ORAL ARGUMENT HELD ON OCTOBER 22, 2019

No. 18-5305

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAROLYN MALONEY, *et al.*,

Plaintiffs-Appellants,

v.

EMILY W. MURPHY, Administrator,
General Services Administration,

Defendant-Appellee.

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

SECOND SUPPLEMENTAL BRIEF OF APPELLANTS CAROLYN MALONEY, *et al*.

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GLOSSARY OF ABBREVIATIONS

GSA: General Services Administration

OLC: Office of Legal Counsel

INTRODUCTION

Plaintiffs-appellants Carolyn Maloney, *et al.*, ("plaintiffs") submit this brief in response to this Court's August 7, 2020, order directing the parties to address the effect on this case of *Committee on the Judiciary of the United States House of Representatives v. McGahn*, No. 19-5331 (D.C. Cir. Aug. 7, 2020), and what further proceedings are appropriate to the disposition of this matter. The Court's *en banc* ruling in *McGahn* strongly supports plaintiffs' standing to maintain this action. Plaintiffs, Members of the House Oversight and Reform Committee who invoked 5 U.S.C. § 2954 to request information from the General Services Administration ("GSA"), urge the Court to reverse the judgment of the district court and remand for further proceedings, for the reasons set forth in plaintiffs' principal and reply briefs, the argument held on October 22, 2019, and plaintiffs' supplemental briefs.

SUMMARY OF ARGUMENT

McGahn resolves each of the core questions on appeal in plaintiffs' favor and cements existing legal principles establishing that plaintiffs have standing to enforce their statutory requests for information from the Executive Branch.

First, *McGahn* confirms that plaintiffs here have suffered an informational injury that is both "concrete" and "particularized." *See* slip op. 4, 10–18. That is, the injury "actually exists," *id.* at 10 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016)), and it "affect[s] the plaintiffs in a personal and individual way," *id.* at 15 (quoting *Spokeo*, 135 S. Ct. at 1548).

Specifically, *McGahn* holds that informational injuries of the kind that plaintiffs have sustained are "concrete" because "Congress must have access to information to perform its constitutional responsibilities." *Id.* at 10. "By defying" plaintiffs' request under 5 U.S.C. § 2954, GSA "has deprived" plaintiffs, and the House Oversight and Reform Committee, of a legal entitlement to information, "and that deprivation is a concrete injury." *Id.* at 15.

McGahn also establishes that the deprivation of information to which plaintiffs are entitled inflicts "particularized" injury. Plaintiffs are the "proper part[ies] to bring this 'particular lawsuit,'" because they, as signatories to the Section 2954 information request at issue, are deprived "of specific information sought in exercise of [their] constitutional responsibilities." *Id.* at 9. Accordingly, GSA's "[d]enial of" information

properly requested under Section 2954 "is a concrete injury, and because the plaintiff[s] [are] the distinctly injured part[ies], the injury is particularized." *Id.* at 17.[1]

Second, *McGahn* reaffirms that judicial enforcement of congressional demands for information made to Executive Branch officials "safeguard[s] the separation of powers … by preserving the legal background against which the political branches have historically negotiated their informational disputes." *Id.* at 37. The "relevant history includes a long tradition of Presidential cooperation with the Legislative Branch in exercising its constitutional responsibilities." *Id.* at 36. As in *McGahn*, that tradition of cooperation was not followed here. Instead, the directive from the Office of Legal Counsel ("OLC") that GSA cease complying with plaintiffs' Section 2954 request was, like the order of President Trump at issue in *McGahn*, an "apparently unprecedented categorical direction." *Id*. *McGahn* thus rejects the district court's holding in this case that "historical experience" counsels against recognizing

[1] *McGahn*'s discussion of the remaining prongs of the standing test—traceability and redressability—applies with equal force to this case. The injury here is "directly caused" by GSA's conduct, and the "injury is also likely to be redressed by a favorable judicial decision." Slip op. 18. GSA has not contested these elements of standing.

plaintiffs' standing, JA at 222-24, as well as GSA's claim that the Circuit's subpoena enforcement cases, which recognize the courts' legitimate role in adjudicating disputes over legal entitlements to compel production of information, "cannot survive" *Raines v. Byrd*, 521 U.S. 811 (1997). GSA Br. at 39.

