ORAL ARGUMENT NOT YET SCHEDULED

No. 26-5072

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

JOE NEGUSE, in his capacity as a Member of the U.S. House of Representatives, *et al.*,

Plaintiffs-Appellees,

v.

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia

REPLY BRIEF FOR APPELLANTS

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GLOSSARY

APA	Administrative Procedure Act
DHS	Department of Homeland Security
ICE	Immigration and Customs Enforcement
JA	Joint Appendix
OBBBA	One Big Beautiful Bill Act

INTRODUCTION

The Article III principles that control this appeal are straightforward: individual legislators lack standing to assert injuries "to official authority or power" that arise "solely because they are Members of Congress." *Raines v. Byrd*, 521 U.S. 811, 821, 826 (1997). Members can sue if they are denied something to which they are personally entitled, like their paychecks or their seats. *See Powell v. McCormack*, 395 U.S. 486, 496 (1969). They may also be able to sue if they are uniquely disabled from exercising official powers—if, for example, a particular Member were barred from the House chamber. *Raines*, 521 U.S. at 824 n.7. But if a legislator's grievance concerns an Executive Branch policy that affects the official authorities of every member of Congress, the injury is to Congress itself—and thus the legislator's only remedy lies in the political process.

The Members' response brief fails to grapple with these principles. Instead, the Members suggest that their injuries are personal because they wish to individually exercise their purported rights to visit detention facilities. But the fact that an official right can be exercised by an individual Member does not make that right personal to the

Member: if it did, *Raines* would have come out the other way because the right it involved—to vote—is also exercised by Members individually. The facts that actually mattered in *Raines* are the same facts that matter here: the challenged policy concerns official authority and applies to every member of Congress.

Even if the district court could have proceeded past standing, it still erred. While the Members portray this case as concerning oversight rights, the reality is different: the Members' merits theory is that the Secretary of Homeland Security adopted the advance-notice policy using funds from the wrong account. Such a claim, however, is subject to the comprehensive scheme set out by the Anti-Deficiency Act. And in any event, the challenged policy specifically directed that it be both promulgated and implemented with funds that were not restricted by Section 527. For those reasons—and because the remaining factors weighed heavily against preliminary relief—this Court should vacate the district court's order and remand with instructions to dismiss.

ARGUMENT

I. The Members Cannot Succeed On The Merits For Multiple Independent Reasons.

A. The Members Lack Article III Standing To Challenge A Policy Concerning The Official Powers Of Every Member Of Congress.

In urging that the Members lack Article III standing, the government is not asking this Court to break new ground. It is instead asking the Court to apply the principle set out in *Raines* and repeatedly applied by this Court: Members of Congress cannot assert injuries "to official authority or power" that arise "solely because they are Members of Congress." *Raines v. Byrd*, 521 U.S. 811, 821, 826 (1997); *see also Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999); *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000); *Blumenthal v. Trump*, 949 F.3d 14 (D.C. Cir. 2020) (per curiam). As the Members acknowledge, "individual legislators cannot assert interests that belong to Congress as a whole." Members.Br.31-32. The Members' attempts to overcome this principle are unavailing.

1. The Members' Injury Is Not Personal Because It Concerns The Official Powers Of Every Member Of Congress.

Under *Raines*, members of Congress may demonstrate standing by "claim[ing] that they have been deprived of something to which they *personally* are entitled"—that is, by asserting harm in a "private capacity." 521 U.S. at 821. But the Members are not asserting a private entitlement; they are asserting a purported right that is only available to members of Congress who exercise it "for the purpose of conducting oversight." Further Consolidated Appropriations Act, 2024, div. C, tit. V, Pub. L. No. 118-47, § 527(a), 138 Stat. 460, 619. But despite that basic fact—and despite Congressman Neguse's acknowledgment that "the plaintiffs sought relief to restore oversight authority to all Members of Congress," Congressman Joe Neguse, *Court Again Orders Trump-Vance Administration to Restore Congressional Oversight of ICE Detention Facilities* (Mar. 2, 2026), https://perma.cc/Z89R-62TP—the Members maintain that they are seeking "judicial redress of harms to their individual interests." Members.Br.47. That contention is incorrect.

