NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals for the District of Columbia Circuit

No. 22-5263

ANDREW S. CLYDE, Individually, and in his Official Capacity as a member of the U.S. House of Representatives; LOUIE GOHMERT, Individually, and in his Official Capacity as a member of the U.S. House of Representatives; LLOYD SMUCKER, Individually, and in his Official Capacity as a member of the U.S. House of Representatives,

Plaintiffs-Appellants,

– v.–

WILLIAM J. WALKER, In his Official Capacity as Sergeant at Arms of the U.S. House of Representatives; CATHERINE SZPINDOR, In her Official Capacity as Chief Administrative Officer of the U.S. House of Representatives,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia in Case No. 1:21-cv-01605-TJK, Honorable Timothy J. Kelly, U.S. District Judge

BRIEF FOR PLAINTIFFS-APPELLANTS

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JANUARY 11, 2023

CERTIFICATE AS TO PARTIES, RULINGS, & RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Appellants' counsels certify as follows:

A. Parties, Intervenors, & *Amicus Curiae*

The Plaintiffs in the District Court, all of whom are the Appellants here, are Andrew S. Clyde, Louie Gohmert, and Lloyd Smucker, all appearing both individually and in their official capacities as Members of the U.S. House of Representatives (Gohmert is a former member as of this writing). The Defendants, both of whom are the Appellees here, are William J. Walker, Sergeant at Arms for the U.S. House of Representatives, and Catherine Szpindor, Chief Administrative Officer of the U.S. House of Representatives, both sued in their official capacities.

B. Rulings Under Review

The ruling under review is District Court's August 1, 2022, order in *Clyde v. Walker*, Case No. 1:21-cv-1605-TJK (D.D.C.), dismissing this matter for lack of subject matter jurisdiction [Dock. # 21], and the accompanying memorandum opinion [Dock. # 22].

C. Related Cases

Undersigned counsel is not aware of any related cases pending in this Court or any other court.

Respectfully submitted,

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Dated: January 11, 2023

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JURISDICTIONAL STATEMENT

Jurisdictional questions are reviewed *de novo*, *Meza v. Renaud*, 9 F.4th 930, 933 (D.C. Cir. 2021), as are questions of constitutional interpretation. *United States v. Akhigbe*, 642 F.3d 1078, 1082 (D.C. Cir. 2011). The district court dismissed the case by final appealable Order on August 1, 2022. Dock. # 21. Notice of appeal was timely filed on August 29, 2022, Dock. # 23 and resubmitted due to ECF categorization error on September 30, 2022. Dock. # 24.

STATEMENT OF ISSUES

1. Whether the District Court erred in holding that the Speech or Debate Clause of U.S. Const. art. I, § 6, cl. 1, precludes exercising subject matter jurisdiction over Appellants' claims against Appellees under the Constitution's Discipline Clause, U.S. Const. art. I, § 5, cl.2, and the Twenty-Seventh Amendment to the Constitution.
2. Whether the Twenty-Seventh Amendment to the Constitution prohibits the U.S. House of Representatives from reducing Members' salaries by deducting punitive fines from those salaries.
3. Whether Members of Congress declining to be subjected to magnetometer screening before accessing the House floor constitutes "disorderly behavior" within the meaning of the Constitution's Discipline Clause. U.S. Const. art. I, § 5, cl.2

STATEMENT OF THE CASE

Plaintiff-Appellants served as Members of the U.S. House of Representatives in the 117th Congress as members of the then-minority opposition party Republican Caucus. Congressmen Andrew Clyde (Georgia 9) and Lloyd Smucker (Pennsylvania 11) currently serve in the 118th Congress, while Louie Gohmert (Texas 1) did not seek reelection. JA 7-8 (Amend. Comp. ¶¶ 1-3).

A. The House Imposes A New Rule to Screen Members & Fine Violators By Reducing Their Salaries.

On Feb. 2, 2021, the House passed H.R. 73, directing the House Sergeant at Arms to impose a $5,000 fine against any member for "failure to complete security screening for entrance to the House Chamber," and a $10,000 fine for any subsequent violation. H.R. 73, 117th Congress, 1st Sess., § 1(a)(1)-(2), *Imposition of Fines for Failure to Complete Security Screening for Entrance to House Chamber* (2021) (hereafter, the "Screening Rule"). Upon notice of an alleged Screening Rule violation, the Member could appeal the charge to the House Ethics Committee. *Id.* § 1(a)(3) and (b). The Member had 90 days from when a violation was determined with finality–either because he didn't contest it or by the Committee's determination that he violated the rule–to pay the fine. *Id.* § 1(c)(1) and (2). The House's Chief Administrative Officer was required to deduct the fine from a Member's salary who did not pay the fine within 90 days. *Id.* § 1(c)(1). JA 8-9 (Amend. Comp. ¶¶ 8-10).

B. The Screening Rule and Fine For Violating the Rule Is Imposed On Republican Members of Congress, But Not Democratic Members of Congress.

The Screening Rule was implemented under the Sergeant at Arms' authority, using magnetometers at the entrances to the House Chamber. JA 9 (Amend. Comp. ¶ 11).

On February 3, 2021, Congressman Clyde entered the House Chamber without being screened by security personnel or passing through a magnetometer. Then-Acting Sergeant at Arms Timothy Blodgett notified Congressman Clyde on February 5, 2021, that Clyde would be fined $5,000 for violating the Screening Rule. In contrast, on February 4, 2021, then-Speaker Nancy Pelosi, the leader of the House Democratic Party majority, violated the Screening Rule by walking past the magnetometers at two entrances and entering the House Chamber via a door in the Speaker's Lobby without subjecting herself to search via the magnetometers. The security personnel, under the Sergeant at Arms' authority, did not force her to be screened or restrain her from entering the Chamber. The Sergeant at Arms did not issue her a citation, her violation was not referred to the House Ethics Committee, and she was not fined. JA 9-10 (Amend. Comp. ¶¶ 12-13).

On February 5, 2021, the Republican members of the House Committee on Administration, Congressmen Rodney Davis, Barry Loudermilk, and Bryan Steil, wrote to Sergeant at Arms Blodgett, pointing out Speaker Pelosi's avoidance of the

new security measures and directing him to inform them once the Screening Rule fine was levied against Speaker Pelosi. Neither Sergeant at Arms Blodgett nor subsequent Sergeant at Arms William Walker ever issued Speaker Pelosi a citation, her violation was not referred to the House Ethics Committee, and she was not fined. Senior Democratic leaders committed similar violations without repercussions, including Congresswoman Maxine Waters (California 43), then-Chairwoman of the House Financial Services Committee, Congressman Jamie Raskin (Maryland 8), and Congresswoman Nydia Velazquez (New York 7), then-Chairwoman of the House Small Business Committee. JA 10-11 (Amend. Comp. ¶¶ 14-17).

On February 5, 2021, Congressman Clyde again entered the House Chamber, this time passing through a magnetometer, but without allowing himself to be detained for a secondary screening by security personnel, saying "I have to vote," as his official phone had set off the magnetometer. Sergeant at Arms Blodgett notified Congressman Clyde on Feb. 8, 2021, that he would be fined an additional $10,000 for violating the Screening Rule a second time. Congressman Clyde appealed the fine notifications to the House Ethics Committee, asserting that the Screening Rule violated Article I, §§ 5 and 6, and the Twenty-Seventh Amendment of the U.S. Constitution and that the Rule was being selectively enforced against only Republican members, and that multiple Democrats,

including Speaker Pelosi, had violated the Screening Rule but had been exempted from enforcement. The Committee denied his appeal on April 11, 2021, directing that he pay $15,000 in fines. Pursuant to H.R. 73 § 1(c)(1), when he failed to pay the fine, House Chief Administrative Officer ("CAO") Catherine Szpindor was required to take $15,000 from his congressional salary. JA 11-12 (Amend. Comp. ¶¶ 18-19).

On February 3, 2021, then-Congressman Gohmert was screened upon entry to the House Chamber without incident. He later left the Chamber through the Speaker's Lobby to the men's bathroom adjacent to the Speaker's Lobby – just feet from a security post. Security personnel were present but did not request him to re-submit to screening before re-entering the Chamber. He repeated that course of action the next day, but the security personnel requested that Congressman Gohmert submit to another screening; however, Gohmert informed them that he had already been screened and proceeded back into the House Chamber. Sergeant at Arms Blodgett subsequently notified him that he had violated the Screening Rule by entering the Chamber without screening and would be fined $5,000. Congressman Gohmert appealed the fine to the Ethics Committee, denying that he had violated the Screening Rule as a factual matter. Congressman Gohmert's appeal also observed that the Screening Rule and its resultant fine were being selectively enforced against only Republicans, that it was not being enforced

against Speaker Pelosi or other Democrats, that it inhibited the voters of Texas's First District from receiving the full benefit of the representative of their choice through the use of punitive fines, and that such fines reduced a Member's salary in the same session in which it was passed. The Committee denied his appeal and directed that he pay a $5,000 fine. CAO Szpindor was then required to take $5,000 from his congressional salary. JA 12-13 (Amend. Comp. ¶¶ 20-23).

