[ORAL ARGUMENT SCHEDULED FOR APRIL 28, 2020]

No. 19-5331

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMMITTEE ON THE JUDICIARY,
UNITED STATES HOUSE OF REPRESENTATIVES,

Plaintiff-Appellee,

v.

DONALD F. MCGAHN, II,

Defendant-Appellant.

On Appeal from the U.S. District Court for the District of Columbia

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SUPPLEMENTAL BRIEF FOR DEFENDANT-APPELLANT ON REHEARING EN BANC

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INTRODUCTION AND SUMMARY OF ARGUMENT

For the first two centuries of this Nation's history, the political branches of the federal government resolved disputes between themselves through political contest and compromise, not by asking the judicial branch to pick a side in zero-sum litigation. That tradition reflects our Constitution's fundamental separation-of-powers principles, which allow federal courts to adjudicate concrete disputes concerning the rights of individuals but bar them from refereeing institutional grievances over the political branches' respective prerogatives. A panel of this Court thus correctly held that a Committee of the House of Representatives lacks Article III standing to bring this extraordinary suit against a former White House Counsel to enforce a legislative subpoena for testimony on matters related to his official duties.

Raines v. Byrd, 521 U.S. 811 (1997), the leading precedent on federal legislative standing, compels the en banc Court to reach the same conclusion. The Supreme Court reaffirmed that Article III standing requires a dispute that is "traditionally thought to be capable of resolution through the judicial process," *id.* at 819, and it emphasized that the relevant "historical practice" is that "no suit was brought on the basis of claimed injury to official authority or power" in myriad past "confrontations between one or both Houses of Congress and the Executive Branch," *id.* at 826; *see id.* at 826-28. Moreover,

the Court concluded that adjudication of such interbranch disputes "is obviously not the regime that has obtained under our Constitution to date," which "contemplates a more restricted role for Article III courts": "[t]he irreplaceable value of the power [of judicial review] lies in the protection it has afforded the constitutional rights and liberties of individual citizens," "not [in] some amorphous general supervision of the operations of government." *Id.* at 829. As Justice Souter explained in his opinion concurring in the judgment, "a dispute involving only . . . the official interests of those[] who serve in the branches of the National Government lies far from the model of the traditional common-law cause of action at the conceptual core of the case-or-controversy requirement," and judicial intervention in such interbranch disputes "would risk damaging the public confidence that is vital to the functioning of the Judicial Branch . . . by embroiling the federal courts in a power contest nearly at the height of its political tension." *Id.* at 833.

In seeking rehearing en banc, the Committee reprised several points made by the panel dissent. It distinguished *Raines* on the ground that the plaintiffs there were individual Members of Congress challenging enacted legislation rather than a Committee authorized by the House to enforce a legislative subpoena. It discounted the absence of any historical tradition of adjudication of such interbranch informational disputes. And it denied any

separation-of-powers problems with this novel judicial intrusion into a clash between the political branches. The Committee gravely erred on each count. The Committee's fact-bound reading of *Raines* is both irreconcilable with that opinion's essential reasoning and contrary to this Court's well-established refusal to circumvent the Supreme Court's authoritative guidance. Nor can the Committee either plausibly contend that there is a traditional basis for this suit or persuasively overcome the dearth of historical practice. And the Committee fails to come to grips with the reasons why the adjudication of increasingly frequent disputes solely between the political branches would confuse the roles of all three Branches and erode public confidence in the Judiciary.

Notably, although the Committee urged rehearing by alleging a conflict with *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976), the latter decision is not binding on this Court sitting en banc, but *Raines* still is and forecloses interbranch suits—as the Executive Branch has consistently maintained since *Raines* was decided. In any event, *AT&T*'s standing discussion contains minimal, unpersuasive reasoning and is also inapposite for several reasons.

Finally, the Court limited supplemental briefing to the Committee's Article III standing, but it can avoid this significant constitutional question by holding that Congress itself has not provided either subject matter jurisdiction or a cause of action that supports this suit, as explained in our panel briefs.

ARGUMENT

ARTICLE III BARS JUDICIAL RESOLUTION OF INTERBRANCH SUITS

A. Historical Tradition Forecloses Adjudication Of Interbranch Informational Disputes

Raines v. Byrd reaffirmed that, among other requirements for a plaintiff's alleged injury to be "legally and judicially cognizable" under Article III, the "dispute" between the parties must be "traditionally thought to be capable of resolution through the judicial process." 521 U.S. 811, 819 (1997) (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)). Interbranch disputes over institutional prerogatives such as access to information do not satisfy this element of Article III standing, given the complete absence of such suits for the first two centuries of this Nation's history despite frequent clashes between the political branches stretching all the way back to the Founding era. *See id.* at 826-29; Opening Br. 16-20; Reply Br. 3-7; Panel Op. 14-18, 21-22, 29-30. Neither the Committee's rehearing petition nor the panel dissent succeeds in refuting that showing.

