[SCHEDULED FOR EN BANC ORAL ARGUMENT ON APRIL 28, 2020]

No. 19-5176

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

UNITED STATES HOUSE OF REPRESENTATIVES,
Appellant,

v.

STEVEN T. MNUCHIN,
in his official capacity as Secretary of the United States Department of the Treasury, et al.,
Appellees.

On Appeal from the United States District Court for the District of Columbia
(Hon. Trevor N. McFadden, United States District Judge)

SUPPLEMENTAL BRIEF OF THE UNITED STATES HOUSE OF REPRESENTATIVES

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Cases

* Authorities upon which we chiefly rely are marked with asterisks.

Constitution and Statutes

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GLOSSARY

DOJ	Department of Justice
DOJ Br.	Brief for Appellees (Dec. 23, 2019)
House	United States House of Representatives
Op. Br.	Opening Brief of the House (Oct. 23, 2019)
Reply Br.	Reply Brief of the House (Jan. 27, 2020)
Senate	United States Senate
Tr.	Transcript of Oral Argument (Feb. 18, 2020)

INTRODUCTION

The United States House of Representatives files this supplemental brief in response to the Court's order granting rehearing en banc and calling for additional briefing on whether the House has Article III standing to bring this suit. The arguments in this brief summarize and supplement the arguments in our opening and reply briefs before the panel. Throughout this brief, we refer the Court to arguments made at greater length in those previous filings.

As explained below and in our prior briefs, the House has standing here to sue Executive Branch officials and their Departments for violating the Appropriations Clause of the Constitution by spending billions of dollars of federal funds to build a southern border wall even though those funds were *not* appropriated by Congress.

* * *

After the longest federal government shutdown in American history—precipitated by a dispute between the President and Congress about border-wall spending—the political branches in early 2019 reached a compromise. President Trump had requested $5 billion to build a wall along the southern border of the United States. In response, Congress enacted and the President signed into law an appropriation of only $1.375 billion for border-wall construction. The President immediately overrode the terms of this compromise, deciding to spend billions more than Congress had appropriated for border-wall construction. As the then-Acting

White House Chief of Staff defiantly announced, the Administration was building the wall "with or without Congress."[1]

The Administration's decision to spend these funds without a valid Congressional appropriation directly contravenes the Appropriations Clause, which provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. The expenditure of billions of dollars in excess of the $1.375 billion appropriated for border-wall construction flouts the Constitution's command that "the expenditure of public funds is proper *only when authorized by Congress*." *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (plurality) (emphasis added).

As explained in our opening and reply briefs, the House has standing to challenge the Executive's violation of the Appropriations Clause. Unlike other constitutional provisions *empowering* Congress to enact legislation through bicameralism and presentment, this Clause *prohibits* the Executive from spending any funds without an appropriation passed by the House and Senate. And the Clause empowers either chamber to prevent the Executive from spending funds—even funds that are otherwise thought to be necessary for the operation of government. Accordingly, the House and the Senate each independently suffers a cognizable

[1] Andrew O'Reilly, *Mulvaney Says Border Wall Will Get Built, 'With or Without' Funding from Congress*, Fox News (Feb. 10, 2019), https://perma.cc/97EA-VXKH.

institutional injury when the Executive spends funds without a Congressional appropriation.

Contrary to the Administration's claim, holding that the House lacks standing here would seriously jeopardize rather than protect the separation-of-powers principles that are the bedrock of our Constitution. In this instance, the Legislative and Executive Branches had already engaged in a political battle of the most extreme nature—shutting down the government at immense economic and social cost. By necessity, the political branches eventually reached a compromise that resulted in a deliberately limited appropriation for border-wall construction. The House had used one of its most potent political weapons and forced the President to yield, only to see him defy that limit.

A refusal by the Judiciary to recognize a remedy in court for this egregious violation of the Appropriations Clause would upend the balance of powers struck by the Framers when they gave the power of the purse to *each* chamber of Congress. The Framers recognized that this was a crucial way to restrict the Executive because the power of the purse is an essential check on potential Executive tyranny. This power has its origins in the limitations placed on the British monarchy following the Glorious Revolution of 1688—limitations that were well known and revered by the Framers. *See* Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* 4-5, 51-52, 56-57 (2017).

