[NOT SCHEDULED FOR ORAL ARGUMENT]
No. 16-5202

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

UNITED STATES HOUSE OF REPRESENTATIVES,

Plaintiff-Appellee,

v.

SYLVIA M. BURWELL, in her official capacity as Secretary of Health & Human Services; JACOB J. LEW, in his official capacity as Secretary of the Treasury,

Defendants-Appellants,

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

BRIEF OF PROFESSORS WALTER DELLINGER, WILLIAM N. ESKRIDGE, JR., AND DAVID A. STRAUSS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS ON THE QUESTION OF ARTICLE III STANDING

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amici* certify that:

Parties and Amici. Except for any *amici* who had not yet entered an appearance in this case as of the filing of Defendants-Appellants' brief, all parties, intervenors, and amici appearing before the District Court and in this Court are listed in the Brief for Defendants-Appellants.

Rulings Under Review. The rulings under review are listed in the Brief for Defendants-Appellants.

Related Cases. This case was not previously before this Court, and *amici* are not aware of any related cases in this Court or any other court.

Dated: October 31, 2016

/s/ Anton Metlitsky
Anton Metlitsky

CERTIFICATE REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), the undersigned states that counsel for all parties have consented to the filing of this brief.[*] *Amici curiae* understand that other individuals or entities may file separate *amicus* briefs. Pursuant to D.C. Circuit Rule 29(d), *amici curiae* certify that a separate brief is necessary because *amici* have a particularly strong interest in the scope of the Article III jurisdiction of federal courts, and it is *amici*'s understanding that no other brief will focus exclusively on standing issues.

Dated: October 31, 2016

/s/ Anton Metlitsky
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[*] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

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INTEREST OF *AMICI CURIAE*

Amici professors of law Walter Dellinger (Douglas B. Maggs Professor Emeritus of Law, Duke University), William N. Eskridge, Jr. (John A. Garver Professor Jurisprudence, Yale Law School), and David A. Strauss (Gerald Ratner Distinguished Service Professor of Law, University of Chicago Law School) are committed to the public interest and have long studied the scope of the Article III jurisdiction of federal courts, including issues relating to standing.

INTRODUCTION

Members of Congress and Executive agencies frequently disagree about how to interpret statutes. This suit is predicated entirely on one such disagreement.

The Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), requires insurance companies offering health insurance plans on an "exchange" to reduce the cost for certain enrollees whose household income is below 250% of the poverty level. To enable the companies to provide such reductions, the Act requires the Secretary of the Treasury to "make periodic and timely payments to the [exchange plan] equal to the value of the reductions." 42 U.S.C. § 18071(c)(3)(A).

The parties agree that the Secretary cannot make such required "cost-sharing reduction" payments unless Congress has also appropriated funds for such expenditures. The defendant Secretaries maintain that 31 U.S.C. § 1324, as amended by the ACA, provides an appropriation for such payments. The House of Representatives disagrees; it contends that the Secretary may not use § 1324 appropriations for cost-sharing reduction payments.

The House brought this suit to enjoin the Treasury Secretary from making such payments, alleging that because neither § 1324 nor any other law appropriates funds for that purpose, the Department's expenditures violate several federal statutes and several clauses of Article I of the Constitution. The merits of *each* of

the House's claims turn entirely on whether the House or the Executive is correct about the scope of § 1324's permanent appropriation—an ordinary question of statutory interpretation. This suit, in other words, is fundamentally an effort to compel the Secretary to comply with the House's contested construction of federal law.[1]

The district court acknowledged (JA46) that there are "decades of precedent for the proposition that Congress lacks standing to affect the implementation of federal law." Accordingly, it held (JA45-46) that the House lacks standing for its claims that Treasury's payments violate several statutes, including § 1324 itself; the ACA's "statutory scheme"; and the provisions of the Administrative Procedure Act (APA) prohibiting agency action "in excess of statutory jurisdiction, authority, or limitation" or "not in accordance with law" (5 U.S.C. §§ 706(2)(C), (A)). The district court also properly held (JA46-47) that the House lacks standing to bring one of its *constitutional* claims: that Treasury's payments, allegedly without appropriation, usurp Congress's affirmative legislative powers under Article I. The House has not sought review of these correct determinations.

The district court further held, however (JA38-45), that the House *does* have standing to bring its other Article I claim, in which it alleges that Treasury's

[1] *Amici* take no position on the merits of this statutory question.

payments violate the so-called "Appropriations Clause," U.S. Const. art. I, § 9, cl. 7, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

No one disputes that Article I, Section 9 would bar the Secretary from "draw[ing]" funds from the Treasury if the Executive's statutory interpretation turns out to be mistaken. But nothing about the Appropriations Clause claim distinguishes it from the other claims the district court appropriately recognized were nonjusticiable under well-settled law. The House's Appropriations Clause claim is in substance precisely the same as the remainder of its claims; it depends entirely on the exact same question of statutory interpretation concerning the scope of the permanent appropriation in 31 U.S.C. § 1324.

