No. 19-1015

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

JUMANA NAGARWALA, et al.,

Appellees.

On Appeal from the United States District Court for the Eastern District of Michigan – No. 17-cr-20274

REPLY IN SUPPORT OF MOTION OF THE U.S. HOUSE OF REPRESENTATIVES TO INTERVENE

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In *INS v. Chadha*, 462 U.S. 919, 940 (1983), the Supreme Court established that "Congress is the proper party to defend the validity of a statute" when the Executive, as the entity "charged with enforcing the statute, agrees . . . that the statute is inapplicable or unconstitutional." A decades-old federal law implements this understanding, clarifying that the House and Senate may "take action, separately or jointly, to intervene" whenever the Executive refuses to defend an Act of Congress in pending litigation. 28 U.S.C. § 530D(b)(2).

By its motion, the United States House of Representatives[1] seeks to intervene solely to present argument in defense of the constitutionality of 18 U.S.C. § 116(a), whose defense the Department of Justice has abandoned. This limited involvement is precisely what *Chadha* contemplates. Intervention here would *not* entail the House exercising prosecutorial power or otherwise enforcing federal law. The House requests only the opportunity to persuade this Court to reverse the district court's ruling, which would eliminate any constitutional concerns about proceeding with the original Section 116(a) counts. Once that occurs, the Department can continue pursuing those charges—or refrain from doing so—in its exclusive discretion.

[1] The House Bipartisan Legal Advisory Group represents the House as an institution, and the Department and defendants are wrong to insinuate otherwise. *See* Rule II.8(b), Rules of the House of Representatives, 116th Cong., https://perma.cc/G5BW-H94T (empowering the Group to "speak[] for, and articulate[] the institutional position of, the House in all litigation matters"). This Rule, adopted pursuant to Article I, section 5's Rulemaking Clause, is "absolute and beyond the challenge of any other body or tribunal." *United States v. Ballin*, 144 U.S. 1, 5 (1892).

Intervention is particularly appropriate here because the House is prepared to present a persuasive defense of Section 116(a)'s constitutionality. This Court should not be the first to deny Congressional intervention to defend an Act of Congress whose defense the Executive has abandoned. The House's motion should be granted.

I. DEFENDING THE CONSTITUTIONALITY OF A CRIMINAL STATUTE IS NOT AN EXERCISE OF PROSECUTORIAL AUTHORITY

The Department and defendants misunderstand the House's role as intervenor by insisting that the House is seeking to take over a federal prosecution and intrude on a core executive function.

Presenting argument to a tribunal that a law does not run afoul of the Constitution is not a form of executive power. *Chadha* expressly distinguishes between "defend[ing] the validity of a statute"—which Congress may do—and "enforcing the statute," which only the Executive may do. 462 U.S. at 940. Courts routinely permit the House and Senate to defend the constitutionality of their enactments, *see* House's Mot. 7-9, because the Constitution does not constrain who may make particular legal arguments in court.

The "enforcement power" described in *Buckley v. Valeo*, 424 U.S. 1, 111 (1976), on which the Department relies, was the authority to "institute a civil action for . . . injunctive or other relief" against conduct alleged to violate a federal statute. Similarly, in *Bowsher v. Synar*, 478 U.S. 714 (1986), the official over whom Congress retained removal power was statutorily authorized to "exercise judgment concerning

facts that affect the application of the Act," and to "command[] the President himself to carry out . . . [certain] directive[s]" in "implement[ing] the legislative mandate," *id.* at 733. The House, by contrast, seeks only to argue before this Court that an Act of Congress is constitutional.

The Department further contends that the House inappropriately wishes "to keep alive a *criminal prosecution*" that the Department has chosen not to pursue. DOJ's Opp. 1. But the House is not attempting to wield prosecutorial power. The House recognizes that the Executive enjoys "exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974). The House's more limited effort to defend its own enactment, if successful, would enable the Department to pursue the original Section 116(a) charges—or decline to do so.

That is precisely what occurred in *Maine v. Taylor*, 477 U.S. 131 (1986), which involved a federal criminal prosecution in which the defendant challenged the constitutionality of a state statute that served as the basis for the prosecution. The State of Maine, pursuant to 28 U.S.C. § 2403(b), intervened to defend the constitutionality of its law. After the court of appeals held the state statute unconstitutional, the Department dismissed its appeal. *Taylor*, 477 U.S. at 136 n.5. Maine then pursued review in the Supreme Court.

