No. 22-425

IN THE

Supreme Court of the United States

ROBIN CARNAHAN, ADMINISTRATOR OF THE GENERAL SERVICES ADMINISTRATION,

Petitioner,

v.

CAROLYN MALONEY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is the deprivation of a personal, statutory right to request and receive information from federal governmental agencies a cognizable injury for purposes of standing to sue in federal court under Article III?

2. Does Congress have authority under the Necessary and Proper Clause, Art. I, § 8, cl. 17, to advance the objective of enhancing oversight of federal agencies by enacting a statute that confers such a personal informational right on specified Members of Congress?

PARTIES TO THE PROCEEDING

Respondents note that of the parties to the proceeding listed in the petition for certiorari, the following are no longer Members of the United States House of Representatives: Carolyn Maloney, William Lacy Clay, Jim Cooper, Brenda Lawrence, Senator Peter Welch, and Val Demings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions

Statutes and Rules

Other

INTRODUCTION

A unique 95-year-old statute often referred to as "the Seven Member Rule," 5 U.S.C. § 2954, gives any seven Members of the House Oversight Committee the right to request and receive from executive agencies any information relating to matters within the Committee's jurisdiction. The court of appeals held that Members who joined in such a request have Article III standing to seek judicial redress when they are injured by an agency's refusal to provide the requested information. In so holding, the court applied the familiar principle that "[a] rebuffed request for information to which the requester is statutorily entitled is a concrete, particularized, and individualized personal injury, within the meaning of Article III." Pet. App. 2a. The court explained that "nothing in Article III erects a categorical bar against legislators suing to enforce statutorily created informational rights against federal agencies." *Id.*

Petitioner, the Administrator of General Services ("GSA"), asserts that the court of appeals' ruling was wrong, but provides no convincing reason why the Court should review its correctness. This case is a legal unicorn. There is no conflict among the circuits over standing under Section 2954. Indeed, only *three times* over the course of nearly a century have Members sued to enforce Section 2954, and neither of the earlier cases resulted in an appellate ruling on standing (or anything else). GSA cannot point to any appellate precedent holding that the violation of a similar statutory right to information is not an injury sufficient to support Article III standing. And GSA cites no authority holding that Congress lacks the power to enact a law conferring a personal informational right on

particular legislators—which is unsurprising because no other law does so. Instead, GSA relies on decisions that deny standing to legislators who allege injuries to abstract institutional interests that they claim to hold in common with the legislature and all its other members. None of those precedents involves the deprivation of concrete, personal informational interests conferred by statute, and none provides a reason for review of the question of first impression presented by this case.

GSA's fears of abusive litigation do not justify review, either. There is no flood of cases under Section 2954, "[o]r even a puddle." Pet. App. 58a (Millett, J., concurring in denial of rehearing). The reason for the dearth of litigation is simple: The longstanding practice of the Executive Branch has been to comply with the statute and work out any disputes over production without litigation. Indeed, before denying the requests that gave rise to this litigation, GSA twice *invited* the Members to request the information at issue under the Seven Member Rule, and the agency's own Inspector General subsequently reported that the ultimate "decision to deny plaintiffs' requests was a departure from GSA's policy."[1] With the need for litigation under Section 2954 so rare, there is no support for GSA's speculation that it may become a breeding ground for abuse. There is zero evidence of abusive *requests*, let alone abusive *litigation*.

The particulars of the dispute here also do not merit this Court's attention. Because GSA decided to

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[1] *See* Office of the Inspector General, GSA, *Evaluation of GSA's Nondisclosure Policy* 7 (Mar. 8, 2018), https://oversight.gov/report/gsa/evaluation-gsa-nondisclosure-policy; *see also id.* at 4–8, 13–18.

treat the Members' requests as if they were made under the Freedom of Information Act (FOIA), it eventually produced nearly all the information requested. At this point, all that is left outstanding are legal opinions, and drafts thereof, that GSA maintains are privileged—and it remains to be decided whether a request under Section 2954, unlike one under FOIA, overcomes that privilege. Thus, it is uncertain whether the request at issue has any remaining practical significance. If the Seven Member Rule confers no greater rights on the Members than does FOIA—under which their standing to pursue judicial remedies is undisputed—the question of standing to invoke Section 2954 is inconsequential.

Another unresolved issue also highlights that the case does not warrant review: Whether there is even a right of action to enforce the statute is undetermined. If there is not, the threshold question of standing will be merely an academic curiosity of no importance. Even if the standing issue might someday merit this Court's attention, there is no urgent need to address it when its significance is far from apparent.

The lack of necessity for this Court's intervention is underscored by the likelihood that, if the Court stays its hand, the issue of access to the small quantity of documents remaining may be mooted either by their production or by agreement among the parties with respect to access—just as the two previous cases brought under the Seven Member Rule were mooted before they could be decided at the appellate level.

Moreover, very strong reasons counsel against addressing the standing issue in advance of further proceedings. Implicit in the government's position is the unstated and unexamined premise that Congress

lacks the power to confer enforceable informational rights on its Members. In addition to making Section 2954 merely precatory by enabling agencies to ignore requests from Members of the minority without consequences, a decision for GSA would severely limit Congress's authority under the Necessary and Proper Clause to enact laws protecting the ability of legislators to obtain from government agencies information necessary to the exercise of its legislative powers. This Court has characterized oversight authority as "an essential and appropriate auxiliary to the legislative function." *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927). Whether the Constitution contains a heretofore unknown limit on that authority is a matter that the Court ought not lightly undertake to decide. As this Court has repeatedly emphasized, "if there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality … unless such adjudication is unavoidable." *Dep't of Commerce v. U.S. House of Reps.*, 525 U.S. 316, 343 (1999) (citations omitted). Respect for that principle counsels denial of GSA's petition.

