No. 01-94

In the Supreme Court of the United States

BOB SCHAFFER, MEMBER OF CONGRESS, PETITIONER

v.

PAUL H. O'NEILL, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, the salaries of Members of Congress and other senior government officials are adjusted annually according to the Employee Cost Index calculated by the Bureau of Labor Statistics, unless Congress passes and the President signs a law disallowing such an adjustment. 2 U.S.C. 31. Petitioner, a Member of Congress, contends that the Ethics Reform Act's provision for adjustments of congressional salaries contravenes the Twenty-Seventh Amendment, which provides that "[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." The question presented is whether petitioner has standing to challenge the constitutionality of the salary-adjustment provisions of the Ethics Reform Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 240 F.3d 878. The opinion of the district court (Pet. App. 19-41) is reported at 54 F. Supp. 2d 1014.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 2001. On April 30, 2001, Justice Breyer entered an order extending the time within which to file a petition for a writ of certiorari to and including July 13, 2001, and the petition was filed on that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. The Twenty-Seventh Amendment became part of the Constitution in 1992, more than 200 years after it was proposed to the States by Congress. See 57 Fed. Reg. 21,187 (1992). The Amendment provides that "[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." U.S. Const. Amend. XXVII.

Before 1967, congressional salaries were set "directly by Congress, in specific legislation setting specific rates of pay." *Humphrey* v. *Baker*, 848 F.2d 211, 212 (D.C. Cir.), cert. denied, 488 U.S. 966 (1988). Since 1967, Congress has established various mechanisms for periodically adjusting its Members' pay without enacting statutes prescribing specific amounts. The Federal Salary Act of 1967 established a Quadrennial Commission to propose to the President salary levels for the top-level government officials, including Members of Congress. See Pub. L. No. 90-206, § 225, 81 Stat. 642. That statute authorized the President to modify the Commission's proposals in transmitting his pay recommendations to Congress. In 1977, Congress amended the Federal Salary Act to require affirmative congressional approval of the President's recommendations. Pub. L. No. 95-19, § 401, 91 Stat. 45; see *Pressler* v. *Simon*, 428 F. Supp. 302 (D.D.C. 1976) (per curiam), aff'd, 434 U.S. 1028 (1978). In 1985, after this Court's decision in *INS* v. *Chadha*, 462 U.S. 919 (1983), Congress again amended the Federal Salary Act to authorize disapproval of the President's recommendations by joint resolution, with presentation to the President. Pub. L. No. 99-190, § 135(e), 99 Stat. 1322; see *Humphrey* v. *Baker*, 848 F.2d at 217.

Congress also enacted separate legislation that authorized cost-of-living adjustments for Members of Congress and certain other federal employees. The Executive Salary Cost-of-Living Adjustment Act of 1975, Pub. L. No. 94-82, § 204(a), 89 Stat. 421, authorized the President to adjust the salaries of Members of Congress and other federal employees annually, based on a comparison with private-sector salaries. That adjustment was subject to disapproval by Congress. See *United States* v. *Will*, 449 U.S. 200, 203-204 (1980).

2. In 1989, Congress overhauled the provisions governing congressional and other federal employees' salaries and enacted the provisions challenged in this action. Congress adopted in large part the recommendations of a Bipartisan Task Force on Ethics. The Task Force proposed, *inter alia*, to compensate employees in all Branches of the government for erosion in the purchasing power of their salaries since 1969, to create a smoother mechanism for adjusting pay in the future, and to phase out private honorarium supplements to Members' compensation. See 135 Cong. Rec. 30,740-30,759 (1989) (reprinting Task Force report).

The resulting Ethics Reform Act of 1989 (Act), Pub. L. No. 101-194, 103 Stat. 1716, granted Members of Congress a one-time 25% pay increase and implemented a system to phase out the acceptance of honoraria. The Act also modified the method by which an annual adjustment to the salaries of Members of Congress is determined. Congress adopted a proposal that the annual percentage increase, if any, be based on changes in the Employment Cost Index (ECI), minus one-half percent. See 2 U.S.C. 31(2); 5 U.S.C. 5303(a). The ECI is "a quarterly index of wages and salaries for private industry as published by the Bureau of Labor Statistics." 135 Cong. Rec. at 30,757. Congress also

provided that the increase in congressional salaries could not exceed five percent in any year. See Pub. L. No. 101-194, § 704(a)(1)(B)(iii), 103 Stat. 1769.

