No.

In the Supreme Court of the United States

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

v.

UNITED STATES HOUSE OF REPRESENTATIVES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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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 a single House of Congress had Article III standing to sue the Executive Branch to challenge expenditures of funds to construct a border wall in alleged violation of statutory authority, and should remand the case with instructions to dismiss the suit as moot.

PARTIES TO THE PROCEEDING

Petitioners are Janet L. Yellen, in her official capacity as Secretary of the Treasury; Lloyd J. Austin, III, in his official capacity as Secretary of Defense; Alejandro N. Mayorkas, in his official capacity as Secretary of Homeland Security; Debra A. Haaland, in her official capacity as Secretary of the Interior; the United States Department of the Treasury; the United States Department of Defense; the United States Department of Homeland Security; and the United States Department of the Interior.*

Respondent is the United States House of Representatives.

RELATED PROCEEDINGS

United States District Court (D.D.C.):

United States House of Representatives v. *Mnuchin*, No. 19-cv-969 (June 17, 2019)

United States Court of Appeals (D.C. Cir.):

United States House of Representatives v. *Mnuchin*, No. 19-5176 (Sept. 25, 2020)

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* Pursuant to this Court's Rule 35.3, the following petitioners have been automatically substituted as official-capacity parties: Janet L. Yellen *vice* Steven T. Mnuchin; Lloyd J. Austin III *vice* Christopher C. Miller; Alejandro N. Mayorkas *vice* Chad F. Wolf; and Debra A. Haaland *vice* David L. Bernhardt.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of Janet L. Yellen, Secretary of the Treasury, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 976 F.3d 1. A prior opinion of the court of appeals (App., *infra*, 59a-79a) is reported at 969 F.3d 353. The opinion of the district court (App., *infra*, 26a-54a) is reported at 379 F. Supp. 3d 8.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 2020. A petition for rehearing was denied on January 13, 2021 (App., *infra*, 57a-58a). On March 19, 2020, this Court extended the time within

which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. App., *infra*, 80a-96a.

STATEMENT

Respondent filed suit in the United States District Court for the District of Columbia, alleging that certain transfers of funds by Executive Branch officials to construct a border wall exceeded statutory authorization and for that reason violated the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7. The district court denied a preliminary injunction and then entered final judgment in favor of the government, holding that respondent lacked Article III standing. App., *infra*, 26a-54a, 55a-56a. The court of appeals reversed. *Id.* at 1a-25a.

1. This case concerns actions previously taken to fund construction of a wall at the southern border of the United States. Congress appropriated $1.375 billion in fiscal year 2019 "for the construction of primary pedestrian fencing" along certain portions of the southern border. Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, Div. A, Tit. II, § 230(a)(1), 133 Stat. 28. The Executive Branch, however, made additional funding available for construction of a barrier using two methods challenged here.

First, the Department of Homeland Security (DHS) submitted a request to the Department of Defense

(DoD) for counterdrug assistance at the border under 10 U.S.C. 284, which authorizes DoD to provide, upon request from another agency, counterdrug support in the form of "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." 10 U.S.C. 284(b)(7). The Acting Secretary of Defense approved the request and transferred approximately $2.5 billion in fiscal year 2019 between DoD appropriations accounts to ensure adequate funds for construction. App., *infra*, 5a. Congress regularly authorizes DoD to "transfer amounts provided in appropriation Acts" to meet the agency's needs. 10 U.S.C. 2214(a). To transfer funds in response to DHS's Section 284 request, the Acting Secretary invoked Sections 8005 and 9002 of the Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, Div. A, Tit. VIII, 132 Stat. 2999 and Tit. IX, 132 Stat. 3042. Section 8005 authorizes transfers of up to $4 billion in appropriations "[u]pon determination * * * that such action is necessary in the national interest." 132 Stat. 2999. Section 9002 likewise permits transfers of up to $2 billion "subject to the same terms and conditions as the authority provided in section 8005." 132 Stat. 3042.

Second, the Secretary of Defense authorized certain border-wall construction projects under 10 U.S.C. 2808. App., *infra*, 5a-6a. Section 2808 provides that when the President declares a "national emergency * * * that requires use of the armed forces," DoD may, "without regard to any other provision of law," reprioritize appropriated military construction funds that "have not been obligated," to "undertake military construction projects * * * that are necessary to support such use of the armed forces." 10 U.S.C. 2808(a). In February

2019, President Trump declared a national emergency at the southern border under the National Emergencies Act, 50 U.S.C. 1601 *et seq.*, stating that "this emergency requires use of the Armed Forces" and specifying that "the construction authority provided in section 2808 * * * is invoked and made available." 84 Fed. Reg. 4949, 4949 (Feb. 20, 2019); see 50 U.S.C. 1631. The Secretary approved the use of up to $3.6 billion in previously appropriated but unobligated military construction funds to fund border-barrier construction under Section 2808. App., *infra*, 5a.

2. Myriad suits across the country—brought by States, Indian Tribes, municipalities, individuals, and environmental groups—sought to stop the border-wall construction, including on the ground that the transfers and expenditures of funds for border-barrier construction had not been made in accordance with the statutory authorities on which the government relied, and for that reason violated the Appropriations Clause. Cf. U.S. Const. Art. I, § 9, Cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

In 2019, a district court in California issued a preliminary injunction against construction of certain segments of the border barrier, but this Court stayed that injunction. *Trump* v. *Sierra Club*, 140 S. Ct. 1 (2019) (No. 19A60). This Court later granted the government's petition for a writ of certiorari in that case with respect to certain Section 284 projects using funds transferred under Sections 8005 and 9002. See *Biden* v. *Sierra Club*, cert. granted, No. 20-138 (Oct. 19, 2020). As of the date this petition is being filed, that case was being held in abeyance; two other petitions related to border-wall construction were pending in this Court,

see *Biden* v. *Sierra Club*, No. 20-685 (petition filed Nov. 17, 2020); *El Paso County* v. *Biden*, No. 20-298 (petition filed Sept. 2, 2020); and other cases challenging border-wall construction were stayed or being held in abeyance in the lower courts.

3. a. Respondent, the United States House of Representatives, brought this suit alleging in the operative complaint that the Executive Branch's "use of unappropriated funds to construct [a] border wall" under 10 U.S.C. 284 and 10 U.S.C. 2808 violated the Appropriations Clause and the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Am. Compl. at 41, 44, 45 (Counts I-III) (capitalization omitted); see *id.* at 46 (Count IV) ("use of transferred funds * * * to construct [a] border wall") (capitalization omitted); see *id.* ¶¶ 94-138. The operative complaint's prayer for relief sought declaratory and injunctive relief to declare unlawful and enjoin the Executive Branch's various transfers "for purposes of constructing a border wall" and "expenditure of funds on a border wall." Am. Compl. at 48-49.

b. In April 2019, shortly after filing the complaint, respondent moved for a preliminary injunction "prohibiting [the government] from spending funds in excess of Congressional appropriations for counter-narcotics support under section 284 and from spending funds under section 2808(a) on the construction of a wall along the southern border." D. Ct. Doc. 17, at 54 (Apr. 23, 2019).

The district court denied a preliminary injunction on the ground that respondent lacked Article III standing. App., *infra*, 26a-54a. Relying on the principles articulated by this Court in *Raines* v. *Byrd*, 521 U.S. 811 (1997), the district court explained that "while the Constitution bestows upon Members of the House many

powers, it does not grant them standing to hale the Executive Branch into court claiming a dilution of Congress's legislative authority." App., *infra*, 27a. The court found it "persuasive" that "[i]n the 230 years since the Constitution was ratified, the political branches ha[d] entered many rancorous fights over budgets and spending priorities," but "no appellate court ha[d] ever adjudicated" a suit between the political Branches over an alleged injury to the appropriations power. *Id.* at 38a-39a. The court also found it significant that the House has "several political arrows in its quiver to counter perceived threats to" Congress's appropriations authority. *Id.* at 51a. The court explained that were it "to rule on the merits of this case," it "would not be deciding constitutional issues as a 'last resort,'" but rather would be "intervening in a contest between the House and the President over the border wall" that would "'risk damaging the public confidence that is vital to the functioning of the Judicial Branch.'" *Ibid.* (citation omitted). At respondent's request, the district court then entered final judgment in favor of the government. *Id.* at 55a-56a.

c. Respondent appealed, and following the oral argument but before issuing a decision, the court of appeals sua sponte decided to rehear this case en banc together with *Committee On the Judiciary* v. *McGahn*, 968 F.3d 755 (D.C. Cir. 2020) (en banc), which addressed whether the House Judiciary Committee had Article III standing to seek judicial enforcement of a subpoena it had issued to the former White House Counsel. See C.A. Doc. 1833513 (Mar. 13, 2020); see also C.A. Doc. 1838907 (Apr. 20, 2020). After the en banc court issued its decision in *McGahn*, however, it remanded this case to the panel without addressing whether the district court had correctly held that respondent lacked Article

III standing. App., *infra*, 59a-60a. Judges Henderson and Griffith dissented from the remand order, stating that they would have affirmed the district court's judgment. *Id.* at 61a-79a.

d. On remand, the court of appeals panel reversed the district court. App., *infra*, 1a-25a. The court of appeals began by summarizing "the protracted disagreement and negotiation between President Trump and the House of Representatives over the President's request for appropriation[s] to erect a physical barrier along the boundary between the United States and Mexico." App., *infra*, 2a. In describing respondent's claim that the challenged funding transfers and expenditures violated the Appropriations Clause and the APA, the court observed that "[f]undamentally, the House's position is that Congress authorized [the Executive Branch] to spend $1.375 billion, and only $1.375 billion, for construction of a barrier, but [the Executive Branch is] attempting to spend $8.1 billion." App., *infra*, 4a.

The court of appeals held that respondent had Article III standing to assert that claim under the Appropriations Clause. The court acknowledged that *Virginia House of Delegates* v. *Bethune-Hill*, 139 S. Ct. 1945 (2019), which was issued after the district court's decision, held that "a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole." App., *infra*, 18a (quoting *Bethune-Hill*, 139 S. Ct. at 1953-1954). The court of appeals also recognized that under the Appropriations Clause, the "constitutional rule is that the Executive Branch cannot spend until both the House and the Senate say so." *Id.* at 22a. The court concluded, however, that respondent was asserting a "distinct individual right," and not a right belonging to "Congress as a

whole," because "the Appropriations Clause requires two keys to unlock the Treasury, and the House holds one of those keys." *Id.* at 20a-21a. According to the court, by expending funds to construct a border wall in alleged excess of what was statutorily authorized, "[t]he Executive Branch has, in a word, snatched the House's key out of its hands. That is the injury over which the House is suing." *Id.* at 21a.

The court of appeals held, however, that respondent lacked standing to bring a claim under the APA against the Executive Branch. App., *infra*, 24a-25a. The court recognized that "Congress does not have standing to litigate a claim that the President has exceeded his statutory authority," and concluded that respondent's allegations in support of its APA claim "in no way set forth a legislative injury distinct to the House of Representatives and affording it standing." *Id.* at 24a.

4. a. On January 20, 2021, President Biden issued a proclamation declaring that "[i]t shall be the policy of [his] Administration that no more American taxpayer dollars be diverted to construct a border wall." Proclamation No. 10,142, 86 Fed. Reg. 7225 (Jan. 27, 2021). To that end, the President terminated the national emergency at the southern border, directed that the authorities invoked in the prior declaration of the national emergency "will no longer be used to construct a wall at the southern border," and ordered an immediate pause of all border-wall construction while the relevant agencies developed a plan to redirect the funds to other purposes consistent with applicable law. *Id.* at 7225-7226; see Memorandum from David L. Norquist, Deputy Secretary of Defense, to the Chairman of the Joint Chiefs of Staff, et al., Department of Defense Actions Regarding the Proclamation of January 20, 2021 (Jan. 23, 2021)

(implementing proclamation by ordering the Army Corps of Engineers to "pause work on all projects" to construct the border wall and to "cease exercising the authority provided by [Section 284] to award contracts or options on existing contracts, incur new obligations that advance project performance, or incur new expenses unrelated to existing contractual obligations").

b. On April 30, 2021, DoD announced that it was canceling all border-wall construction projects and would not use the challenged funds for any further border-wall construction. See Enclosure to Letter from Elizabeth B. Prelogar, Acting Solicitor General, to Hon. Scott S. Harris, Clerk, *Biden* v. *Sierra Club*, *supra* (No. 20-138) (April 30 DoD Memo). Specifically, DoD stated that it would "take immediate action" to "cancel all section 2808 border barrier construction projects" and to "release the unobligated military construction funds" for use in other military construction projects that had been deferred to fund the border wall. *Id.* at 4. DoD explained that it would use funds made available for border-wall construction under Section 2808 to pay only contract suspension and termination costs, which would not include "costs associated with any further construction or construction-related activities of any kind." *Ibid.*

In the April 30 announcement, DoD also stated that it was taking "immediate action to cancel all section 284 construction projects." April 30 DoD Memo at 5. DoD explained that it would use funds transferred under Sections 8005 and 9002 for counterdrug construction projects under Section 284 for contract suspension and termination costs, and also to make permanent certain temporary safety measures put in place during the

pause in construction. *Ibid.* Because the funds transferred for Section 284 projects were available for obligation only in the fiscal year in which they were transferred, they are no longer available for any other use. *Id.* at 20. Any unexpended Section 284 funds will remain in an operations account for five years, after which the account will be closed and the remaining balance canceled. *Ibid.*

c. On June 11, 2021, DoD and DHS announced that they had completed their plans for the redirection of funds that had previously been made available for border-wall construction, as directed by the President's January 20 proclamation. See App. to Gov't Mot. to Vacate, *Biden* v. *Sierra Club*, *supra* (No. 20-138) (June 11, 2021) (June 11 Plan). As relevant here, DoD explained that its "plan is composed of two parts: (1) cancellation of projects," in accordance with the April 30, 2021 memorandum, and "(2) redirection of funds." *Id.* at 1a. With respect to the redirection of funds, DoD announced that $2.2 billion of unobligated military construction funds under Section 2808 that had been made available for border-wall construction would instead be released to fund 66 military construction projects that had been deferred. *Id.* at 1a, 6a. DHS also announced the completion of its plan. *Id.* at 10a-18a. In light of the completion of those plans and the greatly changed circumstances, the government moved to vacate and remand the *Sierra Club* case. See Gov't Mot. to Vacate, *Biden* v. *Sierra Club*, *supra* (No. 20-138).

REASONS FOR GRANTING THE PETITION

The court of appeals' holding that the House of Representatives has standing, as a single House of the bicameral Congress, to sue the Executive Branch to chal-

lenge expenditures allegedly in excess of statutory authority conflicts with this Court's decision in *Virginia House of Delegates* v. *Bethune-Hill*, 139 S. Ct. 1945 (2019), and with bedrock Article III principles. If it remains in place, the court of appeals' unprecedented decision will open the courthouse doors in the District of Columbia to a variety of suits by one House of Congress against the Executive Branch over how the Executive Branch is exercising its statutory authority. That would inject the federal courts into fundamentally political disputes and upset the balance of power between the political Branches.

But respondent's suit challenging the transfer and expenditure of funds to construct a border wall is now moot. Following the change in Administration, and consistent with the President's direction that "no more American taxpayer dollars be diverted to construct a border wall," 86 Fed. Reg. at 7225, DoD has canceled all border-wall projects and discontinued using any of the challenged funds for any further construction. Accordingly, this Court should "vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). When mootness arises before this Court can review the underlying judgment, vacatur ensures that no party is "prejudiced by a [lower-court] decision" and "prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 40-41. That course is warranted here because this case would have merited this Court's review had it not become moot, and the equities favor vacatur under the circumstances.

A. This Case Is Moot

Respondent brought this suit solely to challenge the Executive Branch's transfer and expenditure of funds

for purposes of constructing a border wall, which, respondent asserted, "usurp[ed] Congress's exclusive authority under the Appropriations Clause to control federal funds." Am. Compl. ¶ 59; see *id.* ¶¶ 107, 108, 119, 127, 136. Respondent's theory is that Congress had appropriated only a limited amount of funds that could be spent on a border wall, and the Executive Branch therefore violated the Appropriations Clause and the APA by expending additional funds to construct a wall. See App., *infra*, 2a. Accordingly, all four counts in the amended complaint hinged on the alleged unlawful transfer and use of funds "to construct [a] border wall." Am. Compl. at 41, 44-46 (Counts I-IV) (capitalization omitted).

Specifically, respondent alleged in Count I that "Congress ha[d] not appropriated $2.5 billion in funds for the purposes authorized by 10 U.S.C. § 284 to construct a wall along the southern border," Am. Compl. ¶ 96; Sections 8005 and 9002 do "not authorize defendants to transfer funds that Congress has appropriated for other purposes to the section 284 counter-narcotics account for purposes of constructing a border wall," *id.* ¶¶ 97, 104; and Section 8005 does not authorize transfers "to be expended under section 284 authority to construct a border wall," *id.* ¶ 103. Accordingly, respondent maintained, "the House is entitled to a declaration that defendants' transfer of funds and expenditure of up to $2.5 billion to construct a border wall under section 284 violate [the Appropriations Clause]," and an injunction to prevent "defendants from transferring or expending funds in excess of Congressional appropriations, to build a border wall under section 284." *Id.* ¶ 109.

Similarly, respondent alleged in Count II that "10 U.S.C. § 2808 does not authorize defendants to spend up to $3.6 billion to construct a wall along the southern border," Am. Compl. ¶ 112; and "Defendants' expenditure of up to $3.6 billion on the construction of a border wall under section 2808 violates [the Appropriations Clause]," *id.* ¶ 118. Accordingly, respondent maintained, "the House is entitled to a declaration that defendants' expenditure of funds on a border wall under 10 U.S.C. § 2808 violates [the Appropriations Clause]" and an injunction preventing "defendants from expending any funds pursuant to section 2808 to build a border wall." *Id.* ¶ 120.

In line with those claims, respondent's prayer for relief requested a declaration that the transfer of funds "for purposes of constructing a border wall" and the expenditure of those funds "on a border wall" were unlawful. Am. Compl. at 48. The prayer for relief further sought an injunction preventing any future transfers of funds "for purposes of constructing a border wall" and future expenditures in excess of congressional appropriations "to build a border wall." *Id.* at 49.

Those claims and requests for relief are now moot. DoD has stopped all border-wall construction, canceled the construction projects, and made clear that no more funds will be transferred or expended for further construction of a border wall. See April 30 DoD Memo; June 11 Plan. Those actions were taken in response to the President's express directives that "no more American taxpayer dollars be diverted to construct a border wall" and that DoD and others "shall develop a plan for the redirection of funds." 86 Fed. Reg. at 7225-7226. DoD's plan confirms that no more funds will be made available for construction of a border wall; that funds

previously made available (but not yet obligated) for Section 2808 construction projects will be restored to military construction projects that had been deferred; and that the funds already transferred under Sections 8005 and 9002 for Section 284 construction projects and funds obligated for Section 2808 construction projects will not be used for further border-wall construction. April 30 DoD Memo; June 11 Plan.

The changed circumstances resulting from those formal directives of the President and DoD eliminate any remaining live dispute between the parties here. In the relevant counts of the amended complaint, respondent sought a declaration and injunction against transferring and expending money on border-wall construction, but the Executive Branch is no longer transferring or expending any funds for further construction of a border wall. As a result, no judicial relief exists that would serve to stop further wall construction beyond what the President and DoD already have stopped, and no funds whatsoever will be transferred or expended for further construction, "which is the precise relief that [respondent] requested in the prayer for relief in [its] complaint," *New York State Rifle & Pistol Association, Inc.* v. *City of New York*, 140 S. Ct. 1525, 1526 (2020) (per curiam).