Although the Administration principally maintains that the House cannot bring this suit without the Senate's concurrence, the Administration staked out an extreme position at argument, asserting that both Houses of Congress acting together *never* have standing to sue the Executive to remedy an institutional injury. That extraordinary position is unsupported by the text of the Constitution and is refuted by longstanding precedent adjudicating interbranch disputes. Accepting the Administration's unsupported theory against legislative standing would countenance an Executive power grab of the House's committed constitutional powers and responsibilities.

The stakes in this case are immense. This Court is faced with expansive claims propounded by the Executive in a historically unprecedented attempt to circumvent the Appropriations Clause.

ARGUMENT

I. THE HOUSE HAS ARTICLE III STANDING TO CHALLENGE A VIOLATION OF THE APPROPRIATIONS CLAUSE

A. The House Suffers A Cognizable Institutional Injury When The Executive Spends Funds Beyond An Appropriation

1. The Appropriations Clause grants Congress exclusive power over the purse and operates as a "bulwark of the Constitution's separation of powers among the three branches of the National Government." *U.S. Dep't of the Navy v. FLRA*, 665 F.3d 1339, 1346 (D.C. Cir. 2012). Without that authority, "the executive would possess an unbounded power over the public purse of the nation; and might apply all

its monied resources at his pleasure." *Id.* (quoting 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1342, at 213-14 (1833)).

The Supreme Court has recently explained that, for a suit by a legislative entity to be cognizable in federal court, "the body seeking to litigate" must be "the body to which the relevant constitutional provision allegedly assigned [the impugned] authority." *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019). That condition is satisfied here because the Appropriations Clause vests each House of Congress with independent institutional power. Because each chamber has this independent power, each chamber has standing to sue to obtain a judicial remedy in those rare instances when the Executive—as in this case—encroaches on that power. As explained in our opening and reply briefs, three interrelated features of the Appropriations Clause make this conclusion clear.

First, the Appropriations Clause does not merely give Congress the power to appropriate funds; it also operates as an express textual *prohibition* on Executive Branch spending absent authorization by each House of Congress. Under the Appropriations Clause, "all uses of appropriated funds must be affirmatively approved by Congress; the mere absence of a prohibition is not sufficient." *Dep't of the Navy*, 665 F.3d at 1348; *see also MacCollom*, 426 U.S. at 321 (plurality) (the Appropriations Clause provides that "the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress"). As the Supreme Court has emphasized, appropriations are

not to be implied by the federal courts; Congressional appropriations must be clearly expressed in the relevant statutes. *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424, 430 (1990) ("Money may be paid out only through an appropriation made by law[.]"); *see also* 31 U.S.C. § 1301(d) ("A law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states that an appropriation is made or that such a contract may be made.").

Congress's inaction on appropriations—its refusal or simple failure to appropriate funds for a specific purpose—thus has independent legal force that is absent when Congress declines to pass other legislation. The Appropriations Clause *expressly prohibits* any government entity from acting without an appropriation passed by both Houses of Congress.

Second, because valid appropriations require that both Houses agree to all expenditures, the Clause affords *each chamber* of Congress a veto over both the Executive and each other with respect to federal spending. The Framers explained that the federal purse has "two strings, one of which [is] in the hands of the H. of Reps.," and "*[b]oth houses* must concur in untying" them. 2 *The Records of the Federal Convention of 1787*, at 275 (Max Farrand ed., 1911) (2 Farrand) (James Wilson) (emphasis added). One chamber's refusal to approve an appropriation suffices to prevent the Executive from spending any funds.

Third, appropriations are the *sine qua non* of all government operations; the Executive must spend money to function. As the facts of this case illustrate, each chamber's power to limit the spending necessary to the federal government's operations carries with it the power to determine policies and outcomes. Unlike the failure to pass legislation, the failure to reach agreement on appropriations brings the federal government to a standstill. *See* Op. Br. 19-32; Reply Br. 5-10.