1. The Committee initially contends that *Raines*'s language about traditional judicial resolution merely "refers to the principle that an abstract injury or generalized grievance" does not suffice under Article III. Rehearing Pet. 11 (citing *Allen v. Wright*, 468 U.S. 737, 755-56 (1984)). The Committee offers no support for this interpretation, and it is flawed at every level.

To begin, the plain language of *Raines* refutes the Committee's interpretation. The Court explained that a legally and judicially cognizable injury "requires, among other things, that the plaintiff have suffered 'an invasion of a legally protected interest which is . . . concrete and particularized,' *and* that the dispute is 'traditionally thought to be capable of resolution through the judicial process.'" 521 U.S. at 819 (emphasis added; citations omitted). The Court was thus clear that traditional judicial resolution is an additional standing requirement beyond a concrete and particularized injury. Indeed, while the Committee cites *Allen v. Wright*, it neglects to quote the language from that opinion that is quoted in the same paragraph of *Raines* and confirms our reading. *See id.* ("Is the injury too abstract, *or otherwise not appropriate*, to be considered judicially cognizable?" (quoting *Allen*, 468 U.S. at 752)) (emphasis added).

Moreover, the Committee's interpretation is irreconcilable with *Raines*'s historical discussion. If the inquiry into traditional judicial resolution were limited to whether the alleged institutional injury is sufficiently concrete and particularized, then the Court would have rested on its earlier conclusion that the legislative vote "dilution" alleged by the individual Members of Congress was too "abstract." *Raines*, 521 U.S. at 826. It would not thereafter "have indulged in pages of superfluous historical analysis" about the general absence

of interbranch suits, without regard to the specific nature of the institutional injury. Panel Op. 29. Additionally, the Court never would have emphasized the absence of suits "between one or both Houses of Congress and the Executive Branch," *Raines*, 521 U.S. at 826, much less described as "analogous confrontations" disputes over matters such as restrictions imposed by Congress on the President's ability to fire Cabinet Secretaries, *see id.* at 826-28. After all, the institutional injuries to one or the other Branch in those historical episodes were quite dissimilar from the institutional injuries to the individual legislators in *Raines*, and not "abstract" in any ordinary sense.

Regardless, even the Committee concedes that *Raines* at least requires considering traditional judicial resolution in determining whether an alleged injury is sufficiently concrete and particularized. Other Supreme Court precedents hold likewise. *E.g.*, *FEC v. Akins*, 524 U.S. 11, 24 (1998) (Article III requires the "concrete specificity that characterized those controversies which were the traditional concern of the courts at Westminster" (quotation marks omitted)); *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 274 (2008) (recognizing that assignee of claim had monetary injury "[i]n *some* sense," but consulting "history and tradition" to determine whether Article III was satisfied). And considering historical tradition even only for that purpose dooms the Committee's suit.

That is so in light of the specific reason why the Supreme Court characterized as "abstract" the federal legislators' alleged injury in *Raines*. In describing the "key" aspect of Article III standing when analyzing interbranch suits by federal legislators, *Raines* emphasized the need for "*personal injury*," 521 U.S. at 818-19, which it contrasted with "institutional injury," *id.* at 821, 829. As vote dilution is indisputably a concrete Article III injury when asserted by "an individual," *id.* at 837 (Stevens, J., dissenting), it is thus clear that the vote-dilution harm asserted in *Raines* was "abstract" *only in the sense* that it was an "institutional injury" asserted by federal legislators, *id.* at 829 (majority opinion). And "historical experience" confirmed the inadequacy of institutional injury asserted by members of the federal legislative branch, given the unprecedented nature of interbranch suits brought by them—whether individually or as "one or both Houses of Congress"—"on the basis of claimed injury to official authority or power." *Id.* at 826, 829.[1]

[1] Notably, the only reason *Raines* even addressed the "abstract" nature of the federal legislators' injury was to distinguish *Coleman v. Miller*, 307 U.S. 433 (1939)—a case where "*state* legislators" were allowed to "claim[] an institutional injury" because they were "suing as a bloc" that effectively represented a majority of the Kansas Senate. *See Raines*, 521 U.S. at 821-23; *see also id.* at 824-26. And *Raines* acknowledged that extending *Coleman* to *federal* legislators—even ones suing on behalf of a majority of a House of Congress—would present distinct "separation-of-powers concerns." *Id.* at 824 n.8.