Nor could border-wall construction reasonably be expected to resume. While as a general matter "a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued," even then a case becomes moot if "'it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'" *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013) (citation omitted). The President has declared that "no more American taxpayer dollars [should] be diverted to construct a border wall," 86 Fed. Reg. at 7225,

and DoD has unequivocally canceled the existing projects and stated that the challenged funds will not be used for any further construction, see April 30 DoD Memo; June 11 Plan. DoD has further restored the unobligated funds made available for Section 2808 projects to other military construction projects that had been deferred. See June 11 Plan.

Those actions were not taken to evade judicial review, but rather reflect the conclusion, following the change in Administration, that any transfers or expenditures for further construction of a border wall do not serve the interests of the United States. Cf. *Spomer* v. *Littleton*, 414 U.S. 514, 521-522 (1974) (explaining that an official-capacity suit may be "moot" when the new officeholder does not "intend[] to continue the asserted practices of [the prior officeholder] of which [the plaintiffs] complain"). It is thus "absolutely clear" that DoD will not transfer or expend any funds in excess of congressional appropriations to further construct a border wall. *Already*, 568 U.S. at 91 (citation omitted). And for the same reasons, this is not a case in which "there is a reasonable expectation that the same complaining party will be subject to the same action again." *Kingdomware Technologies, Inc.* v. *United States*, 136 S. Ct. 1969, 1976 (2016) (brackets and citation omitted).

Under the DoD plan developed in response to the President's proclamation, DoD may use the previously obligated military construction funds made available for Section 2808 construction projects to pay contract suspension and termination costs. See April 30 DoD Memo at 4. DoD likewise may use the funds transferred under Sections 8005 and 9002 for Section 284 projects to pay contract suspension and termination costs, and to make permanent certain temporary safety features at some

of the construction sites. See *id.* at 4-5. But those lingering expenditures are not for further construction of a border wall, and halting the transfer and expenditure of funds for such construction was the conduct that respondent sought to declare unlawful and enjoin in this case. See pp. 12-14, *supra*. Nor has respondent ever suggested during this litigation that the payment of costs associated with *stopping* construction of the border wall would be improper. Accordingly, the continued payment of contract suspension and termination costs, and the expenditures to make permanent certain temporary safety features at construction sites, do not prevent this case from being moot.

B. The Court Of Appeals' Decision Would Have Warranted This Court's Review But For Mootness

Vacatur of a lower court's decision because of intervening mootness is generally available only to "those who have been prevented from obtaining the review to which they are entitled." *Camreta* v. *Greene*, 563 U.S. 692, 712 (2011) (quoting *Munsingwear*, 340 U.S. at 39). It has therefore been the longstanding position of the United States that when a case becomes moot after the court of appeals enters its judgment, but before this Court acts on the petition for a writ of certiorari, *Munsingwear* vacatur is appropriate only if the question presented would have merited this Court's review. See, *e.g.*, U.S. Br. in Opp. at 5-8, *Velsicol Chemical Corp.* v. *United States,* cert. denied, 435 U.S. 942 (1978) (No. 77-900); Gov't Br. in Opp. at 6-8, *Electronic Privacy Information Center* v. *Department of Commerce*, cert. denied, 140 S. Ct. 2718 (2020) (No. 19-777). That position is consistent with "observation of th[is] Court's behavior across a broad spectrum of cases since 1978." Stephen M. Shapiro et al., *Supreme Court Practice* § 19.4,

at 19-29 n.34 (11th ed. 2019); see *Camreta*, 563 U.S. at 713 (vacating under *Munsingwear* where the court of appeals' decision was independently "appropriate for review"). The court of appeals' decision here would have warranted this Court's review but for its having become moot. The lower court's decision conflicts with this Court's precedents and with fundamental principles of Article III standing, and raises issues of exceptional importance.

1. a. The court of appeals' holding cannot be squared with this Court's decision in *Bethune-Hill*, which held that "a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole." 139 S. Ct. at 1953-1954. There, the Virginia House of Delegates—the lower house of Virginia's bicameral legislature—attempted to appeal a judicial decision invalidating a state law that had enacted a legislative redistricting plan. *Id.* at 1949-1950. The House of Delegates argued that it had standing because of "its role in enacting redistricting legislation in particular," *id.* at 1953, and noted that it was "the legislative body that actually drew the redistricting plan" that was challenged, *id.* at 1952.

This Court rejected that argument. The Court observed that Virginia's constitution "allocates redistricting authority to the 'General Assembly,' of which the House constitutes only a part." *Bethune-Hill*, 139 S. Ct. at 1953. "Just as individual members lack standing to assert the institutional interests of a legislature," the Court explained, the Virginia House of Delegates "lack[ed] capacity to assert" its alleged interest in drawing the electoral maps that would determine its own composition. *Id.* at 1953-1954 (citing *Raines* v. *Byrd*, 521 U.S. 811, 829 (1997)). The Court explained

that there was a "mismatch between the body seeking to litigate and the body to which the relevant constitutional provision allegedly assigned exclusive redistricting authority." *Id.* at 1953.

Bethune-Hill resolves this suit. Respondent lacks Article III standing because "a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole." 139 S. Ct. at 1953-1954. Respondent asserts that it brought this suit to vindicate its supposed interests "under the Appropriations Clause to control federal funds." Am. Compl. ¶ 59. But the appropriations power is "allocated to Congress" as a whole, not to either House independently. *United States Department of the Navy* v. *Federal Labor Relations Authority*, 665 F.3d 1339, 1346 (D.C. Cir. 2012) (Kavanaugh, J.) (citation omitted); see U.S. Const. Art. I, § 9, Cl. 7. Even respondent's own complaint acknowledges that the Appropriations "[C]lause vests *Congress* with the 'exclusive power over the federal purse.'" Am. Compl. ¶ 58 (emphasis added; citation omitted). As in *Bethune-Hill*, there is thus a "mismatch between the body seeking to litigate and the body to which the relevant constitutional" authority is assigned. 139 S. Ct. at 1953. That alone is dispositive.

b. In holding otherwise, the court of appeals relied on its view that "the Appropriations Clause requires two keys to unlock the Treasury, and the House holds one of those keys." App., *infra*, 21a. From that observation, the court concluded that the Constitution "give[s] the House a vital power of its own"—namely, the power to disagree with the Senate on an appropriation—which in the court's view is a "legal in-

terest that [the House] possesses completely independently of the Senate, or of the Congress as a whole." *Id.* at 24a. That conclusion is incorrect.

Most fundamentally, the court of appeals' conclusion disregards the Constitution's text and structure. When the Constitution "intend[s] to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role," it does so explicitly. *INS* v. *Chadha*, 462 U.S. 919, 955 (1983). For example, the House has the "sole Power of Impeachment," U.S. Const. Art. I, § 2, Cl. 5; the Senate has "the sole Power to try all Impeachments," Art. I, § 3, Cl. 6; and "[e]ach House shall be the Judge of the Elections, Returns, and Qualifications of its own Members," Art. I, § 5, Cl. 1.

Appropriations, by contrast, are "made by Law." U.S. Const. Art. I, § 9, Cl. 7; see *Office of Personnel Management* v. *Richmond*, 496 U.S. 414, 424 (1990) ("[T]he payment of money from the Treasury must be authorized by a statute."). And to become a "Law," a bill must "have passed the House of Representatives *and* the Senate," U.S. Const. Art. I, § 7, Cl. 2 (emphasis added); see *Chadha*, 462 U.S. at 948 ("[N]o law [can] take effect without the concurrence of the prescribed majority of the Members of both Houses."). The "body to which" the Constitution "assign[s]" the appropriations "authority" is thus Congress as a whole, not either House independently. *Bethune-Hill*, 139 S. Ct. at 1953.

Nevertheless, the court of appeals reasoned that "the House is individually and distinctly injured" by an alleged "expenditure of funds not authorized" by statute because the House has the practical ability to "refuse[] to allow" an appropriations bill to become a law. App., *infra*, 21a. But that is true for *any* law—it is an

integral feature and the necessary consequence of bicameralism. Contrary to the court's reasoning, one House's ability to "refuse[] to allow" a bill to become a law, *ibid.*, is not a constitutional *authority* vested in each House within the meaning of *Bethune-Hill*. Precisely the opposite: "The bicameral requirement" is a structural "'check'" that "divide[s] and disperse[s] power" to ensure that "the legislative power w[ill] be exercised only after the opportunity for full study and debate in separate settings" and with the support of the two differently constituted chambers. *Chadha*, 462 U.S. at 948, 950-951 (citation omitted). The bicameralism requirement is thus a *constraint* on the ability of a single House to take unilateral action. See *id.* at 948-951, 955-958. It is not a grant of *authority* to the House to file suit challenging allegedly unauthorized spending even when the Senate—and thus Congress as an institution—does not wish to sue.

c. The court of appeals' "two keys" reasoning also has no limiting principle. The court provided no principled basis for distinguishing respondent's Appropriations Clause claim from a garden-variety claim alleging that an agency has acted in excess of any statutory authority. The court reasoned that the Appropriations Clause "has long been understood to check the power of the Executive Branch by allowing it to expend funds only as specifically authorized" by statute. App., *infra*, 22a. But that is true of essentially *every* statute regulating executive action, for "an agency literally has no power to act * * * unless and until Congress confers power upon it." *Louisiana Public Service Commission* v. *FCC*, 476 U.S. 355, 374 (1986); see *City of Arlington* v. *FCC*, 569 U.S. 290, 297 (2013). In other words, apart

from the contexts in which the President has independent authority under Article II, see, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 668-669 (1981), the Constitution prohibits agencies from taking *any* action absent congressional authorization.

A logical application of the court of appeals' reasoning would thus lead to the flawed conclusion that the House suffers a judicially cognizable "distinct injury" whenever an agency acts in excess of statutory authority, because the House "holds one of th[e] keys" for passing a statute authorizing such action. App., *infra*, 20a-21a. Under the court's logic, any agency action allegedly taken in excess of what the House contends that Congress has authorized would give rise to a claim that the action had "render[ed] for naught" the House's decision to decline to provide such statutory authorization. *Id.* at 21a. In affirming the district court's dismissal of respondent's APA claim, the court of appeals recognized the absurdity of that result, explaining that APA claims "in no way set forth a legislative injury distinct to the House of Representatives." *Id.* at 24a. But the court neither acknowledged the logical inconsistency between its reasoning on the APA claim and its holding on the Appropriations Clause claim, nor explained why the Appropriations Clause claim (Am. Compl. ¶¶ 94-120) should be treated differently from respondent's materially indistinguishable APA claim (*id.* ¶¶ 121-138).

The court of appeals similarly offered no persuasive distinction between a claim to enforce the Appropriations Clause and a claim to enforce other constitutional provisions. The court stated that the Appropriations Clause is "phrased as a limitation" on taking action without approval from Congress. App., *infra*, 11a. But

other constitutional provisions also require congressional approval for things such as officers' acceptance of items from foreign governments (Art. I, § 9, Cl. 8), interstate compacts (Art. I, § 10, Cl. 2), and imposts or duties on imports or exports (Art. I, § 10, Cl. 3). Moreover, several constitutional provisions expressly grant each House independent powers. *E.g.*, Art. II, § 2, Cl. 2 (Senate's power to give its advice and consent to the making of treaties and to the appointment of certain officers). A logical application of the court's reasoning would allow the Senate to maintain a federal suit alleging, for instance, that an executive agreement ought to have been submitted to the Senate as a treaty, or that an executive official is an Officer of the United States whose appointment required the Senate's consent.

Even taken at face value, the court of appeals' attempt to cabin its holding to Appropriations Clause claims does not provide a meaningful limit because virtually any allegation that an agency has exceeded its statutory authority could be recast as an Appropriations Clause claim. After all, agency actions invariably cost money, so many allegations that an agency is acting in a manner that is not authorized by statute effectively allege that funds are being expended in a manner not authorized by statute. This case illustrates the point: respondent's claim does not turn on the text of the Appropriations Clause itself, but instead is premised entirely on allegations that DoD's actions exceeded the scope of various *statutes*. That is of course to be expected, given that the Appropriations Clause prohibits drawing money from the Treasury only when not "in Consequence of Appropriations made *by Law*." U.S. Const. Art. I, § 9, Cl. 7 (emphasis added). But it underscores the limitless nature of the court's reasoning,

which impermissibly allows statutory claims to be converted into constitutional ones and thus would permit a single House of Congress to assert an Appropriations Clause challenge any time it believes the Executive Branch has exceeded statutory authority. Cf. *Dalton* v. *Spector*, 511 U.S. 462, 474 n.6 (1994) (recognizing that "in cases in which the President concedes, either implicitly or explicitly, that the only source of his authority is statutory, no 'constitutional question whatever' is raised," but rather "'only issues of statutory interpretation'") (citation omitted).

2. The court of appeals' holding also conflicts with this Court's decision in *Raines* v. *Byrd*, *supra*. There, six Members of Congress who had unsuccessfully opposed the enactment of the Line Item Veto Act brought suit seeking to declare it unconstitutional. 521 U.S. at 814-816. For purposes of standing, the *Raines* plaintiffs contended that the Act had injured them by "alter[ing] the legal and practical effect of [their] votes" and "divest[ing] [them] of their constitutional role in the repeal of legislation." *Id.* at 816 (citation omitted). This Court disagreed, holding that the alleged "dilution of institutional legislative power" was not a "personal, particularized, concrete, [or] otherwise judicially cognizable" injury sufficient to satisfy Article III. *Id.* at 820, 826.

In so holding, the Court emphasized the absence of any "historical practice" supporting the legislators' suit. *Raines*, 521 U.S. at 826. "It is evident from several episodes in our history," the Court observed, "that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power." *Ibid.*; see *id.* at 826-828 (discussing the political, not judicial, resolution of disputes over the

Tenure of Office Act of 1867 and a pocket veto by President Coolidge). That past Presidents and Congresses had not resorted to the courts to resolve interbranch disputes underscored that the *Raines* plaintiffs' suit against the Executive Branch was not one "traditionally thought to be capable of resolution through the judicial process." *Id.* at 819 (citation omitted). This Court acknowledged that there "would be nothing irrational about a system that granted standing" in these interbranch disputes, and that "some European constitutional courts operate under one or another variant of such a regime." *Id.* at 828. But that "is obviously not the regime that has obtained under our Constitution to date," because it "contemplates a more restricted role for Article III courts"—one that does not extend to "some amorphous general supervision of the operations of government." *Id.* at 828-829 (citation omitted).

Respondent's claim amounts to an allegation that when the Executive Branch spends money in alleged violation of a statute, it "alters the legal and practical effect of [the House's] vote[]" to enact that statute. *Raines*, 521 U.S. at 816 (brackets and citation omitted). As *Raines* held, that does not confer Article III standing. Nor did the court of appeals identify any historical practice supporting Article III adjudication of interbranch political disputes between a single House of Congress and the Executive Branch over expenditures that allegedly exceed statutory authority. To the contrary, as the district court explained, "[i]n the 230 years since the Constitution was ratified, the political branches have entered many rancorous fights over budgets and spending priorities," but "no appellate court has ever adjudicated" a suit by Congress against the Executive over alleged injury to Congress's appropriations power.

App., *infra*, 38a-39a. That absence of historical support confirms that such interbranch disputes are not "traditionally thought to be capable of resolution through the judicial process." *Raines*, 521 U.S. at 819 (citation omitted).

Moreover, as with the *Raines* plaintiffs, the legislative process gives the House "adequate remed[ies]" to prevent the Executive from spending funds in alleged excess of statutory authority, further confirming that respondent's suit is not suitable for judicial resolution. *Raines*, 521 U.S. at 829; see *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (observing that the judicial power "is not an unconditioned authority" to review "executive acts"). Among the political tools at its disposal, Congress here could have restricted or barred the ability of the Executive Branch to use the funding sources that DoD identified for border-barrier construction. Express restrictions on the use of federal funds are familiar features in federal legislation. For example, Congress imposed express restrictions on the use of the $1.375 billion it appropriated in fiscal year 2019 for barrier construction. See Consolidated Appropriations Act, 2019, §§ 231, 232, 133 Stat. at 464 (prohibiting use of the funds for barrier construction in certain locations). Congress also could have enacted a joint resolution terminating President Trump's national-emergency declaration, see 50 U.S.C. 1622(a)(1), which would have prevented DoD from using Section 2808 for border-barrier construction. Both Houses of Congress adopted such resolutions twice in 2019, but each effort failed to secure enough support to override President Trump's veto. See H.R.J. Res. 46, 116th Cong., 1st Sess. (2019); S.J. Res. 54, 116th Cong., 1st Sess. (2019).

The court of appeals discounted those political remedies because they would require a "veto-proof majority of both houses of Congress." App., *infra*, 23a. But *Raines* relied on similar legislative solutions in concluding that six individual Members lacked standing in that case. 521 U.S. at 829 (noting that the individual Members had "adequate remed[ies]" through the political process, such as "repeal[ing] the [Line Item Veto] Act or exempt[ing] appropriations bills from its reach"). The same remedy must, *a fortiori*, be adequate for the entire House. That the House may lack the ability to achieve its desired ends through the bicameral legislative process set forth in the Constitution does not justify permitting respondent, as a single chamber, to end-run that process and file suit against the Executive Branch in federal courts.

Respondent has relied (Resp. C.A. Br. 20-22, 28) on this Court's decisions in *Coleman* v. *Miller*, 307 U.S. 433 (1939), and *Arizona State Legislature* v. *Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015). That reliance is misplaced. In *Coleman*, a group of 21 Kansas state senators (out of 40) and three members of the state house of representatives sought mandamus in state court against the Secretary of the Senate, alleging that their votes had been "overridden and virtually held for naught" through an improper tie-breaking procedure. 307 U.S. at 435-436. *Coleman* held that the legislators had standing to seek this Court's review of the judgment of the Supreme Court of Kansas. *Id.* at 438; see *Raines*, 521 U.S. at 822 & n.5 (explaining the holding of *Coleman*). But as *Raines* later explained, "*Coleman* stands (at most) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to

sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes had been completely nullified." 521 U.S. at 823 (internal citation omitted). By definition, a single chamber of a bicameral legislature does not, by itself, have sufficient power to enact any appropriations statute, and thus lacks standing to challenge an alleged violation of such a statute. Moreover, as *Raines* observed, *Coleman* involved state legislators who brought suit in state court, and thus did not present the federal "separation-of-powers concerns" that were present in *Raines* and that are present here. *Id.* at 824 n.8.

Arizona State Legislature is similarly unhelpful to respondent. There, the Court held that the Arizona Legislature—not merely a single chamber of that legislature—had standing to challenge a state ballot initiative creating an independent redistricting commission, on the ground that the initiative "strips the Legislature of its alleged prerogative to initiate redistricting." 576 U.S. at 800. The Court explained that "[t]he Arizona Legislature * * * is an institutional plaintiff asserting an institutional injury." *Id.* at 802. As explained above, that is not true here. See *Bethune-Hill*, 139 S. Ct. at 1953 (emphasizing that "the Arizona House and Senate" were "*acting together*" and that "there was no mismatch between the body seeking to litigate and the body to which the relevant constitutional provision allegedly assigned exclusive redistricting authority"). Indeed, *Arizona State Legislature* emphasized that its decision "d[id] not touch or concern the question whether Congress has standing to bring a suit against the President." 576 U.S. at 803 n.12. And it reiterated that "a suit between Congress and the President would raise separation-of-powers concerns" that were absent

in a case brought by state legislators, and that "[t]he Court's standing analysis * * * has been 'especially rigorous when reaching the merits of the dispute would force the Court to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.'" *Ibid.* (brackets and citation omitted).

3. The court of appeals' conclusion that respondent has standing to sue the Executive Branch also conflicts with the foundational Article III principle that "an injury amounting only to the alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 575 (1992). This Court has thus refused "[t]o permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts," as that would "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" *Id.* at 577 (citation omitted).

