[EN BANC ORAL ARGUMENT SCHEDULED FOR FEBRUARY 23, 2021]

No. 19-5331

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMMITTEE ON THE JUDICIARY OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Appellee,

v.

DONALD F. MCGAHN, II,
Appellant.

On Appeal from a Final Order of the U.S. District Court for the District of Columbia (No. 1:19-cv-02379)

BRIEF OF FORMER GENERAL COUNSELS OF THE U.S. HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

ROBBINS, RUSSELL, ENGLERT,
ORSECK, UNTEREINER & SAUBER LLP
Lawrence S. Robbins (Bar No. 38805)
D. Hunter Smith (Bar No. 55527)
Carolyn M. Forstein
2000 K Street, N.W., 4th Floor
Washington, DC 20006
Telephone: (202) 775-4500
Facsimile: (202) 775-4510
Email: lrobbins@robbinsrussell.com

Counsel for Amici Curiae

CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

A. *Parties and* amici. – *Amici* adopt the statement of parties and *amici* in Plaintiff-Appellee's brief.

B. *Ruling Under Review*. – *Amici* adopt the statement of the ruling under review in Plaintiff-Appellee's brief.

C. *Related Cases*. – *Amici* adopt the statement of related cases in Plaintiff-Appellee's brief.

/s/ Lawrence S. Robbins
Counsel for Amici Curiae

Dated: December 23, 2020

TABLE OF CONTENTS

Page

CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES i

TABLE OF AUTHORITIES iii

GLOSSARY ix

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE 1

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS 3

ARGUMENT 4

I. FEDERAL COURTS HAVE POWER TO CONSIDER THIS LAWSUIT 4

A. Federal courts have power to remedy unconstitutional executive conduct in cases over which they have subject matter jurisdiction 4

B. The panel's cause-of-action analysis was wrong 8

C. The district court had subject matter jurisdiction 12

II. THE END OF THE 116TH CONGRESS WILL NOT MAKE THIS CASE MOOT 18

III. JUDICIAL INTERVENTION IS NECESSARY TO RESTORE THE TRADITIONAL PRACTICE OF INTERBRANCH ACCOMODATIONS 21

CONCLUSION 27

CERTIFICATE OF COMPLIANCE 28

CERTIFICATE OF SERVICE 29

TABLE OF AUTHORITIES[†]

Page(s)

Cases

Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.,
570 U.S. 205 (2013)....6

Alexander v. Sandoval,
532 U.S. 275 (2001)....9

**Armstrong v. Exceptional Child Ctr., Inc.*,
575 U.S. 320 (2015)....5, 7, 8, 9, 11

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,
403 U.S. 388 (1971)....9

Bostock v. Clayton Cty.,
140 S. Ct. 1731 (2020)....15

Cardiff Bridge Case (*Rex v. Inhabitants in Glamorganshire*)
(1700) 91 Eng. Rep. 1287 5

Citizens United v. Fed. Election Comm'n,
558 U.S. 310 (2010)....6

Clinton v. Jones,
520 U.S. 681 (1997)....7

Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media,
140 S. Ct. 1009 (2020)....9

Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 968 F.3d 755 (D.C. Cir. 2020) (en banc)....8

Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 973 F.3d 121 (D.C. Cir. 2020)....8, 9, 10

Comm. on Judiciary, U.S. House of Representatives v. Miers,
558 F. Supp. 2d 53 (D.D.C. 2008)....26

[†] Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES—CONTINUED

Comm. on Judiciary of U.S. House of Representatives v. Miers,
No. 08-5357, 2009 WL 3568649 (D.C. Cir. Oct. 14, 2009)................................20

Comm. on Oversight & Gov't Reform, U.S. House of Representatives v. Lynch, 156 F. Supp. 3d 101 (D.D.C. 2016) 18

Comm. on Oversight & Gov't Reform v. Barr,
No. 16-5078, 2019 WL 2158212 (D.C. Cir. May 14, 2019) 20

Comm. on Oversight & Gov't Reform v. Holder,
979 F. Supp. 2d 1 (D.D.C. 2013)..26

Committee on Ways & Means v. Dep't of Treasury,
1:19-cv-01974 (D.D.C. 2019)..20

Corr. Servs. Corp. v. Malesko,
534 U.S. 61 (2001)..7

Del Monte Fresh Produce Co. v. United States,
570 F.3d 316 (D.C. Cir. 2009)..19, 20, 21

Earl of Suffolk v. Howard
(1723) 24 Eng. Rep. 689...7

Eastland v. U. S. Servicemen's Fund,
421 U.S. 491 (1975)..20

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,
561 U.S. 477 (2010)..6

Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.,
527 U.S. 308 (1999)..7, 10, 11

Hernandez v. Mesa,
140 S. Ct. 735 (2020)...9

Hughes v. Trs. of Morden Coll.
(1748) 27 Eng. Rep. 973...7

James Bagg's Case
(1615) 77 Eng. Rep. 1271...5

TABLE OF AUTHORITIES—CONTINUED

Jesner v. Arab Bank, PLC,
138 S. Ct. 1386 (2018)....9

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803)....5

McGrain v. Daugherty,
273 U.S. 135 (1927)....4

Nat'l Fed'n of Indep. Bus. v. Sebelius,
567 U.S. 519 (2012)....6

Osborn v. Bank of U.S.,
22 U.S. (9 Wheat.) 738 (1824)....5

Reed v. County Comm'rs of Del. Cty.,
277 U.S. 376 (1928)....11

SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC,
137 S. Ct. 954 (2017)....10, 11

Senate Select Comm. on Presidential Campaign Activities v. Nixon,
366 F. Supp. 51 (D.D.C. 1973)....13