2. The panel dissent alternatively reasoned that "federal courts have traditionally decided cases such as this one, given that the courts have entertained Congressional subpoena-enforcement lawsuits against Executive Branch officials since 1974." Dissenting Op. 8. But this Court did so only twice in the 1970s, with little to no analysis of Article III standing, and it has generally rejected standing for federal legislators post-*Raines*, although a handful of district court opinions continued to allow subpoena enforcement suits. *See infra* pp. 23-27.

As the panel correctly held, that "fleeting diversion from otherwise uniform historical experience" is insufficient to satisfy Article III's requirement that the dispute be traditionally amenable to judicial resolution. Panel Op. 30; *see Printz v. United States*, 521 U.S. 898, 918 (1997) (the "persuasive force" of legislative practice "of such recent vintage" is "far outweighed by almost two centuries of apparent congressional avoidance of the practice"). *Raines* itself concluded that "historical practice" revealed "no suit" involving "analogous confrontations" between the branches, 521 U.S. at 826, notwithstanding its recognition of this Court's legislative-standing cases from the 1970s and 1980s, *see id.* at 820 n.4.[2]

[2] The panel dissent also briefly suggested that "subpoena enforcement" *in general* is a "familiar judicial exercise," Dissenting Op. 15, but the panel

For its part, the Committee tries to "help explain the absence of earlier suits." Rehearing Pet. 13. The Committee suggests that "the need for interbranch litigation" has been minimal until recently because "the Executive Branch has often cooperated with Congressional subpoenas." Rehearing Pet. 12. Although that observation is true so far as it goes—in fact, the political branches reached an accommodation in this case on the documents sought in the subpoena to McGahn, *see* JA718—it ignores the critical historical point: a long line of Presidents starting from George Washington onward have *also often* withheld information requested by Congress, and Congress *never* brought suit for nearly two centuries. *See, e.g.*, *Nixon v. Sirica*, 487 F.2d 700, 733-36 & n.9 (D.C. Cir. 1973) (en banc) (MacKinnon, J., concurring in part and dissenting in part); *Immunity of the Assistant to the President & Dir. of the Office of Political Strategy & Outreach from Cong. Subpoena*, 38 Op. O.L.C. ___, 2014 WL 10788678, *1 (July 15, 2014).

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majority correctly rejected "focusing on the abstract legal question presented while ignoring the parties' identities," Panel Op. 20. Article III authorizes judicial resolution only of cases and controversies between "proper part[ies]" to a "traditional[]" "dispute." *Raines*, 521 U.S. at 818-19; *see also Clinton v. City of New York*, 524 U.S. 417 (1998) (resolving the same constitutional claim raised by the federal legislators in *Raines* when raised instead by injured private parties and municipality).

Indeed, as Judge MacKinnon's opinion in *Sirica* previously detailed, Congress did not sue even when President Jefferson "refuse[d] to expose the names of those involved in the alleged Burr conspiracy," 487 F.2d at 733, when President Buchanan "refused to comply with a request for information as to whether 'money, patronage, or other improper means' had been used to influence Congress," *id.* at 735, or when President Truman "refused to surrender to Congress information and papers relating to loyalty investigations of Government employees," *id.* at 737. It is inexplicable that the Committee nevertheless asserts that "the relevant history supports the Committee's standing." Rehearing Pet. 12.

The Committee falls back to the observation that the federal-question statute "contained an amount-in-controversy requirement" until the mid-1970s, which purportedly "would have been a significant obstacle" to interbranch suits. Rehearing Pet. 12. But this Court could not disregard *Raines*'s historical analysis even if, as the Committee's argument implies, the Supreme Court erred in treating the absence of interbranch suits as "obviously" proving the "restricted role for Article III courts" contemplated by our constitutional regime. 521 U.S. at 828. And besides, Chief Justice Rehnquist and the other members of the *Raines* majority—who were presumably aware of the well-known historical statutory limitations on federal-question jurisdiction,

see, e.g., *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994)—did not err. The amount-in-controversy requirement has long been construed liberally as to constitutional questions, *see, e.g.*, *Jordan v. Hutcheson*, 323 F.2d 597, 601 (4th Cir. 1963), and this Court in fact had held that subpoena disputes would often satisfy the modest amount-in-controversy requirement, *see United States v. AT&T*, 551 F.2d 384, 389 (D.C. Cir. 1976). More fundamentally, the Legislative Branch's decision not to amend the amount-in-controversy requirement to enable interbranch suits itself "reflects Congress's judgment that information disputes between the political branches do not belong in federal court." Panel Op. 18.