On May 19, 2021, a vote was called for the final passage of H.R. 1629. Congressman Smucker was then away from the Capitol grounds, and he returned to vote just before the vote closed. Knowing that he could miss the vote, Congressman Smucker ran to the Chamber and communicated to the security personnel at the entrance that he would quickly vote – within their line of sight – and return to complete the magnetometer screening, which he did directly after that. He believed that had he delayed his vote to accommodate the Screening Rule; he would have missed the vote on H.R. 1629, thereby failing in his first duty to his constituents. Nonetheless, Sergeant at Arms Walker notified Congressman Smucker that he had violated the Screening Rule by entering the House Chamber without being screened and would be fined $5,000. Congressman Smucker appealed the fine notification to the Ethics Committee, denying that he had violated the Screening Rule and providing the foregoing explanation. It denied his

appeal and directed that he pay a $5,000 fine. CAO Szpindor was then required to take $5,000 from his congressional salary. JA 13-14 (Amend. Comp. ¶¶ 24-26).

On April 14, 2021, Congressman Clyde was in his legislative office when a vote was called and then hurried to the Chamber to vote; however, upon his attempted entry, the magnetometer went off, and he was required to be re-screened before his entry. The voting system shut down just before he could press the voting button, and he thus missed the opportunity to vote on H.R. 172, the Anti-Doping Agency Reauthorization Act. But for the magnetometer delay, he would have made that vote. Other Members who missed votes due to being delayed by the magnetometer screening include Republican Representatives Michael Burgess (Texas 26), Lauren Boebert (Colorado 3), Jeff Duncan (South Carolina 3), Chris Smith (New Jersey 4) and Brad Wenstrup (Ohio 2). JA 15 (Amend. Comp. ¶¶ 28-29).

Plaintiff-Appellants Clyde and Gohmert filed suit on June 13, 2021, seeking declaratory and injunctive relief against Sergeant at Arms William Walker and CAO Catherine Szpindor – in their official capacities, and who answered to the Speaker representing the majority party – from enforcing H.R. 73 as violative of the U.S. Constitution's Twenty-Seventh Amendment and Article I, § 5, cl.2, and

seeking the return of their withheld salaries.[1] JA 3, 11-3 (Amend. Comp. ¶¶ 4-5, 30-41); Dock. #1. An Amended Complaint was filed on July 15, 2021, to add Plaintiff-Appellant Smucker. Dock. # 9. The district court issued an opinion and order a year later, on August 1, 2022, dismissing the case for lack of subject matter jurisdiction under the Constitution's Speech or Debate Clause, Article I, § 6, cl.1. Dock # 21, 22 ("*Clyde v. Walker*").

SUMMARY OF THE ARGUMENT

Our Constitution protects liberty in myriad ways. Among them are the "single, finely wrought and exhaustively considered, procedures specified in Article I" designed to ensure American citizens are fully and freely heard in their House of Representatives. *See generally, Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 273 (1991). In 1992, the American people added an additional check to Article I's restraints on Congress by ratifying the Twenty-Seventh Amendment, a restraint the Founders themselves drafted in the original 1789 Bill of Rights. The Amendment simply states: "No 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.

[1] Count II of both complaints also asserted violations of the Arrest Clause, U.S. Const. Art. I, § 6, cl. 1, which is not appealed here.

The "Speech or Debate Clause" found in Article I, § 6, clause 1, guarantees that Members of Congress are unconstrained in their ability to participate fully in core legislative activities without fear of having to answer outside the Congress. They may speak, vote, investigate, draft, and communicate within the Congress without fear of prosecution, suit, or investigation by any entity other than Congress itself, for what they say or do, or their motives in doing so. To the extent they carry out those same functions, congressional employees share the same immunity.

The immunity created under the Speech or Debate Clause does not, however, extend to administrative functions conducted within the Congress that are not themselves fundamentally legislative acts. Speaking and voting are core legislative acts immune from question. Security screening and payroll operations are not. Moreover, while Members of Congress cannot be held to account for speaking or voting for illegal acts, congressional staffers have no lawful authority to carry out such acts, and receive no immunity under the Clause when they do. The Supreme Court has consistently recognized the justiciability of these issue since it first considered these questions over 140 years ago.

In January 2021, the majority party of the 117th Congress enacted House Resolution 73, which required Members to pass through magnetometer security screenings in order to access the House Chamber, and imposing massive fines ($5,000 for the first infraction, $10,000 for the subsequent violations) upon

Members determined to have violated the Screening Rule. The Rule was enforced against members of the minority party, like Plaintiff-Appellants, but not against members of the majority party, including senior members of its leadership. As a result of denying minority party Members access to the House Chamber, numerous Members were deprived of the ability to speak and vote on legislation under consideration by the House, thus depriving their constituents of the most fundamental aspects of democratic representation.

Fines for violating the Rule were imposed by the House Sergeant at Arms without any Member having engaged in "disorderly behavior," the constitutional predicate for punishing a Member under the Constitution's Discipline Clause, Article I, § 5, clause 1. Moreover, the fines were automatically deducted from Members' congressional salaries by the House's Chief Administrative Officer ("CAO") before Members ever received them, in direct contravention of the Twenty-Seventh's Amendment stricture that congressional salaries may not be "varied." These measures are of the very kind the Founders sought to foreclose, coercing minority party Members, and depriving both constituents and the Congress of the full participation and exercise of independent judgment by the people's elected Representatives.

The federal courts have subject matter jurisdiction over these questions, and judicial enforcement of textual constitutional commands is a familiar and expected

role when constitutional violations are presented. This Court should (1) reverse the district court's determination that it lacked jurisdiction; (2) declare that automatic deductions of punitive fines from Members' congressional salaries before they receive them violates the Twenty-Seventh Amendment; (3) declare that the imposition of fines in the absence of conduct that is "disorderly behavior" is unconstitutional under Article I, § 5, cl. 1; (4) enjoin the Sergeant at Arms and CAO from enforcing H.R. 73 or its equivalent to the extent such enforcement requires those unconstitutional acts, and (5) enjoin the CAO to return Plaintiff-Appellants' withheld back pay.

ARGUMENT

I. Invoking the Speech or Debate Clause Does Not Deprive Federal Courts of Jurisdiction, and Courts Are Obligated to Ascertain Whether the Legislative Immunity it Creates Applies to the Case at Hand, and if so, to What Extent.

Over 140 years of Supreme Court precedent make clear that the invocation of the Speech or Debate Clause is not – by itself – a bar to justiciability. Its annals contain no instance in which a party's reliance upon the Clause was held to deprive the Supreme Court—or any other court—of jurisdiction to consider the issue on the merits. The district court's dismissal of this case on subject matter jurisdiction grounds contradicts the Supreme Court's precedents.

In one of the Court's seminal Speech or Debate Clause cases, *Powell v. McCormack*, Congressman Adam Clayton Powell, Jr., was prevented from taking

his seat in violation of the Qualifications Clause of Article I, § 5, cl.1 of the Constitution, and sought declaratory relief against the House employees tasked with implementing the House's unconstitutional decision. 395 U.S. 486 (1969). In particular, Congressman Powell sought a declaratory judgment that the House Sergeant at Arms had unconstitutionally withheld his congressional salary and an injunction ordering the Sergeant at Arms to provide that salary. *Id.* at 493-94. Addressing arguments identical to those invoked by the district court below, *Powell* expressly held both that the Court had subject matter jurisdiction to hear the case and that the Speech or Debate Clause is no bar to justiciability to claims against congressional employees who have violated textual commands of the Constitution. *Id.* at 512-16, 550 (subject matter jurisdiction exists), 500-06, 512, 548-50 (immunity claims under the Speech or Debate Clause against congressional employees alleged to have violated textual constitutional strictures are justiciable). Indeed, *Powell* described its Speech or Debate analysis as entirely distinct from its evaluation of subject matter jurisdiction. *Id.* at 495. Moreover, as directly controls the instant case, *Powell* expressly held that the Court could consider Congressman Powell's request that the Sergeant at Arms "disburse funds," i.e., his congressional salary. *Id.* at 504. The Court concluded that Powell had been unconstitutionally excluded from taking his seat in the House of Representatives and remanded the consideration of equitable relief or ordering the release of his back pay to the lower

courts. *Id.* at 550. If the district court here was correct in asserting that any question related to the legislative function is beyond the federal courts' subject matter jurisdiction. then *Powell*'s adjudication could never have occurred: No declaratory judgment against the Sergeant at Arms could have issued, and no equitable remedies remanded. Though it should go without saying, a court without jurisdiction cannot order relief. *Smith v. Bourbon Cnty.*, 127 U.S. 105, 112-13 (1888); *Green v. Obergfell*, 121 F.2d 46, 55 (D.C. Cir. 1941).