That precept applies with particular force when Congress itself—let alone a single House—tries to sue the Executive Branch to enforce the laws. Cf. *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976) (per curiam) ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'"). Indeed, the court of appeals itself recognized that "[o]nce a statute is passed, a claim that the Executive is exceeding his statutory authority is a generalized grievance and not particular to the body (or part of the body) that passed the law."

App., *infra*, 24a-25a. Yet that is precisely what respondent's Appropriations Clause claims allege. See Am. Compl. ¶ 60 (alleging that the government "cannot satisfy the statutory requirements for transferring and expending funds" to construct a border wall); *id.* ¶ 97 (alleging that "Section 8005 * * * does not authorize defendants to transfer funds * * * for purposes of constructing a border wall"); *id.* ¶ 114 (alleging that the government's "expenditure of section 2808(a) funds on a border wall satisfies none of [Section 2808's] limitations").

4. The court of appeals' unprecedented and erroneous decision raises an exceptionally important question that would have warranted this Court's review, because it would open the courthouse doors to a sweeping range of "confrontations between one or both Houses of Congress and the Executive Branch." *Raines*, 521 U.S. at 826. Although the court of appeals purported to cabin its holding to claims under the Appropriations Clause, an infinite number of disputes between one House of Congress and the Executive Branch about how to construe statutes could easily be reframed as disputes over spending, as discussed above. Allowing such suits to proceed would entangle the Judiciary in fundamentally political disputes and risk undermining the Constitution's assignment to "the President, and not to Congress, * * * the responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley*, 424 U.S. at 138 (citation omitted); see *Raines*, 521 U.S. at 826; *Valley Forge*, 454 U.S. at 474 (recognizing that "[r]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government" risks damaging "public confidence") (citation omitted). Had this case not become moot, therefore, the

court of appeals' flawed decision that the House has Article III standing to sue would have merited this Court's review.

C. The Equities Favor Vacatur

When a case that would otherwise merit this Court's review becomes moot "while on its way [to this Court] or pending [a] decision on the merits," the Court's "established practice" is to "vacate the judgment below and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39. That practice ensures that no party is "prejudiced by a [lower-court] decision" and "prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 40-41; see *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 21 (1994) ("If a judgment has become moot [while awaiting review], this Court may not consider its merits, but may make such disposition of the whole case as justice may require.") (quoting *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671, 677 (1944)) (brackets in original). The Court should follow that usual practice and vacate the court of appeals' decision in this case.

As this Court has repeatedly observed, the determination whether to vacate the judgment when a case becomes moot while pending review ultimately "is an equitable one," *U.S. Bancorp*, 513 U.S. at 29, requiring the disposition that would be "most consonant to justice" in light of the circumstances, *id.* at 24 (citation omitted). See *Azar* v. *Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam) (observing that because *Munsingwear* vacatur "is rooted in equity, the decision whether to vacate turns on 'the conditions and circumstances of the particular case'") (citation omitted).

Here, the equities favor vacatur. This is not a case in which the party requesting vacatur has deliberately frustrated further review. To the contrary, mootness here is, at bottom, the result of a change in Administration following an election. Neither justice nor the public interest would be served by forcing the Executive Branch to choose between continuing border-barrier construction projects that it has concluded are not in the public interest, on the one hand, and acquiescing to a precedential judicial decision that the Executive Branch also believes would be contrary to its prerogatives and harmful to the public interest as a whole, on the other. In these circumstances, the equities support following this Court's "established practice" of vacating the court of appeals' judgment, which will "clear[] the path for future relitigation" of the Article III issue between the House and the Executive Branch without prejudice to either party. *Munsingwear*, 340 U.S. at 39-40.

This Court has observed that absent "exceptional circumstances," vacatur may be unwarranted when "the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari," such as when "mootness results from settlement." *U.S. Bancorp*, 513 U.S. at 25, 29; cf. *id.* at 25 n.3. But different considerations are applicable when the mooting event results from action taken by a coordinate Branch in the exercise of authority and discretion vested in *it* by the Constitution and statutes, apart from the litigation. For example, in *United States* v. *Microsoft Corp.*, 138 S. Ct. 1186 (2018) (per curiam), this Court vacated the lower court's judgment after Congress passed and the President signed a new statute, and the Executive Branch sought and obtained a new search warrant against respondent, the combination of which eliminated the "live

dispute" between the parties on "the issue with respect to which certiorari was granted." *Id.* at 1188; see *United States Department of the Treasury, Bureau of Alcohol, Tobacco & Firearms* v. *Galioto*, 477 U.S. 556, 560 (1986) (similar, citing *Munsingwear*). Likewise, in *Alvarez* v. *Smith*, 558 U.S. 87 (2009), the Court determined that vacatur was appropriate even when the State had voluntarily returned the disputed property to the respondents (thereby mooting the case), because the State had done so for reasons unrelated to the federal litigation. *Id.* at 96.

Indeed, this case is similar in relevant respects to *Munsingwear* itself. The claim for injunctive relief asserted in *Munsingwear* became moot while the government's appeal was pending as a result of the President's issuance of an Executive Order annulling the maximum-price regulation at issue. See 340 U.S. at 39. Nevertheless, the Court indicated that vacatur would have been available had the government requested it. See *id.* at 40; cf. *U.S. Bancorp*, 513 U.S. at 25 n.3 (expressing no view on "*Munsingwear*'s implicit conclusion that repeal of administration regulations" may provide a basis for vacating a lower court's decision even when that decision was adverse to the Executive Branch).

This Court's decision in *Board of Regents of the University of Texas System* v. *New Left Education Project*, 414 U.S. 807 (1973) (Mem.), is likewise instructive. In that case, a state university's appeal of an injunction against the enforcement of two university rules became moot after the university repealed the challenged rules. See *New Left Education Project* v. *Board of Regents of the University of Texas System*, 472 F.2d 218, 219-220 (5th Cir.), reversed, 414 U.S. 807 (1973). The court of appeals refused to vacate the district court's judgment

because the case had "become moot * * * through action of the appellant," *id.* at 221, but this Court summarily reversed, directing vacatur of the judgment. See 414 U.S. at 218. As a leading treatise has explained, vacatur was necessary to ensure that governmental and other parties would not be "deterred" from taking "good faith" actions that would moot a case by "the prospect that," if they do so, "an erroneous district court decision may have untoward consequences in the unforeseen future." 13C Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.10.1, at 583 (3d ed. 2008). For the same reasons, vacatur is warranted here.

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand with instructions to dismiss the case as moot under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

Respectfully submitted.

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JUNE 2021

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5176

UNITED STATES HOUSE OF REPRESENTATIVES,
APPELLANT

v.

STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY, ET AL., APPELLEES

Argued: Feb. 18, 2020
Reheard En Banc: Apr. 28, 2020
Remanded to Panel: Aug. 7, 2020
Decided: Sept. 25, 2020

Appeal from the United States District Court
for the District of Columbia
(No. 1:19-cv-00969)

Before: MILLETT and WILKINS, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* SENTELLE.

SENTELLE, *Senior Circuit Judge*: The United States House of Representatives brought this lawsuit alleging that the Departments of Defense, Homeland Security, the Treasury, and the Interior, and the Secretaries of those departments violated the Appropriations Clause

of the Constitution as well as the Administrative Procedure Act when transferring funds appropriated for other uses to finance the construction of a physical barrier along the southern border of the United States, contravening congressionally approved appropriations. The District Court for the District of Columbia held that it had no jurisdiction because the House lacked standing to challenge the defendants' actions as it did not allege a legally cognizable injury. We disagree as to the constitutional claims and therefore vacate and remand for further proceedings.

I.

A.

On review of a district court's dismissal for lack of jurisdiction, we make legal determinations *de novo*. *See Williams v. Lew*, 819 F.3d 466, 471 (D.C. Cir. 2016). As a result, we consider anew whether the House established that it has standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). In doing so, we "'accept as true all material allegations of the complaint,' [and] draw[] all reasonable inferences from those allegations in plaintiffs' favor." *LaRoque v. Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). Additionally, in assessing standing, we assume the House is correct on the merits of the underlying claims. *Id.* Applying that framework to the House's complaint, we assume the following facts:

After protracted disagreement and negotiation between President Trump and the House of Representatives over the President's request for appropriation to erect a physical barrier along the boundary between the United States and Mexico, Congress enacted a budget

resolution which included an appropriation of $1.375 billion "for the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector." Pub. L. No. 116-6, § 230(a)(1), 133 Stat. 13, 28. The legislation also restricted construction in certain areas, *id.* § 231, 133 Stat. at 28, and limited the construction to "operationally effective designs deployed as of the date of the Consolidated Appropriations Act, 2017 (Public Law 115-31), such as currently deployed steel bollard designs," *id.* § 230(b), 133 Stat. at 28.

The President signed the bill but announced that he planned to "us[e] his legal authority to take Executive action to secure additional resources" beyond the funding appropriated by Congress and signed into law by the President. J.A. 151. He identified three specific sources for the additional funds: the Treasury Forfeiture Fund, Department of Defense funds appropriated for the Support of Counterdrug Activities (10 U.S.C. § 284), and Department of Defense funds allocated for other construction projects (10 U.S.C. § 2808). The House's complaint contests only the latter two sources. Compl. at 39-45, *U.S. House of Representatives v. Mnuchin*, 379 F. Supp. 3d 8 (D.D.C. 2019) (ECF No. 1); Am. Compl. at 41-50, *U.S. House*, 379 F. Supp. 3d 8 (ECF No. 59). We note that the uncontested source did not supply sufficient funds to cover the allegedly unlawful expenditure, and therefore the presence of the uncontested funds does not moot the case.

B.

On April 5, 2019, the House filed this action seeking declaratory and injunctive relief from the transfers of

funds carried out by the Departments of Defense, Homeland Security, the Treasury, and the Interior, and the Secretaries of those departments (defendants), alleging that the defendants' actions violated the Appropriations Clause of the Constitution and the Administrative Procedure Act. Fundamentally, the House's position is that Congress authorized the defendants to spend $1.375 billion, and only $1.375 billion, for construction of a barrier, but the defendants are attempting to spend $8.1 billion. *See* Compl. ¶¶ 58-59. According to the complaint, the defendants' "expenditure of unappropriated funds disregards the separation of powers and usurps Congress's exclusive authority under the Appropriations Clause to control federal funds." *Id.* ¶ 58.

Specifically, the complaint alleged that the defendants violated the Appropriations Clause of the Constitution, U.S. Const. art. I, § 9, cl. 7, by transferring additional funds to spend on construction, and that they cannot justify their violation of the appropriations law by relying on 10 U.S.C. § 284, on § 8005 of the Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981, 2999 (DOD Appropriations Act), or on 10 U.S.C. § 2808, because those statutes do not authorize transfers of funds in these circumstances. Additionally, the House alleges that transfers of funds made pursuant to § 8005 of the DOD Appropriations Act violated the Administrative Procedure Act because they were not in accordance with law. The amended complaint, filed after the district court dismissed the first complaint, added allegations that the transfer of funds under § 9002 of the DOD Appropriations Act also violated the Administrative Procedure Act.

The first of the contested sources of additional funding is the Counterdrug Activities fund. Under 10 U.S.C. § 284, the Secretary of Defense "may provide support for the counterdrug activities or activities to counter transnational organized crime of any other department or agency." The DOD Appropriations Act provided $517.171 million for counterdrug activities. DOD Appropriations Act, Pub. L. No. 115-245, 132 Stat. 2981, 2997. When the House filed suit, it believed that most of the appropriated funds had already been used. Compl. ¶ 62. As a result, to draw from this fund for barrier construction, the Executive Branch would need to transfer "working capital funds of the Department of Defense or funds made available" in the DOD Appropriations Act "between such appropriations or funds or any subdivision thereof." 2019 DOD Appropriations Act § 8005; *see also id.* at § 9002. The statute allows such transfers if the transfers meet certain requirements. 2019 DOD Appropriations Act § 8005; *see also id.* at § 9002. The President made two transfers relying on §§ 8005 and 9002: On March 25, 2019, the President transferred $1 billion, J.A. 177-79, and on May 9, 2019, the President transferred an additional $1.5 billion, J.A. 226-34.

The second contested source of additional funding is the reallocation of funds under 10 U.S.C. § 2808. The President planned to reallocate $3.6 billion citing his authority under § 2808. J.A. 151. Section 2808(a) allows the Secretary of Defense to "undertake military construction projects" when the President declares a national emergency that "requires [the] use of the armed forces" and the construction projects are "necessary to support such use of the armed forces." On February 15, 2019, the President declared a national emergency,

which Congress did not override. *See* Proclamation No. 9844, 84 Fed. Reg. 4949.

Shortly after filing the complaint, the House moved for a preliminary injunction, which the defendants opposed. The district court denied the motion, holding that the House lacked standing because it was not injured. Following the order dismissing the action, the House moved to amend its complaint to include a request for injunctive relief for the transfer of funds under § 9002 of the 2019 DOD Appropriations Act. On June 17, 2019, the district court permitted the amendment, held that the House lacked standing for the same reasons articulated in its original memorandum dismissing the suit, and entered final judgment. On June 18, the House filed a notice of appeal. *See generally U.S. House*, 379 F. Supp. 3d 8.

C.

Under Article III of the Constitution, federal courts are courts of limited jurisdiction. U.S. Const. art. III, § 2, cl. 1; *see, e.g.*, *Chi. & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892). They are empowered only to hear "cases" and "controversies." U.S. Const. art. III, § 2, cl. 1. The case-or-controversy requirement for justiciability involves certain constitutional minima, one of which is standing. *Comm. on Judiciary of U.S. House of Representatives v. McGahn*, 968 F.3d 755, 762 (D.C. Cir. 2020). To establish standing, the injured party must demonstrate that it has an "injury in fact," defined as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."'" *Lujan*, 504 U.S. at 560 (citations omitted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

The injury must be "fairly . . . trace[able] to the challenged action of the defendant" and the injury must be redressable by a favorable decision by the court. *Id.* at 560-61 (alternation in original) (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41-42 (1976)). Appellees contend that appellant has not established the issue of injury in fact. *U.S. House*, 379 F. Supp. 3d at 13.

The House, as the party invoking federal jurisdiction, bears the burden of demonstrating that it has an injury. *Lujan*, 504 U.S at 561. "[T]he manner and degree of evidence required" to show injury changes based on the "stage[] of the litigation." *Id.* "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Id.* (alteration in original) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). As with the plaintiff in *Food & Water Watch, Inc. v. Vilsack*, the House filed a complaint and a motion for preliminary injunction. Defendants moved to dismiss. The House's assertion of injury should be evaluated under the motion to dismiss standard. 808 F.3d 905, 913 (D.C. Cir. 2015). We review the issue of standing *de novo*. *Id.*

Before this court, the House maintains that it has suffered a concrete injury and thus has standing to contest the Executive's self-appropriation of funds described above. In its brief, the House distills Supreme Court precedent on legislative standing to two factors: (1) the institution must suffer an institutional injury, which the House describes as events that cause a "disruption of [a legislative] body's specific powers," House Br. at 20

(alteration in original) (quoting *Tenn. ex rel. Tenn. Gen. Assembly v. U.S. Dep't of State*, 931 F.3d 499, 511 (6th Cir. 2019)), and (2) "there must be a match 'between the body seeking to litigate and the body to which the relevant constitutional provision allegedly assigned [the impugned] authority,'" *id.* (alteration in original) (quoting *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019)).

The House alleges that it has suffered an institutional injury because the defendants' actions have disrupted Congress's specific authority over the appropriation of federal funds. *Id.* at 23-24. Congress's authority is derived from the Appropriations Clause, U.S. Const. art I, § 9, cl. 7, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." The House suggests that the structure of the Appropriations Clause means that Congress, as an institution, has the specific authority to decide how federal funds are allocated and, when the defendants transferred more funds to be spent on construction of the barrier than Congress had authorized, the defendants disrupted congressional authority. *Id.* at 24. The defendants assert that the House of Representatives is not an injured party with standing to litigate this injury in federal court, but that any alleged injury is to the legislative right of Congress as a whole, not the entity comprising a single house of the bicameral body. Thus, the defendants' first line of defense is that a single house of Congress can never have standing to litigate a claim of legislative injury against the Executive, even though each house has a specific authority to prevent the authorization.

The House answers that there is no mismatch between the institution injured and the institution bringing the lawsuit. According to the House, while the Appropriations Clause grants the power to both chambers of Congress in limiting the spending of federal funds, each chamber also possesses a unique interest in appropriations. That interest, the House argues, stems from the nature of appropriations, namely, that appropriations legislation must be passed, "otherwise the government literally cannot function." *Id.* at 25. As a result, the House suggests that each chamber has "the power to dictate funding limits" because if either chamber does not pass an appropriation, there will be no funds for the federal government to spend on the project or goal to which the proposed appropriation is directed. *Id.* at 26.

In support of its position that each chamber has a distinct interest, the House relies on statements from the founding era. In particular, the House turns to the history of the passage and amendment of the Appropriations Clause. In an early draft of the Constitution, all appropriation bills had to originate in the House and could not be altered by the Senate. *See* 2 *The Records of the Federal Convention of 1787*, at 131 (M. Farrand ed., 1911) (hereinafter *Records*); House Br. at 26-27. The origination provision was removed, the House asserts, because it made the Senate subservient to the House in appropriations and the Framers intended that each chamber would have the independent ability to limit spending. Additionally, the House references statements from the founding era that recognize the federal purse has "two strings" and "[b]oth houses must concur in untying" them. 2 *Records* at 275. The structure of

the "two strings" system means, the House maintains, that the House, by not passing an appropriation, can prevent the expenditure of funds for a government project, such as the proposed border wall even if the Senate disagrees. In sum, as the House asserts, "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." House Br. at 27-28.

II.

A.

At the time this appeal was initiated, the appellees argued that there was no controlling precedent directly on point as to the question of whether a single chamber could ever have standing. After the oral arguments in this case, this court accepted for en banc review another case involving the question whether the Constitution categorically denies the House standing to sue the Executive Branch. *See McGahn*, 968 F.3d 755 (D.C. Cir. 2020). The en banc court has now rendered its decision in *McGahn* and returned this case to the original panel for disposition. The *McGahn* court clearly held that a single house of Congress could have standing to pursue litigation against the Executive for injury to its legislative rights. *Id.* at 778.

Underlying the present litigation is a dispute about the nature of Congress's authority under the Appropriations Clause of the Constitution and whether the President's refusal to follow the limits on his authority in-

jures one House of Congress. The Constitution provides, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Because the clause is phrased as a limitation, it means that "the expenditure on public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (plurality opinion) (citing *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1851)). The Appropriations Clause, thus, provides one foundational element of the separation between the powers of the sword of the Executive Branch and the purse of the Legislative Branch. It is a core structural protection of the Constitution—a wall, so to speak, between the branches of government that prevents encroachment of the House's and Senate's power of the purse. *See Freytag v. Comm'r*, 501 U.S. 868, 878 (1991) ("Our separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch."); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 501 (2010) ("The Framers created a structure . . . giving each branch 'the necessary constitutional means, and personal motives, to resist encroachments of the others[.]'") (quoting *The Federalist* No. 48 at 333; and No. 51 at 349 (J. Madison)) (internal citations omitted); *cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) ("[T]he doctrine of separation of powers is a *structural safeguard*. . . . establishing high walls and clear distinctions.") (emphasis in original).

