No.

In the Supreme Court of the United States

ROBIN CARNAHAN, ADMINISTRATOR OF THE GENERAL SERVICES ADMINISTRATION, PETITIONER

v.

CAROLYN MALONEY, ET AL.

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 individual Members of Congress have Article III standing to sue an executive agency to compel it to disclose information that the Members have requested under 5 U.S.C. 2954.

PARTIES TO THE PROCEEDING

Petitioner (defendant-appellee below) is Robin Carnahan, Administrator of the General Services Administration. Respondents are Representatives Carolyn Maloney, Eleanor Holmes Norton, William Lacy Clay, Stephen Lynch, Jim Cooper, Gerald Connolly, Robin Kelly, Brenda Lawrence, Bonnie Watson Coleman, Stacey Plaskett, Raja Krishnamoorthi, Jamie Raskin, Peter Welch, Matt Cartwright, and Mark DeSaulnier (plaintiffs-appellants below) and Val Demings (plaintiff-appellee below).*

RELATED PROCEEDINGS

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

Cummings v. *Murphy*, No. 17-cv-2308 (Aug. 14, 2018)

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

Maloney v. *Murphy*, No. 18-5305 (Dec. 29, 2020)

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* Administrator Carnahan succeeded Acting Administrator Katy Kale, Administrator Emily W. Murphy, and Acting Administrator Timothy Horne as defendant-appellee. Representative Elijah E. Cummings was a plaintiff-appellant below but passed away while the case was pending in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-48a) is reported at 984 F.3d 50. The order of the court of appeals denying rehearing en banc (App., *infra*, 49a-90a) is reported at 45 F.4th 215. The memorandum opinion of the district court (App., *infra*, 91a-138a) is reported at 321 F. Supp. 3d 92. The order of the district court (App., *infra*, 139a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 2020. A petition for rehearing was denied on August 8, 2022 (App., *infra*, 49a-50a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

5 U.S.C. 2954 provides:

Information to committees of Congress on request

> An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, or on request of the Committee on Governmental Affairs of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.

STATEMENT

A. Legal Background

A federal statute, 5 U.S.C. 2954, directs executive agencies to furnish certain information upon request by the "Committee on Government Operations of the House of Representatives" (now known as the Committee on Oversight and Reform) and the "Committee on Governmental Affairs of the Senate" (now known as the Committee on Homeland Security and Governmental Affairs). 5 U.S.C. 2954; see App., *infra*, 93a n.2. The statute also specifies that a request may be made by any seven Members of the House Committee (which currently consists of 45 Members), or by any five Members of the Senate Committee (which currently consists of 14 Members). 5 U.S.C. 2954; see Sarah J. Eckman, Congressional Research Service, *House Committee Party Ratios: 98th-117th Congresses*, R40478, at 4 (Apr. 16, 2021); Sarah J. Eckman, Congressional Research Service, *Senate Committee Party Ratios: 98th-117th Congresses*, RL34752, at 4 (Apr. 16, 2021).

Congress enacted Section 2954 in 1928 as part of legislation repealing more than one hundred earlier statutes requiring executive agencies to submit various annual

reports to Congress. See Act of May 29, 1928, ch. 901, 45 Stat. 986. Congress found that those reporting statutes had resulted in a "waste of time" for executive agencies and had "cluttered up" congressional files "with a mass of useless reports." H.R. Rep. No. 1757, 70th Cong., 1st Sess. 6 (1928). Congress included Section 2954 in the repealing legislation, however, to provide for "the House of Representatives to have furnished any of the information contained in the reports proposed to be abolished." *Ibid.*

B. Factual Background

In 2016, Donald J. Trump was elected President of the United States. After the election, Members of the Democratic minority of the House Oversight Committee began to scrutinize a 2013 agreement between the General Services Administration (GSA) and a company owned in part by President Trump. See App., *infra*, 146a. In that agreement, GSA had leased the Old Post Office building in Washington, D.C. to the company so that the company could convert it into a hotel. See *id.* at 145a. The Members believed that the lease raised "numerous issues" that required "congressional oversight," including "potential conflicts of interest" and the "GSA's ongoing management of the lease." *Id.* at 141a.

Invoking Section 2954, Members of the House Oversight Committee submitted three requests to GSA in 2017. See App., *infra*, 148a-150a. The requesters asked GSA to produce various records relating to the Old Post Office lease, including reports showing the hotel's revenues and expenses, documents concerning liens against the hotel, copies of correspondence with President Trump's company, and documents "containing legal interpretations" of the lease. *Id.* at 149a; see *id.* at 147a-150a.

GSA declined to turn over the requested documents in response to the Section 2954 requests. See App., *infra*, 150a. But GSA announced after this litigation began that it would construe the Section 2954 requests as requests under the Freedom of Information Act (FOIA), 5 U.S.C. 552. See App., *infra*, 100a. Doing so, GSA turned over much of the information sought by the Members, but withheld documents that it determined were privileged or otherwise protected from disclosure under FOIA. See 7/12/18 Tr. 11. Later, after receiving document requests from the Committee itself that overlapped with the requests under Section 2954, GSA also made several productions of nonpublic documents that were responsive to the Members' Section 2954 requests. See Gov't C.A. 7/21/21 Letter; Gov't C.A. 2/27/21 Letter. The Section 2954 requesters were "not satisfied" with GSA's production and continue to seek the documents that GSA has withheld on the basis of privilege. App., *infra*, 100a; see Gov't C.A. 7/21/21 Letter.

C. Proceedings Below

1. The Members of the House Oversight and Reform Committee who submitted the Section 2954 requests—respondents here—sued the Acting Administrator of GSA in the U.S. District Court in the District of Columbia. See App., *infra*, 144a-145a.[1] They sought a declaration that GSA had violated Section 2954 and an order

[1] Seventeen Committee Members brought this suit. See App., *infra*, 92a. Since then, one Member (Representative Elijah E. Cummings) has passed away; one (Representative William Lacy Clay) has left the House of Representatives; three (Representatives Bonnie Watson Coleman, Stacey Plaskett, and Matt Cartwright) have left the Committee; and one (Representative Val Demings) declined to appeal the district court's order dismissing this suit. That leaves eleven Members as plaintiffs.

directing it to produce the requested records. *Id.* at 154a-155a. The government moved to dismiss the complaint, arguing that respondents lacked standing, that they lacked a cause of action, that the court should exercise its equitable discretion to decline to hear the case, and that respondents' document requests fall outside the scope of Section 2954. *Id.* at 102a.

The district court dismissed the complaint for lack of Article III standing. App., *infra*, 91a-138a. The court reasoned that, although individual Members of Congress "may go to court to demand something to which they are privately entitled," this Court's decision in *Raines* v. *Byrd*, 521 U.S. 811 (1997), established that Members generally "cannot claim harm suffered solely in their official capacities as legislators." App., *infra*, 112a. The court determined that, because the failure to answer Section 2954 requests harmed respondents only in their official capacities, not in their private capacities, respondents lacked standing under *Raines*. *Id.* at 116a-123a. The court added that this suit "runs against the strong current of history": "there is almost no historical precedent for Members of Congress to even *attempt* to enforce unmet [Section 2954] demands through the federal courts." *Id.* at 129a-130a. Finally, the court emphasized that the full House of Representatives had not authorized respondents to bring this suit. *Id.* at 131a-136a.

2. A divided panel of the D.C. Circuit reversed and remanded. App., *infra*, 1a-48a.

The court of appeals concluded that respondents had Article III standing. App., *infra*, 1a-35a. The court relied on this Court's precedents regarding standing to challenge the denial of requests for information, noting, for example, that a person may sue a federal agency for

declining to release records under FOIA. *Id.* at 13a-16a. The court reasoned that, because respondents had been denied information that they seek and to which they claim a statutory entitlement, they suffered an Article III injury. *Id.* at 16a-18a.

The court of appeals rejected the government's argument that, under *Raines*, harms to Members of Congress in their official capacity generally do not qualify as Article III injuries. App., *infra*, 18a-29a. The court instead relied on *Powell* v. *McCormack*, 395 U.S. 486 (1969), a case in which this Court entertained a Representative's claim that the House of Representatives had unlawfully excluded him from his seat and withheld his salary. App., *infra*, 26a. The court of appeals read *Powell* to mean that harms may qualify as Article III injuries even if they are "bound up with" the plaintiff's "status as a legislator." *Ibid.*

Judge Ginsburg dissented. App., *infra*, 36a-48a. He concluded that respondents lacked standing because they alleged "a harm to the House as an institution" rather than a harm that was "personal to each of them." *Id.* at 37a. Judge Ginsburg explained that the "power to oversee the workings of the Executive Branch * * * belongs to the House (and the Senate) as an institution," not to each Member as an individual. *Id.* at 41a.

3. The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 49a-50a.

Judge Millett, who authored the panel decision, concurred in the denial of rehearing en banc, joined by the other member of the panel majority. App., *infra*, 51a. She summarized the panel's analysis and responded to the other opinions concerning the denial of rehearing. *Ibid.*

Judge Rao, joined by three other judges, dissented from the denial of rehearing en banc. App., *infra*, 61a-88a. Reviewing the constitutional text, precedent, and historical practice, Judge Rao concluded that "[i]njuries to the official interests of a member of Congress * * * lie outside the traditional understanding of the 'Cases' and 'Controversies' cognizable by the Article III courts." *Id.* at 71a. She also concluded that, "[b]ecause investigation is an institutional prerogative and exists only insofar as it is a legitimate adjunct to the legislative power, Section 2954 cannot confer an informational right on individual members to sue the Executive Branch in federal court." *Id.* at 74a. Finally, she stated that the theory of standing adopted by the panel "unbalances the Constitution's separation of powers." *Id.* at 63a.

Judge Ginsburg joined Judge Rao's dissent and also issued a separate statement regarding the denial of rehearing en banc. App., *infra*, 89a-90a. He stated that the panel opinion would "require the courts to referee the daily disagreements * * * that arise over the production of documents to the Congress," would "subject the Executive to 'the caprice of a restless minority of Members,'" and would "have ruinous consequences for the orderly functioning of government." *Id.* at 90a (citation omitted). He concluded that the en banc court should have vacated the panel opinion and affirmed the district court's judgment, "rather than burden[ing] the Supreme Court with the obvious necessity of doing so." *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals held that individual Members of Congress have Article III standing to sue a federal agency for failing to disclose information sought under

Section 2954. That decision conflicts with this Court's precedents and contradicts historical practice stretching to the beginning of the Republic. The decision also resolves exceptionally important questions of constitutional law and threatens serious harm to all three branches of the federal government. This Court should grant certiorari and reverse.

A. The Court Of Appeals' Decision Was Erroneous

Article III empowers federal courts to decide only "Cases" and "Controversies." U.S. Const. Art. III, § 2, Cl. 1. The case-or-controversy requirement limits the federal courts to the types of "matters that were the traditional concern of the courts at Westminster." *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (citation omitted). That restriction "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded," and it confines the federal courts to their "'proper—and properly limited—role in a democratic society.'" *Allen* v. *Wright*, 468 U.S. 737, 750 (1984) (citation omitted).

This Court has implemented Article III's case-or-controversy requirement largely through the doctrine of Article III standing. See *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2203 (2021). A plaintiff has standing only if he has suffered a judicially cognizable injury that was likely caused by the challenged action and that would likely be redressed by judicial relief. See *ibid.* The requirement of a "legally and judicially cognizable" injury serves to ensure that the dispute is of the sort "'traditionally thought to be capable of resolution through the judicial process.'" *Raines* v. *Byrd*, 521 U.S. 811, 819 (1997) (citation omitted).

Respondents' suit does not constitute a "Case" or "Controversy" within the meaning of Article III. The harm respondents allege—the denial of information requested under Section 2954 by Members of Congress in their official capacities—does not qualify as a cognizable Article III injury. And our Nation's history makes clear that an informational dispute between Members of Congress and the Executive Branch is not of the sort traditionally thought to be capable of resolution through the judicial process.

1. This Court's decision in *Raines* establishes that Members of Congress do not suffer Article III injuries when the Executive Branch allegedly harms their official interests. In *Raines*, a group of Members of Congress challenged the Line Item Veto Act of 1996, Pub. L. No. 93-344, 110 Stat. 1200, which permitted the President to cancel appropriations authorized by Congress. 521 U.S. at 813-814. The Court held that the challengers' asserted harm—the diminution of their lawmaking powers—did not qualify as an Article III injury. *Id.* at 820-821. The Court explained that the challengers had suffered that harm "solely because they [we]re Members of Congress," not "in any private capacity." *Id.* at 821. The Court further explained that the asserted injury attached to "the Member's seat": "If one of the Members were to retire tomorrow, he would no longer have a claim." *Ibid.* The Court determined that such an "injury to official authority or power" did not confer Article III standing. *Id.* at 826.

Raines controls this case. Respondents, who are "duly elected Member[s] of Congress," brought this case "to compel an executive agency to submit information relating to matters within the jurisdiction of the House [Oversight] Committee." App., *infra*, 144a-145a.

They allege that the denial of information harmed them by impeding "the oversight and legislative responsibilities" of their Committee and of the House. *Id.* at 153a. As in *Raines*, "the injury claimed by the Members of Congress here is not claimed in any private capacity but solely because they are Members of Congress." 521 U.S. at 821. And as in *Raines*, the claimed injury runs "with the Member's seat": "If one of the Members were to retire tomorrow, he would no longer have a claim." *Ibid.* As in *Raines*, therefore, the Members' "claimed injury to official authority or power" does not suffice for Article III standing. *Id.* at 826.

Respondents' official-capacity harms do not qualify as Article III injuries because they are not judicially cognizable—that is, they lack the requisite "close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *TransUnion*, 141 S. Ct. at 2204. In our constitutional system, the "province of the court is, solely, to decide on the rights of individuals." *Marbury* v. *Madison*, 1 Cranch 137, 170 (1803). Although an individual's loss of a "private right" has traditionally provided a basis for a lawsuit, an individual legislator's "loss of political power" generally has not. *Raines*, 521 U.S. at 821; see *Braxton County Court* v. *West Virginia ex rel. Tax Commissioners*, 208 U.S. 192, 197 (1908) ("[T]he interest must be of a personal and not of an official nature."); *Smith* v. *Indiana*, 191 U.S. 138, 149 (1903) ("[T]he interest * * * should be a personal and not an official interest."); *Georgia* v. *Stanton*, 6 Wall. 50, 76 (1868) ("[T]he rights in danger * * * must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court.").

Respondents' official-capacity harms also do not qualify as Article III injuries because the harms are not particularized; they do not affect each respondent "in a personal and individual way." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992). In our system of government, an elected Representative holds his seat "as trustee for his constituents, not as a prerogative of personal power." *Raines*, 521 U.S. at 821. In the eyes of the law, elected Representatives' "personal interest in full and unfettered exercise of their authority is no greater than that of all the citizens for whose benefit (and not for the personal benefit of the officeholder) the authority has been conferred." *Moore* v. *United States House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in result), cert. denied, 469 U.S. 1106 (1985). Legislative power "is not personal to the legislator but belongs to the people; the legislator has no personal right to it." *Nevada Ethics Commission* v. *Carrigan*, 564 U.S. 117, 126 (2011). And the notion that an elected Representative has a personal stake in his official authority is "alien to the concept of a republican form of government." *Barnes* v. *Kline*, 759 F.2d 21, 50 (D.C. Cir. 1985) (Bork, J., dissenting).

Respondents' alleged harms are not particularized in an additional respect. Section 2954's ostensible purpose is to facilitate the work of the Committee and the whole House, not to provide a perquisite to individual Members. That is why Section 2954 vests the power to make requests in groups of Members rather than in each Member as an individual. It is why Section 2954 requires that requests relate to a "matter within the jurisdiction of the committee." 5 U.S.C. 2954. And it is why Section 2954 bears the title "Information to *committees of Congress* on request." *Ibid.* (emphasis altered).

Because Section 2954 exists to advance the work of the Committee and thus the House of Representatives as a body, the harm caused by the denial of a Section 2954 request falls upon the Committee and the House, not upon the requesting Members as individuals. This Court's cases make clear that such an institutional harm is insufficiently particularized to enable a Member or group of Members to sue. See *Raines*, 521 U.S. at 821 (emphasizing that the asserted injury, diminution of legislative power, "necessarily damage[d] all Members of Congress and both Houses of Congress equally"); *Virginia House of Delegates* v. *Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019) (explaining that "individual members lack standing to assert the institutional interests of a legislature").

Members of Congress have ample means, short of suing in federal court, for redressing official-capacity harms such as the denial of a Section 2954 request. They may draw public attention to agency failures at oversight hearings, seek to persuade their colleagues to restrict agency budgets or take other measures, vote for bills that the President opposes, and vote against bills that the President supports. See *Barnes*, 759 F.2d at 47 (Bork, J., dissenting). In the system of government established by the Constitution, with its "restricted role for Article III courts," disputes between Members of Congress and the Executive Branch must be resolved through those political mechanisms—not by suits in federal court. *Raines*, 521 U.S. at 828; see *id.* at 829 (observing that such political tools constitute "an adequate remedy").

2. That conclusion is powerfully reinforced by our Nation's "history and tradition," which "offer a meaningful guide to the types of cases that Article III

empowers federal courts to consider." *TransUnion*, 141 S. Ct. at 2204 (citation omitted). In *Raines*, the Court found no Article III standing because it was "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." 521 U.S. at 826. So too here, disputes about congressional demands for executive documents traditionally have not ended up in court. "Instead, they have been hashed out in the 'hurly-burly, the give-and-take of the political process between the legislative and the executive.'" *Trump* v. *Mazars, USA, LLP*, 140 S. Ct. 2019, 2029 (2020) (citation omitted).

That practice of negotiation—rather than litigation—began during the Washington Administration. See *Mazars*, 140 S. Ct. at 2029. In 1792, a committee of the House of Representatives asked the Executive Branch to produce documents concerning General St. Clair's failed military campaign in the Northwest Territory. See *ibid.* President Washington's Cabinet concluded that the House had the authority to "call for papers," but that the President had the discretion to withhold papers whose release would be inconsistent with "the public good." *Id.* at 2029-2030 (citation omitted). Secretary of State Thomas Jefferson then negotiated with Members of Congress on behalf of the Administration. See *id.* at 2030. "The discussions were apparently fruitful, as the House later narrowed its request and the documents were supplied without recourse to the courts." *Ibid.*

President Jefferson carried on that tradition of negotiation and compromise. See *Mazars*, 140 S. Ct. at 2030. In 1807, the House of Representatives asked the

President to produce information concerning Aaron Burr's conspiracy to raise a private army to invade Spanish territory in North America. See *ibid.* The President produced some of the documents sought by the House, but withheld other documents that "neither safety nor justice" would allow him to disclose. *Ibid.* (citation omitted). "Neither Congress nor the President asked the Judiciary to intervene." *Ibid.*

"Ever since, congressional demands for the President's information have been resolved by the political branches without involving this Court." *Mazars*, 140 S. Ct. at 2030. Indeed, despite the ubiquity of requests by individual Members of Congress for information from Executive Branch agencies, respondents "can identify no case" (apart from the decision below) "allowing a member of Congress to sue an executive agency for the failure to release documents pursuant to such a request." App., *infra*, 84a (Rao, J., dissenting).

In particular, although Congress enacted Section 2954 nearly a century ago, "there is almost no historical precedent for Members of Congress to even *attempt* to enforce unmet [Section 2954] demands through the federal courts." App., *infra*, 130a. The parties have identified only two other cases in which Members of Congress have tried to enforce Section 2954 through litigation. See *ibid.* In the first case, the district court held that the Members' claim was justiciable, but the suit became moot before the court of appeals could review that decision. See *Waxman* v. *Evans*, No. 01-cv-4530, 2002 WL 32377615, at *3-*6 (C.D. Cal. Jan. 18, 2002), vacated as moot, 52 Fed. Appx. 84 (9th Cir. 2002). And in the second case, the district court found that the Members lacked standing. See *Waxman* v. *Thompson*, No. 04-cv-3467, 2006 WL 8432224, at *6-*12 (C.D. Cal. July 24,

2006). Historical practice thus confirms that disputes concerning Section 2954 requests, like disputes concerning other congressional requests for the Executive Branch's information, should be resolved through the political process, not through litigation instituted by individual Members of Congress.

3. Two additional points reinforce respondents' lack of standing: Congress has not purported to allow Members to sue to enforce Section 2954, and the House of Representatives has not purported to authorize this particular suit.

This Court has held that Congress may, within constitutional limits, "elevate" harms that were "previously inadequate in law" "to the status of legally cognizable injuries." *TransUnion*, 141 S. Ct. at 2205 (citations omitted); see *id.* at 2220 (Thomas, J., dissenting). In this case, however, Congress has not attempted to do so: Although Section 2954 directs executive agencies to furnish information requested by specified congressional committees or groups of their Members, it does not provide in terms that Members have a legal "right" to receive information. See, *e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275, 289 (2001) (statutes that impose duties do not necessarily create rights). Nor does Section 2954 purport to grant the Committees or their Members the ability to sue executive agencies for failing to fulfill such requests. Cf. *Reed* v. *County Commissioners*, 277 U.S. 376, 388-389 (1928) (holding that a Senate resolution authorizing a committee to subpoena documents did not authorize it to "invoke the power of the judicial department"). The Court accordingly need not decide whether Congress would have the power to "elevate" respondents' asserted harms "to the status of legally cognizable injuries." *TransUnion*, 141 S. Ct. at 2205; cf. *Raines*,

521 U.S. at 815-816 (finding a lack of standing even though a federal statute specifically authorized Members of Congress to sue to test the constitutionality of the line-item veto).

In *Raines*, this Court also "attach[ed] some importance to the fact that [the plaintiffs] ha[d] not been authorized to represent their respective Houses of Congress in th[at] action." 521 U.S. at 829.[2] Even if an Article III court could entertain a suit if authorized by the full House, allowing suit by individual Members without that authorization "would encourage small groups, or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict." *Goldwater* v. *Carter*, 444 U.S. 996, 997 (1979) (Powell, J., concurring in the judgment). Requiring authorization from the full House would also protect "Congress' institutional concerns from the caprice of a restless minority of members." App., *infra*, 133a-134a. A "resolution by the entire legislative body prevents a 'wayward committee from acting contrary to the will of the House' and safeguards against 'aberrant subcommittee or committee demands.'" *Id.* at 134a (brackets and citation

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[2] Since *Raines*, the United States has consistently argued that an interbranch dispute about a congressional demand for information or the functioning of the Executive Branch is not justiciable even if the full House *has* authorized the suit. See, *e.g.*, *Committee on the Judiciary* v. *McGahn*, 968 F.3d 755, 762 (D.C. Cir. 2020) (en banc); Gov't Br. at 31-39, *Committee on Oversight & Government Reform* v. *Lynch*, No. 16-5078 (D.C. Cir. Dec. 20, 2016); *House of Representatives* v. *Burwell*, 130 F. Supp. 3d 53, 66-77 (D.D.C. 2015); Mot. to Dismiss at 23-27, *Committee on the Judiciary* v. *Miers*, No. 08-cv-409 (D.D.C. May 9, 2008). The Court need not reach that broader question here because respondents have sued without the approval of the full House.

omitted). In this case, respondents "did not secure approval from the full House before bringing suit—indeed, they did not even try." *Ibid.* The lack of such approval makes it all the more evident that respondents lack standing.

4. The court of appeals' contrary analysis is deeply flawed. The court reasoned that respondents allege "a quintessential form of concrete and particularized injury": the "failure to provide information to which [they] are statutorily entitled." App., *infra*, 13a. The court believed that the failure to provide information sought under Section 2954 "is on all fours, for standing purposes," with the failure to provide information sought under a statute such as FOIA. *Id.* at 16a.

That line of reasoning overlooks the crucial difference between a harm to a "private right" (which can give rise to standing) and an asserted harm to a Member's "political power" (which cannot). *Raines*, 521 U.S. at 821. FOIA "create[s] a private right to information to be used for any purpose." App., *infra*, 79a (Rao, J., dissenting). Section 2954, in contrast, "gives legislators a right to information specifically for legislating, as evidenced by the fact that information requests must 'relate to any matter within the jurisdiction of the committee.'" *Ibid.* (quoting 5 U.S.C. 2954 (brackets omitted)). The asserted harm to official interests caused by the denial of a Section 2954 request thus differs fundamentally from the harm to private interests caused by denial of the typical FOIA request.

The court of appeals also cited *Powell* v. *McCormack*, 395 U.S. 486 (1969), a case in which this Court reviewed a Representative's claim that the House of Representatives had unlawfully denied him his seat and withheld his pay. App., *infra*, 25a. The court of appeals

construed *Powell* to mean that "harms pertain[ing] directly to [a Member's] fulfillment of his role as a legislator" can qualify as an Article III injury. *Ibid.*

That analysis misreads *Powell*. As this Court explained in *Raines*, the plaintiff in *Powell* had suffered an injury in his "private capacity"—namely, a "loss of salary." *Raines*, 521 U.S. at 821. Such an injury does not attach to "the Member's seat"; if a Member whose pay has been unlawfully withheld were to retire, he would retain his entitlement to the wrongly withheld pay. *Ibid.* This case, in contrast, involves an asserted harm to Members' interests as Members, not a harm to their private pocketbooks. And the claim here does attach to Members' seats; if a requester ceases to be a Member of the House Oversight Committee, he ceases to have a claim. See p. 10, *supra*. *Powell* thus does not suggest that the harms asserted here give rise to Article III standing. See *Moore*, 733 F.2d 959 (Scalia, J., concurring in result) (distinguishing between "the emoluments of the office," which belong to officers as individuals, and "the powers of the office," which belong to officers only as trustees for their constituents).

B. The Question Presented Warrants This Court's Review

This Court should grant certiorari because the court of appeals' decision resolved an exceptionally important question in a manner that conflicts with this Court's precedent, undermines the separation of powers, and threatens to inflict harmful consequences on all three Branches of government. The panel and en banc opinions thoroughly air the relevant issues. And the "exceptional importance" of the decision below is magnified by the D.C. Circuit's "effective monopoly over lawsuits between Congress and the Executive Branch," App., *infra*, 63a (Rao, J., dissenting).

1. The court of appeals' decision "conflicts with relevant decisions of this Court," Sup. Ct. R. 10(c)—specifically, with *Raines*. In *Raines*, this Court explained that a harm to a Member of Congress qualifies as an Article III injury only if it involves the loss of a "private right," as opposed to the "loss of political power." 521 U.S. at 821. In this case, in contrast, the court of appeals reasoned that Article III "does *not* mean that the injury must be private" and that a Member may sue in federal court for harms to his "performance of his legislative job." App., *infra*, 26a-27a (emphasis altered).

In *Raines*, this Court treated the fact that the claimed injury attached to "the Member's seat" as a basis for *rejecting* standing. 521 U.S. at 821. In this case, in contrast, the court of appeals treated that fact as an argument *for* standing: "Of course, any informational injury incurred by that member would also end with the loss of the seat. * * * That same feature * * * underscores the personal and individuated, rather than institutional, character of the legal right and the injury suffered." App., *infra*, 30a.

In *Raines*, this Court also placed significant weight on "historical practice." 521 U.S. at 826. The Court found it significant that, in "several episodes in our history" involving "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." *Ibid.* Here, in contrast, the court of appeals did not mention the historical practice of resolving interbranch disputes through negotiation and compromise. Nor did the court find it significant that, "despite the thousands of requests by members of Congress that sally forth each year to executive branch agencies and officials," respondents "can identify no

case" allowing a Member of Congress to bring a suit like this one. App., *infra*, 84a (Rao, J., dissenting).

The inconsistencies with *Raines* do not end there. In *Raines*, this Court distinguished *Powell* as a case involving a "private" injury—namely, "loss of salary." *Raines*, 521 U.S. at 821. Yet here, the court of appeals read *Powell* as a case involving an official injury—namely, the denial of the plaintiff's ability to "exercise the powers of [his] office." App., *infra*, 26a. In *Raines*, this Court "attach[ed] some importance to the fact that [the plaintiffs] ha[d] not been authorized to represent their respective Houses of Congress in this action." 521 U.S. at 829. Yet here, the court of appeals disregarded the House's failure to authorize respondents to bring this case, instead finding it sufficient that the House "has never *opposed*" the suit. App., *infra*, 32a (emphasis added). Finally, in *Raines*, this Court emphasized that denying standing did not deprive Members of Congress "of an adequate remedy," since the Members could still use political tools to protect their interests. 521 U.S. at 829. Yet here, the court deemed the "legislative process" inadequate for ensuring that the Executive Branch turns over information sought by Members of Congress. App., *infra*, 32a.

In short, as Judge Ginsburg observed, the decision below "flies in the face of [this] Court's clear teaching." App., *infra*, 89a (statement of Ginsburg, J.). And as Judge Rao noted, the decision "decisively breaks with the structural constitutional limits articulated in *Raines*." *Id.* at 62a (Rao, J., dissenting).

2. This Court should also grant review because "disputes of this sort * * * raise important issues concerning relations between the branches." *Mazars*, 140 S. Ct. at 2031. "[D]isputes involving congressional efforts to

seek official Executive Branch information recur on a regular basis." *Ibid.* In fact, "practically every administration since 1792 has clashed with Congress over whether the President, at his discretion, may withhold information requested by the legislative branch." Joel D. Bush, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J.L. & Pol. 719, 724 (1993). Over the past two centuries, the Executive Branch and Congress have worked out a method for resolving such disputes: "negotiation and compromise." *Mazars*, 140 S. Ct. at 2031.