STATEMENT

The History of Section 2954

Congress enacted Section 2954 to restructure the way its standing oversight committees obtain information from executive agencies. *See* Act of May 29, 1928, ch. 901, 45 Stat. 996 (1928 Act). The 1928 Act was the final step in a movement to reform Congress's oversight of public expenditures. First came the enactment of the Budget and Accounting Act of 1921. *See, e.g.*, Louis Fisher, *Presidential Spending Power* 29–35 (1975); Eric Schickler, *Disjointed Pluralism:*

Institutional Innovation and the Development of the U.S. Congress 89–94 (2001). Next, the appropriation committees in each Chamber were merged into a single committee, *see* Schickler, at 94, followed by consolidation of the committees engaged in oversight of Executive Branch expenditures. The Senate went first in 1920, with the merging of its committees into the Senate Committee on Expenditure in the Executive Departments. *See id.* at 95–96. The House followed the Senate's lead on December 5, 1927, by establishing the House Committee on Expenditures in the Executive Departments in place of its predecessors. *See id.* at 96; VII Clarence Cannon, *Precedents of the House of Representatives* § 2041, at 830–31 (1935).

Shortly after the Senate's consolidation of its committees, a congressional investigation exposed the Teapot Dome scandal, sending Interior Secretary Albert Fall to jail and revealing widespread corruption within the Harding Administration. In direct response to the scandal, Congress in 1924 enacted a statute, now set out in 26 U.S.C. § 6103(f), permitting certain congressional committees to have access to tax return information. *See* OLC, *Ways and Means Committee's Request for the Former President's Tax Returns and Related Tax Information Pursuant to 26 U.S.C. § 6103(f)(1)*, 2021 WL 3418600 at *4 (2021).

Then, in 1927, this Court decided *McGrain*, confirming that Congress's oversight authority includes the power to compel the provision of information. *McGrain*'s starting point was that "[a] legislative body cannot legislate wisely or effectively in the absence of information … and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it." 273 U.S. at 175. "Experience has

taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed." *Id.* These concerns were apparent "before and when the Constitution was framed and adopted … [and] [i]n that period the power of inquiry, with enforcing process, was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it." *Id.* *McGrain* concluded that "there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised." *Id.*[2]

Following *McGrain*, Congress took the final step in its reform project by passing the 1928 Act to ensure that Members of its newly formed oversight committees had the information-gathering tools needed to watch over Executive Branch expenditures. The 1928 Act first repealed 128 statutes that required agencies to submit annual reports on a wide range of subjects to various congressional committees. Over time, the utility of those reports had faded, but the statutory reporting requirements remained on the books. *See* S. Rep. No. 70-1320, at 2 (1928); H.R. Rep. No. 70-1757, at 3–4 (1928) (observing that the discontinued reports

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[2] Subsequent cases also stress that the "scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt v. United States*, 360 U.S. 109, 111 (1959); *see Trump v. Mazars USA, LLC*, 140 S. Ct. 2019, 2031–33 (2020); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 & n.15 (1975).

"serve[d] no useful purpose," were "unnecessary," "valueless," "out of date" and "obsolete").

More pertinent here, Congress enacted the Act's second section, codified as Section 2954, to replace its antiquated annual reporting requirements with a process that ensured that the oversight committees, and committee Members, would have swift access to executive agency information. *See* H.R. Rep. No. 70-1757, at 6; S. Rep. No. 70-1320, at 4. Section 2954 states that, on request by seven or more Members of the House Oversight Committee, an executive agency "shall" submit "any information" relating to "any matter within the jurisdiction of the committee." By using the imperative "shall," not the discretionary "may," Congress signaled that compliance is mandatory. *See* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 112 (2012). Congress's repeated use of the word "any"—agencies shall, on request, submit "*any* information" relating to "*any* matter" within the Committees' jurisdiction—underscores the breadth of the authority conferred in Section 2954.[3]

Section 2954 also reflects Congress's concern that, if left unchecked, partisanship might undermine its core oversight function. After all, one party during the Harding Administration controlled the Executive Branch and Congress. Even though the

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[3] Section 2954's antecedents date back to the Treasury Act of 1789, which established the Treasury Department. That statute said it is "*the duty of the Secretary of the Treasury … to make report, and give information to either branch of the legislature in person or in writing* (as he may be required), respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office." Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65 (1789) (emphasis added).

Administration knew the Teapot Dome scandal was brewing, the scandal was exposed only after President Harding's death in 1923. *See* Francis Russell, *The Shadow of Blooming Grove—Warren G. Harding In His Time* 490–92 (1962). Once President Coolidge took office, the Senate appointed two new special prosecutors, one Republican and one Democrat. Their investigation finally brought the scandal to light. *Id.*

In crafting Section 2954, the House aimed not just to bestow on Oversight Committee Members the power to request information from executive agencies. It also sought to ensure that minority Members of the Oversight Committee are able to demand information, even if their majority colleagues do not participate. To those ends, Congress vested authority to invoke Section 2954 in groupings of Members meeting numerical thresholds: seven in the House and five in the Senate. The House number is particularly significant. At the time of the Act's passage, the House Committee on Expenditures in the Executive Department had twenty-one Members, thirteen from the majority party and eight from the minority. *See* 1 David Canon, *et al.*, *Committees in the U.S. Congress 1789–1946: House Standing Committees* 497 (2002). The counterpart Senate Committee had only seven Members, four from the majority party. *See* 2 David Canon, *et al.*, *Committees in the U.S. Congress 1789–1946: Senate Standing Committees* 501 (2002). When enacted, the legislation permitted minority Members of the House Committee, but not its Senate counterpart, to make requests without the concurrence of majority Members.[4]