The separation between the Executive and the ability to appropriate funds was frequently cited during the founding era as the premier check on the President's

power. In fact, "the separation of purse and sword was the Federalists' strongest rejoinder to Anti-Federalist fears of a tyrannical president." Josh Chafetz, *Congress's Constitution, Legislative Authority and the Separation of Powers* 57 (2017); *see also* 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 367 (Jonathan Elliot ed., 2d ed. 1836) (hereinafter *Debates*) (responding to charges that the President could easily become king by explaining that "[t]he purse is in the hands of the representatives of the people"). For example, James Madison, in the Federalist Papers, explained, "Th[e] power over the purse may in fact be regarded as the most compleat and effectual weapon with which any constitution can arm the immediate representatives of the people. . . ." *The Federalist* No. 58 at 394 (J. Madison) (Jacob E. Cooke ed., 1961). At the New York ratification convention, Alexander Hamilton reassured listeners, stating, "where the purse is lodged in one branch, and the sword in another, there can be no danger." 2 *Debates* 349.

As evidenced by the quotations above, a repeated theme in the founding era was the importance of putting the power of the purse specifically in the hands of the "representatives of the people." *The Federalist* No. 58 at 394 (J. Madison) (Jacob E. Cooke ed., 1961); 2 *Debates* 393. As noted above, an early draft of the Constitution went as far as to require appropriations bills originate in the House of Representatives, the representatives of the people. 2 *Records* 131. While the final text does not include that same origination provision and provides only that "[a]ll bills for raising Revenue shall originate in the House of Representatives," U.S. Const. art. I, § 7, cl. 1, "[u]nder immemorial custom the general appropri-

ations bills . . . originate in the House of Representatives." *Cannon's Procedure in the House of Representatives* 20, § 834 (4th ed. 1944). In fact, "the House has returned to the Senate a Senate bill or joint resolution appropriating money on the ground that it invaded the prerogatives of the House." Wm. Holmes Brown, *House Practice* 71 (1996); *see also* 3 *Deschler's Precedents* 336 (1976). The appropriations statute at issue in this case originated with the House, as is traditional. 165 Cong. Rec. H997 (daily ed. Jan. 22, 2019); 165 Cong. Rec. H1181-83 (daily ed. Jan. 24, 2019).

While custom cannot create an interest sufficient to establish standing, it can illustrate the interest of the House in its ability, as discussed above, to limit spending beyond the shared ability of the Congress as a whole.

B.

In cases before the *McGahn* decision of this court, the Supreme Court considered the question of what constitutes an injury to a legislature at several points in history. This court has also considered the issue of legislative standing. Four foundational Supreme Court opinions outline the circumstances that can constitute legislative injury. The district court discussed three of the four. The fourth was released after the district court's memorandum decision.

We turn, first, to *Coleman v. Miller*, 307 U.S. 433 (1939), in which the Supreme Court determined that there was a legislative injury. In *Coleman*, the Kansas legislature voted on whether to ratify the Child Labor Amendment to the U.S. Constitution. *Id.* at 435-36. Twenty of the forty state senators voted to ratify the amendment and twenty voted against ratification. *Id.*

at 436. The Lieutenant Governor broke the tie and voted to ratify the amendment. *Id.* Twenty senators and three members of the Kansas House of Representatives brought suit in Kansas state court challenging the Lieutenant Governor's authority to cast the deciding vote. *Id.* The suit made its way to the Supreme Court. The Court held that the "senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes," thus "com[ing] directly within the provisions of the statute governing [the Supreme Court's] appellate jurisdiction" because the Lieutenant Governor's tie-breaking vote meant that the senators' votes had been "overridden and virtually held for naught." *Id.* at 438. In particular, the Supreme Court noted that the plaintiffs had "an adequate interest to invoke" federal jurisdiction because the injury was more concrete and particularized than an injury to a "right possessed by every citizen" and the votes of the twenty senators "would have been decisive in defeating the ratifying resolution." *Id.* at 438, 440-41. Since it was decided, *Coleman* has come to stand for the idea that action that "nullified" legislative power can establish a legislative injury. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 803 (2015) (quoting *Raines v. Byrd*, 521 U.S. 811, 823 (1997)).

Next, in *Raines v. Byrd*, 521 U.S. 811 (1997), the Supreme Court determined there was no legislative injury. In *Raines*, four senators and two representatives sued the Secretary of the Treasury and the Director of the Office of Management and Budget alleging that the Line Item Veto Act, which was passed over the objections of the six Members of Congress, was unconstitutional. 521 U.S. at 814. While the Act provided that "[a]ny

Member of Congress or any individual adversely affected by [this Act] may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any provision of this part violates the Constitution," the Members of Congress were still required to show an injury in fact to establish constitutional injury. *Id.* at 815-16, 818-19 (alteration in original). The Members of Congress described that injury as a "diminution of legislative power." *Id.* at 821. The Supreme Court held, however, that the alleged injury was not sufficient to establish legislative standing. *Id.* at 829-30. While nullification is a theory that has supported a determination of injury, in this case, the Supreme Court noted, "[t]here is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power." *Id.* at 826.

Additionally, and equally important, the Supreme Court explained, the "appellees have alleged no injury to themselves as individuals" and the potential institutional injury, diminution of power, was "wholly abstract and widely dispersed" among the other Members of Congress. *Id.* at 829. The opinion also "attach[ed] some importance to the fact that appellees [were not] authorized to represent their respective Houses of Congress in th[at] action, and indeed both Houses actively oppose[d] their suit." *Id.* It was, therefore, significant that the plaintiffs were individual Members of Congress attempting to vindicate the rights of Congress as a whole. The Supreme Court made clear that *Raines* involves the standing of individual legislators, not of legislative institutions. *See Bethune-Hill*, 139 S. Ct. at 1953 (citing *Raines* for the proposition that "individual

members lack standing to assert the institutional interests of a legislature"); *Arizona State Legislature*, 576 U.S. at 801-02 ("In *Raines*, this Court held that six *individual Members* of Congress lacked standing to challenge the Line Item Veto Act."). Similarly, this court has also held that there was no standing for individual Members of Congress in suits against the Executive. *See Campbell v. Clinton*, 203 F.3d 19, 22-24 (D.C. Cir. 2000); *Chenoweth v. Clinton*, 181 F.3d 112, 117 (D.C. Cir. 1999). In *Campbell*, thirty-one individual Members of Congress "filed suit claiming that the President violated the War Powers Resolution and the War Powers Clause of the Constitution by directing U.S. forces' participation" in a NATO campaign in Yugoslavia. 203 F.3d at 19-20. We held that they did not have standing to pursue either the statutory or the constitutional claims. *Id.* at 22-24. For the constitutional claim, our analysis was influenced by the fact that the President has war powers independent of those of Congress and "did not claim to be acting pursuant to the defeated declaration of war or a statutory authorization, but instead 'pursuant to [his] constitutional authority to conduct U.S. foreign relations and as Commander-in-Chief and Chief Executive.'" *Id.* at 22 (alteration in original).

In the third Supreme Court decision, *Arizona State Legislature v. Arizona Independent Redistricting Commission*, Arizona voters approved an initiative that would strip the Arizona state legislature of its authority to draw district lines. 576 U.S. at 792. The Arizona state legislature sued in federal court seeking to enjoin the use of the newly drawn legislative district maps. *Id.* The Supreme Court agreed with the special district court that the state legislature had standing. *Id.* at 793. In particular, the Supreme Court relied on the

fact that the state legislature was "an institutional plaintiff asserting an institutional injury, and [the plaintiff] commenced this action after authorizing votes in both of its chambers." *Id.* at 802. The Supreme Court contrasted the situation in *Arizona State Legislature* with that in *Raines* where the plaintiffs were individual members but "[t]he 'institutional injury' at issue . . . scarcely zeroed in on any individual Member." *Id.* Additionally, the Supreme Court noted, the voter initiative "would 'completely nullif[y]' any vote by the Legislature, now or 'in the future,'" as the state senators' votes were nullified in *Coleman*. *Id.* at 804 (alteration in original) (quoting *Raines*, 521 U.S. at 823-24). In sum, the Arizona state legislature had standing because "there was no mismatch between the body seeking to litigate and the body to which the relevant constitutional provision allegedly assigned" authority. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019).

Finally, we reach *Virginia House of Delegates v. Bethune-Hill*, which was released after the district court's opinion in this case. In *Bethune-Hill*, voters sued the state alleging that its districts, drawn after the 2010 census, were racially gerrymandered. *Id.* at 1949-50. The Virginia House of Delegates intervened as defendants. *Id.* at 1950. A special three-judge district court enjoined the use of the new districts because "the [S]tate ha[d] [unconstitutionally] sorted voters . . . based on the color of their skin." *Id.* (alterations and omission in original) (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 180 (2018)). When Virginia's Attorney General declined to appeal, the House of Delegates did so. *Id.* The House of Delegates alleged that it had standing both on behalf of the state, *id.* at 1951-53, and on its own, *id.* at 1953-56. The

Supreme Court swiftly dismissed the House of Delegates's allegation that it had standing on behalf of the state because the Attorney General was the only party authorized to represent the state. *Id.* at 1952.

The Supreme Court also held that the House of Delegates did not have standing on its own. *Id.* at 1953-56. The House of Delegates rested assertions of standing on "its role in enacting redistricting legislation in particular." *Id.* at 1953. But the Supreme Court noted that its "precedent . . . lends no support for the notion that one House of a bicameral legislature, resting solely on its role in the legislative process, may appeal on its own behalf a judgment invalidating a state enactment." *Id.* The Supreme Court also compared the House of Delegates's situation to that in *Arizona State Legislature* and *Coleman*. Because the entire bicameral General Assembly was granted the authority to redraw district lines, there was a "mismatch" between the party seeking to litigate, the House of Delegates, and the party with the constitutional authority, the General Assembly. *Id.* at 1953-54. "Just as individual members lack standing to assert the institutional interests of a legislature, a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole." *Id.* (citations omitted). Moreover, the Supreme Court distinguished *Coleman* because "this case does not concern the results of a legislative chamber's poll or the validity of any counted or uncounted vote." *Id.* at 1954.

These four cases seemingly give rise to two important questions for analyzing legislative standing: First, did the defendant's action curtail the power and

authority of the institution? The authority of the Kansas Senate was curtailed by the tie-breaking vote of the Lieutenant Governor in *Coleman*. So too was the power of the Arizona legislature curtailed by the voter initiative in *Arizona State Legislature*. But the Virginia House of Delegates did not have its power curtailed when the General Assembly's redistricting was enjoined by a special three-judge district court.

Second, is there a mismatch between the entity pursuing litigation and the entity whose authority or right was curtailed? In *Arizona* there was not. In both *Bethune-Hill* and *Raines*, there was, as the plaintiff was attempting to vindicate the rights of another entity.

In addition to those two questions, our cases and the Supreme Court's additionally consider three other factors: the history of interbranch disputes in the courts, alternative political remedies available to the plaintiff, *see, e.g.*, *Raines*, 521 U.S. at 829 (considering whether litigating the dispute is "contrary to historical experience" and whether Congress would have "an adequate remedy" without judicial intervention), and separation of powers, *Chenoweth*, 181 F.3d at 116-17. In none of the above decisions of the Supreme Court or this court was there ever an express determination of the first question before us: whether a single house of a bicameral legislature can ever have standing to litigate an alleged injury to its legislative prerogative distinct from the institutional standing of the entire legislature to litigate an institutional injury to the body as a whole. In *McGahn*, the en banc court considered that question in deciding an action brought on behalf of the House of Representatives to enforce a subpoena not involving the

joinder of the Senate. The court answered the standing question with a resounding "yes."

We need not re-analyze what the en banc court so recently expounded. It suffices to note that the *McGahn* court spoke in conventional language of standing. In distinguishing *Bethune-Hill*, in which the Supreme Court had found no standing, from *McGahn*, in which there was standing, the en banc court explained that in *Bethune-Hill* the Supreme Court focused on the fundamental proposition that to effect standing, an injury must be particularized. "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *McGahn*, 968 F.3d at 766 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016)). In *Bethune-Hill* the alleged injury was to the Virginia legislature as a whole. The House of Delegates was not the injured party and therefore had no standing. In *McGahn*, the injury was particularized to the House of Representatives alone. Therefore, the en banc court found standing in the House to bring the litigation without the joinder of the Senate.

When the injury alleged is to the Congress as a whole, one chamber does not have standing to litigate. When the injury is to the distinct prerogatives of a single chamber, that chamber does have standing to assert the injury. The allegations are that the Executive interfered with the prerogative of a single chamber to limit spending under the two-string theory discussed at the time of the founding. Therefore, each chamber has a distinct individual right, and in this case, one chamber has a distinct injury. That chamber has standing to bring this litigation.

As in *Arizona State Legislature*, the House is suing to remedy an institutional injury to its own institutional power to prevent the expenditure of funds not authorized. Taking the allegations of the complaint as true and assuming at this stage that the House is correct on the merits of its legal position, the House is individually and distinctly injured because the Executive Branch has allegedly cut the House out of its constitutionally indispensable legislative role. More specifically, by spending funds that the House refused to allow, the Executive Branch has defied an express constitutional prohibition that protects each congressional chamber's unilateral authority to prevent expenditures. It is therefore "an institutional plaintiff asserting an institutional injury" that is both concrete and particularized, belonging to the House and the House alone. *Arizona State Legislature*, 576 U.S. at 802.

To put it simply, the Appropriations Clause requires two keys to unlock the Treasury, and the House holds one of those keys. The Executive Branch has, in a word, snatched the House's key out of its hands. That is the injury over which the House is suing.

That injury—the snatched key—fits squarely within the *Lujan* mold because it is not a generalized interest in the power to legislate. Rather, the injury is concrete and particularized to the House and the House alone. The alleged Executive Branch action cuts the House out of the appropriations process, rendering for naught its vote withholding the Executive's desired border wall funding and carefully calibrating what type of border security investments could be made. The injury, in other words, "zeroe[s] in" on the House. *Arizona State Legislature*, 576 U.S. at 802; *see also I.N.S. v. Chadha*, 462

U.S. 919, 946 (1983) ("These provisions of Art. I are integral parts of the constitutional design for the separation of powers.").

Applying the "especially rigorous" standing analysis that the Supreme Court requires in cases like this, *Arizona State Legislature*, 576 U.S. at 803 n.12, reinforces the House's injury in fact. To hold that the House is not injured or that courts cannot recognize that injury would rewrite the Appropriations Clause. That Clause has long been understood to check the power of the Executive Branch by allowing it to expend funds only as specifically authorized. As then-Judge Kavanaugh wrote for this court, 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. Rel. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012).

The ironclad constitutional rule is that the Executive Branch cannot spend until both the House and the Senate say so. "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. Any other course would give to the fiscal officers a most dangerous discretion." *Reeside v. Walker*, 52 U.S. (11 How.) at 291. The Appropriations Clause even "prevents Executive Branch officers from even inadvertently obligating the Government to pay money without statutory authority." *U.S. Dep't of Navy*, 665 F.3d at 1347 (citing *Off. Pers. Mgmt. v. Richmond*, 496 U.S. 414, 416 (1990), and *U.S. Dep't of Air Force v. Fed. Lab. Rel. Auth.*, 648 F.3d 841, 845 (D.C. Cir. 2011)).

But under the defendants' standing paradigm, the Executive Branch can freely spend Treasury funds as it wishes unless and until a veto-proof majority of both houses of Congress forbids it. Even that might not be enough: Under the defendants' standing theory, if the Executive Branch ignored that congressional override, the House would remain just as disabled to sue to protect its own institutional interests. That turns the constitutional order upside down. *Cf. Chadha*, 462 U.S. at 958 ("[T]he carefully defined limits on the power of each Branch must not be eroded."). The whole purpose of the Appropriations Clause's structural protection is to deny the Executive "an unbounded power over the public purse of the nation," and the power to "apply all its monied resources at his pleasure." *U.S. Dep't of Navy*, 665 F.3d at 1347 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1342, at 213-14 (1833)); *see also Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) (noting the Appropriations Clause "was intended as a restriction upon the disbursing authority of the Executive department").

Nor does it work to say that suit can only be brought by the House and Senate together, as that ignores the distinct power of the House alone not to untie its purse string. "[*E*]*ach* Chamber of Congress [possesses] an *ongoing* power—to veto certain Executive Branch decisions—that each House could exercise independent of any other body." *Bethune-Hill*, 139 S. Ct. at 1954 n.5. Unlike the affirmative power to pass legislation, the House can wield its appropriations veto fully and effectively all by itself, without any coordination with or cooperation from the Senate. *Cf. McGahn*, 968 F.3d at 768.

For that reason, expenditures made without the House's approval—or worse, as alleged here, in the face of its specific disapproval—cause a concrete and particularized constitutional injury that the House experiences, and can seek redress for, independently. And again, failure to recognize that injury in fact 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.

In short, Article III's standing requirement is meant to preserve not reorder the separation of powers.

In that way, this case bears no resemblance to *Bethune-Hill*. The House of Representatives seeks to vindicate a legal interest that it possesses completely independently of the Senate, or of the Congress as a whole. The Constitution's structure and the Appropriations Clause together give the House a vital power of its own: "[N]ot a dollar . . . can be used in the payment of any thing" unless the House gives its "sanction[]." *Reeside*, 52 U.S. (11 How.) at 291. That is quite different from an effort by one legislative chamber to enforce rights that vest solely in the full "legislature as a whole." *Bethune-Hill*, 139 S. Ct. at 1953-54.

The claims of the House under the Administrative Procedure Act warrant little separate discussion. Those allegations in no way set forth a legislative injury distinct to the House of Representatives and affording it standing. This court has explained that Congress does not have standing to litigate a claim that the President has exceeded his statutory authority. *See, e.g., Campbell*, 203 F.3d at 22-24. Once a statute is passed, a claim that the Executive is exceeding his statutory authority

is a generalized grievance and not particular to the body (or part of the body) that passed the law. *See, e.g.*, *Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013) (explaining that citizens who stewarded a ballot initiative through the electoral process did not have particularized injury to sue after it was passed); *Lujan*, 504 U.S. at 575-76 ("[A]n injury amounting only to the alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable. . . . "). Both of these cases deal with private individuals as opposed to a house of Congress, but the logic translates to Congress as well.

CONCLUSION

The judgment of the district court insofar as it dismisses the Administrative Procedure Act claims is affirmed. Insofar as the judgment dismisses the constitutional claims, it is vacated and remanded for further proceedings consistent with this decision.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:19-cv-00969 (TNM)

U.S. HOUSE OF REPRESENTATIVES, PLAINTIFF

v.

STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY, ET AL., DEFENDANTS

Filed: June 3, 2019

MEMORANDUM OPINION

Few ideas are more central to the American political tradition than the doctrine of separation of powers. Our Founders emerged from the Revolution determined to establish a government incapable of repeating the tyranny from which the Thirteen Colonies escaped. They did so by splitting power across three branches of the federal government and by providing each the tools required to preserve control over its functions. The "great security against a gradual concentration of the several powers in the same department," James Madison explained, "consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." *The Federalist No. 51.*

This is a case about whether one chamber of Congress has the "constitutional means" to conscript the Judiciary in a political turf war with the President over the implementation of legislation. The U.S. House of Representatives seeks to enjoin the Secretaries and Departments of the Treasury, Defense, Homeland Security, and the Interior (collectively, the "Administration") from spending certain funds to build a wall along our southern border. The House argues that this expenditure would violate the Appropriations Clause of the Constitution and usurp Congress's authority. This harm, the House suggests, constitutes an "institutional injury" supporting Article III standing.

The Administration disagrees. The Judiciary cannot reach the merits of this dispute, it contends, because the Constitution grants the House no standing to litigate these claims. The Administration is correct. The "complete independence" of the Judiciary is "peculiarly essential" under our Constitutional structure, and this independence requires that the courts "take no active resolution whatever" in political fights between the other branches. *See The Federalist No. 78* (Alexander Hamilton). And while the Constitution bestows upon Members of the House many powers, it does not grant them standing to hale the Executive Branch into court claiming a dilution of Congress's legislative authority. The Court therefore lacks jurisdiction to hear the House's claims and will deny its motion.

I.