Senate Select Comm. on Presidential Campaign Activities v. Nixon,
498 F.2d 725 (D.C. Cir. 1974) (en banc)....21

Spencer v. N.L.R.B.,
712 F.2d 539 (D.C. Cir. 1983)....21

**Trump v. Mazars USA, LLP*,
140 S. Ct. 2019 (2020) 4, 5, 6, 22, 27

**United States v. Am. Tel. & Tel. Co.*,
551 F.2d 384 (D.C. Cir. 1976)....14, 15

**United States v. Am. Tel. & Tel. Co.*,
567 F.2d 121 (D.C. Cir. 1977)....19, 24

**United States v. Stanley*,
483 U.S. 669 (1987)....10

TABLE OF AUTHORITIES—CONTINUED

United States v. U.S. House of Representatives,
556 F. Supp. 150 (D.D.C. 1983).....24

Watkins v. United States,
354 U.S. 178 (1957).....5

Ex Parte Young,
209 U.S. 123 (1908).....6

Ziglar v. Abbasi,
137 S. Ct. 1843 (2017).....9

Constitutional Provisions, Statutes, and Rule

U.S. Const., art. I, § 1.....4

U.S. Const., art. I, § 2.....20

2 U.S.C. § 194.....24, 25

28 U.S.C. § 41 (1926).....11

28 U.S.C. § 1331.....12, 13, 15, 16, 17

28 U.S.C. § 1331 (1976).....14

28 U.S.C. § 1365.....4, 12, 13, 14, 15, 17

28 U.S.C. § 2201.....8

Judiciary Act of 1789, 1 Stat. 73.....7

Pub. L. No. 94-574, 90 Stat. 2721 (1976).....13, 14

Pub. L. No. 95-521, Title VII, 92 Stat. 1879 (1978).....13

Pub. L. No. 96-486, 94 Stat. 2369 (1980).....14

Pub. L. No. 104-292, 110 Stat. 3459 (1996).....17

Fed. R. App. P. 43.....19

TABLE OF AUTHORITIES—CONTINUED

Miscellaneous

124 Cong. Rec. 1,118-19 (1978)....................16

*124 Cong. Rec. 36,466 (1978)....................17

128 Cong. Rec. 31,754 (1982)....................25

128 Cong. Rec. 31,776 (1982)....................25

142 Cong. Rec. 19,412-13 (1996)....................17

Assertion of Exec. Privilege with Respect to Clemency Decision, 23 Op. O.L.C. 1 (1999)....................23, 27

Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. Rev. 681 (2009)....................6

Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 Cornell L. Rev. 571 (2014)....................16

*House Rule II.8(c), H.R. Doc. No. 115-177 (2019)....................18

H.R. Rep. No. 29-684 (1846)....................23

H.R. Rep. No. 29-686 (1846)....................22

*H.R. Rep. No. 95-1756 (1978) (Conf. Rep.)....................17

H.R. Res. 5, 113th Cong. (2013)....................18

H.R. Res. 5, 114th Cong. (2015)....................18

H.R. Res. 430, 116th Cong. (2019)....................12

Memorandum for Margaret McKenna, Deputy Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Dual-purpose Presidential Advisers* (Aug. 11, 1977)....................24

John Mitford, A Treatise On The Pleadings In Suits In The Court Of Chancery (2d ed. 1787)....................7

TABLE OF AUTHORITIES—CONTINUED

House Comm. on the Judiciary, *Investigation of the Role of the Department of Justice in the Withholding of Environmental Protection Agency Documents from Congress in 1982-83*, H.R. Rep. 99-435 (1985) 25

The Power of the President to Withhold Information from the Congress (Comm. Print 1958) (85th Cong.) 22

Prosecution for Contempt of Cong. of an Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101 (1984) 25

Prosecutorial Discretion Regarding Citations for Contempt of Cong., 38 Op. O.L.C., slip op. (June 16, 2014) 25

Public Officials Integrity Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings Before the S. Comm. on Governmental Affairs, 95th Cong. 16

Memorandum for John D. Ehrlichman, Assistant to the President for Domestic Affairs, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff"* (Feb. 5, 1971) 23

Ronald D. Rotunda, *Presidents and Ex-Presidents As Witnesses*, 1975 U. Ill. L.F. 1 22

S. Rep. No. 95-170 (1977) 14, 15

S. 555, 95th Cong., (1977) 16

Philip Shabecoff, *House Charges Head of E.P.A. with Contempt*, N.Y. Times (Dec. 17, 1982) 25

1 Joseph Story, Commentaries on Equity Jurisprudence (1836) 11

Testimonial Immunity Before Cong. of the Former Counsel to the President, 43 Op. O.L.C., slip op. (May 20, 2019) 23, 24, 26

GLOSSARY

DOJ	Department of Justice
OLC	Office of Legal Counsel

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

Amici are former General Counsels and Acting General Counsels of the U.S. House of Representatives who served over the last four decades under both Republican and Democratic Speakers of the House. They submit this brief to provide the Court with legal analysis and historical context concerning Congressional informational disputes with the Executive Branch.

Amici and their dates of service are as follows:

William Pittard served in the Office of General Counsel between 2011 and 2016; he was Acting General Counsel in 2016 under Speaker Paul D. Ryan.

Kerry W. Kircher served in the Office of General Counsel between 1995 and 2016; he was General Counsel between 2011 and 2016 under Speakers Ryan and John A. Boehner.

Irvin B. Nathan served as General Counsel between 2007 and 2010 under Speaker Nancy Pelosi.

Geraldine R. Gennet served in the Office of General Counsel between 1995 and 2007; she was Acting General Counsel between 1996 and 1997 and General Counsel between 1997 and 2007 under Speakers Pelosi, J. Dennis Hastert, and Newt Gingrich.