Lack of subject matter jurisdiction as a barrier to justiciability is nowhere to be found in the Supreme Court's Speech or Debate Clause jurisprudence. Indeed, in *Eastland v. United States Servicemen's Fund,* a touchstone of the Court's Speech or Debate Clause cases, all of its justices—whether in the majority, concurrence, or dissent—expressly held the question of the Clause's applicability to be properly before the Court. 421 U.S. 491 (1975). The majority opinion held, "The question to be resolved is whether the actions of the petitioners fall within the sphere of legitimate legislative activity. If they do, the petitioners 'shall not be questioned in any other Place' about those activities since the prohibitions of the Speech or Debate Clause are absolute," and that "the Court of Appeals correctly held that the District Court properly entertained this action initially." *Id.* at 501 and n.14 (cleaned up). Concurring for three justices, Justice Marshall observed, "the District Court properly entertained the action in order to provide a forum in

which respondent could assert its constitutional objections . . . a court's inquiry . . . is necessarily quite limited once defendants entitled to do so invoke [the Clause's privilege]." *Id.* at 514 (Marshall, J., concurring). In dissent, Justice Douglas wrote that the Clause's immunity could be denied to those "within the reach of judicial process." *Id.* at 518 (Douglas, J., dissenting). No justice remotely suggested the Court lacked subject matter jurisdiction to consider the case, even though *Eastland*'s ultimate holding was that the Clause provided "complete immunity" for the Members and Chief Counsel at whom the suit was directed. *Id.* at 495-96, 507.

The asserted lack of jurisdiction upon which the district court below rationalized dismissing this case was the same argument flatly rejected in *Powell.* The district court reasoned that because "the Clause's protections extend to Congressional aides and staff," and the Clause is to be read "broadly," the court could not review the constitutionality of staffers enforcing "legislative acts" such as security screenings, fines, and payroll deductions. *Clyde,* JA 5-8, 11. *Powell* rejects that logic: "Respondents assert that the Speech or Debate Clause of the Constitution, Art. I, § 6, is an absolute bar to [Congressman Powell's suit]." *Id.* at 501. It held, in pertinent part:

> Legislative immunity does not, of course, bar all judicial review of legislative acts. That issue was settled by implication as early as 1803, and expressly in *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881) the first of this Court's cases interpreting the reach of the Speech or Debate Clause. Challenged in *Kilbourn* was the constitutionality of a House Resolution ordering the arrest and imprisonment of a recalcitrant

> witness who had refused to respond to a subpoena issued by a House investigating committee. While holding that the Speech or Debate Clause barred Kilbourn's action for false imprisonment brought against several members of the House, the Court nevertheless reached the merits of Kilbourn's attack and decided that, since the House had no power to punish for contempt, Kilbourn's imprisonment pursuant to the resolution was unconstitutional. It therefore allowed Kilbourn to bring his false imprisonment action against Thompson, the House's Sergeant at Arms, who had executed the warrant for Kilbourn's arrest. The Court first articulated in *Kilbourn* and followed in *Dombrowski v. Eastland*, 387 U.S. 82 (1967), the doctrine that, although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts. Despite the fact that petitioners brought this suit against several House employees—the Sergeant at Arms, the Doorkeeper and the Clerk—as well as several Congressmen . . .
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> . . .
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> That House employees are acting pursuant to express orders of the House does not bar judicial review of the constitutionality of the underlying legislative decision. *Kilbourn* decisively settles this question, since the Sergeant at Arms was held liable for false imprisonment even though he did nothing more than execute the House Resolution that Kilbourn be arrested and imprisoned.
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> . . .
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> The purpose of the [Speech or Debate Clause's] protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions. . . In *Kilbourn* and *Dombrowski* we thus dismissed the action against members of Congress but did not regard the Speech or Debate Clause as a bar to reviewing the merits of the challenged congressional action since congressional employees were also sued. Similarly, though this action may be dismissed against the Congressmen, petitioners are entitled to maintain their action against House employees and to judicial review of the propriety of the decision to exclude petitioner Powell.

395 U.S. at 503-06.

The Court's Speech or Debate Clause cases have been consistent on this point in the 140 years since *Kibourn*. In *Gravel v. United States,* another of the Court's significant explications of the Clause, the Court faced the question of whether the Clause immunized a congressional aide, acting on a Senator's behalf, from testifying before a grand jury. 408 U.S. 606, 613 (1972). The Court explicitly held, "we are of the view that both the question of the aide's immunity and the extent of that immunity are properly before us in this case." *Id.* at 628 n.17. No justice, whether in majority or dissent, suggested that the Clause's invocation deprived the Court of subject matter jurisdiction. *See id,* generally. Indeed, *Gravel* discussed at length the judiciary's proper role in determining whether and when the Clause is applicable. *See id.* at 618-20, 624-25.

Moreover, in *United States v. Brewster,* the Court held that while, "It is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts," "[t]he only reasonable reading of the Clause, consistent with its history and purpose, is that it does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs, but not part of the legislative process itself." 408 U.S. 501, 525, 528 (1972). In so doing, the Court explicitly stated it "has jurisdiction to hear this appeal." *Id.* at 507. While three justices in *Brewer* dissented from the majority's construction of the Speech or Debate Clause,

none contended the Court lacked jurisdiction to consider the matter. *See id.* at 529-50 (Brennan, J., dissenting), 551-63 (White, J., dissenting.).

Similarly, in *Doe v. McMillan,* a majority of justices agreed that the extent to which the Clause immunized Members of Congress and congressional employees for publicizing ostensibly private information was justiciable. 412 U.S. 306, 311 n.6 (1972), 325 (Douglas, J., concurring). And while the other justices disagreed about the majority's application of the Clause to the acts and individuals involved and what remedy might be available, none suggested the Court lacked jurisdiction to hear the case. *See id.* at 331-32 (Burger, C.J., concurring in part and dissenting in part); 332-38 (Blackmun, J., same); 338-45 (Rehnquist, J., same). [2]

[2] The Court's other cases substantively addressing the Speech or Debate Clause contain no discussion of jurisdiction or justiciability at all, but all actively analyze the Clause's applicability to the facts at hand. *See, e.g., Hutchison v. Proxmire*, 443 U.S. 111, 131, 133 (1979) (holding the Clause's immunity as not extending to press releases and newsletters issued by individual members; no member of the Court suggested jurisdiction to hear the case was lacking simply because the case addressed an activity by a legislator), *id.* at 136 (Stewart, J., concurring in part and dissenting in part), *id.* at 136 (Brennan, J., dissenting); *United States v. Heltoski*, 442 U.S. 477 (1979) (holding the Clause precluded a congressman from being questioned by a grand jury for his legislative acts); *Dombrowksi*, 387 U.S. 82 (*per curiam*) (holding that Clause immunized member of Senate investigative committee for activities by the committee, but that committee employee might not be covered); *United States v. Johnson*, 383 U.S. 169 (1966) (holding Clause precluded prosecutorial inquiry into the occurrence and motive of a congressman's speech on the House floor); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (holding by analogy to the Clause that members of a state legislative committee were immune from suit because its investigations were a legislative function); In holding that the act of voting by Members fell within the Clause's protection (but not the resulting order's enforcement by the House Sergeant-At-Arms), the *Kilbourn* Court referred

Hence, the district court's opinion that it lacked subject matter jurisdiction to consider the Members' claims merely because they emanate from a legislative body, *see Clyde,* JA 21, 24-31 is simply untenable in the face of uniform Supreme Court precedents to the contrary. Were the district court correct in its assertion, none of the aforementioned cases could have been decided by the Supreme Court at all, regardless of the Supreme Court's ultimate determination(s) that the Clause gave absolute immunity for members and staff, *see, e.g., Eastland,* 421 U.S. at 495-96, 507, provided immunity for members, but not staff, *see, e.g., Powell*, 395 U.S. at 506, allowed no immunity for members or staff, *see, e.g., Hutchison,* 443 U.S. at 131, 133, embraced immunity for core legislative acts like Representatives making speeches on the floor, *see, e.g.,* 383 U.S. at 185, but not for non-legislative actions like a staffer conducting an unlawful search on behalf of a committee investigation, *see, e.g., Dumbrowski,* 387 U.S. at 82-83, 85, or the House Doorkeeper denying a duly elected member access to the House chamber. *See, e.g., Powell*, 395 U.S. at 493-94, 550. But, the Supreme Court did take those cases and render merits decisions on the Speech or Debate Clause.

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to it not as a jurisdictional question, but as a "defence" to the plaintiff's claims entitling the Members to a dismissal. 103 U.S. at 204-05. *See also, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 810-12 (1982) (discussing, in dicta, the Court's functional approach to congressional employee immunity under the Clause).

