ORAL ARGUMENT NOT YET SCHEDULED

No. 18-5305

# United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELIJAH E. CUMMINGS, *et al.*,

*Plaintiffs-Appellants*,

v.

EMILY W. MURPHY, Administrator,
General Services Administration,

*Defendant-Appellee.*

Appeal from the United States District Court
for the District of Columbia, No. 1:17-cv-02308-APM
(Hon. Amit P. Mehta)

**REPLY BRIEF OF APPELLANTS ELIJAH E. CUMMINGS, *et al*.,**

Scott L. Nelson
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

David C. Vladeck
Stephanie Glaberson
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9540
vladeckd@law.georgetown.edu

Counsel for Appellants

## TABLE OF CONTENTS

Table of Authorities ........ ii

Glossary of Abbreviations ........ vi

Introduction and Summary of Argument ........ 1

I. Plaintiffs have sustained injury in fact ........ 5

A. GSA misreads *Raines* ........ 5

B. *Raines* does not overrule *AT&T v. Department of Justice* ........ 13

II. GSA's "authorization" arguments miss the mark ........ 20

III. Courts may adjudicate cases involving access to agency information ........ 26

Conclusion ........ 30

Certificate of Compliance ........ A-1

Certificate of Service ........ A-2

# TABLE OF AUTHORITIES

**Cases:** **Page:**

*Alaska Leg. Council v. Babbitt*,
181 F.3d 1333 (D.C. Cir. 1999) ........................................................ 8

*Allen v. Wright*,
468 U.S. 737 (1984) ........................................................................ 10

*Am. Sch. of Magnetic Healing v. McAnnulty*,
187 U.S. 94 (1902) .......................................................................... 22

*Arizona State Legislature v. Arizona Ind. Redistricting Comm'n,*
135 S. Ct. 2652 (2015) ...................................................................... 7

*Armstrong v. Exceptional Child Ctr., Inc.*,
135 S. Ct. 1378 (2015) ............................................................. 21, 22

**AT&T v. Dep't of Justice*,
551 F.2d 384 (D.C. Cir. 1976)...................................... 6, 13-17, 20, 26

*Barenblatt v. United States*,
360 U.S. 109 (1959) ........................................................................ 19

*Campbell v. Clinton*,
203 F.3d 19 (D.C. Cir. 2000)......................................................... 7, 9

**Chamber of Commerce v. Reich*,
74 F.3d 1322 (D.C. Cir. 1996)............................................. 22-23, 26

*Chenoweth v. Clinton*,
181 F.3d 112 (D.C. Cir. 1999)............................................ 7, 8, 9, 15

**Coleman v. Miller*,
307 U.S. 433 (1939) ...................................................................... 9-12

* Authorities principally relied upon are marked with an asterisk.

*Comm. on Judiciary, U.S. House of Representatives v. Miers*,
558 F. Supp. 2d 53 (D.D.C. 2008) .......... 17

*Comm. on Oversight & Gov't Reform v. Holder*,
979 F. Supp. 2d 1 (D.D.C. 2015) .......... 17

*Exxon Co. v. FTC*,
589 F.2d 582 (D.C. Cir. 1978) .......... 13

*FEC v. Akins*,
524 U.S. 11 (1998) .......... 2, 8

*In re Sealed Case*,
121 F.3d 729 (D.C. Cir. 1997) .......... 26

*Keepseagle v. Perdue*,
856 F.3d 1039 (D.C. Cir. 2017) .......... 28

*King v. Burwell*,
135 S. Ct. 2480 (2015) .......... 2, 21

*Lujan v. Defs. of Wildlife*,
504 U.S. 555 (1992) .......... 17

**McGrain v. Dougherty*,
273 U.S. 135 (1927) .......... 4, 8, 13, 18, 19, 25

*New Prime Inc. v. Oliveira*,
139 S. Ct. 532 (2019) .......... 23

*New York State Dep't of Social Servs. v. Dublino*,
413 U.S. 405 (1973) .......... 21

*Nixon v. Admin. of Gen. Servs.*,
433 U.S. 425 (1977) .......... 20

**Raines v. Byrd*,
521 U.S. 811 (1997) .......... 2, 3, 4-11, 13-17

*Reed v. Cty. Commissioners*,
277 U.S. 376 (1928) .......... 25

**Spokeo, Inc. v. Robins*,
136 S. Ct. 1540 (2016) .......... 2, 3, 10, 12, 17

**Town of Chester, NY v. Laroe Estates, Inc.*,
137 S. Ct. 1645 (2017) .......... 15

*U.S. House of Representatives v. Burwell*,
130 F. Supp. 3d. 53 (D.D.C. 2015) .......... 17

*U.S. House of Representatives v. Dep't of Commerce*,
11 F. Supp. 2d 76 (D.D.C. 1998) .......... 17

*Watkins v. United States*,
354 U.S. 178 (1957) .......... 18

*Zivotosky ex rel. Ari Z v. Sec'y of State*,
444 F.3d 614 (D.C. Cir. 2006) .......... 2, 12, 13