The Framers understood—and indeed, intended—that each House of Congress would exercise independent power over appropriations. They characterized the two-stringed power of the purse "as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." *The Federalist No. 58* (James Madison). Indeed, the Appropriations Clause was adopted as part of the grand compromise that led to equal representation of the large and small states in the Senate and the Senate's equal role in the appropriations process. *See* Reply Br. 8-9. The debates surrounding the evolution of the Appropriations Clause reveal the Framers' focus on each chamber's *independent* ability to control appropriations. *See, e.g.*, 2 Farrand at 276 ("Why should [the Senate] be restrained from checking the extravagance of the other House?") (James Madison). And because the Executive requires funds to function, the independent role of each chamber means that each can check the Executive and that each suffers an

institutional injury when the Executive defies the Appropriations Clause and spends funds for a particular purpose without an appropriation.

2. The Supreme Court has held that each House of Congress has standing to vindicate institutional rights like those the Appropriations Clause assigns to the House. In *INS v. Chadha*, both the plaintiff and the Executive agreed that the one-House veto statute was unconstitutional. *See* 462 U.S. 919, 931 (1983). The statute was, however, defended by the House and the Senate, which had each separately intervened to defend it. *See id.* at 930 & n.5. The Supreme Court held that there was a "justiciable case or controversy under Art. III"—even though the Executive agreed with the plaintiff that the statute was unconstitutional—due to "the presence of the two Houses of Congress as adverse parties" to the plaintiff. *Id.* at 931 n.6. And the Court made clear that "*[b]oth Houses*" were independently proper parties. *Id.* at 930 n.5 (emphasis added). Each chamber had standing to defend an institutional power—the power to exercise a one-House veto—that the statute conferred on each House independently.

As Justice Scalia later explained, the Court in *Chadha* concluded that the House and Senate had standing to intervene because both "the House and Senate were threatened with destruction of what they claimed to be one of their institutional powers." *United States v. Windsor*, 570 U.S. 744, 783 (2013) (Scalia, J., dissenting); *see also id.* at 758 (majority opinion) (not disputing this feature of Justice Scalia's reading

of *Chadha*); *id.* at 804-07 (Alito, J., dissenting) (taking an even broader view of Congressional standing).

Moreover, in *Bethune-Hill*, after noting that there was some doubt that *Chadha*'s use of the term "proper parties" meant "to refer to standing," the Court clarified that, "[i]n any event, the statute at issue in *Chadha* granted each Chamber of Congress an ongoing power—to veto certain Executive Branch decisions—that each House could exercise independent of any other body." 139 S. Ct. at 1954 n.5. The Court in *Bethune-Hill* thus confirmed that a single chamber of Congress has standing where, as here, it seeks to protect an institutional power committed to it independent of the other chamber.

The same reasoning applies to this case: The Appropriations Clause assigns *each* House of Congress an *ongoing* power to prevent spending, and each House of Congress can exercise that power independent of the other. *See U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 71 n.21 (D.D.C. 2015) (holding that the injury inflicted by an Appropriations Clause violation, "although arguably suffered by the House and Senate alike, is sufficiently concentrated on the House to give it independent standing to sue"). Indeed, the House's standing is even clearer here than it was in *Chadha*. The House does not seek to vindicate a single-chamber veto power conferred by statute, but by the Constitution; and it does not seek to defend a statute, but to remedy a constitutional violation by the Executive.

For similar reasons, the House in this matter has suffered a cognizable injury under the "nullification" principle of *Coleman v. Miller*, 307 U.S. 433 (1939). There, the defendant state officials who favored a defeated constitutional amendment treated it as if it had been ratified, nullifying the votes of those who successfully opposed it, and the latter thus had standing to challenge in federal court the action of those officials. *Id.* at 438. Analogously here, the Administration has treated its defeated border-wall spending proposals as if they had been approved. This action effectively nullified the House's deliberate rejection of such spending after a lengthy political standoff. *See also Raines v. Byrd*, 521 U.S. 811, 823 (1997) (describing *Coleman* as holding 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").

