ORAL ARGUMENT NOT YET SCHEDULED

No. 22-5263

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

ANDREW S. CLYDE et al.,

Plaintiffs-Appellants,

v.

WILLIAM J. WALKER et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia
Case No. 1:21-CV-01605-TJK
(Hon. Timothy J. Kelly, United States District Judge)

DEFENDANTS-APPELLEES' BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Defendants-Appellees respectfully submit this certificate as to parties, rulings, and related cases.

A. Parties and Amici

Plaintiffs-Appellants are Representatives Andrew S. Clyde and Lloyd Smucker, as well as former Representative Louie Gohmert.

Defendants-Appellees are The Honorable William J. Walker[1] and The Honorable Catherine Szpindor, both in their official capacities.

No amici or intervenors have appeared in this Court to date.

B. Rulings Under Review

The rulings under review are the District Court's Order (ECF No. 21), and Memorandum Opinion (ECF No. 22), in *Clyde v. Walker*, No. 21-1605, 2022 WL 3026992 (D.D.C. Aug. 1, 2022) (Kelly, J.). The order granted Defendants-Appellees' motion to dismiss.

C. Related Cases

The case on review has not previously been before this Court. Defendants-Appellees are aware of a related case pending in this Court, *Massie v. Pelosi*, No. 22-5058, involving some of the same defendants and legal issues.

[1] Effective January 7, 2023, Speaker McCarthy appointed William P. McFarland to serve as Acting House Sergeant at Arms pursuant to 2 U.S.C. § 5501.

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INTRODUCTION

Following the events of January 6, 2021, the House of Representatives of the 117th Congress adopted House Resolution 73, requiring that all Members undergo a security screening prior to entering the Hall of the House (sometimes known as the House Chamber). The Resolution also authorized the imposition of fines against Members for failure to complete that security screening and directed that the amount of the fine could be deducted from a Member's paycheck if he or she failed to otherwise pay the fine as required.

House Resolution 73 engendered significant controversy within the House, approved by a vote of 216 to 210. Along with Appellants (two current House Members (Reps. Clyde and Smucker) and one former Member (Rep. Gohmert)), the entirety of the current House Leadership opposed the Resolution, believing that it was misguided. Accordingly, the security screening requirement and attendant fines authorized by House Resolution 73 came to an end at the conclusion of the 117th Congress. They were not readopted at the beginning of the 118th Congress and are not in effect today.

This case, however, is not about the wisdom or desirability of the Resolution. Rather, the instant dispute centers on whether Appellants' claims are amenable to judicial review. As demonstrated in this brief, the district court properly dismissed their complaint for lack of subject matter jurisdiction.

Appellants' suit is barred by the Constitution's Speech or Debate Clause, which provides absolute immunity from suit to Members, Officers, and Congressional aides for any legislative acts. As the district court held, there can be no doubt that the challenged acts, all of which involved enforcement of a Resolution adopted pursuant to the House's constitutional powers to govern its own proceedings and to discipline its own Members, are legislative acts absolutely protected by the Clause. This is particularly true here, where the Resolution at issue was designed to enforce long-standing security regulations restricting the possession of weapons in the one place where the full House congregates to debate and vote on legislation and conduct other business.

In addition, and alternatively, dismissal of Appellants' complaint must be affirmed because they fail to state a claim on which relief can be granted. Despite the fact that the adoption of House Resolution 73 was squarely within the House's broad constitutional authority to make its own rules of proceeding and to discipline Members who violate those rules, the complaint alleges that the challenged actions by Appellees violate the Twenty-Seventh Amendment (Count I), as well as Article I, Section 5, Clause 2 (Count II) of the U.S. Constitution.[1]

[1] Count II of Appellants' complaint also alleged that House Resolution 73 violated the Arrest Clause, U.S. Const., Art. I, § 6, cl. 1. *See* JA17. Appellants, however, did not raise that issue in their appeal.

Although the district court did not reach the merits of these claims because of its ruling on subject matter jurisdiction, they fail as a matter of law. House Resolution 73 did not vary or in any way change the compensation paid to Members for their services. Nor is it a law. Accordingly, the Twenty-Seventh Amendment, by its plain terms and consistent with its history and purpose, does not apply here. In addition, the enforcement of House Resolution 73 lies well within the House's broad powers to punish Members for violating internal House rules under Article I, Section 5, Clause 2 (the Discipline Clause).

