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)

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

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GLOSSARY OF ABBREVIATIONS

GSA: General Services Administration (used in this brief to refer to Emily Murphy as Administrator of the General Services Administration).

ARGUMENT

Plaintiffs-appellants Carolyn Maloney, *et al.*, submit this reply brief to respond to five arguments in the supplemental brief of the defendant-appellee ("GSA").

1. GSA claims (at 3–5) that the right to request information under 5 U.S.C. § 2954 is not a "personal" right because it depends on a party affiliation and that "a party's control over committee assignments can be an important part of maintaining party discipline." This argument wrongly suggests that a "party" is an entity separate and apart from its members. A party is the sum of its constituents—members who have chosen to affiliate with a party. If a member leaves a party (as Representative Justin Amash did last year), it is the member's choice, not the party's. And it is the member's choice, not the party's, to join, or to refrain from joining, a Section 2954 request.

GSA errs as well in contending that caucuses "maintain[] party discipline" (at 5) by forcing standing committee members to give up their seats. The sources listed in the Court's questions and cited by GSA do not include any instance of a party caucus forcing a member to give up a seat as a form of discipline.

And GSA overstates the significance of party affiliation; members are appointed to standing committees even if they do not belong to a party caucus, and members of both parties serve on all standing committees.

2. GSA's contention (at 6–7) that "the canon of constitutional avoidance precludes construing section 2954 to vest a right in individual Members of Congress that is 'personal' to them'" also misses the mark. Nowhere does GSA grapple with the rights-creating text of Section 2954, which unmistakably grants a "personal" right to seven or more Oversight Committee Members to request information, and, by using the verb "shall," unmistakably compels compliance with procedurally valid requests. *See*, *e.g.*, *Jennings v. Rodriquez*, 138 S. Ct. 830, 842 (2018) ("In the absence of more than one plausible construction, the canon [of constitutional avoidance] simply 'has no application.'" (citations omitted)). To hold that Section 2954 does not mean what it says, as GSA urges, would not be an exercise of "avoidance"; it would amount to nullification of a statute on constitutional grounds.

Nor does GSA offer a coherent explanation for its assertion that the Constitution's Article I grant of "[a]ll legislative [p]owers" to Congress is too feeble to permit Congress, with the President's concurrence, to enact

a law delegating authority to some, but not all, of its members. The Supreme Court's opinions in *McGrain v. Daugherty*, 273 U.S. 135 (1927), and *Watkins v. United States*, 354 U.S. 178 (1957), envision muscular Congressional oversight. GSA does not even acknowledge the breadth of Congress's Article I authority. The only support GSA offers for its theory is language in *Raines v. Byrd*, 521 U.S. 811 (1997), relating to members' voting rights—an issue far afield from the informational rights Congress conferred in Section 2954.

GSA's brief (at 9) wrongly analogizes the rights conferred by Section 2954 to the Speaker's authority under the House Rules, which GSA says "[n]o one would think" confer personal rights. A *statute* conferring rights on the Speaker, however, presents an entirely different question. For example, the Speaker would have standing to sue if she were excluded from the advisory committee on protection of Presidential and Vice Presidential candidates created by 18 U.S.C. § 3056, which specifies that the committee consists of the Speaker, the House minority leader, the Senate majority and minority leaders, and another member they select. *See Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999) (holding advisory committee member may sue over exclusion).

3. GSA maintains (at 10) that plaintiffs' brief "raises the new argument" that they can pursue this suit because "their alleged 'institutional injury … injures them, and only them, personally.'" This argument is not new. Plaintiffs have made it from the start. *See* Appt. Br. 29, 49–53; Reply Br. 10–12. Nor is GSA correct that the rejection of standing based on vote dilution in *Raines* and *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), controls where, as here, plaintiffs have suffered concrete and particularized informational injuries that also injure the Committee, the House, and Congress.

As the district court correctly recognized, plaintiffs may be able to assert an institutional injury here because "Section 2954 is unique in that it grants a statutory right to seven members of the House Oversight Committee—a true minority (seven Members) or a minority of the House of Representatives (those Members on the Oversight Committee) to request and receive information from an Executive agency...." JA 221. Courts have often emphasized that the denial of information to which Congress is entitled constitutes an injury that courts can redress. *See*, *e.g.*, *McGrain*, 273 U.S. 135; *United States v. Am. Tel. & Tel. Co.*, 551 F. 2d 384 (D.C. Cir. 1976); *U.S. House of Representatives v. Dep't of*

Commerce, 11 F. Supp. 2d 76, 86, 89 (D.D.C. 1998) (three-judge court finding injury to the House to be both personal and institutional).

4. Relying on *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117 (2011), GSA (at 8) makes the far-fetched suggestion that characterizing the right to make a request for information under Section 2954 as "personal" would imply that the automatic removal of an Oversight Committee member under House Rule X, clause 5(b), would violate the *First Amendment* rights of the member.

GSA misconceives the right conferred by Section 2954. It is a right conferred on members of the Oversight Committee to request information from agencies, so long as seven members join the request. The right is contingent on appointment to and retention on the Committee. Section 2954 is not a grant of tenure to remain on the Committee and does not implicate the First Amendment considerations addressed in *Carrigan*.

5. GSA acknowledges (at 2, 10) that *Raines* leaves intact the holding of *Coleman v. Miller*, 307 U.S. 433 (1939), that aggrieved legislators whose numbers are sufficient to make their action "*decisive*" have standing, at least if they sue as a "bloc." Whether or not suing as a "bloc" is a requirement is irrelevant; plaintiffs in this case *have* sued as a

"bloc" of members whose numbers are sufficient under Section 2954 to require GSA's compliance. At every step, more than seven Committee members who joined in the requests at issue in this case have been plaintiffs and appellants, a fact GSA cannot deny. Plaintiffs, in sum, are a group with the ability "to act determinatively," and the "size of their cohort" is not "too small to act." *Blumenthal v. Trump*, No. 19-5237, slip op. at 10 (D.C. Cir. Feb. 7, 2020). Even under GSA's reading of *Raines* and *Coleman*, the "bloc" in this case has standing.

GSA's acknowledgement that "blocs" of members sizeable enough to act with legally operative effect may sue for something for which they have no "private" entitlement also refutes its insistence (at 2) that only "private" interests, such as a member's interest in her salary, can give rise to standing. There is no plausible claim that the *Coleman* plaintiffs were seeking to vindicate "private" rights. To the contrary, each plaintiff in *Coleman* had a cognizable "personal" interest in vindicating an interest bound up in her institutional role, notwithstanding the absence of any financial or other "private" interest of the kind GSA's argument would require.

CONCLUSION

For the reasons set out above and in plaintiffs' prior submissions, this Court should reverse the district court's judgment and remand the case to the district court for further proceedings.

Respectfully submitted,

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February 12, 2020

* Counsel wish to acknowledge the assistance of Georgetown University Law Center students Alexis Christensen and Christopher Felton in the preparation of this brief.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in this Court's January 21, 2020, supplemental briefing order because it contains 1,262 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 February 12, 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