a. The Members suggest that they are asserting personal rights because the rights purportedly created by Section 527 "extend[] to individual legislators directly." Members.Br.30-31. That theory, however, is incompatible with *Raines*. *See* Gov.Br.45-46. As the government has explained, the right to vote on legislation—the right at issue in *Raines*—is also exercised by individual members. *See* U.S. Const. art. I, § 3, cl. 1 ("[E]ach Senator shall have one Vote."); 119th Cong., *Rules of the House of Representatives*, Rule III.1-2 (2025) ("Every Member … shall vote on each question put" and a "Member may not authorize any other person to cast the vote of such Member."). But even though the *Raines* plaintiffs told the Supreme Court that "[t]he vote is an individual right of the legislator," Brief for Appellees, *Raines v. Byrd*, 1997 WL 251423, at *28 (U.S. May 9, 1997), the Supreme Court held that a member of Congress did not have a cognizable interest in avoiding its dilution—even though private parties might have a cognizable injury on an analogous theory, *see infra* p.16.[1] The mere fact

[1] *Campbell*, *Chenoweth*, and *Blumenthal* each likewise involved the right to vote. *See Chenoweth*, 181 F.3d at 113 (noting that the plaintiffs relied on earlier precedent providing that "the infringement of a legislator's 'right[] to participate and vote on legislation in a manner

Continued on next page.

that an official power is exercised individually does not mean that it is a personal right.

The Members further suggest that their injuries are personal because (1) they "seek physical access to different immigration detention facilities," (2) their oversight activities are "determined by particularized factors such as the member's committee membership and the location and constituent makeup of the member's district," and (3) some members "have not attempted to exercise their oversight prerogative under section 527." Members.Br.38-39. This argument is also foreclosed by *Raines*, where the plaintiff members likewise objected to the Line Item Veto Act on varying bases: Senator Byrd was concerned that the Act would "especially burden the small States," Joint Appendix at 24, 35, *Raines v. Byrd*, No. 96-1671 (U.S. Apr. 18, 1997) (Declaration of Senator Robert C. Byrd); Senator Moynihan was concerned that Act would threaten Medicare funding for teaching

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defined by the Constitution' is an injury sufficiently direct and concrete to support the legislator's standing to sue" (alteration in original) (quoting *Moore v. U.S. House of Representatives*, 733 F.2d 946, 951 (D.C. Cir. 1984))); *Campbell*, 203 F.3d at 22 (describing members' argument that their votes had been "nullified" (quotation marks omitted)); *Blumenthal*, 949 F.3d at 17 (same).

hospitals, *see id.* at 51 (Declaration of Senator Daniel Patrick Moynihan); and so on. But despite the varied circumstances that led each plaintiff to oppose the Act—and even though enough legislators supported the Act for it to have become law—the plaintiffs' asserted injury was still suffered exclusively in their capacity as members of Congress.

Were there any doubt about this point, *Blumenthal* resolved it by holding that any injury arising from the President's receipt of purported emoluments absent an authorization vote was "shared by the 320 members of the Congress who did not join the lawsuit." 949 F.3d at 19. Indeed, *Blumenthal* reached that holding even though the 320 non-plaintiff members never claimed to be aggrieved by the President's business dealings. The fundamental point is that just as any injury arising from the inability to approve emoluments falls on Congress as a whole even though approval would come in the form of votes cast by individuals, any injury arising from the inability of Congress to conduct oversight likewise falls on Congress as a whole even though oversight would come in the form of visits conducted by individuals. That is why

there is a mismatch between the plaintiff and the purportedly injured institution, *contra* Members.Br.39.

To overcome this precedent, the Members would need to demonstrate that while they do not have a personal interest in their vote (as *Raines* holds), they do have a personal interest in conducting oversight. But they plainly do not. Congress's power to conduct oversight is implied from its power to enact legislation. *See McGrain v. Daugherty*, 273 U.S. 135, 175 (1927) (recognizing implied power of oversight because "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change"). Given that the right to vote on legislation is an institutional interest, per *Raines*, any derivative right to obtain information in service of that right is necessarily also institutional. And an institutional injury is not one that an individual member of Congress can assert in litigation; individual members lack standing to litigate over asserted injuries to the official powers and prerogatives of Members of Congress as such.

b. The government further explained that, as in *Raines*, "[i]f one of the Members were to retire tomorrow, he would no longer have a

claim." Gov.Br.25 (alteration in original) (quoting *Raines*, 521 U.S. at 821). The Members suggest that the analogy is inapt because "if one of the plaintiffs were to retire tomorrow, her successor would not possess her claim." Members.Br.42. But the Members do not dispute the central point: irrespective of whether the Members' successors would be substituted or the claim would simply expire, under any circumstances a Member who left Congress would lose his claim, just as in *Raines*. And the fact that such a Member would lose his claim is proof that the claim is not personal; a truly private claim, like a demand for back pay, would survive the member's retirement.[2]

c. Although federal legislators nearly always lack standing to sue over rights that they hold by virtue of their office, the Members observe that there is one potential exception: a legislator who is uniquely disabled from exercising his official powers may have standing