Disputes between the political branches about the scope of appropriations laws have been legion throughout our history, and over the years Congress has used various statutory and other tools to prevent the Executive from making unappropriated expenditures. Such disputes have not, however, ever been resolved by Article III litigation initiated by one of the political branches. There is good reason for this unbroken tradition: Although the "generalized interest" the House of Representatives and its members share with the public in having "the Government act in accordance with law," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575-76 (1992), is certainly implicated if the Executive makes unappropriated

expenditures, that is not the sort of injury-in-fact that Article III requires. Moreover, the fact that Congress is responsible for *enacting* the "Appropriations made by Law" that Article I, Section 9 requires does not mean that a House of Congress, or even Congress as a whole, has a "personal stake" in defending enforcement of the appropriations laws "that is distinguishable from the general interest of every citizen." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013).

ARGUMENT

I. A House of Congress Lacks Standing to Challenge Allegedly Unauthorized Executive Actions Based Upon a Generalized Interest in the Proper Administration of Law.

"'[T]he doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process.'" *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 513 (D.C. Cir. 2016) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). To invoke federal jurisdiction a plaintiff must, at a minimum, have suffered an "injury in fact," the "'[f]irst and foremost' of standing's three elements." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 103 (1998)). And to establish injury in fact, a plaintiff must show that he or she has suffered "an invasion of a legally protected interest" that is "concrete and particularized." *Lujan*, 504 U.S. at 560.

All United States persons, including citizens and taxpayers, have an interest in ensuring that the Executive complies with the law, and does not act *ultra vires*. When the Executive does act without authority, either deliberately or by virtue of a misinterpretation of the law, we all are in some sense harmed by virtue of our "'common concern for obedience to law.'" *FEC v. Akins*, 524 U.S. 11, 23 (1998) (quoting *L. Singer & Sons v. Union Pac. R.R. Co.*, 311 U.S. 295, 303 (1940)). That harm, however, is "not only widely shared, but is also of an abstract and indefinite nature," and thus lacks the "concrete specificity" necessary to establish Article III standing. *Id.* at 23-24. As the Supreme Court has repeatedly held, "[a] litigant 'raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.'" *Hollingsworth*, 133 S. Ct. at 2662 (*quoting Lujan*, 504 U.S. at 573-74). It is a central tenet of the Constitution's separation of powers that such a dispute about the "proper application" of the law—including, in particular, a dispute about the proper expenditure of funds—does not "present[] a 'judicial controversy' appropriate for resolution in federal court but rather a 'matter of public . . . concern' that could be pursued only through the political process." *Ariz.*

Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 135 (2011) (*quoting Frothingham v. Mellon*, 262 U.S. 447, 487-89 (1923)).

Members of Congress, too, have a "public interest in proper administration of the laws," *Lujan*, 504 U.S. at 576, but that interest is no different from the "generalized interest of all citizens in constitutional governance," *id*. (quotation omitted), which is insufficient to support Article III standing when the Executive is alleged to have acted unlawfully, or *ultra vires*. Congress and its members do not suffer a distinct and concrete harm just because Congress enacted the statute in question. "Once a bill becomes law, a Congressman's interest in its enforcement is shared by, and indistinguishable from, that of any other member of the public." *Daughtrey v. Carter*, 584 F.2d 1050, 1057 (D.C. Cir. 1978); *see also Hollingsworth*, 133 S. Ct. at 2663 (although California law gave initiative sponsors a "special" role in the lawmaking process, they "have no 'personal stake' in defending its enforcement that is distinguishable from the general interest of every citizen of California" (*quoting Lujan*, 504 U.S. at 560-61)). "[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation." *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986).

Accordingly, a long line of this Court's decisions rejects the view that

members of Congress have standing to seek the judiciary's assistance in compelling the Executive to comply with the law. *See, e.g.*, *Daughtrey*, 584 F.2d at 1057; *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1381-82 (D.C. Cir. 1984); *Chenoweth v. Clinton*, 181 F.3d 112, 113-17 (D.C. Cir. 1999); *Campbell v. Clinton*, 203 F.3d 19, 20-24 (D.C. Cir. 2000).[2]

[2] This case does not implicate three other contexts in which the question of congressional standing might be more complicated. *First*, the House does not challenge any action by the President, such as a pocket veto, that purports to deny the legal status of legislation passed by both Houses of Congress. *Compare Kennedy v. Sampson*, 511 F.2d 430, 434-36 (D.C. Cir. 1974) (holding that a Senator had standing to challenge a pocket veto), *and Harrington v. Bush*, 553 F.2d 190, 211 (D.C. Cir. 1977) (distinguishing that claim from a challenge to executive administration of the law), *with Raines v. Byrd*, 521 U.S. 811, 828 (1997) (expressing doubt that "a Member of Congress could have challenged the validity of President Coolidge's pocket veto that was sustained in *The Pocket Veto Case*, 279 U.S. 655 [(1929)]"), and *Chenoweth*, 181 F.3d at 114-15 (questioning whether *Raines* undermines the standing holding in *Kennedy*).