The House and the President have been engaged in a protracted public fight over funding for the construction of a barrier along the border with Mexico. Following the longest partial shutdown of the Federal Government

in history, Congress passed the Consolidated Appropriations Act of 2019 (the "CAA"), which provided $1.375 billion for new border fencing in the Rio Grande Valley. *See* Pub. L. No. 116-6 (2019). The President had sought much more. *See* Letter from Acting Dir., Office of Mgmt. & Budget to Senate Comm. On Appropriations (Jan. 6, 2019) (requesting "$5.7 billion for construction of a steel barrier for the Southwest border").[1]

On the same day he signed the CAA into law, President Donald Trump declared that "a national emergency exists at the southern border of the United States." Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019) ("National Emergency Declaration"). The President determined that the "current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests." *Id.* He noted that the "southern border is a major entry point for criminals, gang members, and illicit narcotics" and that the problem of "large-scale unlawful migration" has "worsened in certain respects in recent years." *Id.* "Because of the gravity of the current emergency situation," he added, "it is necessary for the Armed Forces to provide additional support to address the crisis." *Id.*

Congress passed a joint resolution to void the President's National Emergency Declaration. *See* 165 Cong. Rec. S1882 (Mar. 14, 2019). Explaining the vote, Speaker Nancy Pelosi remarked that "[w]e would be delinquent

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[1] The Court takes judicial notice of the government documents cited in this Opinion as "sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201. *See Cannon v. District of Columbia*, 717 F.3d 200, 205 n.2 (D.C. Cir. 2013).

in our duties as Members of Congress if we did not overturn what the President is proposing. He is asking each and every one of us to turn our backs on the oath of office that we took to the Constitution of the United States." *See* Speaker Pelosi's Floor Speech on Privileged Resolution, House of Representatives (Feb. 27, 2019).

The President vetoed the resolution. *See* Veto Message to the House of Representatives for H.J. Res. 46, White House (March 15, 2019). Some Members of the House tried unsuccessfully to override this veto. *See* 165 Cong. Rec. H2815 (Mar. 26, 2019). For the override to be operative, the Senate would have also had to vote to support it by a super-majority. It did not attempt to do so. So the "veto of the President was sustained and the joint resolution was rejected." *Id.* The House then filed this suit.

Upon a declaration of a national emergency "that requires the use of armed forces," the Secretary of Defense "may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces." 10 U.S.C. § 2808(a). The White House explained that Section 2808 would be one of three sources of funding the Administration would use, on top of the $1.375 billion Congress appropriated through the CAA, to build the border wall. *See* President Donald J. Trump's Border Security Victory, White House (Feb. 15, 2019), ECF No. 36-7. It plans to use sequentially: (1) $601 million from the Treasury Forfeiture Fund; (2) up to $2.5 billion in funds transferred for "Support for Counterdrug Activities" under 10 U.S.C. § 284; and (3) up to $3.6 billion

reallocated from Department of Defense military construction projects under Section 2808. *Id.*

The House does not challenge the President's declaration of an emergency under the National Emergencies Act. *See* Compl., ECF No. 1, at 39-43; Hr'g Tr. 81:23-25.[2] Nor does it contest the use of the Treasury Forfeiture Fund to build the wall. *See* Pl.'s Mot. for Prelim. Inj. ("Pl.'s Mot."), ECF No. 17, at 21. Instead, it argues that 10 U.S.C. §§ 284 and 2808 do not authorize the use of funds for building a border wall and that the Administration's planned spending therefore violates the Appropriations Clause of the Constitution and the Administrative Procedure Act (the "APA"). Compl. 39-42.

The Administration rejects the House's interpretation of the statutes. *See* Defs.' Opp. to Mot. for Prelim. Inj. ("Defs.' Opp."), ECF No. 36, at 57-64. But primarily, it contends that the House lacks standing to raise its arguments here. *Id.* at 28. There are "no Appropriations Clause principles at issue in this case," the Administration claims, precisely *because* the parties are contesting the meaning of bills that Congress has validly passed using its Appropriations power. *Id.* at 37. And quarrels over how to implement a law do not support legislative standing, as the "Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts." *Id.* at 36 (quoting *Bowsher v. Synar*, 478 U.S. 714, 722 (1986)).

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[2] All citations are to the page numbers generated by this Court's CM/ECF system.

The parties submitted thorough briefing on these issues, and the House's application for a preliminary injunction is now ripe. The Court also heard oral arguments from both sides and has reviewed the memoranda submitted by *amici curiae*.

II.

Before it may consider the merits of the House's motion, the Court must first confirm its jurisdiction over this case. Article III of the Constitution limits the jurisdiction of federal courts to "actual cases or controversies." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). One element of the "case-or-controversy requirement" is that plaintiffs "must establish that they have standing to sue." *Id.*

Article III's standing requirements are "built on separation-of-powers principles" and serve "to prevent the judicial process from being used to usurp the powers of the political branches." *Id.* Thus, "when reaching the merits of the dispute would force [it] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional," the Court's standing inquiry must be "especially rigorous." *Id.* (quoting *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997)). The power of federal courts to hear cases "is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Valley Forge Christian Coll. v. Am. Utd. for Sep. of Church and State, Inc.*, 454 U.S. 464, 471 (1982).

As the plaintiff, the House "bear[s] the burden of establishing standing." *Commonwealth v. U.S. Dep't of Educ.*, 340 F. Supp. 3d 7, 12 (D.D.C. 2018). The Court "presumes that it lacks jurisdiction unless the contrary

appears affirmatively from the record." *Id.* (cleaned up). To establish standing, the House must allege an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper*, 568 U.S. at 409. For an injury to be legally cognizable, the dispute must be "traditionally thought to be capable of resolution through the judicial process." *Raines*, 521 U.S. at 819.

III.

The Administration concedes, and the Court agrees, that only the first prong of the standing analysis—injury that is concrete and particularized—is at issue here. *See* Defs.' Opp. at 28-43. Applying the "especially rigorous" analysis required, the Court finds that the House has failed to allege such an injury. So the Court must deny the House's motion.

A.

Two Supreme Court decisions—*Raines* and *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015)—guide the Court's inquiry. Neither directly addresses whether one House of Congress has standing to allege an institutional injury to the Appropriations power. Perhaps unsurprisingly, while the House urges the Court to conclude that this case is more like one (*Arizona State Legislature*), the Administration believes this case is more like the other (*Raines*).

In *Raines*, six federal legislators sued to contest the constitutionality of the Line Item Veto Act. *See* 521 U.S. at 813-14. The plaintiffs had voted against it. *Id.* at 814. They sued the Executive Branch, arguing that

the Act "unconstitutionally expands the President's power," "divests the [legislators] of their constitutional role in the repeal of legislation," and "alters the constitutional balance of powers." *Id.* at 816. They claimed, in other words, that "the Act causes a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally." *Id.* at 821.

The Supreme Court found that the legislators lacked standing. Beginning its analysis, it emphasized the "time-honored concern about keeping the Judiciary's power within its proper constitutional sphere." *Id.* at 820. That concern required it to "carefully inquire" about whether the legislators' "claimed injury is personal, particularized, concrete, and otherwise judicially cognizable." *Id.* The Court concluded that it was not. *Id.* at 830.

The legislators could not allege that "the Act will nullify their votes," the Court explained, because "[i]n the future, a majority of Senators and Congressmen can pass or reject appropriations bills; the Act has no effect on this process." *Id.* at 824. Their votes on the Act itself "were given full effect." *Id.* "They simply lost that vote." *Id.* It therefore held that "these individual members of Congress do not have a sufficient 'personal stake' in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing." *Id.* at 830.

By contrast, in *Arizona State Legislature*, the Supreme Court held that a state legislature had standing to challenge the constitutionality of a proposition adopted by Arizona's voters by referendum. *See* 135 S. Ct. at

2659. Proposition 106 amended the Arizona Constitution to remove redistricting authority from the legislature and vest it in an independent commission. *Id.* at 2658. The legislature alleged that the Proposition violated its authority under the Elections Clause of the U.S. Constitution, which provides that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1.

The Court characterized the Arizona Legislature as "an institutional plaintiff asserting an institutional injury," that "commenced this action after authorizing votes in both of its chambers." *Ariz. State Leg.*, 135 S. Ct. at 2664. It noted that Arizona's constitution prohibits the legislature from "adopt[ing] any measure that supersedes a [voter-initiated proposition]" unless the measure "furthers the purposes of the initiative." *Id.* This limitation, when combined with Proposition 106, would "completely nullify" any vote by the state's legislature, "now or in the future," that purported to adopt a redistricting plan. *Id.* at 2665. The Court thus concluded that the legislature had standing. *Id.*

B.

Read together, *Raines* and *Arizona State Legislature* create a spectrum of sorts. On one end, individual legislators lack standing to allege a generalized harm to Congress's Article I power. On the other end, both chambers of a state legislature do have standing to challenge a nullification of their legislative authority brought about through a referendum.

The House sees this case as largely indistinguishable from *Arizona State Legislature*. It alleges that the

Administration's "usurpation" of the Appropriations power "inflicts a significant harm to the House as an institution." Pl.'s Mot. at 32. Permitting the Administration to "offend the Appropriations Clause" by spending funds in an unauthorized way would "affect the balance of powers in a manner that puts the House at a severe disadvantage within our system of government." *Id.* at 33. This form of institutional injury has, in the House's view, "consistently" been recognized as conferring standing upon institutional plaintiffs. *Id.*

But, as the Administration notes, the holding in *Arizona State Legislature* is narrower than the House suggests. *See* Defs.' Opp. at 40-41. The Supreme Court emphasized that its holding "does not touch or concern the question whether Congress has standing to bring a suit against the President." *Ariz. State Leg.*, 135 S. Ct. at 2665 n.12. It explained that there is "no federal analogue to Arizona's initiative power, and a suit between Congress and the President would raise separation-of-powers concerns absent here." *Id.* The Administration also highlights that here, "[o]nly the House of Representatives has initiated this action." Defs.' Opp. at 41 n.7. The Arizona Legislature, however, filed its suit after authorizing votes in both of its chambers. *Id.* (citing *Ariz. State Leg.*, 135 S. Ct. at 2664).

For its part, the House questions the relevance of *Raines*. There, "only six Members of Congress" alleged a "wholly abstract and widely dispersed" injury. Pl.'s Reply in Supp. of Its Mot. for Prelim. Inj. ("Pl.'s Reply"), ECF No. 45 at 12. And both Houses of Congress "actively opposed" the lawsuit. *Id.* This is why, the House argues, *Arizona State Legislature* described *Raines* as "holding specifically and only that individual

members of Congress lack Article III standing" to allege a nullification of their legislative power. *Id.* at 12-13 (quoting *Ariz. State Leg.*, 135 S. Ct. at 2664). *See also* Amicus Br. of Former General Counsels of the U.S. House of Reps. ("Former General Counsels' Amicus Br."), ECF No. 35 at 18 ("*Raines* and its progeny are simply inapplicable here, where the House not only has authorized the lawsuit but also itself appears as a litigant seeking to vindicate its institutional interests.").

This case falls somewhere in the middle of these two lodestars. Both therefore guide the Court's analysis. But, as explained below, the factors considered by the *Raines* Court are more relevant here. Application of these factors reveals that the House lacks standing to challenge the Administration's actions.

1.

Consider first historical practice and precedent. As the *Raines* Court explained, it is "evident from several episodes in our history that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power." *Raines*, 521 U.S. at 826.[3]

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[3] *Arizona State Legislature* does not discuss the importance of historical practice in the context of legislative standing. That case, however, did not "touch or concern the question whether Congress has standing to bring a suit against the President," and it suggested that when this question arises, an "especially rigorous" standing analysis is required. 135 S. Ct. at 2665 n.12. This more exacting inquiry requires consideration of historical practice, as evidenced by the discussion in *Raines*.

For example, Congress passed the Tenure of Office Act over President Andrew Johnson's veto in 1867. *Id.* The Act provided that if an Executive Branch official's appointment required confirmation by the Senate, the President could not remove him without the Senate's consent. *Id.* Undeterred, President Johnson fired his Secretary of War. *Id.* A week later, the House impeached the President, but the Senate acquitted him. *Id.*

Arguably, either the President could have sued Congress over the constitutionality of the Act or Congress could have sued the President for violating it. Yet neither occurred. Had a federal court "entertained an action to adjudicate the constitutionality of the Tenure of Office Act immediately after its passage in 1867" it would have "been improperly and unnecessarily plunged into the bitter political battle being waged between the President and Congress." *Id.* at 827. So too here.

Similar episodes abound throughout our history. In 1933, President Franklin D. Roosevelt fired an official from his Senate-confirmed position at the Federal Trade Commission. The Federal Trade Commission Act permitted removal only for "inefficiency, neglect of duty, or malfeasance in office." *Humphrey's Ex'r v. United States*, 295 U.S. 602, 619 (1935). The President removed the official without providing a reason. *Id.* The Senate likely had a "strong[] claim of diminution of" its Advice and Consent power. *Raines*, 521 U.S. at 826. Yet the Senate made no effort to challenge this action in court.

In *INS v. Chadha*, 462 U.S. 919 (1983), a private plaintiff sought judicial review of his deportation order claiming the Immigration and Nationality Act's one-House

veto was unconstitutional. Under a diminution of institutional power theory, the "Attorney General would have had standing to challenge the one-House veto provision because it rendered his authority provisional rather than final." *Raines*, 521 U.S. at 828. But the Executive brought no such suit.

And, applying the same line of reasoning, Congress could have challenged the validity of presidential pocket vetoes, first exercised by President Madison in 1812. But the pocket veto went unchallenged for over 100 years until President Coolidge pocketed a bill expanding Indian tribes' rights to damages for lost tribal lands and certain tribes sued. *See The Pocket Veto Case*, 279 U.S. 655, 673 (1929). *See also* Tara L. Grove *et al.*, *Congress's (Limited) Power to Represent Itself in Court*, 99 Cornell L. Rev. 571, 583-93 (2014) (discussing these and many other times when Congress declined to seek judicial intervention in the face of the Executive's non-defense of or alleged non-compliance with a federal law).

More still, the Administration notes that, "when Congress was concerned about unauthorized Executive Branch spending in the aftermath of World War I, it responded not by threatening litigation, but by creating the General Accounting Office . . . to provide independent oversight of the Executive Branch's use of appropriated funds." Defs.' Opp. at 38.

This history is persuasive. In the 230 years since the Constitution was ratified, the political branches have entered many rancorous fights over budgets and spending priorities. These fights have shut the Federal Government down 21 times since 1976, when Congress enacted the modern-day budget process. *See* Mihir Zaveri *et al.*, *The Government Shutdown was the Longest Ever.*

Here's the History., N.Y. Times (Jan. 25, 2019). Given these clashes, the paucity of lawsuits by Congress against the Executive would be remarkable if an alleged injury to the Appropriations power conferred Article III standing upon the legislature. *See United States v. Windsor*, 570 U.S. 744, 790 (2013) (Scalia, J., dissenting) (remarking that the "famous, decades-long disputes between the President and Congress [discussed in *Raines*] . . . would surely have been promptly resolved by a Congress-vs.-the-President lawsuit if the impairment of a branch's powers alone conferred standing to commence litigation"). Indeed, no appellate court has ever adjudicated such a suit.

The House points to cases from this Circuit purportedly supporting the view that legislatures have standing to seek redress for this type of injury. Pl.'s Mot. at 33. Not so.

True, the D.C. Circuit has held that the "House as a whole has standing to assert its *investigatory* power." *United States v. AT&T*, 551 F.2d 384, 391 (D.C. Cir. 1976) (emphasis added). *See also Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008) (finding that the House has standing to assert investigatory and oversight authority); *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013) (same). But whatever these cases may suggest about the House's ability to hale the Executive into court in the context of investigations, or the scope of this ability, they are of little use to the House here.

Indeed, using the Judiciary to vindicate the House's investigatory power is constitutionally distinct from seeking Article III standing for a supposed harm to Con-

gress's Appropriations power. Unlike the Appropriations power, which requires bicameralism and presentment, the investigatory power is one of the few under the Constitution that *each* House of Congress may exercise individually. *See* U.S. Const. art. I, § 5 ("Each House may determine the Rules of its Proceedings"); *see also Congress's (Limited) Power to Represent Itself in Court*, 99 Cornell L. Rev. at 596-97 (noting that "the House and the Senate have long asserted the power to conduct investigations and handle any litigation arising out of those investigations," while they have not historically brought suits to enforce federal statutes).

It is perhaps for this reason that the House's power to investigate has been enforced with periodic help from federal courts. In 1927, for instance, the Supreme Court observed that a "legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927). Thirty years later, the Court affirmed that the power to investigate is "inherent in the legislative process" and is "broad." *Watkins v. United States*, 354 U.S. 178, 187 (1957). *See also Miers*, 558 F. Supp. 2d at 56 (noting that vindicating the House's investigatory power "involves a basic judicial task—subpoena enforcement —with which federal courts are very familiar").

And the House has, since the Founding era, exercised an independent power to conduct investigations and gather information. In 1792, it established a committee to examine General St. Clair's defeat at the Battle of the Wabash, a failed raid by the U.S. Army against Native Americans residing in the Northwest Territory. *See* 3 Annals of Cong. 494 (1792). Before complying

with its requests for papers and records, President George Washington and his cabinet members, including Thomas Jefferson and Alexander Hamilton, concluded that "the House could conduct an inquest, institute inquiries, and call for papers." *Congress's (Limited) Power to Represent Itself in Court*, 99 Cornell L. Rev. at 598-99. This history of judicial and executive recognition of the House's investigatory power distinguishes it from the Appropriations power. Standing based on the Appropriations power would be a very different matter.[4]

During oral argument, the House also suggested that *U.S. House of Representatives v. U.S. Department of Commerce*, 11 F. Supp. 2d 76 (D.D.C. 1998), provides an example of courts' willingness to recognize standing in similar contexts. Hr'g Tr. 6:12:23. Not so. There, the House had standing to argue that the Census Bureau's "statistical sampling will deprive Congress of information it is entitled to by statute (and the Constitution), and must have in order to perform its mandatory constitutional duty—the apportionment of Representatives among the states." *U.S. Dep't of Commerce*, 11 F. Supp. 2d at 85. In other words, the "inability to receive information which a person is entitled to by law" is "sufficiently concrete and particular to satisfy constitutional standing requirements." *Id.* This type of informational injury, which an individual can allege, is conceptually distinct from the "institutional" harm to an

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[4] The Administration contends that the "scattered cases involving congressional subpoena enforcement are likewise incorrect and inconsistent with the Constitution's fundamental design, as well as irreconcilable with *Raines*." Defs.' Opp. at 42. But because the Court finds that the House's investigatory power is distinct from Congress's Appropriations power, it need not address this argument.

"institutional plaintiff" the House asks the Court to recognize here. More, informational injuries to Congress arise "primarily in subpoena enforcement cases," which hold that the legislature "has standing to assert its investigatory power." *Id.* at 86.[5]

This leaves the House with a single, non-precedential case in its support. In *U.S. House of Representatives v. Burwell*, the House alleged that the Executive Branch "spent billions of unappropriated dollars to support the Patient Protection and Affordable Care Act." 130 F. Supp. 3d 53, 57 (D.D.C. 2015). This spending, the House alleged, "usurped its Article I legislative authority." *Id.* at 63.

The *Burwell* court held that the House had standing to sue on this "Non-Appropriation Theory," as it would

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[5] The House relied on two other cases at the hearing to suggest that the Supreme Court is "perfectly comfortable" resolving claims of the type it raises. Hr'g Tr. 11:19-12:4. Neither case lends the House's position much support.