The court of appeals' decision would transform that longstanding process. "Instead of negotiating over information requests," as few as seven members of the House of Representatives or five Senators "could simply walk away from the bargaining table and compel compliance in court." *Mazars*, 140 S. Ct. at 2034. That stark departure from historical practice justifies this Court's intervention. The Court has "a duty of care to ensure that [federal courts] not needlessly disturb 'the compromises and working arrangements that [the political] branches themselves have reached.'" *Id.* at 2031 (citation and ellipsis omitted). And here, the court of appeals' departure from longstanding practice threatens to impose significant harms on all three Branches.

To start, the decision below harms the Executive Branch. Under the decision, individual Members of Congress need persuade only "a few likeminded and zealous members * * * to go to court." App., *infra*, 87a (Rao, J., dissenting from denial of rehearing). That means that the "more fractious members" of Congress would be free to "enlist the courts in their political conflicts and strategically threaten executive agencies with protracted litigation." *Id.* at 86a-87a. A congressional

minority—"or even an ideological fringe of the minority"—could bring cases to "distract and harass Executive agencies and their most senior officials." *Id.* at 87a (citation omitted).

The decision below also harms Congress. Although the House of Representatives has not participated in this litigation, the Bipartisan Legal Advisory Group—an entity presenting "the institutional position of the House in litigation"—filed an amicus curiae brief in a previous case arguing that disputes under Section 2954 "should be resolved through negotiation and accommodation, not through the judicial system." Bipartisan Legal Advisory Group Amicus Br. at 1, 3-4, *Waxman* v. *Evans*, 52 Fed. Appx. 84 (9th Cir. 2002) (No. 02-55825). The brief explained that the House has a strong interest in maintaining "institutional control" over requests for information. *Id.* at 3. Allowing "a small group of members of a single committee to enforce a demand for information regardless of the views of a majority of the committee, much less of the House itself," would undermine that prerogative. *Id.* at 26-27. For example, if any seven Members disagreed with a compromise adopted by a majority of the 45-Member Committee, "they could sue (or threaten to sue) for more information," eliminating "the executive branch's incentive to compromise" and undermining the Committee's "negotiating posture." *Id.* at 28.

Finally, the decision below distorts the Judicial Branch's role under the Constitution's framework of separated powers. Article III courts have maintained "public esteem" in part by performing their traditional role of protecting the "rights and liberties of individual citizens." *Raines*, 521 U.S. at 829 (citation omitted). If the courts were to venture beyond that role and begin

to referee "interbranch controvers[ies]," they would raise the "specter of judicial readiness to enlist on one side of a political tug-of-war" and "risk damaging the public confidence that is vital to the functioning of the Judicial Branch." *Id.* at 833-834 (Souter, J., concurring in the judgment). That risk is especially acute in disputes between the political Branches concerning congressional demands for information from the Executive Branch. "[D]isputes involving congressional efforts to seek official Executive Branch information recur on a regular basis, including in the context of deeply partisan controversy." *Mazars*, 140 S. Ct. at 2031. Such disputes between the political Branches are properly resolved through the long-established political process of negotiation and compromise. Judicial intervention in such matters would risk "embroiling the federal courts" in "power contest[s] nearly at the height of [their] political tension." *Raines*, 521 U.S. at 833 (Souter, J., concurring in the judgment).

All in all, the "consequences of allowing a handful of members to enforce in court demands for Executive Branch documents without regard to the wishes of the House majority are sure to be ruinous." App., *infra*, 47a (Ginsburg, J., dissenting). Those consequences confirm the "obvious necessity" of this Court's review. *Id.* at 90a (statement of Ginsburg, J.).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2022

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5305

CAROLYN MALONEY, ET AL., APPELLANTS

v.

EMILY W. MURPHY, ADMINISTRATOR,
GENERAL SERVICES ADMINISTRATION, APPELLEE

Argued: Oct. 22, 2019
Decided: Dec. 29, 2020

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cv-02308)

Before: TATEL and MILLETT, *Circuit Judges*, and GINSBURG, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* MILLETT.

Dissenting opinion filed by *Senior Circuit Judge* GINSBURG.

MILLETT, *Circuit Judge*: Federal law expressly authorizes seven or more members (less than a majority) of the House of Representatives' Committee on Oversight and Reform to request and to receive information from government agencies as relevant to the performance of their Committee duties. *See* 5 U.S.C. § 2954.

In 2017, the Ranking Member of the Committee and seven other members sent such a request to the General Services Administration seeking information related to property owned by the United States government. The agency refused to comply.

The sole question before the court is whether the members who requested agency information under Section 2954 have standing under Article III to enforce their statutorily conferred right to information. We hold that they do. Informational injuries have long satisfied the injury requirement of Article III. A rebuffed request for information to which the requester is statutorily entitled is a concrete, particularized, and individualized personal injury, within the meaning of Article III. That traditional form of injury is quite distinct from the non-cognizable, generalized injuries claimed by legislators that are tied broadly to the lawmaking process and that affect all legislators equally. And nothing in Article III erects a categorical bar against legislators suing to enforce statutorily created informational rights against federal agencies, whether under the Freedom of Information Act, 5 U.S.C. § 552, or under Section 2954. Because the plaintiffs have standing, we reverse the district court's dismissal of the case and remand for further proceedings.

I

A

Under Section 2954 of Title 5, committee members on the House and Senate committees dedicated to governmental oversight may request and receive information from federal agencies that pertains to those members' committee work. Section 2954 provides in full:

> An Executive agency, on request of the Committee on Government Operations of the House of Representatives [now the Committee on Oversight and Reform], or of any seven members thereof, or on request of the Committee on [Homeland Security and] Governmental Affairs of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.

5 U.S.C. § 2954.

At the time of Section 2954's passage, the relevant House committee had 21 members, thirteen from the majority party and eight from the minority. *See* 1 DAVID CANON ET AL., COMMITTEES IN THE U.S. CONGRESS, 1789-1946: HOUSE STANDING COMMITTEES 497 (2002). Section 2954's terms specifically empower not just the full committees, but also a smaller, non-majority group of committee members (seven in the House and five in the Senate) to request needed information from federal agencies.

As now constituted, the two committees covered by Section 2954 are uniquely focused on governmental oversight and accountability. The Committee on Oversight and Reform of the House has relatively broad jurisdiction over, among other things, "[g]overnment management and accounting measures generally"; "[o]verall economy, efficiency, and management of government operations and activities, including Federal procurement"; and "[p]ublic information and records." House Rule X, cl. 1(n). The Committee on Homeland Security and Governmental Affairs of the Senate has jurisdiction

over similar subjects, including "[b]udget and accounting measures" and "[g]overnment information." Senate Rule XXV, cl. 1 (k)(1).

Section 2954 was enacted in 1928 in the wake of the Supreme Court's landmark decision in *McGrain v. Daugherty*, 273 U.S. 135 (1927). Suspecting that the Attorney General of the United States had failed to prosecute specific individuals who had violated the antitrust laws, the Senate formed a select committee to investigate the matter. That committee's investigative powers included issuing subpoenas to witnesses. *Id.* at 151-152. When a witness refused to comply and challenged Congress's right to call individuals to testify, the Court affirmed that Congress's "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *Id.* at 174. Such power was necessary to effective governance because "[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; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it." *Id.* at 175.

Against that backdrop, Congress passed Section 2954, and the President signed it into law. Previously, 128 different statutes scattered across the United States Code had obligated certain federal agencies to submit periodic reports and information to Congress. *See* Act of May 29, 1928, Pub. L. No. 70-611, 45 Stat. 986, 986-996. Congress repealed those mandatory reporting requirements and replaced them with Section 2954, ensuring that legislators serving on the two committees

directly responsible for government oversight could more effectively and more timely receive the information from federal agencies that is necessary and useful to their performance of their legislative duties. *See id.* at 996; *see also* H.R. REP. NO. 1757, 70th Cong., 1st Sess. 3, 6 (1928); *id.* at 6 ("To save any question as to the right of the House of Representatives to have furnished any of the information contained in the reports proposed to be abolished, a provision has been added to the bill requiring such information to be furnished to the Committee on Expenditures in the Executive Departments *or* upon the request of any seven members thereof.") (emphasis added).

Section 2954 is distinct from Congress's institutional authority to request or subpoena documents and witnesses. Those measures require formal authorization by Congress, a Chamber of Congress, or a committee. But an information request under Section 2954 can be made by just a small group of legislators—a true minority—who make the individual judgment to seek the information as a means of better informing their committee work. As both the House and Senate Reports explained: "If any information is desired by any Member or committee upon a particular subject that information can be better secured by a request made by an individual Member or committee, so framed as to bring out the special information desired." H.R. REP. NO. 1757, at 6; S. REP. NO. 1320, 70th Cong., 1st Sess. 4 (1928).[1]

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[1] The tradition of federal agencies providing information to Congress dates back to at least the Treasury Act of 1789, which made it "the duty of the Secretary of the Treasury * * * to make report, and give information to either branch of the legislature, in person or in writing (as he may be required), respecting all matters referred

B

In February 2017, the then-House Oversight Committee Ranking Member, Representative Elijah Cummings, and seven other members of the House Oversight Committee (collectively, "Requesters"), issued a Section 2954 request for information to the General Services Administration ("GSA") after the agency had repeatedly rebuffed their efforts to obtain the information voluntarily.[2]

The Requesters' inquiry has its origin in the GSA's 2013 lease of the Old Post Office building in Washington, D.C., to Trump Old Post Office LLC ("Company"), a business owned by the now-President Donald Trump and his children. The lease agreement explicitly barred any federal or District of Columbia elected official from participating in or benefiting from the lease:

> No member or delegate to Congress, or elected official of the Government of the United States or the Government of the District of Columbia, shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom.

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to him by the Senate or House of Representatives, or which shall appertain to his office." Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 65-66.

[2] During the pendency of this appeal, Representative Cummings passed away. *See* Notice Pursuant to Federal Rule of Appellate Procedure 43(a), *Maloney v. Murphy*, No. 18-5305 (D.C. Cir. Oct. 21, 2019). The seven other requesting members have continued to prosecute this action. *Id.*

J.A. 11, Compl. ¶ 11 (quoting Article 37.19 of the lease agreement).[3]

In November 2016, following President Trump's election, Representative Cummings and three other Committee members requested that the GSA provide a briefing on the lease, as well as unredacted copies of lease documents and the Company's monthly and annual statements. After the request was again made by Representative Cummings and ten other Committee members, invoking Section 2954, the GSA produced records including lease amendments, a 2017 budget estimate, and monthly income statements. The GSA stated that it was releasing the information "[c]onsistent with [Section 2954.]" J.A. 87.

In January 2017, following President Trump's inauguration, Representative Cummings and three other Committee members requested additional information from the GSA relating to the agency's enforcement of the lease terms. Specifically, they asked the GSA

> (a) to explain the steps that GSA had taken, or planned to take, to address President Trump's apparent breach of the lease agreement;
>
> (b) to state whether GSA intended to notify President Trump's company that it is in breach;
>
> (c) to provide the monthly reports President Trump's company submits to the GSA on the Trump International Hotel's revenues and expenses;

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[3] At this stage, we "assume the truth of the plaintiff[s'] material factual allegations." *Blumenthal v. Trump*, 949 F.3d 14, 18 (D.C. Cir. 2020).

> (d) to explain and provide documentation of the steps GSA had taken, or planned to take, to address liens against the Trump International Hotel; and
>
> (e) to provide copies of all correspondence with representatives of President Trump's company or the Trump transition team.

J.A. 13-14, Compl. ¶ 19.

The GSA refused to comply with that request, stating that the Committee members should submit a request under Section 2954. *See* J.A. 95.

The Requesters took the GSA up on its offer. By letter dated February 8, 2017, Ranking Member Cummings and seven other Committee members formally invoked Section 2954 in support of their information request. The Requesters asked for a response by February 13, 2017.

The GSA did not respond. After submitting a number of follow-up inquiries, the Requesters sent a lengthier letter explaining the background and function of Section 2954. On July 6, 2017, the Requesters reiterated their informational inquiry in a third formal communication to the GSA, again invoking Section 2954.

Finally, in July 2017, the GSA rejected those three formal requests in a one-page letter. The letter expressed the agency's view that "[i]ndividual members of Congress, including ranking minority members, do not have the authority to conduct oversight in the absence of a specific delegation by a full house, committee, or subcommittee." The letter did not mention Section 2954.

C

The Requesters filed suit in November 2017 against the then-Acting Administrator of the GSA, asserting that the agency's refusal to comply with the statute "deprived the plaintiffs of information to which they are entitled by law[.]" J.A. 18. The Requesters asserted that the refusal thwarted each Member's ability to:

> (a) evaluate the propriety of GSA's failure to enforce Article 37.19 of the lease which, by its express terms, forbids President Donald Trump, an "elected official of the Government of the United States," from benefiting from the lease in any way;
>
> (b) evaluate GSA's oversight of the lease, including financial management of the lease;
>
> (c) ascertain the amount of income from the lease benefiting President Trump, his daughter Ivanka Trump, and his sons Donald, Jr. and Eric Trump;
>
> (d) determine the extent to which Trump Old Post Office LLC has received funds from foreign countries, foreign entities, or other foreign sources;
>
> (e) assess whether GSA's failure to act is based on a new interpretation of Article 37.19 of the lease, and if so, to review the legal opinion or opinions on which the new interpretation is based;
>
> (f) evaluate whether the GSA contracting officer's decision that the Trump Old Post Office LLC is in compliance with the lease was free from inappropriate influence; and
>
> (g) recommend to the Committee, and to the House of Representatives, legislative and other actions that

> should be taken to cure any existing conflict of interest, mismanagement, or irregularity in federal contracting.

J.A. 18-19, Compl. ¶ 36.

The Requesters filed a motion for summary judgment on the ground that Section 2954 entitled them to the information sought as a matter of law. *Cummings v. Murphy*, 321 F. Supp. 3d 92, 96 (D.D.C. 2018). The GSA, for its part, filed a motion to dismiss arguing that (i) the Requesters, as individual legislators, lacked Article III standing; (ii) Section 2954 does not provide a cause of action for enforcement; (iii) principles of equitable discretion required dismissal; and (iv) Section 2954 does not apply to the information sought. *Id.* at 100.

The district court dismissed the case for lack of standing. The court reasoned that, in *Raines v. Byrd*, 521 U.S. 811 (1997), the Supreme Court established "a binary rubric of potential injuries for purposes of assessing [the] standing" of individual legislators as either "institutional" or "personal." *Cummings*, 321 F. Supp. 3d at 107. The district court then ruled that the Requesters' injury was not personal because they were not "singled out for specially unfavorable treatment," and the injury was not to a private right. *Id.* at 109 (quoting *Raines*, 521 U.S. at 821). The district court also held that the injury was not institutional because no subpoena was involved, and Section 2954 had rarely led to litigation over its enforcement. *Cummings*, 321 F. Supp. 3d at 113-114.

Having dismissed the case on standing grounds, the district court did not address the other grounds for dismissal pressed by the GSA.

The Requesters timely filed a notice of appeal.

II

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 to evaluate its own jurisdiction in this case. We have jurisdiction to review the judgment of dismissal under 28 U.S.C. § 1291.

We review questions of standing *de novo*. *Blumenthal v. Trump*, 949 F.3d 14, 18 (D.C. Cir. 2020). In doing so, we accept as true the plaintiffs' material factual allegations, *id.*, and, to the extent it bears on the standing inquiry, we assume that the Requesters would prevail on the merits of their lawsuit, *Committee on the Judiciary, U.S. House of Representatives v. McGahn*, 968 F.3d 755, 762 (D.C. Cir. 2020) (en banc).

III

A

The Constitution vests limited powers in each branch of the federal government. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1546-1547 (2016). Congress is entrusted with enumerated "legislative Powers," U.S. CONST. Art. I, § 1, the President with "[t]he executive Power," *id.* Art. II, § 1, cl. 1, and the federal courts with "[t]he judicial Power of the United States," *id.* Art. III, § 1.

"[T]o remain faithful to this tripartite structure," the judicial power "may not be permitted to intrude upon the powers given to the other branches." *Spokeo*, 136 S. Ct. at 1547. To that end, the Constitution confines the judicial power "only to 'Cases' and 'Controversies.'" *Id.* (quoting U.S. CONST. Art. III, § 2). Embedded in that "case-or-controversy requirement" is the obligation

of plaintiffs who seek to invoke the jurisdiction of a federal court to establish their standing to sue. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013); *see also McGahn*, 968 F.3d at 762 ("The standing inquiry is trained on whether the plaintiff is a proper party to bring a particular lawsuit.") (formatting modified).

To establish Article III standing, a plaintiff must allege "(1) a concrete and particularized injury, that (2) is fairly traceable to the challenged conduct, and (3) is likely to be redressed by a favorable decision." *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019). To satisfy the first prong, a party's complaint "must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized to him." *Raines*, 521 U.S. at 819. "In this manner does Art[icle] III limit the federal judicial power to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

Given that "the law of [Article] III standing is built on * * * the idea of separation of powers[,]" "our standing inquiry has been especially rigorous" when the suit pits members of the two Political Branches against each other. *Raines*, 521 U.S. at 820-821 (formatting modified); *see McGahn*, 968 F.3d at 763, 769-772 (analyzing the question of standing with "rigor" in a case involving a clash between Congress, a former Executive Branch official, and the Executive). Nonetheless, "the Judiciary has a responsibility to decide cases properly before

it[.]" *Zivotofsky ex. rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194-195 (2012) (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)). "Courts cannot avoid their responsibility merely because the issues have political implications." *Id.* at 196 (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983)); *see also McGahn*, 968 F.3d at 774 (same).

B

The agency's failure to provide information to which the Requesters are statutorily entitled is a quintessential form of concrete and particularized injury within the meaning of Article III.

The Supreme Court has repeatedly held that informational injuries satisfy the injury-in-fact requirement. In *FEC v. Akins*, 524 U.S. 11 (1998), the plaintiffs filed suit against the Federal Election Commission based on the Commission's failure to require a political committee to release information as required by the Federal Election Campaign Act of 1971, 52 U.S.C. § 30101 *et seq.* *See* 524 U.S. at 14, 20-21. The Supreme Court held that the plaintiffs' "inability to obtain information * * * that, on [the plaintiff's] view of the law, [a] statute requires" is a "concrete and particular" injury. *Id.* at 21.

Likewise, in *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 449 (1989), a plaintiff sought information under the Federal Advisory Committee Act's disclosure provision, 5 U.S.C. App. II, § 10(b). *See* 491 U.S. at 449-450. The Supreme Court ruled that the plaintiff had standing. "As when an agency denies requests for information under the Freedom of Information Act," the Supreme Court explained, the "refusal to permit [plaintiffs] to scrutinize * * *

activities to the extent the [Federal Advisory Committee Act] allows constitutes a sufficiently distinct injury to provide standing to sue." *Id.* at 449; *see also Spokeo*, 136 S. Ct. at 1549-1550 (plaintiffs in cases like *Public Citizen* and *Akins* "need not allege any *additional* harm beyond the one Congress has identified").

Our precedent follows suit. As we recently reaffirmed *en banc*, "the denial of information to which the plaintiff claims to be entitled by law establishes a quintessential injury in fact." *McGahn*, 968 F.3d at 766 (citing *Shays v. FEC*, 528 F.3d 914, 923 (D.C. Cir. 2008)); *see also Friends of Animals v. Jewell*, 824 F.3d 1033, 1041 (D.C. Cir. 2016) (holding that Section 10(c) of the Endangered Species Act, 16 U.S.C. § 1539(c), "create[d] a right to information upon which a claim of informational standing may be predicated"); *Zivotofsky ex. rel. Ari Z. v. Secretary of State*, 444 F.3d 614, 617 (D.C. Cir. 2006) (Under FOIA, "[t]he requestor is injured-in-fact for standing purposes because he did not get what the statute entitled him to receive."); *cf. In re Committee on the Judiciary, U.S. House of Representatives*, 951 F.3d 589, 622 (D.C. Cir. 2020) (Rao, J., dissenting) ("Because [the Federal Election Campaign Act of 1971 and the Federal Advisory Committee Act] created affirmative disclosure obligations, a plaintiff could establish an Article III injury by alleging a refusal to provide the required information.").

Cases under the Freedom of Information Act, 5 U.S.C. § 552, and the Government in the Sunshine Act, *id.* § 552b, drive the point home. Supreme Court "decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were

denied specific agency records" to establish standing. *Public Citizen*, 491 U.S. at 449; *see also Zivotofsky*, 444 F.3d at 617-618. Under those statutes, "[a]nyone whose request for specific information has been denied has standing to bring an action[.]" *Zivotofsky*, 444 F.3d at 617. "[T]he requester's circumstances—why he wants the information, what he plans to do with it, what harm he suffered from the failure to disclose—are irrelevant to his standing." *Id.*; *see also Prisology, Inc. v. Federal Bureau of Prisons*, 852 F.3d 1114, 1117 (D.C. Cir. 2017) (stating that a "requester has suffered a particularized injury because he has requested and been denied information Congress gave him a right to receive").

The language of Section 2954 mirrors the operative provisions in those statutes and cases. Section 2954 requires, as relevant here, that, upon a request by at least seven members of an oversight committee, "[a]n Executive agency * * * shall submit any information requested of it relating to any matter within the jurisdiction of the committee." 5 U.S.C. § 2954.

The Freedom of Information Act analogously commands that "[e]ach agency, upon any request for records[,] * * * shall make the records promptly available to any person[.]" 5 U.S.C. § 552(a)(3)(A)); *see Zivotofsky*, 444 F.3d at 617; *see also* Privacy Act, 5 U.S.C. § 552a(d)(1) (An agency, "upon request by any individual to gain access to his record or to any information pertaining to him," must "permit him * * * to review the record and have a copy made of all or any portion thereof[.]"); *Sussman v. United States Marshals Serv.*, 494 F.3d 1106, 1121 (D.C. Cir. 2007) (suit under the Privacy Act by individual whose request for information from the agency had been denied).

Likewise, the Federal Advisory Committee Act at issue in *Public Citizen* requires that enumerated records of advisory committees "shall be available for public inspection[.]" 5 U.S.C. App. II, § 10(b); *see Public Citizen*, 491 U.S. at 446-447. The Federal Election Campaign Act provision at issue in *Akins* similarly provided that "each report under [the statutory] section shall disclose" to the public certain enumerated information. 2 U.S.C. § 434(b) (1997) (now codified at 52 U.S.C. § 30104(b)); *see Akins*, 524 U.S. at 15. And under the Endangered Species Act, "[i]nformation received by the Secretary as a part of any application shall be available to the public as a matter of public record at every stage of the proceeding." 16 U.S.C. § 1539(c); *see Friends of Animals*, 824 F.3d at 1041.

The right to request information under Section 2954 is on all fours, for standing purposes, with the informational right conferred by those other statutes. Also like FOIA, Section 2954's informational right is meant to empower individuals to better "know 'what their government is up to.'" *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004) (internal quotation marks omitted) (quoting *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)); *cf.* H.R. REP. NO. 1757, at 6 (Under Section 2954, "[i]If any information is desired by any Member or committee upon a particular subject that information can be better secured by a request made by an individual Member or committee, so framed as to bring out the special information desired."); S. REP. NO. 1320, at 4 (same). And the agency's deprivation of the information to which requesters are statutorily entitled creates an Article III injury here for the same reasons it did in *Akins*, 524 U.S. at 21, *Public Citizen*, 491 U.S.

at 448-449, *Friends of Animals*, 824 F.3d at 1042, and *Zivotofsky*, 444 F.3d at 617.

That injury in fact is also concrete and particularized, as Article III requires, *see Spokeo*, 136 S. Ct. at 1548. In statutory informational injury cases, a plaintiff must allege that "it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it," and that "it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure." *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016).

The Requesters have alleged just that. First, the Requesters have identified a deprivation of information that, on their reading of the statute, they are legally entitled to receive. The deprivation is accomplished and complete, and the absence of information has been and continues to be felt by the Requesters. As the Supreme Court has recognized numerous times, that denial works a concrete injury. *See Spokeo*, 136 S. Ct. at 1549-1550 ("Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete," citing as examples of cognizable intangible injuries the agencies' failure to provide information in *Akins* and *Public Citizen*).

Second, the Requesters have alleged that the withholding of information has affected each of them "in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)). Section 2954 confers its informational right directly on these specific legislators so that they

personally can properly perform their roles on the oversight committees. In denying their requests for information due to them under that statute, J.A. 16, Compl. ¶ 27, the GSA "thwart[ed]" their individual ability to understand what the GSA is up to with respect to the Old Post Office lease. *See* J.A. 18-19, Compl. ¶ 36.

In sum, ample precedent establishes that the statutory informational injury alleged by the Requesters here amounts to a concrete and particularized injury in fact for purposes of Article III standing.

C

1

The GSA does not question that established body of standing law governing informational injuries. Nor does the GSA dispute that Section 2954 creates a statutory right on the part of the Requesters to seek and to obtain information from federal agencies. And the GSA agrees that Members of Congress suffer informational injuries when they are denied information that they are statutorily entitled to seek from federal agencies under similar laws like the Freedom of Information Act. Oral Arg. Tr. 26 ("[W]e're not disputing that the Plaintiffs can invoke FOIA.").

The GSA's position, instead, is that an informational injury under Section 2954 does not count for Article III purposes simply because that statute vests the informational right only in legislators.

That is not how Article III's injury-in-fact requirement works. For starters, remember, the point of Article III's standing requirement is to ensure that there is a "case or controversy" for the federal court to resolve, U.S. CONST. Art. III, § 2. *See Spokeo*, 136 S. Ct. at 1547

("Although the Constitution does not fully explain what is meant by '[t]he judicial Power of the United States,' it does specify that this power extends only to 'Cases' and 'Controversies[.]'") (first quoting U.S. CONST. Art. III, § 1, then quoting *id.* Art. III, § 2). By demonstrating (i) an injury in fact in the form of the deprivation of information to which the plaintiffs are statutorily entitled (ii) that is concrete and particularized to the Requesters themselves and them alone, (iii) that was caused by the agency's refusal to provide the information, and (iv) that would be redressed by a judicial order to provide the information, a case or controversy has been joined here, just as directly and completely as it has in countless other informational injury cases. It is no different for standing purposes than if these same Requesters had filed a FOIA request for the same information.

In addition, in analyzing the standing of legislators, cases have traditionally asked whether the asserted injury is "institutional" or "personal." An institutional injury is one that belongs to the legislative body of which the legislator is a member. *See Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664 (2015) ("The Arizona Legislature * * * [was] an institutional plaintiff asserting an institutional injury[.]"); *see also Bethune-Hill*, 139 S. Ct. at 1953 ("[I]ndividual members lack standing to assert the institutional interests of a legislature[.]"). Such institutional injuries afflict the interests of the legislature as an entity; they do not have a distinct personal, particularized effect on individual legislators.

A personal injury, by contrast, refers to an injury suffered directly by the individual legislators to a right that they themselves individually hold. A personal injury to

a legislator, for Article III purposes, is not limited to injuries suffered in a purely private capacity, wholly divorced from their occupation. Rather, in the context of legislator lawsuits, an injury is also "personal" if it harms the legal rights of the individual legislator, as distinct from injuries to the institution in which they work or to legislators as a body. *See Powell v. McCormack*, 395 U.S. 486, 493 (1969) (reviewing legislator's claim that he was inappropriately barred from taking his seat and from receiving his pay); *see also Kerr v. Hickenlooper*, 824 F.3d 1207, 1216 (10th Cir. 2016) (stating that, if a subset of legislators was barred from voting, members of the subset "could claim a personal injury"); *cf. Coleman v. Miller*, 307 U.S. 433, 438 (1939) (although asserting an institutional injury, legislators had standing because their individual "votes * * * ha[d] been overridden and virtually held for naught").[4]

The GSA's argument, like the Dissenting Opinion, fundamentally confuses those categories by adopting a sweeping definition of institutional injury that would cut out of Article III even those individualized and particularized injuries experienced by a single legislator alone. The GSA tries to ground its overly broad definition of

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[4] The statute requires that six other Committee members (less than a Committee majority) support the request, thereby preventing harassing or idiosyncratic uses of Section 2954. *See* Dissenting Op. 10-11. That additional requirement does not diminish the individualized and personalized nature of the informational injury, any more than a jointly signed FOIA request would. The impetus for such requests comes from individual members' judgment that they need particular information. These individual Committee members do not require the support or permission of the full Committee to make the request.

institutional injury in the Supreme Court's decision in *Raines*.

But *Raines* was quite different. In that case, six Members of Congress who had voted against passage of the Line Item Veto Act filed suit to challenge the constitutionality of the statute after they were outvoted. 521 U.S. at 814. The Line Item Veto Act gave the President the authority to cancel spending or tax measures after they were passed by both Chambers of Congress and signed into law. *Id.* (citing Pub. L. No. 104-130, 110 Stat. 1200 (1996)). The legislators asserted as injuries the alteration in the balance of powers between the Executive and Congress caused by the law, the supplanting of Congress's veto power, and diminution of the effectiveness of legislative votes. *Raines*, 521 U.S. at 816 (quoting Individual Legislators' Compl. ¶ 14).

Those injuries, though, were not personal and particularized to the six legislators, but instead trod on powers vested in the House and Senate and their members as a whole. The six legislators sought to vindicate a diffuse "institutional injury"—"the diminution of legislative power"—that was suffered by Congress as an entity, and so "necessarily damage[d] all Members of Congress and both Houses of Congress *equally*." *Raines*, 521 U.S. at 821 (emphasis added). There was, after all, no claim that, under the Line Item Veto Act, the plaintiff legislators were "singled out for specially unfavorable treatment as opposed to other Members of their respective bodies." *Id.*; *see also Blumenthal*, 949 F.3d at 19 ("This case is really no different from *Raines*. The [m]embers were not singled out—their alleged injury is shared by the 320 [M]embers of the Congress who did not join the lawsuit—and their claim is based entirely on

the loss of political power."). So the injury on which the suing legislators in *Raines* tried to predicate standing was not personal and particularized to them. It was Congress's ox that was gored, not their own.