Third, McGahn confirms the limited reach of *Raines* and its inapplicability here. *McGahn* recognizes that "*Raines* stands for the proposition that whereas a legislative institution may properly assert an institutional injury, an individual member of that institution generally may not." Slip op. 32. The context of this statement matters; it applies to cases where an individual member of a legislative institution seeks to assert a right that runs to the institution, not the institution's members. Even where the rule applies, it is not categorical, as the Court's careful use of the word "generally" makes clear.

In this case, however, that rule has no bearing. Plaintiffs assert a right conferred by law on *them*, not on the House itself. Just as the plaintiffs in *Coleman v. Miller*, 307 U.S. 433 (1939), had standing to challenge the nullification of their votes, the plaintiffs here have standing to challenge the deprivation of information to which they are legally

entitled. By contrast, as *McGahn* recognizes, *Raines* held that a handful of members of Congress may not complain to the courts about a "wholly abstract and widely dispersed" injury to an "institutional interest[]" that affects all members equally. *McGahn*, slip op. 30, 31 (quoting *Raines*, 521 U.S. at 829, and *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1954 (2019)). Recognition of standing based on plaintiffs' concrete and particularized injury here is fully consistent with *McGahn*'s reading of *Raines*.

This analysis is borne out by *McGahn*'s treatment of the four *Raines* factors, which support plaintiffs' standing, *see* slip op. 33, as well as by the district court's conclusion that there is no "material difference between this case … and a subpoena enforcement case." JA 221. The district court added that "to the extent that *Raines* demands" that congressional plaintiffs "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." JA 222. The district court based its ruling not on core Article III standing requirements, but on the separation of powers arguments *McGahn* rejects.

ARGUMENT

I. *McGahn* Confirms Plaintiffs' Standing.

McGahn begins its standing analysis by underscoring that the test courts employ to demonstrate standing is the same for individuals (including individual legislators) and legislative entities: "An institutional body seeking to demonstrate standing 'must show, first and foremost, injury in the form of invasion of a legally protected interest that is concrete and particularized and actual or imminent.'" Slip op. 9 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 799-800 (2015) (internal quotations omitted)); *see also id.* at 14 (analogizing *McGahn* to cases involving statutory rights to information that confer standing on private parties). Here, as in *McGahn*, standing turns on whether plaintiffs' injury is "concrete" and "particularized."

A. Plaintiffs' Injury Is "Concrete."

Like the Judiciary Committee's injury in *McGahn*, plaintiffs' informational injury is "concrete" because it "'actually exist[s]'" and is "real." Slip op. 10 (quoting *Spokeo*, 136 S. Ct. at 1548). *McGahn*'s theory of injury focuses on "the essentiality of information for the effective functioning of Congress." *Id.* "Because Congress must have access to information to perform its constitutional responsibilities, when Congress

'does not itself possess the requisite information … recourse must be had to others who do possess it.'" *Id.* (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)). Congress's power to compel the production of "documentary evidence has a pedigree predating the Founding and has long been employed in Congress's discharge of its primary constitutional responsibilities: legislating, conducting oversight of the federal government, and, when necessary, checking the President." *Id.* at 11.

Congress's ability to create legally enforceable entitlements to the information required for its functions is not limited to the subpoena power. *McGahn* emphasizes that "[u]nless Congress have and use *every means* of acquainting itself with the acts and the dispositions of the administrative agents of the government, the country must be helpless to learn how it is being served." *Id.* at 12 (quoting *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2033 (2020) (emphasis added)). For that reason, "'the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.'" *Id.* (quoting *McGrain*, 273 U.S. at 174). That power is "a long-recognized right, based on the Constitution." *Id.* at 13.

Accordingly, *McGahn* recognizes that an informational injury is concrete if it rests on a claim that Congress's exercise of its authority to inform the legislative process has given the plaintiff a "legal[] entitle[ment]" to the information sought. *Id.* Relying on *FEC v. Akins*, 524 U.S. 11 (1998), and *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440 (1989), *McGahn* embraces "the principle that the denial of information to which the plaintiff claims to be entitled by law establishes a quintessential injury in fact." Slip op. 14. *McGahn* classifies the "denial of the information to which the Committee alleges it is entitled" as an "informational injury of the kind that the Supreme Court held supported standing in *Akins* and *Public Citizen*." *Id.*