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[4] The House drafted Section 2. JA 163. The Act's legislative history does not explain the choice of seven Members for the

(*Footnote continued*)

For this reason, Section 2954 has long been recognized as an oversight tool for minority Oversight Committee Members. For instance, in *Leach v. Resolution Trust Corp.*, 860 F. Supp. 868 (D.D.C. 1994), Representative Leach invoked FOIA to obtain records relating to the failed Madison Savings and Loan. Leach argued that the agency could not withhold records from a Member of Congress, even if they were otherwise exempt under FOIA. Rejecting Leach's argument, the court said that to "the extent that Representative Leach seeks to suggest that the alleged domination of the Committee by members of an opposing political party makes … a collegial remedy an impossibility, the Defendants note that the House has in fact provided alternative procedures through which small groups of individual congressmembers can request information without awaiting formal Committee action. *See* 5 U.S.C. § 2954." *Id.* at 876 n.7. After the ruling in *Leach*, twelve Republican (then minority) Members of the House Oversight Committee invoked Section 2954 to request the same information. The agency complied. *See* JA 116–21.

The Madison Savings and Loan request is far from the only example. Although there is no comprehensive compendium of Section 2954 requests, the joint

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House and five Members for the Senate. As to the Senate, one possibility is that the decision to require five Senators was based on the Senate's Resolution appointing five Members of the Senate to constitute a Select Committee to investigate then-Attorney General Harry M. Daugherty, who had been accused of corruption. *See McGrain*, 273 U.S. at 151–53. By 1947, the Senate Committee had thirteen Members, enabling a minority to employ Section 2954 on the Senate side. Comm. on Gov't Operations, U.S. Senate, *50th Anniversary: History 1921–1971*, at 85, 92nd Cong., 1st Sess. (1971) (Senate Doc. 31).

appendix in the court of appeals documents numerous occasions when agencies complied with requests under the statute and acknowledged that "5 U.S.C. § 2954 compels [the agency] to disclose the information and material requested by the seven members of the Committee." JA 126; *see* JA 122–45.

The Requests at Issue

On August 5, 2013, GSA entered into a sixty-year lease agreement with Trump Old Post Office LLC, permitting the company to develop the Old Post Office on Pennsylvania Avenue into the Trump International Hotel. When the lease was signed, Trump Old Post Office LLC was (as it still is) owned by Donald Trump, his daughter Ivanka, and his sons Eric and Donald Trump, Jr. To avoid conflicts of interest, Article 37.19 of the lease provides:

> No member or delegate to Congress, or elected official of the Government of the United States or the Government of the District of Columbia, shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom.

JA 63.

On December 22, 2016, the late Representative Elijah Cummings, who was then Ranking Member of the House Oversight Committee, together with ten other Members of the Committee, sent a letter to GSA requesting unredacted lease documents and expense reports relating to the Old Post Office lease, invoking Section 2954. JA 63, 83–85. In keeping with its Section 2954 obligations, GSA produced unredacted documents on January 3, 2017, including amendments to the lease, the 2017 budget estimate, and monthly income statements. GSA's transmittal letter acknowledged that the production was "[c]onsistent with the

Seven Member Rule and judicial and Department of Justice, Office of Legal Counsel opinions (see e.g. 6 Op. O.L.C. 632 (1982) and 28 Op. O.L.C. 79 (2004))." JA 87.[5]

A week later, in a nationally televised news conference, then President-elect Trump announced that he would not divest his interest in his companies, including Trump Old Post Office LLC. JA 65. President-elect Trump had earlier told the New York Times that "occupancy at that hotel will be probably a more valuable asset now than it was before, O.K.? The brand is certainly a hotter brand than it was before."[6]

Donald Trump did not divest himself of his interest in Trump Old Post Office LLC either before or after he was sworn in as President of the United States. JA 65, 90–93. For that reason, by letter dated January 23, 2017, Representative Cummings, together with three other Members of the House, asked GSA to: (1) explain the steps that GSA had taken, or planned to take, to address President Trump's apparent breach of the lease agreement; (2) state whether GSA intended to notify President Trump's company that it was in breach; (3) provide the monthly reports President Trump's company submits to the GSA on the Trump International Hotel's revenues and expenses; (4)

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[5] The letter stated that some materials provided to the Members "contain privileged or confidential information protected from public release in accordance with Privacy Act, Freedom of Information Act, and/or other statutory protections" and should not be disseminated "without prior written coordination and approval" by GSA. JA 87–88.

[6] *Donald Trump's New York Times Interview: Full Transcript*, N.Y. Times (Nov. 23, 2016), https://www.nytimes.com/2016/11/23/us/politics/trump-new-york-times-interview-transcript.html.

explain and provide documentation of the steps GSA had taken, or planned to take, to address liens against the Trump International Hotel; and (5) provide copies of all correspondence with representatives of President Trump's company or the Trump transition team. JA 90–93.

GSA declined to comply with the request, but by letter dated February 6, 2017, promised that "[s]hould the U.S. House of Representatives Committee on Oversight and Government Reform or any seven members thereof submit a request pursuant to 5 U.S.C. § 2954, GSA will review any such request." JA 95.

Responding to GSA's offer, Representative Cummings, joined by seven other Members of the Oversight Committee, made a Section 2954 request on February 8, 2017, for the information sought in the January 23rd letter. The February request pointed out that GSA had complied with Section 2954 requests for information on the same topic before President Trump took office. JA 99. Notwithstanding GSA's promise that it would review a Section 2954 request, GSA did not respond. JA 66, ¶ 15.