[2] The Members suggest that if a plaintiff Member were to retire, her successor would not automatically inherit her claim *in this lawsuit*. Even that is far from clear: each Member brought suit in his capacity as a Member of Congress, and official-capacity parties are automatically replaced in litigation by their successors. *See* Fed. R. Civ. P. 25(d). But even if for some reason Rule 25(d) does not apply to legislative officials the same way it does to executive officials, that has nothing to do with the key Article III point, which is that any Member who left Congress would no longer have any stake in this dispute.

to challenge that unique disability—at least in a suit against legislative branch defendants. *See* Members.Br.33. That much is clear from *Powell v. McCormack*, 395 U.S. 486 (1969), in which Congressman Powell challenged his exclusion from the House by contending that he had been "singled out for specially unfavorable treatment as opposed to other Members," *Raines*, 521 U.S. at 821; *see also id.* at 824 n.7 (reserving hypothetical in which "first-term Members were not allowed to vote on appropriations bills" (quotation marks omitted)).

Whatever the limits of a singling-out theory, it does not apply here. The Members half-heartedly suggest that they have been singled out because they have sought to exercise purported rights under Section 527 while most of their colleagues have not. Members.Br.43. But the fact that only they have chosen to engage in conduct governed by the advance-notice policy does not mean that the policy uniquely singles them out. Once again, it is undisputed that the policy applies to every member of Congress.

Kerr v. Hickenlooper, 824 F.3d 1207 (10th Cir. 2016), *cited in* Members.Br.41, confirms the point. *Kerr* held that Colorado state legislators lacked standing to challenge the Taxpayer's Bill of Rights, a

state constitutional provision that "limits the revenue-raising power of state and local governments." 824 F.3d at 1211. Although the legislators contended that the provision "deprives them of their ability to perform the legislative core functions of taxation and appropriation," *id.* at 1215 (quotation marks omitted), the court rejected standing because the asserted injury was "based on the loss of legislative power that necessarily impacts all members of the General Assembly equally." *Id.* That is the principle that controls this case.

In the separate passage upon which the Members rely, the Tenth Circuit acknowledged that "if a particular subset of legislators was barred from exercising their right to vote on bills, such an injury would likely be sufficient to establish a personal injury." *Kerr*, 824 F.3d at 1216 (citing *Raines*, 521 U.S. at 824 n.7). Again, the government is not asking the Court to hold otherwise: if the Clerk of the House barred a particular legislator from voting, *Raines* would not preclude a lawsuit against the Clerk because the plaintiff would not be alleging an injury to the entirety of the institution. Nor, of course, would such a lawsuit present the separation of powers problems inherent in interbranch litigation. *See* Gov.Br.48.

The Members nevertheless contend that "*Raines* in no way suggested that only a targeted legislator would have standing to vindicate a personal injury." Members.Br.43 (emphasis omitted). If the injury were truly personal, the Members are correct that they would not need to show targeting: if the Treasury Department stopped issuing checks to every member of Congress, every legislator would have an individualized interest in pursuing that private entitlement. But a legislator who seeks to vindicate an official power—a right that attaches to his official functions, rather than his bank account—cannot proceed individually where, as here, he has not even been singled out for uniquely poor treatment.

In contending otherwise, the Members analogize this case to *Committee on the Judiciary of the U.S. House of Representatives v. McGahn*, 968 F.3d 755 (D.C. Cir. 2020) (en banc). But this case is obviously not *McGahn*, which involved a committee suing to vindicate an act taken by that committee with the authorization of the full House. *See* 968 F.3d at 776. *McGahn* expressly distinguished *Raines* as "narrowly concerned with the standing of individual Members of Congress" and held that *Raines* would not "bar a lawsuit brought by an

authorized legislative institution asserting an institutional injury." *Id.* at 775. The "standing of individual Members of Congress," however, is precisely what this case involves. Thus, even under *McGahn*—a decision with which the Executive Branch respectfully maintains its disagreement—the Members lack standing.

d. The Members continue to place substantial weight on this Court's vacated decision in *Maloney v. Murphy*, 984 F.3d 50 (D.C. Cir. 2020). *See* Members.Br.35-36. At the outset, the statute at issue in *Maloney* bears no relationship to Section 527 because it is not a funding restriction; it provides that the Executive Branch "shall submit" certain information upon the request of seven House members. 5 U.S.C. § 2954. *See infra* pp.18-21. But more fundamentally, the Members ignore the fact that after this Court denied rehearing in *Maloney*, the Supreme Court granted the government's certiorari petition, at which point the Members chose to give up instead of face likely Supreme Court reversal—leading the Supreme Court to vacate this Court's decision. That sequence of events extinguishes any persuasive value *Maloney* might otherwise have.