*Waxman v. Thompson*,
No. 04-cv-3467 (C.D Cal. Aug. 19, 2004) .......... 27

**Constitutional Provisions:**

Article I, § 1 .......... 18

Art I, § 8, cl. 17 .......... 18

**Statutes and Rules:**

5 U.S.C. § 702 .......... 22

5 U.S.C. § 706(1) .......... 22

5 U.S.C. § 706(2)(C) .......... 22

*5 U.S.C. § 2954 .......... 1, 4, 5, 11-13, 15, 19-23, 26-29

28 U.S.C. § 1331 .......... 25

28 U.S.C. § 1345 .......... 25

Rule 24(a), FRCP .......... 15

**Legislative History:**

H.R. Rep. No. 70-1757 .......... 24

S. Rep. No. 70-1320 .......... 24

**Miscellaneous:**

Office of the Inspector General, GSA, *Evaluation of GSA Nondisclosure Policy* (March 8, 2018) (Report JE18-002) .......... 29

10 U.S. Op. Off. Legal Counsel 68 (1986) .......... 20

# GLOSSARY OF ABBREVIATIONS

APA: Administrative Procedure Act

GSA: General Services Administration

## INTRODUCTION AND SUMMARY OF ARGUMENT

The question in this case is whether plaintiffs-appellants, each of whom is a member of the House Oversight and Government Reform Committee ("House Oversight Committee"), have standing to challenge the refusal by the General Service Administration's ("GSA") to comply with their request under 5 U.S.C. § 2954 for information regarding GSA's lease of the Old Post Office to one of the Trump family's companies. Remarkably, nowhere in its brief does GSA address the text of Section 2954, which mandates that an executive agency "shall" provide information on request of the House Oversight Committee or "any seven members thereof."

GSA also fails to acknowledge that, until the Justice Department's Office of Legal Counsel instructed GSA to deny plaintiffs' request, GSA adhered to its policy of complying with Section 2954 requests and provided plaintiffs information about the lease similar to the information withheld in this case. GSA also fails to contest plaintiffs' showing that agencies have, with few exceptions, honored Section 2954 requests because they understood that the law required them to comply. And GSA nowhere acknowledges that its reading of Section 2954 would render the

statute a nullity—a result contrary to the first principle of statutory construction. *See*, *e.g.*, *King v. Burwell*, 135 S. Ct. 2480, 2493 (2015).

GSA similarly side-steps the key legal question this case presents. Applying longstanding Supreme Court precedent, this Court has repeatedly recognized that when a statute confers a right to obtain information, "[a]nyone whose request for specific information has been denied has standing to bring an action" because the "requester is injured-in-fact for standing purposes because he did not get what the statute entitled him to receive." *Zivotofsky ex rel. Ari Z v. Sec'y of State*, 444 F.3d 614, 617-18 (D.C. Cir. 2006) (citations omitted); *see also Spokeo*, *Inc. v. Robins*, 136 S. Ct. 1540, 1547-50 (2016); *FEC v. Akins*, 524 U.S. 11, 21 (1998). That statement is inaccurate, according to GSA, because *Raines v. Byrd*, 521 U.S. 811 (1997), holds that Members of Congress may not have a "personal" interest in a right conferred on them by virtue of their office. Indeed, GSA argues that, except perhaps for vote nullification claims, *Raines* sweepingly holds that Members of Congress never can have standing to sue an executive agency unless a similarly situated private person would have the same claim.

GSA's interpretation of *Raines* misses the mark. *Raines* neither closes the door on legislator standing nor addresses legislator standing to enforce congressional subpoenas or access-to-information statutes. *Raines*'s principal relevance here is that it recognizes that legislators alleging vote nullification have standing to pursue that claim, even though it is based on "institutional" injury, because those legislators have *personally* suffered injury in fact. Of course, to satisfy Article III, the injury alleged must be "personal" to the plaintiff. *See*, *e.g.*, *Spokeo*, 136 S. Ct. at 1548 (citations omitted). Thus, GSA's claim that legislators may not suffer "personal" injury incident to their office contradicts the basic premise of *Raines*'s discussion of standing to pursue vote-nullification claims. Unless vote nullification is, in fact, a "personal injury," a legislator-plaintiff could not satisfy Article III's threshold requirement.

Nor does GSA convincingly answer the core question of congressional authority that its theory raises. GSA asserts that Congress may not, as an exercise of its Article I legislative power, enact a statute delegating to Members of Congress the power to enforce access-to-information rights. But GSA does not explain why that assertion is even plausible. Congress's broad legislative power extends to enabling its

members' oversight of executive agencies. After all, informed legislation is impossible unless Congress has ample tools to acquire information to identify where reform is needed. *See*, *e.g.*, *McGrain v. Daugherty*, 273 U.S. 135, 161-80 (1927). Our system of checks and balances requires no less.