In the first, *Chadha*, the Court noted that, before Congress sought to intervene to defend its veto power, "there was adequate Art[icle] III adverseness even though the only parties were the INS and Chadha." 462 U.S. at 939. True, the Court suggested that "Congress is the proper party to defend the validity of a statute when an agency of government . . . agrees with plaintiffs that the statute is inapplicable or unconstitutional." *Id.* at 940. But this statement arose in the context of "prudential, as opposed to Art[icle] III, concerns" about hearing the merits of the parties' claims. *Id.*

In the second, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012), the Court held that the political question doctrine did not bar judicial review of a private plaintiff's claim against the Executive Branch. *Id.* at 191. Both *Chadha* and *Zivotofsky*, in other words, featured private plaintiffs seeking to vindicate their rights. And neither case held that one House of Congress has standing to allege harm to its Appropriations power.

"suffer a concrete, particularized injury if the Executive were able to draw funds from the Treasury without a valid appropriation." *Id.* at 74. The court distinguished "constitutional violations," which it found supported institutional standing, from "statutory violations," which it concluded did not. *Id.* Based on this dichotomy, it dismissed some claims but allowed others to proceed. *See id.*

This slender reed will not sustain the House's burden. As *Burwell* itself shows, it can be difficult to articulate a workable and consistent distinction between "constitutional" and "statutory" violations for legislative standing. There, Counts I and II of the House's complaint both alleged violations of constitutional provisions. Even so, the court dismissed Count II but permitted Count I to survive, because the former's allegations were "far more general" than the latter's. *Id.*

More, as *Burwell* notes, if "the invocation of Article I's general grant of legislative authority to Congress were enough to turn every instance of the Executive's statutory non-compliance into a constitutional violation, there would not be decades of precedent for the proposition that Congress lacks standing to affect the implementation of federal law." *Id.* (citing *Bowsher*, 478 U.S. at 722). But any claim about a violation of the Appropriation power would "inevitably involve some statutory analysis," as the Administration's "primary defense will be that an appropriation *has* been made, which will require reading the statute." *Id.* at 74 n.24 (emphasis in original).

Applying *Burwell* to the facts here would clash with binding precedent holding that Congress may not invoke the courts' jurisdiction to attack the execution of federal laws. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) ("To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an individual right vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3."). The Court thus declines to do so.[6]

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[6] More still, even if the Court were to apply the *Burwell* approach, it is far from certain that the case would survive. Count III of the House's Complaint, for instance, alleges that the Administration's planned spending violates the APA. Compl. 42. This Count claims, in part, that the Administration's actions would be "'in excess of statutory, jurisdiction, authority, or limitations, or short of statutory right.'" *Id.* at 43 (quoting APA § 706(2)(C)). Whether the Administration has fallen afoul of this provision of the APA is a "statutory and not constitutional" question that concerns "the implementation, interpretation, or execution of federal statutory law." *Burwell*, 130 F. Supp. 3d at 74. The House would thus lack standing to allege this part of Count III, as it does not "seek redress for *constitutional* violations." *Id.* (emphasis in original). The remaining counts allege both statutory and constitutional allegations, not dissimilar to the count *Burwell* dismissed. *See* Compl. 39-42.

Additionally, *Burwell* emphasized that the Administration "conceded that there was no 2014 statute appropriating new money" for its planned expenditure. 130 F. Supp. 3d at 63. The Administration made no such concession about the lack of an applicable appropriations authority here. The lack of this concession complicates any effort to distinguish an alleged "constitutional" violation from a "statutory" one. Because the Court declines to apply *Burwell*, it need not resolve this issue.

In short, like in *Raines*, the Court finds the lack of historical examples telling. The Executive and Legislative Branches have resolved their spending disputes without enlisting courts' aid. Until now. The House thus "lack[s] support from precedent," and "historical practice appears to cut against [it] as well." *Raines*, 521 U.S. at 826.

2.

The availability of institutional remedies also militates against finding that the House has standing. The notion that nullification of a legislature's power can support institutional standing, expressed in both *Raines* and *Arizona State Legislature*, comes from *Coleman v. Miller*, 307 U.S 433 (1939).[7] *Id.* There, the Kansas Legislature had rejected Congress's proposed Child Labor Amendment to the U.S. Constitution. *Coleman*, 307 U.S. at 435. Later, a state senator introduced a resolution to ratify the amendment. *Id.* at 435-36. The state senators' votes split evenly, so the lieutenant governor purported to cast a tie-breaking vote for the resolution. *Id.* at 436. The state's house of representatives then adopted the resolution. *Id.*

The senators who voted against, and three members of the state's house, sued in the Kansas Supreme Court to block the resolution from taking effect. *Id.* After the state's high court found that the lieutenant governor could legally cast the deciding vote, the legislators asked

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[7] The House does not rely on, or even cite, *Coleman* in its application for a preliminary injunction. *See generally* Pl.'s Mot. But the holding and reasoning in *Coleman* animates much of the analysis in *Arizona State Legislature* and thus merits brief discussion here.

the U.S. Supreme Court to review and reverse the judgment. *Id.* at 437.

The Court held that the legislators had standing to challenge the state court's decision. It found that, assuming the truth of their allegations, their votes against ratifying the amendment had "been overridden and virtually held for naught." *Id.* at 438. Thus, because they had a "plain, direct and adequate interest in maintaining the effectiveness of their votes," the legislators fell "directly within the provisions of the statute governing [the Supreme Court's] appellate jurisdiction." *Id.* The plaintiffs in *Coleman*, in other words, had no other recourse but to turn to federal court.

So too in *Arizona State Legislature*. There, the Court found that the voter-adopted constitutional amendment "would completely nullify any vote by the Legislature, now or in the future." 135 S. Ct. at 2665 (cleaned up). Because of this, the Court concluded that judicial resolution of the legislature's claims was appropriate. *Id.* at 2665-66.

Not so in *Raines*. There, the Court noted that dismissal "neither deprives Members of Congress an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act)." *Id.* at 829. It clarified that, "at most," *Coleman* means that "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue . . . on the ground that their votes have been completely nullified." *Id.* at 823. No such nullification, the Court held, had been alleged by the six legislators. *Id.* The Court thus concluded that there is

"a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here." *Id.* at 826.

Again, *Raines* is the more salient precedent. The House urges that "Congress's authority under the [Appropriations] Clause is absolute for good reason." Pl.'s Mot. at 31. The Court agrees. It is no doubt true that Congress "should possess the power to decide how and when any money should be" spent by the Federal Government. *OPM v. Richmond*, 496 U.S. 414, 427 (1990). "If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure." *Id.*

But like the plaintiffs in *Raines*, the House retains the institutional tools necessary to remedy any harm caused to this power by the Administration's actions. Its Members can, with a two-thirds majority, override the President's veto of the resolution voiding the National Emergency Declaration. They did not. It can amend appropriations laws to expressly restrict the transfer or spending of funds for a border wall under Sections 284 and 2808. Indeed, it appears to be doing so. *See* ECF No. 36-9 at 3-4 (describing a proposed FY 2020 appropriation stating that "none of the funds appropriated in this or any other Act for a military construction project . . . may be obligated, expended, or used to design, construct, or carry out a project to construct a wall, barrier, fence, or road along the Southern border of the United States"). And Congress "may always exercise its power to expand recoveries" for any

private parties harmed by the Administration's actions. *OPM*, 496 U.S. at 428.

More still, the House can hold hearings on the Administration's spending decisions. As it has recently shown, the House is more than capable of investigating conduct by the Executive. *See, e.g.*, Alex Moe, *House Investigations of Trump and his Administration: The Full List*, NBC News (Mar. 27, 2019) (detailing "at least 50" ongoing House investigations into the President, federal agencies, and members of the Administration). And it has other tools it can use against Officers of the Executive Branch for perceived abuses of their authority.

The House believes it has exhausted the institutional remedies at its disposal. *See* Hr'g Tr. 14:19-15:6 (contending that "the House did exactly what the political weaponry tells it to do"). *See also* Former General Counsels' Amicus Br. at 22 ("Congress has used all of the political tools in its box"); *id.* at 23 (noting that "any new legislation here would require two-thirds majorit[ies] in both the House and Senate to overcome the President's veto, and so would be an exercise not only in redundancy but also futility"). But that the House majority may lack the votes to pass a resolution over the President's veto does not, by itself, confer standing on the legislators who would like to see the resolution enacted. To hold otherwise would likely place "the Constitution's entirely anticipated political arm wrestling into permanent judicial receivership[, which] does not do the system a favor." *Windsor*, 570 U.S. at 791 (Scalia, J., dissenting).

The availability of these institutional remedies shows that there is no "complete nullification" of the House's

power. Considering the type of lawmaking at issue emphasizes this point. As the D.C. Circuit has noted, the "key to understanding the [Supreme Court's] treatment of *Coleman* and its use of the word nullification is its implicit recognition that a ratification vote on a constitutional amendment is an unusual situation." *Campbell v. Clinton*, 203 F.3d 19, 22 (D.C. Cir. 2000). Once the amendment passed, "[i]t is not at all clear whether" the legislature "could have done anything to reverse that position." *Id.* at 22-23.[8]

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[8] *Coleman* may in fact be best understood as a case about the Supreme Court's jurisdiction to review the decisions of state courts rather than to the ability of the Judiciary to hear suits between the coequal political branches of the Federal Government. Recall that the plaintiffs first sued in state court before seeking to invoke the Supreme Court's appellate jurisdiction. *See Coleman*, 307 U.S. at 446. The Court did not suggest that the plaintiffs would have had jurisdiction to bring their claims directly to federal court. Indeed, as Justice Frankfurter observed, "[c]learly a Kansan legislator would have no standing had he brought suit in a federal court." *Id.* at 465 (Frankfurter, J., dissenting). No Justice disagreed with him.

When it issued, scholars and commentators viewed *Coleman* as part of a then-ongoing debate over the scope of the Court's ability to review the decisions on federal law made by state courts. *See, e.g.*, James Wm. Moore *et al.*, *The Supreme Court: 1938 Term II. Rule-Making, Jurisdiction and Administrative Review*, 26 Va. L. Rev. 679, 706-07 (1940) (suggesting that *Coleman* was "consistent with earlier cases" because it held that the legislators could "invoke the appellate jurisdiction of the Supreme Court, although they would not have had standing to sue initially in the federal courts"); *see also Raines*, 521 U.S. at 832 n.3 (Souter, J., concurring). That debate is over, and the "same standing requirements" now apply "both at trial and on appeal to any Article III court." Tara L. Grove, *Government Standing and the Fallacy of Institutional Injury*, forthcoming

The House does not allege that it is powerless to legislate in the future. Nor does it suggest that appropriations bills are unusual in the way the constitutional amendment in *Coleman* or the referendum in *Arizona State Legislature* might have been. Rather, it argues that the Administration's planned expenditures violate the Appropriations Clause because the Administration is interpreting Sections 284 and 2808 incorrectly. But like in *Raines*, the House "may repeal" or amend these laws or "exempt [future] appropriations" from the Administration's reach. *Raines*, 521 U.S. at 829. Thus, it has not alleged that the Administration's actions have nullified its legislative power. And it is therefore the political tools the Constitution provides, rather than the federal courts, to which the House must turn to combat the Administration's planned spending.[9]

3.

Lastly, *Raines* and *Arizona State Legislature* caution federal courts to consider the underlying separation-of-powers implications of finding standing when one political branch of the Federal Government sues another. *See Ariz. State Leg.*, 135 S. Ct. 2665 n.12; *Raines*, 521 U.S. at 820 ("the law of Art. III standing is built on a single idea—the separation of powers"). Respect for

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167 U. Pa. L. Rev. ____ at *40 (2019). The basis on which the *Coleman* legislators had standing then does not supply the House a basis for asserting standing today.

[9] One other distinction between this case and *Arizona State Legislature* merits mention. Here, the House's claims are not being brought by both chambers of the legislature. While the House is correct that its allegations are less disparate and diluted than those brought by the *Raines* plaintiffs, these allegations are also less concrete and particularized than those brought by the united legislature in *Arizona State Legislature*.

the doctrine of separation of powers "requires the Judicial Branch to exercise restraint in deciding constitutional issues by resolving those implicating the powers of the three branches of Government as a 'last resort.'" *Raines*, 521 U.S. at 833 (Souter, J., concurring).

Were it to rule on the merits of this case, the Court would not be deciding constitutional issues as a "last resort." *Id.* Instead, intervening in a contest between the House and the President over the border wall would entangle the Court "in a power contest nearly at the height of its political tension" and would "risk damaging the public confidence that is vital to the functioning of the Judicial Branch." *Id.*

As discussed above, Congress has several political arrows in its quiver to counter perceived threats to its sphere of power. These tools show that this lawsuit is not a last resort for the House. And this fact is also exemplified by the many other cases across the country challenging the Administration's planned construction of the border wall. *Cf. Raines*, 521 U.S. at 534 (Souter, J., concurring) ("The virtue of waiting for a private suit is only confirmed by the certainty that another suit can come to us.").

In some of these lawsuits, including two before this Court, private plaintiffs have disputed the legality of the President's declaration of a national emergency and the Administration's ability to use Sections 284 and 2808 to build the wall. *See Ctr. for Biological Diversity v. Trump*, No. 19-cv-408 (D.D.C. 2019); *Rio Grande Int'l Study Ctr. v. Trump*, No. 19-cv-720 (D.D.C. 2019). The plaintiffs in both cases specifically allege that the Administration's planned expenditures violate the Appropriations Clause. *See, e.g.*, Compl., No. 19-cv-720, ECF

No. 1 at 38; Compl., No. 19-cv-408, ECF No. 1 at 35-36. The House is free to seek leave to file briefs as *amicus curiae* in these suits.

In fact, it has done so in a related matter in the Northern District of California. *See* Br. of Amicus Curiae, *Sierra Club v. Trump* ("House *Sierra Club* Br."), No. 4:19-cv-892 (N.D. Cal. 2019), ECF No. 47. There, two citizens' groups sought a preliminary injunction against the Administration to prevent it from using the Sections 284 and 2808 funds to build the wall. *See Sierra Club v. Trump*, No. 4:19-cv-892, 2019 WL 2247689 (N.D. Cal. May 24, 2019). As *amicus curiae*, the House too, urged the court to enjoin the Administration, raising many of the contentions it did before this Court. *See* House *Sierra Club* Br. at 3-17. The *Sierra Club* court granted the citizens' groups a partial injunction and enjoined the Administration "from taking any action to construct a border barrier" along the southern border using Section 284 funds. *Sierra Club*, 2019 WL 2247689 at *30.

An old maxim in politics holds that, "Where you stand depends on where you sit." *See* Rufus E. Miles, Jr., *The Origin and Meaning of Miles' Law*, 38 Pub. Admin. Rev. 399 (1978). At law too, whether a plaintiff has standing often depends on where he sits. A seat in Congress comes with many prerogatives, but legal standing to superintend the execution of laws is not among them.

As Chief Justice Marshall explained, the "province of the [C]ourt is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

The "irreplaceable value" of the Judiciary's power "lies in the protection it has afforded the constitutional rights and liberties of *individual citizens and minority groups* against oppressive or discriminatory government action." *Raines*, 521 U.S. at 829 (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring)) (emphasis added). It is "this role, not some amorphous, general supervision of the operations of government," that permits the "countermajoritarian implications" of judicial review to coexist with the "democratic principles upon which" the Founders built the Federal Government. *Id.* Mindful of these admonitions, the Court declines to take sides in this fight between the House and the President.[10]

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[10] Based on the D.C. Circuit's reading of *Raines*, the Court includes this separation-of-powers discussion as a part of its standing analysis. *See Chenoweth v. Clinton,* 181 F.3d 112, 116 (D.C. Cir. 1999) (suggesting that *Raines* may "require us to merge our separation of powers and standing analyses"). Before *Raines*, the D.C. Circuit had upheld a district court's dismissal on equitable grounds of an inter-branch controversy that raised significant separation-of-powers concerns. *See Moore v. U.S. House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984).

The House urges the Court not to apply this "doctrine of equitable discretion," as it has rarely been used in recent years. Pl.'s Reply at 22. But the Circuit has not found that *Raines* formally overruled the *Moore* approach. *See Chenoweth*, 181 F.3d at 116 ("*Raines* notwithstanding, *Moore* . . . may remain good law, in part, but not in any way that is helpful to the plaintiff Representatives. Whatever *Moore* gives the Representatives under the rubric of standing, it takes away as a matter of equitable discretion."). Here, as in *Chenoweth*, the parties' dispute is "fully susceptible to political resolution" on either jurisdictional or prudential grounds. *Id.*

IV.

This case presents a close question about the appropriate role of the Judiciary in resolving disputes between the other two branches of the Federal Government. To be clear, the Court does not imply that Congress may never sue the Executive to protect its powers. But considering the House's burden to establish it has standing, the lack of any binding precedent showing that it does, and the teachings of *Raines* and *Arizona State Legislature*, the Court cannot assume jurisdiction to proceed to the merits. For these reasons, it will deny the House's motion. A separate Order accompanies this Opinion.

Dated: June 3, 2019

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TREVOR N. McFADDEN, U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:19-cv-00969 (TNM)

U.S. HOUSE OF REPRESENTATIVES, PLAINTIFF

v.

STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF THE TREASURY, ET AL., DEFENDANTS

Filed: June 17, 2019

ORDER

Upon consideration of the Plaintiff's Unopposed Motion for Leave to File an Amended Complaint and Request for an Order Denying Injunctive Relief and For Entry of Judgment, ECF No. 51, it is hereby

ORDERED that the Plaintiff's Motion is **GRANTED**; it is further

ORDERED that the Amended Complaint is deemed filed with the Court upon entry of this Order; it is further

ORDERED that the Plaintiff's request for an order denying preliminary and permanent injunctive relief with respect to the Administration's transfer of funds under Section 9002 of the 2019 Department of Defense

Appropriations Act for purposes of constructing a border wall is hereby **GRANTED**. The Court holds that the House does not have standing to assert claims and seek relief with respect to Section 9002 for the reasons set forth in the Court's Memorandum Opinion dated June 3, 2019 (ECF No. 54); and it is further

ORDERED that the Plaintiff's request for entry of final judgment is **GRANTED**. The Clerk of the Court shall prepare and enter judgment in this matter pursuant to Federal Rule of Civil Procedure 58.

SO ORDERED.

Dated: June 17, 2019

2019.06.17
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TREVOR N. McFADDEN
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5176
September Term, 2020
1:19-cv-00969-TNM

UNITED STATES HOUSE OF REPRESENTATIVES,
APPELLANT

v.

STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY, ET AL., APPELLEES

Filed: Jan. 13, 2021

ORDER

Before: SRINIVASAN, Chief Judge; HENDERSON, ROGERS, TATEL, GARLAND[*], MILLETT, PILLARD, WILKINS, KATSAS[*], RAO[*], and WALKER[**], Circuit Judges; and SENTELLE, Senior Circuit Judge

Upon consideration of appellees' petition for rehearing en banc, the response thereto, and the absence of a

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[*] Circuit Judges Garland, Katsas, and Rao did not participate in this matter.

[**] A statement by Circuit Judge Walker, concurring in the denial of rehearing en banc, is attached.

request by any member of the court for a vote, it is **ORDERED** that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

Walker, *Circuit Judge*, concurring: "For over two hundred years, the coordinate branches did not enlist the Judiciary in their fights." Committee on the Judiciary of the United States House of Representatives v. McGahn, 968 F.3d 755, 779 (D.C. Cir. 2020) (en banc) (Henderson, J., dissenting). But in McGahn, this court embraced "judicial superintendence" over routine political disputes. Id. at 792 (Griffith, J., dissenting). And because McGahn was en banc, reviewing the panel's thoughtful decision in this case would be unproductive. I therefore respectfully concur in the denial of en banc review.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5176

UNITED STATES HOUSE OF REPRESENTATIVES,
APPELLANT

v.

STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY, ET AL., APPELLEES

Argued: Apr. 28, 2020
Decided: Aug. 7, 2020

On Rehearing En Banc

ORDER

Before: SRINIVASAN, *Chief Judge*, HENDERSON[**], ROGERS, TATEL, GARLAND, GRIFFITH[**], MILLETT, PILLARD, WILKINS, KATSAS[*] and RAO[*], *Circuit Judges*.