Likewise, the Committee nowhere responds to the panel's conclusion that "the absence of congressional authorization" provides additional reason not to entertain this suit. Panel Op. 19; *see Raines*, 521 U.S. at 829. The Committee has no answer to the decision of Congress as a whole to enact 28 U.S.C. § 1365, which expressly provides authority *only* for the *Senate* to sue *private parties* in certain circumstances, thereby evincing a clear intent to "keep disputes between the executive and legislative branches out of the courtroom." Panel Op. 19 (quoting 142 Cong. Rec. 19412 (1996) (statement of Sen. Specter)); *see also, e.g.*, S. Rep. No. 95-170, at 103 (1978) ("Under no circumstances is it intended that this subsection be utilized to authorize the

Counsel to bring any action against the executive branch . . . to challenge a claim of executive privilege.").[3]

3. Finally, the Committee contends that *Raines*' historical analysis "was only one factor among many." Rehearing Pet. 12. Namely, in addition to emphasizing that the federal legislators there lacked injury "as individuals" and that their attempt to litigate their "institutional injury" was "contrary to historical experience," *Raines* also observed that their vote-dilution injury was "wholly abstract and widely dispersed," that they had "not been authorized to represent their respective Houses of Congress," and that they possessed an "adequate remedy" through the political process. 521 U.S. at 829. As the panel dissent stressed, *Raines* noted that it "need not now decide" "[w]hether the case would be different if any of these circumstances were different." Dissenting Op. 5 (quoting *Raines*, 521 U.S. at 829). But while *Raines* therefore, strictly speaking, held "specifically and only that individual members of Congress lack Article III standing," *Arizona State Legislature v. Arizona Indep.*

[3] In fact, the Executive Branch successfully opposed an earlier bill that would have purported to authorize such suits, contending that "the Supreme Court should not and would not undertake to a[d]judicate the validity of the assertion of Executive privilege against the Congress." *Executive Privilege: Secrecy in Government: Hearings before the Subcomm. on Intergovernmental Relations of the Comm. on Govt. Operations of the U.S. Senate*, 94th Cong., 1st Sess. (1975), at 116 (statement of Assistant Attorney General Scalia).

Redistricting Comm'n, 135 S. Ct. 2652, 2664 (2015) (quotation marks and brackets omitted), *Raines* cannot be limited to its facts in this Court.

Treating the additional factual circumstances highlighted by the Committee and the panel dissent as a material distinction of *Raines* would flatly contradict that precedent's reasoning. To repeat, *Raines*'s essential rationale was that the traditional dearth of interbranch suits alleging institutional injuries, notwithstanding the historical existence of "analogous confrontations between one or both Houses of Congress and the Executive Branch," is "obviously" proof that Article III "contemplates a more restricted role"—one in which federal courts protect "the constitutional rights and liberties of individual citizens," rather than engage in "amorphous general supervision of the operations of government." 521 U.S. at 826, 828-29. Although the Supreme Court reserved for itself the right to create an exception to the tradition-based principle it had recognized, this Court lacks the power to do so. *See, e.g.*, *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997) (explaining that, although a Supreme Court precedent "le[ft] open the possibility" of a particular result, that precedent's "rationale and method of analysis foreclose[d] this construction").

That is especially so given this Court's longstanding approach of following the Supreme Court's path regardless of whether it is technically

controlling. Because "[v]ertical stare decisis—both in letter and spirit—is a critical aspect of our hierarchical Judiciary," this Court has repeatedly emphasized that "carefully considered language of the Supreme Court . . . generally must be treated as authoritative" "even if," unlike here, it is "technically dictum." *Winslow v. FERC*, 587 F.3d 1133, 1135 (D.C. Cir. 2009) (quoting *United States v. Dorcely*, 454 F.3d 366, 375 (D.C. Cir. 2006)). In fact, the rule is so well-established in this circuit that all but one of the judges on this en banc panel have joined opinions applying it, including several times just last year. *See, e.g.*, *In re Sealed Case*, 932 F.3d 915, 917, 934 (D.C. Cir. 2019); *In re Grand Jury Investigation*, 916 F.3d 1047, 1048, 1053 (D.C. Cir. 2019); *Winslow*, 587 F.3d at 1134-35; *Dorcely*, 454 F.3d at 369, 375. Accordingly, it would be a radical break from this Court's precedent and practice to cast aside three pages of critical legal reasoning in *Raines* merely because the Supreme Court left open the future possibility that it might exercise its unique prerogative to create an exception to that tradition-based principle in factual circumstances that were different in unspecified ways.