The Members suggest that the *Maloney* plaintiffs only abandoned their suit because "the number of plaintiff members remaining in office dropped below seven." Members.Br.36 n.3. In actuality, the number of Members dropped below seven shortly after the 118th Congress convened in January 2023; when the plaintiffs filed their brief in opposition to the government's certiorari petition, they acknowledged that some of the plaintiffs had left Congress but did not suggest that it defeated their claim. Respondents' Brief in Opposition ii, No. 22-425, *Carnahan v. Maloney* (U.S. Feb. 6, 2023); *see also* Reply Brief for the Petitioner 9, *Maloney*, No. 22-425 (U.S. Feb. 22, 2023). More than three months later, the Supreme Court granted certiorari. *Carnahan v. Maloney*, 143 S. Ct. 2456 (May 15, 2023). Barely three weeks after that—by now over five months into the 118th Congress—the plaintiffs dismissed their suit. *See* Notice of Voluntary Dismissal, *Raskin v. Carnahan*, No. 17-2308 (D.D.C. June 6, 2023). The Members were forthright about the fact that they had decided "to abandon their claim." Response to Suggestion of Mootness 1, *Maloney*, No. 22-425 (U.S. June 20, 2023). Given that history, this Court should be exceedingly wary of repeating the errors of *Maloney*.

2. There Is No History Or Tradition Of Interbranch Suits By Individual Members Over Access To Information.

Article III constrains the types of controversies justiciable in federal courts to those "that were the traditional concern of the courts at Westminster," *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (quotation marks omitted), but there is no history or tradition of litigation between individual members of Congress and the Executive Branch over access to information. *See* Gov.Br.37-38. Instead, "disputes over congressional demands" for information from the Executive Branch have traditionally "been hashed out in the hurly-burly, the give-and-take of the political process between the legislative and the executive." *Trump v. Mazars USA, LLP*, 591 U.S. 848, 859 (2020) (quotation marks omitted). The Members do not suggest otherwise.

The Members' principal response is instead a point the government has never disputed: that injuries like "restrictions on physical access and denial of information" are "of the type that have long been entertained and redressed by federal courts." Members.Br.24. But while "[o]n a superficial level, an injury to such a

statutory right to information might appear to be sufficiently concrete and particularized to give rise to standing," the argument does not work when the information relates "exclusively to [the plaintiff's] duties in his official capacity." *Walker v. Cheney*, 230 F. Supp. 2d 51, 66 (D.D.C. 2002) (rejecting standing for Comptroller General, a legislative branch official, to sue the Executive Branch).

Raines in fact makes clear that a legislative plaintiff does not suffer a cognizable injury whenever a private party asserting a comparable injury would have standing. *See* Gov.Br.43-44 (explaining that *Raines* rejected the plaintiff members' claims that their legislative power had been diluted, even though private parties can bring claims for vote dilution). The Members offer no response to this discussion. It is not enough for there to be a history of private individuals suing over access to information; there must be a history of legislators suing over access to Executive Branch information to which they assert an official entitlement. As *Mazars* confirms, none exists. 591 U.S. at 859.

The Members dismiss *Mazars* on the grounds that it "did not speak to standing," Members.Br.45, but it is black-letter law that a cognizable suit must be of the sort "traditionally thought to be capable

of resolution through the judicial process," *Raines*, 521 U.S. at 819 (quotation marks omitted); *see also, e.g.*, *Texas v. United States*, 599 U.S. 670, 676 (2023) (similar). The deeply ahistorical nature of the Members' suit thus speaks directly to the standing defect.[3]

3. Dismissing This Lawsuit Would Not Deny The Members A Remedy.

Contrary to the Members' suggestion, *see* Members.Br.47, dismissing this lawsuit would not deny them a remedy. If sufficient political will existed, Congress could attach Section 527 to the funds appropriated by the One Big Beautiful Bill Act (OBBBA) and the Secure America Act. Or Congress could enact a substantive provision requiring that members be admitted to detention facilities on demand—legislation that Congressman Neguse is pursuing even as he tells this Court that litigation is his only option. *See* Gov.Br.40 n.4.