Congress postponed the effective date of the new adjustment mechanism until January 1, 1991, after an intervening congressional election. Since then, Members of both Houses have received automatic salary adjustments in 1991, 1992, 1993, 1998, 2000, and 2001. By legislation, Congress stopped adjustments in 1994, 1995, 1996, 1997, and 1999, before they went into effect. See Pet. 8; Pet. App. 4-5, 38.

3. In 1992, several plaintiffs, including Representative John Boehner, filed an action in the United States District Court for the District of Columbia, challenging the adjustment provisions of the Ethics Reform Act as unconstitutional under the newly ratified Twenty-Seventh Amendment. That lawsuit raised substantially the same claims asserted in this action. The district court granted summary judgment upholding the statute, *Boehner* v. *Anderson*, 809 F. Supp. 138 (D.D.C. 1992), and the District of Columbia Circuit affirmed, 30 F.3d 156 (1994). The District of Columbia Circuit held that Representative Boehner had standing to challenge the manner in which his rate of pay was to be determined, *id.* at 160, but went on to hold that the congressional salary-adjustment provision of the Ethics Reform Act of 1989 does not contravene the Twenty-Seventh Amendment "because it did not cause any adjustment to congressional compensation until after the election of 1990 and the seating of the new Congress." *Id.* at 162.

4. In 1999, this action, which (like *Boehner*) seeks to invalidate the adjustments in congressional salaries under the Twenty-Seventh Amendment, was initiated by four plaintiffs, including the petitioner, Representa-

tive Bob Schaffer.[1] The plaintiffs named, as defendants, then-President Clinton, then-Secretary of the Treasury Robert E. Rubin,[2] then-Secretary of the Senate Gary Sisco, and Clerk of the House of Representatives Jeff Trandahl. See Pet. App. 27-30. The complaint asked the district court to declare that the salary-adjustment provision of the Ethics Reform Act violates the Twenty-Seventh Amendment, declare "that any pay increase for members of the United States Congress must be enacted by an affirmative vote and may not take effect until the following Congress has been elected and fully sworn into office," and enjoin any payments to any Member of Congress as a result of any salary increase "that does not comply with the requirement of an intervening election in the 27th Amendment." Pet. C.A. App. 14.

The district court granted the defendants' motions to dismiss and denied the plaintiffs' motion for summary judgment. The court held that the Secretary of the Senate and the Clerk of the House of Representatives were improper defendants because, among other things, petitioner's injury could not be traced to, or

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[1] The other plaintiffs in the district court were Walt Mueller, a Missouri State Senator who voted to adopt the Twenty-Seventh Amendment in the Missouri Senate; Gregory D. Watson, a taxpayer and activist in the movement to ratify the Twenty-Seventh Amendment; and John Stoeffler, a taxpayer. Pet. App. 19. The district court held that Watson, Stoeffler, and Mueller lacked standing to bring the action. *Id.* at 22-24. That ruling was not appealed. Thus, the only plaintiff before the court of appeals and before this Court who may assert standing to challenge the congressional salary adjustments is Representative Schaffer.

[2] After Secretary Rubin resigned in May 1999, he was replaced as a party in the case by then-Secretary Lawrence H. Summers. The current Secretary of the Treasury, Paul H. O'Neill, has been substituted as the respondent to this petition.

resolved by, them. Pet. App. 27-30, 33-36. Among other points, the district court noted that the payment of salaries of Members of the House of Representatives is not the function of the Clerk of the House, but is rather under the supervision of the Chief Administrative Officer of the House, who was not named as a defendant to the action. *Id.* at 27-28. As to the Executive Branch defendants, the court stated that, "[i]f the extent of the president's responsibility in this case is his role in the payment of pensions to retired congressmen and their spouses, the president has not injured the plaintiffs and should not be a party to this suit." *Id.* at 28. The court did not address the propriety of naming the Secretary of the Treasury as a defendant. On the merits, the district court held that the annual congressional salary adjustments do not contravene the Twenty-Seventh Amendment. *Id.* at 37-40.

5. The court of appeals affirmed the dismissal of the case, but on different grounds. The court held that petitioner lacked Article III standing to challenge the congressional salary adjustments on Twenty-Seventh Amendment grounds. Pet. App. 1-18.[3]

The court ruled that petitioner had suffered no actual, personal injury from operation of the challenged statutory scheme that gave him a salary increase. The court observed that petitioner had contended that the salary adjustment caused him injury because it was "personally offensive and professionally harmful to [him], as well as damaging to his political position and his credibility among his constituency." Pet. App. 11 (quoting Pet. C.A. Reply Br. 1). None of those claims of

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[3] Petitioner did not appeal the dismissal of the defendants other than the Secretary of the Treasury, nor did any of the other plaintiffs appeal any of the district court's rulings. See Pet. 2 n.1.

injury, the court held, was sufficient to provide standing.

