IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES HOUSE OF REPRESENTATIVES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:14-cv-01967-RMC
	)	
SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of Health and Human Services, *et al.*,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT

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Introduction

The defendants' opening brief demonstrated that the House of Representatives lacks standing in this case, in which the House asks this Court to adjudicate its difference of opinion with the Executive Branch over the Executive's implementation of existing federal law. As the Supreme Court explained in *Raines v. Byrd*, 521 U.S. 811 (1997), the system of inter-Branch litigation that the House proposes is "obviously not the regime that has obtained under our Constitution to date." *Id.* at 828. Instead, in order to invoke the jurisdiction of a federal court, the House — like any other plaintiff — must demonstrate that it has suffered a concrete and particularized, legally cognizable injury. The House's generalized interest in the proper administration of the laws is an interest shared by every member of the public, and thus cannot be the basis of an Article III injury. *See, e.g.*, *Raines*, 521 U.S. at 826 (rejecting legislative plaintiffs' standing "on the basis of claimed injury to official authority or power"). Indeed, the House could not have Article III standing to pursue such a claim, because separation of powers principles dictate that, once a federal law is enacted, the Executive Branch is responsible for the implementation of that law, and one or both houses of 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).

The House does nothing to rebut these points. It contends that it has standing to litigate the "effect" of its prior "legislative decisions." Opp'n of U.S. House of Representatives to Defs.' Mot. to Dismiss the Complaint ("Opp'n"), ECF 22, at 26. But it would require a "drastic extension" of standing doctrine, one that the Supreme Court is "unwilling to take," to accord legislators standing to litigate over "the meaning and effectiveness of their vote for

appropriations bills" or other legislation. *Raines*, 521 U.S. at 825-26 (internal quotation omitted).

Ignoring the clear import of *Raines*, the House contends that it has suffered a legally cognizable injury "in four distinct ways." Opp'n 24. Rather than setting forth four distinct concepts, however, it sets forth four variations on the same theme: that the Executive has purportedly injured the House "by nullifying its prior legislative decisions." Opp'n 26. This "nullification" frame is merely a relabeling of the House's generalized interest in enforcement of the laws, and thus fails to establish a legally cognizable injury. The Executive Branch does not harm the House in any concrete and particularized way simply by interpreting and administering legislation enacted by a previous Congress in a manner with which the current House disagrees — whether the House labels that disagreement as "nullification" or otherwise.

Nor can the House justify standing through sheer speculation that dire consequences for the separation of powers will follow if this lawsuit is not allowed to proceed. Federal courts sit only to decide actual cases and controversies, not abstract claims of legislative power. What is more, the House retains a variety of political and legislative tools to advance its prerogatives in this inter-Branch dispute — including its "power of the purse." It need not conscript the Judiciary in its effort to superintend the Executive's implementation of the law.

Although the lack of Article III standing is dispositive, the House also fails to identify any source of law that would accord it a cause of action here. The House relies on the Declaratory Judgment Act, but the operation of that statute is only procedural; it does not create any substantive right to sue. The Administrative Procedure Act does not create a cause of action for purely intra-governmental disputes like the one that the House seeks to raise here.

Nor can this Court create an implied cause of action for the House under the Constitution itself, because this action is inconsistent with the constitutional design reserving the enforcement and implementation of federal law to the Executive Branch, not one or both Houses of the Legislature.

Finally, even assuming that the House had standing and a cause of action (which it does not), its complaint should nonetheless be dismissed to avoid entangling this Court in what is, at heart, a political dispute. Under the D.C. Circuit's doctrine of remedial discretion, this Court should exercise its discretionary power to decline to adjudicate the House's claim, and should direct the House to pursue its dispute with the Executive Branch in political fora instead.

Argument

I. The House of Representatives Lacks Standing to Pursue This Action

A. The House Does Not Allege a Legally Cognizable Injury by Asserting that Its Members' Votes Have Been "Nullified"

1. The House relies primarily on *Coleman v. Miller*, 307 U.S. 433 (1939), which the House claims held that "legislators have standing to defend the effect of their legislative decisions." Opp'n 26; *see also* Opp'n 27, 31, 32. This "argument pulls *Coleman* too far from its moorings." *Raines*, 521 U.S. at 825. It would require a "drastic extension" of standing doctrine, one that the Supreme Court is "unwilling to take," to accord legislators standing to litigate over "the meaning and effectiveness of their vote for appropriations bills" or other legislation. *Id.* at 825-26. At bottom, the Supreme Court has rejected the notion that legislators may bring claims based on "the abstract dilution of institutional legislative power" like the claim that the House advances here. *Id.* at 826.