The concreteness of the Judiciary Committee's injury in *McGahn* derived from the House's delegation of its "power of inquiry to its Committees," *see id.* at 13, carrying with it the power to issue subpoenas with the force of law, *see id.* McGahn's refusal to testify "denied the Committee something to which it alleges it is entitled by law," and therefore the Committee's "asserted injury is concrete." *Id.*

Plaintiffs stand on equally firm ground. Plaintiffs' entitlement to information comes not from a House rule, but from a statute enacted by

Congress and signed into law by the President. Section 2954 thus delegates Congress's "power of inquiry" to the Oversight Committee and also to a minority of its individual members acting together. And GSA does not question that Section 2954 imposes on it a legal obligation to produce records. Thus, "[b]y refusing" to provide information in response to plaintiffs' request, GSA "has denied" plaintiffs "something to which" they allege they are "entitled by law." *See* slip op. 13. "And because" plaintiffs have "alleged the deprivation of" information to which they are "legally entitled," their "asserted injury is concrete." *Id.*

B. Plaintiffs' Injury Is "Particularized."

Plaintiffs' injury is also "particularized" because it affects them "in a personal and individual way." *Id.* at 15 (quoting *Spokeo*, 136 S. Ct. at 1548). Oversight Committee members who signed the Section 2954 request invoked *their* statutory rights to the information withheld by GSA. Plaintiffs' injury is thus not "undifferentiated" and is not "common to all members of the public," let alone to other members of the House or even other members of the Oversight Committee. *See id.* (quoting *United States v. Richardson*, 418 U.S. 166, 177 (1974)). The informational right has been granted by statute to a specific group of members meeting

certain qualifications who invoke that right. Plaintiffs' injury is thus "specific to" them. *See id.*

As in *McGahn*, "[t]here is no 'mismatch' here." *See id.* at 16 (quoting *Va. House of Delegates*, 139 S. Ct. at 1953). Because plaintiffs made the request, plaintiffs have a distinctive legal entitlement to receive the requested information from GSA. Other members of the House not party to the Section 2954 request have not suffered that particularized informational injury. Plaintiffs are thus the ones "whose informational and investigative prerogatives have been infringed" because they are the ones "authorized by" law to seek the information (and authorized by law to sue under the Administrative Procedure Act when they are aggrieved by agency action). *See id.*

Accordingly, GSA's "[d]enial of" information properly requested under Section 2954 "is a concrete injury, and because the plaintiff[s] [are] the distinctly injured part[ies], the injury is particularized." *See id.* at 17. *McGahn* thus reaffirms that plaintiffs have standing to bring this action to compel GSA's compliance with their Section 2954 request.

II. Judicial Enforcement of Section 2954 Furthers the Separation of Powers.

The separation of powers arguments GSA made below and repeated in this Court are the same ones that the Court rejected in *McGahn*. GSA's core contention is identical to McGahn's argument that disputes between Congress and executive agencies over access to information must be resolved by resort to politics, not the courts. *Compare* GSA Br. at 49, w*ith* *McGahn*, slip op. 19. And, as did McGahn, GSA argues that permitting judicial enforcement of congressional information requests will "displace the historical practice of accommodation." Slip op. 25; *see* GSA Br. at 31-34. The district court rested its ruling in large part on GSA's "historical practice" argument. *See* JA 223-24.

McGahn, however, rejects the claim that the "historical practice of accommodation" negates the judiciary's role of enforcing legal rights to information. Rather, the judiciary's "proper role" comes into play where one of the other branches deviates from the "historical practice of accommodation." Slip op. 25, 37. GSA has a longstanding practice of honoring Section 2954 requests and negotiating with congressional staff if disagreements arise. App. Br. at 10-13. The "accommodation" in this

case broke down when OLC abruptly "instructed" GSA to stop complying with the plaintiffs' Section 2954 request, and GSA did so. *Id.* at 13.

McGahn drives home that the possibility of judicial intervention in disputes like this one reduces, not exacerbates, friction between the branches. The threat of litigation is part of the "*status quo ante*" and motivates the Executive Branch to negotiate, rather than refuse outright, a valid, legally binding request for information from legislators. Slip op. 37. That courts have not featured prominently in the history of information exchange between the other branches is a reflection of "the history of Presidential cooperation," which "has meant that there have been few occasions necessitating resort to the courts." *Id.* at 36. Removing the possibility of judicial intervention, on the other hand, would also remove the Executive Branch's incentive to negotiate, and therefore significantly curtail plaintiffs' statutory right to information in GSA's possession. As in *McGahn*, the threat of an "enforcement lawsuit may be an essential tool in keeping [GSA] at the negotiating table." *Id.* at 24. Entertaining plaintiffs' lawsuit thus "safeguard[s] the separation of powers" by "ensur[ing] the continuation of the 'established practice' of accommodation." *Id.* at 37.

