice Justifying Vacatur

The Executive Branch has not carried its burden to demonstrate that the court of appeals' narrow standing decision will "prejudice[]" it—or cause it "hardship"—in any meaningful way. *Munsingwear*, 340 U.S. at 40, 41. The decision will not impair the Executive Branch's interests in any ongoing litigation or constrain its freedom of action. In fact, the Executive Branch's *only* suggestion that it will face any "legal consequences," *id.* at 41, is its theatrical assertion that the decision will "open the courthouse doors" to a "sweeping range" of suits by one house of Congress, Pet. 29. As discussed above, that claim is simply not correct. *See* pp. 10-14, *supra*. Indeed, the difficulty of showing prejudice here—given the express limits of the decision below—may be the reason that the petition so strenuously (and inaccurately) proclaims the breadth of that decision.

A proper reading of the decision below makes clear that the Executive Branch has failed to demonstrate prejudice. In concluding that the House had standing, the court of appeals emphasized the particular constitutional claim at issue and the specific facts that brought about this suit, which the Executive Branch does not argue are likely to recur. After all, the decision below was the first time any appellate court had

decided this issue. In all events, the mere possibility that Executive Branch spending decisions could be subject to judicial review at the behest of a single chamber of Congress is not a cognizable harm at all, particularly given the Executive Branch's concession that private parties could bring such challenges. Without any credible demonstration of prejudice, vacatur is inappropriate.

1. This Court's decisions illustrate the kind of harm sufficient to support vacatur of a decision that becomes moot while still on review. In *Munsingwear*, the Court focused on the *res judicata* "hardship" the United States claimed it would suffer if the moot decision in that case were not vacated. 340 U.S. at 41. Specifically, the United States sued the respondent to enjoin violations of a regulation fixing maximum commodity prices and, in a separate count, sought treble damages for past violations. By agreement and a pretrial order, the second count was held in abeyance pending trial on the claim for an injunction, which the government lost on the merits. Thereafter, the regulation that the United States sought to enforce was rescinded by an Executive Order, and the case was mooted. The *res judicata* effect of the now-moot judgment foreclosed the United States' ability to prosecute its still-pending damages action. The Court explained that that these "legal consequences" would have entitled the government to vacatur of the judgment to "clear[] the path for future relitigation of the issues between the parties"—so that no party would be "prejudiced" by the decision. *Id.* at 40-41. But because the United States had failed to move for vacatur, it had forfeited its argument that the Court should exempt it from the ordinary *res judicata* consequences. *Id.*

In later cases, the Court emphasized similar legal consequences. For example, in *Camreta*, 563 U.S. at

713, the petitioner remained employed as a child protective services worker, and thus would continue to be governed in his job by a moot Ninth Circuit ruling requiring him to obtain a warrant before conducting an in-school interview of a minor. Likewise, in *Alvarez v. Smith*, 558 U.S. 87 (2009), the Seventh Circuit had ruled that Illinois' procedure for challenging seizures of personal property used to facilitate drug crimes was inconsistent with the requirements of due process. *Id.* at 91, 97. Leaving that determination in place after it became moot would have interfered with Illinois' ability to seize and retain such evidence in the future. Vacatur was thus necessary to "clear[] the path for future relitigation of the issues between the parties," and thereby avoid prejudice to the rights of the State. *Id.* at 94.

Indeed, the Executive Branch has elsewhere recognized its obligation to show adverse legal consequences from a moot decision in order to obtain vacatur. In *Mayorkas v. Innovation Law Lab*, the Executive Branch justified vacatur by explaining that "the court of appeals' decision affirming the now-moot preliminary injunction interpreted the [Immigration and Nationality Act (INA)] and APA in ways that could have *important 'legal consequences' in the future* if the decision were allowed to remain in place." Petitioners' Suggestion of Mootness and Motion to Vacate 14, *Mayorkas v. Innovation Law Lab*, No. 19-1212 (June 1, 2021) (emphasis added). It explained, for example, that the court's interpretation of one INA provision "could restrict the scope of DHS's contiguous-territory-return authority," thus "calling into question" its programs and actions. *Id.*; *cf.* Petitioners' Motion to Vacate and Remand in Light of Changed Circumstances 11, *Biden v. Sierra Club*, No. 20-138 (June 11, 2021)

(arguing in another case involving border-wall spending that the "permanent injunctive relief that the district court entered, and which the court of appeals affirmed, is no longer appropriate"). In such cases, the judgment at issue spawned adverse legal consequences in the form of substantive *restrictions* on the Executive Branch's ability to take future actions.

2. By contrast, the standing decision below does not cause any of the foregoing types of harm, and the Executive Branch has failed to demonstrate that it will suffer any cognizable legal consequences from the decision.