As for GSA's "authorization" argument, it has nothing to do with the Article III standing of the injured plaintiffs, and, if accepted, would render Section 2954 a dead letter. Section 2954's text makes evident that the statute's core purpose is to enable minority party members of the Oversight Committee to engage in oversight without regard for the participation or approval of their majority colleagues. JA __. Imposing a requirement that minority party members secure permission from the majority, as GSA claims is necessary, would run counter to Section 2954's text and defeat the statute's purpose.

Plaintiffs' opening brief anticipated most of GSA's arguments and explains why they lack merit. Three points warrant further response. First, GSA's sweeping argument that the Constitution restricts legislator standing to vote nullification claims and nothing more is based on a misreading of *Raines* and this Court's congressional standing precedents.

Second, GSA's "authorization" requirement is at odds with Section 2954 and the case law on which GSA relies. Third, precedent soundly rejects GSA's claim that disputes between Congress and executive agencies involving access to information must be resolved in the political arena and not in court.

## I. Plaintiffs have sustained injury-in-fact.

### A. GSA misreads *Raines*.

Instead of grappling with *this* case and acknowledging that GSA's position here would nullify Section 2954, GSA broadly argues that, except perhaps for cases involving vote nullification, Members of Congress may not bring suit to enforce any right they hold by virtue of their office. For that reason, GSA contends that Congress engaged in a singularly futile act by enacting Section 2954, because it has always been unenforceable. Under GSA's theory, *Raines* closes the door to any effort by Congress to confer enforceable "personal" or "institutional" rights on its Members. GSA further contends that, notwithstanding the breadth of Article I, Congress may not delegate judicially enforceable information-gathering power to any of its Members—by statute, rule, or any other means. Indeed, GSA goes so far as to contend that *Raines* should be read broadly

to forbid *all* suits by Members of Congress, even those involving outright vote nullification. GSA Br. at 26 n.5 & 34-39.

GSA rightly points out that Article III's injury in fact requirement demands that a plaintiff allege a "personal" injury. But GSA's argument then unravels. It contends that, under *Raines*, any "right" based on the plaintiff's membership in Congress cannot be "personal," and for that reason, Congress may not delegate judicially enforceable information-gathering power to any of its Members. GSA does not stop there; it goes on to contend that *Raines* invalidates much of the case law in this Circuit regarding congressional access to executive agency information, including long-settled precedents, such as *AT&T v. Department of Justice*, 551 F.2d 384 (D.C. Cir. 1976), because Congress cannot delegate enforcement authority to its Members.

GSA's argument is based on a serious misreading of *Raines.* To start with, *Raines* involved a question poles apart from the issue here. The claim in *Raines* was that the Line Item Veto Act diluted the plaintiffs' votes on all subsequent spending legislation. The Court rejected that claim of standing because the plaintiffs, at that point, had simply been losers on the vote to enact the Line Item Veto Act and

indisputably had a legislative remedy: They could band together with their colleagues to repeal the Act or exempt future spending from it. As for the plaintiffs' assertion that the Act might injure them by diluting the efficacy of future votes on spending measures, the Court said that such abstract, purely institutional injuries are generally not justiciable because they affect every Member of Congress equally. *See Raines*, 521 U.S. at 821.

*Raines* did not, however, address questions of legislator standing outside the realm of vote dilution or nullification. The Court drove home this point in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, by describing *Raines* as "holding specifically and only that 'individual members of Congress [lack] Article III standing'" to challenge the Line Item Veto Act based on alleged vote dilution. 135 S. Ct. 2652, 2664 (2015) (brackets in original). Judge Randolph's opinion concurring in the judgment in *Campbell v. Clinton*, 203 F.3d 19, 29 (D.C. Cir. 2000), similarly remarked that *Raines* is controlling "at least for cases in which a legislator is claiming that his vote has been illegally nullified," but not, or not necessarily, for other claims of injury. And Judge Tatel, in his concurring opinion in *Chenoweth*

*v. Clinton*, 181 F.3d 112, 117 (D.C. Cir. 1999), noted that the breadth of *Raines*'s holding is necessarily linked to the types of claims at issue in that case because standing depends on "precisely the harm" alleged.

*Raines* did not suggest, let alone hold, that notwithstanding Congress's long recognized power to create judicially enforceable statutory rights of access to government information, *see*, *e.g.*, *FEC v. Akins,* 524 U.S. at 21, Congress is somehow disabled from conferring similar rights on its own members. Congress's Article I power is not that feeble. *McGrain,* 273 U.S. at 161-63.

Nor has this Circuit endorsed the sweeping theory urged by GSA. In fact, this Court has often recognized that *Raines* does not categorically bar legislator standing, much less hold that legislators cannot have a "personal" interest in a right held by virtue of office. On several occasions this Court has explained that, under *Raines*, "[i]n narrow circumstances, legislators have a judicially recognized, *personal interest* in maintaining the 'effectiveness of their vote.'" *Alaska Leg. Council v. Babbitt*, 181 F.3d 1333, 1337-38 (D.C. Cir. 1999) (emphasis added) (quoting *Raines*, 521 U.S. at 821-22).