B. Adjudicating Interbranch Informational Disputes Would Reshape The Separation Of Powers Among All Three Branches

Raines also reaffirmed that "the law of Art. III standing is built on a single basic idea—the idea of separation of powers." 521 U.S. at 820 (quoting

Allen, 468 U.S. at 752). Adjudicating interbranch informational disputes would distort the role of each branch, for related reasons.

As for the Executive Branch, Article II vests its "Officers" with the "responsibility for conducting civil litigation in the courts of the United States for vindicating public rights." *Buckley v. Valeo*, 424 U.S. 1, 140 (1976) (per curiam). "A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, *and not to the Congress*, that the Constitution entrusts the responsibility" to ensure faithful execution of the laws. *Id.* at 138 (emphasis added).

As for the Legislative Branch, its implied power under Article I "to compel production of evidence differs widely from authority to invoke judicial power for that purpose." *Reed v. Commissioners of Del. Cty.*, 277 U.S. 376, 389 (1928). "[T]he established practice" has been for Congress instead "to rely on its own powers," *id.*, and "Congressional control over appropriations and legislation is an excellent guarantee that the executive will not lightly reject a congressional request for information," *Sirica*, 487 F.2d at 778 (Wilkey, J., dissenting); *see also Campbell v. Clinton*, 203 F.3d 19, 23-24 (D.C. Cir. 2000).

As for the Judicial Branch, the role of federal courts under Article III "is, solely, to decide on the rights of individuals." *Marbury v. Madison*, 5 U.S. 137, 170 (1803); *accord Raines*, 521 U.S. at 829. If courts instead were to referee

disagreements exclusively between the political branches, that would severely damage "public confidence" by provoking "[r]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982); *accord Raines*, 521 U.S. at 833 (Souter, J., concurring in the judgment).

In sum, adjudicating interbranch informational disputes would shift power from the Executive to the Legislature while politicizing the Judiciary. Opening Br. 24-28; Reply Br. 7-12; Panel Op. 8-14, 24, 30-35. Neither the Committee's rehearing petition nor the panel dissent succeeds in refuting that showing.

1. The Committee and the panel dissent principally contend that federal courts can properly adjudicate disputes exclusively between the political branches even where no individual party's rights are at stake. But their arguments do not support that proposition.

First, the Committee observes that Article III authorizes the States and the United States to litigate controversies against each other. Rehearing Pet. 13. But unlike a component of the federal government alleging only impairment of its own institutional prerogatives by another component of the government, the sovereign itself has been traditionally understood to possess

"standing in court" to prevent "injury to the general welfare," because it represents the rights of the people. *In re Debs*, 158 U.S. 564, 584 (1895); *see Diamond v. Charles*, 476 U.S. 54, 62-65 (1986). Under our Constitution, however, "separation-of-powers concerns" would exist if the Legislative Branch purported to sue the Executive Branch on behalf of the United States and its people. *See Arizona State Legislature*, 135 S. Ct. at 2665 n.12; *accord Raines*, 521 U.S. at 824 n.8.[4]

This precise separation-of-powers problem was the basis of the Supreme Court's holding in *Buckley v. Valeo* that the Federal Election Commission could not include legislatively appointed officers. The Commission's powers went beyond "an investigative and informative nature" to include "enforcement power, exemplified by its discretionary power to seek judicial relief," which was "authority that cannot possibly be regarded as merely in aid of the legislative function of Congress." 424 U.S. at 138. Just as the President cannot arrogate the legislative power by himself enacting laws that he needs to

[4] In contrast, States have wide latitude to determine which branch of their governments will represent the sovereign in litigation. *See Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019); *cf. Arizona State Legislature*, 135 S. Ct. at 2663-65 (holding that a state legislature had standing to allege that the federal constitution vested it with a cognizable right to control congressional redistricting in the state, at least where the alleged right had been "completely nullif[ied]" (quoting *Raines*, 521 U.S. at 823)).

carry out the executive power, so too Congress (let alone a single chamber) cannot arrogate the executive power by itself bringing suits to obtain information it needs to carry out the legislative power. *Loving v. United States*, 517 U.S. 748, 757 (1996) ("[O]ne branch of the Government may not intrude upon the central prerogatives of another").