The same mismatch between the suing plaintiff and the injured party occurred in *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999). There, a group of legislators challenged the issuance of an executive order on the ground that its "issuance * * * , without statutory authority therefor, deprived the plaintiffs of their constitutionally guaranteed responsibility of open debate and vote on issues and legislation involving interstate commerce, federal lands, the expenditure of federal monies, and implementation of the [National Environmental Policy Act]." *Id.* at 113 (formatting modified). As in *Raines*, any such harm befell the institution as a whole and all legislators collectively. No personal injury occurred that was individualized to the plaintiffs. *See also Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126 (2011) (When a legislative vote is cast, "[t]he legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it."); *Campbell v. Clinton*, 203 F.3d 19, 20, 22-23 (D.C. Cir. 2000) (legislators lacked standing to challenge the use of American forces against Yugoslavia on the grounds that the President violated the War Powers Clause of the Constitution and the War Powers Resolution because the claimed injuries were to the legislative power as a whole).[5]

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[5] In *Campbell*, the legislators also advanced a vote nullification argument premised on the Supreme Court's holding in *Coleman*.

The Requesters' injury is a horse of a different color. The Requesters do not assert an injury to institutional powers or functions that "damages all Members of Congress and both Houses of Congress equally." *Raines*, 521 U.S. at 821. The injury they claim—the denial of information to which they as individual legislators are statutorily entitled—befell them and only them. Section 2954 vested them specifically and particularly with the right to obtain information. The 34 other members of the Committee who never sought the information suffered no deprivation when it was withheld. Neither did the nearly 400 other Members of the House who were not on the Committee suffer any informational injury. Nor was the House (or Senate) itself harmed because the statutory right does not belong to those institutions. In other words, their request did not and could not, given their non-majority status, constitute the type of "legislative * * * act" that might warrant treating them differently from private plaintiffs for standing purposes. *Chenoweth*, 181 F.3d at 114; c*f.* Dissenting Op. 8 n.5. Instead, the Requesters sought the information covered by Section 2954 in this case to inform and equip them personally to fulfill their professional duties as Committee members. They alone felt the informational loss caused by the agency's withholding.[6] And they alone had an incentive to seek a remedy.

Campbell, 203 F.3d at 22. This court rejected that claim, concluding that, because Congress had not voted to bar the use of force, the President had not nullified any vote. *Id.* at 23.

[6] The Dissenting Opinion asserts (at 9) that the Requesters' claim to standing is similar to the standing argument rejected by the Supreme Court in *Hollingsworth v. Perry*, 570 U.S. 693 (2013). Not so. The *Hollingsworth* petitioners lacked standing because they

In that regard, the injury is the same as one suffered by a FOIA plaintiff. All persons, including legislators, are statutorily permitted under FOIA to seek information from federal agencies to monitor and scrutinize the activities of federal agencies. 5 U.S.C. § 552(a)(3)(A). But not all individuals have standing to sue following the denial of a FOIA request. Instead, only the individual or entity who filed the request and was denied the information has suffered a cognizable informational injury that can be enforced in federal court. "The filing of a request, and its denial, is the factor that distinguishes the harm suffered by the plaintiff in a FOIA case from the harm incurred by the general public arising from deprivation of the potential benefits accruing from the information sought." *McDonnell v. United States*, 4 F.3d 1227, 1236–1238 (3d Cir. 1993).

So too here. Although all Committee members have the right to pursue a request under Section 2954, an Article III injury occurs only after a request that has been made is denied. And that injury is inflicted only on those who asked for the information. Here, the Requesters are the only ones who sought the information from the GSA, and so were the only ones who suffered a concrete and particularized injury by the GSA's denial. "[T]he requestor has suffered a particularized injury because he has requested and been denied information

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"had no 'direct stake' in the outcome of their appeal" beyond vindicating a "generally applicable" law. 570 U.S. at 705-706. Here, the Requesters do not seek to vindicate the constitutionality of a law—a matter in which all legislators would have an equivalent interest. They seek to obtain information that a statute authorizes them to obtain as individuals. And their stake in the outcome of this litigation is specific and particularized: If they prevail, they will obtain the information they have individually sought.

Congress gave him a right to receive." *Prisology*, 852 F.3d at 1117. To be sure, Congress created the Requesters' underlying informational right. But that does not transform the particularized injury suffered by rebuffed requesters into one dispersed across all of Congress. Just as Congress's enactment of FOIA does not mean that the particularized injury suffered by a legislator's unsuccessful FOIA request is shared by Congress as the body that empowered such requests.

The Supreme Court's decision in *Powell* confirms the personal nature of the Requesters' informational injury. In *Powell*, the Court concluded that a congressman, Adam Clayton Powell, Jr., had standing to sue Members of Congress and the leadership of the United States House of Representatives after he was barred from taking his seat. 395 U.S. at 489. In addition to the denial of his seat, Powell's salary was withheld. *Id.* at 493. The Court concluded that the suit satisfied Article III's requirement that legislators sue based on a personal injury. *Id.* at 512-514; *see also Raines*, 521 U.S. at 821 (confirming that Powell suffered a personal injury by being deprived of something to which he "personally" was entitled as an elected legislator). While the harms pertained directly to his fulfillment of his role as a legislator, they were individualized and confined to him. No other Representative suffered the loss of Powell's seat or of Powell's salary.

The GSA asserts that the Requesters are different from Powell. It points to the Supreme Court's statement in *Raines* that, "[u]nlike the injury claimed by Congressman Adam Clayton Powell, the injury claimed by the Members of Congress here is not claimed in *any*

private capacity but *solely* because they are [M]embers of Congress." *Raines*, 521 U.S. at 821 (emphasis added).

But the GSA's argument misses the Supreme Court's point. After all, the right at issue in *Powell*—to receive a House of Representatives salary, to take a seat in Congress, and to exercise the powers of that office—followed from and was bound up with, not disconnected from, Powell's status as a legislator. *Cf. Nevada Comm'n on Ethics*, 564 U.S. at 126 ("[A] legislator casts his vote 'as trustee for his constituents, not as a prerogative of personal power.'") (quoting *Raines*, 521 U.S. at 821).

As the Supreme Court went on to explain, what made the claims in *Raines* institutional rather than personal was that the interest asserted there ran with the seat in that "the claim would be possessed by [the legislator's] successor," and so belonged to Congress, not the individual Member. *Raines*, 521 U.S. at 821. By contrast, even though Powell's claims were intrinsically intertwined with his position as a Member of Congress, Powell's successor could not claim the same injury or assert the same claims as Powell to the seat and salary for the congressional term to which he was elected. The injury was to Powell's own performance of his legislative job, and so ran to and with the person, not the institution. *See Alaska Legis. Council v. Babbitt*, 181 F.3d 1333, 1338 n.3 (D.C. Cir. 1999) ("[A]n elected representative excluded from the legislature and denied his salary alleges a personal injury because he has been 'singled out for specially unfavorable treatment as opposed to other [m]embers' of that body.") (quoting *Raines*, 521 U.S. at 821).

The same is true here. The GSA does not contend, nor could it, that the informational injury asserted here runs with the Committee seat such that any legislators replacing the Requesters would be successors to this claim. While the *legal right* to request information under Section 2954 runs with Committee membership, the injury arises from the asking and its rebuff, not from the seat itself. If one of the Requesters were to leave the Committee, the injury sued upon would end with her service. Just like *Powell*. Powell's successor would have had an undoubted right to draw a salary from the United States' Treasury and to take the legislative seat, but the denial of Powell's salary and denial of his seat did not work an injury to his successor. And Powell's right to that seat and salary similarly would have terminated when he left his legislative position. In that regard, we agree with the Dissenting Opinion: Powell "sought the position to which he had been elected and all its benefits." Dissenting Op. 7. These Requesters too seek a benefit that Section 2954 invests in them in their individual legislator capacities. And so they "assert a personal injury [because] they allege they were 'deprived of something to which they *personally* are entitled[.]'" *Id.* at 4 (quoting *Raines*, 521 U.S. at 821).

In other words, for Article III purposes, the requirement that a legislator suffer a "personal" injury does not mean that the injury must be *private*. Instead, the requirement of a personal injury is a means of rigorously ensuring that the injury asserted is particularized and individualized to that legislator's own interests. That is, the injury must be one that "zeroes in on the individual," *Kerr*, 824 F.3d at 1216, rather than an injury that "necessarily damages all Members of Congress and both

Houses of Congress equally" or that runs with the institutional seat, *Raines*, 521 U.S. at 821.

That same understanding of "personal" injuries suffered by legislators was well articulated by the Tenth Circuit in *Kerr*:

> An individual legislator certainly retains the ability to bring a suit to redress a personal injury, as opposed to an institutional injury. For example, if a particular subset of legislators was barred from exercising their right to vote on bills, such an injury would likely be sufficient to establish a personal injury. Under those circumstances, the legislator could claim a personal injury that zeroes in on the individual and is thus concrete and particularized.

824 F.3d at 1216 (applying *Raines* to state legislators) (citations omitted); *see also Alaska Legis. Council*, 181 F.3d at 1338 n.3 ("[A] representative whose vote was denied 'its full validity in relation to the votes of [his] colleagues,' might also allege a personal injury sufficient to confer standing.") (quoting *Raines*, 521 U.S. at 824 n.7).

The Dissenting Opinion responds that "[n]othing in the statute [Section 2954] suggests this mechanism for requesting documents is a personal benefit for [m]embers of the Committee, rather than a practical tool" that members can use to "advanc[e] the work of the Committee." Dissenting Op. 8. That overlooks Section 2954's express conferral of its informational right on a *minority* of committee members. Committee tools like subpoenas, by contrast, require the majority's assent to be exercised. *See* House Rule XI, cl. 2(m)(3)(A)(i) (subpoena power may be exercised by the committee or may be delegated by the committee to its chair "under such rules

and under such limitations as the committee may prescribe"); Rule 12(g), Rules of the Comm. on Oversight & Gov't Reform of the U.S. House of Representatives, 115th Cong. (2017) (delegating subpoena power to the committee chair); *see also* House Rule X, cl. 5(c) (majority party selects committee chairs). So Section 2954's plain terms invest the informational right in legislators, not the legislature. Which makes the deprivation of requested information an injury personal to the requesting legislators.

2

The GSA also suggests that the asserted injury cannot be personal because members of the House Committee are chosen, in part, based on their party affiliation. *See* GSA Supp. Br. 4-5. Members of the Committee are nominated for membership by their "respective party caucus or conference." House Rule X, cl. 5(a)(1). Those nominations are then voted on by the full House. *Id.*[7]

But the GSA never finishes the thought. It is hard to see how the process for committee selection diminishes the informational injury suffered when an agency refuses to comply with a Section 2954 request. Nothing in Section 2954 turns on the political affiliation of the requesters, nor does it require that the requesters be of a single party. In any event, members of a political

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[7] Members of Congress not affiliated with either major political party are also able to serve. Typically, such Members "associate with one [party] for purposes of being assigned to standing committees." *Precedents of the United States House of Representatives*, vol. 1, ch. 3, § 8 (2017) ("2017 House Precedents"), https://go.usa.gov/xd8q9 (last accessed Dec. 21, 2020).

party also nominated Powell as their candidate for legislative office. *See* Clayton Knowles, *Edge Is 61 Votes*, N.Y. TIMES, June 29, 1966, at 1, 34. And it seems quite likely that he was elected to that legislative seat based in some part on his political affiliation, positions, and persuasion. Yet that party connection had no bearing on the personal nature of the harms he suffered by virtue of his legislative status.

Nor do rules regarding the removal of Committee members bear on the injury analysis. Under House Rule X, Clause 5(b), if a legislator ceases to be a member of the party that nominated him or her to the Committee, the member's committee membership is vacated. Of course, any informational injury incurred by that member would also end with the loss of the seat. Which makes sense because the informational right is meant to equip individual Committee members with the information needed to discharge their duties on the oversight committees. That same feature also underscores the personal and individuated, rather than institutional, character of the legal right and the injury suffered.

3

In its supplemental brief to this court, the GSA also hints at a constitutional avoidance argument:

> Indeed, if the ability to request information under section 2954 were truly a "personal" right enforceable under Article III, then House Rule X, Clause 5(b) would raise serious constitutional concerns. After all, a Member of Congress has the right under the First Amendment to switch political parties, yet House Rule X, Clause 5(b) penalizes that switch in

> parties (and the resulting resignation or expulsion from the original congressional party's caucus or conference), by *automatically* terminating the Member's seat on the Committee, and hence his or her putative "right" to request information under section 2954.

GSA Supp. Br. 7-8.

The GSA's reasoning on this point is hard to follow. It seems as though the GSA continues to equate a personal injury with a purely private injury. What is more, if terminating a member's Committee seat does not run afoul of the First Amendment, it is hard to see how the attendant loss of an informational right under Section 2954 would change the constitutional calculus.

In any event, we need not probe this undeveloped argument further, as "[m]entioning an argument 'in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones' is tantamount to failing to raise it." *Al-Tamimi v. Adelson*, 916 F.3d 1, 6 (D.C. Cir. 2019) (quoting *Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005)).

D

When called upon to adjudicate disputes between the Political Branches and their members, we apply the standing inquiry with special rigor. *Arizona State Legislature*, 135 S. Ct. at 2665 n.12 (noting that the inquiry is "especially rigorous") (quoting *Raines*, 521 U.S. at 819); *McGahn*, 968 F.3d at 763. We have done so here, and we find that Article III's standing requirements are fully met. The informational injury asserted is a traditional and long-recognized form of Article III

injury. It is concrete—the request was made and straightforwardly denied; the Requesters have been and remain empty-handed. The injury is personal and particularized to the Requesters themselves, not to any other legislators, to a legislative body, or even to their Committee seats.

Article III's causation and redressability prongs are also straightforwardly met. *See Lujan*, 504 U.S. at 560 (stating an injury must be "fairly traceable to the challenged conduct of the defendant" and "likely to be redressed by a favorable judicial decision"). The GSA's categorical refusal to provide the requested documents has caused the Requesters an informational injury. And a judicial order requiring compliance with Section 2954 would redress that injury, just as it routinely does in a FOIA suit.

Also, while the plaintiffs in *Raines* filed suit in defiance of the institution's views, 521 U.S. at 829 ("both Houses actively oppose the[] suit"), the Requesters' information inquiry comes with the strongest dispensation: The statutory authorization of both Houses of Congress and the President who signed Section 2954 into law, 5 U.S.C. § 2954. And for what it is worth, the House of Representatives has never opposed the Requesters' suit, nor has the Senate.

Also, unlike in *Raines*, relief cannot be obtained through the legislative process itself. *See* 521 U.S. at 829 (noting that Congress could repeal the offending Act or "exempt appropriations bills from its reach"). The statutory right, by its plain terms, applies to individual Committee members, as long as at least six others support the request, so that they can exercise their legisla-

tive role with informed vigor. To require the requesting members to obtain enforcement by a majority of the Committee or Chamber, as the Dissenting Opinion proposes (at 10), would be to empty the statute of all meaning, since a Committee or the Chamber can already subpoena desired information. *McGahn*, 968 F.3d at 764.

It also seems quite dubious that the 70th Congress that enacted Section 2954 would have thought that legislators in the minority should simply wait until they assumed majority status to seek judicial enforcement through the subpoena power instead. At the time Congress enacted Section 2954, changes in control of the House were rare. *See* Office of the Historian, U.S. House of Representatives, *Party Divisions of the House of Representatives (1789 to Present)* (one party controlled the House for 32 of the 38 years between 1895 and 1933), (last accessed Dec. 21, 2020). This trend continued for the better part of the century after Section 2954's enactment. *See id.* (one party controlled the House for 60 of the 62 years between 1933 and 1995). Given that history, Congress plainly meant exactly what Section 2954 says: Non-majority legislators too are empowered to seek the information needed to do their jobs. In that way, the statutory right is distinctly non-institutional.

Nor does this case implicate any potentially special circumstances. It is not a suit against the President or a claim for information from him. *See Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) (stating that the President is not an agency under the Administrative Procedure Act); *see also* 5U.S.C.§105 ("For purpose of this title, 'Executive agency' means an Executive de-

partment, a Government corporation, and an independent establishment."). Section 2954, like FOIA, only allows requests for information from an "Executive agency[.]" 5 U.S.C. § 2954; *see id.* §§ 551(1), 552(a).

Information requests against agencies like this are common place, and the informational deficit suffered is not lessened just because the Requesters are legislators. "[T]he requester's circumstances * * * are irrelevant to his standing." *Zivotofsky*, 444 F.3d at 617. The GSA admits as much when it concedes that these same Requesters would suffer an Article III-cognizable informational injury if they sought the same information under FOIA. *See* Oral Arg. Tr. 26 ("[W]e're not disputing that the Plaintiffs can invoke FOIA."). Yet the GSA offers no sound reason, grounded in Article III principles, as to why the informational injury becomes more or less sufficient under Article III based on whether non-legislative people could, if they wanted, also ask for information under the same statute. Indeed, the fact that information requests under Section 2954 are less widely available than record requests under FOIA would seem to make the injury more personal and particularized, not less.

Notably, the GSA's opposition to legislator standing is categorical; it does not argue that any difference between the scope of Section 2954 and FOIA is itself of separation-of-powers moment.

For similar reasons, the Dissenting Opinion's worry that recognizing standing "ruinous[ly]" opens the judicial floodgates to suits by "errant" Members of Congress "acting contrary to the will of their committee, the will of their party, and the will of the House" falls flat. Dissenting Op. 11. That is because every Member of

Congress, errant or otherwise, has been able under FOIA since 1966 to seek similar information from Executive Branch agencies as was requested here, with no hint of such untoward results.

The separation of powers, it must be remembered, is not a one-way street that runs to the aggrandizement of the Executive Branch. When the Political Branches duly enact a statute that confers a right, the impairment of which courts have long recognized to be an Article III injury, proper adherence to the limited constitutional role of the federal courts favors judicial respect for and recognition of that injury.

IV

For those reasons, we hold that the Requesters have asserted an informational injury that is sufficient for Article III standing. This decision resolves only the standing question decided by the district court. To the extent the GSA's argument or the district court's reasoning implicate the existence of a cause of action, the appropriate exercise of equitable discretion, or the merits of the Requesters' claims, those issues remain to be resolved by the district court in the first instance.

The judgment of the district court is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

GINSBURG, *Senior Circuit Judge*, dissenting: When this court recently considered the standing of a committee of the House of Representatives to enforce a subpoena, we asked ourselves the same question we must answer today: "whether the claimed injury is personal to the plaintiff or else shared by a larger group of which the plaintiff is only a component—in other words, whether the injury is particularized." *Committee on the Judiciary, U.S. House of Representatives v. McGahn*, 968 F.3d 755, 767 (2020). We held a House committee had standing to seek judicial enforcement of a subpoena that it had issued to a former Executive Branch official and that it had been authorized by a vote of the full House to pursue in court. *Id.* Because the committee was acting on behalf of the full House, the committee was "an institutional plaintiff asserting an institutional injury," so there was no "mismatch" between the plaintiff and the injured party. *Id.*

This case is fundamentally different. Here, 15 individual Members of the House claim a statute enacted in 1928 and never successfully invoked in litigation gives each of them a personal right to exercise the investigative powers of the House of Representatives. *See* 5 U.S.C. § 2954.[1] Although, as my colleagues remind us more than once, "'our standing inquiry has been especially rigorous' when the suit pits members of the two Political Branches against each other," Ct. Op. 12, 30

[1] The statute, entitled "Information to committees of Congress on request," reads in relevant part: "An Executive agency, on request of the Committee on [Oversight and Reform] of the House of Representatives, or any seven members thereof . . . shall submit any information requested of it relating to any matter in the jurisdiction of the committee."

(quoting *Raines v. Byrd*, 521 U.S. 811, 819 (1997)), the Court today strains Supreme Court precedent to uphold the standing of Plaintiff-Members to assert the interests of the whole House.

* * *

Again, the key question in this case is this: Whether the harm the Plaintiff-Members allege is personal to each of them or is a harm to the House as an institution. The Supreme Court has clearly stated that "individual members lack standing to assert the institutional interests of a legislature." *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950, 1953-54 (2019) (citing *Raines*, 521 U.S. at 829, and holding "a single chamber of a bicameral [state] legislature" lacks standing to appeal the invalidation of a redistricting plan because redistricting authority is vested in the legislature as a whole); *accord McGahn,* 968 F.3d at 767. In other words, there can be no "mismatch between the [party] seeking to litigate and the body" that suffered the alleged harm. *McGahn*, 968 F.3d at 767. Here, the mismatch is plain. The harm the Plaintiff-Members allege —*viz*., the "impedance of [their] legislative and overight responsibilities"—is a harm to the House of Representatives, of which each plaintiff is only one among 435 Members.[2] Accordingly, the Plaintiff-Members lack standing to bring this case.

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[2] *See Raines*, 521 U.S. at 829 n.10 ("The two houses of Congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate member or number of members, but the action of the body as whole." (quoting *United States v. Ballin*, 144 U.S. 1, 7 (1892))).

Article III of the Constitution of the United States permits the federal courts to hear "cases" and "controversies" and nothing more. *Powell v. McCormack*, 395 U.S. 486, 496 n.7 (1969). To stay within our "proper constitutional sphere," the court must ensure in each case that the party invoking its power has standing to do so. *Raines*, 521 U.S. at 819-20; *Va. House of Delegates*, 139 S. Ct. at 1950. This requirement is rooted in the separation of powers. *See* Ct. Op. 11-12. The standing doctrine buttresses that separation by limiting the judicial power "only to redress or otherwise protect against injury to the complaining party," and not to "general supervision of the operations of government." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975); *Raines*, 521 U.S. at 829 (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974)). Separation of powers concerns are "particularly acute . . . when a legislator attempts to bring an essentially political dispute into a judicial forum." *Chenoweth v. Clinton*, 181 F.3d 112, 114 (D.C. Cir. 1999).

To establish their standing, the plaintiffs must allege they suffered an injury-in-fact that is both concrete and particularized. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). A court must consider each of these requirements independently. *See id.* at 1545. The Plaintiff-Members here do allege a concrete harm, *see id.* at 1549 (holding the denial of a statutory right to information is a concrete injury), but they do not allege a harm particularized—that is, personal—to themselves. *See McGahn*, 968 F.3d. at 766 ("For an injury to be particularized, it must affect the plaintiff in a personal and individual way." (quoting *Spokeo*, 136 S. Ct. at 1548) (internal quotation marks omitted)). The particulariza-

tion requirement helps to ensure the plaintiff is the appropriate party to vindicate the claim. *See Warth*, 422 U.S. at 499 ("A federal court's jurisdiction . . . can be invoked only when the plaintiff himself has suffered"); *Blumenthal v. Trump*, 949 F.3d 14, 18 (D.C. Cir. 2020) (holding 215 Members of the Congress lacked standing to seek a declaration that the president was violating the Foreign Emoluments Clause of the Constitution, and explaining that "our standing inquiry . . . focuses on whether the plaintiff is the proper party to bring the suit" (cleaned up)).

The particularization inquiry is of special importance when the plaintiffs are legislators. Thus did *Raines,* "our starting point when individual members of the Congress seek judicial remedies," *Blumenthal*, 949 F.3d at 19, distinguish between "personal" injuries, which are particular to the plaintiff, and "institutional" injuries, which are not.[3] *Raines*, 521 U.S. at 818-19, 821. Legislators assert a personal injury when they allege they were "deprived of something to which they *personally* are entitled—such as their seats as Members of Congress after their constituents had elected *them*." *Raines*,

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[3] The Supreme Court has allowed individual legislators to sue over an institutional injury in one and only one situation: "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 have been completely nullified." *Raines*, 521 U.S. at 823 (explaining *Coleman v. Miller*, 307 U.S. 433 (1939)); *see also Ariz. State Legis. v. AIRC*, 135 S. Ct. 2652, 2665 (2015) (confirming this understanding of *Coleman*). The "*Coleman* exception to the *Raines* rule," as this court has called it, *Campbell v. Clinton*, 203 F.3d 19, 22 (2000), clearly does not apply here because this is not a case about a disputed vote.

521 U.S. at 821. In contrast, legislators assert an institutional injury when they allege "a loss of political power," *id.*, and an institutional injury requires an "institutional plaintiff." *AIRC*, 135 S. Ct. at 2664. Maintaining this distinction helps avoid a mismatch between the party suing and the party harmed. *See McGahn*, 968 F.3d at 767 (explaining legislator-standing cases require "an inquiry into whether the claimed injury is personal to the plaintiff or else shared by a larger group . . . in other words, whether the injury is particularized").

The Plaintiff-Members here allege harm to the House rather than to themselves personally. Their theory of injury is that the General Services Administration (GSA), by refusing their request for certain documents, hindered their efforts to oversee the Executive and potentially to pass remedial legislation. The Complaint is clear and consistent on this point: The Plaintiff-Members were harmed through the "impedance of the oversight and legislative responsibilities that have been delegated to them by Congress involving government management and accounting measures and the economy, efficiency, and management of government operations and activities." Compl. ¶ 36. More specifically, the Plaintiffs-Members, who sit on the Committee on Oversight and Reform, allege the denial of their requests under 5 U.S.C. § 2954 thwarted their efforts to evaluate several aspects of the GSA's management of the Trump Old Post Office lease, and hence their ability to "recommend to the Committee, and to the House of Representatives, legislative and other actions that should be taken to cure any existing conflict of interest, mismanagement, or irregularity in federal contracting." *Id.* That the allegations of harm go to the Plaintiff-

Members' responsibilities for oversight and legislation makes manifest the institutional nature of the harm in this case.

When a defendant impedes legislators in the fulfillment of their legislative duties, the defendant harms the legislature, not the legislators. After all, a legislator legislates "as trustee for his constituents, not as a prerogative of personal power." *Raines*, 521 U.S. at 821. Any legislative power delegated to a legislator "is not personal to the legislator but belongs to the people; the legislator has no personal right to it." *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125-26 (2011).

The power to oversee the workings of the Executive Branch likewise belongs to the House (and the Senate) as an institution. Each House of the Congress has an inherent power to conduct investigations, including "probes into departments of the Federal Government to expose corruption, inefficiency or waste." *Watkins v. United States*, 354 U.S. 178, 187 (1957). This power has long been recognized as an "auxiliary to the legislative function," *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927), as was reconfirmed earlier this very year in *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020): "[E]ach House has power to secure needed information in order to legislate," which power is "justified solely as an adjunct to the legislative process." (quotations omitted). *Accord McGahn*, 968 F.3d at 764 ("Each House of Congress is specifically empowered to compel . . . the production of evidence in service of its constitutional functions"). Just as the legislative power is not vested personally in individual legislators, neither is the auxiliary power of oversight. Indeed, the power of

oversight is so squarely committed to the institution that an investigation is illegitimate if it is conducted to further the personal interests of legislators rather than to aid the House in legislating. *Mazars*, 140 S. Ct. at 2032 ("Investigations conducted solely for the personal aggrandizement of the investigators . . . are indefensible" (quoting *Watkins*, 354 U.S. at 200)).

The Plaintiff-Members sought information from the GSA in order to search for a "conflict of interest, mismanagement, or irregularity" and to recommend remedial legislation—a clear exercise of the oversight power of the House. Compl. ¶ 36; *compare Watkins*, 354 U.S. at 187 (reaffirming the House's power to probe for "corruption, inefficiency or waste" in furtherance of "intelligent legislative action"). When their request was refused, it was the House that suffered a legally cognizable injury-in-fact, not the Members who bring this suit.

My colleagues rely upon *Powell v. McCormack*, 395 U.S. 486 (1969), to reach the opposite conclusion, but that case is in complete harmony with the principles just discussed. During the 89th Congress, a House investigation found evidence that longtime congressman Adam Clayton Powell, Jr. had overstated his travel expenses. *Id.* at 489-90. At the start of the 90th Congress, the House barred Powell from taking his seat. *Id.* at 493. Powell sued for his seat and his salary, and a declaration that his exclusion violated the Constitution. *Id.* While the case was being litigated, Powell was reelected; the 91st Congress allowed him to take his seat but stripped him of his seniority and fined him $25,000. *Id.* at 494-95. The House defendants argued Powell's case was moot. *Id.* at 496. The Supreme Court disagreed: Powell had an "obvious and continuing interest in his

withheld salary," so there remained a live case or controversy. *Id.* at 496-99.

The Supreme Court, in denying standing to the legislator plaintiffs in *Raines,* distinguished *Powell* in terms that apply equally to this case: "Unlike the injury claimed by Congressman Adam Clayton Powell, the injury claimed by the Members of Congress here is not claimed in any private capacity but solely because they are Members of Congress." 521 U.S. at 821. Powell's claim was justiciable not because he had been deprived of his ability to legislate or investigate; it was justiciable because Powell claimed he was owed money, to which he was "*personally* . . . entitled." *Id.*

The Members' injury here is also quite different from the denial of Powell's seat.[4] Powell sought the position to which he had been elected and all its benefits. The political power of the House was not diminished by his absence—the harm fell upon Powell alone. Claiming a seat in the House of Representatives is personal; wielding the investigative power of the House is not.

That § 2954 delegates authority to certain Members to request information from an Executive agency does not mean it confers a right personal to each of them. The Congress enacted § 2954 in an apparent attempt to "reform Congress's oversight of public expenditures."

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[4] The Supreme Court held Powell's case presented a case-or-controversy based solely upon his request for back pay, as Powell had been seated by the time the Supreme Court issued its decision. *See Powell*, 395 U.S. at 495-96. Nevertheless, the Supreme Court's discussion in *Raines* suggested the denial of Powell's seat was also a personal injury. 521 U.S. at 821; *see also Campbell*, 203 F.3d at 21 n.2 (noting the deprivation of Powell's salary and seat were "both personal injuries").