That GSA, like McGahn, *see* slip op. 23, has not challenged the validity of the request or asserted any constitutional objection to producing the records sought reinforces the absence of any threat to separation of powers if the courts play their normal role in resolving legal disputes involving concrete informational injuries. As in *McGahn*, enforcing the request for records poses "minimal" risks to the judiciary because it does not require weighing in on any "political dispute" between the branches or on a direct clash between Congress and the President; it only involves applying the law concerning the entitlement to these records. *Id.* at 29. Once plaintiffs have shown an injury that supports Article III standing, the "court may not avoid its responsibility to decide the case because of its political context or consequences." *Id*.

McGahn, to be sure, suggests that the courts' standing analysis must be "especially rigorous" where reaching the merits "would force" the court to decide whether one of the other branches has acted unconstitutionally. *Id.* at 8 (quoting *Raines*, 521 U.S. at 819-20). But unlike *McGahn* or *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976), this case involves no "'portentous'" inter-branch dispute. Slip op. 35 (quoting *AT&T*, 551 F.2d at 385). The question in this case is simply

whether GSA has acted lawfully in withholding agency records. And even if a mere disagreement between members of different branches of government were enough to call into play "especially rigorous" standing analysis, *McGahn* makes clear that a careful examination of plaintiffs' standing to vindicate an informational injury satisfies whatever "rigor" is required to ensure that "the judiciary, in exercising jurisdiction over the present lawsuit, …. plays its appropriate constitutional role." *Id.* at 20.[2]

Although *McGahn* understandably focuses on subpoena enforcement, the Court's separation of powers analysis applies with equal force to Congress's other information-gathering tools. These include, most notably, statutes that require Executive Branch officials to submit information to Congress, congressional committees, or members thereof. As the Supreme Court noted in *Nixon v. Administrator of General Services*, 433 U.S. 425, 445 (1977), "there is abundant statutory

[2] *McGahn* also rejects a central pillar of GSA's argument: that this Circuit's subpoena enforcement cases—including *AT&T v. DOJ*—"form[] part of an outdated body of congressional-standing decisions that cannot survive *Raines*." *Compare* slip op. 24, *with* GSA Br. at 38-39 & 39 n.8.

precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch."

The word "mandatory" is not surplusage. It conveys the point that when Congress enacts statutes like 5 U.S.C. § 2954 to impose a duty on an agency to provide it with information, Congress expects the agency to comply. Indeed, courts "ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (quoting *Bowen v. Mich. Acad. of Family Physicians,* 476 U.S. 667, 681 (1986)).

This case is important because it will determine whether Congress has authority to pursue its informational interests in support of legislative and oversight functions, "us[ing] every means" available, slip op. at 12, including validly enacted statutes granting informational entitlements to specific members. Subpoenas are issued for Congress's informational needs not otherwise provided for by statute, and *McGahn* underscores that courts will ensure that Executive Branch officials comply with them. Congress cannot carry out its constitutional duties

without the power to investigate whether the Executive Branch is faithfully executing the law and properly spending the money Congress appropriates. Section 2954 recognizes the critical role that granting information rights to minority members plays in facilitating the exercise of that power.

In short, subpoenas are not the only tool at Congress's disposal. That is why statutes like Section 2954 were enacted. And as the Supreme Court stressed in *Mazars*, Congress must "have and use every means of acquainting itself with the acts and the dispositions of the administrative agents of the government," 140 S. Ct. at 2033 (quotation omitted), including statutes that require agencies to comply with information demands. For that reason, "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *McGahn*, slip op. 16 (quoting *McGrain*, 273 U.S. at 174).

Recognizing plaintiffs' standing accordingly furthers separation of powers principles by ensuring that both the Legislative and Judicial Branches carry out their proper roles without interfering in legitimate Executive Branch functions. Under *McGahn*, the district court erred by

resting its denial of standing in part on the premise that courts must refrain from interceding in inter-branch disputes.