As the D.C. Circuit has explained, in contrast to the House's expansive reading of *Coleman*, that case announced only a "very narrow" exception to the rule prohibiting legislative standing. *Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000). Under this narrow exception, a legislator, at most, could sue to "compel a proper record of legislative action," *Coleman*, 307 U.S. at 437, where the officials responsible for that record had "treat[ed] a vote that did not pass as if it had, or vice versa," *Campbell*, 203 F.3d at 22. "The [Supreme] Court did not suggest … that the President 'nullifies' a congressional vote and thus legislators have standing whenever the government does something Congress voted against, still less that congressmen would have standing anytime a President allegedly acts in excess of statutory authority." *Campbell*, 203 F.3d at 22.[1]

The House nonetheless contends that *Coleman* stands for the proposition that members of Congress may sue to challenge the statutory basis for Executive Branch actions, and it further contends that *Raines* "reaffirmed" this expansive view of legislative standing. Opp'n 27. It quotes *Raines* as follows: "'*Coleman* stands for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes

[1] Moreover, as the D.C. Circuit has explained, "the key to understanding" *Coleman* "is its implicit recognition that a ratification vote on a constitutional amendment is an unusual situation." *Campbell*, 203 F.3d at 22. After the constitutional amendment was "deemed ratified," there was substantial doubt whether the plaintiff legislators "could have done anything to reverse that position." *Id.* at 22-23. Here, in contrast, a majority of Congress retains the power to enact legislation that would amend or repeal the appropriations statutes through which the defendants are making advance payments of cost-sharing reductions, or that would amend or repeal the regulatory authority through which the defendants are providing transitional relief with respect to the Affordable Care Act's large-employer tax. *See id.* at 23.

have been completely nullified.'" Opp'n 27 (purporting to quote *Raines*, 521 U.S. at 823). The House then attempts to analogize its claim that the Executive is misapplying federal law to the claim of legislative standing that *Raines* purportedly endorsed. *Id.*

The House, however, has misquoted the passage from *Raines* upon which it relies, without disclosing the alteration to this Court. The actual quotation from *Raines* is as follows:

> It is obvious, then, that our holding in *Coleman* stands (at most, see n.8, *infra*) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.
>
> It should be equally obvious that appellees' claim does not fall within our holding in *Coleman*, as thus understood. They have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated. In the vote on the Act, their votes were given full effect. They simply lost that vote.

Raines, 521 U.S. at 823-24 (footnotes omitted; material excised from the House's quotation is underlined).[2]

As the full quotation makes clear, the Supreme Court in *Raines* did not endorse the notion that legislators could sue to dispute the proper interpretation of existing law. Instead, *Raines*

[2] Footnote 8 in the passage from *Raines* quoted above noted, but did not rule upon, two additional grounds upon which *Coleman* could be distinguished. *Raines*, 521 U.S. at 824 n.8. First, *Coleman* originated in state court, and that court had treated the state legislator plaintiffs' claim of vote "nullification" as a ground to reach the federal question. *Coleman* thus provides no clear guidance for a case arising in federal court. Second, federal separation-of-powers principles would preclude Congressional plaintiffs from claiming standing on the same grounds. *See, e.g.*, *Harrington v. Bush*, 553 F.2d 190, 205 (D.C. Cir. 1977). The House dismisses these additional distinctions, asserting without any explanation that "neither is relevant." Opp'n 32. To the contrary, these distinctions would be dispositive here. *Coleman* did not present any federal separation-of-powers concerns, and the Court found any state separation-of-powers concerns to have been addressed by the state court's decision to entertain the suit. 307 U.S. at 446. Under the federal Constitution, however, the power to sue to enforce federal law is reserved to Executive officials. *See Bowsher*, 478 U.S. at 733-34.

emphasized the narrowness of the holding in *Coleman*, and clarified that a legislator could claim an injury from the alleged "nullification" of his or her vote, if at all, only where the claim concerned the proper recording of the result of legislative action. *See Campbell*, 203 F.3d at 22. The House does not assert any such claim here, and thus neither *Coleman* nor *Raines* (quoted accurately) offers it any assistance in its unfounded claim to standing.