First, the Executive Branch does not credibly argue that the standing decision below will have any meaningful effect on current or future litigation. As a preliminary matter, there is no ongoing litigation between the parties regarding the Appropriations Clause. And even with respect to hypothetical future litigation, the effect of the decision is necessarily limited. The court of appeals held only that the House had standing to sue for a violation of the Appropriations Clause. The decision did not involve an adjudication on the merits (indeed, the court of appeals did not even rule on whether the House has a cause of action), and thus the decision will not impact future litigation of the merits of any claim under the Appropriations Clause.

On top of that, the unique facts that led to this suit constrain the precedential impact of the decision below. Article III's standing requirement "limit[s] the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers.'" *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 472 (1982) (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)). Accordingly, precedents on standing are not to be "pull[ed] too far from [their] moorings," *Raines*,

521 U.S. at 825, and instead are often read in light of their particular facts and context. *See*, *e.g.*, *Bethune-Hill*, 139 S. Ct. at 1953-54 (distinguishing standing decision in *Arizona State Legislature v. Arizona Independent Redistricting Comm'n,* 576 U.S. 787 (2015), based on its particular facts).

The decision below arose in the context of the President's unprecedented expenditure of funds in defiance of a clear refusal by the House to authorize additional expenditures for that very purpose. The court of appeals' reasoning was grounded in those facts: as the court explained, the House asserted a concrete and particularized institutional injury because it alleged that the Executive Branch spent funds "that the House *refused to allow*," thus "rendering for naught its vote withholding the Executive's desired border wall funding." Pet. App. 21a (emphasis added); *see also id.* (emphasizing that "the injury over which the House is suing" is that the Executive Branch "*snatched the House's key* out of its hands" (emphasis added)).

The Executive Branch fails to show that an Appropriations Clause suit by a single chamber is likely to arise again, let alone in the context of the remarkable facts here. In stark contrast to the arguments raised by the Executive Branch in *Mayorkas*, the substituted federal defendants in this case nowhere suggest that they need or intend to continue the activities that were challenged in this litigation—or that a future Administration would repeat President Trump's unprecedented conduct. Rather, this case is similar to *Electronic Privacy Information Center v. Presidential Advisory Commission on Election Integrity*, where the United States successfully opposed vacatur of a D.C. Circuit standing decision because there was "no need to preserve the 'path for future relitigation' between the parties, since the Commission [at issue] no longer

exist[ed] and it [was] purely speculative whether it (or anything like it) w[ould] ever exist again." Br. in Opp. 17, No. 18-267 (Nov. 30, 2018).

Second, the Executive Branch does not suggest that the court of appeals' standing decision might be used to "call[] into question" or "cast doubt" on any existing Executive Branch actions or policies, or any policies it might conceivably pursue in the future. Petitioners' Suggestion of Mootness and Motion to Vacate 14, *Mayorkas*, *supra*. Simply put, there is no reason to suspect that Executive Branch officials will again seek to spend funds on activities in amounts that Congress (at the insistence of one chamber) unequivocally and unmistakably refused to provide, and to spend those funds immediately after reaching a compromise with that chamber for a far smaller appropriation in order to end an extended government shutdown. The Executive Branch thus has not shown any realistic probability that the decision will "spawn[] any legal consequences." *Munsingwear*, 340 U.S. at 41.

Third, even if the Executive Branch could argue that it might be subject to Appropriations Clause suits by a single chamber of Congress in the future, that alone would not constitute a cognizable "hardship" justifying vacatur. Merely being subject to suit by a particular person or entity is fundamentally different from being subject to restrictions on primary conduct. The latter harm flows from substantive rulings, such as interpretations of statutes that the Executive Branch administers, that can interfere with the Executive Branch's ability to execute the laws in accordance with its legal and policy views. By contrast, the Executive Branch is already subject to suit for a sweeping array of actions it takes, both under statutes such as the APA, 5 U.S.C. § 702 *et seq.*, and the Tucker Act, 28 U.S.C.

§ 1491, as well as judicially created doctrines that provide for non-statutory review in certain circumstances, *see, e.g.*, *Leedom v. Kyne*, 358 U.S. 184, 190 (1958). Against this backdrop of comprehensive judicial review of its actions, it would simply be untenable for the Executive Branch to claim that it suffers hardship from a narrow standing decision that exposes it to suit for violations of the Appropriations Clause at the behest of a chamber of Congress.

Indeed, this point is underscored by the arguments the Executive Branch made below. In those proceedings, it stressed that denying standing to a single chamber of Congress would *not* foreclose judicial review of alleged Appropriations Clause violations, because such challenges could be brought by an appropriate private party. *See* Supp. Br. for Appellees on Remand From Rehearing En Banc 14 ("litigants who have thus far challenged the Executive's expenditures have either lacked Article III standing or have been unable to satisfy the zone-of-interests requirement, but that does not mean that no private party could ever be a proper plaintiff"). The Executive Branch cannot now not argue that being subject to suit for Appropriations Clause violations at the behest of a chamber of Congress constitutes a cognizable hardship justifying the extraordinary remedy of vacatur when it has conceded that it could be haled into court over the exact same conduct at the behest of private individuals.