Even though Section 2403(b) permits intervention by a State "[i]n *any* action, suit, or proceeding" (emphasis added) in which its statutes are challenged on

constitutional grounds, the defendant argued that Maine could not appeal the dismissal of federal *criminal* charges. In his view, because "the United States and its attorneys have the sole power to prosecute criminal cases in the federal courts," *Taylor*, 477 U.S. at 136, only the Department could appeal the reversal of a federal criminal conviction.

The Supreme Court squarely rejected this position. The Court noted that, if the lower court's judgment were "left undisturbed," Maine would be "bound by the conclusive adjudication that its [statute] is unconstitutional." *Id.* at 137. The prospect of such an injury gave Maine a substantial "stake in the outcome of th[e] litigation." *Id.* It is thus manifestly untrue that "[o]nly the Executive Branch may pursue an appeal of the dismissal of criminal charges."[2] DOJ's Opp. 6. So too here: the House "clearly has a legitimate interest in the continued enforceability of its own statutes," *Taylor*, 477 U.S. at 137, one that will be impaired if the district court's erroneous decision remains on the books.

Other Supreme Court precedent demonstrates that the Department's absolutist position is overly simplistic. The Court has appointed amici to "keep alive" a potential use of prosecutorial power that the Department has chosen not to wield for constitutional reasons. For example, in *Dickerson v. United States*, 530 U.S. 428 (2000),

[2] The federal statute governing "Appeal by [the] United States," 18 U.S.C. § 3731, is not to the contrary. That provision sets forth the circumstances in which the Executive may appeal adverse district-court rulings in criminal cases, but it does not speak to who may *intervene* in such proceedings.

the Court appointed private counsel to defend the constitutionality of a federal statute governing the admissibility of confessions in federal criminal cases—a provision the Department refused to defend. *See id.* at 441 n.7. Reversal of the judgment below would have enabled the presentation of evidence whose admission the Department believed would violate the Constitution. As in *Dickerson*, intervention here by the House would merely preserve the Executive's opportunity for future enforcement armed with an authoritative judicial determination that the statute at issue is indeed constitutional.

The Supreme Court's categorical language in *Chadha* further underscores that there is no relevant distinction between civil and criminal proceedings in the circumstances now before this Court. *Chadha* established unequivocally that "Congress is the proper party to defend the validity of a statute" when the Executive will not. 462 U.S. at 940. Tellingly, *Chadha* itself arose in the context of deportation, a "particularly severe penalty" that "may be of greater concern to a convicted alien than any potential jail sentence." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (citation omitted).

Section 530D likewise expressly contemplates intervention by the House or Senate whenever the Executive "refrain[s] . . . from defending or asserting, in *any* judicial, administrative, or other proceeding, the constitutionality of *any* provision of *any* Federal statute." 28 U.S.C. § 530D(a)(1)(B)(ii) (emphases added). There is "no reason to read [a civil-specific] limitation into the straightforward and unambiguous

terms" of such a statute. *Taylor*, 477 U.S. at 135. That is because "[f]ederal nullification" of a duly enacted law "is a grave matter whether it occurs in civil litigation or in the course of a criminal prosecution." *Id.*

On multiple occasions, the Department has sent Section 530D letters designed to enable Congress to defend the constitutionality of a federal criminal statute. This has occurred even in the context of a criminal prosecution. *See* Letter from Drew S. Days, III, Solicitor General, to Michael Davidson, Senate Legal Counsel, at 1-2 (June 1, 1995), https://perma.cc/J3KW-EQ4J ("Unless we hear further from you, we will instruct the United States attorney to dismiss the appeal on July 1, 1995.").