The Administration's claim that other statutory provisions authorize its spending does not alter this analysis. Even if those provisions were valid defenses to the House's claims on the merits—and they are not (*see* Op. Br. 38-53)—that would not be a basis for denying standing. In this suit, the House maintains that the Administration violated the Appropriations Clause by ignoring the House's decision to limit fiscal year 2019 spending on border-wall construction to $1.375 billion.[2]

[2] The House likewise limited fiscal year 2020 spending on border-wall construction to $1.375 billion, *see* Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, § 209(a)(1), 133 Stat. 2317, 2511, and the Administration has again announced

Because this appeal arises at the motion to dismiss stage, the Court must assume that the House's constitutional arguments are correct when assessing the House's standing. *See In re Navy Chaplaincy*, 534 F.3d 756, 760 (D.C. Cir. 2008) ("In reviewing the standing question, we must … assume that on the merits the plaintiffs would be successful in their claims." (quotation marks omitted)).

The House thus has standing regardless of any conclusion this Court might eventually reach on the Administration's merits defenses. The House, moreover, did not convert its claim of a constitutional violation into a statutory claim when it anticipated the Administration's statutory defenses in its complaint. *Cf. Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 14 (1983) (a plaintiff who anticipates a federal defense in its complaint does not convert its state-law claims into federal claims).

The Executive is spending money far beyond the $1.375 billion that Congress appropriated to resolve the political standoff on border-wall construction. The House maintains that this spending violates the Appropriations Clause and interferes with the House's institutional right to exercise a veto in the appropriations process. The House therefore has standing to bring this suit under the exceptional circumstances created by this Administration's violation of the Appropriations Clause.

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its plans to defy that limitation by diverting $3.831 billion appropriated for other purposes, *see* Notice Regarding Authorization of Additional Border Projects Pursuant to 10 U.S.C. § 284, at 2, *California v. Trump*, No. 4:19-cv-872 (N.D. Cal. Feb. 13, 2020), ECF No. 271.

B. *Bethune-Hill* Supports The House's Standing To Vindicate Its Appropriations Authority

The Administration asserts that the Supreme Court's decision in *Bethune-Hill* prohibits the House's suit. *See* DOJ Br. 19-24. But the Administration's reliance on *Bethune-Hill* is misplaced. There, the Attorney General of Virginia declined to defend the constitutionality of a state redistricting plan after a federal court invalidated the plan as impermissible racial gerrymandering. 139 S. Ct. at 1949-50. The Virginia House of Delegates—one chamber of the bicameral legislature that had passed the plan—sought to appeal. *Id.* at 1950-51. The Court first examined the relevant state statutes, which vested "responsibility for representing the State's interests in civil litigation … exclusively with the State's Attorney General," *id.* at 1951, and found that the House of Delegates "lack[ed] authority to displace Virginia's Attorney General as representative of the State," *id.* at 1950. The Supreme Court further held that the House of Delegates lacked standing because it was seeking to vindicate an authority "belonging to the legislature as a whole"—the power over redistricting legislation. *Id.* at 1953-54.

Bethune-Hill stands for the proposition that one chamber of a bicameral state legislature lacks standing to vindicate a statute that it could not have enacted on its own. The House of Delegates in *Bethune-Hill* had no independent power to enact its redistricting plan; Senate agreement was required. *See id.* By declining to join the House of Delegates' suit, the Virginia Senate obtained the same result it could have

obtained by declining to join the House of Delegates in enacting the plan in the first place. Because only the full legislature had the power to enact the plan, the Supreme Court reasoned that only the full legislature had standing to appeal the invalidation of the plan. *See id.* at 1956.

For the reasons explained above, this case is different. The text, structure, design, and history of the Appropriations Clause effectuate the Framers' intent that each chamber serve as a check on Executive Branch spending, and that neither chamber be able to authorize spending over the other's objection. In this case, the House had the power together with the Senate to enact an appropriation of $1.375 billion for border-wall construction, *and also had* the power independent of the Senate to prevent the Executive from spending more than that amount. Accordingly, when the Executive spent more than the House agreed to appropriate, the House suffered an institutional injury.