[3] The Members' observation that *Texas* did not involve legislative standing, Members.Br.45-46, misses the point. *Texas* confirms that an injury that might be cognizable in the hands of one sort of plaintiff—even an injury like "[m]onetary costs"—may not be cognizable if it arises in a dispute that "history and tradition" showed was not "thought to be capable of resolution through the judicial process." 599 U.S. at 676 (quotation marks omitted).

Before these tools may be employed, of course, the Members would have to persuade a majority of their colleagues to act; they might also need to overcome a presidential veto. But bicameralism and presentment are a feature, not a bug, of our system of separated powers; those "choices were consciously made by men" who "ranked other values higher than efficiency." *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983). As a result, if members of Congress "fail[] to prevail in their own Houses," they "[can]not repair to the Judiciary to complain." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 802 (2015). Legislators "must care enough to act against the" Executive Branch themselves, "not merely enough to instruct [their] lawyers to ask [the courts] to do so." *United States v. Windsor,* 570 U.S. 744, 791 (2013) (Scalia, J., dissenting).

4. The Members' Claim Is Especially Weak Because It Rests Upon A Funding Restriction.

Even if the Court had doubts about these arguments, this is a particularly easy case because Section 527 does not grant the Members any substantive rights. It is instead a funding restriction providing that certain funds may not be used for certain purposes. But as we

have explained, a claim that the Executive Branch has unlawfully expended funds is a pure generalized grievance. Gov.Br.36.

The Members suggest that a denial of funding for a particular activity is legally equivalent to a substantive bar on engaging in that activity. *See* Members.Br.28-29 (citing *United States v. McIntosh*, 833 F.3d 1163, 1172-73 (9th Cir. 2016)). But subsequent Supreme Court precedent refutes that theory: *Maine Community Health Options v. United States* holds that even when Congress provides that "no[] … funds" could be used for a particular purpose, the Executive Branch was still obligated to perform the function for which no appropriation was available. 590 U.S. 296, 315-17 (2020) (alteration and quotation marks omitted). In other words, a "mere failure to appropriate does not repeal or discharge" the underlying obligation. *Id.* at 316. The same is true here, where the Department of Homeland Security's (DHS's) authority to control access to detention facilities is encompassed within its general statutory authority to run those facilities, *see, e.g.*, 6 U.S.C. § 112(b); 8 U.S.C. § 1231(g), and the fact that DHS allegedly acted without appropriations in carrying out its authority would at most

mean that the expenditure of money was purportedly illegal, not that the exercise of authority was illegal.

The Members' observation that Congress "routinely uses appropriation limitations to codify its chosen policies in federal law," Members.Br.28, is thus beside the point. Congress may routinely enact such spending limitations, and such limitations may have the incidental effect of achieving its substantive policy objectives. But that does not speak to whether, when the Executive Branch allegedly fails to comply with an appropriations limitation, members of Congress have suffered a personal injury supporting standing to sue.

Finally, the government explained that even if the Members had standing to enforce Section 527, the district court's order ultimately rests upon a conclusion that the government is violating the OBBBA—a statute that does not even plausibly vest the Members with any rights. Gov.Br.41-42; *see* JA525-26 (acknowledging the government's intention to "adjust[] accounts" but holding that "the Purpose Statute, 31 U.S.C. § 1301(a), does not allow Defendants to use OBBBA funds for at least some of the relevant expenditures"). But even if the court were right that "DHS could not legally use OBBBA funds," it would not follow that

it "has in fact used Section 527-restricted annually appropriated funds." JA513. It would instead mean that the government improperly used OBBBA funds. *See* JA168 (requiring that policy be "implemented and enforced exclusively with money appropriated by the OBBBA"). The government strongly disagrees with the suggestion that it has misused OBBBA funds, but that is not a question as to which the Members even claim to have standing.

B. The Members' Administrative Procedure Act Claims Are Precluded.

Even if the Members had standing, their Administrative Procedure Act (APA) claims are precluded by the Anti-Deficiency Act, which provides a comprehensive—and thus exclusive—set of remedies for allegedly unlawful Executive Branch expenditures. *See* Gov.Br.53-59.

The Members first point to the general presumption in favor of review of agency action. *See* Members.Br.49. That presumption, however, yields where "a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons." *Global Health Council v. Trump*, 153 F.4th 1, 18 (D.C. Cir. 2025) (quoting *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349

(1984)). And just as the Impoundment Control Act provides a "detailed mechanism" for redressing assertedly unlawful Executive Branch impoundment, *id.* (quotation marks omitted), the Anti-Deficiency Act provides a detailed mechanism for redressing assertedly unlawful Executive Branch expenditures.