Similarly, the Department has welcomed Congressional intervention to defend criminal statutes in suits brought by regulated parties. For example, in *Players International, Inc. v. United States*, 988 F. Supp. 497, 498 (D.N.J. 1997), several plaintiffs sought injunctive relief to prohibit the Department from prosecuting them under 18 U.S.C. § 1304. The district court held that it would be unconstitutional to prosecute the plaintiffs under that law, and the Department ultimately agreed. Instead of opposing Congressional defense of the relevant criminal statute, as it has here, the Department did precisely the opposite: it "request[ed] that the court of appeals . . . afford Congress the opportunity to decide whether to participate in the case to defend the constitutionality of the statute." Letter from Seth P. Waxman, Solicitor General, to Patricia Bryan, Senate Legal Counsel, at 3 (Aug. 6, 1999), https://perma.cc/R7J2-

A33Z.[3] It would make little sense for Congress to be able to intervene when a district court has invalidated a criminal statute—one that would otherwise be left undefended—in a case seeking injunctive relief, but not when a criminal statute is struck down following a motion to dismiss in a criminal case.

Even if no court has held that the House may intervene to defend the constitutionality of a federal criminal statute in the circumstances presented here (*see* Defs.' Opp. 27; DOJ's Opp. 10), that illustrates how rare it is for the Executive to bring a prosecution, vigorously defend the constitutionality of the statute, and then—only after an adverse constitutional ruling by the district court—decline to defend the statute on appeal. And nothing cited by the Department or defendants holds that the House cannot intervene here. For the same reason, the lack of an established practice of permitting the House and Senate to intervene in criminal cases sheds no light on whether intervention is authorized here.

II. THE COURT HAS ARTICLE III JURISDICTION

This appeal presents a "case or controversy," despite the Department's decision not to pursue its appeal.

A. The House Possesses Article III Standing

The Department does not contest that the House and Senate are injured when

[3] *See also* Letter from Benjamin R. Civiletti, Attorney General, to Michael Davidson, Office of the Secretary, U.S. Senate (Oct. 11, 1979), https://perma.cc/Z2WB-FL6L ("The Department has filed an Answer to Plaintiffs' Complaint to protect your interests should you decide to defend this suit . . . .").

a judicial decision impairs Congress's ability to legislate. Instead, the Department argues that the Constitution assigns to the Executive the exclusive authority to vindicate that institutional injury by defending the constitutionality of federal statutes in court. *See* DOJ's Opp. 14-15. According to the Department, the House "has no judicially cognizable interest" in defending the constitutionality of its enactments because only the Executive is authorized to do so. *Id.* at 15.

That view cannot be squared with what the Supreme Court instructed in *Chadha*: that "Congress is both a proper party to defend the constitutionality of" a federal statute left undefended by the Executive "and a proper petitioner under 28 U.S.C. § 1254(1)." 462 U.S. at 939; *see also id.* at 931 n.6 (clarifying that "a justiciable case or controversy" existed "because of the presence of the two Houses of Congress as adverse parties"). The principle of law announced in *Chadha*—one that did not distinguish between types of federal statutes[4]—is binding on this Court. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("[T]he principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law." (citation omitted)).

That the House has suffered a legally cognizable injury is confirmed by the

[4] It is thus irrelevant that the statute at issue in *Chadha* purported to vest the House and Senate with unusual procedural rights. *See* DOJ's Opp. 16. Moreover, "because legislating is Congress' central function, any impairment of that function is a more grievous injury than the impairment of a procedural add-on." *United States v. Windsor*, 570 U.S. 744, 805 (2013) (Alito, J., dissenting on other grounds).

Supreme Court's recent decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015). There, the Court held that a state legislature had properly alleged an "institutional injury" for Article III purposes because a popular initiative, if permitted to go into effect, would have "strip[ped] the Legislature of its alleged prerogative to initiate redistricting," *id.* at 2663-64. Similarly, the district court's decision here—if allowed to stand—would deprive Congress of its authority to implement the United States' treaty obligations in a manner authorized by *Missouri v. Holland*, 252 U.S. 416 (1920), as well as to regulate certain harmful conduct under the Commerce Clause, U.S. Const., art. I, § 8, cl. 3.