Because the suit is barred by the Speech or Debate Clause, and because in any event Appellants fail to state a claim upon which relief can be granted, the judgment of the district court dismissing the complaint must be affirmed.

STATEMENT OF JURISDICTION

In their brief, Appellants failed to set forth the basis of the district court's jurisdiction in their Statement of Jurisdiction as required by this Court's rules. *See* D.C. Cir. R. 28(a)(4); Fed. R. App. P. 28(a)(4)(A). The district court concluded that the absolute immunity provided by the Speech or Debate Clause applied and dismissed this case for lack of subject matter jurisdiction. *See* JA31. Such jurisdictional questions are reviewed *de novo*. *See Meza v. Renaud*, 9 F.4th 930, 933 (D.C. Cir. 2021).

STATEMENT OF THE ISSUES

1. Whether the Speech or Debate Clause bars Appellants' suit challenging Appellees' implementation and enforcement of a House rule that imposed fines for Members who failed to complete the required security screening before entering the House Chamber.

2. Whether such rule violated the Twenty-Seventh Amendment.

3. Whether such rule violated the Discipline Clause.

STATEMENT OF THE CASE

A. The House's Constitutional Authority To Govern Itself

Article I of the Constitution vests all federal "legislative Powers … in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const., Art. I, § 1. Those powers are "not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate member or number of members, but the action of the body as a whole." *United States v. Ballin*, 144 U.S. 1, 7 (1892).

The Constitution grants the House and Senate each wide discretion to effectuate their Article I powers and to govern themselves. The Rulemaking Clause empowers each body to "determine the Rules of its Proceedings," and the Discipline Clause authorizes each chamber to enforce those rules by "punish[ing] its Members for disorderly Behaviour." U.S. Const., Art. I, § 5, cl. 2.

B. The Events Of January 6 And House Resolution 73

1. Except as authorized by Capitol Police Board regulations, federal law expressly prohibits the carrying of "a firearm, dangerous weapon, explosives, or an incendiary device" on the U.S. Capitol Grounds and inside all buildings on the Capitol Grounds, including, *inter alia*, the U.S. Capitol and all House and Senate Office Buildings. *See* 40 U.S.C. § 5104(e)(1); *see id.* at §§ 5101, 5102. Since enactment of the statute in 1967, the Capitol Police Board has issued and maintained regulations that set forth limited circumstances in which carrying firearms would be authorized while specifying that, notwithstanding such exceptions,

> [n]o person … shall carry any firearm inside the chamber or on the floor of either House, in any lobby or cloakroom adjacent thereto, in the galleries of either House or in the Marble Room of the Senate or Rayburn Room of the House unless assigned or approved by the two Sergeants of Arms for maintenance of adequate security.

Police Board Regulations Pertaining to Firearms, Explosives, Incendiary Devices and Other Dangerous Weapons (Oct. 31, 1967), *in* The Capitol Police Board, Traffic Regulations for the United States Capitol Grounds (amended Feb. 17, 2019), Appendix J.[2]

2. On January 6, 2021, a Joint Session of the House and Senate convened in the Capitol to count the Electoral College votes in the 2020 presidential election.

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[2] *Available at* https://perma.cc/P3FP-Z3VK.

The events that followed are well known: In the early afternoon, a large group unlawfully entered the Capitol, including by breaking windows and assaulting police officers. *See* Comm. on Homeland Sec. & Governmental Affs. & Comm. on Rules & Admin. of the U.S. Senate, *Examining the U.S. Capitol Attack, A Review of Security, Planning, and Response Failures on January 6*, at 21, 23-25.[3] Members of the House and Senate were evacuated from their respective Chambers, and the Senate Chamber was overrun. *Id.* at 25-26. Rioters vandalized the Capitol, stole property, and ransacked offices. *See id.* at 1. Seven hours after the breach, the Capitol was finally declared secure. *See id.* at 27.

3. Following this breach of the Capitol, magnetometers were installed outside the House Chamber, and Members were informed that failing to complete the security screening, or carrying prohibited firearms or other dangerous weapons, could result in denial of access to the Chamber. *See* Hunter Walker, *In wake of Capitol riot, House members subject to security screenings*, Yahoo News (Jan. 12, 2021).[4]

In support of its mission to protect Congress, the U.S. Capitol Police operated the magnetometers at the entrance to the House Chamber, as it does in numerous locations within buildings on the Capitol Grounds. Magnetometers

[3] *Available at* https://perma.cc/Q4MN-N9C2.