The Members suggest that *Global Health Council* is distinguishable because the plaintiffs there were expressly seeking to enforce the Impoundment Control Act, whereas the complaint here did not mention the Anti-Deficiency Act. Members.Br.52; *see also* JA145 (district court's similar reasoning). But by the time *Global Health Council* reached the Supreme Court, the plaintiffs had abandoned their Impoundment Control Act claim; they contended that their "APA claims rest on violations of the 2024 Appropriations Act and prior appropriations acts—not the [Impoundment Control Act]." Response in Opposition to Application for Partial Stay 16, *Global Health Council*, No. 25A269 (U.S. Sept. 12, 2025). The government responded that "labels" did not matter because "the APA-preclusion inquiry is functional, centering on whether allowing suit 'would severely disrupt a complex and delicate administrative scheme.'" Reply in Support of

Application for Partial Stay 9, *Trump v. Global Health Council*, No. 25A269 (U.S. Sept. 15, 2025) (alteration omitted) (quoting *Block*, 467 U.S. at 348). With this dispute squarely before it, the Supreme Court found that the government had "made a sufficient showing that the Impoundment Control Act precludes respondents' suit, brought pursuant to the Administrative Procedure Act, to enforce the appropriations at issue here." *Department of State v. AIDS Vaccine Advoc. Coal.*, 146 S. Ct. 19, 19 (2025) (per curiam). Labels did not matter there, and they do not matter here.

The Members also suggest that *Global Health Council* is distinguishable because the Impoundment Control Act "created a complex scheme of notification of the Congress, congressional action on a proposed rescission or deferral and suit by a specified legislative branch official if the executive branch violates its statutory expenditure obligations." Members.Br.52-53 (quoting *Global Health Council*, 153 F.4th at 18). But the Anti-Deficiency Act likewise carefully regulates funding deficiencies and requires notification to Congress and the Comptroller General. 31 U.S.C. § 1351. And while the Impoundment Control Act authorizes lawsuits by the Comptroller General, that

provision is unconstitutional, *see Walker*, 230 F. Supp. 2d 51, and thus has never been the law, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803). It is therefore not a basis for distinguishing the Anti-Deficiency Act from the Impoundment Control Act.

The Members also point to an Office of Legal Counsel opinion indicating that the Anti-Deficiency Act is "'one of several means by which Congress has sought to enforce'" its appropriations instructions. Members.Br.50 (quoting 25 Op. O.L.C. 33, 33 (2001) (emphasis omitted)). But that opinion does not suggest that APA review is one of those mechanisms—as opposed to other tools like the Impoundment Control Act, oversight hearings, mandatory reports to Congress, etc.[4] Nor has this Court rejected the government's preclusion argument; *Kimberlin v. U.S. Department of Justice*, 318 F.3d 228 (D.C. Cir. 2003) (per curiam), did not consider a preclusion argument under *Block*, and

[4] The Department of Justice has been consistent about this issue across at least the last two administrations. As the Solicitor General explained in 2023, the Anti-Deficiency Act governs "expenditure of public money in excess of, or in the absence of, an appropriation," and an APA plaintiff cannot "have prior agency actions declared void merely by persuading a court that they were carried out with unappropriated funds." Brief for the Petitioners 43, *CFPB v. Community Fin. Servs. Ass'n*, No. 22-448 (U.S. May 8, 2023).

the plaintiffs did not allege that the Executive Branch was unlawfully expending funds. Similarly, neither *Sherley v. Sebelius*, 689 F.3d 776, 780 (D.C. Cir. 2012), *cited in* Professors' Amicus Br. 7, nor *National Treasury Employees Union v. Devine*, 733 F.2d 114, 121 (D.C. Cir. 1984), *cited in* Professors' Amicus Br. 7, considered an argument premised on *Block*—indeed, *Devine* was decided months before *Block*.