2. The House also relies heavily on *U.S. House of Representatives v. U.S. Department of Commerce*, 11 F. Supp. 2d 76 (D.D.C. 1998), *appeal dismissed for want of a substantial federal question*, 525 U.S. 316 (1999) ("*Census Case*"). The House asserts that the *Census Case* stands for the principle that a legislative plaintiff may sue for redress of an "institutional injury amounting to vote nullification." Opp'n 31; *see also* Opp'n 23, 30, 36, 37. That case does not remotely stand for this principle; instead, the court expressly rejected any such claim of legislative standing.

In the *Census Case*, the House challenged the constitutionality of the Census Bureau's use of statistical sampling procedures to determine the allocation of House seats among the states. The district court held that the House had standing because it was entitled to information (specifically, an accurate accounting of the census) that the Executive Branch had withheld, and because the House's interest in its own lawful composition would be threatened if House seats were misallocated. 11 F. Supp. 2d at 85-86. On direct review, the Supreme Court resolved the merits question in a companion case brought by private parties. Rather than deciding the question of the House's standing, the Court dismissed the appeal for want of a substantial federal question. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 344 (1999).

Far from endorsing the principle for which the House now cites it, the district court instead took care to avoid "the specter of 'general legislative standing' based upon claims that the Executive Branch is misinterpreting a statute or the Constitution":

> In concluding that the House of Representatives has pleaded a legally cognizable injury and satisfied Article III, the specter of "general legislative standing" based upon claims that the Executive Branch is misinterpreting a statute or the Constitution is not raised. This is because the vast majority of legislation does not affect a legislature or a legislator in a concrete and particularized manner, and in a manner distinct from the general public. Only in an extremely rare case could a house of Congress claim that existing law, as interpreted and implemented by the Executive Branch, injures that house in a matter that satisfies Article III's rigorous demands. However, because the Executive's interpretation of existing law and the Constitution here affects the House's statutory right to receive information and ultimately will affect its composition, this suit is that extremely rare case.

11 F. Supp. 2d at 89-90. In the defendants' view, the theory of standing that the district court adopted in the *Census Case*, which accorded standing to the House to litigate a dispute over its own composition, is incompatible with Article III and the separation of powers under the Constitution. That theory, in any event, is inapplicable here. The House does not claim here to be disputing the interpretation of a law that affects it directly in a manner distinct from the general public. It therefore cannot claim standing under the reasoning of the district court in the *Census Case*.[3]

3. The House, accordingly, is unable to locate any case law that could support its novel claim of legislative standing. It instead attempts to distinguish *Raines* and other authorities by

[3] The House also relies on *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972). Opp'n 36. In that case, the state senate was held to have standing to litigate the question of its own lawful composition. 406 U.S. at 194. This case, however, involves the federal Legislature and federal separation-of-powers barriers to suit, and there is in any event no question here of the lawful composition of the House, or of the allocation of its seats among the states.

reasoning that, even if an individual member of Congress would lack standing under a "vote nullification" theory, a House of Congress could still establish such standing. It claims that *Raines* "recognized the 'importance'" of this distinction. Opp'n 32 n.19 (quoting *Raines*, 521 U.S. at 829). To the contrary, *Raines* does not stand for the proposition that one or both chambers of the Legislature would have standing to litigate with the Executive Branch over the meaning of federal law. Instead, the rationale of *Raines* precludes legislative plaintiffs from suing to dispute the implementation of federal law, whether such a suit is brought by individual legislators or by one or both of the houses of Congress.

As an initial matter, the House is incorrect in its claim that the *Raines* plaintiffs lacked a Congressional grant of authority for their suit. To the contrary, Congress had enacted a statutory grant of authority for the legislator plaintiffs in *Raines* to bring their suit. The Supreme Court recognized that this statutory grant removed any prudential concerns regarding the legislators' standing, but nonetheless reasoned that the Article III requirements for standing remained unchanged, and that the legislator plaintiffs could not assert the legally cognizable injury that is required for constitutional standing. *Raines*, 521 U.S. at 820 n.3.