III. *Raines* Does Not Foreclose Plaintiffs' Standing.

McGahn confirms that *Raines*'s holding is narrow: Individual legislators do not have standing to vindicate "institutional" injuries that affect all members of Congress equally and thus could be remedied by legislation. *See* slip op. 30-32. *Raines* "stands for the proposition that whereas a legislative institution may properly assert an institutional injury, an individual member of that institution generally may not." *Id.* at 32. Here, that generality is inapplicable because plaintiffs assert an injury that is in the first instance theirs, not the institution's, notwithstanding that Congress conferred a legal entitlement on them as a means of pursuing its own interests as well.

To start, *Raines*'s treatment of *Coleman v. Miller*, 307 U.S. 433, demonstrates that "individual member[s]" of a legislative body may have standing where they, and they alone, have suffered concrete and particularized injury, even though the injury alleged—the nullification of their votes—also more generally harms the institution of which they belong. *See Raines*, 521 U.S. at 825-26 (contrasting the "plain, direct, and

adequate interest" of the *Coleman* plaintiffs with "the abstract dilution of institutional legislative power that is alleged here."). Plaintiffs have shown that they have a "plain, direct, and adequate interest" in obtaining the information requested from GSA pursuant to a statute, App. Reply Br. at 9-12, and *McGahn* strongly indicates that such an interest is sufficient to confer standing.

This case falls outside the "general[]" rule pronounced in *Raines* for the additional reason that, as in *McGahn*, "[t]here is no 'mismatch' here." *McGahn*, slip op. 16 (quoting *Va. House of Delegates*, 139 S. Ct. at 1953). *Raines* establishes that "[t]he standing inquiry focuses on whether the plaintiff is the proper party to bring this suit." 521 U.S. at 818 (citation omitted). In *Raines*, the alleged injury was "wholly abstract and widely dispersed" and damaged every Member of Congress "equally." 521 U.S. at 829, 821. Likewise, in *Virginia House of Delegates*, "a single House of a bicameral legislature lack[ed] capacity to assert interests belonging to the legislature as a whole." 139 S. Ct. at 1953-54. But as demonstrated above, the injury plaintiffs allege here is concrete, particularized, and specific to them; only plaintiffs have a "legal entitlement" to the records

that GSA withheld. *See* JA 221. They are the "proper part[ies]" to bring this case; no one else could.

McGahn also addresses the four considerations on which the *Raines* Court relied in holding the plaintiffs there lacked standing. Slip op. 32-33. Each of those considerations supports plaintiffs' standing here, as they supported the Committee's standing in *McGahn*. First, as explained above, plaintiffs allege injuries, both personal and institutional, that are concrete, particularized, and specific to them—a far cry from the "wholly abstract and widely dispersed" allegations in *Raines*. *Id.* at 33.

Second, plaintiffs' attempt to litigate their claim is not contrary to historical experience, *see id.*, but plainly in line with the tradition of interbranch accommodations against the backdrop of legally enforceable information requirements, *see id.* at 24, as well as with Congress's expectation that a statute that commands an executive agency to provide information to Congress will be obeyed, or the courts will intercede to enforce compliance. *See Reich*, 74 F.3d at 1328.

Third, the House does not oppose (and has never opposed) this litigation, and plaintiffs' authorization to litigate this case is an essential incident of the statute and existing rights of action that provide judicial

remedies for agency action violating it. *See* slip op. 33; App. Br. at 54-57; App. Reply Br. at 20-26.

Fourth, holding that requesters lack standing to seek redress for violations of Section 2954 will deprive plaintiffs in this case (and potentially the House Oversight Committee in future cases in which it invokes its own rights under the statute) of any effective remedy for the deprivation of information to which they are entitled by law. *See* slip op. 33. For plaintiffs, it is judicial enforcement or nothing. Given GSA's intransigence, Congress could pass a dozen new laws requiring production, and each one would be ignored—just as GSA, at OLC's insistence, is ignoring Section 2954.

CONCLUSION

For the reasons set out above and in plaintiffs' prior submissions, this Court should, without further briefing or argument, reverse the district court's judgment and remand the case to the district court for further proceedings.

Respectfully submitted,

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August 21, 2020

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in this Court's August 7, 2020, supplemental briefing order because it contains 3,812 words, excluding the parts of the brief exempted by Fed. 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.

/s/ David C. Vladeck
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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2020, a copy of the foregoing was served via the Court's ECF system on all counsel of record.

/s/ David C. Vladeck
David C. Vladeck