Second, Congress has investigative authorities relating to its lawmaking functions, *see Buckley v. Valeo*, 424 U.S. 1, 137 (1976) (per curiam), and is permitted to act in a quasi-executive capacity to enforce those authorities, *see McGrain v. Daugherty*, 273 U.S. 135 (1927). This Court has held that "the House as a whole has standing to assert its investigatory power." *United States v. AT&T Co.*, 551 F.2d 384, 391 (D.C. Cir. 1976); *see also, e.g.*, *Comm. on the Judiciary of the House of Representatives v. Miers*, 558 F. Supp. 2d 53, 65-78 (D.D.C. 2008) (holding that House committee had standing to bring civil action to enforce congressional subpoenas), *stayed pending appeal*, 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam). No such investigatory power is at issue here.

Third, this case does not challenge any law or action affecting the actual composition of a House of Congress. *Compare Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 364-65 (1999) (Stevens, J., dissenting) ("the House of Representatives has standing to challenge the validity of the process [in that case, statistical sampling in the 2000 census] that will determine the size of each State's congressional delegation"); *Powell v. McCormack*, 395 U.S. 486, 548

II. Characterizing Alleged *Ultra Vires* Action as a "Constitutional Violation" that "Deprives Congress of its Constitutional Role" Does Not Create Article III Standing.

The district court acknowledged that "Congress lacks standing to affect the implementation of federal law," JA46—and thus properly dismissed most of the House's claims challenging the alleged absence of appropriations for the Secretary's reimbursements of cost-sharing reductions. The court nevertheless held (JA45) that the House has standing to sue "to the extent that it seeks to remedy *constitutional* violations" (emphasis added), and on that ground upheld the House's ability to assert the claims in its complaint styled as allegations that the Department violated the Appropriations Clause. If the Treasury Secretary is making payments without any statutory appropriation, the district court reasoned, "the appropriations process is itself circumvented," and "Congress finds itself deprived of its constitutional role and injured in a more particular and concrete way" (JA47; *see also* JA50). According to the district court, "because the House occupies a unique role in the appropriations process prescribed by the Constitution, . . . perversion of that process inflicts on the House a particular injury quite distinguishable from any suffered by the public generally" (JA43).

(1969) ("Congress has an interest in preserving its institutional integrity"); *cf. Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194 (1972).

For three reasons, the district court erred in sustaining the House's standing by recharacterizing this ordinary statutory dispute as a suit to remedy an alleged "depriv[ation]" of the House's "constitutional role."

A. A Dispute About Whether Executive Action is Authorized By, or Consistent With, Statutes Does Not Raise a Distinct Constitutional Question.

The district court's rationale proves too much: it would transform countless ordinary statutory disputes into "constitutional" cases implicating the legislature's "role," and thereby create standing in many cases that even the district court acknowledged are nonjusticiable pursuant to "decades of precedent" (JA46).

It is easy to recharacterize virtually any alleged statutory violation, or *ultra vires* action, by the Executive as a transgression of the Constitution. If, for example, the political branches dispute the scope of a statutory limitation, and if it turns out that the statute in question does, indeed, prohibit the Executive's action, then the Executive, according to the district court's logic, will have "nullified" Congress's Article I authority to impose the statutory limit. Under the district court's reasoning, one or both Houses of Congress could sue the Executive to enjoin that practice simply by alleging that the Executive's action is

unconstitutional, even though they could *not* sue if they simply alleged the identical statutory violation without constitutional dressing.[3]

The same is true where the dispute is about whether a statute affirmatively authorizes agency action: If the agency's reading of the law in such a case is incorrect, a House of Congress might then characterize the conduct as *ultra vires* or "unilateral" and, on the district court's view, sue in federal court asserting that the Constitution requires congressional authorization for the agency to act. For example, one House of Congress—instead of the injured individual in *King v. Burwell*, 135 S. Ct. 2480 (2015)—could have sued the Executive, challenging whether the ACA authorized the IRS to make tax credits available to taxpayers enrolled in an insurance plan through an exchange established by the Department of Health and Human Services.