Appellant's Br. at 13-14. The Member-Plaintiffs inform us that prior to the passage of § 2954 various statutes required federal agencies to send hundreds of periodic reports to the House for review. *Id.* at 16 (citing H.R. Rep. No. 70-1757, at 6). By 1928, many of these reports had become outdated and irrelevant. *Id.* The statute discontinued these reports, while providing a mechanism for the Committee on Oversight, "or any seven members thereof," to make more targeted and useful requests of the Executive. *See* An Act to Discontinue Certain Reports Now Required by Law to Be Made to Congress, Pub. L. No 70-611, 45 Stat. 986 (1928). Nothing in the statute suggests this mechanism for requesting documents is a personal benefit for Members of the Committee, rather than a practical tool made available to Members for the purpose of advancing the work of the Committee.[5] *See id.*

The Court makes much of the fact the statute gives the ability to make requests "specifically and particularly" to a group of Committee Members, rather than to any group of Members of the House. Ct. Op. 22. The

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[5] The Court gets off track when it analogizes a request made by Members under § 2954 to a request made under the Freedom of Information Act. The GSA has already given the Plaintiff-Members all the information to which they were entitled under the FOIA. In its cases on legislator standing, the Supreme Court has not looked for analogies to statutes like the FOIA that make no distinction between legislators and other members of the public. To the contrary, the Court long ago forced us to rethink our view "that congressional and private plaintiffs should be treated alike for the purpose of determining their standing." *Chenoweth*, 181 F.3d at 114-15 (holding this principle was "untenable in the light of *Raines*").

Supreme Court considered a similar argument in *Hollingsworth v. Perry*, 570 U.S. 693 (2013), where the official proponents of a successful ballot initiative asserted they had standing to defend the constitutionality of the law resulting from their initiative. The proponents stressed their "'unique,' 'special,' and 'distinct' role in the initiative process" under state law, but the Supreme Court was not persuaded. *Id.* at 706. Notwithstanding the proponents' particular role, their interest was shared with every citizen of their state. *Id.* at 706-07. Just so here. Requests must come from Members of the Committee, but it does not follow that Committee Members suffer a *personal* harm when a request is denied.

From the foregoing discussion, it is clear the Plaintiff-Members have not alleged the impedance of their legislative duties harmed them in any private or personal capacity. Rather, they allege and seek to redress an institutional injury that befell the House of Representatives. This is fatal to their case: "individual members lack standing to assert the institutional interests of a legislature." *Va. House of Delegates*, 139 S. Ct. at 1953.

* * *

Making a request for information is just the first step in the process of congressional oversight of an Executive agency. An Executive agency is likely to grant routine requests. *See* Hearings on S. 2170 et al. before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 94th Cong., 107-08 (1975) (A. Scalia, Assistant Attorney General, Office of Legal Counsel) (stating § 2954 may be used to obtain "routine information"); *Id.* at 71 (informal

requests from a single legislator are "usually accommodated"). If a request is refused, the Committee on Oversight and Reform can issue a subpoena. If the subpoena is ignored, the House can, by majority vote, authorize the Committee to seek judicial enforcement or to hold the respondent in contempt. This process is more cumbersome than allowing seven individual Members to sue without persuading a majority of their colleagues,[6] but it is necessary to safeguard against investigative demands made for "personal aggrandizement of the investigators" or for other idiosyncratic reasons. *See Mazars*, 140 S. Ct. at 2032. Once their party became the majority in the House, if not earlier, the Plaintiff-Members in this case might well have obtained a subpoena from the Committee and, if necessary, a House Resolution authorizing suit. *See McGahn*, 968 F.3d at 764 ("The Supreme Court has . . . long held that each House has power to secure needed information

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[6] My colleagues insist that "[t]o require the requesting members to obtain enforcement by a majority of the Committee or Chamber . . . would be to empty the statute of all meaning." Ct. Op. 31. That seems to assume without reason that the Executive habitually ignores requests made pursuant to the statute. In any event, it is a fundamental precept that the "Congress cannot erase Article III's standing requirements" by statute. *Spokeo*, 136 S. Ct. at 1547-48 (quoting *Raines*, 521 U.S. at 820 n.3). The Congress attempted to do so in *Raines* itself. There, as we recently summarized, although the statute the legislators challenged "provided that '[a]ny Member of Congress or any individual adversely affected by [this Act] may bring an action, [in our District Court] for declaratory and injunctive relief on the ground that . . . [it] violates the Constitution,' the Members of Congress were still required to show an injury in fact to establish constitutional injury." *U.S. House of Representatives v. Mnuchin*, 976 F.3d 1, 10 (D.C. Cir. 2020) (quoting *Raines*, 521 U.S. at 815-16) (first two alterations in original).

through the subpoena power" (cleaned up) (quoting *Mazars*, 140 S. Ct. at 2031)); *United States v. AT&T*, 551 F.2d 384, 391 (D.C. Cir. 1976) (holding the House of Representatives has standing to enforce a subpoena in court); House Rule XI, cl. 2(m) (governing the House's subpoena power). Perhaps they preferred to take their chance on establishing a more powerful precedent.

The consequences of allowing a handful of members to enforce in court demands for Executive Branch documents without regard to the wishes of the House majority are sure to be ruinous. Judicial enforcement of requests under § 2954 will allow the minority party (or even an ideological fringe of the minority party) to distract and harass Executive agencies and their most senior officials; as the district court said, it would subject the Executive to "the caprice of a restless minority of Members." *Cummings v. Murphy*, 321 F. Supp. 3d 92, 115 (2018). In the past this court has warned it would be hesitant to enforce a document demand made by "a wayward committee acting contrary to the will of the House." *AT&T*, 551 F.2d at 393; *see also id.* at n.16 (explaining the requirement of a resolution of the full House to cite a witness for contempt "assures the witness some safeguard against aberrant subcommittee or committee demands"). Today's ruling does more than that; it blazes a trail for judicial enforcement of requests made by an errant group of Members acting contrary to the will of their committee, the will of their party, and the will of the House.

Conclusion

Because the legislative power and the attendant power of investigation are committed to the House and

not to its Members, a legislator does not suffer a personal injury when the denial of information he or she requested impedes the oversight and legislative responsibilities of the House. Accordingly,

I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5305

CAROLYN MALONEY, ET AL., APPELLANTS

VAL DEMINGS, APPELLEE

v.

ROBIN CARNAHAN, ADMINISTRATOR,
GENERAL SERVICES ADMINISTRATION, APPELLEE

Filed: Aug. 8, 2022

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cv-02308)

On Petition for Rehearing En Banc

ORDER

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

Appellee Kale's petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

* Circuit Judges Katsas and Childs did not participate in this matter.

** A statement by Circuit Judge Millett, joined by Senior Circuit Judge Tatel, concurring in the denial of rehearing en banc, is attached.

*** Circuit Judge Rao would grant the petition for rehearing en banc. A statement by Circuit Judge Rao, joined by Circuit Judges Henderson and Walker, and Senior Circuit Judge Ginsburg, dissenting from the denial of rehearing en banc, is attached.

**** A statement by Senior Circuit Judge Ginsburg is attached.

MILLETT, *Circuit Judge*, with whom Senior Circuit Judge TATEL joins, concurring in the denial of rehearing en banc: While much still remains to be litigated in district court, the court rightly denies rehearing en banc on the narrow issue before us. The only question in this case is whether Plaintiffs, who are individual Members of Congress, have standing to enforce an information request as authorized by a statute, 5 U.S.C. § 2954, that confers on certain legislators a right to obtain information from federal agencies. This court held that the Plaintiffs' injury—"[a] rebuffed request for information to which the requester is statutorily entitled"—has long been held to be "a concrete, particularized, and individualized personal injury, within the meaning of Article III." *Maloney v. Murphy*, 984 F.3d 50, 54 (D.C. Cir. 2020). Further, applying *Raines v. Byrd*, 521 U.S. 811 (1997), the court rejected the General Services Administration's ("GSA") contention that the injury of which the Plaintiffs complain was to Congress rather than to themselves as individual lawmakers. *See Maloney*, 984 F.3d at 62-70. I write to respond briefly to the views of my colleagues who thoughtfully dissent from the denial of rehearing en banc.

I

As Judge Ginsburg did in his opinion dissenting from the court's decision, Judge Rao characterizes the Plaintiffs' injury as institutional, not personal. She reasons that their power to request documents from GSA is a delegation of Congress's power of inquiry, which is "an adjunct to the legislative process." *Watkins v. United States*, 354 U.S. 178, 197 (1957); *see* Rao Dissent 10. Viewing the Plaintiffs' statutory right as one that really

belongs to Congress, she argues that the injury that resulted from GSA's noncompliance is also institutional.

Not at all. The source of the Plaintiffs' informational right is not Congress's inherent power to obtain information in aid of legislation—as, say, a committee subpoena authorized by House rules would be. Rather, it is the express provision of a federal law—5 U.S.C. § 2954—duly enacted by both Houses of Congress and signed into law by President Coolidge. *See* Act of May 29, 1928, Pub. L. No. 70-611, 45 Stat. 986, 996. Their right to information, in other words, is the outcome of bicameralism and presentment, not an implicit constitutional power.

Beyond that, while the power of inquiry vests in "each House[,]" *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020), and is exercised by "Congress, a Chamber of Congress, or a committee[,]" Section 2954 applies to members as individuals, *Maloney*, 984 F.3d at 55, 64. Not only that, but Section 2954 extends an informational right to individuals in a committee minority, underscoring that, by its very design, the statute's right to information is entirely independent of any congressional or committee decision to investigate anything. So an individual's exercise of that specific statutory right to request information is neither derived from nor an exercise of the implicit investigative power. *See id.* at 55-56.

Instead, the statutory right the Plaintiffs are enforcing is a product of Congress's Article I authority to ensure the proper functioning of government through accountability and transparency. *See* U.S. CONST. Art. I, § 8, cl. 18. That authority includes the power to create an individual right to obtain information, including from

federal agencies. The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the Federal Advisory Committee Act, 5 U.S.C. app. 2 § 10(b), the Federal Election Campaign Act, 52 U.S.C. § 30104(b), the Endangered Species Act, 16 U.S.C. § 1539(c), the Government in the Sunshine Act, 5 U.S.C. § 552b, and the Privacy Act, 5 U.S.C. § 552a(d)(1), are all examples of statutes that create such a right. And under these statutes, "[a]nyone whose request for specific information has been denied has standing to bring an action[.]" *Zivotofsky ex rel. Ari Z. v. Secretary of State*, 444 F.3d 614, 617-618 (D.C. Cir. 2006) (discussing FOIA, Government in the Sunshine Act, and Federal Advisory Committee Act); *see also, e.g.*, *Public Citizen v. Department of Justice*, 491 U.S. 440, 449 (1989) (Federal Advisory Committee Act); *FEC v. Akins*, 524 U.S. 11, 21 (1998) (Federal Election Campaign Act); *Friends of Animals v. Jewell*, 824 F.3d 1033, 1040-1041 (D.C. Cir. 2016) (Endangered Species Act); *cf. Doe v. Chao*, 540 U.S. 614, 624-625 (2004) (observing that anyone who suffers an "adverse effect" from a violation of the Privacy Act "satisfies the injury-in-fact and causation requirements of Article III standing").

Section 2954 "is on all fours, for standing purposes, with the informational right conferred by those other statutes." *Maloney*, 984 F.3d at 61. And there is no dispute that Plaintiffs are among those in whom Section 2954 invests an informational right. So their Article III standing is no different from the standing of individuals to enforce other statutory rights to information in the federal government's possession. In other words, Section 2954 fits the tradition of numerous other information-disclosure statutes and, like many of them, is a product of Congress's Article I authority to enact

statutes creating a right to obtain information from federal agencies about their taxpayer-funded activities, not some exercise of an implicit power to investigate.[1]

Judge Rao suggests that this statutory injury is not "grounded in historical practice[.]" Rao Dissent 5 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)). To be sure, that the informational right in this case arises from a statute is not alone enough to decide the standing question because "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines*, 521 U.S. at 820 n.3. But the precedential basis for Congress's creation of such informational injuries is longstanding. Binding precedent from the Supreme Court and this court has long held that informational injuries give rise to standing. *See Spokeo*, 578 U.S. at 342 (citing *Akins* and *Public Citizen* as cases in which, consonant with the "common law * * * , the violation of a procedural right granted by statute" was sufficient "to constitute injury in fact"); *see also, e.g.*, *Public Citizen*, 491 U.S. at 449; *Akins*, 524 U.S. at 21; *Zivotofsky*, 444 F.3d at 617-618; *Friends of Animals*, 824 F.3d at 1040-1041.

To be sure, Section 2954's informational right vests in individuals who are members of Congress, rather

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[1] Judge Rao contends that *Maloney* "assume[d] the most important question—whether a statute can constitutionally grant members of Congress a *personal* right, enforceable in federal court, to information from the Executive Branch." Rao Dissent 11. But Judge Rao does some assuming of her own in suggesting that Congress's power to command disclosure "stems exclusively from the legislative power[,]" Rao Dissent 2, despite the rich history of disclosure statutes that do not arise from Congress's inherent power of inquiry.

than in the general public. *See* Rao Dissent 17. But for standing purposes, that is beside the point. Article III standing depends on a plaintiff demonstrating an injury in fact, causation, and redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The only prong at issue here is the injury-in-fact requirement, and reams of precedent has recognized that an informational injury is a "quintessential" injury in fact. *Maloney*, 984 F.3d at 59; *see also, e.g.*, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021) (reiterating that plaintiffs who "allege that they failed to receive * * * required information" under a disclosure statute have standing). And Article III has never required that an otherwise qualifying injury in fact be shared with others—let alone the general public—before it counts. There is no *noscitur a sociis* canon for Article III injuries; their existence does not depend on the company they keep.

What is more, Plaintiffs' injury is materially identical to an injury any member of the public *could* suffer: the denial of a FOIA request. Indeed, if these Plaintiffs had requested the same information under both FOIA and Section 2954, they would have standing to vindicate that informational injury. *Spokeo*, 578 U.S. at 342; *Zivotofsky*, 444 F.3d at 617-618. And their status as members of Congress would not change things: Under FOIA, "the requester's circumstances—why he wants the information, what he plans to do with it, what harms he suffered from the failure to disclose—are irrelevant to his standing." *Zivotofsky*, 444 F.3d at 617. The government agrees. Oral Arg. Tr. 26 (GSA Counsel: "[W]e're not disputing that the Plaintiffs can invoke FOIA."). And courts have long entertained FOIA actions brought by members of Congress even though, as

Judge Rao observes, FOIA can "be used for any purpose[,]" legislative or otherwise. Rao Dissent 17; *see id.* 18-19 n.6; *EPA v. Mink*, 410 U.S. 73, 75 (1973) (adjudicating FOIA action brought by 33 members of Congress).

If Congress may, under 5 U.S.C. § 552, confer on Plaintiffs a right to this very same information, the denial of which gives rise to standing, it may do the same under 5 U.S.C. § 2954. Article III's standing inquiry does not change based on the section of Title 5 in which Congress houses the informational right.

Of course, Section 2954's scope is narrower than FOIA in that the informational right vests only in members of two congressional committees, and extends only to "information * * * relating to any matter within the jurisdiction of the committee." 5 U.S.C. § 2954. But even if a Section 2954 request has a relationship to "official congressional responsibilities," Rao Dissent 19, that does not change the standing analysis.

After all, "personal, particularized" injuries suffered by legislators, and legislators alone, can affect prerogatives essential to the legislative role and yet still confer standing. *Maloney*, 984 F.3d at 62. For instance, Congressman Adam Clayton Powell had standing when he complained of the loss of his seat and his salary—both of which were entitlements meant *solely* to enable him to participate in legislating. *See Raines*, 521 U.S. at 821 (explaining that although members hold their seats "as trustee[s] for [their] constituents," "they *personally* are entitled" to them for standing purposes) (emphasis in original). The congressional seat for which he sued "pertained directly to his fulfillment of his role as a legislator," and yet its loss was still a concrete, individual

harm that gave him Article III standing. *See Maloney*, 984 F.3d at 66.

Likewise, even if legislators are denied the right to engage in core legislative *acts*—like voting—on a particularized basis, they would have standing to remedy that denial. *See Kerr v. Hickenlooper*, 824 F.3d 1207, 1216 (10th Cir. 2016); *Alaska Legis. Council v. Babbitt*, 181 F.3d 1333, 1338 n.3 (D.C. Cir. 1999); *cf. Raines*, 521 U.S. at 824 n.7.

This is all to say that an injury is not institutional simply because it trenches on a right that exists to enable legislators to perform their individual jobs. Even injuries that "pertain[] to the official, legislative powers of members" may be personal for standing purposes. Rao Dissent 16; *see id.* 9 n.3 ("[I]n narrow circumstances a private harm, like the denial of a salary, may result from an official position."). What matters is that the Plaintiffs complain of an injury that "befell them and only them[,]" rather than "all Members of Congress[,]" "both Houses of Congress equally[,]" or the successor to the requester's committee seat. *Maloney*, 984 F.3d at 64 (internal quotation marks omitted) (quoting *Raines*, 521 U.S. at 821). Because Plaintiffs' informational injury "zeroes in on the individual[,]" it confers standing. *Kerr*, 824 F.3d at 1216.

Judge Rao is correct that Congress enacted Section 2954 to aid committee members' work and the legislative process as a whole. *See* Rao Dissent 17-19. The statute's text and legislative history confirm as much. *See* 5 U.S.C. § 2954; H.R. REP. NO. 1757, 70th Cong., 1st Sess. 3, 6 (1928); *Maloney*, 984 F.3d at 55-56. But Congress's subjective policy goals in passing a law have no role in the standing analysis. With FOIA, Congress

likewise sought to make oversight of the executive branch work better by "pierc[ing] the veil of administrative secrecy and * * * open[ing] agency action to the light of public scrutiny[.]" *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). That underlying purpose, however, does not mean that FOIA requests are somehow a delegation of Congress's oversight powers. And (it bears repeating) that remains true even when members of Congress seek information germane to their legislative work under FOIA. *Maloney*, 984 F.3d at 69. Indeed, if Congress had simply amended FOIA to expressly include members of the two legislative committees listed in Section 2954 seeking information relevant to their job as "person[s]" who may obtain information, 5 U.S.C. § 552(a)(3)(A), the informational right and injury would be identical to that of any other FOIA claimant for standing purposes. That Congress accomplished that same end through two statutes rather than one has no bearing on Article III's injury-in-fact analysis.

II

Judges Rao and Ginsburg anticipate that the court's decision will have "ruinous" consequences. Ginsburg Dissent 2; *see* Rao Dissent 21-26. That concern does not stand up either practically or legally.

Their practical concern that the Executive Branch will be overwhelmed by Section 2954 lawsuits is misplaced. For one thing, Section 2954 has been on the books since 1928 without causing any such flood of litigation. Or even a puddle. *Compare* Pls.' Opening Br. at 19-20 (documenting a handful of occasions dating back three decades on which members have requested information under Section 2954), *with* Rao Dissent 23

n.8. For another thing, FOIA and a host of other federal laws already subject federal agencies to informational demands from the public—legislators included—and lawsuits if the agencies fail to comply. And remember, *more* Members of Congress can obtain *more* information of interest to them as legislators under FOIA than under Section 2954 because FOIA's right lacks Section 2954's limitations. That has been true since 1966, "with no hint of such untoward results." *Maloney*, 984 F.3d at 69. In any event, Article III is not a roadblock to suits judges happen to find uncongenial as a policy matter.

To the extent the dissenters are concerned about "whether a statute can constitutionally grant members of Congress a personal right, enforceable in federal court, to information from the Executive Branch[,]" Rao Dissent 11 (emphasis omitted), they are getting ahead of this case. This court has not yet even decided if Section 2954 creates a cause of action. More generally, questions about Section 2954's scope and constitutionality are for another day. *See Maloney*, 984 F.3d at 70 ("[T]he existence of a cause of action, the appropriate exercise of equitable discretion, [and] the merits of the [Plaintiffs'] claims * * * remain to be resolved by the district court in the first instance."); Defs.' Mot. to Dismiss at 36, *Cummings v. Murphy*, 321 F. Supp. 3d 92 (D.D.C. 2018) (No. 17-2308), ECF No. 8 (asserting that Plaintiffs' use of the statute could "raise serious constitutional concerns."). The *only* question before the court in this case was whether the Plaintiffs have suffered an informational injury in fact for Article III standing purposes. In answering that question, we assume that the Plaintiffs are correct on all merits questions in the case, including the existence of a cause of

action and the constitutionality of the statute that provides the source of their asserted legal claim. *See NB ex rel. Peacock v. District of Columbia*, 682 F.3d 77, 82 (D.C. Cir. 2012); *Maloney*, 984 F.3d at 58.

The central mistake that the dissenting opinions make is trying to force the injury-in-fact prong of the Article III standing analysis to take on the substantive merits work of resolving their constitutional qualms about this statutory scheme, facially or as applied. The en banc court rightly recognizes today that there is no need for Article III to get out over its skis. Those constitutional questions and more await resolution on remand. All we have held in this case is that the agency's denial of a statutorily conferred right to information inflicted an injury in fact on the requesting Plaintiffs.

* * *

For those reasons and with the greatest respect for my colleagues' dissenting views, I concur in the denial of rehearing en banc.

RAO, *Circuit Judge*, with whom Circuit Judges HENDERSON and WALKER and Senior Circuit Judge GINSBURG join, dissenting from the denial of rehearing en banc:

Disputes between Congress and the Executive over documents have occurred since the Founding but have seldom involved the Judiciary. In concluding that individual members of Congress have standing to sue when an executive agency rejects their requests for information, the panel majority clears the way for the federal courts to referee ordinary informational disputes between the political branches. The panel's rationale has no logical stopping point and would permit standing to even a single member of Congress suing the Executive. To reach this unprecedented holding, the panel relies on a nearly 100-year-old statute that allows members to request information from executive branch agencies and finds that 5 U.S.C. § 2954 creates a personal "informational right" for members exercising their "professional" legislative duties. *Maloney v. Murphy*, 984 F.3d 50, 64-65 (D.C. Cir. 2020). The Members' claim in this case, however, has no historical analogue. The panel's recognition of a personal injury to legislative power clashes with the fundamental constitutional principles that limit congressional standing, upends the balance of power between Congress and the Executive, and drags courts into disputes wholly foreign to the Article III "judicial Power."

Perhaps this is a logical culmination of this court's recent decisions on congressional standing, which continue to invoke the Supreme Court's decision in *Raines v. Byrd*, 521 U.S. 811 (1997), while steadily moving away

from its substantive foundation.[1] By recognizing standing for members of Congress based on harms that are simultaneously personal and legislative, the panel decisively breaks with the structural constitutional limits articulated in *Raines*.

I would revisit the panel decision because, first, the text and structure of the Constitution, historical practice, and the Supreme Court's decisions all establish that individual members of Congress cannot bring suit to assert injuries to the legislative power. The federal courts do not superintend disputes between the political branches because such disputes are outside the traditional understanding of an Article III "Case" or "Controversy." Second, the power of members of Congress to investigate the Executive Branch stems exclusively from the legislative power. Section 2954 cannot convert that institutional legislative power into a personal "informational right" for members that is vindicable in federal court. Finally, allowing standing for members

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[1] *See Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 968 F.3d 755, 782 (D.C. Cir. 2020) (en banc) (Griffith, J., dissenting) (explaining that "[t]he majority returns this circuit to the prudential approach to standing that we experimented with decades ago and that the Supreme Court rejected in *Raines*"); *U.S. House of Representatives v. Mnuchin*, 976 F.3d 1 (D.C. Cir. 2020) (extending the *McGahn* majority's prudential approach to conflicts over appropriations), *vacated as moot*, 142 S. Ct. 332 (2021); *In re Comm. on the Judiciary, U.S. House of Representatives*, 951 F.3d 589, 617-18 (D.C. Cir. 2020) (Rao, J., dissenting) ("[A]llowing standing in this context would run against historical practice and the limited role of the federal judiciary in our system of separated powers.") (citing *Raines*, 521 U.S. at 819), *vacated as moot sub nom. Dep't of Justice v. House Comm. on the Judiciary*, 142 S. Ct. 46 (2021).

of Congress under Section 2954 not only expands the judicial power, but otherwise unbalances the Constitution's separation of powers.

The novel questions presented here are of exceptional importance, particularly because the D.C. Circuit has an effective monopoly over lawsuits between Congress and the Executive Branch. These questions should be resolved by the full court to realign our decisions with the Constitution and longstanding Supreme Court precedent.

I.

Seventeen members of Congress brought this suit under an extraordinary statute, one that permits "any seven members" of the House Committee on Oversight and Reform or "any five members" of the Senate Committee on Homeland Security and Governmental Affairs—less than a majority of each committee—to compel executive agencies to disclose information. Act of May 29, 1928, Pub. L. No. 70-611 § 2, 45 Stat. 986, 996 (codified as amended at 5 U.S.C. § 2954). Upon such a request, "[a]n Executive agency . . . shall submit any information requested of it relating to any matter within the jurisdiction of the committee." 5 U.S.C. § 2954.

This case concerns requests made under Section 2954 to the General Services Administration ("GSA") by members of the House Committee on Oversight and Reform (the "Committee"). The Members sought records relating to GSA's lease of the Old Post Office building to a company owned by President Donald Trump and members of his family. GSA did not provide the requested information, and members of the Committee who made

the rebuffed requests brought this action seeking to compel disclosure. In particular, the Members pleaded that "numerous issues" concerning the lease "requir[ed] congressional oversight," including "potential conflicts of interest" and "GSA's ongoing management of the lease." The complaint repeatedly referenced the official oversight responsibilities of Congress and the Committee. The Members claimed the deprivation of information "thwart[ed]" their ability "to carry out their congressionally-delegated duty to perform oversight" and impeded the fulfillment of their "legislative responsibilities."

The district court dismissed the complaint on the jurisdictional ground that the Members lacked standing. *Cummings v. Murphy*, 321 F. Supp. 3d 92 (D.D.C. 2018). A divided panel of this court reversed, holding that Section 2954 confers an individual right to information on members of Congress, and that members have standing in federal court to assert those rights against an executive branch agency. *Maloney*, 984 F.3d at 54. Judge Ginsburg dissented, explaining that "[b]ecause the legislative power and the attendant power of investigation are committed to the House and not to its [m]embers, a legislator does not suffer a personal injury when the denial of information . . . impedes the oversight and legislative responsibilities of the House." *Id.* at 76.

II.

The Members here allege they have standing to sue an executive branch agency for information because Section 2954 gives them a personal right to exercise the official legislative powers of investigation. Their claims are foreclosed by the Constitution, longstanding precedent, and historical practice, which dictate that

harms to official legislative powers cannot be vindicated in the federal courts by individual legislators.

Article III of the Constitution extends the federal judicial power only to "Cases" or "Controversies." U.S. CONST. art. III, § 2. "No principle is more fundamental to the [J]udiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual [C]ases or [C]ontroversies." *Raines*, 521 U.S. at 818 (cleaned up). While the panel majority recites these constitutional limitations, it rests its standing analysis entirely on Section 2954, which purportedly "confers [an] informational right directly on . . . specific legislators so that they personally can properly perform their roles on the oversight committees." *Maloney*, 984 F.3d at 61.

But "[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines*, 521 U.S. at 820 n.3; *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577-78 (1992). The standing inquiry, therefore, cannot simply begin and end with the so-called informational right created by Section 2954. To determine whether the Members' claim is judicially cognizable, we must consider whether the alleged harm is "grounded in historical practice" and "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) (a concrete injury requires plaintiffs to "identif[y] a close historical or common-law analogue for their asserted injury"); *id.* at

2219 (Thomas, J., dissenting) (explaining that the requirement of concreteness developed with respect to public rights and interests).

Members of Congress seeking standing in the federal courts must satisfy particularly stringent requirements because of the serious separation of powers concerns raised by judicial resolution of disputes between the political branches. *See Raines*, 521 U.S. at 819-20; *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 803 n.12 (2015); *see also id.* at 854 (Scalia, J., dissenting); *Chenoweth v. Clinton*, 181 F.3d 112, 114 (D.C. Cir. 1999) (explaining that separation of powers concerns "are particularly acute [ ] when a legislator attempts to bring an essentially political dispute into a judicial forum"). As a result, the Supreme Court has established a narrow set of circumstances in which individual legislators can sue in federal court.

"*Raines* is our starting point when individual members of the Congress seek judicial remedies." *Blumenthal v. Trump*, 949 F.3d 14, 19 (D.C. Cir. 2020) (per curiam). In *Raines*, the Supreme Court recognized the novelty of the question of legislative standing presented for review and explained why "historical practice" did not support legislative standing because "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*." 521 U.S. at 826 (emphasis added). Instead, constitutional challenges to the respective powers of the political branches had been adjudicated primarily in lawsuits in which a private individual had suffered a personal, particularized, and concrete harm. Canvassing the historical record, the Court pointed to numerous instances

where, if it had been possible, the President or a member of Congress might have sued to vindicate their respective constitutional powers but never had. *Id.* at 826-28.

The Court concluded that the Judiciary serving as referee between the political branches "is obviously not the regime that has obtained under our Constitution to date." *Id.* at 828. Moreover, the Constitution vests the Article III courts with a restricted role, primarily that of protecting individual rights and liberties, not providing "some amorphous general supervision of the operations of government." *Id.* at 829 (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring)). The Judiciary should hesitate to adjudicate "dispute[s] involving only officials, and the official interests of those, who serve in the branches of the National Government" because such disputes lie "far from the model of the traditional common-law cause of action at the conceptual core of the case-or-controversy requirement." *Id.* at 833 (Souter, J., concurring in the judgment).