*Chenoweth* and *Campbell* also recognize that *Raines* leaves open the possibility of legislator standing based on personal injury, at least when legislators allege vote nullification. *Chenoweth* observes that *Raines*, in discussing *Coleman v. Miller*, 307 U.S. 433 (1939), acknowledged that "the 20 legislators who had voted against the amendment had standing to sue because the Lieutenant Governor's act deprived them of their 'plain, direct, and adequate interest in maintaining the effectiveness of their votes.'" *Chenoweth*, 181 F.3d at 116 (quoting *Coleman*, 307 U.S. at 438).

*Campbell* makes the same point. It recognizes that *Raines* leaves open "a soft spot in the legal barrier against congressional challenges to executive action." 203 F.3d at 21. And it notes that the twenty legislators in *Coleman* whose votes were allegedly nullified could bring suit "because they ha[d] a legal interest 'in maintaining the effectiveness of their votes.'" *Id.* (quoting *Coleman*, 307 U.S. at 438). Both *Chenoweth* and *Campbell* recognize that only those legislators who claimed their votes were nullified had standing to sue—their injury was thus "personal" to them.

At bottom, GSA's argument is tautological: Legislator-plaintiffs cannot have standing because Congress cannot confer rights on them the deprivation of which would constitute "personal injury" sufficient to confer standing. GSA Br. at 28-29. Rather, GSA contends, any such injury is necessarily "institutional" and cannot serve as the basis for standing by individual legislators. To be sure, *Raines* characterizes the injury plaintiffs claimed in *Coleman* as one involving "institutional injury" in some sense, 521 U.S. at 821, and GSA therefore repeatedly contends that "*Coleman* did not involve a 'personal' injury to legislators." GSA Br. at 26 n.5 & 34-39.

But that characterization is incorrect. *Raines* cannot plausibly be read, as GSA claims, to hold that the *Coleman* plaintiffs did not also suffer "personal injury." After all, *Raines* begins its standing analysis by emphasizing that "[a] plaintiff must allege *personal injury* fairly traceable to the defendant's allegedly unlawful conduct" in order to satisfy Article III's injury in fact requirement." 521 U.S. at 818-19 (quoting *Allen v. Wright,* 468 U.S. 737, 751 (1984)) (emphasis added in *Raines*). Article III's foundational requirement is that each plaintiff must allege injury in fact that is "personal." *See*, *e.g.*, *Spokeo*, 136 S. Ct. at

1547-49 (and cases cited therein). The plaintiffs' claims in *Coleman* would have failed at the threshold had they been unable to assert a personal injury.[1]

*Raines*'s treatment of *Coleman* thus validates plaintiffs' arguments here. Like the *Coleman* plaintiffs, the plaintiffs here have suffered injury in fact by the complete deprivation of their asserted right: their right of access to information requested under Section 2954—a right that is "personal" to them and no one else. The *Coleman* plaintiffs had standing because they alleged "personal injury" cognizable under Article III, even though the alleged nullification of their votes, if proven, would also have injured the legislature and thus inflicted an "institutional injury" as well as the personal injury that allowed the plaintiffs to sue. *See Raines*, 521

[1] GSA also argues that, under *Raines*, Section 2954 cannot "establish[] a predicate for Article III standing" because the right of action the Line Item Veto Act conferred "did not transform the harms to the *Raines* plaintiffs into 'personal' injuries' in the Article III sense." GSA Br. at 30-31. GSA's argument conflates two different issues. Creating a right of action is not the same as creating an underlying "right," and the standing defect in *Raines* was that the right plaintiffs asserted—the right to be free of vote dilution—was not a right personal to any Member of Congress. *Raines*, 521 U.S. at 829. The plaintiffs here do not assert that they have standing because Section 2954 creates a right of action (indeed, it does not do so expressly), but because it creates a substantive right that is personal to them. And GSA does not deny that Section 2954 creates a "right"; it instead argues that the right is not "personal" to plaintiffs.

U.S. at 825-26 (contrasting the "plain, direct, and adequate interest" of the Kansas senators in *Coleman* with "the abstract dilution of institutional legislative power that is alleged here").

Plaintiffs here are in the same position. They have a personal, legally protected right that is particularized to them, and no one else, to gain access to the information they requested. And the deprivation of the information to which they are entitled under Section 2954 constitutes injury in fact. Regardless of whether that injury is characterized as "personal," or "institutional" or both, it is sufficient under Article III. *See* Pls. Br. at 33-42. As a fallback, GSA claims that plaintiffs "never explain how being deprived of information regarding governmental operations has affected them in a personal way." GSA Br. at 26. In fact, plaintiffs' complaint (JA 19) explains in detail how the deprivation of the requested information hobbled the ability of each plaintiff to engage in oversight. In any event, the denial of information to anyone who is statutorily entitled to it constitutes "personal" injury for standing purposes. *Spokeo,* 136 S. Ct. 1549-50; *Zivotofsky*, 444 F.3d at 617-18.[2]

[2] GSA contends that plaintiffs' failure to allege that the information they sought from GSA *would*, rather than *might*, lead to legislation makes their claims of injury speculative. GSA Br. at 38. That argument

### B. *Raines* does not overrule *AT&T v. Department of Justice.*

Building on its cramped interpretation of *Raines*, GSA challenges Congress's power to delegate the enforcement of information-gathering powers to Members of Congress and the soundness of *AT&T v. Department of Justice*, which GSA says "forms part of an outdated body of standing decisions that cannot survive *Raines*." GSA Br. at 39. GSA's misguided attack on *AT&T* is essential to its position, because GSA's argument that congressional subpoenas and Section 2954 requests are unenforceable cannot be reconciled with *AT&T*.