Thomas J. Spulak served as General Counsel between 1994 and 1995 under Speaker Thomas S. Foley.

Charles Tiefer served in the Office of General Counsel between 1984 and 1995; he was Acting General Counsel in 1994 under Speaker Foley.

Steven R. Ross served as General Counsel between 1983 and 1993 under Speakers Foley, James C. Wright, Jr., and Thomas P. "Tip" O'Neill, Jr.

Stanley Brand served as General Counsel between 1976 and 1983 under Speaker O'Neill.

All parties have consented to the filing of this brief. Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *Amici* certifies that a separate brief is necessary because this brief presents argument derived from *Amici*'s experience as lawyers for the House.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No party's counsel authored this brief in whole or in part. No party, party's counsel, or any person other than *amici curiae* and their counsel, contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

Amici submit this brief to make three distinct points, each informed by their experience as General Counsels of the U.S. House of Representatives. *First*, there is both a cause of action and subject matter jurisdiction for the Committee to pursue this lawsuit. The Department's and the panel's submissions to the contrary muddle the applicable case law and distort the text and history of the Senate's jurisdictional statute, 28 U.S.C. § 1365, a statute which one of *Amici* was involved in drafting. *Second*, this case will not become moot upon the conclusion of the 116th Congress, just as past interbranch subpoena litigation has not become moot upon the conclusion of past Congresses. And, *third*, despite the Department's argument to the contrary, permitting this lawsuit to proceed will not disturb Congress's traditional working arrangements with the Executive Branch; instead, it will help to restore them.

I. FEDERAL COURTS HAVE POWER TO CONSIDER THIS LAWSUIT

A. Federal courts have power to remedy unconstitutional executive conduct in cases over which they have subject matter jurisdiction

The Constitution confers upon "each House [the] power to 'secure needed information.'" *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (quoting *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927)). The power to seek such information is included in "the constitutional provisions which commit the legislative function to the two houses." *McGrain*, 273 U.S. at 175; *see* U.S. Const. art. I, § 1. When Congress seeks information, "it 'unquestionably' remains 'the duty

of all citizens to cooperate.'" *Trump*, 140 S. Ct. at 2036 (quoting *Watkins v. United States*, 354 U.S. 178, 187 (1957) (emphasis omitted)).

Here, McGahn has refused to comply with his constitutional duty to respond to the Committee's subpoena. The Committee can sue to compel his compliance with that duty because "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers . . . reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).[1]

From their earliest days, federal courts have remedied wrongful executive action in cases over which they had subject matter jurisdiction. *See, e.g.*, *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 844 (1824) ("[N]o plausible reason suggests itself to us . . . that an injunction may not be awarded to restrain" a state official from executing an unconstitutional law); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162-73 (1803) (holding that the court had power to remedy Secretary of State's wrongful withholding of commission, before dismissing for lack of subject matter jurisdiction).

---

[1] *E.g.*, *James Bagg's Case* (1615) 77 Eng. Rep. 1271, 1277-78 ("[T]o this Court of King's Bench belongs . . . Authority . . . to correct . . . any manner of misgovernment.") (Coke, C.J.); *Cardiff Bridge Case* (*Rex v. Inhabitants in Glamorganshire*) (1700) 91 Eng. Rep. 1287, 1288 ("[T]his Court may see that [officials] keep themselves within their jurisdiction; and if they exceed them, to restrain them.").

Cases seeking judicial enforcement of rights under the Constitution became more "common after 1875, when Congress conferred general federal question jurisdiction on the federal courts." Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. Rev. 681, 687 (2009). *E.g.*, *Ex Parte Young*, 209 U.S. 123 (1908). And, today, the Supreme Court routinely considers plaintiffs' challenges to alleged unconstitutional executive action, without any analysis into whether the plaintiffs had a cause of action to bring the lawsuit. *E.g.*, *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 211-12 (2013) (affirming "preliminary injunction barring the Government from cutting off . . . funding" based on plaintiffs' speech); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 543 (2012) (considering merits of lawsuit seeking "to restrain" officials from collecting Affordable Care Act penalty); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 319 (2010) (reversing denial of preliminary injunction).[2]

At times, the Supreme Court has suggested that courts' power to enjoin unconstitutional executive conduct arises "under the Constitution" itself. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010).

---

[2] Though McGahn is no longer employed by the Executive Branch, he is acting on a claim of privilege from the President based on McGahn's prior employment. He is therefore for these purposes an executive official. *See Trump*, 140 S. Ct. at 2035 (the Constitution "deals with substance, not shadows.").

At others, it has called the power to award such relief a "creation of courts of equity," *Armstrong*, 575 U.S. at 327, which suggests the power might trace back to the Judiciary Act of 1789's grant to federal courts of all the powers "in equity exercised by the High Court of Chancery in England" in 1789, *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (citing 1 Stat. 73).[3]

But this Court need not, and should not, decide whether its power to remedy unconstitutional executive conduct is itself constitutional or statutory. That question may be of significance if Congress ever attempted to withdraw courts' power to remedy executive misconduct, but whether and how Congress may do so should not be decided "in advance of the necessity for [that question's] decision." *Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997).