Raines also clarified that members of Congress may not circumvent the Judiciary's limited role in interbranch disputes by bringing suit as individuals to vindicate harms to the legislative power. Because the legislative power is vested in Congress as a whole, not in individual representatives and senators, injuries to the legislative power are not injuries to the individual members. Therefore, a suit by members of Congress challenging the Line Item Veto Act could not be maintained in federal court because the "claim of standing [was] based on a loss of political power, not loss of any *private* right, which would make the injury more concrete."

Id. at 821 (majority opinion) (emphasis added). In subsequent cases, the Supreme Court adhered closely to *Raines* and emphasized that "individual members lack standing to assert the institutional interests of a legislature." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019); *Ariz. State Legislature*, 576 U.S. at 802.

After *Raines* decisively closed the door on this circuit's expansive congressional standing decisions,[2] we have consistently denied standing to legislators seeking to sue the Executive Branch to vindicate legislative powers or to enforce the requirements of a statute. *See Chenoweth*, 181 F.3d at 113 (holding that members of Congress lacked standing to challenge an executive order they claimed "denied them their proper role in the legislative process"); *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000) (holding that legislators lacked standing to challenge presidential actions they alleged violated the War Powers Resolution). We recently explained that the Supreme Court's "as well as this court's precedent confirm that *Raines* stands for the proposition that

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[2] We have recognized that *Raines* was the culmination of a long period of tension between this court's approach to standing and the Supreme Court's. *Chenoweth*, 181 F.3d at 115. In the 1970s, this court was "receptive to the idea that we had jurisdiction to hear" complaints brought by members of Congress "seek[ing] judicial relief from allegedly illegal executive actions that impaired the exercise of their power as legislators." *Id.* at 114 (citing *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), and *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir.) (en banc) (per curiam), *vacated on other grounds*, 444 U.S. 996 (1979)). Even as the Supreme Court clarified that standing was an essential aspect of the separation of powers, *Allen v. Wright*, 468 U.S. 737, 752 (1984), this court continued to analyze standing apart from separation of powers concerns. *See Chenoweth*, 181 F.3d at 114.

whereas a legislative institution may properly assert an institutional injury, an individual member of that institution generally may not." *McGahn*, 968 F.3d at 775. Individual lawmakers lack standing to assert the official, institutional interests of Congress because of the "mismatch" problem, i.e., congressmen cannot assert injuries on behalf of Congress. *Bethune-Hill*, 139 S. Ct. at 1953; *McGahn*, 968 F.3d at 767.

The only two Supreme Court decisions recognizing legislator standing similarly do not support standing for members of Congress asserting harms to a purportedly personal legislative power. First, Congressman Powell was allowed to sue for backpay in connection with the salary he was denied when the House unlawfully prevented him from taking his seat. *Powell v. McCormack*, 395 U.S. 486 (1969). In *Raines*, the Court contrasted Congressman Powell's injury, which was claimed in a "*private* capacity" and for which there could be standing, with an "*institutional* injury (the diminution of legislative power)" claimed by a member of Congress in an "*official* capacit[y]," for which there was no standing. 521 U.S. at 821 (emphases added). The Constitution guarantees that members of Congress shall be paid. U.S. CONST. art. I, § 6. This is plainly a private and personal right of individual members of Congress, the invasion of which inflicts a paradigmatic Article III injury. *See TransUnion*, 141 S. Ct. at 2204 ("[C]ertain harms readily qualify as concrete injuries under Article III. The most obvious are traditional tangible harms, such as . . . monetary harms."). An unpaid salary was not a harm to the legislative power, but rather an

injury to Powell's pocketbook.[3] Moreover, in *Powell*, the claim for backpay was not made against the Executive Branch, but the agents of Congress, and therefore did not implicate the same type of conflict between the branches. *See* 395 U.S. at 550.

The only other case recognizing individual legislator standing, *Coleman v. Miller*, 307 U.S. 433 (1939), involved state legislators and has been cabined to its facts. *See Raines*, 521 U.S. at 823-24, 824 n.8 (explaining *Coleman*'s limited application and noting that the case involved state legislators, which would not raise the same separation of powers concerns as suits between the federal political branches); *Bethune-Hill*, 139 S. Ct. at 1954 (repeating *Raines*'s characterization of *Coleman*).

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A legislator may have standing in the federal courts only if his affected "interest . . . [is] of a personal and not of an official nature." *Braxton Cnty. Ct. v.*

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[3] The panel majority takes from *Powell* that some official harms may be personal. *Maloney*, 984 F.3d at 65-66. It is true that Powell's monetary harms flowed from his election as a congressman. That simply means that in narrow circumstances a private harm, like the denial of a salary, may result from an official position. *See, e.g.*, *Humphrey's Executor v. United States*, 295 U.S. 602, 618 (1935) (deciding the extent to which Congress may insulate a commissioner of a so-called independent agency from presidential removal in the context of a suit in the Court of Claims for the unpaid salary of a fired executive official). *Powell* cannot be read to recognize a category of personal legislative injuries because Powell's injuries were not to his exercise of legislative power. Indeed, *Raines* recognized that *Coleman v. Miller* is the only case upholding "standing for legislators (albeit *state* legislators) claiming an institutional injury," further reinforcing that *Powell* is not a case about institutional or official harms. *Raines*, 521 U.S. at 821.

West Virginia ex rel. State Tax Comm'rs, 208 U.S. 192, 197 (1908). Injuries to the official interests of a member of Congress, like other harms to institutional legislative power, lie outside the traditional understanding of the "Cases" and "Controversies" cognizable by the Article III courts.

III.

The foregoing provides the constitutional backdrop for assessing the panel majority's conclusion that Section 2954 grants members of Congress a personal right to information from executive branch agencies that is no different from any other private informational injury that may be vindicated in court. *Maloney*, 984 F.3d at 64. The investigative power of Congress is not and cannot be personal, because it is "justified solely as an adjunct to the legislative process." *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (cleaned up).

Section 2954 cannot create a personal right to information for the Members, because Congress cannot constitutionally convert its institutional legislative power to investigate into a personal right of its members. Nor can the official and institutional injuries alleged by the Members under Section 2954 be analogized to the private informational injuries under statutes such as the Freedom of Information Act ("FOIA") and the Federal Advisory Committee Act ("FACA"). Therefore, the denial of information under Section 2954 does not provide members of Congress with the type of concrete and particularized injury cognizable by the Article III courts.

A.

The panel majority frames this case generically as simply a question of whether the denial of information to which a "person" or "requester" is statutorily entitled constitutes an injury sufficient to invoke Article III jurisdiction. It concludes a concrete injury exists because "Section 2954's plain terms invest the informational right in legislators, not the legislature. Which makes the deprivation of requested information an injury personal to the requesting legislators." *Maloney*, 984 F.3d at 67. But framing the case this way assumes the most important question—whether a statute can constitutionally grant members of Congress a *personal* right, enforceable in federal court, to information from the Executive Branch. Section 2954 cannot create such a personal right because any power to investigate belongs to the House and Senate as part of their institutional legislative powers, and Congress cannot delegate these institutional powers in a way that creates rights in individual members.

Congress' power to investigate the Executive Branch derives solely from the legislative power. As the Supreme Court recently reiterated, "Congress has no enumerated constitutional power to conduct investigations[,] . . . but we have held that each House has power 'to secure needed information' in order to legislate." *Mazars*, 140 S. Ct. at 2031 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927)). The panel's so-called informational right is merely an "auxiliary to the legislative function." *McGrain*, 273 U.S. at 174. Just as the legislative power is vested in Congress, U.S. CONST. art. I, § 1, the auxiliary power to investigate also belongs to *Congress* and is inextricably linked to the

need to gather information in order to "legislate 'wisely or effectively.'" *Mazars*, 140 S. Ct. at 2031 (quoting *McGrain*, 273 U.S. at 175). Perhaps in recognition of these principles, the Members pleaded that the informational right in Section 2954 was "congressionally-delegated" and that they were exercising necessary "congressional" oversight.

The power to legislate, however, "is not personal to the legislator," so "the legislator has no personal right to it." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126 (2011). Injuries to "political power" are not judicially cognizable because the legislator exercises legislative power "as trustee for his constituents, not as a prerogative of personal power." *Raines*, 521 U.S. at 821; *see also United States v. Ballin*, 144 U.S. 1, 7 (1892) ("The two houses of Congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body."). While members of course undertake myriad lawmaking functions, legislators have no personal right to the legislative power and therefore have no personal right to the incidents of that power, such as investigation and oversight.[4]

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[4] The principle that a legislator has no personal right to the legislative power follows from the text and structure of the Constitution, which confers no power on representatives and senators that may be exercised individually. The Constitution recognizes individual members primarily with regard to their selection and compensation. *See* U.S. CONST. art. I, § 2, cl. 1; *id.* § 3, cl. 1; *id.* § 6, cl. 1. The Constitution vests the legislative power in Congress as a whole. U.S. CONST. art. I, § 1; *see also* Neomi Rao, *Why Congress Matters: The Collective Congress in the Structural Constitution*, 70 FLA. L. REV. 1, 71 (2018) ("Congress can take no *binding* action against the other branches except through legislation or through impeachment

Because investigation is an institutional prerogative and exists only insofar as it is a legitimate adjunct to the legislative power, Section 2954 cannot confer an informational right on individual members to sue the Executive Branch in federal court. The Supreme Court has consistently invalidated statutes that attempt to reallocate the legislative power to Congress' constituent parts. *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 715-18 (1997) (discussing these cases).

For instance, a single house of Congress cannot exercise the legislative power because legislative power must be exercised through bicameralism and presentment. *See INS v. Chadha*, 462 U.S. 919, 955 (1983) (explaining that when the Constitution permits "either House of Congress to act alone," it "narrowly and precisely define[s] the procedure for such action"). The prohibition, recognized in *Chadha*, against Congress reassigning legislative power to a single house applies *a fortiori* to reassigning legislative powers to individual members of Congress. Similarly, Congress cannot assign a subset of its members the power to veto decisions made by an agency, because "Congress may not delegate the power to legislate to its own agents or to its own [m]embers." *Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 275 (1991). Indeed, "[i]f Congress were free to delegate its policymaking authority to one of its components, or to one of its agents, it would be able to evade

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and removal."). Members share a part of the legislative power and exercise an important public trust, but the legislative power does not belong to them individually.

the carefully crafted restraints spelled out in the Constitution." *Bowsher v. Synar*, 478 U.S. 714, 755 (1986) (Stevens, J., concurring in the judgment) (cleaned up).

Furthermore, the Court has specifically held that Congress cannot by statute convert a "generalized grievance" about government into a judicially cognizable personal injury. *See Lujan*, 504 U.S. at 573-76 (discussing cases). In *Lujan*, the Court reviewed a citizen-suit provision and recognized that the relevant question was "whether the public interest in proper administration of the laws . . . can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue." *Id.* at 576-77. The Court answered that question with a resounding *no*: "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.'" *Id.* at 577 (quoting U.S. CONST. art. II, § 3).

Interpreting Section 2954 to confer standing on individual members of Congress would raise parallel constitutional problems because it would allow Congress to convert the collective legislative power, and the accompanying power to investigate, into an "individual right" of lawmakers that could be vindicated in the federal courts. To allow such actions "would enable the courts, with the permission of Congress, to assume a position of authority over the governmental acts of another and co-equal department, and to become virtually continuing

monitors of the wisdom and soundness of Executive action. We have always rejected that vision of our role." *Id.* (cleaned up).

Just as Congress cannot transfer bits of the President's executive power to the general public, it similarly cannot transfer bits of Congress' legislative power to individual legislators. Statutory say-so is insufficient to expand the powers of individual legislators and the reach of the federal courts.

The unsuitability of judicial review is further highlighted by the fact that Section 2954 accomplishes by statute what would ordinarily be addressed by the internal rules or orders of the House and Senate, which frequently assign investigative authority to committees and subcommittees. *See* U.S. CONST. art. I, § 5, cl. 2. Such rules, however, do not create any personal rights in members enforceable in federal court. Internal allocations of congressional power generally cannot be vindicated in court by any legislator or groups of legislators. *See Metzenbaum v. FERC*, 675 F.2d 1282, 1287 (D.C. Cir. 1982) (per curiam) (concluding that the question of whether the House observed its own rules was political and therefore nonjusticiable); *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1181 (D.C. Cir. 1983) (Bork, J., concurring in the judgment) ("[F]ederal courts should firmly refuse to enter upon the wholly inappropriate task of ensuring absolute equity in Congress's legislative procedures. It is absurd to think that courts should purge the political branches of politics."); *id.* at 1176 (majority opinion) (calling adjudication of such disputes a "startlingly unattractive idea") (cleaned up); *Chadha*, 462 U.S. at 955 n.21 (emphasizing that the rulemaking power "only empowers Congress to bind itself").

Judicial review of House and Senate rules of proceeding would likely exceed the Article III "judicial Power" and encroach on the independence of Congress. This further suggests that Congress lacks the authority to vest individual members with judicially enforceable investigative rights that would ordinarily be allocated by non-reviewable internal rules.[5]

I would also note that there is no evidence that Congress created individual member standing when enacting Section 2954. Given the total absence of any historical precedent for such lawsuits in 1928, the establishment of a judicially cognizable informational right would have been an exceptional expansion of federal court jurisdiction to decide informational disputes between Congress and the Executive. In light of the novelty of the statute and the fact that it makes no mention of a cause of action or of standing for individual members, we should not readily assume Section 2954 creates the type of right and injury that is cognizable by the federal courts. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not . . . hide elephants in mouseholes."); *FEC v. Akins*, 524 U.S.

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[5] A further constitutional difficulty is that each house of Congress has an independent power to make internal rules of proceeding. U.S. CONST. art. I, § 5. Section 2954, however, purports to allocate (or delegate) some investigative authority to a subgroup of committee members in both the House and Senate. If Congress by statute may allocate power to individual representatives and senators, that could frustrate the independent constitutional power of each house to make its own rules, because one house of Congress would be unable to promulgate a rule of proceeding contrary to a statute without the consent of the other house and the President.

11, 30 (1998) (Scalia, J., dissenting) ("Because this provision is so extraordinary, we should be particularly careful not to expand it beyond its fair meaning.").

The Members' complaint and the panel majority's reasoning recognize that the "informational right" in Section 2954 pertains to the official, legislative powers of members. *See Maloney*, 984 F.3d at 64 ("[T]he Requesters sought the information covered by Section 2954 in this case to inform and equip them personally to fulfill their *professional duties as Committee members*.") (emphasis added). What the panel majority fails to explain, however, is how Congress may convert the institutional legislative power of investigation into a personal right of individual legislators.

Congress cannot self-delegate a piece of the legislative power to individual representatives and senators in a way that creates judicially cognizable rights. Section 2954 should not be read to create standing for members of Congress asserting their investigative, i.e., legislative, powers when such an interpretation would contravene the Constitution's separation of powers.

B.

The panel's analogy to private informational injuries under FOIA and FACA is similarly inapposite. Those statutes create certain informational rights against the government, and individuals may sue in federal court to challenge an agency's failure to provide information to which the person is entitled. *See* 5 U.S.C. § 552(a)(4)(B); 5 U.S.C. app. 2 § 10(b). The Supreme Court and this court have held that the deprivation of such information can constitute a private, particularized, and concrete injury that gives rise to standing. *See Pub. Citizen v.*

U.S. Dep't of Justice, 491 U.S. 440, 449-50 (1989); *Prisology, Inc. v. Fed. Bureau of Prisons*, 852 F.3d 1114, 1117 (D.C. Cir. 2017).

The informational right created by Section 2954 is different. FOIA and FACA create a private right to information to be used for any purpose. By contrast, Section 2954 gives legislators a right to information specifically for legislating, as evidenced by the fact that information requests must "relat[e] to any matter within the jurisdiction of the committee." 5 U.S.C. § 2954. Only by glossing over this material distinction can the majority avoid the salient constitutional questions. *See* Concurring Op. 3-6.

While in the context of private plaintiffs the court properly looks to whether the withholding of information has harmed the plaintiff "in a personal and individual way," *Spokeo*, 578 U.S. at 339, the inquiry is entirely different for members of Congress seeking to exercise their legislative powers.[6] The panel states that

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[6] Members of Congress sometimes use FOIA to seek information from the Executive Branch, and there are a few cases in which they have litigated an agency's failure to release information under FOIA. But these cases have recognized a distinction between individual informational rights held by private citizens and the official prerogatives of members of Congress. FOIA suggests that Congress' power to investigate and to seek information from the Executive is distinct from and perhaps greater than private citizens' FOIA rights. *See* 5 U.S.C. § 552(d) ("This section is not authority to withhold information from Congress."); *see also Murphy v. Dep't of the Army*, 613 F.2d 1151, 1157 (D.C. Cir. 1979) (explaining that "when a document is released for official congressional purposes, a waiver of [a] FOIA exemption is not implied").

The courts have struggled, however, with distinguishing FOIA requests made by a member in his or her private capacity and those

"[a] personal injury . . . refers to an injury suffered directly by the individual legislators to a right that they themselves individually hold." *Maloney*, 984 F.3d at 62. But legislators have no individual right to information from the Executive Branch in the exercise of their official legislative duties. Rather, as already discussed, any investigative rights a member has may be exercised only as part of the institutional, legislative power of the House or the Senate.

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made in an official capacity. *See Leach v. Resol. Tr. Corp.*, 860 F. Supp. 868, 880 (D.D.C. 1994) (refusing to decide whether a member could assert the rights of Congress as an institution and dismissing the case without prejudice to the representative's "right to assert any claims he might have as a member of the public"). We have, for instance, distinguished a FOIA request by a representative made as a private citizen from his receipt of that same information as a member of a committee. *See Aspin v. Dep't of Def.*, 491 F.2d 24, 26 & n.14 (D.C. Cir. 1973). In *EPA v. Mink*, the Supreme Court treated a FOIA request by 33 representatives as a request made by private citizens. *See* 410 U.S. 73, 75 (1973). It is notable that the district court in *Mink* dismissed the action "insofar as plaintiffs seek to maintain the action in their capacity as [m]embers of Congress on the ground that plaintiffs have failed to present a justiciable [C]ase or [C]ontroversy and they may not maintain the action in that capacity by reason of the Separation of Powers provisions of the Constitution." *Mink v. EPA*, No. 1614-71, 1971 U.S. Dist. LEXIS 15238 at *1-2 (D.D.C. Aug. 27, 1971). The D.C. Circuit did not reach that issue, so it was not before the Supreme Court. *Mink*, 410 U.S. at 73 n.2.

The few decisions allowing members to bring suit under FOIA have generally proceeded as though the requests for information were made by private individuals. None of these decisions have held that members of Congress may sue to vindicate personal informational injuries to the exercise of their official legislative powers.

When members make a request under Section 2954, they are exercising their official, congressional responsibilities and therefore are not acting as private individuals. In other contexts, the Supreme Court has rebuffed the claim that members of Congress act as individuals when exercising congressional responsibilities. For example, even when a statute designated members of Congress as serving on a Board "in their individual capacities" the Court noted this fact "does not prevent this group of officials from qualifying as a congressional agent exercising federal authority for separation-of-powers purposes." *Metro. Washington Airports Auth.*, 501 U.S. at 267. Because the Members were exercising "congressional responsibilities," it "belie[d] the *ipse dixit* that the Board members will act in their individual capacities." *Id.* (cleaned up). Section 2954 limits information requests to official congressional responsibilities, namely those within the jurisdiction of the Committee, which belies the panel majority's claim that members have a personal right to the information.[7]

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[7] The panel majority maintains that the Members' informational right does not run with their Committee seats and therefore must be a personal injury, similar to Congressman Powell's claim for loss of salary. *Maloney*, 984 F.3d at 65-66. But Congressman Powell would have been entitled to backpay even after leaving office because he was entitled to the salary in his "private capacity." *Raines*, 521 U.S. at 821. By contrast, upon leaving office, the Members here would not be entitled to information under Section 2954, as the panel majority recognizes. *Maloney*, 984 F.3d at 66 ("If one of the Requesters were to leave the Committee, the injury sued upon would end with her service."). This difference shows the flaw in the panel majority's analogy. Unlike Congressman Powell, the Members' claimed injury is to official powers because it is wholly dependent upon the Members' current service in the House (and on a particular

Characterizing the exercise of congressional responsibilities as personal and individual only further unmoors this Circuit's law from *Raines*, *Chenoweth*, *Campbell*, and other congressional standing cases. Members of Congress acting in their official capacity are not like private parties. As we noted in *Chenoweth*, the idea that "congressional and private plaintiffs should be treated alike for the purpose of determining their standing" is "untenable" after the Supreme Court's decision in *Raines*. 181 F.3d at 114-15. Analogies to private injuries of private persons do not bear on our inquiry in congressional standing cases where the branches are suing each other. *See, e.g.*, *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring) ("[A] court will not decide a question unless . . . the *relationship between the parties* [is] such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed.") (emphasis added).

The analogy between Section 2954 and private informational harms fails because members of Congress are not acting as private persons when exercising official, legislative powers, such as investigating the Executive Branch.

* * *

Section 2954 cannot create a so-called "informational right" in members of Congress because the investigative powers of Congress belong to the House and the Senate

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committee). An injury cannot be "personal" and "individual" if it is extinguished when a member leaves office.

as an adjunct of their legislative powers and may not be delegated to individual members. Interpreting Section 2954 to allow congressional standing in a suit against an executive branch agency strays far afield of the historical understanding of the "Cases" and "Controversies" cognizable by the Article III courts.

IV.

Within the Constitution's carefully calibrated structure of separated powers, the expansion of one federal power inevitably distorts the others. The panel's assertion of jurisdiction to decide this lawsuit not only exceeds the Article III limits on the federal courts, but it also implicates additional constitutional concerns that cannot be swept under the rug. *Contra Maloney*, 984 F.3d at 69 ("Nor does this case implicate any potentially special circumstances."). The Supreme Court has cautioned that courts must scrutinize novel attempts by Congress to enlist the courts in disputes against the Executive. *See Mazars*, 140 S. Ct. at 2033-34 (rebutting the conclusion of the D.C. Circuit that a subpoena for the President's papers presented "no direct interbranch dispute"); *id.* at 2036 (concluding that the courts of appeal "did not take adequate account" of the "special concerns regarding the separation of powers"). In that vein, I highlight some of the constitutional concerns implicated by allowing standing to members of Congress in informational disputes with executive agencies.

First, this case pits Congress and the President against each other. Although the panel majority places weight on the fact that this is "not a suit against the President or a claim for information from him," *Maloney*, 984 F.3d at 69, the Members requested information

about the former President's lease with GSA and potential conflicts of interest. And while this lawsuit is nominally between members of Congress and the GSA, these parties are simply subcomponents of Congress and the Executive. An investigation of the President by Congress may present the most profound separation of powers concerns, but the balance of power may be unsettled even in a less direct "clash between rival branches of government over records of intense political interest for all involved." *Mazars*, 140 S. Ct. at 2034.

Second, allowing standing for members of Congress to sue the Executive for information would substantially and unnecessarily change the "'established practice' of the political branches." *Id.* (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014)). Committees, subcommittees, and individual members of Congress frequently request information or documents from executive branch agencies. Such requests are ordinarily dealt with through negotiation and the give and take between the branches. *See id.* at 2029. Indeed, despite the thousands of requests by members of Congress that sally forth each year to executive branch agencies and officials, plaintiffs can identify no case, and I am aware of none, allowing a member of Congress to sue an executive agency for the failure to release documents pursuant to such a request.[8] If individual members of Congress can bring such lawsuits in the federal courts,

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[8] That includes requests under Section 2954, which has never been successfully invoked in litigation since its passage in 1928. One district court, in a decision later vacated as moot, allowed such a suit to go forward, *Waxman v. Evans*, 2002 WL 32377615 (C.D. Cal. Jan. 18, 2002), *rev'd and vacated*, 52 F. App'x 84 (9th Cir. 2002). The only other case to consider the question of standing under Section

"[i]nstead of negotiating over information requests, Congress could simply walk away from the bargaining table and compel compliance in court." *Mazars*, 140 S. Ct. at 2034. Nothing in the Constitution's text or structure or our historical practice suggests that members of Congress can resort to the courts in order to shake documents loose from the Executive Branch.

Moreover, in the disputes between the political branches Congress is already vested with substantial powers to pressure the Executive to disclose information. Congress may conduct oversight hearings, drawing attention to problems of administration. Congress may reduce or eliminate agency funding, or it may create or abolish programs. Congress may eliminate the statutory authority of an agency or mandate specific agency actions by statute. Congress may impeach and remove executive branch officials and may create new offices within the Executive Branch. The existence of these and other formidable powers strongly weighs against judicial review of ordinary informational disputes. Having delegated substantial authority and discretion to agencies, members of Congress understandably seek new ways to hold those agencies accountable. But Congress may provide accountability only through the exercise of its legislative powers.[9] It cannot dragoon the federal courts into its investigations.

2954 held that the legislators had no standing to sue. *Waxman v. Thompson*, 2006 WL 8432224, at *6-12 (C.D. Cal. July 24, 2006).

[9] The Constitution vests the President with all executive power and therefore responsibility and accountability for the execution of the laws. U.S. CONST. art. II, § 1. Agency accountability to Congress exists only as an incident of the legislative power.

Third, finding disputes under Section 2954 to be justiciable encourages congressional aggrandizement because Congress may deputize small subgroups of members to conduct investigations, not through the traditional legislative process, but through the federal courts. Empowered cabals may thus take aim at executive branch agencies.[10] Ordinary political squabbling will now entitle members of Congress to proceed to court. The Executive Branch then must face not one political rival, Congress, but countless combinations of lawmakers, as Section 2954 requires only seven members of a 45-person House committee or five members of a 14-person Senate committee. Furthermore, the panel majority's reasoning provides no limit to Congress' ability to assign such legislative powers to even smaller groups or a single member. Consequently, members of Congress may enlist the courts in their political conflicts and strategically threaten executive agencies with protracted litigation.

Finally, dispersing the investigative power to small groups of representatives or senators who may then bring lawsuits allows Congress to duck responsibility for oversight and investigations. While the House and

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[10] The Framers of the Constitution frequently expressed concern about legislation by "cabal" or "junto," by which small self-interested groups could corrupt the legislative power. *See* Rao, *supra*, at 29-30; *see also* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 376-77 (Gaillard Hunt & James Brown Scott eds., 1987) (warning of dangers by a "juncto" if a small number of legislators were permitted to govern); THE FEDERALIST NO. 55, at 288 (James Madison) (George W. Carey & James McClellan eds., 2001) ("[I]n all cases, a certain number at least seems to be necessary . . . to guard against too easy a combination for improper purposes.").

the Senate regularly delegate authority to committees and subcommittees, the hierarchical structure of those committees creates a certain type of accountability in the leadership of the House and Senate. If Section 2954 creates standing, a few representatives or senators on their respective committees need not persuade the chairman or a committee majority; instead they need just a few likeminded and zealous members willing to go to court to obtain information from the Executive. Allowing standing could be "ruinous" and "[j]udicial enforcement of requests under § 2954 will allow the minority party (or even an ideological fringe of the minority party) to distract and harass Executive agencies and their most senior officials." *Maloney*, 984 F.3d at 75 (Ginsburg, J., dissenting). The panel's decision not only empowers small groups of lawmakers, it also frees House and Senate leadership from taking responsibility for their more fractious members or from being tasked with negotiating the requests of such members with the Executive Branch.

The legislative power often expands in imperceptible ways. As James Madison warned, Congress ultimately has the upper hand and can "mask under complicated and indirect measures, the encroachments which it makes on the coordinate departments." THE FEDERALIST NO. 48, at 257 (James Madison) (George W. Carey & James McClellan eds., 2001). Allowing standing under Section 2954 both empowers individual legislators and expands the reach of congressional investigations, while at the same time undermining Congress' responsibility and accountability for incursions against the Executive. Such aggrandizement without accountability contravenes the Constitution's vesting of the legislative,

executive, and judicial powers in three separate and distinct departments of the federal government.

* * *

By holding that Section 2954 creates an informational right that may give rise to standing for members of Congress against the Executive Branch, this court has conscripted the Judiciary in an inter-branch dispute far afield of the traditional domain of the Article III courts. For the foregoing reasons, I respectfully dissent from the denial of rehearing en banc.

GINSBURG, *Senior Circuit Judge*, statement regarding the court's denial of *en banc* review:

Today the court declines to rehear a panel decision holding a nearly century-old statute, 5 U.S.C. § 2954, never before successfully invoked in court, grants any seven members of the House Oversight Committee a personal right to investigate the Executive—a right they have standing to enforce in court. Until now, before going to court, Committee Members seeking to force an Executive Branch official to produce documents had to get the full Committee to approve and, if that was not enough, get the House to issue a subpoena, which is enforceable in court. *See Comm. on Judiciary of U.S. House of Representatives v. McGahn*, 968 F.3d 755, 764-66 (D.C. Cir. 2020) (en banc). In the panel majority's view, that is not, and for a century has not been, necessary: When seven Members of the Committee request documents pursuant to this statute, they are acting—oxymoronically—on their own behalf "to inform and equip them *personally* to fulfill their professional duties *as Committee members*." *Maloney v. Murphy*, 984 F.3d 50, 64 (D.C. Cir. 2020) (emphasis added). Therefore, the plaintiff-Members here each suffered a *personal* injury when the General Services Administration limited his or her ability to peruse Executive Branch files for any "conflict of interest, mismanagement, or irregularity in federal contracting" and hence to recommend remedial legislation.

As explained in my dissent, *Id.* at 70-76, the panel's decision flies in the face of the Supreme Court's clear teaching that "individual members lack standing to assert the institutional interests of a legislature." *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct.