[4] *Available at* https://perma.cc/GFM9-BN9L.

work by using an electromagnetic field to detect magnetic metal objects, including firearms and other dangerous weapons. If a person sets off the magnetometer while walking through it, a secondary screening will be conducted, often using a handheld wand scanner, to locate the metal object responsible for setting off the magnetometer.

All persons entering the House Chamber were instructed to walk through the magnetometer, and persons who attempted to enter the House Chamber without first walking through the magnetometer were reminded to do so. Any incident of a person entering the House Chamber while deliberately bypassing the magnetometer, or refusing to submit to a request for secondary screening, was memorialized by U.S. Capitol Police and transmitted to the Office of the Sergeant at Arms.

4. House Resolution 73 was introduced by then-Committee on Rules Chairman James McGovern on February 1, 2021, and was adopted by the full House the next day. *See* H. Res. 73, 117th Cong. (2021); 167 Cong. Rec. H274-75 (daily ed. Feb. 2, 2021). The Resolution provided that the "Sergeant-at-Arms [wa]s authorized and directed to impose a fine against a Member, Delegate, or the Resident Commissioner for failure to complete security screening for entrance to the House Chamber." H. Res. 73 § 1(a)(1). The Resolution specified a $5,000 fine for a first offense and a $10,000 fine for any subsequent offense. *Id.* § 1(a)(2).

The fined individual could appeal to the Committee on Ethics, which by majority vote could overturn the fine. *Id.* § 1(b)(2). The Resolution further provided that "[i]f a Member, Delegate, or Resident Commissioner against whom a fine [wa]s imposed ... ha[d] not paid the fine prior to the expiration of the 90-calendar day period" following the resolution of an appeal or the expiration of the time to appeal, "the Chief Administrative Officer shall deduct the amount of the fine from the net salary otherwise due the Member, Delegate, or Resident Commissioner." *Id.* § 1(c).

5. On February 4, 2021, Acting Sergeant at Arms Timothy Blodgett notified House Committee on Ethics Chairman Theodore Deutch that Rep. Clyde had violated House Resolution 73 and had been fined $5,000, and four days later provided notification of a second violation resulting in a $10,000 fine. Letters from Timothy P. Blodgett to Theodore E. Deutch (Feb. 4 & 8, 2021).[5] On February 23, 2021, the Committee received from Rep. Clyde an appeal of the two fines. *See* Letter from Theodore E. Deutch & Jackie Walorski to Nancy Pelosi (Apr. 12, 2021).[6] On April 12, 2021, Chairman Deutch and Ranking Member

[5] *Available at* https://perma.cc/ZUR2-PLDZ *and* https://perma.cc/9LHD-3JVN.

[6] *Available at* https://perma.cc/52QZ-28CY.

Walorski informed Speaker Pelosi and Rep. Clyde that the Committee had denied his appeal. *Id.*

On February 5, 2021, the Acting Sergeant at Arms notified Chairman Deutch that Rep. Gohmert had violated H. Res. 73 and had been fined $5,000. Letter from Timothy P. Blodgett to Theodore E. Deutch (Feb. 5, 2021).[7] On February 26, 2021, the Committee received from Rep. Gohmert an appeal of the fine. *See* Letter from Theodore E. Deutch & Jackie Walorski to Nancy Pelosi (Mar. 30, 2021).[8] On March 30, 2021, Chairman Deutch and Ranking Member Walorski informed Speaker Pelosi and Rep. Gohmert that the Committee had denied his appeal. *Id.*

On May 20, 2021, Sergeant at Arms William Walker notified Chairman Deutch that Rep. Smucker had violated H. Res. 73 and had been fined $5,000. Letter from William J. Walker to Theodore E. Deutch (May 20, 2021).[9] On May 25, 2021, the Committee received from Rep. Smucker an appeal of the fine. *See* Letter from Theodore E. Deutch & Jackie Walorski to Nancy Pelosi (June 28, 2021).[10] On June 28, 2021, Chairman Deutch and Ranking Member Walorski

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[7] *Available at* https://perma.cc/HY5V-44T9.

[8] *Available at* https://perma.cc/TWE2-7WH6.

[9] *Available at* https://perma.cc/XX3K-VWLP.