First, the court observed, petitioner's "moral outrage, however profoundly and personally felt, does not endow him with standing to sue." Pet. App. 13. Second, the court stated that "[w]e do not see how [petitioner] could have suffered an injury in fact by receiving a nominal (though not, in economic terms, a real) *increase* in pay." *Id.* at 14. To the contrary, the court noted, "it is counterintuitive to claim 'injury' by virtue of having received more than one's due," and thus petitioner "was not injured for standing purposes simply because he received a higher salary." *Ibid.* Third, although petitioner argued that the salary adjustments had damaged him politically among his constituency, the court stressed that petitioner "points to no concrete evidence of a loss of credibility or other reputational injury," and indeed was reelected twice after receiving the salary adjustments, *id.* at 15 & n.8, and that petitioner had not been singled out for especially unfavorable treatment among Members of the House of Representatives, *id.* at 15-16.

The court also found its conclusion that petitioner lacked standing to be supported by *Raines* v. *Byrd*, 521 U.S. 811, 821 (1997), in which this Court held that Members of Congress could not challenge the constitutionality of a line-item veto on the basis that they suffered a "loss of political power." Pet. App. 16. The court of appeals disagreed with the District of Columbia Circuit's decision in *Boehner* that a Member of Congress did have standing to challenge the congressional salary adjustments, noting that that decision preceded *Raines* and finding it contrary to more recent decisions of this Court. *Id.* at 16-17.

ARGUMENT

The court of appeals correctly concluded that petitioner had not alleged any injury in fact necessary for standing to challenge congressional salary adjustments as violative of the Twenty-Seventh Amendment. Although the District of Columbia Circuit ruled in *Boehner* that a Member of Congress did have standing to challenge those salary adjustments, that decision has been superseded by this Court's intervening decision in *Raines*. Accordingly, there is no live conflict between the decision below and the District of Columbia Circuit's ruling on standing in *Boehner*.

In addition, the question whether petitioner has shown the injury in fact necessary to establish standing in this case and in *Boehner* arises in the unique setting of a challenge to a statute providing for automatic pay increases that has been in effect for more than a decade. It is therefore significant that the decision below and *Boehner* are consistent in their ultimate result, in that both in the end rejected challenges to the automatic salary adjustments, albeit on different grounds. Finally, petitioner cannot in any event make the showing of redressability necessary for standing in this particular case, because the only remaining defendant, the Secretary of the Treasury, does not issue paychecks to petitioner, and so an order against the Secretary would not provide petitioner with any relief.

1. A party seeking to invoke a federal court's jurisdiction bears the burden of establishing his standing to sue. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). To meet that burden, plaintiffs must satisfy at least three elements of standing that constitute an "irreducible constitutional minimum." *Id.* at 560. First, they must show an "injury in fact," namely, "an in-

vasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Ibid.* (citations and internal quotation marks omitted). Second, plaintiffs must demonstrate the existence of "a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant." *Ibid.* (internal punctuation and quotation marks omitted). Finally, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (citation and internal quotation marks omitted). In addition, and of particular relevance here, the Court emphasized in *Raines*, 521 U.S. at 819-820, that the standing inquiry is "especially rigorous" when the plaintiff asks a federal court to hold that an action by one of the other Branches of the federal government is unconstitutional.

The court of appeals correctly ruled, under these settled criteria for standing, that petitioner lacks standing to challenge the constitutionality of the congressional salary increases that were granted to all Members of Congress, including himself. Petitioner does not challenge the court of appeals' ruling that an increase in his salary, as such, cannot cause him injury for purposes of Article III standing. Pet. App. 14; see Pet. 12-13. Rather, petitioner maintains that the congressional salary increases have damaged his political reputation, "by arousing public suspicion and influencing his constituency's view of him." See Pet. 10. But as the court of appeals pointed out, that asserted injury is amorphous and in no way specific to petitioner; the salary adjustments, "which apply to every Representative, necessarily damage all Members of Congress equally." Pet. App. 16 (internal punctuation and quotation marks omitted). Even if the salary adjustments under the

Ethics Reform Act have damaged the reputation of Congress as an institution, there is nothing to suggest that the adjustments have, or could have, impaired petitioner's personal interests in any special way. Petitioner therefore has not shown that he has suffered any "particularized" injury, meaning that "the injury must [have] affect[ed] [him] in a personal and individual way." *Defenders of Wildlife*, 504 U.S. at 560 n.1.[4]