Whatever its foundation, "injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally," *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001), and therefore the Court has the power to

[3] The Court of Chancery routinely remedied executive misconduct. *E.g.*, *Hughes v. Trs. of Morden Coll.* (1748) 27 Eng. Rep. 973, 974 (granting injunction against turnpike commissioners who had acted "without authority"). It also "entertain[ed] a jurisdiction in certain cases for the mere purpose of compelling a discovery," JOHN MITFORD, A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY 148 (2d ed. 1787), which is all the Committee seeks here. *E.g.*, *Earl of Suffolk v. Howard* (1723) 24 Eng. Rep. 689, 690 (requiring the defendant to "bring before the Master all deeds and writings, and let the plaintiff the present Earl, either by himself or agents, have the inspection of them").

order McGahn to comply with his constitutional duty to respond to the Committee's subpoena. Subpoena enforcement has long been a "familiar judicial exercise," *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 968 F.3d 755, 772 (D.C. Cir. 2020) (en banc), and the district court plainly had the power to award it against an executive official who has defied his constitutional obligation to cooperate with a Congressional subpoena.[4] Indeed, *Amici* are not aware of a single case in which a litigant with Article III standing was denied injunctive relief to enforce rights arising under the Constitution for lack of a cause of action.[5]

B. The panel's cause-of-action analysis was wrong

The panel nonetheless engaged in a misguided cause-of-action analysis to conclude that this Court lacked power to afford the Committee relief. It relied on three distinct kinds of cases, but its reliance on each was misplaced.

First, the panel looked to cases analyzing whether there was a cause of action to enforce *statutory* rights. *See Comm. on the Judiciary of the U.S. House of Representatives v. McGahn (McGahn II)*, 973 F.3d 121, 123 (D.C. Cir. 2020) (citing

---

[4] At a minimum, as the Committee explains in its brief (at 27-28), the Declaratory Judgment Act, 28 U.S.C. § 2201, also permits the Court to declare the parties' "rights" and "legal relations."

[5] *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), concerned the enforcement of *statutory* rights, not the availability of a Supremacy Clause cause of action. *See, e.g.*, *id.* at 333 (Breyer, J., concurring) ("Like all other Members of the Court, I would not characterize the question before us in terms of a Supremacy Clause 'cause of action.'").

Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media, 140 S. Ct. 1009, 1015 (2020); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018); *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001)). But when Congress creates statutory programs, it has broad power over "the manner of their implementation," including whether to "permit the enforcement of its laws by private actors." *Armstrong*, 575 U.S. at 326. That is why, in cases involving statutory rights, "[s]tatutory intent . . . is determinative" and "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create . . . a private remedy." *Alexander*, 532 U.S. at 286. Such cases have no applicability to whether courts may enjoin unconstitutional conduct.

Second, the panel relied on cases concerning whether the Constitution provides a right of action for *damages* against federal officials in their private capacities. *See McGahn II*, 973 F.3d at 123 (citing *Hernandez v. Mesa*, 140 S. Ct. 735, 741-43 (2020); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017)); *see also Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). But such private-capacity damages remedies involve several policy judgments for which Congress is better suited than courts. *See, e.g.*, *Ziglar*, 137 S. Ct. at 1861 (observing that a personal damages remedy "is more likely to cause an official to second-guess difficult but necessary decisions" than "a claim seeking injunctive or other equitable relief").

Such constitutional damages cases therefore have no application to cases that, like this one, seek an order that executive officers comply with the law; such prospective relief implicates no concerns about property rights or judicial policymaking. That is why the Supreme Court has held that cases seeking redress "designed to halt or prevent [a] constitutional violation rather than the award of money damages . . . *d[o] not ask the Court to imply a new kind of cause of action*." *United States v. Stanley*, 483 U.S. 669, 683 (1987) (emphasis added) (quotation marks omitted). The panel majority ignored that admonition in nonetheless relying on the constitutional damages cases in holding that the Committee did not have a cause of action to seek prospective relief.

Third, the panel relied on two cases denying relief that was beyond courts' "traditional equitable powers." *See McGahn II*, 973 F.3d 123-24 (citing *Grupo Mexicano*, 527 U.S. at 319 and *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017)). But remedying unconstitutional executive conduct *is* one of the courts' traditional equitable powers. *See supra* n.3 and accompanying text. The equitable cases on which the panel relied did not concern unconstitutional executive conduct (or any rights arising the Constitution at all), and thus have no application here. And because this case seeks only an order compelling an official to comply with his constitutional obligations, the panel's cases' concerns about placing "the whole rights and property of the community under the arbitrary

will of the Judge," *Grupo Mexicano*, 527 U.S. at 332 (quoting 1 Joseph Story, Commentaries on Equity Jurisprudence § 19, at 21 (1836)), or "giv[ing] judges a 'legislation-overriding' role," *SCA Hygiene Prods.*, 137 S. Ct. at 960, cannot possibly have any relevance here. A court's award of injunctive relief under the Constitution is simply an exercise of the traditional judicial power and duty to order executive compliance with the law. *See Armstrong*, 575 U.S. at 327.

The Department, for its part, rehashes (at 27-36) the panel's flawed cause-of-action analysis. But, like the panel, it fails to identify a single case in which a litigant with standing was denied injunctive relief under the Constitution for lack of a cause of action. Unlike the panel, the Department (at 27-28) also claims that *Reed v. County Commissioners of Delaware County*, 277 U.S. 376, 389 (1928), shows that the Committee lacks a cause of action. But that case affirmed a ruling that the district court "was *without jurisdiction*." *Reed*, 277 U.S. at 386 (emphasis added). The Committee had asserted jurisdiction under a statute that provided it for suits "brought by the United States, or *by any officer thereof authorized by law to sue*," but, as the Supreme Court held, the relevant Senate resolution "did not . . . authorize the committee" to sue. *Id.* at 386, 389 (emphasis added) (quoting 28 U.S.C. § 41(1) (1926)). *Reed*, in other words, concerns subject matter jurisdiction, and adds nothing

to the panel's flawed cause of action analysis.[6]

C. The district court had subject matter jurisdiction

Unable to defend the panel's decision, the Department advances an alternate argument: It argues that the district court lacked subject matter jurisdiction. *See* DOJ Br. 19-27. This argument is baseless.