Thus, unlike in *Bethune-Hill*, because the House has an independent veto power over appropriations, there is no "mismatch" between the alleged injury and the institution suing. *Id.* at 1953. Here, "the body seeking to litigate" is a "body to which the relevant constitutional provision allegedly assigned [the impugned] authority." *Id.* at 1953.

The Administration's argument before the panel ignored the unique nature of the Appropriations Clause. The Administration characterized the Clause as nothing more than an "example" of the "general rule" that the Executive may only act "within

the bounds of its statutory authority," noting that either chamber "can block any law." DOJ Br. 21-22; *see also* Tr. 69 (arguing that the Appropriations Clause "just refers to the general lawmaking power").

That argument fails to take account of the text of the Clause itself, which—unlike the other provisions of Article I empowering Congress to enact legislation—is an affirmative prohibition on the Executive, and bars spending except with the approval of each chamber. *See Dep't of the Navy*, 665 F.3d at 1348. Congress's decision not to enact legislation imposes no comparable prohibition on the Executive. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

On the Administration's theory, the Senate could as a practical matter permit Executive Branch spending on the border wall without the House's assent, by declining to join this suit challenging the Executive's unconstitutional spending. That would weaken the House's power over the purse—and nullify the Framers' understanding that "*[b]oth houses* must concur in untying" the federal purse strings, 2 Farrand at 275 (James Wilson) (emphasis added), and that each should therefore be able to "check[] the extravagance of the other," *id.* at 276 (James Madison). Any requirement that the full Congress must bring a constitutional claim for an Appropriations Clause violation would be wholly inconsistent with the Framers' intent in designing the Clause.

II. ARTICLE III DOES NOT PROHIBIT CONGRESS FROM SUING EXECUTIVE BRANCH OFFICIALS

Although it was unclear from its briefing, the Administration took an extreme position at the oral argument before the panel: Congress can never sue the Executive—no matter how blatant the violation and no matter whether both Houses join the suit. *See* Tr. 31-32, 40, 53-56. On this reasoning, the distinction the Administration draws under *Bethune-Hill* between a suit brought by one chamber and one brought by the full legislature is irrelevant. So too is the Administration's argument that Congress must deploy other political tools before suing.

The Administration's absolutist position reflects an unrecognizable understanding of Article III. Like the Supreme Court, this Court has recognized the ability of Congressional parties to invoke the judicial power in suits involving disputes with the Executive. *See United States v. Am. Tel. & Tel. Co.*, 551 F.2d 384, 385 (D.C. Cir. 1976); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 726 (D.C. Cir. 1974) (en banc). The Administration's efforts to evade this precedent are unpersuasive.

A. *Raines* Does Not Foreclose The House's Suit

According to the Administration, the "core reasoning of *Raines v. Byrd*," Tr. 32, precludes a suit by Congress against the Executive in all circumstances. But the Administration misreads *Raines* and ignores the Supreme Court's later instruction that the holding of *Raines* is limited in scope. A properly informed reading of *Raines* makes

clear that the dismissal there turned on considerations not applicable in this suit by the House to vindicate its Appropriations Clause power.

First, in *Raines*, there was a mismatch between the plaintiffs seeking to sue and the entity suffering the injury. *Raines* was brought by six *individual* Members of Congress to challenge the Line Item Veto Act, a statute that they claimed diminished *Congress's* power. The Court concluded that these plaintiffs "alleged no injury to themselves as individuals" as opposed to the body in which they served. 521 U.S. at 829. And the plaintiffs could not sue on behalf of Congress because they were not "authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose[d] their suit." *Id.*

As the Supreme Court later instructed, *Raines* held "specifically and only" that "six *individual Members* of Congress lacked standing" where they were not authorized by either chamber to sue. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664 (2015); *see also Bethune-Hill*, 139 S. Ct. at 1953 n.4 ("*Raines* held that individual Members of Congress lacked standing[.]"). Because the injury in *Raines* "scarcely zeroed in on any individual Member," none of the plaintiffs "could tenably claim a 'personal stake' in the suit." *Ariz. State Legislature*, 135 S. Ct. at 2664.