Second, both the Committee and the panel dissent emphasize that federal courts routinely adjudicate politically controversial separation-of-powers questions. Rehearing Pet. 13-14; Dissenting Op. 22-23. But for "nearly 200 years" of judicial review, the adjudication of such questions "has been recognized as a tool of last resort" when necessary to "vindicat[e] individual rights." *Valley Forge*, 454 U.S. at 473-74. Because private parties lack "the political self-help available to congressmen," *Campbell*, 203 F.3d at 24, "[d]eciding a suit to vindicate an interest outside the Government raises no specter of judicial readiness to enlist on one side of a political tug-of-war," *Raines*, 521 U.S. at 834 (Souter, J., concurring in the judgment).

By contrast, the threat of politicizing the judiciary is starkly underscored by the fact that, "[d]uring the President's impeachment trial in the Senate, both sides referenced this lawsuit in connection with" the "alleg[ation] that the President obstructed Congress." Dissenting Op. 23. And "[j]udicial entanglement in the branches' political affairs would not end" with this case,

as courts would quickly and inevitably "becom[e] an ombudsman for interbranch information disputes." Panel Op. 11; *accord id.* at 11-12 (noting that further privilege disputes would arise if McGahn were forced to testify, and that a different House committee sued two Cabinet Secretaries to enforce a different subpoena just one day after the district court's ruling in this case). Placing that "entirely anticipated political arm wrestling into permanent judicial receivership does not do the system a favor." *United States v. Windsor*, 570 U.S. 744, 791 (2013) (Scalia, J., dissenting).

Finally, the Committee alternatively suggests that, in fact, this dispute does concern "individual rights" because McGahn has returned to being "a private citizen." Rehearing Pet. 13. But the Committee has never before argued that this is not an interbranch suit, and for good reason: A component of the Legislative Branch is suing McGahn solely in his capacity as the former Counsel to the President, JA18, and he is defending based on the Executive Branch's prerogatives, Panel Op. 2. Although the Committee cites in passing a few cases that adjudicated the legal obligations of executive officers to respond to subpoenas, *see* Rehearing Pet. 13-14, those cases are all factually and procedurally inapposite, *see* Reply Br. 4. In all events, if the Committee truly were suing McGahn as a private party, the suit would fail on its own terms, because the purported cause of action the Committee (erroneously) invokes is

limited to implied suits in equity "to enjoin unconstitutional actions by state and federal *officers*." Resp. Br. 13 (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015)) (emphasis added).

2. The Committee and the panel dissent also object that the House lacks meaningful political remedies to ensure compliance with lawful subpoenas. To be clear, though, they do not seriously dispute the panel's point that "Congress (or one of its chambers) may hold officers in contempt, withhold appropriations, refuse to confirm the President's nominees, harness public opinion, delay or derail the President's legislative agenda, or impeach recalcitrant officers." Panel Op. 13; *accord Blumenthal v. Trump*, 949 F.3d 14, 20 (D.C. Cir. 2020) ("The Members can, and likely will, continue to use their weighty voices to make their case to the American people, their colleagues in the Congress and the President himself . . . .").

Instead, the Committee complains that appeals to the public might not result in immediate political pressure, and that deployment of legislative remedies might not be worth the cost. Rehearing Pet. 16. But, of course, "Congress can tailor its sanctions to the gravity of the Executive Branch's offense." Panel Op. 32. It simply "must care enough to act against the President itself, not merely enough to instruct its lawyers to ask [the courts] to do so." *Windsor*, 570 U.S. at 791 (Scalia, J., dissenting). Likewise, the panel

dissent worries that "[s]ome of these [political] remedies cannot be undertaken by a single House of Congress." Dissenting Op. 17. But again, "many of the remedies *can* be exercised without majorities in both chambers," such as declining to enact measures that the President desires. Panel Op. 32. And regardless, the "finely wrought and exhaustively considered" structural checks of bicameralism and presentment are designed to "protect the Executive Branch from Congress" and ensure "full study and debate." *INS v. Chadha*, 462 U.S. 919, 951 (1983); *see also Campbell*, 203 F.3d at 24 (federal legislators are "required to turn to politics instead of the courts for their remedy" even if that requires following the maxim that "if at first you don't succeed, try and try again"). Simply put, the objections to the House's political remedies reflect features, not bugs, of our constitutional design.