This case "aris[es] under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, and the Department does not even dispute that this case satisfies Section 1331's plain and broad text. It argues instead (at 19-26) that the text and history of a different statute, 28 U.S.C. § 1365, justify the judicial invention of unwritten exceptions to Section 1331. No judge has ever accepted that jurisdictional argument, and rightly so.

1. The Department's textual arguments fail for the simple reason that Section 1365 has no application to cases brought by House committees. Section 1365 provides subject matter jurisdiction only over those subpoena enforcement actions "brought by the Senate" and its committees. 28 U.S.C. § 1365(a). Thus, Section 1365 cannot be rendered "superfluous" (DOJ Br. 23), if Section 1331 supplies jurisdiction here. Nor could this case violate the various "limitations" (DOJ Br. 22) on Senate committees' right to bring to suit codified in Section 1365 and elsewhere.

---

[6] The House has, in any event, expressly authorized the Committee "to initiate [this] judicial proceeding." H.R. Res. 430, 116th Cong. (2019).

Still less could proceeding in this case run afoul of Section 1365's direction that "[t]his section shall not apply" to enforce subpoenas against executive officials; "[t]his section" would not apply—Section 1331 would.

2. Lacking any viable textual argument, the Department falls back to Section 1365's legislative history. But the legislative history of one statute (Section 1365) cannot repeal by implication the express text of another (Section 1331). And to the extent the legislative history of Section 1365 has any relevance at all, it *supports* the availability of federal question jurisdiction here.

First, the history of Section 1365 *confirms* that Section 1331 provides subject matter jurisdiction over Congressional lawsuits to enforce subpoenas against executive branch defendants. Section 1365 was enacted in 1978. *See* Pub. L. No. 95-521, Title VII, § 705(f)(1), 92 Stat. 1879, 1879-80 (1978). A few years earlier, in 1973, Judge Sirica had held that federal question jurisdiction was not available to enforce a Congressional subpoena because such an action could not satisfy the federal question statute's then-extant amount-in-controversy requirement. *See Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51, 59-61 (D.D.C. 1973). In 1976, however, Congress removed Section 1331's amount-in-controversy requirement for all lawsuits with federal defendants. *See* Pub. L. No. 94-574, § 2, 90 Stat. 2721, 2721 (1976). That same year, the D.C. Circuit recognized that Section 1331 provided jurisdiction over "a clash of the powers of the legislative

and executive branches" over the enforcement of a House subpoena. *United States v. Am. Tel. & Tel. Co.* (*AT&T I*), 551 F.2d 384, 389 (D.C. Cir. 1976).

Thus, at the time of Section 1365's enactment, there was every reason to believe Section 1331 provided jurisdiction for subpoena enforcement lawsuits against federal officials. And because such jurisdiction already existed in Section 1331, there was no reason for Congress to provide it again in Section 1365. For that reason, when Congress enacted Section 1365, it provided that "th[e] section shall not apply" to enforcement suits against federal officials. Section 1365's purpose, by contrast, was to provide jurisdiction for subpoena lawsuits against *non-federal* defendants, for whom an amount-in-controversy requirement still existed.[7]

The DOJ nonetheless argues (at 24) that Section 1365's federal official carveout would be "pointless," if Section 1331 already provided jurisdiction. But it is not pointless for Congress to draft statutes so as to avoid superfluous jurisdictional grants. The federal official carveout also averted unnecessary conflict with the Executive Branch, which had long opposed statutes expressly granting Congress subject matter jurisdiction to enforce subpoenas against federal officials. *See* DOJ Br. 21-22 (describing DOJ resistance).

---

[7] *See* 28 U.S.C. § 1331 (1976); Pub. L. No. 96-486, § 2, 94 Stat. 2369, 2369 (1980) (removing the requirement for all federal question lawsuits); *see also* S. Rep. No. 95-170, at 17-18 (1977) (Section 1365's committee report discussed subpoenas to steel companies, to a state official, and to a gang member).

The Department's alternative reading that Section 1365's carveout *deprives* courts of Section 1331 jurisdiction in subpoena disputes with federal officials fails at every step of the way. It has no textual support: Section 1365 says only that "[t]his section shall not apply" to disputes with federal officials; it does not say that *no* section of the U.S. Code provides jurisdiction. And it is flatly contradicted by the Senate Committee's report, which states that Section 1365's carveout was "not intended to be a Congressional finding that the Federal courts do not [already] have the authority to hear a civil action to enforce a subpoena against an officer or employee of the Federal Government." S. Rep. No. 95-170, at 91-92.[8]

The legislative history also refutes the Department's other principal contention: that Section 1365 reflects a Congressional intention to allow committees of the Senate to sue, but not those of the House. *Amicus* Brand would know: he participated in some of the very drafting decisions on which the DOJ now relies.

Section 1365 originated as a Senate bill that would have created an Office of

---

[8] The DOJ repeatedly asserts (at 19, 21, 23) that "it was well understood" at the time of Section 1365's enactment "that Congress otherwise lacked the authority to sue to enforce its subpoenas." But legislators' subjective understandings as to whether Section 1331 provided jurisdiction can "supply no reason to ignore th[at] law's demands." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1737 (2020). In any event, the DOJ's assertion as to what was "well understood" in 1976 is plainly false, as both the quoted statement from the Committee report and the very filing of the *Senate Select Committee* case each show. *See also AT&T I*, 551 F.2d at 389 (holding, two years before the enactment of Section 1365, that interbranch subpoena litigation satisfies Section 1331).