Article III cannot possibly admit of such an easy work-around. As Justice Scalia recently explained, such a system, "in which Congress can hale the Executive before the courts not only to vindicate its own institutional powers to act, but to correct a perceived inadequacy in the execution of its laws," would offer

[3] Thus, for instance, when the Executive controversially determined that certain extreme interrogation techniques such as waterboarding were not "torture" that chapter 113C of Title 18 prohibits, on the district court's theory the Senate could have gone into federal court to challenge the use of such techniques as a deprivation of Congress's constitutional authority to make rules for captured individuals, *see* U.S. Const. art. I, § 8, cl. 11, rather than (as it did) taking legislative steps to countermand the Executive's interpretation.

"endless" opportunities "for dragging the courts into disputes hitherto left for political resolution." *United States v. Windsor*, 133 S. Ct. 2675, 2703-04 (2013) (Scalia, J., dissenting).

In an analogous context, also involving justiciability, the Supreme Court explained that a party cannot transform what is essentially a dispute about the scope of a statute into a constitutional question merely by invoking the principle that the Constitution forbids the Executive from acting *ultra vires*. Where, as here, the Executive concedes that the only source of its authority is a disputed statute, "no 'constitutional question whatever' is raised." *Dalton v. Specter*, 511 U.S. 462, 474 n.6 (1994) (*quoting* Jesse Choper, *Judicial Review and the National Political Process* 316 (1980)). "Rather, '[such] cases concern only issues of statutory interpretation.'" *Id.* "[I]f every claim alleging that the President exceeded his statutory authority were considered a constitutional claim," explained the Court, then any "constitutional challenges" exception to a nonjusticiability rule "would be broadened beyond recognition. The distinction between claims that an official exceeded his statutory authority, on the one hand, and claims that he acted in violation of the Constitution, on the other, is too well established to permit this sort of evisceration." *Id.* at 474.[4]

[4] The question in *Dalton* was whether a presidential order closing a military base was subject to judicial review under the APA. In an earlier case, *Franklin v. Massachusetts*, 505 U.S. 788 (1992), the Court had held that the President is not an

B. To Permit One House of Congress to Invoke Federal Jurisdiction to Adjudicate Even Genuine Constitutional Clashes Between the Branches Would be Inconsistent with Our Constitutional History.

More fundamentally, even if this case did not turn on a simple disagreement of statutory interpretation, but could instead fairly be said to involve a dispute concerning the political branches' constitutional powers, allowing a House of Congress to invoke federal jurisdiction to resolve that dispute would be a sharp break from centuries of established practice. As the Supreme Court explained in *Raines v. Byrd*, 521 U.S. 811, 826 (1997), history is replete with "confrontations between one or both Houses of Congress and the Executive Branch," yet none of those confrontations has been settled by an Article III suit "brought on the basis of claimed injury to official authority or power."

The *Raines* Court identified several well-known instances in which Congress has enacted statutes that, in the Executive's view, impermissibly impinged upon the President's constitutional authorities, including: the 1867 Tenure of Office Act, forbidding removal of principal officers without Senate consent, Act of March 2, 1867, ch. 170, § 2, 14 Stat. 485, 486-87; a similar removal restriction that the Court

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"agency" for APA purposes, but had suggested an exception for cases in which presidential actions are challenged as unconstitutional, *id.* at 801. Senator Specter argued that because President Bush allegedly lacked statutory authority, his order was unconstitutional. Writing for a unanimous Court, Chief Justice Rehnquist held that "claims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims, subject to judicial review under the exception recognized in *Franklin*." *Dalton*, 511 U.S. at 473-74.

declared invalid in *Myers v. United States*, 272 U.S. 52 (1926); the one-house-veto provision that the Court declared invalid in *INS v. Chadha*, 462 U.S. 919 (1983); and the provision of the Federal Election Campaign Act authorizing members of Congress to appoint executive officers, which the Court declared invalid in *Buckley v. Valeo*, 424 U.S. 1, 124-37 (1976) (per curiam). *See Raines*, 521 U.S. at 826-28. These statutes prompted interbranch disputes about the relative allocation of *constitutional* authorities that "would surely have been promptly resolved by a Congress–vs.–the–President lawsuit if the impairment of a branch's powers alone conferred standing to commence litigation." *Windsor*, 133 S. Ct. at 2704 (Scalia, J., dissenting). Yet they were not.

