No. 22-425

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondents make little effort to defend the court of appeals' holding that individual Members of Congress have Article III standing to sue a federal agency for failing to disclose information sought under 5 U.S.C. 2954. They instead principally argue (Br. in Opp. 20-29) that, even if the decision below was erroneous, the question presented does not warrant this Court's review. That is wrong. Members of Congress routinely seek information from executive agencies and the process for resolving disputes about those requests is of profound importance to both the Legislative and Executive Branches. Until now, Congress and the Executive have resolved such disputes through negotiation and compromise, but the decision below threatens to replace that process of political accommodation with a system of litigation and judicial decree. That radical

transformation of the traditional relationship between the Branches warrants further review.

This Court's review is warranted even though the number of respondents who remain members of the House Committee on Oversight and Reform has recently dropped from eleven to five, two fewer than the number required by Section 2954. Those developments since the filing of the government's petition—which respondents acknowledge only obliquely, see Br. in Opp. ii—are a further reason why respondents are not entitled to the relief they seek. But that defect goes to the merits of respondents' claim, not to Article III jurisdiction. This Court should therefore grant certiorari and resolve that important antecedent question, which has implications extending far beyond this particular case. Alternatively, if the Court believes the developments moot the case or warrant further consideration by the district court in the first instance, the Court could grant certiorari, vacate the decision below, and remand with instructions to dismiss or to return the case to the district court. But in no event should the Court allow the decision below to remain binding precedent in the circuit where virtually any informational dispute between Members of Congress and the Executive could be brought to the Article III courts.

A. The Court Of Appeals' Decision Was Wrong

Respondents do not address, let alone refute, many of the government's central arguments (Pet. 8-18). For example, they fail to distinguish this Court's holding in *Raines* v. *Byrd*, 521 U.S. 811 (1997), that a harm to "official authority or power" does not qualify as a judicially cognizable injury under Article III. *Id.* at 826. Nor do they deny that Members of Congress and the Executive Branch have traditionally resolved informational

disputes through negotiation and compromise; quite the contrary, they candidly acknowledge (Br. in Opp. 22-24) that this suit is virtually unprecedented.

Respondents instead rely (Br. in Opp. 20-21) on this Court's decisions in *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190 (2021), and *Powell* v. *McCormack*, 395 U.S. 486 (1969). But in *TransUnion*, the Court simply stated that "members of the public" who request information in their private capacities may have standing to challenge the denial of those requests. 141 S. Ct. at 2214. *Powell*, too, involved the loss of a "private right" —namely, a Member of Congress's "loss of salary." *Raines*, 521 U.S. at 821; see *Powell*, 395 U.S. at 496.

The asserted injury in this case, in contrast, involves a harm to a prerogative of office rather than the loss of a private right. As the court of appeals recognized, Section 2954 allows members of the specified committees to seek information to "fulfill their professional duties as Committee members," Pet. App. 23a, and if one of those members "were to leave the Committee, the injury sued upon would end," *id.* at 27a. That injury to respondents in their official capacities as Members does not satisfy Article III, which requires an injury "of a personal and not of an official nature." *Braxton County Court* v. *West Virginia ex rel. the State Tax Commissioners*, 208 U.S. 192, 197 (1908).

Respondents also cite (Br. in Opp. 21-22) *Coleman* v. *Miller*, 307 U.S. 433 (1939)—the "one case in which" this Court has "upheld standing for legislators (albeit *state* legislators) claiming an institutional injury." *Raines*, 521 U.S. at 821. In *Raines*, however, the Court treated *Coleman* as a narrow exception to ordinary principles of legislative standing, applicable only when state "legislators whose votes would have been sufficient to

defeat (or enact) a specific legislative Act" sue "on the ground that their votes have been completely nullified." *Id.* at 823. The Court also specifically refused to "exten[d]" *Coleman* any further. *Id.* at 826. *Coleman* thus cannot overcome the long line of decisions establishing that Members of Congress ordinarily may not resort to the federal courts to vindicate their official (as opposed to personal) interests. See Pet. 10.

Finally, respondents assert (Br. in Opp. 29) that the government's Article III arguments "ignore[] an antecedent question"—namely, whether Congress has the constitutional authority to grant Members a judicially enforceable right to demand information from the Executive. But Congress cannot authorize the federal courts to hear cases that do not satisfy Article III, and "Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide" whether Article III's requirements are met. *TransUnion*, 141 S. Ct. at 2205. And to the extent that Congress's conferral of a right to sue may sometimes be "instructive" in conducting that Article III analysis, *id.* at 2204 (citation omitted), it is respondents who ignore the critical point here: Congress has *not* purported to confer any right to enforce Section 2954 in court, and respondents instead invoke general equitable principles and the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* See Pet. 15-16.

B. The Court Of Appeals' Decision Warrants Review

Respondents principally argue (Br. in Opp. 20-29) that, even if the court of appeals' decision was wrong, it does not warrant review. That is incorrect.