The Members further suggest that the government's position is "startling" because it would "foreclose enforcement of any appropriations restriction by anyone outside of the executive branch." Members.Br.51. But Congress routinely forecloses enforcement of federal laws by anyone outside of the Executive Branch—including all criminal laws and various regulatory laws that authorize solely Executive enforcement. That is true even when the laws regulate the Executive Branch itself. *See, e.g.*, 18 U.S.C. §§ 205, 208, 209. Faithfully executing the law is an Executive Branch responsibility, and a "system of separate and coordinate powers necessarily involves an acceptance of exclusive power that can theoretically be abused." *Morrison v. Olson*, 487 U.S. 654, 710 (1988) (Scalia, J., dissenting). The Executive Branch's "exclusive power" to enforce the law is no more "unthinkable"

than Congress's "exclusive power of legislation" or the Supreme Court's "exclusive power to pronounce the final decision on justiciable cases and controversies." *Id.* But if the legislative branch is nevertheless unhappy with the enforcement mechanisms it has created to protect its appropriations power, it can attempt to enact new ones.

Finally, if Section 527 were understood as creating oversight rights, the Members' suit would be precluded by the statutes governing how disputes over congressional access to information may reach an Article III court. *See* Gov.Br.57. The Members respond that those statutes are irrelevant because they "concern enforcement of requests for documents and testimony by committees," Members.Br.53, which effectively means that the Members think individual legislators have more enforcement options than congressional committees do. That exceptionally counterintuitive result is not a plausible construction of the preclusive effect of the statutes that Congress has enacted to enforce legislative prerogatives concerning information.

C. The Advance Notice Policy Is Lawful Because It Complies With All Applicable Funding Restrictions.

Even if the Members could surmount these threshold hurdles, they still would not be entitled to relief because the challenged policy does not rely on funds subject to Section 527 and would not violate Section 527 even if it did.

1. The advance-notice policy does not rely on funds subject to Section 527. As to *implementation*, the question is straightforward. First, the policy was explicit that Immigration and Customs Enforcement (ICE) would implement it with funds not subject to Section 527. *See* Gov.Br.60; JA168. The Members quibble with whether it would be possible to engage in the kind of accounting that the policy contemplates, Members.Br.59,62, but the Members' speculation that it would be difficult for the government to implement a facially lawful policy is not a reason to stay such a policy across the board. And second, ICE no longer has funds subject to Section 527; its funding comes from the OBBBA and the Secure America Act, neither of which incorporates the conditions at issue in this litigation. ICE obviously

will not be implementing the policy with funds subject to Section 527 because it no longer has any.[5]

The Members alternatively contend that, at least at the time the Secretary *issued* the policy, the Secretary's office was funded by appropriations subject to Section 527. That theory also fails. At the outset, the mere issuance of a policy does not itself prevent Members of Congress from doing anything. *See* Gov.Br.61. But even if that were incorrect, the policy directs the Department's Chief Financial Officer and General Counsel to "ensure appropriate funding for the promulgation of this policy, including use of OBBBA funding where appropriate." JA168. The Members advance a convoluted theory of why transfers between accounts would be unlawful, *see* Members.Br.61-64, but the district court did not adopt it: it declined to address "complex questions regarding the technical details of DHS budgeting

[5] The Members' only response is to suggest that the Secretary remains encumbered by Section 527, and that the Secretary retains a role in the policy because he may approve exceptions to it. *See* Members.Br.59-60. But that theory at most would support relief against the Secretary's granting exceptions—relief the Members obviously lack standing to seek. Beyond that, the Secure America Act provides the Secretary funding that is available for immigration enforcement and is not encumbered by Section 527. *See* Pub. L. No. 119-98, § 203, 140 Stat. 837, 841 (2026).

and the application of appropriations law that the Court finds difficult," JA526.[6] And under longstanding precedent, there is no basis for this Court to affirm the district court's grant of preliminary relief on grounds other than those relied upon by the district court. *See Sherley v. Sebelius*, 644 F.3d 388, 398 (D.C. Cir. 2011) ("[T]he plaintiffs have not identified, nor have we found, any precedent for upholding a preliminary injunction based upon a legal theory not embraced by the district court.").

The district court's actual reasoning was its belief that the government was not lawfully authorized "to use OBBBA funds for at least some of the relevant expenditures here." JA526. But as set out above, *see supra* p.20, the Members do not even claim to have standing to police expenditures under the OBBBA. And in any case, the court

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[6] The district court had good reason to be wary of the Members' transfers-are-illegal theory. *See* U.S. Gov't Accountability Off., GAO-06-382SP, *Principles of Federal Appropriations Law* 7-9 (2006) (explaining that an "agency may initially charge common-use items to a single appropriation as long as it makes the appropriate adjustments from other benefiting appropriations before or as of the end of the fiscal year" and that "[t]here is no rule or formula for this allocation apart from the general prescription that the agency must use a supportable methodology"). Plaintiffs' claims concern common-use items like office supplies and building space, not the deliberate mischarging of wrong accounts. *Contra* Members.Br.64 n.5.

did not dispute that, on its own terms, the OBBBA might provide relevant funding. It instead held that defendants could not use OBBBA funds because relevant expenditures are also provided for elsewhere. JA529. The Members' theory, however, is that the annual appropriations acts did *not* provide funds that could be used for an advance-notice policy; if they are right about that, then relevant expenditures are not provided for elsewhere.