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[*] Circuit Judges Katsas and Rao did not participate in this matter.

[**] A statement by Circuit Judge Henderson, with whom Circuit Judge Griffith joins, dissenting from the order remanding the case, is attached.

[**] A statement by Circuit Judge Griffith, with whom Circuit Judge Henderson joins, dissenting from the order remanding the case, is attached.

On March 13, 2020, a majority of the judges eligible to participate voted to rehear this case en banc together with *Committee on the Judiciary of the U.S. House of Representatives v. McGahn*, No. 19-5331, to consider the "common issue of Article III standing presented" in both cases. *See* Order at 1, *U.S. House of Representatives v. Mnuchin*, No. 19-5176 (D.C. Cir. Mar. 13, 2020). The en banc court's decision in *McGahn* resolves that common issue by holding that there is no general bar against the House of Representatives' standing in all cases involving purely interbranch disputes. *See Committee on the Judiciary of the U.S. House of Representatives v. McGahn*, No. 19-5331 (D.C. Cir. Aug. 7, 2020) (en banc). Accordingly, it is

ORDERED that this case be remanded to the original panel for further consideration in light of *McGahn*. *See Al Bahlul v. United States*, 767 F.3d 1, 31 (D.C. Cir. 2014) (en banc) (remanding case to panel to consider outstanding questions); *United States v. McCoy*, 313 F.3d 561, 562 (D.C. Cir. 2002) (en banc) (same).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

KAREN LECRAFT HENDERSON, *Circuit Judge*, with whom *Circuit Judge* GRIFFITH joins, dissenting: After the Committee on the Judiciary of the United States House of Representatives timely petitioned for rehearing en banc in *McGahn*, the *Mnuchin* panel *sua sponte* asked the full court to take up that case as well to resolve "the common issue of Article III standing." Order at 1, *U.S. House of Representatives v. Mnuchin*, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020). The court agreed to rehear both cases en banc, ordered supplemental briefing to address Article III standing and consolidated the cases for oral argument. Now, however, the court has determined that only one of the two warrants discussion, remanding *Mnuchin* to the panel for further consideration in light of *McGahn*. Because I would resolve the House's standing in *Mnuchin* as an en banc court, I dissent from the order remanding that case.

En banc rehearing is "not favored," "rarely granted" and usually ordered only "to secure or maintain uniformity of decisions among the panels . . . or to decide questions of exceptional importance." *D.C. Circuit Handbook of Practice and Internal Procedures* 58 (2019). As an initial matter, it is not obvious that rehearing *Mnuchin* was necessary to achieve uniformity. The *Mnuchin* panel had not issued an opinion before *sua sponte* seeking rehearing en banc and, in line with our precedent, could have simply "elect[ed] to withhold its decision until the en banc court decide[d] the potentially dispositive question" in *McGahn*. *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 374 (D.C. Cir. 2014) (Srinivasan, J., concurring in part) (providing examples), *overruled on other grounds by Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (en banc). Nevertheless, once

the en banc court agreed to rehear the Article III issue in *Mnuchin*, we committed, I thought, to fully resolve the exceptionally important questions of legislative standing therein. By reserving these matters for the panel to consider in the first instance, the remand order disserves the parties' expectations and makes poor use of scarce judicial resources.

First, the parties do not appear to have shared the circumscribed view that the Article III standing question before the en banc court concerned only whether interbranch suits are generally barred. Both the House of Representatives and the Department of Justice briefed the court on matters relevant to whether *Mnuchin* could be resolved on narrower grounds, *see, e.g.*, Appellant's Supp. Br. 13; Appellee's Supp. Br. 5, and we provided no notice that such important questions would remain unanswered after consideration by the en banc court. On the contrary, the precedent cited in the order granting rehearing en banc belies this outcome, *see Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1 (D.C. Cir. 2006) (en banc) (two appeals heard together en banc and decided in a consolidated opinion); *United States v. Crowder*, 87 F.3d 1405 (D.C. Cir. 1996) (en banc) (same), *cert. granted, judgment vacated*, 519 U.S. 1087 (1997), and the remand order's post hoc explanation falls short. In *United States v. McCoy*, 313 F.3d 561, 567 (D.C. Cir. 2002) (en banc), we remanded the merits question to the panel, rather than to the district court, in order "to consume fewer judicial resources." But, as highlighted below, remanding has the opposite effect here. And in *Al Bahlul v. United States*, 767 F.3d 1, 31 (D.C. Cir. 2014) (en banc), the appellant raised four challenges that "[w]e intended neither the *en banc*

briefing nor argument to address" and "with the exception of a few passages . . . , we received none from the parties." Remand was therefore necessary to dispose of the outstanding issues but, here, we asked for and conducted a thorough airing of the House's *Mnuchin* standing. The majority points to no case—nor am I aware of any—in which we *sua sponte* consolidated two appeals for en banc rehearing and then addressed only one of them in the resulting opinion.

Second, although the remand is functionally equivalent to holding *Mnuchin* in abeyance pending the resolution of *McGahn*, that does not mean our procedural maneuverings can be written off as "no harm, no foul." To do so would overlook "the time and energy required of this court every time it gathers en banc," Order Denying Rehearing En Banc, *Edison Pharm. Co. v. FDA*, 517 F.2d 164, 165 (D.C. Cir. 1975) (statement by Leventhal, J.), a concern that is especially pertinent given the constraints imposed by the current pandemic. After two sets of briefing, two merits arguments and months of consideration, there is no reason that the parties should continue to languish without a definitive answer from this court. I see no benefit in prolonging the disposition of this important case and, accordingly, I respectfully dissent.

GRIFFITH, *Circuit Judge*, with whom *Circuit Judge* HENDERSON joins, dissenting: Today the en banc court issues an order remanding this case to the three-judge panel without deciding the sole issue we agreed to resolve: whether the House of Representatives has Article III standing to sue the Executive Branch for violating the Appropriations Clause. The parties have been litigating this case for well over a year, and the court's remand of the matter to the panel will likely delay final judgment for at least that long again. Such delay not only deprives the parties of timely resolution of this dispute, but it leaves this circuit's law on congressional standing uncertain. That confusion invites Congress to continue to litigate its political disputes with the Executive Branch—to the detriment of both Congress and the Judiciary.

This is not a hard case. Even under the return to the discredited view of legislative standing that the court adopts today in *McGahn*, the House still lacks Article III standing to sue to enforce the Appropriations Clause. At bottom, the House's lawsuit is indistinguishable from a claim that the Executive Branch has failed to follow the law—a "generalized grievance[]" that cannot confer Article III standing. *Allen v. Wright*, 468 U.S. 737, 751 (1984). What's more, the House alone cannot sue to protect Congress's interest in enforcing the Appropriations Clause, as the Supreme Court made clear in *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953-54 (2019). The House's lawsuit must be dismissed.

I

On February 14, 2019, after the longest-ever partial shutdown of the federal government, Congress passed the Consolidated Appropriations Act of 2019, Pub. L. No. 116-6, 133 Stat. 13, which appropriated $1.375 billion for construction of a wall along the border with Mexico. That amount was several billion dollars less than the President sought. The same day the President signed the bill, the Administration announced that it had "identified up to $8.1 billion" in appropriated funds from other congressional statutes to build the wall. *President Donald J. Trump's Border Security Victory*, White House (Feb. 15, 2019), J.A. 151.

On April 5, 2019, the House filed suit in federal district court, alleging that the Administration "flouted fundamental separation-of-powers principles and usurped for itself the legislative power specifically vested by the Constitution in Congress." Compl. at 2, J.A. 19. According to the House, the appropriations statutes invoked by the Administration "d[id] not authorize" the Executive Branch to expend funds "to construct a wall along the southern border." *Id.* ¶ 103, J.A. 58. The House claimed that this unauthorized spending violated the Administrative Procedure Act and the Appropriations Clause. *Id.* ¶¶ 89-120, J.A. 56-60. The district court denied the House's motion for a preliminary injunction, concluding that the House lacked standing. *See U.S. House of Representatives v. Mnuchin*, 379 F. Supp. 3d 8 (D.D.C. 2019).

The House timely appealed, and the matter was fully briefed and then argued before a three-judge panel on February 18, 2020. On February 28, our circuit decided *Committee on the Judiciary v. McGahn*, 951 F.3d

510 (D.C. Cir. 2020) (*McGahn I*), *reh'g en banc granted sub nom. U.S. House of Representatives v. Mnuchin*, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020) [hereinafter *Mnuchin* Order]. In *McGahn I*, a divided panel held that the Judiciary Committee's suit to enforce a congressional subpoena against the Executive Branch did "not present an Article III case or controversy." *Id.* at 531.

After the Committee filed a petition for rehearing en banc, "the panel [in *Mnuchin*] requested a vote of the en banc court to determine whether to rehear *Mnuchin* en banc in light of the common issue of Article III standing presented in that case and *McGahn*." *Mnuchin* Order at 1. A majority of eligible judges voted to rehear both cases en banc. *Id.* at 2. We then ordered the parties to file supplemental briefs in each case, and we heard nearly four hours of oral argument in the two cases. In the *McGahn* appeal, which is decided today, the en banc court concludes that the Committee has Article III standing to enforce its subpoena against McGahn. *See Comm. on the Judiciary v. McGahn*, No. 19-5331 (D.C. Cir. Aug. 7, 2020) (en banc). But the court declines to resolve the similar question presented here. Instead, it remands this case to the original three-judge panel to resolve that issue in the first instance.

II

I cannot agree with the court's refusal to decide this case. When the court granted rehearing, it necessarily determined that a "question of exceptional importance" —*i.e.*, whether the House has Article III standing to enforce the Appropriations Clause against the Executive Branch—justified the full court's attention. Fed. R.

App. P. 35(a)(2). Indeed, that question seemed so exceptional that, acting on its own initiative, the court voted to rehear the case *before* the three-judge panel had issued an opinion. Rehearing en banc should be rare; *sua sponte* rehearing even more so. Piling exception upon exception, the full court now departs from regular order by sending the case back to the panel without answering the "question of exceptional importance" that triggered rehearing in the first place.

What accounts for this extraordinary departure? The court offers no explanation for this unusual move, and I can think of none. We have more than enough information to resolve the issue—a thorough district court opinion, three rounds of briefing from the parties, a lengthy oral argument, and access to the U.S. Reports. The House and the Department of Justice have provided the "vigorous prosecution and [the] vigorous defense of the issues" that "[s]ound judicial decisionmaking requires." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 572 (1993) (Souter, J., concurring in part and concurring in the judgment) (internal quotation marks omitted). At the very least, we owe the parties an explanation of *why* we've deprived them of timely resolution of their dispute.

Resolving *Mnuchin* and *McGahn* together, which I thought was the reason for hearing both cases en banc, makes good sense. Both ask whether or when the Legislative Branch may invoke the jurisdiction of the federal courts in a dispute with the Executive Branch. By declining to resolve *Mnuchin* today, the court leaves the limits of its newly revived theory of congressional standing in *McGahn* undefined. That decision not only robs Congress of a timely answer in this case, but also leaves

both Congress and the Executive Branch guessing about how future litigation between the branches might play out, inviting them to file further suits. Sometimes, "it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). I would not keep our coordinate branches waiting for an answer to this "question of exceptional importance."

III

The question is easily answered. Even if a chamber of Congress has Article III standing to enforce a legislative subpoena against the Executive Branch (as the court wrongly holds in *McGahn*), the House lacks standing to enforce the Appropriations Clause for two further reasons. First, the Supreme Court has repeatedly held that a "generalized grievance" about the Executive Branch's failure to comply with the law cannot be an Article III injury, and the House's complaint reduces to an argument that the Administration lacks statutory authority to spend money. Second, even setting aside the generalized-grievance issue, a single chamber of Congress cannot assert an injury to Congress as a whole. By its own terms, the Appropriations Clause vests power in the House and Senate—acting together through bicameralism and presentment—to control appropriations. At the very least, the House alone cannot invoke the court's jurisdiction to vindicate the full Congress's interest in the appropriations process.

A

1

The irredeemable flaw in the House's suit is that it alleges only a "generalized grievance" that the Executive Branch has failed to comply with the law, and that sort of grievance cannot confer Article III standing.

The House "maintains that the Administration violated the Appropriations Clause by ignoring the House's decision to limit fiscal year 2019 spending on border-wall construction to $1.375 billion." House Suppl. Br. 10. Though the House frames its claim as an "Appropriations Clause violation," its argument is indistinguishable from a claim that the Executive Branch has exceeded its statutory authority. The Appropriations Clause demands that "the payment of money . . . must be authorized by a statute." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990). This is no different from any other action by the Executive Branch that is not authorized by the Constitution itself. The House's grievance here thus collapses into an argument that the Administration's spending on the border wall lacks statutory authorization, as the terms of the House's complaint confirm. *E.g.*, Compl. ¶ 59, J.A. 44 ("But defendants cannot satisfy the *statutory requirements for transferring and expending funds*. . . . " (emphasis added)); *id.* ¶ 92, J.A. 56 (similar); *id.* ¶ 103, J.A. 58 (similar).

Over and over and over again, the Supreme Court has reaffirmed that an "injury amounting only to the alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 575 (1992); *see also, e.g.*,

FEC v. Akins, 524 U.S. 11, 23-24 (1998); *Whitmore v. Arkansas*, 495 U.S. 149, 160 (1990); *Allen*, 468 U.S. at 751; *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 219-20 (1974); *United States v. Richardson*, 418 U.S. 166, 176-78 (1974); *Massachusetts v. Mellon*, 262 U.S. 447, 488-89 (1923); *Fairchild v. Hughes*, 258 U.S. 126, 129-130 (1922). That fundamental principle imbues standing doctrine's injury-in-fact prong with the "separation-of-powers significance" that the Court has "always said" it must have. *Lujan*, 504 U.S. at 577. As the Court has explained, "Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." *Id.* at 576 (emphasis omitted). If the "undifferentiated public interest in executive officers' compliance with the law" were "vindicable in the courts," then unelected judges would effectively perform "the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" *Id.* at 577 (quoting U.S. CONST. art. II, § 3).

Congressional plaintiffs must not be allowed to circumvent this cardinal feature of the separation of powers. *Cf. Barnes v. Kline*, 759 F.2d 21, 49-50 (D.C. Cir. 1984) (Bork, J., dissenting) ("It is well settled that citizens . . . would have no standing to maintain this action. That being so, it is impossible that these representatives should have standing that their constituents lack." (footnote omitted)), *vacated sub nom. Burke v. Barnes*, 479 U.S. 361 (1987). Article III prevents courts from "assum[ing] a position of authority over the governmental acts of another and co-equal department," whether at a private citizen's behest or at Congress's.

Lujan, 504 U.S. at 577 (internal quotation marks omitted). Indeed, substituting the House for a private citizen doesn't alleviate the separation-of-powers problems; it compounds them. The Judiciary isn't Congress's watchdog, and Congress may not enlist us to "monitor[] . . . the wisdom and soundness of Executive action." *Id.* (internal quotation marks omitted). In *Raines v. Byrd*, the Court declared it "obvious[]" that the Judiciary lacks the power to engage in some "amorphous general supervision of the operations of government." 521 U.S. 811, 828-29 (1997) (internal quotation marks omitted). Allowing the House to dress up a generalized grievance as an "institutional injury" would force the federal courts into a role that the Supreme Court has repeatedly and emphatically refused to accept.

The House rightly reminds us that the Executive Branch is not above the law. But neither is the Judiciary. The Constitution—"the supreme Law of the Land," U.S. CONST. art. VI, cl. 2—confines each of the three branches to its proper sphere. Article III empowers the federal courts to resolve "Cases" and "Controversies," not generalized disputes about the "operations of government." *Raines*, 521 U.S. at 829 (internal quotation marks omitted). And the law of Article III standing constrains courts to policing the Executive Branch *only* when necessary "to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009). Indeed, as this case languishes in our circuit, other federal judges have been doing just that—evaluating some of the very same spending decisions in suits that allege actual injury to private citizens. *See Sierra Club v. Trump*, 963 F.3d 874, 884 (9th Cir. 2020) (noting that the

border wall could injure the recreational and aesthetic interests of thousands of people); *see also id.* at 902-03 (Collins, J., dissenting) (agreeing that the plaintiffs have standing).

I express no view on the reasoning in that decision, but it illustrates the *type* of case in which a federal court may consider whether the Executive Branch has violated the law: a case that implicates the "rights and liberties of individual citizens [or] minority groups against oppressive or discriminatory government action." *Raines*, 521 U.S. at 829 (internal quotation marks omitted). Unless a party comes to court alleging *that* sort of an injury, we have "no charter to review and revise . . . executive action." *Summers*, 555 U.S. at 492; *see also McGahn I*, 951 F.3d at 516-17.

2

The House has no persuasive counterarguments. The House concedes that a suit alleging that the President violated a statute would "never or virtually never" be justiciable. Oral Arg. Tr. 103:24. When a litigant brings a suit that is conceptually indistinguishable from one that the litigant concedes "never or virtually never" belongs in court, we should dismiss that case.

Nevertheless, the House seeks to distinguish this case by casting it as a suit to enforce the *Constitution itself*—and thus more than an effort to stop the Executive Branch from exceeding its statutory authority. *But see, e.g.*, Compl. ¶ 59, J.A. 44 (alleging that the Executive Branch "cannot satisfy the statutory requirements for transferring and expending funds"); *id.* ¶ 92, J.A. 56 (similar); *id.* ¶ 103, J.A. 58 (similar); *id.* ¶ 114,

J.A. 59 (similar). At oral argument, we probed the limits of the House's theory. Could Congress or the House sue to enforce the Declare War Clause? The Bicameralism and Presentment Clause? Counsel repeatedly declined to give definitive answers, *e.g.*, Oral Arg. Tr. 99:17-18 ("And I just don't feel able to answer your question with a definitive yes-no."), but insisted that "the Appropriations Clause [is] different from almost every other [Clause] in the Constitution," *id.* at 99:20-21.

Why? The House says that a harm to Congress's appropriations power is concrete because the Appropriations Clause "operates as an express textual *prohibition* on Executive Branch spending absent authorization by each House of Congress." House Suppl. Br. 5; *see also* Oral Arg. Tr. 99:10-15. That distinction won't work. It is not enough that the Clause imposes a "prohibition" on spending, because the Constitution imposes other "prohibitions" on the Executive Branch too. Unless given authority to do so by the Constitution, the Executive Branch "literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."). *That* prohibition on Executive Branch action without congressional authorization is just as fundamental as the Appropriations Clause's prohibition on spending without authorization.

The House also emphasized the text of the Appropriations Clause—specifically, that the Clause is an express limitation on the Executive Branch's conduct. *See* U.S. CONST. art. I, § 9, cl. 7 ("*No Money shall* be

drawn from the Treasury, but in Consequence of Appropriations made by Law. . . . " (emphasis added)). But that distinction cannot matter either, for it would craft a rule both too narrow and too broad. Too narrow because it fails to justify the Committee's standing to sue in *McGahn*, which involves an injury to the House's *implied* power "to conduct investigations or issue subpoenas." *Trump v. Mazars USA, LLP*, No. 19-715, slip op. at 11 (U.S. July 9, 2020). Too broad because it would authorize Congress to sue under the similarly worded Port Preferences Clause, Titles of Nobility Clause, and Emoluments Clause—suits which the House seems to concede it cannot bring. *See, e.g.*, Oral Arg. Tr. 108:14-17; *id.* at 109:20-24.

When pressed at argument, the House eventually abandoned its "express textual prohibition" distinction and settled on arguing that the Appropriations Clause was "unique" because of "a combination of . . . various factors," including "text," "history," and the "absence of any corollary power under Article 2." *Id.* at 110:1-19. In other words, it just so happens that the *only* Clause in the Constitution that gives the House standing is this one. That is not a theory of the case. It is a doctrinal gerrymander.