Here, by contrast, the full House, not individual Members, brought suit. Justice Souter, joined by Justice Ginsburg, explained in his *Raines* concurrence that it is "possible that the impairment of certain official powers may support standing for Congress, or one House thereof, to seek the aid of the Federal Judiciary." 521 U.S. at

831 n.2 (Souter, J., concurring). Accordingly, in the context of a suit by a state legislature, the Supreme Court recently held that "an institutional [legislative] plaintiff asserting an institutional injury" has standing to sue. *Ariz. State Legislature*, 135 S. Ct. at 2664.

Second, the injury alleged in *Raines* was "wholly abstract and widely dispersed." 521 U.S. at 829. The plaintiffs in *Raines* alleged that the Line Item Veto Act altered the balance of powers in favor of the President and at the expense of Congress, by allowing the President to cancel certain individual appropriations and tax preferences after having signed them into law. The plaintiffs' claimed injury—that at some future point the President might cancel appropriations that Congress favored—was thus an "abstract dilution of institutional legislative power." *Id.* at 826.

In this case, by contrast, the House's injury is concrete and particularized. The Appropriations Clause gives the House the power to prevent the Executive from spending money. The Executive infringed—and continues to infringe—that power by spending billions of dollars from the Treasury for border-wall construction that the House refused to appropriate. The House does not complain about the abstract dilution of its power by a hypothetical future act; it instead challenges concrete action by the Executive that violated the House's constitutionally committed institutional power.

Third, the Court in *Raines* explained that adjudicating a suit brought by legislators to challenge a statute would be "contrary to historical experience." 521

U.S. at 829. But, as pointed out in our reply brief here (at 20), *Raines* did not treat historical practice as dispositive. The Court introduced its historical discussion by observing only that "historical practice *appears* to cut against" the individual legislators' claim of standing. *Id.* at 826. Moreover, after noting the possibility of political self-help and private lawsuits, the Court declined to decide "[w]hether the case would be different if any of these circumstances were different." *Id.* at 829-30. If, as the Administration now claims (Tr. 32), the "core reasoning" of *Raines* forecloses all suits brought by Congress against the Executive, it is difficult to understand the Court's express reservation of the question that the Administration claims *Raines* resolved.

In addition, the historical discussion in *Raines*—like the challenge in *Raines* itself—principally involved challenges to *enacted statutes*. After a statute is enacted through bicameralism and presentment, the task of implementing it passes to the Executive, who has the Constitutional duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3; *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992). Hence, "once Congress makes its choice in enacting legislation, its participation ends." *Bowsher v. Synar*, 478 U.S. 714, 733 (1986). The Court in *Raines* thus expressed skepticism that legislative plaintiffs should be permitted to challenge in court enacted statutes.

Appropriations Clause claims are manifestly different. The House files suit here not to challenge the Executive's implementation of a statute it is charged with "faithfully" executing, but because the Executive has violated a funding limit it is

required by the Appropriations Clause to obey. This suit thus seeks to vindicate the House's constitutional power to prohibit the Executive from spending money absent an appropriation. A lawsuit to vindicate that power does not interfere with any proper Executive Branch function in implementing the law. *See Windsor*, 570 U.S. at 783-84, 788-89 (Scalia, J., dissenting) (suggesting that Congress may bring suit "to vindicate its own institutional powers to act," but not "to correct a perceived inadequacy in the execution of its law"). And the Executive cannot convert the House's constitutional claim into a dispute over statutory implementation by means of its statutory defense. Recognizing the House's ability to obtain judicial relief from an Appropriations Clause violation does not raise the same concerns that *Raines* noted in discussing the absence of interbranch disputes over enacted statutes.