The court's conclusion that petitioner lacks standing is also supported by this Court's decision in *Raines*. In *Raines*, the Court ruled that Members of Congress lacked standing to attack the constitutionality of the Line Item Veto Act. 521 U.S. at 820-830. As pertinent here, the Court held that a "claim of standing * * * based on a loss of political power" (*id.* at 821) by Members of Congress is insufficiently concrete and personal to satisfy the requirements of Article III, at least where that injury is "widely dispersed" among Members of Congress, *id.* at 829. *Raines* teaches that petitioner cannot sue here because of a claimed loss of political influence as a Member of Congress that does not affect him in a uniquely personal way.

Petitioner errs in relying (Pet. 9-11) on *Meese* v. *Keene*, 481 U.S. 465 (1987), for the proposition that injury to his reputation is sufficient to establish standing. In *Keene*, the plaintiff, a California state senator, challenged the constitutionality of a federal statute that required a category of films to be labeled as "political propaganda." Keene wished to exhibit certain films

[4] Nor, indeed, has petitioner contended that the salary increase he received cost him any votes or caused him to lose an election. In fact, as the court of appeals pointed out, petitioner was first elected to Congress in 1996, and has been re-elected twice since, each time with a substantial increase in percentage of the vote. Pet. App. 15 n.8.

falling within that category, and alleged that the mandatory labeling threatened his "personal, political and professional reputation." *Id.* at 473. Keene, however, alleged an injury that was personal to him and was not shared by all the other members of the body to which he was elected; he wished to exercise his own First Amendment rights, and claimed a chill from doing so from the government's requirement that the films he wished to exhibit be given an allegedly derogatory classification. *Id.* at 475. Thus, the Court concluded that Keene was not "merely an undifferentiated bystander with claims indistinguishable from those of the general public," *id.* at 476, but had adequately alleged particularized injury. By contrast, petitioner does not allege that he has been chilled in the exercise of any of his individual constitutional rights.

Moreover, in *Keene*, the action that allegedly caused the injury had nothing to do with Keene's status as a member of a legislative body. The governmental action affected him solely based on conduct in which he sought to engage in his personal capacity. Here, by contrast, the action of which petitioner complains is the action of the very legislative body of which he is a Member. That action—the payment of salaries that are increased in accordance with the Ethics Reform Act—applies to all Members in the same way, and it is speculative indeed that his constituents would hold him personally accoutable in a judicially cognizable way for the actions of the House of Representatives or of Congress as a whole. To the extent that petitioner asserts that his own political reputation would distinctly suffer because of charges of inconsistency in his position by contending that the automatic salary increases are unconstitutional or inappropriate while at the same time benefiting from the increases, any such injury is attributable to his own

retention of the salary increases rather than returning them to the United States, not to the payment of the salaries in the first instance.

The decision below is also consistent with *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). In *Valley Forge*, the Court held that the plaintiffs lacked standing to challenge governmental action transferring property to a religiously affiliated institution because they had "fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485. That ruling supports the court of appeals' decision here that any personal offense to petitioner caused by a statute with which he disagrees does not create an injury sufficient to endow standing. See Pet. App. 12-13.

2. Petitioner contends (Pet. 14-16) that the decision below conflicts with the District of Columbia Circuit's decision on congressional standing in *Boehner*. Although the District of Columbia Circuit did rule in *Boehner* that a Member of Congress had standing to challenge the congressional salary adjustments, see 30 F.3d at 159-160, the analysis in that decision has been superseded by this Court's intervening decision in *Raines*. No other court of appeals has addressed congressional standing to challenge salary increases since *Raines*. Thus, there is no live circuit conflict warranting this Court's review.

The District of Columbia Circuit's decision in *Boehner* noted that Representative Boehner was not only a Member of Congress, but was an employee of the United States, and "[a]s such, he clearly has standing to challenge the operation of a law that directly deter-

mines his rate of pay." *Boehner*, 30 F.3d at 160. The court in *Boehner* went on to state that, despite the government's argument that an increase in a Representative's pay is not an injury, Representative Boehner said "that in the context of his constituency it is" an injury. *Ibid.* Thus, in the District of Columbia Circuit's view, Representative Boehner had standing in that he asserted that a pay increase was harmful to him "in his political position." *Ibid.* That analysis does not survive this Court's decision in *Raines*, which makes clear that such a generalized injury to the political position of a Member of Congress is insufficient for Article III standing. Rather, Article III requires a concrete and personalized injury, and petitioner has failed to allege one.