Congressional Counsel to represent both Houses of Congress and granted courts subject matter jurisdiction to hear subpoena lawsuits brought by either House. *See* S. 555, 95th Cong., §§ 201-214 (1977), reprinted in appendix to *Public Officials Integrity Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings Before the S. Comm. on Governmental Affairs*, 95th Cong., 28-52. But, as the DOJ acknowledges, "the House did not support that version" of the bill. DOJ Br. at 20. The House had a "longstanding institutional rivalry with the Senate" and "feared that a joint office would not reflect House preferences on matters that divided the two chambers." Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 Cornell L. Rev. 571, 612 (2014); *see, e.g.*, 124 Cong. Rec. 1,118-19 (1978) (remarks by Sen. Abourezk).[9] What is more, Section 1331 already provided subject matter jurisdiction for the civil enforcement actions that mattered most: those against executive officials (who were not as readily subject to criminal referral or the House's inherent contempt power).

In conference, the House and Senate reached a compromise: the Senate could have the counsel and the jurisdictional provision it wanted, but the counsel would represent only the Senate, not the House, and the new jurisdictional provision would

---

[9] The House had also already developed its own in-house Office of General Counsel. *See* Grove & Devins, *Congress's (Limited) Power*, at 609 (describing how "[i]n 1976 Speaker O'Neill called upon [*Amicus*] Stanley Brand . . . to develop a counsel's office").

apply only to Senate lawsuits, not to House ones. *See* H.R. Rep. No. 95-1756, at 80 (1978) (Conf. Rep.). As the House managers reported back to the House, those revised provisions "*applie[d] only to the other body*," i.e., the Senate, and would "*ha[ve] no impact on th[e] House*." 124 Cong. Rec. 36,466 (1978) (remarks of Rep. Danielson) (emphasis added). The House and Senate then approved the revised bill.

The actual history of Section 1365 is therefore consistent with the statute's text: Congress did not intend for Section 1365 to apply to the House or to have any effect on it. The DOJ nonetheless invites the Court to "presume" (DOJ Br. 21) that Section 1365 reflects a Congressional decision to prevent the House from suing executive officials. Nothing supports that interpretation; indeed, as the DOJ acknowledges (at 20), the House was excluded from Section 1365 at the House's own insistence, and, anyone who has ever served in Congress would know that the House would never insist on denying itself a core oversight power that its rival, the Senate, enjoyed.[10]

In sum, the Court has power to consider, and remedy, McGahn's

---

[10] The DOJ also relies on the statements of two Senators concerning a 1996 amendment to Section 1365. *See* DOJ Br. 24-25 (discussing 142 Cong. Rec. 19,412-13 (1996) (statements of Sens. Specter and Levin concerning Pub. L. No. 104-292, 110 Stat. 3459, 3460 § 4 (1996)). This argument is even less relevant. Senators' views on the reasons for amending Section 1365—a statute which applies only to the Senate and its committees—shed zero light on whether Section 1331 provides courts with jurisdiction to consider lawsuits filed by the House or its committees.

unconstitutional defiance of the Committee's subpoena.

II. THE END OF THE 116TH CONGRESS WILL NOT MAKE THIS CASE MOOT

Just as prior subpoena lawsuits have not become moot upon the conclusion of prior Congresses, the conclusion of the 116th Congress on January 3, 2021, will not make this case moot for two independent reasons.

1. Under the House Rules, the Judiciary Committee of the 117th Congress may "act as the successor in interest" of the current committee and "take such steps as may be appropriate to ensure continuation of [this] litigation matter." House Rule II.8(c), H.R. Doc. No. 115-177 (2019). Under this or an analogous rule of the next Congress, the new Judiciary Committee may therefore renew or reissue the current subpoena and otherwise act as the current Committee's successor-in-interest in this litigation.

House Committees have in the past exercised similar authority to continue subpoena litigation from prior Congresses. *See, e.g.*, H.R. Res. 5, 113th Cong. § 4 (2013) (permitting Committee to continue litigation over subpoenas regarding "Fast and Furious" investigation); H.R. Res. 5, 114th Cong. § 3(f) (2015) (same in the next Congress). And, in prior disputes, the Department has not even argued that the end of one Congress and the start of another rendered the pending case moot. *Cf. Comm. on Oversight & Gov't Reform, U.S. House of Representatives v. Lynch*, 156 F. Supp. 3d 101, 107 (D.D.C. 2016) (addressing House subpoena dispute, with no discussion

of mootness, two House terms after Committee first issued subpoena); *United States v. Am. Tel. & Tel. Co.* (*AT&T II*), 567 F.2d 121 (D.C. Cir. 1977) (addressing House subpoena dispute, with no discussion of mootness, in the House term after subpoena first issued).

Though the Department argues (at 13-19) that this case will become moot, it does not even address House Rule II.8(c) or the previous instances in which committees of a new Congress have, with the Department's acquiescence, acted as successors-in-interests to the committees of a prior one. As that silence implies, there will be no issue of mootness here if the next Judiciary Committee continues this litigation as the present Committee's successor—just as there is no issue of mootness any other time a party succeeds to the rights of a predecessor that had brought litigation. *Cf.* Fed. R. App. P. 43 (providing for continuity of actions by or against successors where a party, among other things dies, is dissolved, or resigns from office).