The district court's labeling of its decision as one of "subject matter jurisdiction," is understandable, given this Circuit's use of similar nomenclature. *See Clyde*, JA 25 (citing *Judicial Watch, Inc. v. Schiff*, 998 F.3d 989, 993 (D.C. Cir. 2021)). It is undoubtedly true that *Judicial Watch* described the dismissal of the complaint under Speech or Debate immunity as "for want of subject matter jurisdiction," but without explanation for that characterization. *Id.* Similar usages have been found in other of this Circuit's Speech or Debate Clause cases. *See, e.g., McCarthy v. Pelosi*, 5 F.4th 34, 38 (D.C. Cir. 2021) (describing its analysis under the Clause as "jurisdictional"); *Rangel v. Boehner*, 785 F.3d 19, 22 (D.C. Cir. 2015) (same). *See also Consumers Union of the U.S., Inc. v. Periodical Correspondents' Ass'n,* 515 F.2d 1341, 1346, 1351 (D.C. Cir. 1975) (holding the Clause as providing the Houses of Congress with immunity from challenges to their rules governing press galleries and describing the case as thus "not justiciable").

These characterizations are *dicta*, not essential to their decisions, and made without full consideration of the jurisdictional/justiciability question. *See Lawson v. United States*, 176 F.2d 49, 51 (D.C. Cir. 1949). Subject matter jurisdiction is a court's statutory or constitutional power to adjudicate a case. *Lightfoot v. Cendant Mortg. Corp.*, 580 U.S. 82, 92 (2017). Immunity doctrines, as both Supreme Court and this Circuit have characterized the Speech or Debate Clause, are generally

considered a defense, not a jurisdictional limitation on a court's judicial authority. *See, e.g., Siegert v. Gilley*, 500 U.S. 226, 231 (1991) ("qualified immunity is a defense"); *Alden v. Maine*, 527 U.S. 706, 728 (1999) ("sovereign immunity is a defense"); *John v. Barron*, 897 F.2d 1387, 1392 (7th Cir. 1992) ("judicial immunity is a defense"); *Cornish v. Johnson,* 1985 U.S. App. LEXIS 14096 at *5 (6th Cir. Sept. 11, 1985) (describing executive immunity as a defense); *NPR Holdings, LLC. v. City of Buffalo*, 916 F.3d 177, 194 (2d Cir. 2019) (legislative immunity is a defense). The Speech or Debate Clause creates one form of legislative immunity. *Powell*, 395 U.S. at 503. Like other immunities, legislative immunity can be waived by its holder. *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1039 (D.C. Cir. 2003); *Gravel*, 408 U.S. at 621-22 (suggesting that a Member of Congress could waive or repudiate an aide's Speech or Debate immunity); *see also Scott v. Taylor,* 405 F.3d 1251, 158 (11th Cir. 2005) (observing that legislators can waive immunity to have case decided on the merits); *Heltoski*, 442 U.S. at 493 (suggesting that an individual member of Congress might be able to waive Speech or Debate immunity "by an explicit and unequivocal expression"). As the Supreme Court cases discussed *supra*, demonstrate, a party's invocation of the Speech or Debate Clause is no impediment to a court's exercise of jurisdiction over the case, or its justiciability.

II. The Court Has Jurisdiction To Provide Relief Against the Unconstitutional Conduct By Employees of the House of Representatives.

Regardless of any "jurisdictional" and "justiciability" labeling, it is beyond dispute that longstanding Supreme Court and D.C. Circuit precedents hold not only that congressional rules and practices are subject to judicial review where a constitutional violation is alleged, but that congressional staff are subject to federal court jurisdiction when the challenged conduct is not a core legislative act immunized by the Speech or Debate Clause. Here, the congressional staff functions at issue–providing security and engaging in payroll deductions–are purely administrative in nature, and not within the Speech or Debate Clause's ambit.

A. Supreme Court & Circuit Precedents Mandate That House Rules Subject to Allegations of Unconstitutionality Be Subject to Judicial Review.

The circumstances under which House rules are susceptible to judicial review were established in *United States v Ballin*, 144 U.S. 1 (1892) (*reaff'd, NLRB v. Noel Canning*, 573 U.S. 513, 551 (2014)). As this Court observed in *Consumers Union, Ballin*'s general rule is that each house of Congress's "power to make rules" under Art. I, § 5 "is a continuous power, always subject to be exercised by the house" and "absolute," but "within the limitations suggested [in the *Ballin* opinion]." 515 F.2d 1341, 1347 (1975) (quoting *Ballin*, 144 U.S. at 5)

(emphasis added). Thus, while the House ordinarily has substantial authority to enact rules free from judicial review, that authority has outer limits, beyond which judicial scrutiny is appropriate: "[1] It may not by its rules ignore constitutional restraints or [2] violate fundamental rights, and [3] there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained." *Ballin*, 144 U.S. at 5. All three circumstances exist here.

Each claim in this case is directed to the House exceeding the boundaries of its constitutional power. Running afoul of *Ballin*, the House has ignored express constitutional restraints upon its rulemaking authority. First, implementing punitive fines under H.R. 73 via salary deductions explicitly violates the 27th Amendment's prohibition against salary reductions. JA 16 (Am. Compl., ¶¶ 30-35). Second, H.R. 73 punishes members for behavior that is not "disorderly," thereby exceeding the express limitation on the House's power to punish its Members under Constitution Article I, § 5, Clause 2. JA 12-13 (Am. Compl. ¶¶ 36-37, 39 & 41). The district court refused to recognize the Supreme Court's *Ballin* directive, asserting the Speech or Debate Clause bars such challenges. *Clyde*, JA 30. This was error.

"It has long been settled . . . that rules of Congress and its committees are judicially cognizable." *Yellin v. United States,* 374 U.S. 109, 114 (1963) (internal citations omitted). And "it is perfectly clear that the Rulemaking Clause is not an

absolute bar to judicial interpretation of the House Rules." *United States v. Rostenkowski*, 59 F.3d 1291, 1305 (D.C. Cir. 1995). Indeed, this Court has already held that a congressman's 27th Amendment salary alteration claim against the Clerk of the House of Representatives is judicially cognizable. *Boehner v. Anderson*, 30 F.3d 156, 160 (1994). In that same case, this Court acknowledged the federal courts' obligation to exercise jurisdiction "when a congressman suffers an effective nullification of his vote, or if his influence is substantially diminished." *Id.* (citing *Goldwater v. Carter,* 617 F.2d 697, 702-03 (D.C. Cir. 1979) (*en banc), vacated on other grounds,* (Congress had no way to block the President's action terminating a treaty without Senate consent)); *Kennedy v. Sampson,* 511 F.2d 430 (D.C. Cir. 1974); *Moore v. U.S. House of Rep.,* 733 F.2d 946, 951-52 (D.C. Cir. 1984) (where Senate originated revenue bill, Representative deprived of constitutionally guaranteed opportunity to debate and vote on same prior to Senate action); *Vander Jagt v. O'Neill,* 699 F.2d 1166 (D.C. Cir. 1983) (minority party congressmen have standing to challenge dilution of influence when assigned less than proportionate number of committee seats). Plaintiffs have alleged just such a violation of their fundamental rights of representation here.[3]

[3] *Boehner* held that altering a congressional salary in violation of the 27th Amendment would comprise both an official and personal injury to the Member. 30 F.3d at 160.

Furthermore, *Ballin*'s condition that "there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained" is violated by H.R. 73's implementation through (1) the use of salary deductions; and (2) the use of magnetometers in such a way that Members miss votes – their single most important duty to their constituents and the Nation. While the House certainly has constitutional authority to enact rules for discipline and safety, it may not do so by unconstitutional means. As discussed in Part B, *infra*, none of the D.C. Circuit cases upon which the district court relied in relinquishing its *Ballin* obligations involved textual constitutional commands. Specific, explicit textual constitutional protections take precedence over more general provisions of the Constitution. *Stop the Beach Renourishment, Inc. v. Florida Dept. of Env. Protection*, 560 U.S. 702, 721 (2010) (citing *Albright v. Oliver*, 510 U.S. 266, 273 (1994)). Though the Speech or Debate Clause creates important constitutional protections, it does not extinguish other provisions of the Constitution.

Hence, House rules, or their implementation, are indisputably subject to judicial review where a plausible constitutional violation is alleged. The district court's rationale below tortured the Speech or Debate Clause beyond recognition to mean its very opposite: Instead of denoting a specific legislative function, the district court's logic has the immunity created by the Speech or Debate Clause

encompassing all functions performed within the legislative branch, regardless of whether those functions are even legislative, much less speech or debate. As common sense suggests, performing security and administering payroll are neither legislative, nor speech, nor debate. Precedent confirms that understanding.

B. Providing Security Screening & Administering Payroll Are Not Core Legislative Functions Covered by the Speech or Debate Clause.