The *Raines* examples barely scratch the surface. Presidents throughout our history have concluded that statutes unconstitutionally limited their powers. *See Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 203-11 (1994) (canvassing examples). In some such cases, the Executive has complied with such laws, thus forestalling adjudication of the constitutional question. In others, the Executive has complied with the statute and then refused to defend it when an injured private party challenged its constitutionality—thus facilitating judicial resolution, but not in the context of a suit initiated by the political branches themselves. *See, e.g.*, *United States v. Lovett*, 328 U.S. 303 (1946); *Chadha*, 462 U.S. 919; *see also Metro Broad., Inc. v.*

FCC, 497 U.S. 547 (1990) (refusing to defend statutes on equal protection grounds); *Windsor*, 133 S. Ct. 2675 (same). And in yet a third category of cases, the President has refused to enforce the contested statute—which sometimes has resulted in litigation initiated by private parties, *see, e.g.*, *Myers*, 272 U.S. 52; *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015), and other times not, *see, e.g.*, *Memorial of Captain Meigs*, 9 Op. Att'y Gen. 462 (1860); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 Harv. L. Rev. 941, 1072-74 (2008) (recounting President Ford's evacuation of foreign nationals from Saigon despite a statutory prohibition on using funds for that purpose); *Bill To Relocate United States Embassy from Tel Aviv to Jerusalem*, 19 Op. O.L.C. 123 (1995); *Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act*, 33 Op. O.L.C. 1 (2009).

In *none* of these cases, however, did it "occur[] to . . . these Presidents that they might challenge the Act in an Article III court." *Raines*, 521 U.S. at 827. Likewise, in the subset of cases where the President has declined to enforce arguably unconstitutional statutes (*e.g.*, the cases cited immediately above, as well as *Myers*, *supra*, and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)), the federal courts have never entertained suits by Congress or one of its Houses to

challenge the President's conduct on the ground that it deprived the legislature of its constitutional role.

Similarly, it is almost unheard of for Congress, or one House thereof, to sue to vindicate its proper constitutional role in cases where the President has asserted a controversial claim of constitutional authority to act "unilaterally." For example:

- President Lincoln suspended the privilege of the writ of habeas corpus during the Civil War, *see Suspension of the Privilege of the Writ of Habeas Corpus*, 10 Op. Att'y Gen. 74 (1861), an action that many considered a usurpation of Congress's suspension authority under Article I, section 9. Neither House of Congress sued.
- Presidents over many decades asserted a controversial authority to make recess appointments during sessions of the Senate (a practice the Court approved in *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560-67 (2014)); yet the Senate never sued the President for allegedly circumventing its role under the Appointments Clause, U.S. Const. art. II, § 2, cl. 2.
- President Bush controversially issued a directive to state courts to compel them to reopen certain final criminal judgments to ensure United States treaty compliance. *See Medellín v. Texas*, 552 U.S. 491 (2008). Neither House sued to vindicate Congress's power to implement treaties.

- When President Truman ordered seizure of steel factories, neither House of Congress sued, even though the Court later held that the seizure effectively stripped Congress of its "exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952).
- On many occasions since President Truman's introduction of U.S. forces into the Korean War, Presidents have unilaterally initiated hostilities (in, *e.g.*, Somalia, Haiti, Bosnia, Kosovo, and Libya) that, in the view of many members of Congress, impinged upon Congress's authority to "declare war," *see* U.S. Const. art. I, § 8, cl. 11. Even so, neither Congress nor a House thereof has sued to challenge such actions.

As the Supreme Court explained in *Raines*, "[t]here would be nothing irrational about a system" that allowed either or both political branches to invoke the judiciary to settle such interbranch constitutional disputes; indeed, "some European constitutional courts operate under one or another variant of such a regime." 521 U.S. at 828. Moreover, although it expressed a good deal of skepticism in *Raines*, the Supreme Court has never definitively resolved whether Congress as a whole might have standing to sue in one or more of these settings.

Nevertheless, the "longstanding practice of the government can inform our determination of what the law is." *Noel Canning*, 134 S. Ct. at 2560 (citations omitted); *see also PHH Corp. v. CFPB*, -- F.3d --, 2016 WL 5898801, at *3 (D.C. Cir. Oct. 11, 2016) ("history and tradition are critical factors in separation of powers cases where the constitutional text does not otherwise resolve the matter"). And that practice demonstrates that such interbranch litigation "is obviously not the regime that has obtained under our Constitution to date." *Raines*, 521 U.S. at 828.

Therefore, whatever the eventual Article III answer might be in the context of hypothetical cases where the entire Congress sues to resolve an actual constitutional dispute between the political branches, historical practice surely points strongly against the notion that Article III permits a suit of the sort at issue here, where a *single* House of Congress has sued, ostensibly for a "constitutional" violation, but where the political branches are not at odds about their respective constitutional powers (*see* Appellants' Br. at 30 (agreeing that the Secretary could not make payments absent a valid source of statutory appropriations)).

In fact, this Court has twice rejected legislators' claims closely analogous to the one here—in *Chenoweth* and in *Campbell*. In *Campbell*, for example, 31 members of Congress challenged President Clinton's use of the armed forces in Kosovo. The members alleged not only that such action exceeded the President's

statutory authority, and that it violated the War Powers Resolution, but also that it violated the "War Powers Clause of the Constitution," 203 F.3d at 19, by usurping Congress's authority to "declare War," Art. I, § 8, cl. 11. *See* Br. for Pls.-Appellants at 20-24, *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000) (No. 99-5214). This Court rejected the members' claim to standing, including on "their constitutional argument . . . that the President has acted illegally—in excess of his authority—because he waged war in the constitutional sense without a congressional delegation." 203 F.3d at 22. *See also infra* at 28-29 (discussing *Chenoweth*).