1945, 1950, 1953-54 (2019) (citing *Raines v. Byrd*, 521 U.S. 811, 829 (1997)). The upshot of this judicial affrontery is that a few members of the Oversight Committee can wield the investigative powers of the House and prevent a majority of the Committee and of the House from blocking an ill-advised lawsuit. As the district court said, it will subject the Executive to "the caprice of a restless minority of Members," *Cummings v. Murphy*, 321 F. Supp. 3d 92, 115 (D.D.C. 2018), who may represent no more than "an ideological fringe of the minority party." *Maloney*, 984 F.3d at 76 (Ginsburg, J., dissenting). This is sure to have ruinous consequences for the orderly functioning of government; it will require the courts to referee the daily disagreements, sure to multiply under this ruling, that arise over the production of documents to the Congress. For these reasons, I believe the *en banc* court should vacate the panel's opinion and affirm the judgment of the district court rather than burden the Supreme Court with the obvious necessity of doing so.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 17-cv-02308 (APM)

ELIJAH E. CUMMINGS, ET AL., PLAINTIFFS

v.

EMILY W. MURPHY, ADMINISTRATOR,
GENERAL SERVICES ADMINISTRATION, DEFENDANT

Filed: Aug. 14, 2018

MEMORANDUM OPINION

I. INTRODUCTION

This case concerns an agency's refusal to produce records in response to what is referred to in political parlance as a "Seven Member Rule" request. That moniker derives from the "Seven Member Rule," which is embodied in 5 U.S.C. § 2954. Adopted by Congress in 1928, section 2954 provides in pertinent part that, upon request of the Committee on Oversight and Government Reform of the U.S. House of Representatives ("the House Oversight Committee"), "*or of any seven members thereof*," an Executive agency "shall submit any information requested of it relating to any matter within the jurisdiction of the committee." 5 U.S.C. § 2954 (emphasis added). The Seven Member Rule thus provides a statutory mechanism for members of the

minority party to obtain records from the Executive Branch to support the Committee's oversight function.

Plaintiffs here are seventeen minority members of the House Oversight Committee who have made several Seven Member Rule requests of the General Services Administration ("GSA") for information relating to GSA's management of its lease agreement with Trump Old Post Office LLC.[1] That lease agreement granted Trump Old Post Office LLC—an entity owned by President Donald J. Trump, his daughter Ivanka Trump, and his sons, Donald, Jr., and Eric Trump—the rights to develop and convert the Old Post Office building in Washington, D.C., into the Trump International Hotel. In early January 2017, GSA produced records that were responsive to Plaintiffs' initial requests. Since President Trump's inauguration, however, GSA has disclosed no additional information about the Old Post Office lease agreement in direct response to Plaintiffs' subsequent Seven Member Rule requests. Plaintiffs brought this action against GSA's Administrator to compel compliance with their Seven Member Rule requests.

Before the court is Defendant's Motion to Dismiss and Plaintiffs' Cross-Motion for Summary Judgment. For the reasons stated below, the court concludes that these Plaintiffs, as individual members of the House Oversight Committee, lack standing to bring this action. Thus, the court grants Defendant's Motion to Dismiss

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[1] Plaintiffs are Ranking Member Elijah E. Cummings and Members Carolyn Maloney, Eleanor Holmes Norton, William Lacy Clay, Stephen Lynch, Jim Cooper, Gerald Connolly, Robin Kelly, Brenda Lawrence, Bonnie Watson Coleman, Stacey Plaskett, Val Demings, Raja Krishnamoorthi, Jamie Raskin, Peter Welch, Matt Cartwright, and Mark DeSaulnier. *See generally* Compl., ECF No. 1.

under Federal Rule of Civil Procedure 12(b)(1) and denies Plaintiffs' Cross-Motion for Summary Judgment.

II. BACKGROUND

A. Statutory Background

Congress enacted the Seven Member Rule in 1928 as part of an Act containing only three sections, the first two of which are pertinent here. *See* Act of May 29, 1928, ch. 901, 45 Stat. 986. Section 1 of the Act repealed 128 mandatory reporting statutes that obligated federal agencies to submit periodic reports to Congress. *See id.* § 1, 45 Stat. at 986-96. Congress repealed these requirements, because it deemed the reports to no longer "serve [a] useful purpose," as the reports proved to be labor intensive but ultimately "useless" in their utility. *See* H.R. Rep. No. 70-1757, at 3, 6 (1928); *see also id.* at 6 ("The departmental labor in preparation is a waste of time and the files of Congress are cluttered up with a mass of useless reports."). Section 2 of the Act replaced this mandatory, reports-based model of disclosure with a request-driven process. *See* Act of May 29, 1928, ch. 901, § 2, 45 Stat. 986, 996. Section 2 is now codified at 5 U.S.C. § 2954, which provides in relevant part: "An Executive agency, on request of the Committee on Government Operations of the House of Representatives [today, the House Committee on Oversight and Government Reform], or of any seven members thereof . . . shall submit any information requested of it relating to any matter within the jurisdiction of the committee." 5 U.S.C. § 2954.[2] Thus, instead of requiring mandatory reporting by Executive

[2] A 1995 statute requires that references to the House Committee on Government Operations in earlier laws "be treated as referring

agencies, section 2 provided a mechanism by which the House Oversight Committee and its members could obtain information by making a specific demand for information.

Section 2954 plainly gives members of the House Oversight Committee the right to request information from Executive agencies, so long as the information sought falls within the Committee's jurisdiction and at least seven members join in the request. That much is clear. Section 2954's legislative history, however, reveals some ambiguity as to the statute's reach. *See generally* Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 Duke L.J. 323, 362-64 (2002). Part of the legislative history suggests that Congress intended to limit the scope of a request made under section 2954 to information contained in the abolished regular reports that Executive agencies previously had sent to Congress. *See* H.R. Rep. No. 70-1757, at 6 ("To save any question as to the right of the House of Representatives to have furnished any of the information contained in the reports proposed to be abolished, a provision has been added to the bill requiring such information. . . . "). But other portions of the legislative history suggest no such limitation. For instance, both the House and Senate Reports provide that, "[i]f *any information* is desired by any Member or committee upon a particular

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to the [House] Committee on Government Reform and Oversight," References in Laws to Committees and Officers of the House of Representatives, Pub. L. No. 104-14, § 1(a)(6), 109 Stat. 186 (1995), the name of which was changed in 2007 to the Committee on Oversight and Government Reform by House resolution, *see* Pls.' Cross-Mot. for Summ. J. & Opp'n to Def.'s Mot. to Dismiss, ECF No. 11, Pls.' Mem. in Supp., ECF No. 11-1, at 1 n.1; *cf.* Def.'s Mot. to Dismiss, ECF No. 8, Def.'s Mem. of P. & A., at 1 n.1.

subject that information can be better secured by a request made by an individual Member or committee, so framed as to bring out the special information desired." *Id.* (emphasis added); S. Rep. No. 70-1320, at 4 (1928) (emphasis added). Thus, hidden behind the seemingly straightforward and broad statutory language of section 2954 is legislative history that leaves some uncertainty as to the precise scope of demandable information. *See* Fisher, *supra*, at 363.

B. Factual Background

Now, spring forward 85 years. On August 5, 2013, GSA entered into a lease agreement with Trump Old Post Office LLC, a company owned by now President Donald J. Trump, his daughter Ivanka Trump, and his sons, Donald, Jr., and Eric Trump. Compl., ECF No. 1, ¶ 10. The lease agreement permitted the company to develop and convert the Old Post Office on Pennsylvania Avenue in Northwest Washington, D.C., into the Trump International Hotel. *See id.* As relevant here, Article 37.19 of the lease agreement provides:

> No member or delegate to Congress, or elected official of the Government of the United States or the Government of the District of Columbia, shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom.

Id. ¶ 11. It is probably safe to say that when GSA and Trump Old Post Office LLC entered into the lease agreement in August 2013, few would have anticipated that, within years, Article 37.19 would become central to a controversy between the political branches of the federal government.

On November 8, 2016, Donald J. Trump was elected President of the United States. On November 30, 2016, House Oversight Committee Ranking Member Elijah Cummings, joined by three other Representatives, sent a letter to then GSA Administrator Denise Turner Roth requesting unredacted copies of lease documents, monthly and annual statements from Trump Post Office LLC, and a briefing. *Id.* ¶ 13. On December 14, 2016, they sent another letter to GSA requesting similar records. *See id.* ¶ 14. On December 22, 2016, Ranking Member Cummings, joined by 10 other members of the House Oversight Committee, sent a third letter to GSA that specifically invoked the Seven Member Rule and demanded unredacted documents and expense reports related to the Old Post Office lease agreement. *See id.* ¶ 15. By letter dated January 3, 2017, GSA responded to these demands and produced the requested records, including amendments to the lease, a 2017 budget estimate, and monthly income statements. *Id.* ¶ 16; *see also id.* (noting that in the letter, GSA Associate Administrator Lisa A. Austin stated that the production was "[c]onsistent with the Seven Member Rule and judicial and Department of Justice, Office of Legal Counsel opinions" (alteration in original)).

Upon his inauguration on January 20, 2017, President Trump became an "elected official of the Government of the United States." *See id.* ¶¶ 11, 18. Recall, Article 37.19 of the Old Post Office lease provides that "[n]o . . . elected official of the Government of the United States . . . shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom." *Id.* ¶ 11. Yet, according to Plaintiffs, neither President Trump nor his children have divested their in-

terests in Trump Old Post Office LLC. *Id.* ¶ 18. Concerned about potential conflicts of interest, Ranking Member Cummings, along with the same three Representatives who joined in the first two requests, sent a letter to then GSA Acting Administrator Timothy Horne on January 23, 2017, asking GSA:

> (a) to explain the steps that GSA had taken, or planned to take, to address President Trump's apparent breach of the lease agreement; (b) to state whether GSA intended to notify President Trump's company that it is in breach; (c) to provide the monthly reports President Trump's company submits to the GSA on the Trump International Hotel's revenues and expenses; (d) to explain and provide documentation of the steps GSA had taken, or planned to take, to address liens against the Trump International Hotel; and (e) to provide copies of all correspondence with representatives of President Trump's company or the Trump transition team.

Id. ¶ 19. GSA did not comply with the request. *Id.* ¶ 20. Instead, by letter dated February 6, 2017, GSA Acting Associate Administrator Saul Japson promised that "[s]hould the [House Oversight Committee] or any seven members thereof submit a request pursuant to 5 U.S.C. § 2954, GSA will review such a request." *Id.*

Members of the House Oversight Committee took Japson up on his invitation. On February 8, 2017, Ranking Member Cummings, joined by seven other committee members—all Democrats in the minority—sent a letter to Horne demanding the same documents related to the Old Post Office lease and, this time, specifically invoking section 2954. *Id.* ¶ 21. GSA did not respond to the February 8th letter. *Id.* ¶ 22. It did, however,

issue two important public statements in the months that followed. First, on March 23, 2017, GSA issued a letter from a contracting officer asserting that Trump Old Post Office LLC was in full compliance with Article 37.19 of the lease. *Id.* ¶ 23. Second, in testimony before the House Committee on Appropriations in May 2017, Horne announced that GSA would comply with oversight requests from Democrats if joined by a Republican Chair of a committee. *Id.* ¶ 24. Horne did not acknowledge the Seven Member Rule in his testimony. *Id.*

Thereafter, Ranking Member Cummings and other minority members of the House Oversight Committee continued their pursuit of records. By letter dated June 5, 2017, Ranking Member Cummings, now joined by 17 other House Oversight Committee members (collectively "Plaintiffs"),[3] renewed the demand for records made in the February 8th letter and requested additional records, including documents "containing legal interpretations of Section 37.19 of the Old Post Office lease" and "relating to funds received from any foreign country, foreign entity, or foreign source." *Id.* ¶ 25. In this letter, Plaintiffs also asserted that GSA's failure to provide the requested information violated section

[3] In both the June 5, 2017, letter referenced above, as well as the July 6, 2017, letter discussed below, Ranking Member Cummings was joined by 17 other minority members of the House Oversight Committee—only 16 of whom are Plaintiffs in this action. *Compare* Compl., *with* Pls.' Cross-Mot. for Summ. J. & Opp'n to Def.'s Mot. to Dismiss, ECF No. 11, Exs. 9–10, ECF Nos. 11-11 and 11-12. By collectively referring to the authors of these letters as "Plaintiffs," the court only intends to refer to those committee members named in this action, *see generally supra* note 1 (listing Plaintiffs).

2954; was "inconsistent with prior practices of both Republican and Democratic administrations and of GSA's prior practice to honor requests made under the Seven Member Rule"; and "thwart[ed] the ability of Committee members to carry out their congressionally-delegated duty to perform oversight." *Id.* Once more, GSA provided no response. Undeterred, on July 6, 2017, Plaintiffs sent a third letter demanding a response to their previous requests. *See id.* ¶ 26.

GSA responded in writing to this third demand, but produced no records. By letter dated July 17, 2017, GSA Associate Administrator P. Brennan Hart, III denied Plaintiffs' request, citing a recent Office of Legal Counsel ("OLC") memorandum. *Id.* ¶ 27. Quoting from the OLC memorandum, Hart's letter states that "[i]ndividual members of Congress, including ranking minority members, do not have authority to conduct oversight in the absence of a specific delegation by a full house, committee, or subcommittee," and that "the Executive Branch's longstanding policy has been to engage in the established process for accommodating congressional requests for information only when those requests come from a committee, subcommittee, or chairman authorized to conduct oversight." *Id.* (alteration in original); *see also* Pls.' Cross-Mot. for Summ. J. & Opp'n to Def.'s Mot. to Dismiss, ECF No. 11 [hereinafter Pls.' Cross-Mot.], Ex. 11, ECF No. 11-13. The OLC memorandum did not, however, address requests made under section 2954. Compl. ¶ 28; *see also* Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch, 2017 WL 5653624 (O.L.C. May 1, 2017). Three days later, on July 20, 2017, the White House changed course. It sent a letter to Senator Charles Grassley,

stating that "the OLC opinion '*does not* set forth Administration policy' and that '[t]he Administration's policy is to respect the rights of all individual Members, regardless of party affiliation, to request information about Executive branch policies and programs.'" Compl. ¶ 29 (alteration in original) (emphasis added).

Notwithstanding this stated position, GSA still has yet to produce any records in direct response to Plaintiffs' Seven Member Rule requests. *See id.* ¶ 30. Instead, GSA has announced, apparently for the first time in this litigation, that it will treat Plaintiffs' requests as if made under the Freedom of Information Act ("FOIA"). *See* Def.'s Mot. to Dismiss, ECF No. 8, Def.'s Mem. of P. & A. [hereinafter Def.'s Mem.], at 10; Hr'g Tr., ECF No. 19, at 11. Not surprisingly, Plaintiffs are not satisfied with production pursuant to FOIA. *Cf.* Hr'g Tr. at 54-56.

C. Procedural Background

Plaintiffs commenced this action against GSA's Administrator on November 2, 2017. *See generally* Compl. In their Complaint, Plaintiffs assert that Defendant's refusal to provide the requested information regarding GSA's implementation of the Old Post Office lease agreement with Trump Old Post Office LLC thwarts Plaintiffs' ability to:

> (a) evaluate the propriety of GSA's failure to enforce Article 37.19 of the lease which, by its express terms, forbids President Donald Trump, an "elected official of the Government of the United States," from benefiting from the lease in any way;
>
> (b) evaluate GSA's oversight of the lease, including financial management of the lease;

> (c) ascertain the amount of income from the lease benefiting President Donald Trump, his daughter Ivanka Trump, and his sons Donald, Jr., and Eric Trump;
>
> (d) determine the extent to which Trump Old Post Office LLC has received funds from foreign countries, foreign entities, or other foreign sources;
>
> (e) assess whether GSA's failure to act is based on a new interpretation of Article 37.19 of the lease, and if so, to review the legal opinion or opinions on which the new interpretation is based;
>
> (f) evaluate whether the GSA contracting officer's decision that the Trump Old Post Office LLC is in compliance with the lease was free from inappropriate influence; and
>
> (g) recommend to the [House Oversight] Committee, and to the House of Representatives, legislative and other actions that should be taken to cure any existing conflict of interest, mismanagement, or irregularity in federal contracting.

Id. ¶ 36. Plaintiffs seek a declaration that Defendant's failure to provide the requested information violates section 2954, and ask the court to order Defendant to produce the requested information without redactions. *See id.* ¶¶ 6, 30-31; *see also id.* at 13-14. As the statutory basis for their claims, Plaintiffs rely on the Administrative Procedure Act, 28 U.S.C. §§ 701 *et seq.*; the Mandamus Act, *see* 28 U.S.C. § 1361; the All Writs Act, 28 U.S.C. § 1651; and the Declaratory Judgment Act, *see* 28 U.S.C. §§ 2201-2202. *See* Compl. ¶¶ 6, 31-35.

On January 8, 2018, Defendant moved to dismiss the case pursuant to Federal Rules of Civil Procedure

12(b)(1) and 12(b)(6). *See* Def.'s Mem. Defendant makes four separate arguments in her Motion to Dismiss. First, Defendant contends that Plaintiffs' claims must be dismissed for lack of subject-matter jurisdiction under Rule 12(b)(1) because Plaintiffs, as individual Members of Congress, lack standing to vindicate the institutional interests of Congress as a whole. *Id.* at 1, 11-23. Second, Defendant argues that the court should dismiss Plaintiffs' claims under Rule 12(b)(6) for failure to state a claim, because neither section 2954 nor the other statutes on which Plaintiffs base their claims provide a cause of action. *Id.* at 2, 23-35. Third, Defendant maintains that the court should decline to hear this case under principles of equitable discretion. *Id.* at 35-36. And, finally, Defendant asserts that even if the court were to reach the merits, Plaintiffs' claims still fail, because their demands for records fall outside the scope of section 2954. *See id.* at 2-3, 36-39. As to this final argument, Defendant submits the term "any information" in section 2954 does not really mean "*any* information," but rather any information "contained in the agency reports that Congress abolished in 1928," *id.* at 39. Because the information that Plaintiffs requested is not covered by one of those 128 reports, Defendant argues, Plaintiffs have failed to state a violation of section 2954 in this case. *See id.*; *see also* Def.'s Reply & Opp'n to Pls.' Cross-Mot. for Summ. J., ECF No. 14, at 26-27.

Plaintiffs opposed Defendant's Motion on February 5, 2018, and simultaneously moved for summary judgment on the merits of their claims pursuant to Rule 56. *See generally* Pls.' Cross-Mot., Pls.' Mem. in Supp., ECF 11-1 [hereinafter Pls.' Mem.]. Plaintiffs maintain

that section 2954 unambiguously requires GSA to provide the requested information about GSA's implementation of the Old Post Office lease, as such information falls squarely within the House Oversight Committee's jurisdiction and more than seven members have joined in the request. *See id.* at 5, 12-13, 20-21.

The court held oral argument on the parties' motions on July 12, 2018. Those motions are now ripe for consideration.

III. LEGAL STANDARD

Because standing implicates the court's subject-matter jurisdiction, *see Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015), the court first must consider Defendant's motion to dismiss under Rule 12(b)(1), *see Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 430-31 (2007) ("[A] federal court generally may not rule on the merits of a case without first determining that it has . . . subject-matter jurisdiction[ ]. . . . "); *Conference of State Bank Supervisors v. Office of Comptroller of Currency*, No. 17-cv-0763, 2018 WL 2023507, at *3 (D.D.C. Apr. 30, 2018) ("A motion to dismiss for lack of standing proceeds under Rule 12(b)(1) because 'the defect of standing is a defect in subject matter jurisdiction.'" (quoting *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987)).

When evaluating a Rule 12(b)(1) motion, the court "must . . . 'accept all [well-pleaded] factual allegations in [the] complaint as true.'" *Jerome Stevens Pharm., Inc. v. Food & Drug Admin.*, 402 F.3d 1249, 1253-54 (D.C. Cir. 2005) (third alteration in original) (quoting *United States v. Gaubert*, 499 U.S. 315, 327 (1991)). Additionally, the court may consider materials

outside the pleadings "as it deems appropriate to resolve the question whether it has jurisdiction to hear the case." *Scolaro v. D.C. Bd. of Elections & Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000); *see also Herbert v. Nat'l Acad. of Scis.*, 974 F. 2d 192, 197 (D.C. Cir. 1992) ("[W]here necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."). The plaintiff bears the burden of establishing that the court has subject-matter jurisdiction. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

IV. DISCUSSION

The threshold—and, ultimately, dispositive—issue in this case is whether Plaintiffs, as individual members of the House Oversight Committee, have standing to sue GSA to produce the records requested under section 2954.

The doctrine of standing derives from Article III, section 2, of the U.S. Constitution, which limits the jurisdiction of federal courts to "Cases" or "Controversies." U.S. Const. art. III, § 2; *Lujan*, 504 U.S. at 560. The standing inquiry focuses on whether the plaintiff is the proper party to bring an action. *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015). "[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers," *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)), and "the proper—and properly limited—role of the courts in a democratic society," *Warth v. Seldin*, 422 U.S. 490, 498 (1975). These concerns "are particularly acute" where, as here, "a legislator attempts to bring an

essentially political dispute into a judicial forum." *Chenoweth v. Clinton*, 181 F.3d 112, 114 (D.C. Cir. 1999).

"The 'irreducible constitutional minimum of standing contains three elements': [1] injury in fact, [2] causation, and [3] redressability." *Arpaio*, 797 F.3d at 19 (quoting *Lujan*, 504 U.S. at 560). At issue in this case is the first prong of the standing analysis—whether Plaintiffs have suffered a legally cognizable injury in fact. There is no dispute as to the other two. To establish an injury in fact, a plaintiff must demonstrate that the alleged injury is "personal, particularized, concrete, and otherwise judicially cognizable." *Raines*, 521 U.S. at 820. With respect to these first two requirements, the Supreme Court has "consistently stressed that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Id.* at 819. As to the last two requirements, the Court has emphasized that the plaintiff must have suffered "an invasion of a legally protected interest which is . . . concrete," *id.* (quoting *Lujan*, 504 U.S. at 560), and that the dispute must be one "traditionally thought to be capable of resolution" by the courts, *id.* (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)).

Although these general standing principles frame the question presented here, the outcome of the case in large part turns on application of the Supreme Court's decision in *Raines v. Byrd*. The court therefore starts with a detailed discussion of *Raines* before addressing the parties' specific arguments.

A. *Raines v. Byrd*

In *Raines*, six individual Members of Congress sued the Secretary of Treasury and the Director of the Office of Management and Budget seeking a declaration that the Line Item Veto Act, which had passed both houses of Congress over the plaintiffs' "nay" votes, was unconstitutional. 521 U.S. at 814. The Act authorized the President to "cancel" certain spending and tax measures after signing a bill into law, unless the cancellation was subsequently overridden by Congress by joint resolution. *Id.* The Act also provided that any Member of Congress or individual adversely affected by the Act could bring an action challenging any provision of the Act as unconstitutional. *Id.* at 815-16. The plaintiffs filed suit under that provision, claiming that the Act constituted an unconstitutional expansion of presidential authority and violated the requirements of bicameral passage and presentment by allowing the President alone "to cancel and thus repeal provisions of federal law." *Id.* at 816 (internal quotation marks omitted). They further alleged that the Line Item Veto Act injured them directly and concretely by:

> (a) alter[ing] the legal and practical effect of all votes they may cast on bills containing such separately vetoable items, (b) divest[ing] the [plaintiffs] of their constitutional role in the repeal of legislation, and (c) alter[ing] the constitutional balance of powers between the Legislative and Executive Branches, both with respect to measures containing separately vetoable items and with respect to other matters coming before Congress.

Id. (internal quotation marks omitted).

The defendants moved to dismiss for lack of jurisdiction, arguing that the plaintiffs did not have standing to sue. *Id.* Both parties also filed motions for summary judgment on the merits. *Id.* The district court denied the defendants' motion to dismiss and granted the plaintiffs' summary judgment motion, holding that the Line Item Veto Act was unconstitutional. *Id.* On direct appeal, the Supreme Court vacated the judgment of the district court, *see id.* at 817-18, holding that the plaintiffs lacked Article III standing because they "[did] not have a sufficient 'personal stake' in th[e] dispute and ha[d] not alleged a sufficiently concrete injury," *id.* at 830. In finding no "legislative standing," *see id.* at 820, the Court distinguished two prior cases in which it had determined that legislators did have standing to bring suit: *Powell v. McCormack*, 395 U.S. 486 (1969), and *Coleman v. Miller*, 307 U.S. 433 (1939). *See Raines*, 521 U.S. at 820-26.

Starting with *Powell*, the Court explained that the *Raines* plaintiffs did not possess what was present in *Powell*: a sufficiently *personal* injury. *See Raines*, 521 U.S. at 821. In *Powell*, the U.S. House of Representatives refused to seat the plaintiff, Adam Clayton Powell, Jr., for making false reports about travel expenses and diverting House funds to his wife in the form of illegal salary payments. 395 U.S. at 490, 492-93. Powell challenged the constitutionality of his exclusion (and his consequent loss of salary), arguing that the House could not prevent a duly elected person from taking his seat for any reason other than the failure to meet the age, citizenship, and residence requirements contained in Article I, section 2, of the Constitution—"requirements the House specifically found Powell met." *Id.* at 489. The Supreme Court ultimately held that Powell's challenge

presented an Article III case or controversy. *See id.* at 495-96, 512, 517-18, 549-50.

In *Raines*, the Court distinguished its decision in *Powell* on two key grounds, which merit quotation in full:

> *Powell* does not help [plaintiffs]. **First**, [plaintiffs] have not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies. Their claim is 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. **Second**, [plaintiffs] do not claim that they have been deprived of something to which they *personally* are entitled—such as their seats as Members of Congress after their constituents had elected *them*. Rather, [plaintiffs'] claim of standing is based on a loss of political power, not loss of any private right, which would make the injury more concrete. Unlike the injury claimed by Congressman Adam Clayton Powell, the injury claimed by the Members of Congress here is not claimed in any private capacity but solely because they are Members of Congress. If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. The claimed injury thus runs (in a sense) with the Member's seat, a seat which the Member holds (it may quite arguably be said) as trustee for his constituents, not as a prerogative of personal power.

Raines, 521 U.S. at 821 (first and second emphases added) (citations omitted).

The Court then proceeded to distinguish its prior decision in *Coleman v. Miller*, which the Court characterized as "[t]he one case in which we have upheld standing for legislators (albeit *state* legislators) claiming an institutional injury." *Raines*, 521 U.S. at 821. In *Coleman*, 20 of Kansas' 40 state senators voted not to ratify the proposed "Child Labor Amendment" to the Federal Constitution. 307 U.S. at 435-36. The vote deadlocked, such that the amendment ordinarily would not have been ratified. *Id.* at 436. To break this tie, the Lieutenant Governor, the presiding officer of the State Senate, cast a vote in favor of the amendment, and the amendment was deemed ratified (after the State House of Representatives voted to ratify it). *Id.* The 20 state senators who had voted against the amendment, joined by another state senator and three members of the State House of Representatives, challenged the right of the Lieutenant Governor to cast the deciding vote, and sought a writ of mandamus to compel state officials to recognize that the legislature had not in fact ratified the amendment. *Id.* The Supreme Court held that the 20 state senators who had voted against the amendment had standing to sue because their "votes against ratification [had] been overridden and virtually held for naught although . . . their votes would have been sufficient to defeat ratification." *Id.* at 438. Because the state senators had "a plain, direct and adequate interest in maintaining the effectiveness of their votes," the Court held that the plaintiffs had standing. *See id.* at 437-38.

In *Raines*, the Court explained that a key factor of its decision in *Coleman* was that the senators' "votes not to ratify the amendment were deprived of all validity."

Raines, 521 U.S. at 823. The Court in *Raines* then explicitly limited the scope of its holding in *Coleman*:

> It is obvious, then, that our holding in *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 have been *completely nullified*.

Id. (emphasis added); *accord Chenoweth*, 181 F.3d at 116-17; *see also Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000) (characterizing *Coleman* as "a very narrow possible . . . exception to *Raines*").

With the reach of *Coleman* now limited, the Court concluded that the *Raines* plaintiffs' claim "obvious[ly]" did not fall within its holding in *Coleman*, because the plaintiffs did not allege "that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated." *Raines*, 521 U.S. at 824. To the contrary, the plaintiffs' votes on the Line Item Veto Act "were give full effect," but the plaintiffs "simply lost that vote." *Id.* Similarly, the Court reasoned that the plaintiffs could not allege that the Act would "nullify their votes in the future in the same way that the votes of the *Coleman* legislators had been nullified," *id.*, because the *Raines* plaintiffs had a sufficient legislative remedy, *see id.* (noting that Congress could still pass or reject appropriations bills, or even repeal the Act or exempt a given appropriations bill or provision therein from its reach); *see also Campbell*, 203 F.3d at 22-23. Furthermore, while the plaintiffs attempted to shoehorn their case into the *Coleman* mold by suggesting that the Line Item Veto Act

reduced the "effectiveness," "meaning," and "integrity" of their votes by allowing the President to cancel certain spending projects, the court rejected this argument. *Raines*, 521 U.S. at 825. Instead, the Court found that there was "a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power" alleged in *Raines*. *Id.* at 826. Thus, the Court ultimately refused to extend *Coleman* to uphold standing for the plaintiffs in *Raines*. *Id.*

The Court did not end its analysis there, however. It went on to find that "historical practice appear[ed] to cut against" the plaintiffs, as well. *See id.* The Court explained that in several similar disputes between one or both Houses of Congress and the Executive Branch, neither branch of government had brought suit based on a claimed injury to official authority or power. *Id.* at 826-28. Based on that history, the Court reasoned, a system in which the judiciary waded in to resolve such claims "is obviously not the regime that has obtained under our Constitution to date," which "contemplates a more restricted role for Article III courts." *Id.* at 828.