[10] *Available at* https://perma.cc/LT83-DSBT.

informed Speaker Pelosi and Rep. Smucker that the Committee had denied his appeal. *Id.*

6. Because "the House [of Representatives] is not a continuing body," *Comm. on Judiciary, U.S. House of Reps. v. Miers*, 558 F. Supp. 2d 53, 97 (D.D.C. 2008) (citing *United States v. AT&T*, 551 F.2d 384, 390 (D.C. Cir. 1976)), the requirements of House Resolution 73 expired at the end of the 117th Congress. *See* U.S. Const., Amend. XX. When the 118th Congress convened and adopted its governing rules package, the provisions of House Resolution 73 were not readopted. *See* H. Res. 5, 118th Cong. (2023). As a result, the magnetometers have been removed from outside the House Chamber, and security screening prior to entry into the House Chamber is no longer required. The decision not to readopt the provisions of House Resolution 73 did not affect fines previously assessed to any Members during the 117th Congress.

C. Member Compensation

The Constitution provides that "Compensation" for Members of Congress must be "ascertained by Law, and paid out of the Treasury of the United States." U.S. Const., Art. 1, § 6, cl. 1. Before the early 1990s, Congress periodically enacted legislation to alter its compensation. *See* Cong. Rsch. Serv., CRS Report

97-1011, Salaries of Members of Congress: Recent Actions and Historical Tables 2 (2022) (hereinafter CRS Report 97-1011).[11]

More recently, compensation has been determined pursuant to a statutory formula for automatic adjustments. *See id.* The Ethics Reform Act of 1989 establishes the current annual adjustment formula, which is based on changes in private sector wages as determined by a specified index. *See* CRS Report 97-1011 at 2; *see also* 2 U.S.C. § 4501. The adjustment is automatic unless it is denied by legislation, although the percentage may not exceed the percentage base pay increase for certain other federal employees. *See id.* Beginning with an adjustment in 1991, annual adjustments were accepted by Congress thirteen times, with the most recent adjustment in 2009. *See id.* Since 2009, pay adjustments have been denied by legislation every year. *See id.*

Since 1983, Member salaries have been funded in a permanent appropriations account. *See* CRS Report 97-1011 at 1. House Members are paid on a monthly basis. *See* 2 U.S.C. § 5301. Members' monthly paychecks reflect numerous voluntary and required deductions from their salary, including, but not limited to, deductions for federal retirement benefits, Thrift Savings Plan contributions, health and life insurance contributions, federal and state taxes, and Social Security.

[11] *Available at* https://perma.cc/YVK3-KWHQ.

D. Procedural History

1. Appellants filed their complaint in the district court against the then-House Sergeant at Arms, William Walker, and House Chief Administrative Officer, Catherine Szpindor. JA6. The complaint alleges that, by enforcing House Resolution 73, these House officials were violating Article I, Sections 5 and 6, and the Twenty-Seventh Amendment of the Constitution. JA16-JA18. Appellants sought both declaratory and injunctive relief. JA18. Appellees moved to dismiss on the grounds that the suit was barred by the Speech or Debate Clause and that Appellants failed to state a claim upon which relief could be granted.

2. The district court granted the Appellees' motion to dismiss, holding that the Speech or Debate Clause precluded Appellants' suit. The court determined that "each challenged act of the House Officers qualifies as a legislative act." JA26 (citing *Gravel v. United States*, 408 U.S. 606, 625 (1972)).

The court concluded that the security screening itself qualified as a legislative act, reasoning that not only was the screening "being performed at the entrances to the House Chamber, [where it] regulate[d] 'the very atmosphere in which lawmaking deliberations occur,'" JA26 (quoting *Walker v. Jones*, 733 F.2d 923, 930 (D.C. Cir. 1984)), but it was also "done in execution of internal rules of the House … [a]nd the execution of internal rules like this one is legislative." *Id.* (internal quotation marks omitted) (first citing *Consumers Union of the U.S., Inc. v.*

Periodical Correspondents' Ass'n, 515 F.2d 1341, 1351 (D.C. Cir. 1975) and then citing *Rangel v. Boehner*, 785 F.3d 19, 24 (D.C. Cir. 2015)).