GSA argues that a "committee or legislator that seeks information for legislative oversight necessarily does so as an agent for the entire legislative body, and any setback to that effort is thus 'a type of institutional injury ... which necessarily damages all Members ... and

---

is meritless. As this Court recognized in *Zivotofsky*, where a statutory right to information is denied, "the 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." 444 F.3d at 617. GSA's assertion would only be relevant—and even then, not to standing, but to whether the request was enforceable on the merits—if there were some basis for suggesting that the request lacked a valid legislative purpose. GSA has not made that claim, and courts presume that Congress is exercising its powers responsibly. *See*, *e.g.*, *McGrain*, 273 U.S. at 177-78; *Exxon Co. v. FTC*, 589 F.2d 582, 589 (D.C. Cir. 1978).

both Houses of Congress equally,'" and hence is non-justiciable. GSA Br. at 24 (citing *Raines*, 521 U.S. at 821) (ellipses in original). GSA further contends that, because Article I makes no mention of Congress's power to compel executive agencies to provide information, plaintiffs "are thus asserting that Congress's 'auxiliary,' non-textual power of investigating provides broader grounds for standing than the primary, textually grounded power of legislating that was at issue in *Coleman* itself." GSA Br. at 38.

The upshot of GSA's argument is that, although this Court held in *AT&T* that "the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf," 551 F.2d at 391, that ruling cannot be reconciled with *Raines*. *See* GSA Br. at 39. According to GSA, "even if *AT&T* were still good law after *Raines*, it would not support standing here—especially since this Court at most held that the House could defend against judicial invalidation of its subpoena directed to a private party, not that it may affirmatively seek a judicial order compelling the Executive Branch to produce information." *Id*. And GSA dismisses the district court cases cited in plaintiffs' opening brief (at 51 n.14) as "inapposite" and having "no precedential force." GSA

Br. at 39 n.8.[3] GSA's bottom line is that the House may *defend* the validity of its subpoenas or compulsory processes like Section 2954 when challenged, but it may not bring affirmative litigation to *enforce* compliance.

GSA's theory runs counter to *Raines* and basic standing doctrine. To start, GSA's concession that the House may intervene to "defend against judicial invalidation of its subpoena directed to a private party" refutes its argument that the House cannot also bring an action to enforce compliance. Contrary to GSA's claim, there is no asymmetry between standing requirements to bring an action and standing requirements to intervene defensively as a matter of right under Federal Rule of Civil Procedure 24(a). As the Supreme Court has explained, "[f]or all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor as of right." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017).

---

[3] GSA claims that this Court has "agree[d] that prior decisions of this Court had become 'untenable in light of *Raines*.'" GSA Br. at 39. GSA quotes *Chenoweth*, 181 F.3d at 115, but the passage on which GSA relies does not refer to *AT&T* or any of this Court's cases involving Congress's standing to enforce its right of access to Executive Branch information. Instead, the passage addresses cases involving claims of vote impairment, dilution or nullification.

Nor does GSA's distinction between suits against a private party and suits against an executive agency hold water. *Raines* says that standing requirements have been "especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." 521 U.S. at 519-20. But *Raines* does not suggest that standing requirements are different simply because an executive agency is the defendant. *See id*. at 518-20. And the injury inflicted by denial of information sought under a House subpoena or a statute commanding an executive agency to provide information would amply satisfy any heightened standing test prescribed by *Raines*, assuming such a standard were even applicable.

For these reasons, GSA is wrong to suggest that this Court's holding in *AT&T* is suspect. There, the Court ruled that "[i]t 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." 551 F.2d at 391. The Court's holding is a commonplace application of the settled understanding that Congress's investigatory power is a form of "legally protected interest," the "invasion" of which inflicts "concrete and particularized" injury that

is "actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

This understanding is reinforced by the post-*Raines*, three-judge court ruling in *U.S. House of Representatives v. Department of Commerce*, 11 F. Supp. 2d 76 (D.D.C. 1998), which upheld the House's claim of informational standing to seek records relating to the Census. The court concluded that the House had standing under *Raines* because it had been "deprived of something to which [it] personally [was] entitled." *Id.* at 89 (quoting *Raines*, 521 U.S. at 821). The court also relied on the "well established" rule "that a legislative body suffers a redressable injury when that body cannot receive information necessary to carry out its constitutional responsibilities." *Id.* at 86. And several district court decisions have similarly rejected the contention that *Raines* somehow casts doubt on the continued soundness of *AT&T*.[4]

[4] *See, e.g.*, *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d. 53, 68 (D.D.C. 2015) ("*AT&T*'s precedential force was not diminished by *Raines*"); *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 4 & 13-14 (D.D.C. 2013) (*AT&T* has been "binding precedent … in this Circuit for more than thirty-five years," and was not disturbed by *Raines*); *Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 68 (D.D.C. 2008) ("*Raines* and subsequent cases have not undercut either the precedential value of *AT&T* or the force of its reasoning").