In light of the foregoing analysis, the Court ultimately held that the individual Members of Congress in *Raines* lacked standing to sue because they "alleged no injury to themselves as individuals (contra, *Powell*), the institutional injury they allege[d] [was] wholly abstract and widely dispersed (contra, *Coleman*), and their attempt to litigate this dispute at this time and in this forum [was] contrary to historical experience." *Id.* at 829. Importantly, the Court also identified several other factors that it found relevant to its decision. For instance, the Court "attach[ed] some importance" to the

fact that the plaintiffs "ha[d] not been authorized to represent their respective Houses of Congress in this action, and indeed, both Houses actively oppose[d] their suit." *Id.* Additionally, the Court noted that its holding "neither deprive[d] Members of Congress of an adequate remedy . . . nor foreclose[d]" the possibility of a future constitutional challenge in court, as long it was brought by someone "who suffer[ed] judicially cognizable injury." *Id.* at 829-30.

* * *

To summarize, the following principles emerge from *Raines*. Individual Members of Congress generally do not have standing to vindicate the institutional interests of the house in which they serve. This means that Members of Congress may go to court to demand something to which they are privately entitled, *see Powell*, 395 U.S. 486, but they cannot claim harm suffered solely in their official capacities as legislators that "damages all Members of Congress and both Houses of Congress equally," *see Raines*, 521 U.S. at 821, 829; *cf. Arizona*, 135 S. Ct. at 2664. Otherwise, to establish standing under *Raines*, individual Members of Congress alleging *institutional* injury must, at the very least, assert an injury that is neither "wholly abstract" nor "widely dispersed." *Walker v. Cheney*, 230 F. Supp. 2d 51, 64 (D.D.C. 2002) (quoting *Raines*, 521 U.S. at 829).

Complete vote nullification is clearly a type of an institutional injury sufficient to support legislator standing. *See Raines*, 521 U.S. at 826 ("There is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of legislative power

that is alleged here."); *id.* at 829 (explaining that the "institutional injury" alleged by the plaintiffs was "wholly abstract and widely dispersed (contra, *Coleman*)"). What is less clear, however, is whether vote nullification is the *only* type of institutional injury that grants *individual legislators* standing to seek redress consistent with *Raines*. Courts in this District have recognized, at least implicitly, that other types of institutional injuries can be redressed by Article III courts. Those cases, however, have arisen almost exclusively in the subpoena enforcement context and have involved circumstances in which the plaintiff was a congressional committee that was "duly authorized" to bring suit by House resolution. *See, e.g.*, *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 14, 20-22 (D.D.C. 2013); *Comm. on Judiciary v. Miers*, 558 F. Supp. 2d 53, 71 (D.D.C. 2008). In those cases, courts have found congressional authorization to be the "key" distinguishing factor, "mov[ing] th[e] case from the impermissible category of an individual plaintiff asserting an institutional injury" in *Raines* "to the permissible category of an institutional plaintiff asserting an institutional injury." *Miers*, 558 F. Supp. 2d at 71; *accord Holder*, 979 F. Supp. 2d at 14, 20-22; *cf. U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 67, 71-72 (D.D.C. 2015) (noting in a case involving an appropriations challenge to the Affordable Care Act that the plaintiff was the "House of Representatives, duly authorized to sue as an institution, not individual members as in *Raines*," which the court found to be a "critical" distinction).

This case then presents a unique factual circumstance. Individual Members of Congress are seeking to vindicate a statutory right to information and to compel the production of records from the Executive Branch

without authorization from the institution to do so. Do they have standing consistent with *Raines*? The court now turns to answer that question.

B. Application of *Raines*

1. Does the Statutory Right Here Make This Case Different From Raines*?*

To begin, Plaintiffs contend that this case falls outside of *Raines*, because the informational injury they assert is sufficient to confer standing under the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). *See* Pls.' Mem. at 23-25. According to Plaintiffs, the denial of information requested under section 2954 itself constitutes an injury in fact, as the Supreme Court "has often held that deprivation of a statutory right to access to information constitutes injury." *Id.* at 24.

To be sure, the Supreme Court in *Spokeo* recognized that the deprivation of a statutory right to information can be a sufficiently personal, particularized, and concrete injury. *See* 136 S. Ct. at 1548; *id.* at 1549-50 (citing *FEC v. Akins*, 524 U.S. 11, 20-25 (1998); and *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989)); *see also Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016) (explaining that the deprivation of a statutory right to information constitutes a "sufficiently concrete and particularized" injury where the plaintiff "suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure"). This is true even when a statute broadly confers a general right to access to information on "any person." *See Akins*, 524 U.S. at 19-21, 24-25 (holding that a group of voters' "inability to obtain information"

subject to public disclosure under the Federal Election Campaign Act constituted an "injury in fact"); *cf. Public Citizen*, 491 U.S. at 447-50 (holding that two advocacy organizations had standing to sue the Department of Justice for refusal to provide information subject to disclosure under the Federal Advisory Committee Act because they had suffered "a sufficiently distinct injury"). Plaintiffs therefore are correct that individuals may sustain an injury in fact when they are denied a statutory right to information. *See Spokeo*, 136 S. Ct. at 1549-50; *see also Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp.*, 879 F.3d 339, 343-44 (D.C. Cir. 2018).

But *Spokeo* also made clear that the mere denial of a statutory right does not automatically give rise to a cognizable injury in fact for purposes of Article III standing. The Court stated:

> Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation.

Spokeo, 136 S. Ct. at 1549; *see also id.* at 1547-48 ("[I]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." (quoting *Raines*, 521 U.S. at 820 n.3)). *Spokeo* itself cites to *Raines*, in which the Court refused to recognize standing even though Congress had specifically granted Members the statutory right to challenge the constitutionality of the Line Item Veto Act. *See Raines*, 521

U.S. at 815-16, 829-30. Thus, the mere fact that Plaintiffs here have been denied a statutory right to information conferred by the Seven Member Rule cannot alone resolve the standing question.

The other Supreme Court decisions on which Plaintiffs rely—*Akins* and *Public Citizen*—do not compel a different result. *See* Pls.' Mem. at 24-25. In both cases, the statutes at issue entitled members of the public, not Members of Congress, to request agency records. *See Akins*, 524 U.S. at 19; *Public Citizen*, 491 U.S. at 446-47. Also, in both cases the suits were "*brought by private parties, not government officials*, and thus involved injuries in which the plaintiffs (having no official, governmental interests) had only a personal stake." *Walker*, 230 F. Supp. 2d at 66 n.10 (emphasis added). Thus, the personal/institutional injury distinction made in *Raines*, which rests at the heart of this case, had no application in either *Akins* or *Public Citizen*. Therefore, it is not simply enough for this particular group of plaintiffs to point to an informational injury arising from an unmet statutory demand to demonstrate standing. They must establish standing consistent with *Raines*.

2. Plaintiffs Allege Institutional, Not Personal, Injury

The parties here agree on one thing about *Raines*: In cases such as this one, where suit is brought by individual Members of Congress, *Raines* establishes a binary rubric of potential injuries for purposes of assessing standing. Stated more simply, they agree that the alleged injury in such cases is either personal or institutional. *See* Def.'s Mem. at 15-22; *cf.* Pls.' Mem. at 27; Hr'g Tr. at 28-29. Where the parties part ways,

however, is in characterizing the type of injury Plaintiffs claimed to have suffered here.

Defendant contends that GSA's non-response to Plaintiffs' Seven Member Rule requests is not an injury that is personal to Plaintiffs. Rather, when Plaintiffs seek information from the Executive Branch pursuant to section 2954, Defendant argues, "they do so exclusively in their capacities as members of the Oversight Committee" for "the benefit of the entire House." Def.'s Mem. at 15. Defendant notes that, just as in *Raines*, if Plaintiffs were to retire tomorrow, they would no longer be entitled to request information under section 2954. *Id.* at 16. Plaintiffs push back on this logic, arguing that the injury they allege is sufficiently personal and particularized as to them as minority members of the House Oversight Committee whose Seven Member Rule requests were denied. Pls.' Mem. at 27-28. The fact that they suffered injury in their official capacities as legislators, Plaintiffs insist, does not disqualify the injury as one that is sufficiently personal to them. *Id.* Notably, only one other federal court has addressed this issue, and it ruled that individual members of the House Oversight Committee did not suffer a personal injury when their Seven Member Rule request went unanswered. *See Waxman v. Thompson ("Waxman II")*, No. 04-03467, 2006 WL 8432224, at *6-12 (C.D. Cal. July 24, 2006).

This court agrees with Defendant and the court in *Waxman II* that Plaintiffs did not suffer a "personal" injury, as the term is used in *Raines*, by GSA's failure to produce documents in response to their Seven Member Rule requests. Plaintiffs' injury arises not "in any private capacity," but "solely because they are Members

of Congress." *Raines*, 521 U.S. at 821. Plaintiffs' Complaint makes this clear, as it characterizes their injury as a "depriv[ation] . . . of information to which they are entitled by law" under section 2954 as a group of at least seven members of the House Oversight Committee. Compl. ¶ 36; *see id.* ¶ 31. Indeed, Plaintiffs tie their injury directly to their constitutional duties as legislators, claiming their alleged harm to be the "impedance of the oversight and legislative responsibilities that have been delegated to them by Congress." *Id.* ¶ 36; *see also* Pls.' Mem. at 22 (describing Plaintiffs' injury as "the deprivation of information to which they are entitled by law and that they need *in order to perform their congressionally-delegated oversight function*" (emphasis added)). Thus, Plaintiffs do not assert a loss of any "private right." *See Raines*, 521 U.S. at 821. Additionally, just as in *Raines*, "[i]f one of the [Plaintiffs] were to retire tomorrow, he would no longer have a claim." *Id.* The alleged injury therefore "runs (in a sense) with the [Plaintiff's] seat," which is not held "as a prerogative of personal power." *Id.*[4]

Notwithstanding these parallels to *Raines*, Plaintiffs insist that they have suffered a "personal" injury. *See generally* Pls.' Mem. at 22–29. According to Plaintiffs,

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[4] As the court in *Waxman II* observed, "[t]he right does not, strictly speaking, 'run' with the seat, since a successor to one of the named plaintiffs might not be named to the [House Oversight] Committee, or if designated a member of that committee, might not join in a request for information," and "[s]uch a member would not have standing to challenge the denial of his or her predecessor's records request." 2006 WL 8432224, at *8 n.26. Nevertheless, if a plaintiff in this case were to retire, the claim as to that plaintiff would not survive his or her retirement. *See id.* at *8.

Raines' definition of personal injury does not exclude injury suffered in legislators' official capacities, because *Raines* reaffirms *Powell* and *Coleman* and thus makes clear that "legislators have standing to bring suit where an injury is personal to them, even when their injury is inextricably tied to their positions as members of the legislature." *Id.* at 27; *see also id.* at 28 ("[I]n *Powell* and *Coleman*, the Court clearly understood the 'personal injury' element to require only that the injury be suffered by an identifiable party rather than the institution itself, and not that the right infringed must be 'personal' in the sense of being private."). Plaintiffs therefore contend that their asserted injury is "personal" to them as individual members of the House Oversight Committee who joined in the Seven Member Rule requests, even if the informational right is suffered in their official capacities as legislators and thus not personal in the sense of being "private." *See id.* at 27-28.

Try as they may, Plaintiffs cannot shape their claimed harm into the type of "personal" injury recognized in *Raines* as sufficient to confer standing on an individual Member of Congress. That conclusion is clear in light of the *Raines* Court's distinguishing of *Powell*. In *Powell*, the underlying question was whether Adam Clayton Powell, Jr., an American citizen having met the age and residency requirements laid out in the Constitution and having been elected to the U.S. House of Representatives, had a right to be seated despite the House of Representative's refusal to seat him. *See* 395 U.S. at 489. The Court in *Raines* described Powell's claim as asserting a "private right," that is, the right to be seated in the House as a result of his election by his constituents. *See* 521 U.S. at 821. By contrast, the Court continued, the plaintiffs in *Raines* had not been "deprived

of something to which they *personally* are entitled"; rather, their injury was claimed "not . . . in any private capacity but solely because they [were] Members of Congress." *Id.* So, too, here. Plaintiffs' rights under the Seven Member Rule derive solely from their membership in the House of Representatives and, even more specifically, their assignment to the House Oversight Committee. Again, if a Plaintiff here were to lose her seat, she likewise would lose all rights under the Seven Member Rule.

Plaintiffs further argue that the informational injury they suffered is personal because, "in sharp contrast to *Raines*, . . . all Members of Congress of both Houses [do not] share this injury 'equally,' which is how *Raines* defined 'institutional injury.'" Pls.' Mem. at 27 (quoting *Raines*, 521 U.S. at 821). But in *Raines*, the Court merely observed that the plaintiffs there, unlike Powell, had "not been singled out for specially unfavorable treatment" and, in that sense, had asserted "a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally." *Raines*, 521 U.S. at 821. The same is true here. Plaintiffs have not been "singled out for specially unfavorable treatment" like Adam Clayton Powell. Rather, their claimed injury is institutional because it is rooted in a right granted to them as Members of Congress. True, the deprivation of that right is not necessarily shared "equally" by "every member of the Committee, let alone every member of the House or Congress." *See* Pls.' Mem. at 24, 27. Thus, in some sense, Plaintiffs' injury as seventeen members of the House Oversight Committee who joined in the Seven Member Rule requests is more particularized than the injury in *Raines*. But the

fact that all Members might not share in the informational harm Plaintiffs claim is not *the* distinguishing feature between a personal and institutional injury under *Raines*. As the foregoing discussion makes clear, the *Raines* Court distinguished the injury asserted in *Powell* not only because the *Raines* plaintiffs suffered an injury that "necessarily damages all Members of Congress . . . equally," but also because they failed to claim that they had been "deprived of something to which they *personally* are entitled," which would have made the injury "more concrete." *Raines*, 521 U.S. at 821. In other words, the Court did not suggest that an injury qualifies as "personal" simply because it is not shared equally by every other Member of Congress. *See Walker*, 230 F. Supp. 2d at 64, 66-68. Thus, the fact that Plaintiffs' injury is more particularized than the plaintiffs' injury in *Raines* does not render Plaintiffs' injury analogous to the one suffered by Powell. *Cf. Common Cause v. Biden*, 909 F. Supp. 2d 9, 24 (D.D.C. 2012) (noting that in order to qualify for the *Powell* "exception[]" to the legislative standing doctrine announced in *Raines*, individual Congress members must have been "*individually* deprived of something they are *personally* entitled to" (emphases added)).

Nor does *Coleman* help Plaintiffs to define their injury as "personal" in nature. Admittedly, like the plaintiffs in *Coleman* who were found to have standing, Plaintiffs here assert injury arising in their official capacities. But the parallel goes no further. The *Raines* Court cited *Coleman* as an exception to the general rule that institutional injury cannot confer standing upon an individual Congress member, and not as an example of a case in which a legal interest stemming from a plain-

tiff's official status as a legislator can give rise to a *private* injury. *See Raines*, 521 U.S. at 821 ("The one case in which we have upheld standing for legislators . . . claiming an *institutional* injury is *Coleman*. . . . " (emphasis added)). Furthermore, the Court strictly cabined this exception in *Raines*, requiring complete vote nullification. *Id.* at 823-24; *accord Chenoweth*, 181 F.3d at 116-17; *accord Campbell*, 203 F.3d at 22-23. Vote nullification is not at issue here.

The foregoing conclusions are consistent with another decision from this District Court, *Walker v. Cheney*. There, the court held that the Comptroller General of the United States lacked standing to sue to enforce a request to Vice President Dick Cheney for information regarding the National Energy Policy Development Group ("NEPDG"). *See* 230 F. Supp. 2d at 52-53. The Comptroller General, as the head of the General Accounting Office and an agent of Congress, has authority under various statutes to carry out investigations for the benefit of Congress. *See id.* at 53-54. When the requested records were not forthcoming, the Comptroller General sued Vice President Cheney, NEPDG's Chair. *Id.* at 53, 58. The *Walker* court held that the Comptroller General lacked standing, in part because he had failed to show any harm suffered in a private sense. *Id.* at 65-66, 74. While the "Vice President's refusal to disclose the requested documents may have frustrated plaintiff in his efforts to fulfill his statutory role," the court found that "plaintiff himself ha[d] no personal stake in th[e] dispute." *Id.* at 66. The plaintiff did not claim that he had "been deprived of something to which he personally [was] entitled." *Id.* (cleaned up) (quoting *Raines*, 521 U.S. at 821). Rather, his interest in the dispute was "solely institutional, relating exclusively to

his duties in his official capacity as Comptroller General of the United States." *Id.*

Like the Comptroller General, Plaintiffs here have not "been deprived of something to which [they] *personally* are entitled," *Raines*, 521 U.S. at 821, and thus lack a personal stake in this dispute. Their interests in this action—gaining access to information related to GSA's lease with Trump Old Post Office LLC in order to carry out their oversight responsibilities—relate "exclusively to [their] duties in [their] official capacit[ies] as" members of the House Oversight Committee. *See Walker*, 230 F. Supp. 2d at 66. Thus, because Plaintiffs only allege harm stemming from their official status as legislators, as opposed to injury suffered in their private capacities, Plaintiffs fail to allege sufficiently personal injury under *Raines*.

3. Plaintiffs' Claimed Institutional Injury Is Insufficient to Confer Standing

Because Plaintiffs fail to assert a personal injury, the question remains whether they have suffered the type of *institutional* injury that is sufficient to confer standing. *See* Hr'g Tr. at 28-29 (arguing that even if the court characterizes Plaintiffs' injury as institutional in nature, their injury is distinguishable from the harm asserted in *Raines* because it is sufficiently concrete and particularized to Plaintiffs). That question raises a threshold issue: Does *Coleman* provide the only exception to *Raines*' general prohibition of legislator standing to assert institutional injuries? If the answer is "yes," as Defendant claims, then the court's standing analysis is relatively simple, as Plaintiffs clearly do not fit the narrow *Coleman* exception. If the answer is "no," however, that invites two questions: What other

types of institutional injuries are sufficiently concrete and particularized to pass muster under *Raines*, and does Plaintiffs' claimed injury here fit that bill?

As the discussion suggests, the answer to these questions is not clear. Far from it. *See generally* Matthew I. Hall, *Making Sense of Legislative Standing*, 90 S. Cal. L. Rev. 1 (2016). On the one hand, Circuit precedent appears to lend some support to Defendant's argument that complete vote nullification is the one and only exception to the general rule in *Raines* that individual legislators lack standing to assert institutional injuries. *See* Def.'s Mem. at 15, 17-18; *see also* Anthony Clark Arend & Catherine B. Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 Harv. J.L. & Pub. Pol'y 209, 273 (2001) ("[T]he D.C. Circuit has seemed to acknowledge that a nullification of a vote is the *only* basis for legislator standing."). For example, in its most recent case on the subject, the D.C. Circuit characterized *Coleman* as "a soft spot in the legal barrier against congressional legal challenges to executive action" and "the very narrow possible . . . exception to *Raines*." *Campbell*, 203 F.3d at 21, 23.

At the same time, however, all of the relevant cases in this jurisdiction that have referenced and distinguished *Coleman* as a narrow and unmet exception—including *Campbell*—have involved, like *Raines*, an alleged dilution of voting power. *See Campbell*, 203 F.3d at 19-20, 22 (noting, in suit challenging an executive order that directed the U.S. armed forces' participation in NATO airstrikes in Yugoslavia without congressional authorization, that the plaintiff congressmen "sought to fit within the *Coleman* exception to the *Raines* rule" by

"specifically defeating the War Powers Resolution authorization by a tie vote and by defeating a declaration of war"); *cf. Chenoweth*, 181 F.3d at 113, 116-17 (explaining that the plaintiffs' claim of standing was predicated on theory that by introducing a particular initiative via executive order rather than statute, the President denied them "their constitutionally guaranteed responsibility of open debate and vote on issues and legislation," thereby "diminish[ing] their power as Members of Congress," and holding that such theory did not satisfy *Coleman*'s vote nullification standard); *Common Cause*, 909 F. Supp. 2d at 14, 23, 24-27 (holding that House Representative plaintiffs failed to satisfy "*Coleman* exception" in suit challenging the Senate's Cloture Rule on grounds that it prevented a simple majority in the Senate from closing debate on and passing certain legislation, thereby nullifying the votes personally cast by plaintiffs in favor of such legislation).

The alleged injury in this case, by contrast, is "the deprivation of information to which [Plaintiffs] are entitled by law and that they need in order to perform their congressionally-delegated oversight function" as members of the House Oversight Committee. Pls.' Mem. at 22; *see* Compl. ¶ 36. Thus, at least on the facts presented here, whether *Coleman*'s complete nullification standard represents the only exception to *Raines*' general prohibition on suits alleging institutional injury—or whether *Raines* permits a legislator to assert other institutional injuries that are sufficiently concrete and particularized—is arguably an open question. *See Walker*, 230 F. Supp. 2d at 66-68 (reasoning that any possible *institutional* injury to Congress' legislative and oversight functions caused by Executive's failure to

produce records was too "vague and amorphous" to confer standing under *Raines*, without any mention of *Coleman*).[5]

This court is not of the view that complete vote nullification is the *only* instance in which an individual legislator can assert institutional injury consistent with *Raines*. As discussed above, because the plaintiffs in *Raines* claimed that they had an adequate interest in maintaining the "effectiveness of their votes" like the plaintiffs in *Coleman*, *Raines* arguably left open the question whether individual Members of Congress have standing to assert other types of institutional injuries outside the vote dilution context. The Court seemed to suggest as much when, in closing, it observed that "the institutional injury [the plaintiffs] allege is wholly abstract and widely dispersed (contra, *Coleman*)." *Raines*, 521 U.S. at 829. Might a claimed institutional injury that is *neither* "wholly abstract" *nor* "widely dispersed" suffice to confer standing on an individual Member of Congress?

Arguably, this is such a case. Section 2954 is unique in that it grants a statutory right to seven members of the House Oversight Committee—a true minority (seven Members) of a minority of the House of Representatives

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[5] *See generally Hall*, *supra*, at 4, 23 (arguing that "confusion and inconsistency in legislative standing doctrine" is attributable to the doctrine's use in "a multitude of distinct and unrelated types of claims that have little in common other than the presence of a legislative litigant," and further noting that the Supreme Court "has never mustered a majority definitively to explain the continuing relevance of *Coleman* or the principles that guide the determination of which institutional injuries can be litigated, and by whom").

(those Members on the Oversight Committee)—to request and receive information from an Executive agency, provided that information falls within the Committee's jurisdiction. The denial of a Seven Member Rule request, although not a personal injury, is a more particularized type of institutional injury than a general diminution of legislative power, such as the dilution of the efficacy of Congress members' votes (e.g., *Raines*) or the deprivation of their right to participate and vote in manner prescribed by the Constitution (e.g., *Chenoweth*). Those types of injuries, by definition, affect all Members *equally*. Here, by contrast, not every Member even possesses the right to make a Seven Member Rule request—only a small percentage do and, even then, it must be a collective demand. So, the injury brought upon by a denial of a Seven Member Rule request cannot genuinely be said to apply equally to all Members. It falls specifically on the Members that made the demand and therefore is not "widely dispersed."

Additionally, the rejection of a Seven Member Rule request is more concrete than, say, again, a claim of vote dilution. Courts have not, for instance, doubted in the congressional subpoena enforcement context that the Executive Branch's refusal to produce records is a sufficiently concrete injury. *See, e.g.*, *Miers*, 558 F. Supp. 2d at 71; *see also Holder*, 979 F. Supp.

2d at 20–22. At least in terms of concreteness, it is hard to conceive of a material difference between this case—a suit to enforce a congressional records demand—and a subpoena enforcement case—a suit to enforce a congressional records demand. Thus, to the extent that *Raines* demands that an individual Member of Congress have an

injury that is both concrete and particularized to vindicate an institutional injury, this case bears those characteristics in a way that other cases post-*Raines* have not.[6] Accordingly, the court finds that Plaintiffs have made a stronger case than the plaintiffs in *Raines* that they have suffered the type of institutional injury that could potentially establish Article III standing.

But that is not the end of the analysis. The Court in *Raines* instructed that, when evaluating the standing of a Member of Congress, courts also must consider "historical experience," 521 U.S. at 829, as well as several other factors, including whether the Member has been "authorized to represent" the house of Congress in which she serves and the availability of an "adequate remedy," *see id. Accord Walker*, 230 F. Supp. 2d at 64-65, 68-74. Here, these additional considerations all weigh heavily against recognizing standing in this case.

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[6] The court recognizes that *Walker*, a case that also involved an effort to enforce a congressional demand for documents from the Executive Branch, came to a different conclusion on institutional injury. *See* 230 F. Supp. 2d at 66-68. But *Walker* can be distinguished, at least in part, based on *who* made the records demand. There, the demand for information from the Executive Branch was made by "an agent of the Legislative Branch," the Comptroller General, who is the head of the General Accounting Office. *Id.* at 53. This "subservient" relationship to Congress is the difference between *Walker* and this case. *See id.* at 66 (citing *Bowsher v. Synar*, 478 U.S. 714, 730 (1986)). By virtue of Congress' principal-agent relationship with the Comptroller General, the injury in *Walker* was shared equally by all Members of Congress, as it was the institution's agent who was thwarted in his records demand. Here, by contrast, there is no agency relationship between Plaintiffs, individually or collectively, and the House of Representatives or the House Oversight Committee. Their injury is particular to them, not the institution through its agent as in *Walker*.

As discussed in further detail below, the absence of any historical precedent for enforcing Seven Member Rule demands in federal court, the lack of authorization from the House of Representatives to bring suit, and the availability of political avenues of redress, all compel the conclusion that Plaintiffs—although perhaps suffering a more particularized and concrete institutional injury than the plaintiffs in *Raines*—lack standing to bring this action.

a. Historical Practice

In *Raines*, the Supreme Court looked to "historical practice to determine whether the claims [the] plaintiffs asserted in that case were the sort that had traditionally been adjudicated by Article III courts." *Waxman II*, 2006 WL 8432224, at *13 (citing *Raines*, 521 U.S. at 826-29); *see also Walker*, 230 F. Supp. 2d at 70-74 (conducting similar analysis). Like the plaintiffs in *Raines*, what Plaintiffs here ask of the court is "contrary to historical experience." *See Raines*, 521 U.S. at 829. First, as a general matter, inter-branch disputes have typically been resolved through the political process. *See Chenoweth*, 181 F.3d at 113-14 ("Historically, political disputes between Members of the Legislative and Executive Branches were resolved without resort to the courts."); *cf. Raines*, 521 U.S. at 826 ("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."). Plaintiffs' suit therefore runs against the strong current of history.

Second, when courts have entered the fray to resolve informational disputes between the political branches,

they have done so exclusively in the context of subpoena enforcement actions. *See Waxman II*, 2006 WL 8432224, at *16 (noting that such cases merely suggest that "as a matter of historical practice, federal courts have adjudicated informational disputes between the executive and legislative branches only when one of the Houses of Congress has sought their intervention," not that courts "should act when individual Members file suit"); *see, e.g.*, *Holder*, 979 F. Supp. 2d 1; *Miers*, 558 F. Supp. 2d 53. As discussed in more detail in the next section, the majority consent required to bring such actions makes those cases materially different than this one.

Third, there is almost no historical precedent for Members of Congress to even *attempt* to enforce unmet Seven Member Rule demands through the federal courts. The parties have identified only two other cases in the 90-year history of section 2954 like this one. *See Waxman v. Evans* ("*Waxman I*"), No. 01-4530, 2002 WL 32377615 (C.D. Cal. Jan. 18, 2002), *rev'd and vacated*, 52 F. App'x 84 (9th Cir. 2002) (vacating ruling in favor of legislator-plaintiffs); *Waxman II*, 2006 WL 8432224, at *6-12 (holding that committee members lacked standing); *see also id.* at *13-14 (noting that, prior to *Waxman I*, only two cases "even mentioned the statute," and that, "if anything," those cases suggested "that [it] has *not* been the practice" for "the executive and legislative branches to resort to the courts when they dispute the proper scope of disclosure under § 2954," because in each case, "FOIA, rather than § 2954, was invoked"). This complete dearth of Seven Member Rule enforcement proceedings over a 90-year period is strong evidence that, historically, the proper solution has been a political and not a judicial one. *See* Hr'g Tr. at 54 (noting that in the past, the political

branches have worked out document requests "simply by sitting down and talking," even in "controversial disputes, like Whitewater or the savings [and] loan controversy").

In sum, "[a]n analysis of historical precedent does not turn the standing assessment in [Plaintiffs'] favor by demonstrating a judicially cognizable injury." *Walker*, 230 F. Supp. 2d at 70.

b. Lack of Authorization

Equally significant is Plaintiffs' lack of authorization to bring this action. At the end of its opinion in *Raines*, the Court noted that it "attach[ed] some importance to the fact that [the plaintiffs] ha[d] not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose[d] their suit." 521 U.S. at 829. Since *Raines*, courts have treated authorization by the whole to bring suit as a significant factor in the standing analysis.