On March 23, 2017, GSA publicly released a letter it had sent Donald Trump, Jr., asserting that Trump Old Post Office LLC had brought itself into full compliance with Section 37.19 of the lease. JA 66, ¶ 16. GSA's letter took the position that, because President Trump had placed the income he received from the Hotel into revocable trusts and other corporate entities, he would not directly receive any income from the hotel during the term of his presidency, and thus would not "benefit" from the lease. *Id*.

In testimony on May 24, 2017, before the House Committee on Appropriations, Acting GSA Administrator Timothy Horne cited what he represented to be a new Administration policy of rejecting all oversight requests from Democrats unless they also were joined by a Republican Chairman. Mr. Horne testified that "for matters of oversight, the request needs to come from the Committee chair." *Hearing on the General Services Administration*, H. Comm. on Appropriations, Subcomm. on Fin. Servs. and Gen. Gov't, 115th Cong., 1st Sess. (May 24, 2017). His testimony did not address Section 2954.

On June 5, 2017, Representative Cummings, now joined by sixteen other Members of the Oversight Committee (including all respondents here), sent GSA another letter renewing the request initially made on February 8, 2017. The letter invoked Section 2954, renewed the demand for records, and requested additional documents in response to GSA's actions taken after the February request, including (1) all documents containing legal interpretations of Section 37.19 of the Old Post Office lease, (2) all documents relating to funds the Trump International Hotel had received from any foreign country, foreign entity, or foreign source, (3) any legal opinion relied upon by GSA in making a determination regarding the President's compliance with Section 37.19, and (4) all drafts and edits of the contracting officer's March 23d letter. The June letter explained that GSA's failure to respond violated Section 2954, was inconsistent with GSA's policy, and was at odds with the practice of Republican and Democratic administrations to honor Section 2954 requests. JA 67; 103–08. GSA did not respond.

Undeterred, the same seventeen Oversight Committee Members sent another letter to GSA on July 6, 2017, demanding a response to the prior requests and reminding GSA that in the past it had adhered to its policy of complying with Section 2954 requests. JA 110–12. GSA denied the Members' requests by letter dated July 17, 2017. JA 115. To justify its denial, GSA purported to rely on a May 1, 2017, Office of Legal Counsel (OLC) memorandum asserting that "[i]ndividual members of Congress, including ranking minority members, do not have authority to conduct oversight in the absence of a specific delegation by a full house, committee, or subcommittee." *Id.* GSA's letter added that "the Executive Branch's longstanding policy has been to engage in the established process for accommodating congressional requests for information only when those requests come from a committee, subcommittee, or chairman authorized to conduct oversight." *Id.* (citing OLC, *Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch* 1 (May 1, 2017)).[7]

Proceedings Below

1. The Members who are respondents here joined in filing this action on November 2, 2017, seeking declaratory and injunctive relief to compel GSA to provide the requested information. Pet. App. 140a. GSA moved to dismiss, arguing that the Members lacked standing, that Section 2954 provides no right of action, that the court should deny relief as a matter of equitable discretion, and that Section 2954 applies only to the information that was contained in the

[7] The OLC opinion is available at https://www.justice.gov/olc/file/966326/download. It makes no mention of Section 2954.

agency reporting requirements that were discontinued when it was enacted. The Members cross-moved for summary judgment and opposed GSA's motion to dismiss.

The district court held that plaintiffs lacked standing and dismissed the case. Pet. App. 91a. The court recognized that Section 2954 "provides a statutory mechanism for members of the minority party to obtain records from the Executive Branch to support the Committee's oversight function." *Id.* at 91a–92a. The court explained that "Section 2954 is unique in that it grants a statutory right to seven members of the House Oversight Committee—a true minority (seven members) of a minority of the House of Representatives (those Members on the Oversight Committee)—to request and receive information from an Executive agency." *Id.* at 126a–27a. The court added: "Not every Member even possesses the right to make a Seven Member Rule request—only a small percentage do and, even then, it must be a collective demand." *Id.* at 127a.

The court also rejected GSA's claim that *Raines v. Byrd*, 521 U.S. 811 (1997), controlled the standing question. The court was "not of the view that complete vote nullification is the *only* instance in which an individual legislator can assert institutional injury consistent with *Raines*." *Id.* at 126 (emphasis in original). "Arguably, this is such a case," where the plaintiffs could assert a personal injury based on the denial of a statutory right to information. *Id. at* 126–27.

The court further recognized that "[a]t least in terms of concreteness, it is hard to conceive of a material difference between this case—a suit to enforce a congressional records demand—and a subpoena

enforcement case—a suit to enforce a congressional records demand." *Id.* at 127. Thus, "to the extent that *Raines* demands that an individual Member of Congress have an injury that is both concrete and particularized to vindicate an institutional injury, this case bears those characteristics in a way that other cases post-*Raines* have not." *Id.* 127–28.

Nonetheless, citing *Raines*'s observation that the "historical experience" has been that "inter-branch disputes have typically been resolved through the political process," and noting that Congress had not expressly authorized the litigation, *id.* 129–38, the court dismissed the case for lack of standing.

2. The D.C. Circuit reversed, holding that the Members have standing to enforce their rights under Section 2954. The court recognized that to have Article III standing the plaintiff "must allege (1) a concrete and particularized injury, that (2) is fairly traceable to the challenged conduct, and (3) is likely to be redressed by a favorable decision." Pet. App. 12a (citing *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019)). To satisfy the "concrete and particularized injury" requirement, a party "must establish that he has a 'personal stake' in the alleged dispute, and the alleged injury is particularized to him." *Id.* (quoting *Raines*, 521 U.S. at 819). The court also recognized that this Court's "standing inquiry 'has been especially rigorous' when the suit pits members of the two Political Branches against each other." *Id.* (quoting *Raines*, 521 U.S. at 820–21).