It is therefore unsurprising that in *United States v. Windsor*, 570 U.S. 744 (2013), Justice Alito explicitly concluded that the House enjoyed Article III standing. As he explained, under *Chadha*, any judicial decision that "limit[s] Congress' power to legislate" inflicts a "grievous injury" upon both houses of Congress. 570 U.S. at 804-05 (Alito, J., dissenting on other grounds). As a result, when "a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress both has standing to defend the undefended statute and is a proper party to do so." *Id.* at 807.[5]

[5] That the House suffers an injury-in-fact when its enactments are invalidated does not mean that both houses of Congress may automatically intervene whenever a litigant challenges the constitutionality of a federal statute. Ordinarily, the Department "adequately represent[s]" these bodies' interests in federal court. Fed. R. Civ. P. 24(a)(2). That is what occurred in *Newdow v. U.S. Congress*, 313 F.3d 495 (9th Cir. 2002); *see id.* at 499-500 ("[T]he government is already represented in this case by the Attorney General."). The Department's reliance on *Newdow* is thus inapposite.

Even if—contrary to *Chadha*—some limits existed on the House's ability to intervene to defend an Act of Congress that the Executive will not, no such restriction would apply here. The district court's ruling implicates Congress's core authority as an institution to enact legislation pursuant to its enumerated powers. When such a judicial decision is issued, *and* when the Department abandons its defense of the invalidated statute, the House clearly suffers a legally cognizable injury. *See Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 888 n.8 (3d Cir. 1986) (affirming that "Congress has standing to intervene whenever the executive declines to defend a statute"). Unless the House is permitted to intervene, there will be "no one to speak for the constitutionality of [Section 116(a)]." *Id.*

B. This Appeal Implicates a Live Controversy

The Department's decision to dismiss its appeal does not eliminate the existence of an Article III "controversy." Reversal of the district court's judgment will enable the Department to continue pursuing the original Section 116(a) counts, and defendants face a credible threat of future prosecution.

According to defendants, the House "bears the burden of showing that there will be a prosecution under Section 116(a)." Defs.' Opp. 2. That assertion is unfounded. Just as persons seeking injunctive or declaratory relief need not show that they *will* be prosecuted—and just as, in *Dickerson*, the defendant need not have shown that certain evidence *would* have been introduced against him—the House is not faced with such an impossible burden. In determining whether an Article III controversy

exists here, the relevant question is whether a "credible threat of enforcement" exists. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014).[6]

Defendants are faced with such a threat. There is not merely "a history of past enforcement" on similar facts, *id.*—there is a history of past enforcement on *these exact facts*. The Department vigorously pursued its Section 116(a) charges for nearly two years, up until the moment that it "reluctantly determined" to cease those efforts. *See* Letter from Noel J. Francisco, Solicitor General, to Hon. Jerrold Nadler, Chairman, House Comm. on the Judiciary, at 2 (Apr. 10, 2019), http://perma.cc/U469-TKU8. As the Department's Section 530D letter makes clear, constitutional concerns were the sole reason that the Department declined to pursue this appeal.

The Department "ha[s] not disavowed enforcement" in the event that this Court finds Section 116(a) to be constitutional. *Driehaus*, 573 U.S. at 165. The Department's Section 530D letter recognizes "the severity of the charged conduct" in this case and "condemn[s] [it] in the strongest possible terms." *Nagarwala* § 530D Letter, at 2. And the Department's most recent filing decries female genital mutilation as "heinous and reprehensible," underscoring the "broad condemnation of this abhorrent practice." DOJ's Opp. 1-2. A decision by this Court upholding the constitutionality of the statute will afford the Department an opportunity to help

[6] Because there is such a credible threat here, it does not matter that the Department has declined to "s[eek] further review" of the decision below, as occurred in both *Chadha* and *Windsor*. DOJ's Opp. 15.

extirpate "a form of physical torture causing grave and permanent harm" to young girls. *Abay v. Ashcroft*, 368 F.3d 634, 642 (6th Cir. 2004); *see also Niang v. Gonzales*, 492 F.3d 505, 510 (4th Cir. 2007) (describing FGM as "a barbaric practice unbecoming of a civilized society"); Pam Belluck, *4 Women With Lives Scarred by Genital Cutting: Could a Surgeon Heal Them?*, N.Y Times, May 24, 2019, https://perma.cc/2GWN-MF4T (documenting the excruciating pain and severe health problems suffered by victims of FGM).

Moreover, four of the eight defendants remain under indictment on other federal charges, including for obstruction of justice. The Department has never indicated that it intends to drop these other charges, which were unaffected by the district court's ruling. Accordingly, a renewed decision to prosecute defendants under Section 116(a) would not require the Department to undertake criminal proceedings that otherwise would not occur.