The decision below also does not conflict with *Miller* v. *Moore*, 169 F.3d 1119 (8th Cir. 1999). In that case, the court of appeals held that a state senator who opposed term limits for Members of Congress had standing to challenge a state constitutional amendment directing the State's elected officials to support federal term limits, and requiring that a pejorative label be placed next to the name of any incumbent official who failed to comply with that provision. See *id.* at 1122. In that case, the state action under challenge, the ballot label, itself had a direct, concrete, and pejorative effect on the plaintiff's opportunity for reelection. By contrast, in this case, the congressional salary statute affects all Members of Congress in the same manner, see *Raines*, 521 U.S. at 821, 829, and petitioner cannot show that his salary increase will "threaten [his] political career and livelihood." 169 F.3d at 1122-1123.

Nor does the decision below conflict with either *Irish Lesbian and Gay Organization* v. *Giuliani*, 143 F.3d 638 (2d Cir. 1998) (*ILGO*), or *Riggs* v. *City of Albuquer-*

que, 916 F.2d 582 (10th Cir. 1990), cert. denied, 499 U.S. 976 (1991). Those decisions simply hold that governmental actions that directly and concretely threaten an individual's or entity's personal and professional reputation may form the basis for standing. See *ILGO*, 143 F.3d at 649-651; *Riggs*, 916 F.2d at 586-587. The court of appeals in this case did not hold to the contrary. Rather, it ruled that petitioner had not alleged an injury that was "personal, particularized, [and] concrete." Pet. App. 17 (citation omitted).

3. Petitioner urges the Court (Pet. 21-25) to grant review in order to overrule its decision in *United States* v. *Richardson*, 418 U.S. 166 (1974), and find standing for litigants who do not otherwise meet the requirements of Article III, if otherwise no plaintiff would be able to challenge allegedly unconstitutional governmental action. Petitioner has given no good reason why standing requirements should be waived in this case or why this Court's holding in *Richardson* should be reexamined. Petitioner expresses concern (Pet. 21) that, if he is not permitted to sue, no one will be able to litigate the Twenty-Seventh Amendment issue sought to be raised in this case. This Court has already explained, however, that "the absence of any particular individual or class to litigate [such] claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. * * * Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert [one's] views in the political forum or at the polls." *Richardson*, 418 U.S. at 179. Indeed, the Court has stressed that, in light of separation of powers concerns, the standing inquiry must be "especially rigorous" when action by one of the other Branches of the government is challenged as unconstitutional, and

the judiciary "must put aside the natural urge to proceed directly to the merits of [an] important dispute and to 'settle' it for the sake of convenience and efficiency." *Raines*, 521 U.S. at 819-820. Moreover, as a Member of Congress, petitioner has even greater opportunity for redress than is available to most voters: he may directly introduce bills and urge his colleagues within the House of Representatives to vote to repeal the salary statute, or to prevent automatic pay increases from going into effect, as Congress has done on several occasions since the statute was enacted.

4. Petitioner lacks standing for another, independent reason: he cannot show that a judgment against the sole remaining defendant in this case, the Secretary of the Treasury, could redress his alleged injury. To establish standing, plaintiffs must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Defenders of Wildlife*, 504 U.S. at 561 (internal quotation marks omitted). The Secretary of the Treasury has no role in the payment of petitioner's salary. Consequently, even if a declaratory judgment or injunction were issued against the Secretary, that order would have no effect because the Secretary could do nothing to alleviate the alleged injury. There can be no Article III standing when the defendant has taken no action that could have caused the plaintiff's injury, and an order against the defendant will not redress that injury. See *ibid.* The responsibility for all personnel who disburse salaries to Representatives resides with the Chief Administrative Officer of the House of Representatives. See 2 U.S.C. 80. Nevertheless, petitioner made no effort to amend his complaint to attempt to name a correct defendant from among House officials. Compare *Powell* v. *McCormack*, 395 U.S. 486, 493, 500,

501-506 (1969) (allowing Representative's suit to proceed against House Sergeant at Arms, who refused to pay him). Indeed, petitioner has made no demonstration that the Secretary of the Treasury has anything to do with payment of Representatives' salaries. Accordingly, even if this Court were to find that petitioner had alleged injury in fact sufficiently concrete and particularized for standing purposes, the court of appeals' decision dismissing the case for lack of standing nonetheless should be upheld.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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