The panel dissent also attempted to draw support from two opinions issued by the Office of Legal Counsel (OLC) in the 1980s—before *Raines* and *Campbell*—which addressed the adequacy of certain remedies for non-compliance with legislative subpoenas. The dissent emphasized OLC's conclusion that executive officials who decline to comply with legislative subpoenas based on executive objections are not subject to either criminal contempt prosecutions by the Executive or inherent contempt arrests by the Legislature. *See* Dissenting Op. 12-14. The dissent then used that conclusion

as the basis to leap to the judgment that a civil enforcement action in federal court was both necessary and proper. *See id.*

As a threshold matter, it is certainly true—contrary to the Committee's breathtaking suggestion, Rehearing Pet. 14—that Congress lacks any inherent contempt power to arrest individuals for actions within the scope of their duties as executive officials. Because Congress has no express contempt power under the Constitution, any such "implied power[]" must be "auxiliary and subordinate," limited to cases "of necessity," and informed by "the history of the practice of our legislative bodies." *Anderson v. Dunn*, 19 U.S. 204, 225-26, 228, 231 (1821). None of those criteria is satisfied here.

Legislative authority to arrest Executive officials is the type of "great substantive and independent power[]" that the Constitution would not have left to mere implication, *see NFIB v. Sebelius*, 567 U.S. 519, 559 (2012) (Roberts, C.J.), as it would impermissibly "undermine the authority and independence of . . . another coordinate Branch," *see Mistretta v. United States*, 488 U.S. 361, 382 (1989). Moreover, the Legislative Branch has sought to arrest Executive Branch officials only twice in the Nation's history, both instances occurred more than a century ago, and neither effort was ultimately successful—one time, the Supreme Court granted habeas relief, *Marshall v. Gordon*, 243 U.S. 521, 545, 548 (1917); the other time, the House Judiciary Committee *itself*

rejected contempt on the ground that the requested records were, "under our theory of government, . . . under the control of the President," who could determine that "it was not consistent with the public interest to give the House such information," H.R. Rep. No. 45-141, at 3 (1879). Perhaps most importantly for present purposes, unlike with private contemnors, Congress has no need to arrest Executive officials, because it can deploy its ample political remedies against the Executive Branch instead.

For that reason, though, the panel dissent went astray in suggesting that the unavailability of the particular remedy of inherent contempt somehow justified civil enforcement suits notwithstanding the potent political remedies the House retains. And insofar as the OLC opinions suggested that such suits were permissible, they were issued a decade before *Raines* abrogated this Court's earlier, looser approach to legislative standing, *see* 521 U.S. at 820 n.4; *Chenoweth v. Clinton*, 181 F.3d 112, 113-17 (D.C. Cir. 1999), and before *Campbell* reinvigorated the importance of alternative political remedies, *see* 203 F.3d at 23-24. Indeed, since *Raines* was decided, the Department of Justice has consistently maintained across Administrations that *Raines* forecloses interbranch suits. *See Committee on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 9 (D.D.C. 2013); *Committee on Judiciary v. Miers*, 558 F. Supp. 2d 53, 66-67 (D.D.C. 2008).

C. This Court's Pre-*Raines* Decisions Are Neither Controlling Nor Persuasive

Both the Committee's rehearing petition and the panel dissent urged that standing exists here under this Court's pre-*Raines* decisions in *United States v. AT&T*, *supra*, and *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (en banc), as well as a handful of district court decisions relying on *AT&T*. Rehearing Pet. 7-10; Dissenting Op. 8-9. But now that this Court is sitting en banc, it may "set aside its own precedent" if, among other things, the prior decision is contrary to "a Supreme Court decision" or otherwise "fundamentally flawed." *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 876 (D.C. Cir. 1992) (en banc). And here, to the extent *AT&T* and similar cases address Article III standing, they are poorly reasoned, factually and procedurally inapposite, and—most importantly—legally irreconcilable with *Raines*.

First, neither *AT&T* nor *Senate Select Committee* even contains any analysis of Article III standing. *Senate Select Committee* did not address standing at all, and it is settled that "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011). As for *AT&T*, the relevant portion consists, in its

entirety, of this conclusory assertion: "It is clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf." 551 F.2d at 391. A "drive-by jurisdictional ruling[] of this sort" should have "no precedential effect," *cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998), particularly when this Court sits en banc.