2. Even if the Judiciary Committee of the 117th Congress did not have power under the House Rules to act as a successor-in-interest to the current Committee, this case would still satisfy the "capable of repetition yet evading review exception to mootness." *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 322 (D.C. Cir. 2009). Each of that doctrine's two conditions is satisfied: First, McGahn's refusal to comply with the current Judiciary Committee's subpoena cannot "be fully

litigated prior" to the end of the House's term, and thus may evade Supreme Court review. *Id.*; *see id.* ("[A]ctions of less than two years' duration" general satisfy the evading-review test); U.S. Const, art. I, § 2. And, second, "there [is] a reasonable expectation that the same complaining party would be subjected to the same action again," *Del Monte*, 570 F.3d at 322; indeed, neither McGahn nor DOJ has given any indication that McGahn would comply with a subpoena in the next Congress.

The Department's arguments against the capable-of-repetition-yet-evading-review doctrine are insubstantial. First, the Department argues (at 16) that the issues here will not evade Supreme Court review because Congressional subpoena cases can "ordinarily" be resolved within two years. Yet the Department cites no examples of subpoenas cases that actually were resolved in that timeframe. Almost none are. *See, e.g.*, *Comm. on Oversight & Gov't Reform v. Barr*, No. 16-5078, 2019 WL 2158212, at *1 (D.C. Cir. May 14, 2019) (unresolved after five years of litigation); *Comm. on Judiciary of U.S. House of Representatives v. Miers*, No. 08-5357, 2009 WL 3568649, at *1 (D.C. Cir. Oct. 14, 2009) (unresolved after nearly two years of litigation); *Committee on Ways & Means v. Dep't of Treasury*, 1:19-cv-01974 (D.D.C. 2019) (case remains stayed in district court, with DOJ's support, one-and-a-half years after being filed); *see also Eastland v. U. S. Servicemen's Fund*, 421

U.S. 491, 511 (1975) (case took "nearly five years" to reach Supreme Court).[11]

Second, the Department argues that this controversy is not capable of repetition because any future controversy will "involve at least one different party: a Committee of the 117th Congress," not of the 116th Congress. DOJ Br. 17. To be sure, the capable-of-repetition doctrine requires that a future dispute involve the "same complaining party," *Del Monte*, 570 F.3d at 322. But that is only to ensure that the plaintiff retains a "sufficient interest in the result," *id.*, so that there will be adequate "adversarial scrutiny of the relevant issues," *Spencer v. N.L.R.B.*, 712 F.2d 539, 554 & n.55 (D.C. Cir. 1983). Successive committees of the House, with substantially similar leadership and membership, share such a sufficient identity of interest.

III. JUDICIAL INTERVENTION IS NECESSARY TO RESTORE THE TRADITIONAL PRACTICE OF INTERBRANCH ACCOMODATIONS

The Department argues (at 13) that judicial intervention should be denied

[11] The window for litigating a subpoena case is, in fact, much shorter than two years. Two years would be available only if a committee issues a subpoena on the first day of Congress and then proceeds immediately to litigation, without ever engaging in the accommodations process. And even in the rare instance when litigation proceeds quickly enough to resolve a case before the end of a Congress's term, accommodations and other intervening events may still moot a case prior to the opportunity for Supreme Court review. *E.g.*, *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (en banc) (Nixon resigned before time to petition for certiorari expired).

because granting it would result in "a dramatic departure from historical practice." But, as *Amici* now explain, the relevant departure here is the Executive's invention both of a theory of immunity from Congressional investigation and of a sweeping prerogative to be the judge and jury of its own privilege claims. These departures have broken down the branches' "tradition of negotiation and compromise," *Trump*, 140 S. Ct. at 2031, and made judicial intervention necessary for that tradition to be restored.

1. Prior to the 1970's, Congress had never needed to seek judicial enforcement of its subpoenas. To be sure, Congress had, on occasion, skirmished with the Executive over the President's power to withhold information. But as late as 1958, when the Eisenhower administration sought to justify the doctrine of executive privilege, the Attorney General admitted that there had been "relatively few instances" in which a President had withheld information from Congress over Congressional insistence that it be produced. *The Power of the President to Withhold Information from the Congress* 2 (Comm. Print 1958) (85th Cong.). And even when the President had withheld information, Congress had often obtained it by other means, including, in one instance, by taking depositions, under subpoena, of two former Presidents. *See* Ronald D. Rotunda, *Presidents and Ex-Presidents As Witnesses*, 1975 U. Ill. L.F. 1, 7 (describing depositions of former Presidents John Tyler and John Quincy Adams, after President Polk had withheld information); H.R.

Rep. No. 29-686, at 9, 22-25, 27-29 (1846); H.R. Rep. No. 29-684, 8-11 (1846).

Under President Nixon, however, the Office of Legal Counsel first drew the "tentative and sketchy" conclusion that the President and his immediate advisers should be "deemed absolutely immune from testimonial compulsion." Memorandum for John D. Ehrlichman, Assistant to the President for Domestic Affairs, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff"* at 7 (Feb. 5, 1971) (Rehnquist Memorandum).

This claimed absolute immunity was "distinct from, and broader than, executive privilege" in several ways. *Testimonial Immunity Before Cong. of the Former Counsel to the President*, 43 Op. O.L.C., slip op. at 4 (May 20, 2019) (*Testimonial Immunity*). First, it supposedly shielded the "President and his immediate advisors" from "even be[ing] compelled to appear before a congressional committee." Rehnquist Memorandum at 7. Second, it could not be "overborne by competing congressional interests." *Assertion of Exec. Privilege with Respect to Clemency Decision*, 23 Op. O.L.C. 1, 5 (1999) (*Clemency Decision*). And, third, it was not based on any functional need of government, such as the necessity for secrecy in law enforcement operations, the need to ensure that advisors can advise the President candidly, or the like. Congress shares with the Executive an interest in the effective functioning of the government, so such rationales provide ground for

"optimal accommodation through a realistic evaluation of the needs of the conflicting branches." *AT&T II*, 567 F.2d at 127. Instead, the Executive premised its new claimed immunity on an abstract and one-sided interest in the supposed "independence and autonomy of the President himself." *Testimonial Immunity* at 4; Memorandum for Margaret McKenna, Deputy Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Dual-purpose Presidential Advisers*, Appendix at 2 (Aug. 11, 1977).