Take *Committee on the Judiciary v. Miers*, for example. In that case, the House Committee on the Judiciary sued to compel senior presidential aides to testify and produce a privilege log in response to a congressional subpoena *after* the House passed a resolution authorizing the committee to seek civil enforcement of its subpoena authority. *See Miers*, 558 F. Supp. 2d at 55-64. There, the court held that the House Judiciary Committee had standing "to enforce its duly issued subpoena through a civil suit." *Id.* at 68. Importantly, the court found that *Raines* did not undermine the D.C. Circuit's decision in *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976), a case in which the chairman of a subcommittee was authorized to intervene on behalf of the House

to defend the institution's interest in compliance with a duly issued congressional subpoena. *Miers*, 558 F. Supp. 2d at 68-70; *see also AT&T*, 551 F.2d at 391 ("It is clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf."). The *Miers* court reasoned that unlike in *Raines*, where "*individual* Members sought to ameliorate Congress's *institutional* injury without the consent of the institution itself," the chairman in *AT&T* "represented the *institution* and sought to remedy a potential *institutional* injury." *Miers*, 558 F. Supp. 2d at 70. The court also distinguished its prior decision in *Walker*, explaining that "all of the missing factors identified in *Walker* [were] present" in *Miers*, including a congressional subpoena and authorization from the full House for the suit. *Id.* Indeed, "the fact that the House ha[d] issued a subpoena and explicitly authorized th[e] suit" was "the *key factor* that move[d] th[e] case from the impermissible category of an individual plaintiff asserting an institutional injury (*Raines*, *Walker*) to the permissible category of an institutional plaintiff asserting an institutional injury ([*AT&T*], . . .)." *Id.* at 71 (emphasis added). Other decisions likewise emphasize the importance of authorization to bring suit as a key component of standing. *See Holder*, 979 F. Supp. 2d at 21 ("[T]he House of Representatives has specifically authorized the initiation of this action to enforce the subpoena. Twice. Thus, *Raines* is entirely distinguishable from the situation at hand. . . . "); *cf. Burwell*, 130 F. Supp. 3d at 67 ("But the plaintiff here is the House of Representatives, duly authorized to sue as an institution, not individual members as in *Raines*.").

None of this is meant to suggest that authorization to sue, by itself, is enough to confer standing. *See Raines*,

521 U.S. at 829 (expressly declining to decide whether the plaintiffs would have had standing if they had received authorization); *United States v. Windsor*, 570 U.S. 744, 790-91 (2013) (Scalia, J., dissenting) (rejecting as a basis for standing the notion that "a bare majority of both Houses could bring into court the assertion that the Executive's implementation of welfare programs is too generous—a failure that no other litigant would have standing to complain about"). But there are good reasons for courts to look to the presence of authorization as a necessary, even if not sufficient, factor in evaluating standing in cases that pit the Executive and Legislative Branches against one another.

First, an affirmative vote to sue ensures that "the Judiciary's power [is kept] within its proper constitutional sphere." *Raines*, 521 U.S. at 820. Indeed, the Supreme Court has emphasized that the standing inquiry must be "especially rigorous when reaching the merits of a dispute would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government" is unlawful. *Id.* at 819-20. Insisting on approval from the institution as a whole ensures that only fully considered inter-branch conflicts enter the judicial realm. *See id.* at 820 n.3, 829 (stating that, as a general matter, a legislative enactment granting a particular plaintiff the

right to sue "significantly lessens the risk of unwanted conflict with the Legislative Branch when that plaintiff brings suit," but ultimately attaching "some importance" to absence of congressional authorization where plaintiffs were individual Members of Congress). Additionally, requiring authorization protects Congress' institutional

concerns from the caprice of a restless minority of Members.[7] As the D.C. Circuit explained in *AT&T*, a resolution by the entire legislative body prevents a "wayward committee [from] acting contrary to the will of the House" and safeguards against "aberrant subcommittee or committee demands." *See* 551 F.2d at 393 & n.16 (citing *Wilson v. United States*, 369 F.2d 198 (1966)). And, as the Supreme Court has observed since *Raines*, where individual Members of Congress "fail[] to prevail in their own Houses" by receiving authorization to file suit, "the suitors [cannot] repair to the Judiciary to complain." *Arizona*, 135 S. Ct. at 2664.

In this case, Plaintiffs did not secure approval from the full House before bringing suit—indeed, they did not even try to. *See* Hr'g Tr. at 33-34. That fact not only carries "some importance" and therefore counsels against recognizing standing, *see Raines*, 521 U.S. at 829, but it also distinguishes this case from *Miers*, *Holder*, and *Burwell*—the *only* cases that have recognized legislative standing to vindicate an institutional injury that does not satisfy the narrow *Coleman* standard. In other words, while there is some authority in this Circuit that supports the proposition that "*a House of Congress or committee of Congress* would have standing to sue to retrieve information to which it is entitled," *Walker*, 230 F. Supp. 2d at 68 (emphasis added) (citing cases); *see supra* (discussing *Miers* and *Holder*)—there is no authority that recognizes an *individual* Member of Congress' right to do the same.

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[7] The court does not suggest that the Plaintiffs here are so motivated.

Recognizing this weakness, Plaintiffs insist that they have been "duly authorized" to bring this suit by virtue of Congress' enactment of section 2954 itself. Pls.' Mem. at 25 n.10. The mere adoption of section 2954 cannot, however, carry the weight that Plaintiffs accord it. It is a dubious proposition that, when Congress adopted the Seven Member Rule 90 years ago, it meant the statute to be an unqualified grant of permission for as few as seven members of the House Oversight Committee to bring suit against the Executive Branch any time those members were dissatisfied with a document production. *See Walker*, 230 F. Supp. 2d at 69-70 (stating that the "highly generalized allocation of enforcement power" given to the Comptroller General "twenty-two years ago hardly gives this Court confidence that the current Congress has authorized this Comptroller General to pursue a judicial resolution of the specific issues affecting the balance of power between the Article I and Article II Branches"). Nothing about the text or history of section 2954 supports such an interpretation.[8] Indeed, Plaintiffs' view, if accepted, would have profound consequences for the balance of powers between the political branches, as it would mean that a small group of congressmen could initiate an inter-branch

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[8] The court also notes that treating section 2954 as a blanket authorization for minority members of the Oversight Committee to sue would seem to conflict with current House Rules regarding the enforcement of a subpoena issued by the Committee itself. *See* Rule XI, cl. 2(m)(1)-(3), Rules of the House of Representatives, https://rules.house.gov/sites/republicans.ruleshouse.gov/files/115/PDF/House-Rules-115.pdf [hereinafter House Rules]. Under those rules, "[c]ompliance with a subpoena issued by a committee . . . may be enforced *only as authorized or directed by the House*." House Rule XI, cl. 2(m)(3)(C) (emphasis added).

conflict, even if the institution, speaking through a majority vote, opposes the confrontation. So, the court reads the Seven Member Rule only to allow what it plainly says: A minority group of Members of the House Oversight Committee may make a demand for information from an Executive agency. The Rule says nothing, however, about such a group's capacity to file suit to enforce the demand, let alone whether they could do so without the majority assent of their colleagues.[9] The absence of approval from the House to commence this suit to remedy an institutional injury therefore is fatal to Plaintiffs' assertion of standing.

c. Alternative Remedies

Finally, the Court in *Raines* buttressed its standing decision by noting that the plaintiffs there were not left without avenues of redress. They could, the Court observed, endeavor to "repeal the [Line Item Veto Act] or exempt appropriations bills from its reach." *Raines*, 521 U.S. at 829. The Circuit likewise has recognized that the availability of political solutions strongly militates against finding legislative standing to resolve a dispute between the political branches. *Cf. Campbell*,

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[9] Notably, Plaintiffs' assertion that they are "duly authorized" by statute—rather than by House Resolution as in *Miers*, *Holder*, and *Burwell*—conflicts with the Supreme Court's decision in *Raines*. There, the Court observed that the plaintiffs had not been "authorized to represent their respective Houses of Congress," *Raines*, 521 U.S. at 829, even though the Line Item Veto Act contained a general provision granting Congress members the right to challenge the Act's constitutionality. Thus, even if section 2954 contained a similar provision—which it does not, *see* 5 U.S.C. § 2954; Pls.' Mem. at 3 (conceding that section 2954 itself does not provide a private right of action)—such a provision would not serve as evidence that the current House of Representatives "authorized" Plaintiffs to file suit.

203 F.3d at 24 (emphasizing *Raines*' general focus on "the political self-help available to congressmen" and noting that *Raines* explicitly rejected argument that "legislators should not be required to turn to politics instead of the courts for their remedy").

Plaintiffs here have political tools available to them, too. For instance, Plaintiffs could attempt to convince a majority of their colleagues on the House Oversight Committee to join in their demand under section 2954 or, alternatively, to issue a subpoena for the documents, *see* Rule XI, cl. 2(m)(1)–(3), Rules of the House of Representatives, https://rules.house.gov/sites/republicans.rules.house.gov/files/115/PDF/House-Rules-115.pdf [hereinafter House Rules]. Presumably, with majority support from the Oversight Committee, GSA's refusal to produce documents would be met with greater political force. And, even if their Oversight Committee colleagues rejected their efforts, Plaintiffs could urge the House Bipartisan Legal Advisory Group to support litigation to enforce the Seven Member Rule requests.[10] According to Plaintiffs, they did not try this route. *See* Hr'g Tr. at 33-36. And of course there are other political levers at the House's disposal if Plaintiffs were able to convince a majority of their colleagues of the institutional importance of respecting a Seven Member Rule request. *See generally* Fisher, *supra* (listing various means by which Congress can obtain information from the Executive).

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[10] The Bipartisan Legal Advisory Group consists of the Speaker of the House and the majority and minority leaderships. House Rule II, cl. 8(b). According to House Rules, "[u]less otherwise provided by the House, the Bipartisan Legal Advisory Group speaks for, and articulates the institutional positions of, the House in all litigation matters." *Id.*

Admittedly, had these paths been readily available, Plaintiffs would not have filed this action. But the fact that a political remedy is hard to achieve does not automatically swing open the doors to the federal courts. *See Campbell*, 203 F.3d at 23-24 (broadly construing available options for political redress to even include "the possibility of impeachment should a President act in disregard of Congress' authority").

V. CONCLUSION

For the foregoing reasons, Plaintiffs lack standing under Article III to seek judicial enforcement of their requests for information from GSA under 5 U.S.C. § 2954. Accordingly, the court grants Defendant's Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1) and denies Plaintiffs' Cross-Motion for Summary Judgment.

A separate order accompanies this Memorandum Opinion.

Dated: Aug. 14, 2018

/s/ AMIT P. MEHTA
AMIT P. MEHTA
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 17-cv-02308 (APM)

ELIJAH E. CUMMINGS, ET AL., PLAINTIFFS

v.

EMILY W. MURPHY, ADMINISTRATOR,
GENERAL SERVICES ADMINISTRATION, DEFENDANT

Filed: Aug. 14, 2018

ORDER

For the reasons set forth in the court's Memorandum Opinion, ECF No. 20, Defendant's Motion to Dismiss, ECF No. 8, is granted, and Plaintiffs' Cross-Motion for Summary Judgment, ECF No. 11, is denied.

This is a final, appealable order.

Dated: Aug. 14, 2018

/s/ AMIT P. MEHTA
AMIT P. MEHTA
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.

ELIJAH E. CUMMINGS, CAROLYN MALONEY, ELEANOR HOLMES NORTON, WM. LACY CLAY, STEPHEN LYNCH, JIM COOPER, GERALD CONNOLLY, ROBIN KELLY, BRENDA LAWRENCE, BONNIE WATSON COLEMAN, STACEY PLASKETT, VAL DEMINGS, RAJA KRISHNAMOORTHI, JAMIE RASKIN, PETER WELCH, MATT CARTWRIGHT, AND MARK DESAULNIER, MEMBERS OF THE UNITED STATES HOUSE OF CIVIL ACTION NO. REPRESENTATIVES, COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES, COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM 2471 RAYBURN HOUSE OFFICE BUILDING WASHINGTON, D.C. 20515, PLAINTIFFS

v.

TIMOTHY O. HORNE, ACTING ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION

1800 F STREET, N.W. WASHINGTON, D.C. 20405, DEFENDANT

Filed: Nov. 2, 2017

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

1. This is an action by seventeen members of the Committee on Oversight and Government Reform of the United States House of Representatives to enforce their rights under 5 U.S.C. § 2954 to obtain records from the General Services Administration ("GSA"). The records at issue relate to GSA's implementation of the Old Post Office lease agreement with Trump Old Post Office LLC, a company owned by Donald Trump, his daughter Ivanka, and his sons Donald, Jr., and Eric. President Trump has refused to divest his ownership interest in the Trump Old Post Office LLC, even though the lease explicitly prohibits any "elected official of the Government of the United States" from taking or sharing in any benefit that "may arise" from the lease. President Trump's refusal to divest his ownership interest in a company that contracts with the federal government raises numerous issues requiring congressional oversight, including oversight of potential conflicts of interest, oversight of GSA's interpretation of the contract requirements, and oversight of GSA's ongoing management of the lease. The House of Representatives has delegated responsibility for overseeing the management of government operations, including operations of GSA, to the House Committee on Oversight and Government Reform and its members.

2. 5 U.S.C. § 2954, known as the "Seven Member Rule," provides: "An Executive agency, on request of the Committee on Government Operations of the House of Representatives [now the House Committee on Oversight and Government Reform], or of any seven members thereof . . . *shall submit* any information re-

quested of it relating to any matter within the jurisdiction of the committee." (Emphasis added.) The Seven Member Rule is a statutory delegation of broad investigatory authority by Congress, not just to the Committee on Oversight and Government Reform, but also to the Committee's members, so long as seven members join in a request.

3. On December 22, 2016, eleven members of the Committee on Oversight and Government Reform sent a letter to GSA requesting documents related to the Old Post Office lease under the Seven Member Rule. On January 3, 2017, GSA produced unredacted documents in response to that letter including amendments to the lease, the 2017 budget estimate, and monthly income statements. GSA stated that the production was being made "[c]onsistent with the Seven Member Rule."

4. Following the inauguration of President Trump, GSA's practice of honoring Seven Member Rule requests changed, but the rationale for the change has been shifting and contradictory. On January 23, 2017, Committee on Oversight and Government Reform Ranking Member Cummings and Committee on Transportation and Infrastructure Ranking Member Peter DeFazio, along with Representatives Gerald Connolly and André Carson, requested updated monthly expense reports, correspondence with representatives of President Trump's company, and other information from GSA relating to the Old Post Office lease. On February 6, 2017, GSA's Acting Associate Administrator declined to produce the information, but promised that "[s]hould the U.S. House of Representatives Committee on Oversight and Government Reform or any seven members thereof submit a request pursuant to 5 U.S.C.

§ 2954, GSA will review any such request." To follow up, on February 8, 2017, eight members of the Oversight Committee sent a letter demanding that GSA produce the requested information pursuant to the Seven Member Rule. GSA did not respond. On June 5, 2017, eighteen members of the Committee, including the plaintiffs in this action, again invoked the Seven Member Rule in a detailed letter to GSA Acting Administrator Timothy Horne, the defendant in this action, explaining that he and GSA had a legal obligation to provide the requested information and that the information is critical to the oversight responsibilities of the Committee and its members. GSA did not respond. On July 6, 2017, plaintiffs sent yet another letter under the Seven Member Rule to defendant Horne demanding a response to their prior letters. By letter dated July 17, 2017, GSA denied the request on the ground that the Administration would respond to "congressional requests for information only when those requests come from a committee, subcommittee or chairman authorized to conduct oversight."

5. GSA's refusal to comply with 5 U.S.C. § 2954 following the President's inauguration was a drastic departure from its position taken on January 3, 2017, and illustrates the need for Congress to conduct oversight of GSA's ability to manage a lease with the President.

6. Defendant Horne's refusal to comply with plaintiffs' requests violates his mandatory duty under Section 2954. The Administrative Procedure Act, 5 U.S.C. § 706, empowers this Court to "compel agency action unlawfully withheld or unreasonably delayed" and to "hold unlawful" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

law." Plaintiffs seek declaratory and injunctive relief directing the defendant Horne to carry out forthwith his mandatory duty under Section 2954 and provide information to plaintiffs. This Court is authorized to order the relief sought under 28 U.S.C. § 1361 (Mandamus), 28 U.S.C. § 1651 (All Writs Act); 5 U.S.C. §§ 701, 702, 703, 704 & 706 (the Administrative Procedure Act), and 28 U.S.C. §§ 2201 & 2202 (the Declaratory Judgment Act).

Jurisdiction

7. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1361.

Parties

8. Plaintiff Elijah E. Cummings is a duly elected Member of Congress from Maryland and is the Ranking Member of the House Committee on Oversight and Government Reform, the successor Committee to the House Committee on Government Operations. *See References in Law to Committees and Officers of the House of Representatives*, Pub. L. 104-14, § 1(6), 109 Stat. 186 (1995). Plaintiffs Carolyn Maloney, Eleanor Holmes Norton, William Lacy Clay, Stephen Lynch, Jim Cooper, Gerald Connolly, Robin Kelly, Brenda Lawrence, Bonnie Watson Coleman, Stacey Plaskett, Val Demings, Raja Krishnamoorthi, Jamie Raskin, Peter Welch, Matt Cartwright, and Mark DeSaulnier, are duly elected Members of Congress and are members of the House Committee on Oversight and Government Reform. Each plaintiff joined in one or more of the Seven Member Rule requests at issue in this case. Plaintiffs bring this action to compel an executive agency to submit information relating to matters within the jurisdiction of the

House Committee on Oversight and Government Reform.

9. Defendant Timothy O. Horne is the Acting Administrator of the GSA, an executive agency of the United States. Defendant Horne has possession, custody and control of the information requested by plaintiffs and has violated his mandatory, statutory duty to provide the information to the plaintiffs. Defendant Horne is sued in his official capacity.

Factual Background

10. On August 5, 2013, GSA entered into a lease agreement with Trump Old Post Office LLC, permitting the company to develop and convert the famous Old Post Office on Pennsylvania Avenue, N.W., just two blocks away from the White House, into the Trump International Hotel. At the time the lease was entered into, Trump Old Post Office LLC was owned by Donald Trump, his daughter Ivanka Trump, and his sons Donald, Jr., and Eric Trump.

11. To avoid conflicts of interest, Article 37.19 of the lease agreement provides:

> No member or delegate to Congress, or elected official of the Government of the United States or the Government of the District of Columbia, shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom.

12. House Rule X confers on the House Committee on Oversight and Government Reform jurisdiction over "[g]overnment management and accounting measures generally," as well as "[o]verall economy, efficiency, and management of government operations and activities." House Rules require the Committee to "review and

study on a continuing basis the operation of Government activities at all levels with a view to determining their economy and efficiency." More broadly, the Committee has the authority to "at any time conduct investigations" of "any matter." House Rule X, clauses 1(n) & (4)(c)(2).

13. On November 30, 2016, Oversight Committee Ranking Member Elijah E. Cummings and Transportation and Infrastructure Committee Ranking Member Peter DeFazio, along with Representatives Gerald Connolly and André Carson, sent a letter to then-GSA Administrator Denise Turner Roth requesting unredacted copies of lease documents, annual and monthly statements between Trump Old Post Office LLC and the United States of America, and a briefing. GSA did not produce any unredacted documents in response to that letter.

14. On December 14, 2016, Oversight Committee Ranking Member Cummings and Transportation Committee Ranking Member Peter DeFazio, along with Representatives Gerald Connolly and André Carson, sent another letter to then-Administrator Roth requesting unredacted lease documents, monthly expense reports, and other documents.

15. On December 22, 2016, eleven members of the Committee on Oversight and Government Reform sent a letter request under the Seven Member Rule to then-Administrator Roth demanding unredacted lease documents and expense reports related to the Old Post Office lease.

16. On January 3, 2017, GSA produced unredacted documents pursuant to its obligations under the Seven

Member Rule, including amendments to the lease, the 2017 budget estimate, and monthly income statements. Associate Administrator Lisa A. Austin wrote in a letter to Ranking Member Cummings that the production was "[c]onsistent with the Seven Member Rule and judicial and Department of Justice, Office of Legal Counsel opinions (see e.g. 6 Op. O.L.C. 632 (1982) and 28 Op. O.L.C. 79 (2004))." GSA's compliance with the Seven Member Rule was also consistent with GSA's own internal policies.

17. In a nationally televised news conference on January 11, 2017, then President-elect Trump announced that he would not divest his ownership interest in his companies. He also stated in an interview with the *New York Times* that "occupancy at that hotel will be probably a more valuable asset now than it was before, O.K.? The brand is certainly a hotter brand than it was before." Donald Trump's New York Times Interview: Full Transcript (Nov. 23, 2016) (available at https://www.nytimes.com/2016/11/23/us/politics/trump-new-york-times-interview-transcript.html).

18. Donald Trump was sworn in as President of the United States on January 20, 2017, without having divested his ownership interest in Trump Old Post Office LLC. On information and belief, neither he nor his children have divested their interests in the lease since he took office.

19. By letter dated January 23, 2017, sent to defendant Horne, Oversight Committee Ranking Member Cummings and Transportation Committee Ranking Member Peter DeFazio, along with Representatives Gerald Connolly and André Carson, asked GSA (a) to explain

the steps that GSA had taken, or planned to take, to address President Trump's apparent breach of the lease agreement; (b) to state whether GSA intended to notify President Trump's company that it is in breach; (c) to provide the monthly reports President Trump's company submits to the GSA on the Trump International Hotel's revenues and expenses; (d) to explain and provide documentation of the steps GSA had taken, or planned to take, to address liens against the Trump International Hotel; and (e) to provide copies of all correspondence with representatives of President Trump's company or the Trump transition team.

20. By letter dated February 6, 2017, GSA Acting Associate Administrator Saul Japson declined to release the records, but promised that "[s]hould the U.S. House of Representatives Committee on Oversight and Government Reform or any seven members thereof submit a request pursuant to 5 U.S.C. § 2954, GSA will review such a request."

21. By letter dated February 8, 2017, plaintiff Cummings, joined by seven other members of the Committee on Oversight and Government Reform, made a request pursuant to 5 U.S.C. § 2954 to GSA Acting Associate Administrator Japson for the information sought in plaintiff Cummings' January 23, 2017, letter. The letter pointed out that GSA had previously complied with requests for information on the same topic under 5 U.S.C. § 2954 before President Trump was sworn in.

22. Notwithstanding Mr. Japson's promise that GSA would review a request pursuant to 5 U.S.C. § 2954 made by seven or more members of the Committee on Oversight and Government Reform, neither Mr. Japson nor

anyone else at GSA responded to the February 8th request.

23. On March 23, 2017, GSA publicly released a letter from the contracting officer for the Old Post Office lease asserting that the Trump Old Post Office LLC is in full compliance with Section 37.19 of the lease.

24. In testimony on May 24, 2017, before the House Committee on Appropriations, defendant Horne cited a new policy of rejecting all oversight requests from Democrats unless they are also joined by a Republican Chairman. Mr. Horne testified that "for matters of oversight, the request needs to come from the Committee chair." He did not address the Seven Member Rule in his testimony. *Hearing on the General Services Administration before House Committee on Appropriations, Subcommittee on Financial Services and General Government*, 115th Congress (available at https://appropriations.house.gov/calendar/eventsingle.aspx?EventID=394879).

25. By letter dated June 5, 2017, and sent to defendant Horne, plaintiff Cummings, now joined by seventeen other members of the Committee on Oversight and Government Reform, including plaintiffs in this action, renewed the request initially made on February 8th. The letter specifically invoked 5 U.S.C. § 2954 and requested additional documents in response to GSA's actions taken after the February 8 letter, including all documents containing legal interpretations of Section 37.19 of the Old Post Office lease, all correspondence and documents relating to funds received from any foreign country, foreign entity, or foreign source, any legal opinion relied upon by GSA in making a determination regarding the President's compliance with Section 37.19, and all drafts

and edits of the contracting officer's March 23, 2017 letter. The June 5th request letter explains that GSA's failure to respond violates the clear mandate of the statute, is inconsistent with prior practices of both Republican and Democratic administrations and of GSA's prior practice to honor requests made under the Seven Member Rule, and thwarts the ability of Committee members to carry out their congressionally-delegated duty to perform oversight.

26. On July 6, 2017, plaintiff Cummings, joined by seventeen other members of the Committee on Oversight and Government Reform, including plaintiffs in this action, sent yet another letter to defendant Horne, demanding that he respond to the prior requests and reminding him that GSA in the past had complied with requests under 5 U.S.C. § 2954.

27. By letter dated July 17, 2017, GSA Associate Administrator P. Brennan Hart III denied plaintiffs' 5 U.S.C. § 2954 request. The letter cites a recent Office of Legal Counsel ("OLC") memorandum stating that "[i]ndividual members of Congress, including ranking minority members, do not have authority to conduct oversight in the absence of a specific delegation by a full house, committee, or subcommittee." OLC, *Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch* at 1 (May 1, 2017). Quoting the new OLC memorandum, the GSA letter states that "the Executive Branch's longstanding policy has been to engage in the established process for accommodating congressional requests for information only when those requests come from a committee, subcommittee, or chairman authorized to conduct oversight."

28. Notwithstanding GSA's reliance on the OLC memorandum as the basis for its response to plaintiffs' request, the OLC memorandum does not address requests made under 5 U.S.C. § 2954. In fact, the memorandum contradicts GSA's legal position and supports plaintiffs' position. Information demands made pursuant to 5 U.S.C. § 2954 are requests pursuant to "a specific delegation" of oversight authority, not just by one "full house, committee, or subcommittee," but by a statute enacted through bicameral action by both Houses of Congress and presentment to and signature by the President.

29. Undermining defendant's position further, the White House sent a letter to Senator Charles Grassley on July 20, 2017, three days after GSA sent its response to the Oversight Committee, stating that the OLC opinion "does not set forth Administration policy" and that "[t]he Administration's policy is to respect the rights of all individual Members, regardless of party affiliation, to request information about Executive branch policies and programs."

30. Defendant Horne's refusal to comply with plaintiffs' request under 5 U.S.C. § 2954 violates the law and constitutes final agency action under the Administrative Procedure Act. 5 U.S.C. § 704.

Claim for Relief

31. Section 2954 of Title 5, U.S. Code, imposes a mandatory duty on defendant Horne, an officer of an Executive agency, to "submit any information requested of it relating to any matter within the jurisdiction of the committee" by the House Committee on Oversight and Government Reform or "any seven members thereof." By

refusing to produce the information requested by Members of the Committee on Oversight and Government Reform, defendant Horne has violated his non-discretionary duty under the law, and plaintiffs are entitled to a declaratory judgment stating that they are entitled to production of the requested information and an injunction or writ of mandamus ordering its production.

32. Defendant Horne has refused to carry out the non-discretionary, mandatory duty he owes to the plaintiffs under 5 U.S.C. § 2954. The All Writs Act, 28 U.S.C. § 1651, authorizes this Court to issue a writ in the nature of mandamus to compel performance of such a nondiscretionary legal duty and 28 U.S.C. § 1361 grants jurisdiction to this Court to grant such relief.

33. Defendant Horne's refusal to comply with plaintiffs' requests under 5 U.S.C. § 2954 constitutes final agency action reviewable under the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 702, 703 & 704. The APA empowers this Court to "compel agency action unlawfully or unreasonably withheld or delayed," 5 U.S.C. § 706(1), and to "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). By failing to produce the information requested by the plaintiffs, defendant Horne has unlawfully and unreasonably withheld and delayed production of information to which plaintiffs are entitled by law, and defendant Horne's decision to deny production of the information is arbitrary and capricious, an abuse of discretion, and contrary to law.

34. Defendant Horne's refusal to provide the information requested by plaintiffs is an ongoing violation of 5 U.S.C. § 2954. The federal courts have the power in

appropriate circumstances to enjoin violations of federal law by federal officials independent of the APA. *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1384 (2015).

35. Defendant Horne's refusal to produce the information plaintiffs have requested violates plaintiffs' rights under 5 U.S.C. § 2954. The Declaratory Judgment Act, 28 U.S.C. §§ 2201 & 2202, authorizes the Court to "declare the rights . . . of any interested party seeking such a declaration," in addition to any injunctive or other relief available.

36. Defendant Horne's refusal to carry out the mandate of 5 U.S.C. § 2954 has deprived the plaintiffs of information to which they are entitled by law and thereby caused and continues to cause the plaintiffs serious, irreparable injury. As a result of defendant Horne's failure to produce the information to which plaintiffs are entitled in a timely fashion, plaintiffs are harmed, and continue to be harmed, in a number of ways, including, but not limited to, impedance of the oversight and legislative responsibilities that have been delegated to them by Congress involving government management and accounting measures and the economy, efficiency, and management of government operations and activities. The deprivation of the information sought thwarts plaintiffs' ability to:

(a) evaluate the propriety of GSA's failure to enforce Article 37.19 of the lease which, by its express terms, forbids President Donald Trump, an "elected official of the Government of the United States," from benefiting from the lease in any way;

(b) evaluate GSA's oversight of the lease, including financial management of the lease;

(c) ascertain the amount of income from the lease benefiting President Trump, his daughter Ivanka Trump, and his sons Donald, Jr., and Eric Trump;

(d) determine the extent to which Trump Old Post Office LLC has received funds from foreign countries, foreign entities, or other foreign sources;

(e) assess whether GSA's failure to act is based on a new interpretation of Article 37.19 of the lease, and if so, to review the legal opinion or opinions on which the new interpretation is based;

(f) evaluate whether the GSA contracting officer's decision that the Trump Old Post Office LLC is in compliance with the lease was free from inappropriate influence; and

(g) recommend to the Committee, and to the House of Representatives, legislative and other actions that should be taken to cure any existing conflict of interest, mismanagement, or irregularity in federal contracting.

Prayer for Relief

WHEREFORE, plaintiffs respectfully request that the Court enter an Order:

(A) Declaring that defendant Horne's failure to provide in a timely manner the information requested in the plaintiffs' February 8, 2017, June 5, 2017, and July 6, 2017, demand letters, signed by more than seven members of the House Oversight and Government Reform Committee, violates 5 U.S.C. § 2954 and the Administrative Procedure Act;

(B) Requiring defendant Horne to produce the requested unredacted information to the plaintiffs forthwith;

(C) Awarding the plaintiffs their costs and attorneys' fees in this action; and

(D) Granting the plaintiffs such other and further relief as the Court deems just and proper.

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