This case is different in one sense from those prior lawsuits. *Raines*, *Chenoweth* and *Campbell* all involved suits brought by individual members of Congress, whereas here one *House* of Congress has sued. The district court apparently thought that this factor cuts in favor of legislative standing. *See* JA37 ("no case has decided whether this institutional plaintiff has standing on facts such as these").

As we explain in Section C, below, however, the House is not differently situated from a subset of its members for purposes of Article III standing: neither represents the allegedly injured party (Congress as a whole), even on the district court's theory of "deprivation" of constitutional authority. What is more, as the Supreme Court's historical exposition in *Raines* demonstrates, the fact that neither

Congress nor either House thereof has ever before challenged executive authority in such a case, while not necessarily dispositive,[5] surely establishes a strong presumption that "[o]ur regime contemplates a more restricted role for Article III courts." *Raines*, 521 U.S. at 828.

C. The House of Representatives Does Not Have Standing to Sue for an Alleged Injury to Congress.

Even assuming *arguendo* the district court was correct that *ultra vires* action by an Executive agency deprives *Congress* "of its constitutional role," and thus injures the legislature "in a more particular and concrete way" that might support Article III standing (JA47), it would not follow (as the court assumed) that the *House of Representatives* is distinctly harmed in a "particular and concrete way."

The suit here does not involve one of the "narrowly and precisely defined" authorities of the House as a distinct entity, *Chadha*, 462 U.S. at 955—such as the power to impeach, U.S. Const. art. I, § 2, cl. 5, the authority to determine House members' qualifications, U.S. Const. art. I, § 5, cl. 1, or the authority to originate bills for raising revenue, U.S. Const. art. I, § 7, cl. 1. Instead, it implicates the power to spend and the power to enact laws "necessary and proper" to carry into execution other federal laws (such as the ACA)—authorities the Constitution assigns not to the House alone, but to *Congress*. *See* U.S. Const. art. I, § 8, cls. 1,

[5] *See* Leah M. Litman, *Debunking Anti-Novelty*, 66 Duke L.J. (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2843763.

18 ("*The Congress* shall have power . . . to pay the debts and provide for the common defense and general welfare of the United States" and "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers" (emphases added)); *see also* Art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

Thus, even if one were to accept the district court's broad theory of standing, the party whose constitutional "role" the Treasury Department has allegedly "deprived" is not present in this case: The "power of the purse" belongs to the two Houses (and the President) working in combination—not to a single House acting alone. Yet Congress, as such, has *not* sued to enjoin the Secretary's cost-sharing reduction payments.[6] *Compare Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664 (2015) ("The Arizona Legislature . . . is an institutional plaintiff asserting an institutional injury, and it commenced this action *after authorizing votes in both of its chambers*" (emphasis added)).[7]

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[6] In a footnote, the district court wrote that "[t]he Court finds that the injury, although arguably suffered by the House and Senate alike, is sufficiently concentrated on the House to give it independent standing to sue." JA41 n.21. The so-called "injury" the court identified, however, is suffered not by the House and Senate "alike," but by the two Houses *collectively* (together with the President). There is no sense in which it is distinctly and "sufficiently concentrated on the House."

[7] The *Arizona State Legislature* case is also fundamentally different from this one because in that case a state constitutional amendment purported to formally

III. The Appropriations Clause, Which Does Not Confer Additional Powers on the House of Representatives, Does Not Establish the House's Standing.

The district court recognized that the House lacks standing to bring all but one of its "constitutional" claims: If "every instance of the Executive's statutory non-compliance" were deemed "a constitutional violation" by virtue of the fact that it circumvents constitutionally required legislative involvement, the court explained, "there would not be decades of precedent for the proposition that Congress lacks standing to affect the implementation of federal law" (JA46). The district court nevertheless thought that there is something radically different about the House's *Appropriations Clause* challenge. The court's reasoning was somewhat opaque, but it appeared to rest on two considerations: first, that the House's Appropriations Clause challenge is allegedly more "specific" than its other claims; and second, that the prohibitory nature of Article I, § 9, cl. 7 changes the Article III analysis. Neither explanation, however, justifies the court's conclusion that the House has standing to bring its Appropriations Clause claim.