The Speech or Debate Clause does not insulate legislative functionaries carrying out non-legislative tasks from suit. *McMillan*, 412 U.S. 306, 315 (1973). Congressional employees may accrue Speech or Debate immunity from suit "insofar as the conduct of the [employee] would be a protected legislative act if performed by the Member himself."[4] *Rangel v. Boehner*, 785 F.3d 19, 24-25 (D.C. Cir. 2015) (quoting *Gravel*, 408 U.S. at 618). "Legislative acts are those 'generally done in a session of the House by one of its members in relation to the business before it.'" *McCarthy v. Pelosi,* 5 F.4th 34, 39 (D.C. Cir. 2021)

[4] The district court only glancingly conceded the existence of the distinction between legislative and non-legislative acts. *Clyde,* JA 28 ("these acts [security screening, fining, and salary deductions] qualify as legislative acts even though considered at a high degree of generality and divorced from their context, they are "administrative functions.") The district court, however, has the concept backwards; it is only at the highest degree of generality—that these non-legislative functions happen to be occurring within the legislative branch—that they can be labeled "legislative acts." As discussed, *infra*, the cases upon which the district court relies for that conclusion involve core legislative activities, such as voting (*McCarthy*), the investigation and censure of a Member (*Rangel*), and preventing the interruption of congressional proceedings by third parties (*Consumers Union*).

(emphasis added) (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204, (1881)). In general, the Supreme Court has followed a functional approach to legislative immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 810 (1982). "The key consideration, the Supreme Court cases teach, is the *act* presented for examination, not the *actor*." *Rangel*, 785 F.3d at 25 (emphasis in *Rangel*), (quoting *Walker v. Jones*, 733 F.2d 923, 929 (D.C. Cir. 1984) (Ginsburg, J.)).

Hence, the district court's conclusion below that "each challenged act of the House Officers qualifies as a legislative act" is erroneous. *Clyde*, JA 6. "Legislative acts are not all-encompassing" of the Speech or Debate Clause. *Gravel*, 408 U.S. at 625. "The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Id.* (emphasis added).

In *Rangel*, this Court summarized the kind of legislative activities falling within the Clause's protections for both Members and employees: preparing committee reports, conducting hearings, conducting investigations, committee staff using documents for official business, communications between a congressman

and his staff regarding legislative business, selecting witnesses, bill drafting, staff members' preparations for legislative activities, and, of course, voting. 785 F.3d at 24-25 (collecting cases); *see also McCarthy*, 5 F.4th at 39 ("rules governing how Members may cast their votes [ ] concern core legislative acts"). By contrast, numerous activities well within the normal course of a legislator's and congressional staff duties have been held not to be protected by the Speech or Debate Clause: Contacting executive branch employees and agencies and seeking to influence them, privately publishing documents obtained in the course of congressional duties, assistance in obtaining government contracts, preparing constituent newsletters, press releases, speeches and documents delivered outside of Congress *See, e.g., Gravel*, 408 U.S. at 624-26; *United States. v. Brewster*, 408 U.S. 501, 512-13; *McMillan*, 412 U.S. at 317. Moreover, non-legislative functions occurring within the legislative branch, such as an opening prayer by a chaplain employed by the House, or personnel actions in the course of superintending congressional food service facilities, are also plainly not subject to the Clause's immunity. *See, e.g., Barker v. Conroy*, 921 F.3d 1118 (D.C. Cir. 2019); *Walker*, 733 F.2d at 930-32.

As then-Judge Ginsberg pointed out in *Walker,* the argument that every administrative function performed by the House falls within the Speech or Debate Clause is "far-fetched." 733 F.2d at 931. There, a woman who managed the

House of Representatives' restaurants brought suit for unlawful discharge against the Congressman who chaired the subcommittee overseeing the restaurants, and his staff director. *Id.* at 925. The defendant Congressman and staffer moved to dismiss the suit under Fed.R.Civ.P. 12, invoking the Speech or Debate Clause defense under the theory that the plaintiff's discharge was a "legislative act because it was reached and effected in committee" and that "food service caters to a need essential to the [House's] internal functioning." *Walker*, 733 F.2d at 925, 927. Judge Ginsburg made short work of that argument:

> Personnel who attend to food service, medical care, physical fitness needs, parking,[5] and haircutting for members of Congress no doubt contribute importantly to our legislators' well-being and promote their comfort and convenience in carrying out Article I business. But these staff members, unlike those who help prepare for hearings or assist in the composition of legislative measures, cater to human needs that are not "intimately cognate," *Davis v. Passman*, 544 F.2d 865, 879 (5th Cir. 1977), to the legislative process. The "fundamental purpose" of the Speech or Debate Clause is to "free the legislator from executive and judicial oversight that realistically threatens to control his conduct *as a legislator*." *Gravel*, 408 U.S. at 618 (emphasis added). Auxiliary services attending to human needs or interests not peculiar to a Congress member's work qua legislator may advance a member's general welfare. To characterize personnel actions relating to such services as "legislative" in character, however, is to stretch the meaning of the word beyond sensible proportion. Selecting, supervising, and discharging a food facilities manager, we believe, is not reasonably described as work that significantly informs or influences the shaping of our nation's laws.

[5] It bears noting that "parking" refers to a security function, such as protecting and restricting access to parking garages for the benefit of Members, it is not merely a convenience for Members.

> Nor do we grasp why consideration or a vote in committee should place all personnel superintendence of auxiliary services of a nonlegislative character inside a legislative sphere. Assuming arguendo that anything done in committee is necessarily a legislative act, Walker's complaint against [the defendant congressman and staff director] nonetheless survives a Rule 12(b) motion.

Walker, 733 F.2d at 931 (cleaned up) (italics in original) (underline added). Simply put, the constitutional test for speech or debate tracks the common-sense notion that the vast array of administrative functions performed by the House do not fall within the Speech or Debate Clause unless they are integral to the core legislative functions of deliberation and communication among members concerning the public's business.

The district court pointed to no contrary case suggesting that administrative functions of security and payroll might constitute "legislative acts." Nor could it, because "the Clause has not been extended beyond the legislative sphere." *Gravel*, 408 U.S. at 624-25. The district court asserted, "screening is done 'in execution of internal rules,'" and such "execution" "'is legislative.'" *Clyde,* JA26 (quoting *Consumers Union,* 515 F.2d at 1351; *Rangel*, 785 F.3d at 24). But *Consumers Union* says no such thing. That case involved the refusal of the houses of Congress (through their employees and delegees) to accredit a certain periodical for the press gallery. *Consumers Union*, 515 F.2d at 1342.

Consumers Union rested on two rationales, neither applicable to the security screening of Members nor administering payroll. First, the opinion noted the right of each house under Art. I, § 5 to determine its own rules has since the first Congress always included the authority to decide whether and which members of the public–particularly the press–have access to its proceedings. *Id.* at 1343-47. "Under th[ese] circumstances," the case was "nonjusticiable because it involves matters committed by the Constitution to the Legislative Department." *Id.* at 1346. By contrast, the instant case involves two constitutional limitations on congressional rules not present in *Consumers Union*: (1) the prohibition on salary alteration under the 27th Amendment; and (2) the prohibition against punishing members for behavior that is not "disorderly" under Article I, § 5, Clause 2. As *Ballin* and *Boehner* make manifest, transgressions of constitutional limitations are plainly justiciable, a point this Court recently reiterated in *Barker*. *Barker*, 921 F.3d at 1128 ("Congress may not by its rules ignore constitutional restraints or violate fundamental rights.") (cleaned up) (quoting *Ballin*, 144 U.S. 1, 5 (1892)).

Second, and as *Barker* emphasized while explicating *Consumers Union*, the Speech or Debate Clause was implicated in *Consumers Union* precisely because allowing press access to Congress brought with it direct press interference in congressional deliberations:

> Essential to [*Consumers Union's*] determination was the fact that Congress itself had developed the press gallery rules to protect legislators' independence: Congress designed the rules to ensure that the galleries would be used by bona fide reporters who would not abuse the privilege of accreditation by importuning Members on behalf of private interests or causes. *Consumers Union*, 515 F.3d at 1347. As we explained in a later case, because the Association's denial of the organization's application involved regulation of the very atmosphere in which *lawmaking deliberations* occur, the Speech or Debate Clause barred us from hearing the suit.[6]

Barker, 921 F.3d at 1128 (cleaned up) (emphasis in original). On this point, the district court missed the mark by invoking *Walker*'s discussion of *Consumers Union* to assert "security screening regulates 'the very atmosphere in which lawmaking deliberations occur,' which courts have found makes an act legislative." *Clyde*, JA 26 (citing *Walker*, 733 F.2d at 930 (discussing *Consumers Union*, 515 F.2d at 1347 & n12, 1350)). No such consideration of lawmakers' independence from outside influence exists in the present case; indeed, the reverse is true: The majority party used H.R. 73 to dissuade and prevent Republican

[6] After 1802, "reporters were permitted on the floors of the Senate and House. This privilege apparently was abused with considerable frequency by journalists importuning Members on behalf of various claims before Congress. (Cong.Globe, 32d Cong., 2d Sess. 52 (1852)). For that reason and the growing congestion on the floors, both Houses finally enacted rules permanently removing the press from the floors of Congress. Press galleries above the floors were eventually established: in 1888 the Senate (Cong.Directory, 50th Cong., 1st Sess. 160 (1888)), and in 1916 the House (53 Cong.Rec. 1214 (1916)), entrusted their management to a Standing Committee of Correspondents." *Consumers Union*, 515 F.2d at 1343.

members of Congress from being able to speak, debate, or vote at all.[7] Whereas the internal rule in *Consumers Union* addressed curbing outsiders who had no constitutional right to insert themselves into congressional proceedings, H.R. 73 was designed and implemented to prevent Congressmen from participating in Congress, as essential a constitutional right as might be imagined. The Supreme Court perceived this very problem in *Brewster*: While the Clause is mainly intended to protect congressional processes from outside interference, it does little to prevent a congressional majority from oppressing the minority. 408 U.S. at 519-20.