B

Even were the House to discover a better explanation for its contention that the Appropriations Clause is different from the rest of the Constitution, it would not matter in *this* case because the House's claim has yet another fatal flaw. There is a "mismatch between the body seeking to litigate and the body to which the relevant constitutional provision" assigns the institutional

interest that the asserted injury impairs. *Bethune-Hill*, 139 S. Ct. at 1953.

In *Bethune-Hill*, the Supreme Court considered whether the Virginia House of Delegates—a single chamber of Virginia's bicameral legislature, the General Assembly—had standing to appeal the invalidation of a redistricting plan drawn by the General Assembly. The House of Delegates argued that it had standing as "the legislative body that actually drew the redistricting plan." *Id.* at 1952-53 (internal quotation marks omitted). But the Virginia Constitution stated that "members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts *established by the General Assembly*." *Id.* at 1953 (emphasis added) (quoting VA. CONST. art. 2, § 6). The Court concluded that this language "allocate[d] redistricting authority to the 'General Assembly,' of which the House constitute[d] only a part." *Id.* And because "a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole," the Supreme Court dismissed the case for want of standing. *Id.* at 1953-54.

Bethune-Hill squarely controls. The Appropriations Clause says: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made *by Law*. . . . " U.S. CONST. art. I, § 9, cl. 7 (emphasis added). That use of "by Law" references the Bicameralism and Presentment Clause, *see* U.S. CONST. art. I, § 7, cl. 2, which mandates that "no law [can] take effect without the concurrence of the prescribed majority of the Members of both Houses," *INS v. Chadha*, 462 U.S. 919, 948 (1983). Like the Virginia constitutional provision in *Bethune-Hill*, the Appropriations Clause

assigns a prerogative to the bicameral body: Congress.

Other constitutional provisions confirm that conclusion. When the Framers sought to grant a unicameral power, they did so explicitly. For instance, Article I, Section 5 states that "*[e]ach House* shall be the Judge of the Elections, Returns and Qualifications of its own Members," and that "*[e]ach House* may determine the Rules of its Proceedings." U.S. CONST. art. I, § 5, cls. 1, 2. Likewise, the Constitution vests certain unicameral prerogatives in the House alone, *see id.* art I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment."), and others in the Senate alone, *see id.* art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments."); *id.* art. II, § 2, cl. 2 ("[The President] shall have power, by and with the Advice and Consent of the Senate, to make Treaties. . . . "). The Appropriations Clause refers not to "each House," nor to the "House of Representatives," nor to "the Senate," but instead to Congress's collective capacity to make "Law[s]."

Without even engaging with the "by Law" requirement of the Clause, the House insists that there's no mismatch problem because the Clause vests "*each chamber* of Congress [with] a veto over both the Executive and each other with respect to federal spending." House Suppl. Br. 6. Quoting James Wilson, the House says that "the federal purse has 'two strings, one of which [is] in the hands of the H. of Reps.,' and '*[b]oth* houses must concur in untying' them." *Id.* (alterations in original) (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 275 (Max Farrand ed., 1911) (James Wilson)).

That vivid metaphor has almost no argumentative content. Undoubtedly, *both* chambers of Congress must agree to pass an appropriations act, and that institutional reality sometimes gives a single chamber—practically speaking—a "veto" over federal spending. But that is true of any piece of legislation that Congress wants to enact; indeed, it is a necessary feature of a bicameral legislature. If the House's practical "veto" argument suffices to convert a bicameral power into a unicameral one, *Bethune-Hill* has no force. There too, the Virginia House of Delegates had a veto over the State's redistricting plans. But that practical fact did not overcome the text, which vested a power in both houses of the Virginia legislature. Creative metaphors aside, *Bethune-Hill* compels the conclusion that the House alone lacks a cognizable institutional interest in enforcing compliance with the Appropriations Clause.

III

Anyone who thinks that the federal courts should mediate political disputes between the branches should watch this case wend its way through the courts. Recall that in April 2019 the House asked a district court to enjoin the Executive Branch from spending money to build a border wall. Well over a year later, the House is still waiting. Now the case goes back to the three-judge panel for another round of briefing and perhaps oral argument. That's another couple months of waiting. If the panel affirms the district court (as it should), the House might ask the Supreme Court to intervene. Wait a couple more months. If the panel reverses, the prospects for timely resolution are even worse. Assuming the Department of Justice petitions for certiorari, that's a few more months—whatever the Supreme

Court does. And remember, even if the House has standing, on remand the district court will need to address whether it has a cause of action and whether it wins on the merits. More appeals will follow those rulings. Careful deliberation is a hallmark of the federal courts, but that virtue comes at price: we can take a long time. The reality is that if the House were to eventually prevail, it would not get its injunction for well over a year.

Courts are not suited to helping the branches resolve their differences. But in recent years, political actors seem to be bringing more and more of these interbranch disputes to federal court. As I've said, adjudicating these disputes risks giving the impression that we've joined the political fray. *See McGahn I*, 951 F.3d at 517-18. That impression—deserved or not—will erode public confidence in an institution that promises to "judge by neutral principles." Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16 (1959). And all that so the House can wait years for a court to *possibly* take its side against the Executive Branch?

I would put an end to all these lawsuits now. I would definitively hold that disputes between the Legislative and Executive Branches simply do not belong in the federal courts. Barring that, I would dispense with the set of interbranch disputes that arise out of bare disagreements about the scope of the Executive Branch's statutory authority. And barring that, I would dispense with those cases in which the House or Senate, by itself, seeks to assert the institutional interests of Congress as a whole. But I cannot agree to delay resolution of the

case by remanding to the three-judge panel. That delay harms the parties, and the uncertainty leaves two coequal branches guessing whether or when we will intervene in their political disputes. The very least we can do is resolve the question we agreed to answer, and I respectfully dissent from the order declining to do so.

APPENDIX F

1. U.S. Const. Art. I, § 9, Cl. 7 provides:

No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

2. U.S. Const. Art. III, § 2, Cl. 1 provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

3. 10 U.S.C. 284 provides:

Support for counterdrug activities and activities to counter transnational organized crime

(a) SUPPORT TO OTHER AGENCIES.—The Secretary of Defense may provide support for the counter-

drug activities or activities to counter transnational organized crime of any other department or agency of the Federal Government or of any State, local, tribal, or foreign law enforcement agency for any of the purposes set forth in subsection (b) or (c), as applicable, if—

(1) in the case of support described in subsection (b), such support is requested—

(A) by the official who has responsibility for the counterdrug activities or activities to counter transnational organized crime of the department or agency of the Federal Government, in the case of support for other departments or agencies of the Federal Government; or

(B) by the appropriate official of a State, local, or tribal government, in the case of support for State, local, or tribal law enforcement agencies; or

(2) in the case of support described in subsection (c), such support is requested by an appropriate official of a department or agency of the Federal Government, in coordination with the Secretary of State, that has counterdrug responsibilities or responsibilities for countering transnational organized crime.

(b) TYPES OF SUPPORT FOR AGENCIES OF UNITED STATES.—The purposes for which the Secretary may provide support under subsection (a) for other departments or agencies of the Federal Government or a State, local, or tribal law enforcement agencies, are the following:

(1) The maintenance and repair of equipment that has been made available to any department or agency of the Federal Government or to any State,

local, or tribal government by the Department of Defense for the purposes of—

(A) preserving the potential future utility of such equipment for the Department of Defense; and

(B) upgrading such equipment to ensure compatibility of that equipment with other equipment used by the Department.

(2) The maintenance, repair, or upgrading of equipment (including computer software), other than equipment referred to in paragraph (1) for the purpose of—

(A) ensuring that the equipment being maintained or repaired is compatible with equipment used by the Department of Defense; and

(B) upgrading such equipment to ensure the compatibility of that equipment with equipment used by the Department.

(3) The transportation of personnel of the United States and foreign countries (including per diem expenses associated with such transportation), and the transportation of supplies and equipment, for the purpose of facilitating counterdrug activities or activities to counter transnational organized crime within or outside the United States.

(4) The establishment (including an unspecified minor military construction project) and operation of bases of operations or training facilities for the purpose of facilitating counterdrug activities or activities to counter transnational organized crime of the Department of Defense or any Federal, State, local, or

tribal law enforcement agency within or outside the United States.

(5) Counterdrug or counter-transnational organized crime related training of law enforcement personnel of the Federal Government, of State, local, and tribal governments, including associated support expenses for trainees and the provision of materials necessary to carry out such training.

(6) The detection, monitoring, and communication of the movement of—

(A) air and sea traffic within 25 miles of and outside the geographic boundaries of the United States; and

(B) surface traffic outside the geographic boundary of the United States and within the United States not to exceed 25 miles of the boundary if the initial detection occurred outside of the boundary.

(7) Construction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States.

(8) Establishment of command, control, communications, and computer networks for improved integration of law enforcement, active military, and National Guard activities.

(9) The provision of linguist and intelligence analysis services.

(10) Aerial and ground reconnaissance.

(c) TYPES OF SUPPORT FOR FOREIGN LAW ENFORCEMENT AGENCIES.—

(1) PURPOSES.—The purposes for which the Secretary may provide support under subsection (a) for foreign law enforcement agencies are the following:

(A) The transportation of personnel of the United States and foreign countries (including per diem expenses associated with such transportation), and the transportation of supplies and equipment, for the purpose of facilitating counterdrug activities or activities to counter transnational organized crime within or outside the United States.

(B) The establishment (including small scale construction) and operation of bases of operations or training facilities for the purpose of facilitating counterdrug activities or activities to counter transnational organized crime of a foreign law enforcement agency outside the United States.

(C) The detection, monitoring, and communication of the movement of—

(i) air and sea traffic within 25 miles of and outside the geographic boundaries of the United States; and

(ii) surface traffic outside the geographic boundaries of the United States.

(D) Establishment of command, control, communications, and computer networks for improved integration of United States Federal and foreign law enforcement entities and United States Armed Forces.

(E) The provision of linguist and intelligence analysis services.

(F) Aerial and ground reconnaissance.

(2) COORDINATION WITH SECRETARY OF STATE.—In providing support for a purpose described in this subsection, the Secretary shall coordinate with the Secretary of State.

(d) CONTRACT AUTHORITY.—In carrying out subsection (a), the Secretary may acquire services or equipment by contract for support provided under that subsection if the Department of Defense would normally acquire such services or equipment by contract for the purpose of conducting a similar activity for the Department.

(e) LIMITED WAIVER OF PROHIBITION.—Notwithstanding section 376[1] of this title, the Secretary may provide support pursuant to subsection (a) in any case in which the Secretary determines that the provision of such support would adversely affect the military preparedness of the United States in the short term if the Secretary determines that the importance of providing such support outweighs such short-term adverse effect.

(f) CONDUCT OF TRAINING OR OPERATION TO AID CIVILIAN AGENCIES.—In providing support pursuant to subsection (a), the Secretary may plan and execute otherwise valid military training or operations (including training exercises undertaken pursuant to section 1206(a) of the National Defense Authorization Act for Fiscal Years

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[1] See References in Text note below.

1990 and 1991 (Public Law 101-189; 103 Stat. 1564)[2] for the purpose of aiding civilian law enforcement agencies.

(g) RELATIONSHIP TO OTHER SUPPORT AUTHORITIES.—

(1) ADDITIONAL AUTHORITY.—The authority provided in this section for the support of counterdrug activities or activities to counter transnational organized crime by the Department of Defense is in addition to, and except as provided in paragraph (2), not subject to the other requirements of this chapter.

(2) EXCEPTION.—Support under this section shall be subject to the provisions of section 375[1] and, except as provided in subsection (e), section 376[1] of this title.

(h) CONGRESSIONAL NOTIFICATION.—

(1) IN GENERAL.—Not less than 15 days before providing support for an activity under subsection (a), the Secretary of Defense shall submit to the appropriate committees of Congress a written and electronic notice of the following:

(A) In the case of support for a purpose described in subsection (c)—

(i) the country the capacity of which will be built or enabled through the provision of such support;

(ii) the budget, implementation timeline with milestones, anticipated delivery schedule

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[2] So in original. Another closing parenthesis probably should appear.

for support, and completion date for the purpose or project for which support is provided;

(iii) the source and planned expenditure of funds provided for the project or purpose;

(iv) a description of the arrangements, if any, for the sustainment of the project or purpose and the source of funds to support sustainment of the capabilities and performance outcomes achieved using such support, if applicable;

(v) a description of the objectives for the project or purpose and evaluation framework to be used to develop capability and performance metrics associated with operational outcomes for the recipient;

(vi) information, including the amount, type, and purpose, about the support provided the country during the three fiscal years preceding the fiscal year for which the support covered by the notice is provided under this section under—

(I) this section;

(II) section 23 of the Arms Export Control Act (22 U.S.C. 2763);

(III) peacekeeping operations;

(IV) the International Narcotics Control and Law Enforcement program under section 481 of the Foreign Assistance Act of 1961 (22 U.S.C. 2291);

(V) Nonproliferation, Anti-Terrorism, Demining, and Related Programs;

(VI) counterdrug activities authorized by section 1033 of the National Defense Authorization Act for Fiscal Year 1998 (Public Law 105-85); or

(VII) any other significant program, account, or activity for the provision of security assistance that the Secretary of Defense and the Secretary of State consider appropriate;

(vii) an evaluation of the capacity of the recipient country to absorb the support provided; and

(viii) an evaluation of the manner in which the project or purpose for which the support is provided fits into the theater security cooperation strategy of the applicable geographic combatant command.

(B) In the case of support for a purpose described in subsection (b) or (c), a description of any small scale construction project for which support is provided.

(2) COORDINATION WITH SECRETARY OF STATE.—In providing notice under this subsection for a purpose described in subsection (c), the Secretary of Defense shall coordinate with the Secretary of State.

(i) DEFINITIONS.—In this section:

(1) The term "appropriate committees of Congress" means—

(A) the Committee on Armed Services, the Committee on Appropriations, and the Committee on Foreign Affairs of the House of Representatives; and

(B) the Committee on Armed Services, the Committee on Appropriations, and the Committee on Foreign Relations of the Senate.

(2) The term "Indian tribe" means a Federally recognized Indian tribe.

(3) The term "small scale construction" means construction at a cost not to exceed $750,000 for any project.

(4) The term "tribal government" means the governing body of an Indian tribe, the status of whose land is "Indian country" as defined in section 1151 of title 18 or held in trust by the United States for the benefit of the Indian tribe.

(5) The term "tribal law enforcement agency" means the law enforcement agency of a tribal government.

(6) The term "transnational organized crime" means self-perpetuating associations of individuals who operate transnationally for the purpose of obtaining power, influence, monetary, or commercial gains, wholly or in part by illegal means, while protecting their activities through a pattern of corruption or violence or through a transnational organization structure and the exploitation of transnational commerce or communication mechanisms.

4. 10 U.S.C. 2801 provides:

Scope of chapter; definitions

(a) The term "military construction" as used in this chapter or any other provision of law includes any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road (as described in section 210 of title 23).

(b) A military construction project includes all military construction work, or any contribution authorized by this chapter, necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility (or to produce such portion of a complete and usable facility or improvement as is specifically authorized by law).

(c) In this chapter and chapter 173 of this title:

(1) The term "appropriate committees of Congress" means the congressional defense committees and, with respect to any project to be carried out by, or for the use of, an intelligence component of the Department of Defense, the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

(2) The term "facility" means a building, structure, or other improvement to real property.

(3) The term "life-cycle cost-effective", with respect to a project, product, or measure, means that the sum of the present values of investment costs,

capital costs, installation costs, energy costs, operating costs, maintenance costs, and replacement costs, as estimated for the lifetime of the project, product, or measure, does not exceed the base case (current or standard) for the practice, product, or measure.

(4) The term "military installation" means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control.

(5) The term "Secretary concerned" includes the Secretary of Defense with respect to matters concerning the Defense Agencies.

(d) This chapter (other than sections 2830, 2835, and 2836 of this chapter) does not apply to the Coast Guard or to civil works projects of the Army Corps of Engineers.

5. 10 U.S.C. 2808 provides:

Construction authority in the event of a declaration of war or national emergency

(a) In the event of a declaration of war or the declaration by the President of a national emergency in accordance with the National Emergencies Act (50 U.S.C. 1601 *et seq.*) that requires use of the armed forces, the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects, and may authorize the Secretaries of the military

departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces. Such projects may be undertaken only within the total amount of funds that have been appropriated for military construction, including funds appropriated for family housing, that have not been obligated.

(b) When a decision is made to undertake military construction projects authorized by this section, the Secretary of Defense shall notify, in an electronic medium pursuant to section 480 of this title, the appropriate committees of Congress of the decision and of the estimated cost of the construction projects, including the cost of any real estate action pertaining to those construction projects.

(c) The authority described in subsection (a) shall terminate with respect to any war or national emergency at the end of the war or national emergency.

6. 50 U.S.C. 1621 provides:

Declaration of national emergency by President; publication in Federal Register; effect on other laws; superseding legislation

(a) With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency. Such proclamation shall immediately be transmitted to the Congress and published in the Federal Register.

(b) Any provisions of law conferring powers and authorities to be exercised during a national emergency

shall be effective and remain in effect (1) only when the President (in accordance with subsection (a) of this section), specifically declares a national emergency, and (2) only in accordance with this chapter. No law enacted after September 14, 1976, shall supersede this subchapter unless it does so in specific terms, referring to this subchapter, and declaring that the new law supersedes the provisions of this subchapter.

7. 50 U.S.C. 1631 provides:

Declaration of national emergency by Executive order; authority; publication in Federal Register; transmittal to Congress

When the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act. Such specification may be made either in the declaration of a national emergency, or by one or more contemporaneous or subsequent Executive orders published in the Federal Register and transmitted to the Congress.

8. Section 8005 of Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, Div. A, Tit. VIII, 132 Stat. 2999, provides:

DIVISION A—DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2019

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Tit. VIII
GENERAL PROVISIONS

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SEC. 8005. Upon determination by the Secretary of Defense that such action is necessary in the national interest, he may, with the approval of the Office of Management and Budget, transfer not to exceed $4,000,000,000 of working capital funds of the Department of Defense or funds made available in this Act to the Department of Defense for military functions (except military construction) between such appropriations or funds or any subdivision thereof, to be merged with and to be available for the same purposes, and for the same time period, as the appropriation or fund to which transferred: *Provided*, That such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress: *Provided further*, That the Secretary of Defense shall notify the Congress promptly of all transfers made pursuant to this authority or any other authority in this *Act: Provided further*, That no part of the funds in this Act shall be available to prepare or present a request to the Committees on Appropriations for reprogramming of funds, unless for higher priority

items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which reprogramming is requested has been denied by the Congress: *Provided further*, That a request for multiple reprogrammings of funds using authority provided in this section shall be made prior to June 30, 2019: *Provided further*, That transfers among military personnel appropriations shall not be taken into account for purposes of the limitation on the amount of funds that may be transferred under this section.

9. Section 9002 of Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, Div. A, Tit. IX, 132 Stat. 3042, provides:

DIVISION A—DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2019

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TITLE IX

OVERSEAS CONTINGENCY OPERATIONS

MILITARY PERSONNEL

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SEC. 9002. Upon the determination of the Secretary of Defense that such action is necessary in the national interest, the Secretary may, with the approval of the Office of Management and Budget, transfer up to $2,000,000,000 between the appropriations or funds made available to the Department of Defense in this title: *Provided*, That the Secretary shall notify the Congress promptly of each transfer made pursuant to the

authority in this section: *Provided further*, That the authority provided in this section is in addition to any other transfer authority available to the Department of Defense and is subject to the same terms and conditions as the authority provided in section 8005 of this Act.