1. Respondents first observe (Br. in Opp. 1) that "[t]here is no conflict among the circuits over standing

under Section 2954." But the existence of a circuit conflict is not the only basis for granting certiorari. The Court also grants review when a court of appeals decides a case "in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). As the government has shown (Pet. 19-20), the decision below conflicts with this Court's decision in *Raines*.

This Court's review is likewise warranted because the court of appeals has "decided an important question of federal law" that should be "settled by this Court." Sup. Ct. R. 10(c). "[D]isputes involving congressional efforts to seek official Executive Branch information recur on a regular basis." *Trump* v. *Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020). Such disputes "can raise important issues concerning relations between the branches." *Ibid.* "Congress and the Executive have nonetheless managed for over two centuries to resolve such disputes among themselves." *Ibid.* The decision below upsets that longstanding practice. And this Court has "a duty of care to ensure that [the Judiciary] not needlessly disturb 'the compromises and working arrangements'" that Congress and the Executive have reached. *Ibid.* (citation omitted). That is particularly so because allowing the decision below to stand would significantly change the balance of power between Congress and the Executive Branch. "Instead of negotiating over information requests, Congress"—or, for that matter, a small group of Members—"could simply walk away from the bargaining table and compel compliance in court." *Id.* at 2034.

Finally, as Judge Rao observed, the "D.C. Circuit has an effective monopoly over lawsuits between Congress and the Executive Branch." Pet. App. 63a (Rao, J., dissenting). Members of Congress who seek judicial

enforcement of Section 2954 will almost always be able to lay venue in the District of Columbia. See 28 U.S.C. 1391(e)(1). And now that the D.C. Circuit has held that Members have standing to sue to enforce Section 2954, they will have little incentive to sue anywhere else.

2. Respondents next argue (Br. in Opp. 1) that this Court should deny review because this suit is almost unprecedented—specifically, it is only the third case in which Members of Congress have sued to enforce Section 2954. That gets things backwards. "[H]istory and tradition 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). The lack of precedent for this suit thus further confirms that the decision below is a stark departure from fundamental separation-of-powers principles. That is a reason to grant review, not to deny it.

Nor would Section 2954 suits likely be rare in the future. Until now, there has been substantial doubt that such suits could be brought. One of the two prior cases was dismissed for lack of standing, the other became moot before the court of appeals could resolve the standing question, and even the House of Representatives' Bipartisan Legal Advisory Group had argued that Section 2954 was not judicially enforceable. See *Waxman* v. *Evans*, 52 Fed. Appx. 84 (9th Cir. 2002); *Waxman* v. *Thompson*, No. 04-cv-3467, 2006 WL 8432224, at *6-*12 (C.D. Cal. July 24, 2006); Pet. 22. Now that the D.C. Circuit has held that Members of Congress have standing to bring suits under Section 2954, those suits can be expected to proliferate—to the detriment of Congress, the Executive, and the Judiciary alike. See Pet. 20-23.

The importance of this case, moreover, transcends Section 2954 litigation. The decision below is part of a recent line of cases in which legislators have sought, and the D.C. Circuit has allowed, judicial resolution of inter-branch disputes. In one recent case, the D.C. Circuit held that a "single house" has standing to sue the Executive Branch for allegedly injuring its official powers. *United States House of Representatives* v. *Mnuchin*, 976 F.3d 1, 8 (2020), vacated, 142 S. Ct. 332 (2021). In another, the D.C. Circuit held that a congressional Committee has standing to sue the Executive Branch for failure to comply with a subpoena. *Committee on the Judiciary* v. *McGahn*, 968 F.3d 755, 778 (2020) (en banc). And in this case, the D.C. Circuit went even further, holding that a "non-majority group of committee members" can have standing to sue the Executive Branch for withholding information. Pet. App. 3a. That decision marks the "logical culmination of [the D.C. Circuit's] recent decisions on congressional standing," which have "steadily mov[ed]" further and further away from *Raines*. *Id.* at 61a (Rao, J., dissenting). That broader trend underscores the need for this Court's review.

3. Respondents additionally contend (Br. in Opp. 26-29) that the case comes to this Court in an interlocutory posture and that, on remand, the government may still prevail on the ground that the respondents lack a cause of action, that the requested information falls outside the scope of Section 2954, or that the information is privileged. But interlocutory review is often appropriate where, as here, a case raises an "important jurisdictional" question. Stephen M. Shapiro et al., *Supreme Court Practice*, § 4.18, at 4-56 (11th ed. 2019). Indeed, this Court routinely grants review to decide questions

of Article III standing in the present posture—that is, after the court of appeals has found standing but before the district court has fully resolved the merits. See, *e.g.*, *Town of Chester* v. *Laroe Estates, Inc.*, 137 S. Ct. 1645, 1649-1650 (2017); *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 336-337 (2016); *Clapper* v. *Amnesty International USA*, 568 U.S. 398, 407-408 (2013).