Second, *AT&T* is distinguishable because the House was not a plaintiff there. *AT&T* involved a suit brought by the Executive Branch to enjoin a private company from complying with a congressional subpoena, not a suit brought by the Legislative Branch against the Executive Branch. *See* 551 F.2d at 385. While this Court later asserted that a Member of Congress authorized by the House to intervene on its behalf had standing to appeal, it did so only after the district court had quashed the subpoena. *See id.* at 391. *AT&T* thus did not address the question whether the House may sue to enjoin *mere non-compliance* with a still-operative subpoena; it at most addressed the question whether the House could appeal to challenge a district-court judgment that *invalidated* a legislative subpoena. Although *AT&T* was wrongly decided even on the latter question, this Court need not resolve that here, as it suffices to note that *AT&T* did not even present the former question, which is the one presented here. *Compare Arizona State Legislature*, 135 S. Ct. at 2665 (noting special rule where legislative standing may exist in certain circumstances

involving the permanent nullification of legislative votes), *with Chenoweth*, 181 F.3d at 117-18 (Tatel, J., concurring in the judgment) (discussing cases, even pre-*Raines*, that rejected legislative standing based on executive non-compliance with the law). Especially at en banc review, *AT&T* cannot control in this distinct context.

Third, *AT&T*'s single sentence on standing is further inapposite because, as the panel noted, it was written at a time when this Court kept "distinct [its] analysis of *standing* and [its] consideration of the *separation of powers* issues raised" by a legislative suit. Panel Op. 26 (quoting *Chenoweth*, 181 F.3d at 114; emphasis added by panel). Indeed, in a separate section of *AT&T*, this Court observed, without definitively deciding, that "a better balance would result in the constitutional sense, however imperfect it might be, if it were struck by political struggle and compromise than by a judicial ruling." *AT&T*, 551 F.2d at 391. As this Court recognized, and as the Committee does not dispute, *Raines* and other Supreme Court decisions later merged those inquiries. *Chenoweth*, 181 F.3d at 114-15. Accordingly, the conclusory assertion of standing in *AT&T* does not cover the key separation-of-powers issues that all parties agree must now be part of the standing analysis. And particularly given that crucial omission, it should receive no weight during en banc review.

Finally, in all events, *AT&T* is not binding on this Court sitting en banc, whereas the essential reasoning of *Raines* still must be treated as the Supreme Court's authoritative guidance, whether or not it is strictly a controlling holding. *See supra* pp. 13-14. And for all the reasons discussed above, that analysis, grounded in historical tradition and separation of powers, compels the conclusion that the Committee lacks Article III standing to sue McGahn to enforce a legislative subpoena for testimony concerning his official duties as White House Counsel.

D. This Court Can Avoid The Serious Article III Concerns Presented By Holding That Congress Itself Has Foreclosed The Committee From Bringing This Suit

This Court limited supplemental en banc briefing to the Article III standing issue. As demonstrated above and by the panel decision, the Committee's standing to sue presents, at the very least, a serious constitutional question. Accordingly, this Court could avoid that question by holding that, in light of the express limitations in 28 U.S.C. § 1365, Congress deprived district courts of statutory subject-matter jurisdiction over suits by House committees to enforce subpoenas against Executive Branch officials asserting a governmental objection. Opening Br. 34-41; Reply Br. 12-19; Panel Op. 18-19. Alternatively, this Court could hold that, regardless of whether jurisdiction exists, Congress denied the Committee a cause of action to enforce its

subpoena. Opening Br. 41-46; Reply Br. 19-23. Or this Court could deny relief at the threshold as an exercise of its equitable discretion. Opening Br. 46-47; Reply Br. 24.

This Court could dispose of the case on any of these threshold nonmerits grounds without resolving the Article III standing question. *See, e.g.*, *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005); *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-31 (2007). And it would be eminently reasonable to avoid the significant constitutional question whether a House committee can sue the Executive Branch until Congress itself makes clear that it intends such suits to proceed. *Cf.* Panel Op. 18-19, 35-36.

CONCLUSION

This Court should reverse the judgment below and order that the case be dismissed.[5]

Respectfully submitted,

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[5] If this Court were to disagree and affirm the judgment below, it should leave the existing administrative stay in place for a reasonable period to allow the Solicitor General to seek appropriate relief from the Supreme Court, especially given that the need for McGahn's testimony is considerably lessened now that Senate impeachment proceedings have concluded.

CERTIFICATE OF COMPLIANCE

This brief complies with this Court's March 13, 2020 Order because it contains 6313 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Calisto MT 14-point font, a proportionally spaced typeface.

/s/ Mark R. Freeman
MARK R. FREEMAN

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2020, I electronically filed the foregoing brief with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Mark R. Freeman
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