GSA's contention that Congress has no authority to designate Members to assert rights of access to executive agency information in support of Congress's legislative authority is also irreconcilable with longstanding Supreme Court precedent. As the Court explained in *McGrain*, 273 U.S. at 175, "before and when the Constitution was framed and adopted … the power of inquiry, with enforcing process, was regarded and employed as a necessary and appropriate attribute of the power of legislate—indeed, was treated as inhering in it." *McGrain* drives home that Congress's "power of inquiry" must have an "enforcing process" because "some means of compulsion are essential to obtain what is needed." *Id.*; *see also Watkins v. United States*, 354 U.S. 178, 187 (1957) ("The power of the Congress to conduct investigations is inherent in the legislative process" and that power is "broad" and "comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.").

GSA's misfire is based on its focus on what is absent in Article I, not on what Article I actually says. Article I, § 1, assigns "All legislative Powers" to Congress, and the Necessary and Proper Clause, Article I, § 8, cl. 17, gives Congress wide latitude to enact legislation delegating its

information-gathering power as it sees fit. *McGrain*, 273 U.S. at 160-63, 174-75. As to legislative powers, *McGrain* emphasizes that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *Id.* at 174. The "power of inquiry," is not, as GSA suggests, a lesser power because it is "auxiliary." To the contrary, "[t]he scope of the power of inquiry … is as penetrating and far-reaching as the power to enact and appropriate under the Constitution." *Barenblatt v. United States*, 360 U.S. 109, 111 (1959). Nor does plaintiffs' argument suggest, as GSA contends, that the power of inquiry "provides broader grounds for standing" than the power of legislating itself. GSA Br. at 38. Rather, as befitting the equal scope of those "far-reaching" powers, plaintiffs' argument is that they have the same implications for standing: When a legislator has a *personal* legally protected interest grounded in the exercise of either the legislative power itself (as in *Coleman*) or the accompanying investigative power (as here) the deprivation of that legally protected right is sufficient to confer standing.

As to the Necessary and Proper Clause, the provision bestows broad authority to enact statutes like Section 2954 that delegate to members the power to compel executive branch compliance. *McGrain,* 273 U.S. at

161-63. After all, GSA owes its very existence to statutes enacted by Congress pursuant to the Necessary and Proper Clause; Congress can certainly impose conditions on GSA without overstepping the separation of powers. *See*, *e.g.*, *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 445 (1977). For these reasons, GSA's attack on *AT&T*, and the cases that followed, is without merit.[5]

## II. GSA's "authorization" arguments miss the mark.

Plaintiffs demonstrated in their opening brief that, to the extent that authorization is a prerequisite to filing this suit, Section 2954 supplies any authorization required. Pls. Br. at 54-57.[6]

GSA's principal response is that plaintiffs had a duty to seek House authorization before filing suit, and their failure to do so is fatal to this case. GSA Br. at 40-44. Yet GSA neither points to anything in the text of Section 2954 that requires authorization, nor addresses the inevitable

[5] *See also* 10 U.S. Op. Off. Legal Counsel 68, 87-88 & n. 33 (1986) (separation of powers does not prohibit a House of Congress from enforcing subpoena against an Executive Branch official in court).

[6] Plaintiffs also pointed out that GSA's "authorization" argument had nothing to do with whether plaintiffs had suffered injury in fact sufficient to confer standing. GSA nowhere explains why its authorization argument goes to standing rather than to the merits.

consequences of its argument. Requiring House authorization, as GSA claims is necessary, would render Section 2954 a nullity. As Section 2954's text makes clear, its core purpose is to enable minority party members of the committee to engage in oversight without the participation of their majority colleagues. JA _. Compelling minority party members to secure majority approval as a condition of enforcing their rights would stand the statute on its head. A basic canon of statutory construction is that courts may not "interpret federal statutes to negate their own stated purposes." *King v. Burwell*, 135 S. Ct. 2480, 2493 (2015) (quoting *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 419-20 (1973)). GSA's "authorization" argument, if accepted, would do just that.

GSA next argues that rights of action must be "unambiguously conferred," and because the text of Section 2954 "provides no express right to sue, it necessarily cannot constitute legislative authorization." GSA Br. at 45. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015), the one case on which GSA relies, demonstrates GSA's error. *Armstrong* rejected the contention that there is an implied right of action under the Supremacy Clause to challenge violations of federal law. But

in so ruling, the Court explicitly reaffirmed the availability of non-statutory equitable actions, including claims "with respect to violations of federal law by federal officials." *Id.* at 1384. *Armstrong* cites *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), as an exemplar of such cases.