At the same time as the Executive Branch began to assert immunity from Congressional investigations, it also began to claim that it—and it alone—had the power to be the judge and jury of its privilege claims.

Since 1857, Congress has possessed the power to refer recalcitrant witnesses to a U.S. Attorney for prosecution. *See* 2 U.S.C. § 194 (derived from 11 Stat. 156 (1857)). If exercised, that power would allow courts to be the ultimate arbiter of any privilege claims because those claims could be "raised as defenses in a criminal prosecution." *United States v. U.S. House of Representatives*, 556 F. Supp. 150, 152 (D.D.C. 1983). But the desire of both branches to avoid criminal prosecution of federal officials provided ample incentive for compromise and negotiation, and thus resort to the statute in an interbranch dispute never became necessary.

In 1982, however, EPA Administrator Anne Gorsuch refused to produce documents to the House on the basis of a claimed executive privilege. *See* Philip

Shabecoff, *House Charges Head of E.P.A. with Contempt*, N.Y. Times (Dec. 17, 1982), https://perma.cc/M2UN-4F3H. When, on instructions of the President, Gorsuch remained steadfast in her refusal, she became the first cabinet-level official to be held in contempt by Congress. *Id.*; 128 Cong. Rec. 31,776 (1982).

The House referred the contempt citation to a U.S. Attorney, *see* 128 Cong. Rec. 31,754 (1982), but, even though it was his statutory "duty" to "bring the matter before the grand jury for its action," 2 U.S.C. § 194, he did not promptly do so. *See* House Comm. on the Judiciary, *Investigation of the Role of the Department of Justice in the Withholding of Environmental Protection Agency Documents from Congress in 1982-83*, H.R. Rep. 99-435, at 350 (1985). Subsequent OLC opinions made clear that the Executive Branch would decline to present all future contempt referrals in interbranch disputes to grand juries as well. *See Prosecution for Contempt of Cong. of an Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege*, 8 Op. O.L.C. 101, 127-28 (1984) (Olson Memorandum); *Prosecutorial Discretion Regarding Citations for Contempt of Cong.*, 38 Op. O.L.C., slip op. at *1 (June 16, 2014) (re-affirming this position).

Not only did the Executive Branch refuse to present privilege disputes to the courts, it also maintained that "any attempt by Congress to utilize its inherent 'civil' contempt powers to arrest . . . an executive official who asserted a Presidential claim of executive privilege" would also be unconstitutional. Olson Memorandum at 140

n.42; *see also Testimonial Immunity* at 20 (reaffirming this view).[12] Thus, unless Congress could bring civil enforcement actions, the Executive's position was that it—and it alone—should be the judge and jury of its privilege claims.

3. Congress turned to civil enforcement actions in reaction to these novel and expansive claims of Executive authority. In 2008, when a United States Attorney again refused to present a Congressional contempt referral to a grand jury, the House filed an enforcement action to obtain judicial resolution of the Executive's claim of immunity. *See Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 63-64 (D.D.C. 2008) (describing Attorney General's refusal to allow U.S. Attorney to present contempt citation to grand jury). And it did so again, after a similar refusal by another U.S. Attorney five years later. *See Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 7 (D.D.C. 2013). The current administration's aggressive and often unprecedented assertions of privileges and immunity have now led to this and a number of other such enforcement suits.

Enforcement litigation is slow, expensive, and best suited for resolving issues of law, and so is not likely ever to become a routine tool of Congressional oversight. *See Amici* Br. Of Former Gen. Counsels (April 17, 2020). But resort to such

---

[12] Such officials might have sought judicial resolution of the validity of the privilege claims in a habeas proceeding. But OLC's position that Congress cannot use its inherent powers to test claims of privilege all but requires a gun battle between Congress and the Executive Branch before the courts could ever rule on such a claim.

litigation is necessary here because, without it, the Executive will never abandon its newfound claim of immunity. That claimed immunity, which the Executive itself says cannot be "overborne by competing congressional interests," *Clemency Decision*, 23 Op. O.L.C. at 5, makes impossible any reasonable interbranch accommodation. Thus, judicial intervention that puts a stop to it will not disrupt the branches' "tradition of negotiation and compromise," *Trump*, 140 S. Ct. at 2031, but instead clear the way for that tradition's restoration.

CONCLUSION

This Court should hold that the district court had the power to enforce the subpoena against McGahn.

Respectfully submitted,

/s/ Lawrence S. Robbins
Lawrence S. Robbins (Bar No. 38805)
D. Hunter Smith (Bar No. 55527)
Carolyn M. Forstein

ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
2000 K Street, N.W., 4th Floor
Washington, DC 20006
Telephone: (202) 775-4500
Facsimile: (202) 775-4510
Email: lrobbins@robbinsrussell.com

Counsel for Amici Curiae

Dated: December 23, 2020

CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limitation of Fed. R. App. P. 29(a)(5) and this Court's October 15, 2020, Order because this brief contains 6,265 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

2. 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

/s/ Lawrence S. Robbins
Counsel for Amici Curiae

Dated: December 23, 2020

CERTIFICATE OF SERVICE

I certify that on December 23, 2020, I filed one copy of the foregoing document via the CM/ECF system of the United States Court of Appeals for the District of Columbia Circuit, which I understand caused service on all registered parties.

/s/ Lawrence S. Robbins
Counsel for Amici Curiae

Dated: December 23, 2020