More to the point, the logic of *Raines* leaves no more room for a "nullification" claim brought by one or both Houses of Congress than it does for such a claim brought by individual legislators. As Justice Scalia recently explained, the "reasoning" of *Raines* has "decide[d] this issue." *United States v. Windsor*, 133 S. Ct. 2675, 2704 (2013) (Scalia, J., dissenting).

> The opinion [in *Raines*] spends three pages discussing famous, decades-long disputes between the President and Congress — regarding congressional power to forbid the Presidential removal of executive officers, regarding the legislative veto, regarding congressional appointment of executive officers, and regarding the pocket veto — 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. But it does not, and never has ….

Id. at 2704 (Scalia, J., dissenting). The House's theory in this case cannot be squared with the historical discussion in *Raines*. A claim of "the impairment of a branch's powers alone" does not state a claim of a legally cognizable injury, whether such a claim is brought by the Legislative Branch or by one of its members. *Id.*; *see Raines,* 521 U.S. at 826 (rejecting theory that suit could be brought by legislators "on the basis of claimed injury to official authority or power").

B. The House Does Not Allege a Legally Cognizable Injury by Claiming that It Has Been "Divested" of "Core Article I Functions"

1. In an attempt to bolster its claim to standing under its "vote nullification" theory, the House resorts to alarmist and unfounded rhetoric. It asserts that it must be accorded standing here to protect nothing less than "the continued viability of the separation of powers doctrine." Opp'n 23. In the House's telling, if its complaint were to be dismissed, the Executive Branch would be emboldened to ignore federal law on a widespread basis. This turn of events would "strip[] the House of its constitutional function of voting affirmatively to appropriate public funds," Opp'n 25, would deprive the House of "its power of the purse to check the Executive," Opp'n 28, and would "seriously distort the balance of powers between the political branches." Opp'n 22. In short, the House warns, this "divest[iture]" of legislative power would be "so enormously damaging to the House as an institution that it is impossible to overstate." Opp'n 25.

The House does not improve its claim to standing by resorting to such rhetoric or engaging in such wild speculation. As the Court explained in *Raines,* Article III standing may

not be asserted on the basis of a generalized claim of "the abstract dilution of institutional legislative power." *Raines*, 521 U.S. at 826. The House's conjecture that conflict will arise between the Branches in the future if its claim is not adjudicated here only underscores that the House lacks the sort of concrete, here-and-now injury that is necessary to establish an Article III injury-in-fact. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (injury-in-fact must be "actual or imminent rather than conjectural or hypothetical").

It is also noteworthy that the House's rhetoric concerning a claimed constitutional crisis is entirely mismatched to the allegations that are actually at issue in this case. The House's disagreement with the Executive Branch concerns whether a standing permanent appropriation provides funds for only some, or for all, of the payments that are made under the Affordable Care Act's mandatory payment program for subsidizing the purchase of health insurance. That is, the defendants do not in any way assert that they "are free to pass out public funds in the absence of any constitutionally-enacted appropriation," Opp'n 26; an appropriation is in place, and the House and the Executive Branch simply disagree over its scope. Likewise, the House's claims concerning the Affordable Care Act's large-employer tax involve a dispute over the scope of the Treasury Department's authority under the Internal Revenue Code to provide for transitional relief for newly-enacted tax legislation. In short, the House has described two relatively straight-forward differences of opinion between the Legislative and Executive Branches as to the interpretation of federal law. These are differences of opinion that occur with some regularity under our system of separation of powers, and they hardly forebode the destruction of "our tradition of separate institutions acting as checks and balances on one another." Opp'n 29. The House's difference of opinion with the Executive Branch over the

implementation of federal law states only a generalized grievance that is shared with any member of the public who believes that the Executive is misapplying the law, and such a generalized grievance cannot support Article III standing. *See Daughtrey v. Carter*, 584 F.2d 1050, 1057 (D.C. Cir. 1978) ("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.").