Barker involved the House Chaplain asserting Speech or Debate immunity from suit by an atheist seeking to lead the House in prayer as a guest chaplain. 921 F.3d at 1121. This Court held that "[the House chaplain's] administration of the guest chaplain program is not an integral part of the House's deliberative and communicative processes. Judicial review of Conroy's conduct thus poses no threat to 'the integrity of the legislative process.'" *Id*. (cleaned up). Likewise, the administration of security screening and payroll deductions do not "regulate the

[7] *Consumers Union* rested its decision in part on the undisputed assumption that the defendants there were acting in good faith. *See* 515 F.2d at 1350. Appellants here make no such concession, and, as stated in the Amended Complaint, contend that H.R. 73 is not only unlawful, but was implemented in a discriminatory and malign manner intentionally harassing members of the House minority. JA 10-11, 14-15 (Am. Compl. ¶¶ 13-17, 27, & 29).

very atmosphere in which lawmaking deliberations occur" and "pose[] no threat to the integrity of the legislative process." *Id.* (cleaned up). Even more on point, the Supreme Court in *Powell* expressly held that it could find unconstitutional the House Doorkeeper's exclusion of Congressman Powell from the House Chamber, and the Sergeant at Arms' failure to pay his salary, the very same acts complained of here, notwithstanding the defendants' claim in *Powell* that the Speech or Debate Clause precluded that decision. 395 U.S. at 486, 493-94, 503-06, 550 (1969).

The district court's reliance on *Rangel* also falls flat. *Clyde*, JA 26-28, 31 (citing 785 F.3d at 23-24). There, Congressman Rangel's complaint was directed explicitly to communications by House staff members during the House Ethics Committee's investigation of his misconduct. 785 F.3d at 21-22. Because those staff members were doing their work in place of, and at the direction of Members themselves, and disciplinary proceedings are a function Members have historically done themselves (prior to the Congress's growth and reliance on staff), *Rangel* came to the obvious conclusion that Members' staff activities were quintessentially legislative in character, and well within the Clause's immunity that derivatively applies to staff because it applies to Members themselves. 785 F.3d at 23-25.

Providing security screenings and operating payroll are not remotely "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings," nor do they constitute "other

matters which the Constitution places within the jurisdiction of the House." *Gravel,* 408 U.S. at 624-25. Notwithstanding the district court's contrary suggestion, "the Clause has not been extended beyond the legislative sphere." *Id.* The Speech or Debate Clause simply does not reach conduct "that is in no wise [sic] related to the due functioning of the legislative process." *Id.* at 625 (quoting *United States v. Johnson*, 383 U.S. 169, 172 (1966)). "The only reasonable reading of the Clause, consistent with its history and purpose, is that it does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself." *Brewster*, 408 at 528. Providing security and administering payroll may well be important functions that contribute to the well-being of Members and the smooth running of House operations, but the desirability of those activities does not convert them into legislative activities, much less speech or debate. *See Walker*, 733 F.2d at 931. Accordingly, Speech or Debate Clause immunity is not available to Defendant-Appellees here

C. House Employees Are Subject to Judicially-Imposed Relief to Prevent Illegal Conduct Even if the Members of Congress Who Authorized that Conduct Are Immune from Suit.

The district court asserted that because Defendants' actions executing H.R. 73 were pursuant to a rule enacted as part of the legislative process for which Members are immune, they inherit that immunity as implementing employees.

Clyde, JA 29-30. The Supreme Court categorically rejected this reasoning in *Gravel.* 408 U.S. at 618-622. *Gravel* made plain that the deliberations, communications, and debate by Members and their staff are an entirely different function than carrying out a deed, which must be analyzed on its own merits. *Id.*

Gravel surveyed three controlling cases. First, in *Kilbourn v. Thompson,* the Court held that the Speech or Debate Clause:

> [p]rotected House Members who had adopted a resolution authorizing Kilbourn's arrest; that act was clearly legislative in nature. But the resolution was subject to judicial review insofar as its execution impinged on a citizen's rights as it did there. That the House could with impunity order an unconstitutional arrest afforded no protection for those who made the arrest. The Court quoted with approval from *Stockdale* v. *Hansard*, 9 Ad. & E. 1, 112 Eng. Rep. 1112 (K. B. 1839): "'So if the speaker by authority of the House order an illegal act, though that authority shall exempt him from question, his order shall no more justify the person who executed it than King Charles's warrant for levying ship-money could justify his revenue officer.'" 103 U.S. at 202. The Speech or Debate Clause could not be construed to immunize an illegal arrest even though directed by an immune legislative act.

Gravel, 408 U.S. at 618-19 (emphasis added) (quoting *Kilbourn*, 103 U.S. 168, 200, 202 (1881)).

Second, *Gravel* noted that the Court had similarly held in *Dombrowski v. Eastland* that Speech or Debate immunity would protect a Senator, who was a subcommittee chairman, but not the committee counsel "who was charged with conspiring with state officials to carry out an illegal seizure of records that the

committee sought for its own proceedings. The committee counsel was deemed protected to some extent by legislative privilege, but [the immunity] did not shield him from answering as yet unproved charges of conspiring to violate the constitutional rights of private parties. Unlawful conduct of this kind the Speech or Debate Clause simply did not immunize." *Gravel*, 406 U.S. at 619-20 (citing *Dombrowski*, 387 U.S. 82, 84 (1967)).

Finally, *Gravel* pointed out that in *Powell v. McCormack*, wherein the Court had invalidated the House's exclusion of Representative-elect Powell, the Court had "afford[ed] relief against House aides seeking to implement the invalid resolutions. The Members themselves were dismissed from the case because shielded by the Speech or Debate Clause both from liability for their illegal legislative act and from having to defend themselves with respect to it." *Gravel*, 406 U.S. at 620 (citing *Powell*, 395 U.S. at 506 ("though this action may be dismissed against the Congressmen[, sic] petitioners are entitled to maintain their action against House employees and to judicial review of the propriety of the decision to exclude petitioner Powell")).

In sum, *Gravel* explained:

> [i]mmunity was unavailable [to congressional employees] because they engaged in illegal conduct that was not entitled to Speech or Debate Clause protection. The three cases [*Kilbourn, Dumbrowski,* and *Powell*] reflect a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that

> essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings. In *Kilbourn*, the Sergeant-at-Arms was executing a legislative order, the issuance of which fell within the Speech or Debate Clause; in [*Dumbrowski*], the committee counsel was gathering information for a hearing; and in *Powell*, the Clerk and Doorkeeper were merely carrying out directions that were protected by the Speech or Debate Clause. In each case, protecting the rights of others may have to some extent frustrated a planned or completed legislative act; but relief could be afforded without proof of a legislative act or the motives or purposes underlying such an act. No threat to legislative independence was posed, and Speech or Debate Clause protection did not attach.

Gravel, 408 U.S. at 620-21 (emphasis added). *McCarthy*, to which the district court pointed, is not to the contrary, as "voting" is a core legislative act, as were the acts required of House staffers to implement the rule at issue in that case. 5 F.4th at 34, 38-39, 41 (D.C. Cir. (2021). Nor did proxy voting violate any textual constitutional command.

This Circuit likewise recognizes the distinction between legislative acts and execution thereon for purposes of ascertaining when Speech or Debate immunity applies. As then-Judge Ginsberg pointed out, "The Supreme Court has drawn a key distinction, 'between legislative speech or debate and associated matters such as voting and committee reports and proceedings,' on the one hand, and 'executing a legislative order,' or 'carrying out legislative directions,' on the other hand. The former, the Supreme Court has emphasized, is what the Speech or Debate

Clause shields." *Walker*, 733 F.2d at 931-32 (cleaned up) (citing *Gravel,* 408 U.S. at 620-21; *McMillan*, 412 U.S. 306, 314-15 (1973)). Carrying out a decision, "even if the decision itself is properly called 'legislative,' is not cloaked with Speech or Debate immunity, for execution or carrying out directions post-dates what the Clause protects—the *process* leading up to the issuance of legislative directions." *Walker*, 733 F.2d at 932 (emphasis in original). Members of Congress may have immunity for discussing and voting for an unconstitutional rule. But congressional employees, like the Sergeant-at-Arms and Chief Administrative Officer, are not immune from a judicial order forbidding the rule's implementation.