With that background in place, the court relied on this Court's rulings to conclude that the "agency's failure to provide information to which the Requesters are statutorily entitled is a quintessential form of

concrete and particularized injury within the meaning of Article III." Pet. App. 13a; *see id.* at 13a–16a (discussing *FEC v. Akins*, 524 U.S. 11, 20-21 (1998); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989); and *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1546–47 (2016)).

In responding to GSA's argument that the Members lack standing because the deprivation of the requested information is an "institutional injury," the court pointed out that the argument "fundamentally confuses" the category of institutional and personal injury "by adopting a sweeping definition of institutional injury that would cut out of Article III even those individualized and particularized injuries experienced by a single legislator alone." Pet. App. 20a–21a. The court distinguished the injury in *Raines*, which "damage[d] all Members of Congress and both Houses of Congress equally," *Raines*, 521 U.S. at 821, by contrasting it to the Members' injury—"the denial of information to which they as individual legislators are statutorily entitled"—which "befall[s] them and only them." *Id.*

The panel opinion also lays bare the flaws in GSA's invocation of the dissent's argument that the Members' injuries are not "personal" because Section 2954 is nothing more than a "practical tool" that Members can use to "advanc[e] the work of the Committee." Pet. App. 28a (quoting *id.* at 42a). That argument "overlooks Section 2954's express conferral of its information right on a *minority* of committee members," *id.* at 28a, which enables Members to engage in active and robust oversight even if the Committee itself takes no action. For that reason, "Section 2954's plain terms invest the informational right in legislators, not the legislature," *id.* at 29a, and thus the Members

have standing to assert their "personal" informational injuries.

Senior Circuit Judge Ginsburg dissented, arguing that the rights conferred by Section 2954 are "institutional," and thus the plaintiffs lack standing. He also worried that a favorable ruling for the Members might unleash "the minority party (or even the ideological fringe of the minority party) to distract and harass Executive agencies." Pet. App. 41a–42a; 47a.

3. GSA filed a petition for rehearing en banc, which the D.C. Circuit denied. Circuit Judge Millett filed a concurrence, joined by Senior Circuit Judge Tatel, driving home that neither dissent grappled with the fact that the source of the Members' authority was not Congress's inherent power of inquiry, as in *McGrain*, but was instead "the express provision of a federal law—5 U.S.C. § 2954—duly enacted by both Houses of Congress and signed into law by President Coolidge." Pet. App. 52a. Judge Millett stressed that the injury alleged is "personal" because "Section 2954 applies to members as individuals," "underscoring that, by its very design, the statute's right to information is entirely independent of any congressional or committee decision to investigate anything." *Id.* Circuit Judge Rao and Senior Circuit Judge Ginsburg filed separate dissents, arguing that the Members lack standing because the injury at issue is "institutional," not personal. Pet. App. 64a–70a; 117a–24a.

4. Meanwhile, treating the Members' requests as FOIA requests joined by each Member, GSA has produced thousands of documents, some of which are directly responsive to their requests. Included among the records that GSA has provided are the financial reports the Members requested, as well as the

submissions on behalf of the Trump Organization in support of its position that Mr. Trump's accession to the Presidency did not result in a violation of the lease conditions. The only category of information that was requested and not yet produced consists of legal opinions and drafts thereof prepared by the Justice Department and other government lawyers regarding whether the President's trust arrangements satisfied the condition that no government official have a share or part of, or benefit from, the lease.

More recently, the House of Representatives adopted a rule providing that the "chair of the [Oversight] Committee … must be included as one of the seven members of the committee making any request of an Executive agency" pursuant to Section 2954."[8] The new House rule does not purport to amend the statute, nor apply retrospectively. Prospectively, the rule may undermine the ability of minority Members of the Committee to invoke Section 2954 because failure to comply with a House Rule subjects Members to possible disciplinary action, which can result in censure, fines, or other penalties. *See*, *e.g.*, Congressional Research Service, *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives* (June 17, 2016).[9]

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[8] 169 Cong. Rec. H54 (Jan. 9. 2023).

[9] https://www.everycrsreport.com/files/20160627_RL31382_8b0e5d7921411e047eee6a9a7bba38e6c389a172.pdf.

REASONS FOR DENYING THE WRIT

I. This case does not warrant review.

GSA's claim that this case merits review is wrong and wrong again. The case involves no division of authority requiring resolution by this Court, but only the application of well-established principles of informational standing to a singular statute. Moreover, it presents no recurring constitutional issue warranting this Court's attention. To the contrary, it involves a once-in-a-decade, virtually unprecedented rejection of a Section 2954 request.

A. That the case implicates neither intercircuit conflict nor conflict with a controlling decision of this Court is apparent: The decision below is the *only* appellate decision addressing standing under Section 2954. Decisions of this Court cited by GSA that deny standing to individual legislators who claim intangible injuries to institutional interests of legislative bodies common to all their members are not to the contrary. As the court of appeals recognized, none of those decisions—in particular *Raines*, on which GSA places greatest weight—involved the assertion of statutory rights granting specific legislators concrete informational interests that belong neither to the legislature as a whole nor to other members. Far from conflicting with this Court's precedents, the court of appeals' recognition of standing to assert such personal informational rights *follows* from the Court's consistent recognition that deprivations of statutory entitlements to information constitute concrete personal injuries that give rise to Article III standing.