2. In any event, Congress does not require invocation of the Judiciary in order to exert influence upon the Executive Branch. It has a wide range of non-judicial tools that it can use to respond to the Executive Branch, if it believes that the Administration has misapplied existing federal law. It could, for example, repeal or amend the terms of regulatory authority that it has conferred on the Executive Branch. *See Chenoweth v. Clinton*, 181 F.3d 112, 116 (D.C. Cir. 1999). It could withhold appropriations, or amend the terms of appropriations statutes. *See Raines*, 521 U.S. at 824; *Campbell*, 203 F.3d at 23. It could also decline to enact legislation preferred by the Administration. U.S. Const., art. I, § 7, cl. 2. Under the Congressional Review Act, it may review regulations adopted by federal agencies, and may bicamerally adopt joint resolutions of disapproval of those regulations. 5 U.S.C. §§ 801-08. In short, "Congress has a broad range of legislative authority it can use" to influence the implementation of federal law, "and therefore under *Raines* congressmen may not challenge [the Executive Branch's implementation of federal law] in federal court." *Campbell*, 203 F.3d at 23. *See also Harrington v. Bush*, 553 F.2d 190, 213 (D.C. Cir. 1977) (holding that "all the traditional

alternatives related to the 'power of the purse' remain intact" when considering an agency's alleged misuse of appropriations).[4]

The House cannot reasonably dispute that it has these tools at its disposal. At bottom, its complaint is not that it lacks the means to assert its prerogatives in the political process. Instead, the House simply would prefer to "enlist the aid of the federal judiciary," Opp'n 1, because it finds the political process to be cumbersome and unwieldy. As the House puts the matter, it would be inconvenient for it to rely solely on the "fortunes of politics" in order to assert its interpretation of existing federal law. Opp'n 23. But "[u]nimaginable evil this is not. Our system is *designed* for confrontation." *Windsor*, 133 S. Ct. at 2704 (Scalia, J., dissenting) (emphasis in original). *See also Ange v. Bush*, 752 F. Supp. 509, 514 (D.D.C. 1990) ("The court does not suggest that any of the above options are appropriate or necessary. Nor does the court suggest that any of them would be politically popular for legislators."). *Cf. NLRB v. Noel Canning*, 134 S. Ct. 2550, 2577 (2014) ("friction between the branches is an inevitable consequence of our constitutional structure").

3. The House asserts that it must be accorded standing here because "there is no reason to believe anyone would be injured for Article III purposes by defendants' giveaways of public funds." Opp'n 3. But "the assumption that if [plaintiffs] have no standing to sue, no one

[4] The defendants noted in their opening brief that *Harrington* forecloses the House's claim to standing here. The House entirely ignores *Harrington*, except to assert that the case is distinguishable because it involved "individual legislators." Opp'n 38 n.21. The reasoning of *Harrington* cannot be limited on that ground; the court recited that neither "the lawmaking power *of Congress* or appellant" was "invaded" by the Executive's alleged misuse of appropriations. 553 F.2d at 213 (emphasis added).

would have standing, is not a reason to find standing." *Clapper v. Amnesty Int'l USA, Inc.*, 133 S. Ct. 1138, 1154 (2013) (internal quotation and alterations omitted).

In any event, the House's accusation that the defendants "seek to eliminate any role for the Article III branch" in disputes over the interpretation of appropriations enactments, Opp'n 21, is misplaced. There are numerous cases in which a party from outside the federal government has had standing to litigate the meaning of appropriations statutes, and courts have proceeded to authoritatively interpret those statutes. *See, e.g., Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2193-94 (2012) (permanent appropriation in Judgment Fund must be used for mandatory payments if another appropriation is unavailable); *TVA v. Hill*, 437 U.S. 153, 175 (1978) (appropriations for TVA were subject to limitations in Endangered Species Act); *National Shooting Sports Found. v. Jones*, 716 F.3d 200, 213 (D.C. Cir. 2013) (construing rider in Consolidated and Further Continuing Appropriations Act of 2012); *Sherley v. Sebelius*, 610 F.3d 69, 73-74 (D.C. Cir. 2010) (competitor of grantee had standing to raise alleged violation of condition on use of appropriations for NIH grants). In short, the ordinary principles of Article III standing provide that the federal courts may interpret appropriation statutes in cases that are properly brought before them, and there is no need to invent a special doctrine of Article III standing for the House here.