III. The Screening Rule Violates Both the Twenty-Seventy Amendment and the Constitution's Discipline Clause.

The district court did not reach the merits of the Amendment Complaint's claims because of its erroneous conclusion that it lacked subject matter jurisdiction over the suit. *Clyde*, JA 21, 24, 28-31. As shown in Parts I and II, *supra*, jurisdiction exists, and this case is entirely justiciable. H.R. 73 violates both the Twenty-Seventh Amendment to the Constitution and the Constitution's Discipline Clause at Article I, § 5, clause 2, and the Court should so hold.

A. The Fines Levied Under the Rule Violate the Twenty-Seventh Amendment by Varying (Reducing) Members' Actual Compensation.

The Twenty-Seventh Amendment states, "No 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.

1. A Primary Purpose of the 27th Amendment is to Prevent Congressional Salaries From Being Decreased, a Practice the Founders Expressly Recognized Could Be Used to Threaten the Integrity and Independence of Members, and Dissuade Individuals of Modest Means from Serving in Congress.

What is today known as the Twenty-Seventh Amendment began its odyssey to enactment as the second amendment in the original Bill of Rights draft proposed by James Madison and adopted by the First Congress in 1789.[8] *See generally,* Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497, 521-31 (Dec. 1992) ("*Sleeper*"). Between 1789 and 1791, this "compensation amendment" was ratified by only six states, making it ineligible to join the ten amendments approved as the Bill of

[8] The original proposed first amendment concerned the maximum number of people who would be represented by each Member of the House. *See Sleeper*, 61 FORDHAM L. REV. at 530-31 N.171 (citing Creating the Bill of Rights: The Documentary Record from the First Federal Congress) (Helen E. Veit et al. eds. 1991). Madison's proposed amendments three through twelve were ratified by a sufficient number of states in 1791, becoming what we know today as the Bill of Rights. *See Sleeper*, 528-31.

Rights. *Id.* at 532-33. In response to a significant (and retroactive) pay increase Congress granted itself in 1873 that became known as the "Salary Grab," Ohio ratified the amendment that year. *Id.* at 534. The amendment then lay fallow for more than 100 years, until 1978, when Wyoming also ratified it. *Id.* at 537. Then, Maine ratified the proposed amendment in 1983, beginning a cascade of state ratifications,[9] with Michigan providing the 38th approval necessary to make it the 27th Amendment to the Constitution in 1992. *Id.* at 537, 539 n. 214.

While the 27th Amendment is commonly thought of today as a limitation on Congress's ability to vote itself a pay raise, that was but one animating purpose.[10] Instead, the Amendment prohibits any law "varying the compensation," not just those that increase it.

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[9] The sudden interest in the long-moribund proposed amendment was driven by Gregory D. Watson, a sophomore at the University of Texas-Austin, who, while seeking a paper topic for a government class, discovered that the proposed amendment could still be ratified because, unlike for later amendment proposals, Congress had placed no time limit for state ratifications. He wrote his paper on it, arguing that the amendment could–and should–be ratified. Unimpressed, his professor gave him a "C," telling him the amendment was a "dead letter and would never become part of the Constitution." *Sleeper*, 61 FORDHAM L. REV. at 536-37. Undeterred, Watson began a one-man, decade-long crusade for the amendment's ratification. After his success, his professor retroactively changed his grade to an "A" in 2017. Ken Herman, Herman: *35 Years Later, A+ for Austinite Who Got Constitution Amended?* Austin-American Statesman (March 14, 2017).

[10] Ratifications *after* the Founding Period were clearly motivated by opposition to particular pay increases that Congress voted for itself during the Amendment's 203-year ratification period. *See Sleeper* at 533-40.

Americans' understanding of British parliamentary practice is vital to construing the purpose of the Constitution they adopted in 1787. *See, e.g, Uzuegbunum v. Preczewski*, 141 S.Ct. 792, 799 (2021) (recognizing nominal damages as creating Article III standing with reference to the determination of the House of Lords on the question); *Timbs v. Indiana*, 139 S.Ct. 682, 695 (2019) (Thomas, J. concurring) (looking to parliamentary practice in construing the meaning of the Eighth Amendment's Excessive Fines Clause); *United States v. Cabrales*, 524 U.S. 1 n.1 (1998) (Ginsburg, J.) (in construing Constitution's criminal venue requirement, pointing to American colonists' negative reaction to Parliament's practice of haling Americans to Britain for trial); *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927) (noting Parliamentary power in determining Congressional constitutional authority to compel witness testimony). In addition to the threats posed by congressional self-aggrandizement, the Founders were also greatly concerned that diminishing congressional pay could be used to pressure Members from exercising independent judgment, and to prevent qualified men of modest means from serving in the new national legislature. For instance, the founding generation was well-aware of the practice of candidates for the British House of Commons of promising to reduce (or even eliminate!) their wages to garner popularity with their constituents, which had that very effect. *Sleeper* at

500-01.[11] Americans in the 1770s and 1780s found such conduct debasing to the notion of representative government and believed it had "led members of Parliament to override the Americans' rights under the British constitution" *Id.* at 501.[12]

Similarly relevant in ascertaining constitutional meaning are the Founders' understanding of the colonial and state legislative practices before 1789. *See, e.g., N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S.Ct. 2111, 2142-45 (2022) (examining state legislative firearms regulation before 1789); *Fulton v. City of Philadelphia,* 141 S.Ct. 1868, 1905-07 (2021) (reviewing colonial practices in ascertaining the meaning of the Free Exercise Clause); *Kisor v. Wilkie*, 139 S.Ct. 2400, 2437 (2019) (Gorsuch, J., concurring) (noting colonial legislative interference with judicial independence in the context of evaluating permissible deference under the Constitution executive rulemaking); *Horne v. Dept. of Agric.,* 576 U.S. 351, 359 (2015) (analyzing Takings Clause with reference to the New York Legislature's reaction to property seizures by the Continental Army). From 1774 until the Constitution's ratification in 1789, during the Continental

[11] Citing 1 Edward Porritt with Annie G. Porritt, The Unreformed House of Commons: Parliamentary Representation Before 1832, at 151-203 (1909).

[12] Citing 1 Poritt. at 96-98; The Eighteenth-Century Constitution: 1688-1815, at 151-52 (E. Neville Williams ed., 1960); Bernard Bailyn, The Ideological Origins of the American Revolution 46-51, 85-93, 130-138 (enlarged ed. 1992).

Congresses and into the Articles of Confederation period, state legislatures responsible for paying their congressional delegates used that leverage to punish Congress for ignoring state interests, and those delegates were an easy target for fiscal belt-tightening during the poor economy following the American Revolution. *Sleeper* at 501-02.[13] Delegates had to wait longer and longer to be paid, if at all. "Even those delegates who had independent means, and thus did not rely on the small salaries paid by the states, did not accept this situation lightly. Notable American politicians began to write scathing letters to their home states, demanding to know how long they were to serve their country without being paid for it." *Id.* at 502.[14]

Hence, the new national legislature's independence and stability were major concerns at the 1787 Constitutional Convention. *Id.*[15] In discussing how congressional pay should be set in the context of debating what eventually became

[13] Citing Jack P. Greene, The Quest for Power (1963); Edmund Cody Burnett, The Continental Congress 420, 421, 425, 629, 650, 710, 713 (1941); Richard B. Morris, The Forging of the Union, 1781-1789, at 91-94 (1987); Jack N. Rakove, The Beginnings of National Politics: An Interpretive History of the Continental Congress 235-38 (1979)

[14] *See* sources cited *supra,* note 13.

[15] Citing 1 The Records of the Federal Convention of 1787, at 20-22 (Max Farrand ed., 1937) (all references are to James Madison's notes unless otherwise indicated).

known as the Constitution's "Ascertainment Clause,"[16] the delegates avidly debated the potential harms of insufficient congressional remuneration or its potential diminishment. These discussions are highly relevant in ascertaining the Founder's concerns regarding congressional compensation. *See, e.g., Chiafalo v. Washington,* 140 S.Ct. 2316, 2320, 2325 (2020) (looking to Convention discussions to ascertain the constitutional limits on "faithless electors") and 2330 (Thomas, J., concurring) (same); *Rucho v. Common Cause*, 139 S.Ct. 2484, 2495 (2019) (referring to the Convention debate in ascertaining the authority granted under Article I's Election Clause); *U.S. Term Limits v. Thornton*, 514 U.S. 779, 790-91 (1995) (analyzing Article I's Qualifications Clause meaning with reference to the Convention discussions).

Echoing the well-known concern about House of Commons candidates seeking voter favor by promising to cut their pay, Massachusetts delegate Elbridge Gerry[17] noted as "one principal evil" of democracy was "the want of due provision for those employed in the administration of Governnt [sic]. It would seem to be a

[16] "The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States." U.S. Const., Art. 1, § 6, cl.1.