GSA's frequent citation to *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), undermines its cause. *TransUnion* acknowledged that deprivation of

statutory informational rights is an injury that gives rise to standing, and it denied informational standing only to plaintiffs who "did not allege that they failed to receive any required information." *Id.* at 2214. GSA's contention that Section 2954 cannot be enforced even by those who *prove* that "they failed to receive" the required information is at odds with *TransUnion*. Indeed, GSA cites no precedent of this Court holding that deprivation of a personal statutory entitlement to information is not an Article III injury.

Instead, GSA theorizes that the informational rights in this case cannot be "personal" within the meaning of the Court's Article III precedents because they are dependent on membership in the House of Representatives or Senate, and that the informational rights are not "particularized" because they were conferred to serve Congress's broader interest. GSA's theories do not reflect the *holding* of any decision of this Court or a court of appeals. Indeed, they are impossible to square with *Powell v. McCormack*, 395 U.S. 486 (1969), which recognized a congressman's personal Article III interest in rights connected to his status as an officeholder—including not only what GSA labels his "private" interest in his salary, but also his interest in holding his seat, an interest inextricably linked to his official status as an elected Member of the House. See Pet. App. 56a–57a (Millett, J., concurring in denial of rehearing).

Coleman v. Miller, 307 U.S. 433 (1939), is to the same effect. The *Coleman* plaintiffs had standing because they alleged a personal injury cognizable under Article III, based on the alleged nullification of their votes. *See Raines*, 521 U.S. at 823. *Raines* cannot be read otherwise. After all, *Raines* begins its standing analysis by emphasizing that "[a] plaintiff must allege

personal injury fairly traceable to the defendant's allegedly unlawful conduct" to satisfy Article III's injury-in-fact requirement, *id.* at 818 (citation omitted), and ends by reaffirming the plaintiffs' standing in *Coleman*, *see id.* at 821–25, 829.

B. In any event, arguments that a court of appeals' application of principles derived from this Court's decisions to a question of first impression was "erroneous," Pet. 8, are insufficient in themselves to justify review by this Court, absent a conflict in authority, a departure from "the accepted and usual course of judicial proceedings," or a reason why an "important question" needs to be "settled by this Court." S. Ct. R. 10. None of these features is present here.

As GSA acknowledges, disputes about congressional demands for executive documents have seldom "ended up in court." Pet. 13. In fact, in the 95-year history of Section 2954, this case is only the third challenging an agency refusal to provide requested information. *Id.* at 14. Even the word "refusal" is not entirely accurate. GSA treated the Members' request as if each Member filed a FOIA request and provided thousands of records. Only one aspect of the requests remains in issue.

Three cases over ninety-five years, or even over the twenty-one years between the first such case and this one, amount to no more than a molehill. Why so few cases? Because with very rare exceptions, executive agencies comply with Seven Member Rule requests, and, if sensitive information is involved, the Members and agency staff work out accommodations to safeguard confidential information. *See* JA 87–88. Indeed, the events giving rise to this case initially proceeded in that way: GSA urged the requesters, minority

Members of the Committee, to formalize their requests under the Seven Member Rule. The Members did so, and GSA initially complied before President Trump took office, after which OLC ordered it to stop. GSA's own Inspector General acknowledged the agency's failure to comply with the Seven Member Rule requests departed from GSA's policy. *See* n.1, *supra*. GSA has never denied that compliance with Section 2954 requests is mandatory. GSA's breach here, dictated by OLC, was an aberration.

Further, although GSA purports to worry about requests by "fractious members" of Congress, Pet. 21, it does not identify any instances of abusive requests. Certainly, neither GSA's behavior nor its stated reason for denying the request here suggested it thought the request was abusive. And although there is no comprehensive compendium of Section 2954 requests, there are records of many such requests and responses. Neither party has identified a complaint by an executive agency that a request was out of bounds.[10]

The two previous cases litigated under Section 2954 are illustrative. In the first, the dispute was over

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[10] Section 2954 requests typically focus on agency matters, not international affairs, defense, or intelligence. House Rule X(1)(n) confers on the Oversight Committee jurisdiction over "[g]overnment management and accounting measures generally," as well as "[o]verall economy, efficiency, and management of government operations and activities." House Rules task the Committee with the responsibility to "review and study on a continuing basis the operation of Government activities at all levels with a view to determining their economy and efficiency." House Rule X(3)(i). More broadly, the Committee has the authority to "at any time conduct investigations" of "any matter." House Rule X(4)(c)(2).

the timing of the release of adjusted 2000 census data. The Members argued that the delay in releasing the data hindered Congress's ability to fairly allocate federal funds. The government did not contest standing in the district court, which granted summary judgment to the Members. *Waxman v. Evans*, 2002 WL 32377615 (C.D. Cal. 2002). After the Commerce Department lost a FOIA action seeking the same data, *Carter v. U.S. Dep't of Commerce*, 307 F.3d 1084 (9th Cir. 2002), the court of appeals dismissed the government's appeal in the Section 2954 case as moot. *Waxman v. Evans*, 52 F. App'x 84 (9th Cir. 2002).

The second case, filed in 2004, challenged the Department of Health and Human Services' refusal to disclose a forecast of the anticipated costs of pending drug pricing legislation. Again, the question was *when*, not *if*, the agency would release the report. The district court ruled that the Members lacked standing, W*axman v. Thompson*, 2006 WL 8432224, at *15–*16 (C.D. Cal. 2006), but the agency released the report soon after the Members appealed.