C. The House Does Not Allege a Legally Cognizable Injury by Asserting that Its Investigatory Power Has Been Infringed

As a last resort, the House contends that it has standing to challenge what it alleges to be an infringement on its investigatory power. Opp'n 29-31. As it puts the matter, if it lacks standing to litigate the meaning of existing federal law in this case, it will lose power relative to

the Executive Branch, and the Administration would be less likely to cooperate in the future with Congressional oversight efforts. Because several district court decisions have held that a house of Congress would suffer an Article III injury-in-fact if the Executive Branch does not comply with a Congressional subpoena, the House reasons, it necessarily follows that a Congressional plaintiff would have standing to seek to protect its ability to use the tool of appropriations to ensure Executive cooperation with future subpoenas. Opp'n 31.

The House's conclusion does not follow from its premise.[5] Again, a plaintiff does not allege an Article III injury-in-fact by speculating that adverse consequences may happen in the future. *See Lujan*, 504 U.S. at 560-61. Thus, even if the House could proceed on its "nullification" theory — and it may not, for the reasons explained above — it could not support its theory by surmising that, in the future, legislative power might as a general matter be diminished in some way, relative to executive power. Such a "wholly abstract" claim of an "institutional injury" is far too speculative to support any claim of legislative standing. *Raines*, 521 U.S. at 829.

For this reason, even the decisions that have accorded a House of Congress standing to litigate disputes over the enforcement of subpoenas have limited their reasoning to particularized disputes over specific Congressional requests for information, rather than reasoning that a Congressional plaintiff would have standing to litigate any question that might touch upon its

[5] Nor is its premise correct. We respectfully disagree with the reasoning of the cases that have accorded a house of Congress standing to litigate the enforceability of a subpoena to the Executive Branch. The matter need not be revisited here, however, because even the (incorrect) reasoning of those cases could not support the materially different theory that the House advances here.

oversight authority. *See Committee on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 70 (D.D.C. 2008), *appeal dismissed*, No. 08-5357, 2009 WL 3568649 (D.C. Cir. 2009) (holding that a House committee's "conjectural or hypothetical" reliance on its general interest in oversight was "too vague and amorphous to confer standing"); *Committee on Oversight and Gov't Reform, U.S. House of Representatives v. Holder*, 979 F. Supp. 2d 1, 16 (D.D.C. 2013) (same). *See also Walker v. Cheney*, 230 F. Supp. 2d 51, 67-68 (D.D.C. 2002) ("if it is these general interests in lawmaking and oversight that are allegedly impaired by defendant's failure to produce the requested records, then the possible injury to Congress is too vague and amorphous to confer standing").

In short, it does not follow from the Congressional oversight power that the House of Representatives also has the power to enforce federal law, or that it may invoke the assistance of the judiciary to vindicate that alleged power. *See Walker*, 230 F. Supp. 2d at 72 (distinguishing claims of Congressional standing to compel compliance with subpoena from claims of "alleged injury to legislative power more generally," which are foreclosed by *Raines*); *see also Miers*, 558 F. Supp. 2d at 75 ("although Congress does not have the authority to enforce the laws of the nation, it does have the 'power of inquiry'").

Because the House does not have Article III standing to litigate its difference of opinion with the Executive Branch over the interpretation of existing federal law, under a "nullification" theory or otherwise, its complaint should be dismissed for lack of jurisdiction.

II. The House Lacks a Valid Cause of Action

Even if the House did have standing to ask the Court to decide this abstract dispute regarding the interpretation of federal law, it would need also to identify some source of law that

provides it with a cause of action to pursue this claim. A "cause of action is a necessary element" of any claim. *Davis v. Passman*, 442 U.S. 228, 239 (1979). The House asserts that its cause of action arises under the Declaratory Judgment Act, the Administrative Procedure Act, or directly under the Constitution itself. It is wrong on all three counts.