The Department has changed course once already in this case; if this Court rules that Section 116(a) is constitutionally valid, the Department could well do so again. For these reasons, the prospect of enforcement on remand is "far from imaginary or speculative." *Driehaus*, 573 U.S. at 165 (citation omitted).

III. THE HOUSE OF REPRESENTATIVES IS ENTITLED TO INTERVENE AS OF RIGHT

As both *Chadha* and Section 530D confirm, the House and Senate are entitled to intervene when the Executive abandons its defense of any Act of Congress, civil or

criminal. Rule 24's intervention standard thus remains instructive for purposes of deciding the House's motion. The House need not satisfy any specific intervention standard prescribed in a Federal Rule of Civil or Criminal Procedure, however, for federal courts may "formulate procedural rules not specifically required by . . . Congress to implement a remedy for violation of recognized rights." *United States v. Aref*, 533 F.3d 72, 81 (2d Cir. 2008) (citation omitted).

Neither the Department nor defendants contest the timeliness of the House's motion, nor do they argue that the existing parties will adequately represent the House's position on the constitutionality of Section 116(a). And the House satisfies the two contested requirements of Rule 24(a)(2) because it "possesses a substantial legal interest in the case" and "its interest will be impaired without intervention." *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011).

Because the House enjoys Article III standing, it necessarily possesses a "substantial legal interest" in this case. *See Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991) ("[A] party seeking to intervene need not possess the standing necessary to initiate a lawsuit."). And because even private citizens can have an "interest in the validity of legislation," *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997), the same must be true of the legislature that enacted the challenged statute. *See also id.* at 1247 (finding that "potential stare decisis effects can be a sufficient basis for finding an impairment of interest" in the context of "an adverse ruling in the district court"); *Karcher v. May*, 484 U.S. 72, 80 (1987) ("The [New

Jersey] Legislature was permitted to intervene because it was responsible for enacting the statute and because no other party defendant was willing to defend the statute." (quoting *May v. Cooperman*, 578 F. Supp. 1308, 1316 (D.N.J. 1984))).

Both *Chadha* and Section 530D confirm this understanding, as they expressly contemplate intervention by either house of Congress when the Executive declines to defend a federal statute.[7] *See Gavett v. Alexander*, 477 F. Supp. 1035, 1044 (D.D.C. 1979) ("It is the evident purpose of [§ 530D] to permit the Congress to act on its own to defend the constitutionality of legislation when the Executive Branch declines to do so."); Letter from Theodore B. Olson, Solicitor General, to Hon. J. Dennis Hastert, Speaker of the House, at 3 (Dec. 20, 2001), https://perma.cc/TZ7C-EEH2 ("If your office wishes to participate in this litigation, we will be happy to notify the district court and seek an appropriate extension of time to accommodate your filing."). Every decision permitting the House or Senate to intervene in these circumstances—including the Supreme Court's decision in *Chadha*—necessarily stands for the proposition that legislative bodies have a meaningful interest in the validity of their enactments. And, if any doubt remains on this score, it must be "resolved in favor of recognizing [the legislature's] interest." *Mich. State AFL-CIO*, 103 F.3d at

[7] To be clear, the House does not argue that Section 530D, standing alone, "creates a statutory right" to intervene here. DOJ's Opp. 12. The House's position is that Section 530D expressly recognizes that the House may intervene in these circumstances, pursuant to *Chadha*'s unequivocal determination that either house of Congress is a "proper party to defend the validity of a statute" when the Executive refuses to do so. 462 U.S. at 940.

1247.

Acknowledging that federal courts have repeatedly permitted the House and Senate to intervene to defend their enactments, the Department notes that only one of those motions was opposed. DOJ's Opp. 18. That fact only reinforces just how abnormal the Department's opposition is in this case. It is unfortunate that the Department assails the House's effort to seek a judicial determination of Section 116(a)'s constitutionality, for "it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court." *Windsor*, 133 S. Ct. at 2688. If intervention is denied here, the Executive's nondefense of Section 116(a) will function like a forbidden line-item veto, even though powerful arguments can be made in the law's defense. *See Clinton v. City of New York*, 524 U.S. 417, 438 (1998) ("There is no provision in the Constitution that authorizes the President . . . to repeal statutes.").