Contrary to respondents' suggestion (Br. in Opp. 3), the Article III standing question presented here has "practical significance" whether or not there is a cause of action to enforce Section 2954. As discussed above, the decision below does not stand alone; it is part of a broader trend of recent decisions in which the D.C. Circuit has blessed judicial resolution of interbranch disputes. Further review in this case would do more than just determine whether Members of Congress could sue to enforce Section 2954; it would also provide guidance on broader principles of congressional standing.

4. Finally, respondents assert (Br. in Opp. 25-26) that "the remaining stakes in the case involve only a handful of documents." But the government is not seeking this Court's review to vindicate a case-specific interest in withholding these particular documents. The government is instead seeking to vindicate the fundamental separation-of-powers principle that this sort of dispute between the political Branches should continue to be resolved through negotiation and compromise rather than by the Judicial Branch.

Respondents speculate (Br. in Opp. 3) that this case "may be mooted" by the Executive Branch's production of the remaining documents. But the Executive Branch has consistently declined to produce those documents because it has determined that they are privileged or otherwise protected from disclosure. See Pet. 4.

Respondents identify no reason to think that the Executive Branch would change course now, produce the documents, and moot its own petition for a writ of certiorari.

C. Developments Since The Filing Of The Petition Do Not Diminish The Need For This Court's Review

The petition noted (at 4 n.1) that 17 Members had brought this suit, but that six of those Members had passed away, left the House of Representatives, left the Committee, or declined to appeal. Since then, five Members (Representative Val Demings, who had declined to appeal, as well as Representatives Carolyn Maloney, Jim Cooper, Brenda Lawrence, and Peter Welch) have left the House. Br. in Opp. ii. Two others (Representatives Robin Kelly and Mark DeSaulnier) have left the Committee. See H.R. Res. 71, 118th Cong., 1st Sess. (Jan. 30, 2023). That leaves only five Members as respondents.

Respondents do not contend that those developments moot this case or otherwise create any obstacle to this Court's review. Indeed, respondents do not even mention those developments in the body of their brief: They note the departure of some respondents from the House only in the "Parties to the Proceeding" section (Br. in Opp. ii) and do not acknowledge the departure of other respondents from the Committee at all.

The government agrees that the reduction in the number of respondents does not moot this case. A case becomes moot only if, as a result of some intervening event, it becomes "impossible for [a court] to grant any effectual relief." *United States* v. *Washington*, 142 S. Ct. 1976, 1983 (2022) (citation omitted). It is not impossible to grant relief here: A court could still order

the Executive Branch to turn over the requested materials to the remaining respondents.

The change in the number of respondents instead raises a merits question—namely, whether Section 2954 authorizes such relief when the relevant information was initially requested by seven or more Members if the number of requesters has since dropped below seven. In the government's view, the answer is no. But that question, "which goes to the meaning of the [statute] and the legal availability of a certain kind of relief," is a matter of "the merits," not "mootness." *Chafin* v. *Chafin*, 568 U.S. 165, 174 (2013). It thus would not affect this Court's ability to resolve the antecedent question of Article III standing.*

If this Court were to disagree with the above analysis and conclude that this case is moot, it should grant the petition, vacate the judgment below, and remand the case with instructions to dismiss. When a suit that otherwise warrants review ceases to be justiciable "while on its way" to the Court, the Court's "established practice" is to vacate the judgment and remand the suit with instructions to dismiss. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); see, *e.g.*, *Ritter* v. *Migliori*, 143 S. Ct. 297 (2022). That practice reflects the understanding that a "party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstances, ought not in fairness be forced

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* The same is true of the other intervening development noted by respondents, the new House rule requiring that Section 2954 requests made during the 118th Congress must include the Chair of the Committee on Oversight and Reform. See Br. in Opp. 19. As respondents note (*ibid.*), that rule does not appear to apply retroactively to prior requests, and would not in any event affect the Article III question presented in the petition.

to acquiesce in the judgment." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 25 (1994).

Alternatively, this Court could follow the approach it took in two recent cases where intervening developments called into question plaintiffs' entitlement to the relief they sought: The Court could grant certiorari, vacate the court of appeals decision, and remand with instructions to return the case to the district court to allow that court to determine in the first instance "what further proceedings are necessary and appropriate in light of the changed circumstances." *Biden* v. *Sierra Club*, 142 S. Ct. 46, 46 (2021); see *Biden* v. *Sierra Club*, 142 S. Ct. 56 (2021).

The government respectfully submits, however, that the most appropriate course would be to grant plenary review. The decision below undermines the separation of powers, conflicts with this Court's precedents, transforms the process that Congress and the Executive have long used to resolve informational disputes, and threatens "ruinous consequences for the orderly functioning of government." Pet. App. 90a (statement of Ginsburg, J.). Making matters worse, the decision does not stand alone; rather, it is part of a broader trend of decisions in which the D.C. Circuit has moved away from *Raines* and has accepted increasingly expansive theories of congressional standing. This Court should put a stop to that trend by granting the petition and reversing the decision below. At a minimum, the Court should vacate the decision and remand the case. In all events, the decision should not be allowed to stand.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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