Aside from these two cases, in which the information sought was ultimately released, GSA cites no other cases in which a request under the statute has even been denied, let alone litigated. This history underscores the remarkable absence of interbranch friction that Section 2954 requests have produced. It also underscores why courts must remain open as a backstop to ensure that Section 2954's mandatory requirements remain operative. Because the statute confers rights on the *minority* as well as the Committee, the absence of a potential judicial remedy if agencies refuse cooperation will significantly impair the statute's functioning because the political tools available to congressional *majorities* in interbranch disputes are not

in play here. That the statute confers an enforceable legal entitlement ultimately ensures its efficacy.

There is every reason, moreover, to think that Congress intended the statute to be enforceable. After all, "courts will ordinarily presume that Congress intends the executive to obey its statutory commands." *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (cleaned up). In 1928, when Congress enacted Section 2954, the stain of Teapot Dome and one-party hegemony lingered. The merger of law and equity was still a decade away. The word "standing" was barely part of our legal lexicon, and the courts, including this Court, forced government officials to comply with statutory requirements by entertaining mandamus cases and actions for review of ultra vires agency action. *See*, *e.g.*, *Miguel v. McCarl*, 291 U.S. 442, 451–52 (1934) (mandamus); *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902) (review of ultra vires agency action); *see generally* Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 Iowa L. Rev. 777, 818–30 (2004). There is no reason to doubt that the Congress that enacted Section 2954, and the President who signed it into law, understood that Members of the House Oversight Committee could seek relief in court if an executive agency refused to comply with Section 2954. And there is no reason for this Court to cut off such review in the exceedingly rare instances where it may be sought.

II. Other unresolved issues may obviate any possible need for this Court to consider standing in this case.

Review is unwarranted not only because the issue here is unusual and rarely recurring, and the remaining stakes in the case involve only a handful of

documents, but also because any broader significance of the standing question in the case depends on the resolution of as-yet undecided issues of statutory construction.

First, as Judge Millett pointed out in her opinion concurring in the denial of en banc review, it is premature to consider "whether a statute can constitutionally grant members of Congress a personal right, enforceable in federal court, to information from the Executive Branch" until the courts have "decided whether Section 2954 creates a cause of action," Pet. App. 59a—an issue that remains to be considered by the district court. The constitutional standing issue GSA proffers is inconsequential if there is no right of action to enforce the statute to begin with.

Second, the importance of the standing issue also depends on unresolved issues concerning "Section 2954's scope," *id.*, and particularly the availability and extent of defenses agencies may assert to disclosure. Those issues will determine whether the Section 2954 standing issue matters, because GSA acknowledges that Members, like anyone else, may submit FOIA requests for the same agency records at issue here, and that they have Article III standing to litigate the denial of any such requests. Thus, only if Section 2954 requires production of records unavailable under FOIA does the potential for judicial enforcement of the Seven Member Rule create practical consequences distinct from those of FOIA's judicial remedies, whose constitutionality this Court has recognized and GSA does not question.

Again, *Waxman v. Evans* illustrates the point. There, the court of appeals declined to address the Section 2954 standing issue and dismissed the case as

moot because the court had chosen to decide first, in a parallel case argued the same day, that all the records in question were subject to disclosure under FOIA. 52 F. App'x 84; *see Carter*, 307 F.3d at 1086.

Here, as explained above, only one category of requested information remains at issue: the legal opinion(s) providing the explanation for GSA's about-face on whether President Trump could retain an interest in the Old Post Office lease. The other records requested by the Members, including financial records regarding the Trump Hotel, and communications from President Trump and his companies to GSA concerning the lease issue, were eventually provided by GSA.[11] GSA has not, however, produced the legal opinion (if one exists) and related drafts prepared by GSA and DOJ (and perhaps the White House Counsel's office), based on the claim that the executive and attorney-client privileges shield the records from disclosure under both the Seven Member Rule and FOIA.

Whether Section 2954 requires GSA to provide the Members with legal opinions and related drafts it claims are shielded by attorney-client and executive privileges is an unsettled question. Under FOIA's exemption 5, by contrast, an agency may lawfully refuse to force disclosure of records subject to legal privileges otherwise available in litigation. *See* 5 U.S.C. § 552(b)(5); *U.S. Fish & Wildlife Serv. v. Sierra Club,*

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[11] As to the financial records, then-Oversight Chair Carolyn Maloney sent GSA a letter in 2021, reminding GSA that the request for monthly financial reports from the Trump Hotel to GSA, initially filed under the Seven Member Rule, was still outstanding. GSA provided the information in 2021, without acknowledging that the production satisfied one aspect of the Seven Member Rule request.

Inc., 141 S. Ct. 777 (2021). Those privileges include executive privilege and attorney-client privilege, and if this were a FOIA case, GSA would doubtless have the better of the argument. *E.g.*, *Campaign Legal Ctr. v. U.S. Dep't of Justice*, 34 F.4th 14, 23–28 (D.C. Cir. 2022); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (collecting cases).

It is not clear that the result would be the same under Section 2954, which has no express exemptions. Members often accept access to sensitive agency records with an understanding that the records must remain confidential; indeed, GSA and the Members did just that before OLC ordered it to stop responding to Seven Member Rule requests. JA 87–88. Nonetheless, GSA would presumably argue that Section 2954, if otherwise judicially enforceable, should be read to preclude compelled disclosure of such records. If that argument were to prevail, the significance of whether Members have standing under Section 2954 or must instead resort to the unquestioned remedies available under FOIA would be minimal at best.