The district court badly erred in assessing those arguments. Its Commerce Clause ruling overlooked significant evidence that so-called "cutters"—including medical professionals—are typically paid to perform female genital mutilation and that, in communities in which FGM is prevalent, families often pool their resources to

compensate cutters willing to travel from abroad.[8] Moreover, as the Department of State's official blog explains, FGM's "negative impacts take a toll on economies due to the medical costs associated with FGM[]-related complications." *United in the Commitment to End Female Genital Mutilation/Cutting*, DipNote: U.S. State Department Official Blog (Feb. 6, 2018), https://perma.cc/MV2K-WVZB; *see also Female Genital Mutilation (FGM): Background Information and Issues for Congress*, Congressional Research Service (Aug. 27, 2004), https://perma.cc/U7GK-BBQZ (documenting the lifelong health complications caused by FGM, ones often necessitating various forms of medical care).

The district court's holding regarding the Treaty Power violated a cardinal principle of stare decisis in deciding defendants' motion as if the Supreme Court's decision in *Missouri v. Holland*, 252 U.S. 416 (1920), had been overruled by implication. And the court severely misconstrued Article 24(1) of the International Covenant on Civil and Political Rights, a treaty obligation that the United States sought to effectuate by passing Section 116(a).

Female genital mutilation is not a form of purely "local criminal activity," Op.

[8] Moreover, the Department's Section 530D letter states that FGM "does not *appear* to be inherently an economic activity," and "does not *appear* to be part of an economic class of activities that have a substantial effect on interstate commerce." *Nagarwala* § 530D Letter, at 2 (emphases added) (citation omitted). These qualifiers suggest that the Department did not undertake an exhaustive inquiry into the market for FGM before concluding that it would not defend the statute. The House has undertaken such an inquiry and is prepared to incorporate this analysis into its briefing on the merits of the statute's constitutionality.

and Order, R. 370, Page ID #3086—it is a transnational abomination whose elimination requires cooperation at the national and international levels. *See Proclamation of Interagency Support for Female Genital Mutilation/Cutting (FGM/C) Investigations Between U.K. and U.S. Law Enforcement* (Aug. 30, 2018), https://perma.cc/6JBL-BBK2 (explaining that FGM "is a global issue that transcends our borders"); *ICE Leads Effort to Prevent Female Genital Mutilation at Newark Airport*, ICE Newsroom (June 25, 2018), https://perma.cc/45EG-SYWA (citing "the necessity for a whole government approach to prevention of FGM").

Both the Department and defendants suggest that the House's interest will not be impaired without intervention, because Congress can simply pass a new law that conforms to the lower court's understanding of Congressional power. *See* DOJ's Opp. 5; Defs.' Opp. 28. But Congress cannot remedy this diminution of its legislative authority simply by passing new laws. Because the Department has failed to fulfill its duty to defend Section 116(a)'s constitutionality, the House's interest will be impaired unless it is permitted to intervene here.

IV. PERMISSIVE INTERVENTION IS WARRANTED

The House's motion also satisfies the standard for permissive intervention, a lower showing than is required to intervene as of right. The House's interest in preserving its constitutional authority endows it with "a claim . . . that shares with the main action a common question of law." Fed. R. Civ. P. 24(b)(1)(B). The Department's argument that the House lacks a "claim" under this rule runs contrary

to Supreme Court precedent, which recognizes that permissive intervention "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of litigation." *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459 (1940); *see also Mich. State AFL-CIO*, 103 F.3d at 1248 (confirming that a "claim that [a law is] valid" is a type of "claim" contemplated by Rule 24(b)(1)(B)).

Finally, contrary to the Department's view, intervention would not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Federal law expressly permits the Department to appeal orders "dismissing an indictment," 18 U.S.C. § 3731, which it does with some frequency. Any delay incident to that ordinary appellate process is no less justified when the House—rather than the Department—seeks a judicial determination of the scope of Congressional authority.

CONCLUSION

The House respectfully requests that the Court grant its motion to intervene for the limited purpose of defending the constitutionality of Section 116(a).

Dated: June 7, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2019, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

/s/ Daniel B. Rice
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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point roman-style Garamond font.

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