Finally, the Court in *Raines* stressed that its decision did not foreclose a "constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act)." 521 U.S. at 829. Indeed, Justice Souter concurred based on "the certainty that another suit can come to us," since the parties agreed that the President's exercise of his right to cancel a spending or tax provision pursuant to the Act would cause the beneficiaries of that provision to suffer a cognizable injury and have standing under Article III. *Id.* at 834.

Here, however, under the Administration's expansive and incorrect reading of *Raines*, neither the House nor the whole Congress can sue. And in other litigation, the Administration argues (with no apparent sense of irony) that private parties have no

cause of action to challenge its spending, because it claims (by way of a defense) that its spending is sanctioned by certain other provisions of law, and these laws (the Administration asserts) protect only *Congress's interests*, not those of private parties. *See, e.g.*, *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (mem.). Under these heads-we-win-tails-you-lose theories of standing and justiciability, there is no possibility, much less a "certainty," that any court will ever determine the constitutionality of the Administration's actions.

B. The Existence Of Political Tools, Which Have Proven Ineffective With This Administration, Does Not Foreclose The House's Suit

The Administration repeatedly claims that the Court must stand aside while the House instead makes use of the "political tools at its disposal" to redress its injury. DOJ Br. 27; *see, e.g.*, Tr. 36-37, 43, 63-66. At the same time, in parallel litigation in this Court, the Administration has pointed to the Appropriations Clause as one of the political tools the House can wield to ensure the Executive's compliance with the Constitution. *See* Tr. of Oral Argument at 11, *Comm. on the Judiciary v. McGahn*, 951 F.3d 510 (D.C. Cir. Jan. 3, 2020) (No. 19-5331) (arguing that "the House has powerful tools," including the ability "to block appropriations"); *see also McGahn*, 951 F.3d at 528-29 (D.C. Cir. 2020), *reh'g en banc granted, judgment vacated*, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020) (maintaining that judicial enforcement of Congressional subpoenas is unnecessary in part because "[t]he Executive Branch cannot spend a dime without

Congress's consent, and that's a powerful incentive to follow Congress's instructions" (citation omitted)).

But, here, the House exercised its appropriations power; the Administration ignored it; and the Administration now argues that the House has no authority to vindicate its appropriations power after all. After the House availed itself of perhaps the most potent self-help remedy it possesses under the Constitution—a lengthy government shutdown over the dispute about border-wall funding—a compromise was reached. The Administration then declared that it would spend billions of dollars more than the parties agreed, "with or without Congress." The House thus comes to the Court only as a last resort. Nothing in the text of the Constitution or separation-of-powers principles requires the House to do more.

First, the Administration insists that the House should pass a law that "restrict[s] or bar[s] the Executive's ability to use the funding sources it has identified for border barrier construction." DOJ Br. 26-27. But the House has already exercised its power of the purse—its "most complete and effectual weapon," *Dep't of the Navy*, 665 F.3d at 1347 (quoting *The Federalist No. 58* (James Madison))—by specifying how much could be spent on border-wall construction and refusing to appropriate more. Forcing Congress to pass a second law, repeating the limitation it already adopted, frustrates the purpose of the Appropriations Clause, which makes clear that the "absence of a prohibition" does not allow the Executive to spend money that both Houses of Congress have not expressly approved. *Id.* at 1348.

The Administration's argument, if adopted, would invert the rule and require Congress to speak a second time before the Administration is actually prohibited from spending more than Congress allowed. It would also effectively require the Senate to concur with the House to prohibit spending, even though the House can—and in this case already did—exercise its power independently of the Senate to prohibit spending. Moreover, given that the Administration has once flouted a Congressional spending limit, there is no reason to think it would not do so again if Congress passed a second law.

The Administration's reliance on *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999), and *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000), is equally unavailing. In *Chenoweth*, four individual Members of Congress challenged the President's creation of the American Heritage Rivers Initiative through an executive order. 181 F.3d at 112-13. This Court relied on *Raines*'s holding that individual Members lacked standing to assert a "dilution of their authority as legislators," to rule that the Members in *Chenoweth* lacked standing to assert an "identical" institutional injury. *Id.* at 115. The Court further noted that "the parties' dispute [was] … fully susceptible to political resolution" because "Congress could terminate the [program] *were a sufficient number in each House* so inclined." *Id.* at 116 (emphasis added). Here, majorities of both chambers of Congress already appropriated only $1.375 billion for a border wall and no more. If the President wants additional funding, *he* must persuade Congress to act.