2. The Members' claim also fails because the notice policy does not prevent them from entering ICE facilities. *See* Gov.Br.63-64. The Members suggest that the policy "prevents entry because it 'stops visiting Members of Congress from entering a facility unless they have'" complied with the advance-notice provision. Members.Br.54 (quoting JA149). That theory, however, could potentially bar the government from requiring the Members to comply with any conditions: on the Members' theory, the government might equally violate Section 527 if it refused to admit Members who arrive at 3:00 a.m., who arrive carrying firearms, or who arrive with obvious signs of contagious illness. The Members' understanding of what it means to "prevent" conduct would presumably also mean that a state unlawfully prevents a couple from

exercising the fundamental right to marry, *see Zablocki v. Redhail*, 434 U.S. 374 (1978), by requiring that they obtain a license days in advance. *See, e.g.*, Mass. Gen. Laws ch. 207, § 19 (three days in advance); Tex. Fam. Code Ann. § 2.204 (same). Regulating the terms on which conduct may occur is logically and legally distinct from preventing it entirely.

Because their theory about prevention is wrong, the Members turn to Section 527(b), which provides that "[n]othing in this section may be construed to require a Member of Congress to provide prior notice of the intent to enter a facility described in subsection (a) for the purpose of conducting oversight." Pub. L. No. 118-47, § 527(b), 138 Stat. at 619. But the government is not asking the Court to construe Section 527 in the manner that Section 527(b) prohibits—to itself impose an advance-notice requirement. Instead, the government's authority to control access to detention facilities is encompassed within its general authority to run those facilities. *See supra* p.19. And other than its holding about Section 527, the district court did not find that the government would lack the statutory authority to impose such a policy.

The Members suggest Section 527(b) would "serve no purpose," Members.Br.55, if it were read according to its plain text. But "vague notions of a statute's basic purpose are inadequate to overcome the words" that Congress actually chose. *Montanile v. Board of Trs. of the Nat'l Elevator Indus. Health Benefit Plan*, 577 U.S. 136, 150 (2016) (alterations and quotation marks omitted). In other words, courts "are not free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal." *New Prime Inc. v. Oliveira*, 586 U.S. 105, 107 (2019). That is because legislation is the product of compromise: while the Members suing here may have imagined Section 527 as substantively guaranteeing on-demand access to detention facilities, other legislators might have been willing to vote for it on the understanding that its impact was more modest. Rather than guess what any particular legislator was thinking, this Court should follow the Supreme Court's instruction to "presume that a legislature says in a statute what it means and means in a statute what it says there." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) (quotation marks omitted).

II. The Remaining Factors Favor The Government.

The remaining factors weigh heavily against preliminary relief. As we have explained, the Members assert only official-capacity harms that do not even suffice for standing. Gov.Br.65. But on the other side of the ledger, the government determined, "following significant and sometimes violent incidents at ICE facilities," that "advance notice is necessary to ensure adequate protection for Members of Congress, congressional staff, detainees, and ICE employees alike" because "[u]nannounced visits require pulling ICE officers away from their normal duties." JA167-68. An ICE declarant similarly explained that the policy is "critical to ensure the safety of ICE facilities for staff, detainees, and visitors." JA91; *see* JA92 (noting that some members of Congress have "refused to comply with facility visitation requirements, including limitations on recording devices," thereby "requir[ing] additional staff attention and resources"); Press Release, U.S. Atty's Off. Dist. of N.J., *Congresswoman Charged for Forcibly Impeding and Interfering with Federal Officers* (June 10, 2025), https://perma.cc/W6GG-8MHF. When ICE has adequate warning in advance of these visits, it can ensure the staffing necessary to keep

everyone safe. The Members' suggestion that "DHS never submitted any record evidence substantiating a legitimate safety concern," Members.Br.66, is thus incorrect, *see* JA91-92, JA167-168, and it would be inappropriate to second-guess the agency's determination of the procedures necessary to ensure the safe operation of detention facilities.

CONCLUSION

This Court should vacate the district court's order and remand with instructions to dismiss.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,489 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 Word for Microsoft 365 in Century Schoolbook 14-point font, a proportionally spaced typeface.

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