In *McAnnulty*, the Court upheld a school's right to bring a non-statutory equitable action for injunctive relief against the Postal Service for engaging in *ultra vires* acts that allegedly infringed the school's constitutional rights and exceeded the Postmaster General's claimed statutory authority. *Armstrong* reaffirms *McAnnulty*, confirming that prior to 1947, when the Administrative Procedure Act ("APA") took effect, and indeed prior to the 1938 merger of law and equity in the federal courts, Oversight Committee members would have had strong mandamus and *ultra vires* claims if an agency refused to comply with a Section 2954 request. After 1947, the APA also provided a right of action for such claims, *see* 5 U.S.C. §§ 702, 706(1) & 706(2)(C), but, as *Armstrong* makes clear, the APA did not extinguish preexisting non-statutory, equitable bases for suit, and they remain viable today. *See*, *e.g.*, *Chamber*

*of Commerce v. Reich*, 74 F.3d 1322, 1327-29 (D.C. Cir. 1999).[7] Particularly in light of the legal backdrop against which it was enacted, Section 2954's conferral of substantive rights on the requesting minority members conveys authority to use available legal remedies to enforce those rights. *Cf. New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (holding that a statute's words should be given their ordinary meaning at the time Congress enacted it).

GSA turns to Section 2954's legislative history to bolster its argument, contending that it "portrays the provision that became Section 2954 as nothing more than a mundane bureaucratic improvement over the reporting requirements the Act simultaneously abolished." GSA's Br. at 48. GSA's argument cherry-picks portions of the legislative history that address Section 1 of the bill and disregards the significance of the addition of Section 2 (now Section 2954) to the legislation. Until the House Committee on Expenditures in the Executive Departments was formed in December 1927, the proposal had been simply to abolish a

---

[7] Plaintiffs' complaint alleges rights of action under the APA, as well as non-statutory equitable claims alleging *ultra vires* acts by GSA and mandamus claims alleging that GSA's Administrator failed to carry out a non-discretionary duty. JA __.

hundred or so mandatory reporting provisions. H.R. Rep. No. 70-1757, at 6; S. Rep. No. 70-1320, at 4.

Section 2 was added at the insistence of the newly formed House Committee to ensure that it would routinely be able to obtain executive agency information. *Id.* The Committee was willing to give up a system of mandatory reporting, but it was hardly willing to give up its right to information. The Committee was then, and its successor remains today, responsible for oversight of federal expenditures, an essential part of our system of checks and balances. The Committee cannot possibly fulfill its constitutional mission if agencies have unchecked discretion over what information they will provide. For that reason, swift, ready and certain access to agency information was critical to the members of the new House committee. And the legislative history that GSA side-steps makes explicit that Section 2 of the Act means exactly what it says: It "requires every department of the Government upon request of the Committee on Expenditures in the Executive Department, or any seven members thereof, to furnish any information requested of it relating to any matter within the jurisdiction of the committee." *Id.*; *see also* JA __.

Finally, GSA contends that *Reed v. County Commissioners*, 277 U.S. 376, 388-89 (1928), "rejected the argument that legislative authorization to sue could be implied by reference." GSA Br. 45-46. GSA overstates *Reed*'s holding. The plaintiffs in *Reed* claimed authority to sue under the predecessor statute to 28 U.S.C. § 1345, which then, as today, provides jurisdiction over suits brought by government officers so long as Congress "authorized" them to bring suit. *Reed*, 277 U.S. at 386. The plaintiffs in *Reed* had no statutory right to proceed and had not sought Senate authorization. *Reed* thus holds, as a matter of construction of § 1345's language, that, in the absence of some form of congressional authorization, federal jurisdiction may not be invoked under that statute.

*Reed* has no bearing here. Plaintiffs did not claim "authorization" and invoke § 1345. They instead brought this action under 28 U.S.C. § 1331 in their own name, and not in the name of the Committee or the House. In contrast to the plaintiffs in *Reed*, who had no statutory mooring for their case, plaintiffs here are proceeding under a statute that unambiguously gives them a right of access to executive agency information—a right that *McGrain* says must have an "enforcing process." 273 U.S. at 175. That "enforcing process" includes the APA and

the non-statutory right to seek equitable relief to enforce agency compliance with federal law—rights of action that may be invoked by any person with standing. *Reich*, 74 F.3d at 1327-29.

### III. Courts may adjudicate cases involving access to agency information.

GSA makes a number of arguments about why, in its view, this case is unsuited for judicial resolution. None is persuasive.