A. The Declaratory Judgment Act Does Not Create a Cause of Action that Is Not Provided for under Other Law

As the defendants showed in their opening brief, it is black-letter law that the Declaratory Judgment Act, 28 U.S.C. § 2201, does not create an independent cause of action; instead, a plaintiff must identify some other source of law that gives it authority to sue. *See C&E Servs., Inc. of Wash. v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 202 (D.C. Cir. 2002). The House acknowledges that the Declaratory Judgment Act is not an independent source of *jurisdiction*, but reasons, by negative inference, that the statute must be read to provide an independent *cause of action*. (Opp'n 39-40.) This conclusion does not follow. Instead, the Declaratory Judgment Act neither independently vests courts with jurisdiction nor "provide[s] a cause of action." *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011); *see also Metz v. BAE Sys. Tech. Solutions & Servs. Inc.*, 774 F.3d 18, 25 n.8 (D.C. Cir. 2014). Thus — as the defendants explained in their opening brief and as the House fails to dispute — the Act's "'operation … is procedural only.'" *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 138 (2007) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)).[6] The House must identify some

[6] The House cites *Haworth* as holding that the Declaratory Judgment Act has substantive effect, asserting that the Act creates a cause of action under federal law where a "traditional cause of action" is not otherwise available. Opp'n 40. This is incorrect. *Haworth* involved an anticipatory suit, brought in diversity, over the potential enforcement of an insurance contract.

other source of law, then, that accords it the right to bring these claims in a federal court. It cannot do so.

B. The House Lacks a Cause of Action under the APA

The House alternatively asserts that it has a cause of action under the APA, which, in the House's telling, creates a cause of action "for all parties — including the House — aggrieved by agency conduct." (Opp'n 42.) This is incorrect. The APA instead provides a cause of action for "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. The House does not, and could not, contend that it has suffered "legal wrong" within the meaning of the APA. Nor may the House assert that it is "adversely affected or aggrieved by agency action" under 5 U.S.C. § 702. This phrase "is a term of art used in many statutes to designate those who have standing to challenge or appeal an agency decision, within the agency or before the courts." *Director, Office of Workers' Compensation Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co*., 514 U.S. 122, 126 (1995).[7] This term of art "does not

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The underlying cause of action arose under that contract as a matter of state law. 300 U.S. at 243-44. In contrast, a similar state-law contract action between non-diverse parties could not be brought in federal court under the Declaratory Judgment Act, because the only substantive cause of action at stake in that case would arise under state law, not federal law. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673 (1950) (noting that the Act does not authorize claims, in non-diversity cases, for the "vast current of litigation indubitably arising under State law, in the sense that the right to be vindicated was State-created").

[7] The House has relied on *Newport News* to represent to the Supreme Court that it "has no authority to file suit under the myriad of general laws authorizing aggrieved persons to challenge agency action" and thus it could not sue to attempt "to impinge upon the Executive's general authority to execute and enforce the law." Brief for U.S. House of Representatives at 22, *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999) (No. 98-404),

refer to an agency acting in its governmental capacity," and so a governmental entity may not assert that it is a "person" that is "aggrieved" for the purpose of the APA simply by reciting "the mere existence and impairment of [a] governmental interest." *Id.* at 130. Instead, the APA incorporates "the universal assumption that 'person adversely affected or aggrieved' leaves private interests (even those favored by public policy) to be litigated by private parties." *Id.* at 132. The House here alleges only an injury to a governmental interest — that is, its asserted interest in directing that the Executive follow its interpretation of previously-enacted legislation — and it therefore is not "aggrieved by agency action" within the meaning of 5 U.S.C. § 702. It accordingly lacks a cause of action under the APA.

C. The House Lacks an Implied Cause of Action under the Constitution

Unable to identify any statutory basis for its suit, the House asks this Court to create a new implied cause of action for it under the authority of the Constitution itself. But "implied causes of action are disfavored." *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *see also Klay v. Panetta*, 758 F.3d 369, 373 (D.C. Cir. 2014). Indeed, "[t]here is even greater reason" for a court to decline to find implied rights of action "in the constitutional field." *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring). *See also Armstrong v. Exceptional Child Ctr., Inc.*, --- S. Ct. ---, 2015 WL 1419423, at *3 (Mar. 31, 2015) (noting that the Supremacy Clause

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1998 WL 767637 at *22. *See also id*. at *17 (disclaiming the possibility that the House would ever attempt "to afford itself broad standing to challenge the lawfulness of Executive conduct").

does not create a cause of action, as it "is silent regarding who may enforce federal laws in court, and in what circumstances they may do so").