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transfer to a different state entity an authority (prescribing congressional districts) that the federal Constitution arguably assigned to the state legislature itself. The Treasury Secretary's cost-sharing reduction payments obviously do not purport to strip the House of Representatives or Congress—formally or otherwise—of any of their constitutionally assigned functions. *See also* 135 S. Ct. at 2665 n.12 ("The case before us does not touch or concern the question whether Congress has standing to bring a suit against the President. There is no federal analogue to Arizona's initiative power, and a suit between Congress and the President would raise separation-of-powers concerns absent here.").

A. The Specific/General Distinction.

Count I of the House's complaint, wrote the court, "alleges a violation of the *specific*, constitutional prohibition in Article I, § 9, cl. 7," whereas Count II, in which the House makes its other constitutional claims, "is far more *general*: it cites only Article I, § 1 (vesting legislative power in Congress) and Article I, § 7, cl. 2 (prescribing the lawmaking process)" (JA46) (emphasis added).

This "specific/general" distinction does not withstand scrutiny. In every case in which an Executive actor is said to have "deprived" Congress of a constitutional "role" by acting in violation of a statute or without statutory authority—including this one—one or more specific, enumerated congressional authorities are implicated. If, for example, the President were to borrow money on the credit of the United States, or coin money, or raise an army, in a situation where he mistakenly believes he has statutory authority to so act, he could be accused of "usurping" Congress's "roles" to legislate pursuant to an enumerated clause in Article I, Section 8—in those three hypotheticals, Clauses 2, 5, and 12, respectively.

So, too, here: The affirmative constitutional authorities of which Congress allegedly was "deprived" by the Secretary's cost-sharing reduction payments are *specific* authorities enumerated in Article I, Section 8, regardless of whether the House identified them in its complaint—namely, the Spending authority to

"provide for the . . . general welfare of the United States" (clause 1) and the power to "make all laws which shall be necessary and proper for carrying into execution" the ACA (clause 18).

B. The Prohibitory Nature of the Clause.

The district court also suggested that the Article III analysis in this case is different because of the prohibitory nature of the Appropriations Clause. *See* JA46 ("Count I alleges a violation of the specific, constitutional *prohibition* in Article I, § 9, cl. 7 that is meant to safeguard the House's role in the appropriations process and keep the political branches of government in equipoise" (emphasis added)); JA40 ("If . . . actions are taken, in contravention of the specific *proscription* in Article I, § 9, cl. 7, the House as an institution has standing to sue.") (emphasis added). The fact that the Appropriations Clause is written as a prohibition does not, however, affect whether the House has standing to sue the Executive over a dispute about whether a particular statute provides an appropriation for expenditures made by an executive agency.

The Clause provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." As its passive voice ("No money shall be drawn") and placement (in Article I) indicate, the Clause's injunction is addressed not to the Executive branch alone, but instead to all government actors. Neither Congress nor the Judiciary, any more than the

Executive, may draw money from the Treasury except in accordance with appropriations made by law.[8]

There is not a great deal of evidence about why the Framers included the Clause in the Constitution, and it is not obvious that any of the three branches would have had the power to draw unappropriated funds from the Treasury in the *absence* of the Clause. Perhaps the framers thought an express prohibition would confirm that the "vesting clauses" for the three branches in Articles I, II and III do not give the three branches such an untethered expenditure power.[9]

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[8] *See, e.g.*, *OPM v. Richmond*, 496 U.S. 414 (1990) (a court may not order an equitable money remedy against the federal government if Congress has not appropriated funds for such use).

[9] The Supreme Court has indicated that the "fundamental and comprehensive purpose" of the Clause "is to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *OPM v. Richmond*, 496 U.S. at 427-28. The relatively sparse academic literature offers various speculations about the Clause's primary functions. *See, e.g.*, Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1377-86 (1988) (arguing that the Clause imposes an obligation on Congress to appropriate funds through legislation of certain specificity and meeting certain procedural requirements); J. Gregory Sidak, *The President's Power of the Purse*, 1989 Duke L.J. 1162 (1989) (arguing that the Clause does not prohibit the President from drawing funds as necessary to perform his constitutional duties because the phrase "made by Law" does not necessarily refer only to legislation); Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 Mich. L. Rev. 1207 (2009) (arguing that the Clause precludes suits against the federal government for damages). None of those analyses, however, offers any basis for concluding that the Framers included the Clause to confer a special institutional prerogative on the House, let alone to affect the standing requirements of Article III for legislative suits against the Executive.

Whatever the functions of the Clause might be, however, there does not appear to be any basis for concluding that it creates any special *institutional* prerogative of Congress—and certainly not of the House of Representatives alone. Indeed, it does not even establish the power to make "Appropriations . . . by Law," but instead merely identifies such lawmaking (typically pursuant to the Spending and Necessary & Appropriate Clauses) as a necessary condition for expenditures from the Treasury.

Most importantly, the Clause surely does not purport to affect Article III standing requirements, particularly where, as here, any "violation" of the Clause would merely be the result of an agency misinterpretation of an appropriations statute (if the House's reading of § 1324 is correct)—a phenomenon that is hardly uncommon.