GSA's main argument is that, as a matter of separation of powers, disputes between Congress and executive agencies over access to information must be resolved by recourse to politics, not the courts. GSA Br. at 49. To be sure, courts are properly reluctant to wade into inter-branch disputes that can be resolved by other means; this Court made that sentiment clear in *AT&T* and in *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997). But GSA seeks to transform a rule of cautious judicial intervention into an absolute rule of non-intervention, a move that this Court has decisively rejected. *AT&T*, 551 F.2d at 389-90; *In re Sealed Case*, 121 F.3d at 737-38. And GSA's proposed bar on judicial review would render Section 2954 a dead letter; it was enacted to empower minority members who, by definition, may lack access to the majoritarian political remedies that GSA claims are exclusive.

In a related argument, GSA speculates that permitting the plaintiffs' action to proceed might engender "intrabranch dispute[s] between segments of Congress itself" because the majority might object to the plaintiffs' request. GSA Br. at 41-42 (citation omitted). GSA offers no evidence that such a dispute has ever arisen. Certainly in this case, the then-majority made no objection to the request. In any event, if these concerns were to arise, Congress would hardly be powerless. Congress could repeal the statute, or the House could attempt to take action to prevent plaintiffs from proceeding, which the House did not do here.[8]

Finally, relying on non-record material, GSA argues that the information GSA refused to provide plaintiffs is "privileged and

---

[8] GSA's argument on this point is taken from an *amicus* brief filed in *Waxman v. Thompson*, No. 04-cv-3467 (C.D. Cal. Aug. 19, 2004) by the Bipartisan Legal Advisory Group of the U.S. House of Representatives. JA __. The brief was not "bipartisan;" it was signed only by Republican-majority members of the House, who argued, contrary to GSA's position here, that the House should focus its information-gathering on subpoenas, which the House leadership could regulate, and which are judicially enforceable. To be sure, the brief argued that Section 2954 cases should not be justiciable, but the principal reason given was that the majority needed to be in control—a reason at odds with the text and purpose of Section 2954. An *amicus* brief filed by members of the Democratic Party explained why the concerns raised in the Bipartisan brief were off-target and could be addressed legislatively by the majority if it cared to do so. *See* JA __.

confidential," and "not publicly releasable," and thus the case should be dismissed. GSA Br. at 2, 8, 28, 43 & Addendum 12-13. GSA refrained from making that argument in the district court and did not place the May 14, 2018, letter on which it now relies in the record. Had GSA done so, it would have been obligated to supply some evidentiary support for its claims. In any event, GSA's belated assertion that it has merits defenses to the production of particular materials provides no basis for affirming the district court's erroneous dismissal of this case for lack of standing; any such claimed defenses should be considered in the first instance in the district court.

Putting aside whether GSA's failure to raise the "confidential and privileged" argument below constitutes a waiver, *Keepseagle v. Perdue*, 856 F.3d 1039, 1053 (D.C. Cir. 2017), the letter in fact demonstrates that this case has nothing to do with the sensitivity of the withheld information. For one thing, it confirms that GSA is withholding the monthly financial reports that the Trump Hotel files with GSA, even though GSA earlier provided those reports to the plaintiffs pursuant to Section 2954. *See* JA __.

In addition, GSA overlooks the fact that GSA urged plaintiffs to invoke Section 2954 in the first place, JA __, and that GSA was apparently willing to comply with the request at issue here until it was "instructed" not to do so by the Justice Department's Office of Legal Counsel. *See* Office of the Inspector General, GSA, *Evaluation of GSA's Nondisclosure Policy* at 7 (2018) (Report JE18-002); *see also id.* at 4-8, 13-18 (available at: https://oversight.gov/report/gsa/evaluation-gsa-nondisclosure-policy). And GSA disregards the fact that Members of Congress and their staffs are routinely provided "confidential," "privileged" and classified material by executive agencies and have protocols in place to ensure that sensitive information is safeguarded. Plaintiffs have done precisely that with any sensitive information they have acquired from GSA. For these reasons, to the extent that GSA is now basing its argument on the sensitivity of the withheld information, its bare-bones assertions fall far short of providing an alternative basis for dismissal of plaintiffs' action.

## CONCLUSION

For the reasons stated above, and in plaintiffs' opening brief, the district court's judgment dismissing this action should be reversed, and the case remanded to the district court for further proceedings.

Respectfully submitted,

*<u>/s/ David C. Vladeck</u>*

David C. Vladeck
Stephanie Glaberson
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9540
vladeckd@law.georgetown.edu

Scott L. Nelson
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Plaintiffs-Appellants

June 14, 2019

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,115 words, excluding the parts of the brief exempted by F. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using word Century Schoolbook type-style with a 14 point type.

Respectfully submitted,

*/s/ David C. Vladeck*
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9540
vladeckd@law.georgetown.edu

Attorney for Appellants
Elijah E. Cummings, *et al.*

**CERTIFICATE OF SERVICE**

I, David C. Vladeck, certify that on June 14, 2019, a copy of Appellant's brief was served via the Court's ECF system on all counsel of record.

Respectfully submitted,

*/s/ David C. Vladeck*
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9540
vladeckd@law.georgetown.edu

Attorney for Appellants
Elijah E. Cummings, *et al.*