Finally, in all likelihood, none of the remaining issues in this case will need to be definitively resolved in court. Instead, absent this Court's intervention, disputes over any remaining outstanding documents will likely be resolved in the way such issues are normally resolved under Section 2954: through the process of negotiation, compromise, and accommodation. That process may result in further production, possibly under safeguards to ensure confidentiality of any sensitive matters. Or it may end in a determination by the requesters that some materials within the scope of the request are no longer salient and need not be produced. Any such resolution, whatever its contours,

would obviate any need to address the constitutional issues implicated in GSA's petition.

For all these reasons, this is a case where the Court's "usual adjudicatory rules" suggest that it "*should* forbear resolving [the] issue" that GSA poses, *Camreta v. Greene*, 563 U.S. 692, 705 (2011), and no exceptional circumstances compel this Court to "avoid avoidance," *id.* at 706. This Court should follow its own counsel to "think hard, and then think hard again, before turning [a] small case[] into [a] large one[]." *Id.* at 707.

III. This Court should not call into question Congress's authority to provide its Members an enforceable right to information under Section 2954.

In framing its question entirely in terms of standing, GSA ignores an antecedent question: whether the Necessary and Proper Clause, Art. I, § 8, cl. 17, empowers Congress to confer a personal right on a set number of Members serving on its oversight committees to seek information from executive agencies and, if need be, seek judicial review if an agency refuses to comply. Implicit in GSA's position, however, is the premise that Congress lacks the power to enact a statute conferring such a right on Members as distinct from the general public.

Accepting that proposition would have grave consequences. Congressional oversight is a core constitutional function, a cornerstone of the checks and balances on which our government is built. Congress cannot carry out its constitutional duties without the power to investigate whether the Executive Branch is faithfully executing the law and properly spending the money Congress appropriates. Congress's authority

necessarily "encompasses inquiries into the administration of existing laws." *Mazars*, 140 S. Ct. at 1031. GSA, however, asks this Court to undermine those checks and balances by restricting Congress's power to confer informational rights on Members—a result that would gut a unique statute that empowers Members of the Oversight Committees to conduct oversight, even when one political party dominates both Congress and the Executive Branch.

Although GSA implicitly questions whether Congress is empowered to confer an enforceable right to information on Members of the oversight committees, Congress plainly has the authority to enact such a statute. *McGrain* drives home that Congress's "power of inquiry" must have an "enforcing process," because "some means of compulsion are essential to obtain what is needed." 273 U.S. at 175. This Court made the same point in *Mazars*. 140 S. Ct. at 2031–32.

One of *McGrain*'s many lessons is that the Necessary and Proper Clause gives Congress wide latitude to bestow information-gathering authority as it sees fit. 273 U.S. at 158, 160–63, 175. Oversight is not intrinsically an activity that Congress, or even each House, must undertake as a whole. Indeed, doing so would be intolerably unwieldy. That is why Congress delegates its information-gathering functions to committees, and often to committee chairs—even though such delegations have no statutory pedigree. *McGrain*, after all, did not address a *statute* enabling Congress to engage in oversight of the then-Attorney General. Instead, *McGrain* enforced a subpoena issued by a five-member, *ad hoc* Senate Committee organized to investigate allegations that the then-Attorney General was implicated in whitewashing the Teapot Dome Scandal, as well as other improprieties. *Id.*

at 151–53. It is little wonder that Congress enacted Section 2954 in the shadow of Teapot Dome and *McGrain*, ensuring that Members would have more secure statutory tools to obtain information concerning expenditures and safekeeping of government property, especially when one party controls all the levers of federal power. GSA's position disregards Congress's constitutional authority to enact such legislation.

GSA's denial of congressional authority to confer such statutory rights is particularly incongruous in light of its own recognition, reflected in its production of almost all the information requested here, that each Member who had joined in the Section 2954 request could also assert a right of access to the requested information under FOIA and would have standing to litigate if records were withheld. If FOIA can constitutionally confer such a personal right on individuals, *including* each Member of Congress, a statute conferring a personal right on Oversight Committee Members who join with colleagues to invoke Section 2954 to obtain information from executive agencies is surely constitutional as well. *See* Pet. App. 56a, 58a (Millett, J., concurring in denial of rehearing). After all, at the root of each statute is Congress's judgment that certain executive agency information should be subject to disclosure. In Section 2954, Congress designated Oversight Committee Members who jointly file a request as the possessors of the right to information, and in FOIA it designated "any person." As this Court has emphasized, "of course, there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch." *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 445 (1977).

If this Court were to consider GSA's standing arguments, it would be required to grapple with the question of congressional power that GSA ignores. After all, if legislation enacted under the Necessary and Proper Clause may confer a judicially enforceable, personal right on seven or more Members of the House Oversight Committee who join together to request information from an Executive agency under Section 2954, the standing question—whether the deprivation of that right is an Article III injury—answers itself under this Court's precedents. *E.g.*, *Spokeo*, 578 U.S. 330; *Pub. Citizen*, 491 U.S. 440.

The question of congressional authority implicated by GSA's position is fundamental, but not one that it is important for this Court to settle, and especially not at this time. The argument for limiting Congress's power has never been squarely presented and developed by GSA in its briefing in the lower courts or in its petition for certiorari. And the lower courts have not yet addressed it, or considered the questions of statutory construction (such as the existence of a cause of action) that bear on whether there is a need to decide the constitutional issue. Thus, as Judge Millett pointed out below in her rehearing concurrence, "questions about Section 2954's … constitutionality are for another day." Pet. App. 59a.

This Court has long recognized that it is important *not* to address constitutional issues "in advance of the necessity of deciding them." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988); *see also Ashwander v. TVA*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring). Granting GSA's request that the Court consider standing in this case would effectively force the Court to address the constitutional issue of Congress's authority to confer

enforceable informational rights on its Members, far in advance of any arguable necessity of doing so.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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