At bottom, the Executive Branch seeks vacatur based on nothing more than the mere existence of the court of appeals' jurisdictional decision against it, without demonstrating any likely harmful legal consequences from that decision. If the Executive Branch's showing were sufficient here, vacatur would be effectively automatic in every case that becomes moot on appeal. That is not consistent with the Court's

longstanding approach to vacatur. Because the Executive Branch has not established that it will suffer cognizable harm from the decision below, its request for vacatur should be denied.

B. The Executive Branch's Actions And The Public Interest Also Weigh Against Vacatur

Other equitable considerations—namely, the actions of the Executive Branch and the public interest—further seriously undermine the argument that vacatur is warranted here.

1. Where, as here, the losing party mooted its own appeal, the equities generally disfavor vacatur. As the Court has explained, absent "exceptional circumstances," vacatur of a court of appeals' judgment in light of mootness is unwarranted when "the losing party has voluntarily forfeited" review. *U.S. Bancorp*, 513 U.S. at 25, 29. "To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system." *Id.* at 27; *see also Karcher v. May*, 484 U.S. 72, 83 (1987) (declining to vacate under *Munsingwear* following newly-elected legislators' decision not to pursue prior officeholders' appeal).

The Executive Branch argues (Pet. 31) that it should not be penalized for the changes in policy that accompany changes in Administrations—claiming that, in such circumstances, a case becomes moot "due to circumstances unattributable to any of the parties," *U.S. Bancorp*, 513 U.S. at 23, or to "vagaries of circumstance," *id.* at 25. As a preliminary matter, this Court

has expressly reserved the question whether *Munsingwear* vacatur is appropriate where the Executive Branch has mooted a case. *See id.* at 23, 25 n.3; *Karcher*, 484 U.S. at 83. But even assuming the Executive Branch does not *forfeit* a right to vacatur when it enacts policy changes that moot litigation against a previous Administration, its decision to do so plainly does not *entitle* the new Administration to vacatur.[4] The Executive Branch must show that the parties have "not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp*, 513 U.S. at 26. It has failed to make the requisite showing. *See* pp. 20-27, *supra*.

Moreover, in another recent case involving a decision on Article III standing, the Executive Branch *opposed Munsingwear* vacatur, arguing in part that "the lower court's ruling on an Article III jurisdictional ground does not warrant a vacatur on a different Article III jurisdictional ground." Br. in Opp. 6-7, *Elec. Privacy Info. Ctr.*, No. 18-267. The Court sided with the Executive Branch, denying certiorari rather than vacating the decision. *See* 139 S. Ct. 791 (2019). To be sure, the lower court in that case had concluded that the petitioner *lacked* standing, but it makes little sense to al-

[4] The Executive Branch relies on this Court's vacatur of decisions where appeals are mooted after legislatures changed the relevant law—changes that necessarily render prior precedent less valuable and potentially inapplicable or misleading. Pet. 31-32 (citing *United States v. Microsoft*, 138 S. Ct. 1186, 1187-88 (2018) (per curiam); and *U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms v. Galioto*, 477 U.S. 556, 560 (1986)). These cases are plainly distinguishable from those where the Executive Branch voluntarily changes policy after an election, even assuming that both types of decisions are made in good faith and not to thwart appellate review.

low the Executive Branch to obtain vacatur of a decision recognizing standing against it and avoid vacatur of standing decisions favorable to it.

2. Finally, the public interest weighs heavily against vacatur. Significantly, this Court has recognized that judicial precedents "are presumptively correct and valuable to the legal community as a whole"—they should thus "stand unless a court concludes that the public interest would be served by a vacatur.'" *U.S. Bancorp*, 513 U.S. at 26 (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)). The panel issued the decision below after extended litigation—including an *en banc* hearing and decision in a related case—and the full D.C. Circuit denied *en banc* review of the panel's decision without any recorded dissent. The public interest clearly favors the preservation of the decision below, particularly in light of the Executive Branch's failure to show harm flowing from the standing decision in a case that its own actions mooted.

Where, as here, the Executive Branch has not shown that it will be prejudiced by the lower court's decision, and all of the relevant equities counsel against vacatur, that extraordinary remedy is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

Carter G. Phillips
Virginia A. Seitz
Joseph R. Guerra
Christopher A. Eiswerth
SIDLEY AUSTIN
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidleyaustin.com

Douglas N. Letter
Counsel of Record
Todd B. Tatelman
Eric R. Columbus
Stacie M. Fahsel
OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
5140 O'Neill House Office Building
Washington, D.C. 20515
(202) 225-9700
douglas.letter@mail.house.gov

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