[17] Later Governor of Massachusetts, Gerry gifted his name to the American political lexicon in the word "gerrymandering." *See generally, https://www.smithsonianmag.com/history/where-did-term-gerrymander-come-180964118/.*

maxim of democracy to starve the public servants." 1 The Records of the Federal Convention of 1787, at 48 (Max Farrand ed., 1937). Virginia delegate George Mason raised the problematic history of low pay discouraging capable men from public service, "[t]he parsimony of the States might reduce the provision so low as had already happened in choosing delegates to Congress, the question would be not who were most fit to be chosen, but who were most willing to serve." *Id* at 216. Nathaniel Gorham of Massachusetts and Edmund Randolph of Virginia both raised the threat to congressional independence created by the possibility of salary reductions. Gorham pointed out that state legislatures "were always paring down salaries in such a manner as to keep out of offices men most capable of executing the functions of them." *Id* at 372. Randolph, in turn, stressed that "[i]f the States were to pay the members of the Natl. Legislature, a dependence would be created that would vitiate the whole System." *Id.* (emphasis added). In stark contrast, only one delegate, Benjamin Franklin, suggested that federal legislators should receive no salary whatsoever, a suggestion the other delegates tabled without comment. *Id.* at 81-85.

With the proposed Constitution setting no restraint on either increasing or decreasing congressional salaries, it became the second of Madison's proposed amendments in the Bill of Rights he offered in the First Congress. As in the Constitutional Convention, Representatives discussed the sorry history of the

House of Commons manipulating wages. Congressman Theodore Sedgwick stated that 'designing men'…

> … might reduce the wages very low, much lower than it was possible for any gentleman to serve without injury to his private affairs, in order to procure popularity at home, provided a diminution of pay was looked upon as a desirable thing; it might also be done in order to prevent men of shining and disinterested abilities, but of indigent circumstances, from rendering their fellow citizens those services they are well able to perform, and render a seat in this house less eligible than it ought to be.

Debates in the House of Representatives (Aug. 14, 1789), in The Congressional Register, Aug. 14, 1789. Salary diminutions were as much a consideration for the Founders as were pay raises. *See, e.g., Fulton*, 141 S.Ct. at 1903 ("Since the First Congress also framed and approved the Bill of Rights, we have often said that its apparent understanding of the scope of those rights is entitled to great respect.").

Plainly, Revolutionary dismay over Parliamentary reductions in pay, the Founders' understanding of the way national legislators could be dissuaded from independent judgment, and the threat of excluding those of modest means from public service all informed the 27th Amendment enactment. Those critical concerns are precisely what underlie this case: The manipulation of salary by the House Democratic Majority to deprive Republican Members of their political independence and financial ability to serve. "In the general course of human

nature, a power over a man's subsistence amounts to a power over his will." Alexander Hamilton, *Federalist Paper No. 79* (May 28, 1788). *See also Schaffer v. Clinton*, 240 F.3d 878, 884-85 (10th Cir. 2001) (noting that Hamilton was speaking of a *decrease* in pay, and that such a decrease would be a real injury providing standing under the 27th Amendment). The 27th Amendment was enacted not just to prevent congressional self-dealing by pay increases, but to protect Members from pay *decreases* being used as an instrument for either political pressure or exclusion.

2. House Resolution 73 Varies Compensation in Violation of the 27th Amendment.

House Resolution 73 "varies compensation" of the Members by specifically and explicitly targeting their salary. "If a Member… against whom a fine is imposed by the Sergeant-at-Arms under [this resolution] has not paid the fine prior to the expiration of the [relevant time period], the Chief Administrative Officer *shall* deduct the amount of the fine from the net salary otherwise due the Member." H.Res. 73, § 1(c)(1) (emphasis added). Lest there be any doubt that the fines here are specifically directed against Members' salaries, Section 1(d) of the Resolution explicitly forecloses other ways Members might have paid the fines in question – leaving only their salary or other personal funds to answer. This ensures that

maximum pressure is brought to bear on those Members who rely on their Congressional salary as their sole or primary means of support. [18]

It is beyond cavil that the fines imposed and collected under House Resolution 73 vary the compensation for services of House Members. While the fines may not change the underlying salary level of $174,000 per annum, it defies logic (and math) to suggest that deducting money – $5,000 or $15,000 per Plaintiff – does not vary, i.e., reduce, those Members' actual compensation for their services. The fine reduces the Member's salary before he ever receives it. While it is undoubtedly true that Congress had the authority to fine Members and deduct those fines directly from Member salaries before 1992 (and did so), the 27th

[18] Plaintiff-Appellants readily exemplify the Founder's concern about the potential use of pay to exert pressure, as former Representative Gohmert was reliant on his Congressional salary as his primary means of support, while Representatives Clyde and Smucker deducted nearly all of their paychecks to pay their federal withholding taxes, as they had the benefit of prior saved income from which they could sustain themselves until they filed their tax returns each year. Gohmert suffered the forcible deduction of $277.77 from each of his 18 final monthly paychecks of the 117th Congress in satisfaction of his $5,000 fine. At the same time, Representatives Clyde and Smucker had approximately one dollar ($1.00) deducted from each of their final 18 monthly paychecks to pay their fines of $15,000 and $5,000 respectively, because the fine deductions occur after tax deductions, and they arranged to deduct nearly all of their salaries to pay taxes. So, not only were they less reliant on their Congressional salary than former Representative Gohmert, but they were also better positioned to avoid much of the impact of the fines in light of their other available means.

Amendment now precludes such authority, at least for punitive fines imposed under the guise of disciplining disorderly behavior.[19]

B. Article I, § 5, cl.2. Bars Imposing Fines for Behavior that is Not Disorderly.

Article I, § 5, clause 2 of the Constitution provides that "[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." Under *Ballin*, Members may be punished only for behavior that is "disorderly," which is a textual "constitutional restraint" on actions for which a Member may be punished. 144 U.S. 1, 5 (1892). This is simultaneously a power of the House and a protection for each Member.

Appellees may not use the House's internal rulemaking authority to shield actions that reach beyond the power of the House itself. *Kilbourne*, 103 U.S. 168, 182 (1881); *Ballin*, 144 U.S. at 5. In this case, those acts include levying fines against Members' salaries for behavior that is not "disorderly," as well as detaining Members from floor access via threat of such fines. "[T]he specific enumeration of the particular classes of cases ought to be construed as excluding all others not

[19] Plaintiff-Appellants take no position here on salary deductions for absences, restitution fines, or individual court-ordered garnishments, as such circumstances may be governed by considerations not relevant to this case.

enumerated, upon the known maxim, . . . *expressio unius est exclusio alterius.* *Ex parte City Bank of New Orleans*, 44 U.S. 292, 313 (1844). Here, the Discipline Clause permits the House to punish only disorderly conduct (a term with substantive meaning), not just infraction of any rules a majority may impose. Were it otherwise, an oppressive House majority could enact any rule it wished to enable punishments against the minority, just as the Resolution was implemented in the present case.

Neither the Constitution nor any case defines the meaning of "disorderly behavior" as used in the Discipline Clause, and it should be given its ordinary meaning as understood at the time of ratification. The most applicable definition of "disorderly" – used in the Constitution as an adjective – is "irregular; tumultuous." Samuel Johnson, A Dictionary of the English Language, (1785).[20]

A Representative walking into the House Chamber, with no suspicion or allegation of wrongdoing by that Member (e.g., having threatened another Member), is not "disorderly" behavior that can be punished by the expedient of the majoritarian House passing a rule requiring Members to submit to security

[20] "Disorderly" is a word whose meaning has changed little, if at all, since the founding period. *See, e.g.,* Black's Law Dictionary, 6th ed., 1991 (abridged), still defined the word as: "violative of the public peace or good order; turbulent, riotous, or indecent" (exclusive of its reference to rules, that being circular in the present case).

screenings. There is nothing "irregular or tumultuous," much less "riotous or indecent" about a Member entering the House Chamber. There could hardly be a more ordinary occurrence during House business.[21] While the House plainly may promulgate rules to ensure its safety, it must do so by methods that do not interfere with Members' ability to exercise their constitutional duties within that body.

CONCLUSION

House Resolution 73 violates the Twenty-Seventh Amendment and the Constitution's Discipline Clause, Article I, § 5, clause 2. The Court has subject matter jurisdiction over these questions, and this case is entirely justiciable. These textual provisions of the U.S. Constitution exist to protect Americans' right to independent, uncoerced, and unimpeded representation in Congress. Because the questions posed are purely ones of constitutional interpretation, the Court should issue the requested declaratory and injunctive relief without remand. *Azima v. RAK Inv. Auth.*, 926 F.3d 870, 880 (D.C. Cir. 2019); *Connecticut Dept. of Children*

[21] *See also,* Justice John Marshall Harlan: *Lectures on Constitutional Law, 1897-98, Lecture 7, Nov. 20, 1897*, 81 GEO. WASH. L. REV. Arguendo 12, 84 (July 2013) ("'Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour ....' Punish them, how? ... Put him in jail if he is guilty of misbehavior. If a member of the House should stagger into that body some day drunk, that is disorderly behavior. He can be fined by that body, and punished for that disorderly behavior.").

& Youth Servs. v. Dept. of Health & Human Servs., 9 F.3d 981, 989 (D.C. Cir. 1993).

Respectfully submitted,

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