The House offers no rationale as to why the Constitution can be read to implicitly give it the right to sue the Executive Branch to manage the implementation of federal law. To the contrary, as discussed above, it is a foundational Constitutional principle that the House does not play any direct role in the implementation of law. The "responsibility for conducting civil litigation in the courts of the United States for vindicating public rights … may be discharged only by persons who are 'Officers of the United States[.]'" *Buckley v. Valeo*, 424 U.S. 1, 140 (1976). *See also Bowsher v. Synar*, 478 U.S. at 733-34 ("Once Congress makes its choice in enacting legislation, its participation ends."); *Walker v. Cheney*, 230 F. Supp. 2d at 73 ("the role of the Article III courts has not historically involved adjudication of disputes between Congress and the Executive Branch based on claimed injury to official authority or power"). Nowhere in its opposition brief does the House even acknowledge these fundamental separation-of-powers principles that preclude it from "conducting civil litigation … for vindicating public rights," *Buckley*, 424 U.S. at 140, let alone explain how its claim could possibly be consistent with these principles.

Buckley and *Bowsher* are fatal to the House's request for this Court to create an implied cause of action. Whatever the scope of a federal court's authority to create a new cause of action may be, that authority surely does not extend to a power to create a cause of action that is foreclosed under the constitutional structure of separation of powers. And, as the House is unable to identify either an explicit or implicit source of a cause of action for its claims, its complaint must therefore be dismissed.

III. Alternatively, This Court Should Exercise Its Discretion to Refrain from Adjudicating the House's Complaint

There is no absolute right to a declaratory judgment in federal court. The Declaratory Judgment Act instead provides that courts "*may* declare the rights and other legal relations of any interested party seeking" such a judgment and that "[f]urther necessary or proper relief based on a declaratory judgment or decree *may* be granted." 28 U.S.C. §§ 2201(a), 2202 (emphases added). Accordingly, "[a] declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest." *Eccles v. Peoples Bank of Lakewood Vill.*, 333 U.S. 426, 431 (1948); *see also Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995).

This principle of restraint holds particular force in cases concerning legislative plaintiffs. The D.C. Circuit — before *Raines v. Byrd* overruled its doctrine of legislative standing — frequently exercised its discretion to decline to decide suits filed by legislators attempting "to bring … essentially political dispute[s] into a judicial forum." *Chenoweth*, 181 F.3d at 114. Thus, even where legislators had standing to sue under the D.C. Circuit's prior (and now-overruled) case law, their standing only "got them into court just long enough to have their case dismissed because of the separation of powers problems it created." *Id*. at 115; *see also Vander Jagt v. O'Neill*, 699 F.2d 1166, 1174-75 (D.C. Cir. 1983) (exercising "remedial discretion" to dismiss case out of "proper respect for the political branches and a disinclination to intervene unnecessarily in their disputes") (internal quotation omitted). If the House has both standing and a cause of action to pursue its claims here — and to be clear, it has neither — this Court should nonetheless exercise its discretion to dismiss the complaint and to direct the House

to seek a "political resolution" to its grievances with the Executive Branch. *Chenoweth*, 181 F.3d at 116.

The House asserts that the D.C. Circuit's doctrine of remedial discretion was "only ever applied to suits brought by individual legislators" and that "the doctrine has no vitality after *Raines*." Opp'n 45. The first point is true only because no chamber of Congress has ever before attempted the tactic that the House tries here, namely, the use of a civil suit as a vehicle to direct the manner in which the Executive implements federal law. As to the second point, the defendants of course agree that this Circuit's doctrine of remedial discretion is now superfluous in light of *Raines v. Byrd*, because no claim of legislative standing could be reconciled with the holding and reasoning of that case. But the point is that, even if the House could somehow show standing to litigate with the Executive over the meaning of existing federal law, this Court should nonetheless exercises its discretionary power to direct the House instead to its political remedies. *See Humphrey v. Baker*, 848 F.2d 211, 214 (D.C. Cir. 1988).

Conclusion

For the foregoing reasons and for the reasons stated in their opening brief, the defendants respectfully request that the complaint be dismissed for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure and for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of those rules.

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Respectfully submitted,

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