In *Campbell*, the Court likewise rejected several individual Members' claims of standing to challenge military actions in the former Yugoslavia. 203 F.3d at 23-24. The Court held that the legislators lacked standing because they could convince their colleagues to "forbid[] the use of U.S. forces in the Yugoslav campaign" and "cut off funds for the American role in the conflict" but failed to do so. *Id.* at 23. In this case, both Houses—not just a handful of individual Members of Congress—already took these actions by appropriating a limited amount of funding for the wall. *Campbell* does not require Congress to pass such limitations a second time.

There is no ambiguity here that should be resolved through the passage of another law. The President recognized the day that he signed the $1.375 billion compromise legislative package that Congress had chosen not to provide the additional funding he requested; he simply chose not to abide by that limit. Op. Br. 14 ("I went through Congress. I made a deal. I got almost $1.4 billion … [b]ut I'm not happy with it."). Large parts of the federal government ceased to function for weeks due to the impasse between the President and the House over border-wall funding. The power of the purse was exercised, and no additional Congressional action is necessary to establish standing.

Second, the Administration also contends that "Congress could terminate the President's national emergency declaration," DOJ Br. 27, which is a predicate for some of the Administration's border-wall expenditures. But the House and Senate passed such a joint resolution—twice—and the President vetoed it both times. *See*

Op. Br. 15. Requiring Congress not only to pass additional measures to effectuate its appropriations power, but to do so with veto-proof majorities, completely distorts the constitutional scheme.

As discussed above, the Framers designed the Appropriations Clause to enable each chamber to check spending by the Executive and by each other. Yet, under the Administration's view, Congress can check a defiant Executive only through bicameral super-majorities. Thus, while the Framers understood that "[b]oth houses must concur in *untying*" the federal purse strings, 2 Farrand at 275 (James Wilson) (emphasis added), the Administration would require both chambers to agree, by supermajorities, to *lock* that purse. And even then, the Executive's position would prohibit judicial review if the President defied the veto override. Such an arrangement eviscerates what is supposed to be the "most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation." *Richmond*, 496 U.S. at 427 (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1348 (3d ed. 1858)).

Finally, the Administration claims that the House could "pass legislation even in unrelated areas" to exert pressure on the Executive to follow appropriations limits. Tr. 72. This suggestion is a recipe for dysfunction, not for effective government. It is also no remedy for the House's individual appropriations power to say that the House can effectuate its check on the Senate and the President by working with them to pass legislation. It instead would create a situation in which the Executive may neutralize

the House's exercise of its appropriations power, so long as the Senate is unwilling to contest the Administration's expenditures. That upends the careful balance enshrined in the Constitution to empower each House of Congress to protect against Executive overreach. *See Dep't of the Navy*, 665 F.3d at 1347 (describing the Appropriations Clause as "a bulwark of the Constitution's separation of powers among the three branches of the National Government"). This Court should not construe Article III to permit such a distortion of the Appropriations Clause.

CONCLUSION

For these reasons and those in our opening and reply briefs, this Court should reverse the district court's dismissal of the case for lack of standing, and return the case to the panel for expedited briefing and determination on the merits of the Appropriations Clause violation, or remand to the district court to make that determination.

Respectfully submitted,

/s/ Douglas N. Letter

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March 30, 2020

CERTIFICATE OF COMPLIANCE

1. This brief complies with the en banc Court's order of March 13, 2020, because it contains 6,062 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Professional Plus 2016 in 14-point Garamond type.

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CERTIFICATE OF SERVICE

I certify that on March 30, 2020, I filed the foregoing supplemental brief via the CM/ECF system of the United States Court of Appeals for the District of Columbia Circuit, which I understand caused service on all registered parties.

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