Once again, history undermines the notion that a legislative suit is the proper way to resolve the common interbranch disagreements about the scope of appropriations laws. For example, in the years immediately following the Constitution's ratification, the branches often clashed over whether generally worded appropriations laws could be used to make expenditures for functions that the laws did not specify, and to make expenditures in advance of anticipated congressional ratification:

> [T]he Washington, Adams, and Jefferson Administrations were marked throughout by pitched

> struggles over how much leeway the executive branch enjoyed to use appropriations as it thought most efficacious . . . . To avoid what appeared to be statutory limits on appropriations, the executive branch during this period resorted to "various compensatory devices" that allowed it to "formally admit[] the principle of Congressional control" while at the same time "relaxing the severities of its application" [*quoting* Lucius Wilmerding, Jr., *The Spending Power* 19 (1943)].
>
> . . . .
>
> This "practical" application of the appropriations laws regularly provoked the ire of many in Congress, especially Representative (and future Treasury Secretary) Albert Gallatin, who viewed the practice in the military and naval establishments, in particular, as "making the law a mere farce, since the officers of the Treasury did not consider themselves as at all bound by the specific sums" [*quoting* 6 Annals of Cong. 2322 (1797)].[10]

Congress has taken various steps over the course of the Nation's history to ratify, regulate or limit these interpretive practices of the executive with respect to appropriations laws. *See* Wilmerding, *supra*. In more recent years, for example, Congress has "implemented" the command of Article I, section 9, clause 7 by way of the Antideficiency Act, which, *inter alia*, prohibits federal employees from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). Employees who violate the Act are subject to administrative discipline and may be subject to fines or imprisonment for knowing and willful

[10] Barron & Lederman, *supra*, 121 Harv. L. Rev. at 958-59.

violations. *Id.* §§ 1349, 1350. Violations of the Antideficiency Act must be reported immediately to the President and Congress, and a copy of each report must be submitted to the Comptroller General. *Id.* § 1351.

Throughout this longstanding push-and-pull between the branches concerning disputes about the scope of appropriations statutes, it has never (until now) occurred to Congress, or to either House, that such disagreements could be, or ought to be, settled by suing the Executive for purported violations of the Appropriations Clause.[11]

During the Clinton Administration, however, four members of the House initiated such a suit, and this Court dismissed it for lack of Article III standing. In *Chenoweth v. Clinton*, *supra*, those four House members challenged an environmental executive order that President Clinton had promulgated, allegedly without statutory authority. The President's action, they claimed, was an "effort 'to usurp Congressional authority by implementing a program, for which [the President] has no constitutional authority, in a manner contrary to the Constitution.'" 181 F.3d at 116 (*quoting* Br. of Appellants at 20, *Chenoweth v.*

[11] Indeed, even on those not-infrequent occasions when the Executive Branch has disregarded an express statutory restriction on expenditures on the ground that it is unconstitutional, Congress has never filed suit to enforce its appropriations' limits. *See supra* at 14-15 (listing examples of Department of Justice opinions concluding that the Executive could disregard unconstitutional statutory funding conditions); *see also Constitutionality of Section 7054*, *supra*, 33 Op. O.L.C. 1, Part IV (describing historical practice).

Clinton, 181 F.3d 112 (D.C. Cir. 1999) (No. 98-5095)). Notably, the House members specifically alleged that the Executive branch had violated *the Appropriations Clause* by "reprogramming" funds to functions for which Congress had not appropriated them. *See* Brief of Appellants in *Chenoweth*, *supra*, at 12-14.

This Court rejected the members' standing, including with respect to their Appropriations Clause claim: "Their claim to standing on the ground that the President's implementation of the [program] without congressional consent injured them by diluting their authority as Members of the Congress is indistinguishable from the claim to standing the Supreme Court rejected in *Raines*." 181 F.3d at 117.

The Court's holding in *Chenoweth* governs this case. *See supra* at 19 (explaining that the House is not differently situated from its constituent members for purposes of Article III standing where a specific power of the House, as such, is not implicated). If standing to challenge a dispute about the scope of appropriations laws could be established merely by pleading that the expenditure in question violated the Appropriations Clause, the judiciary would be constantly enmeshed in interbranch disputes about the scope of such appropriations laws. This court should not invite such a radical transformation in the way the political branches have traditionally resolved such interpretive disputes.

CONCLUSION

For the foregoing reasons, the district court's order should be vacated and the case remanded with instructions that it be dismissed for lack of standing.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because this brief contains 6,996 words—no more than half the length of the parties' principal briefs—excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: October 31, 2016

/s/ Anton Metlitsky
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CERTIFICATE OF SERVICE

I certify that, on October 31, 2016, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

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