The court further reasoned that the imposition of monetary fines for violations of House Resolution 73 qualified as a legislative act because the fines were (i) "imposed in execution of internal rules of the House and to discipline Members for violating those internal rules," (ii) "an integral part of the scheme that the House has adopted to regulate Members' behavior in the lawmaking atmosphere—it is the mechanism that the House has chosen to enforce the security-screening requirement[,]" and (iii) "subsequently ratified by the House Committee on Ethics, confirm[ing] their occurrence within the scope of the legislative process." JA27 (internal quotation marks and citations omitted).

The court also determined that deducting the fines from the Members' paychecks qualified as a legislative act. *See* JA27. According to the district court, this action was also taken in "execution of internal rules" and was an "integral part of the scheme" that the House adopted "to regulate the Members' behavior in the lawmaking atmosphere." JA27-JA28 (internal quotation marks omitted).

Finally, the district court addressed and rejected several counterarguments raised by the Appellants. *First*, it rejected the claim that the Appellees' actions were merely "administrative functions" unprotected by the Clause because such a characterization "ignore[s] their context" as "part of an overall scheme regulating[]

Members' behavior in the lawmaking atmosphere on the House floor." JA28. *Second*, the court rebuffed tAppellants' distinction between "legislative acts and execution thereon" by noting that this exact argument was recently rejected by this Court in *McCarthy v. Pelosi*. *See* JA29 ("[T]he 'salient distinction under the Speech or Debate Clause is not between enacting legislation and executing it' but between 'legislative acts and non-legislative acts.'" (quoting *McCarthy v. Pelosi*, 5 F.4th 34, 40-41 (D.C. Cir. 2021)). *Last*, the court cast aside Appellants' argument that House Rules are subject to judicial review, noting that, while true at times, it is not the case "when the Speech or Debate Clause bars the challenge." JA30 (citing *Consumers Union*, 515 F.2d at 1341).

SUMMARY OF THE ARGUMENT

I. The Speech Or Debate Clause Bars This Suit

The protections of the Speech or Debate Clause are absolute and immunize Members and their aides from litigation related to all "legislative acts" that are "an integral part of the deliberative and communicative processes by which Members participate in … House proceedings" as well as "other matters which the Constitution places within the jurisdiction of [the] House." *Gravel*, 408 U.S. at 625.

Applying these principles, this Court in *Consumers Union* held that the implementation of congressional rules governing access to Congress's press galleries is a "legislative act." *See* 515 F.2d at 1351. Like the rules at issue in

Consumers Union, Appellees' administration of House Resolution 73, which governed security screenings performed at the entrance to the House Chamber and thus regulated "the very atmosphere in which lawmaking deliberations occur[red]," JA26, was a "legislative act" protected by Speech or Debate Clause immunity. Appellants' effort to distinguish *Consumers Union* from the instant case is unconvincing. Moreover, their attempt to draw a distinction for purposes of Speech or Debate Clause immunity between the adoption of a House rule, on one hand, and the enforcement of that rule, on the other, is squarely foreclosed by this Court's precedent.

Because Speech or Debate Clause immunity is absolute, no consideration of the merits of Appellants' constitutional claims is necessary to affirm the district court's order of dismissal. This Court has repeatedly reiterated, most recently in *McCarthy*, that claims that the House or Senate has acted unconstitutionally or in violation of their own rules are not relevant to determining the applicability of the Speech or Debate Clause. *McCarthy*, 5 F.4th at 41; *see also Rangel*, 785 F.3d at 25.

II. Appellants Have Failed To State A Claim

In any event, even if this Court chooses to reach the merits, the district court's order of dismissal still must be affirmed because Appellants have failed to state a valid claim as a matter of law.

First, Appellants' Twenty-Seventh Amendment argument is incorrect. Appellants' attempt to convert a single House Resolution authorizing the imposition of a fine for violating House rules into a "law[] varying the compensation for the services of … Representatives," U.S. Const., Amend. XXVII, fails for at least two reasons: a fine does not affect the "compensation for the services" of a Member; and the Resolution is not a "law" for purposes of the Twenty-Seventh Amendment. Furthermore, the history and purpose of that Amendment make clear that a fine is not within its scope.

Second, House Resolution 73 does not violate the Discipline Clause, which provides broad and nearly unreviewable authority for each House to discipline its members—including by fines.

STANDARD OF REVIEW

This Court reviews the district court's dismissal based on Speech or Debate Clause immunity *de novo*, and may affirm the dismissal on Speech or Debate Clause grounds alone. *See Rangel*, 785 F.3d at 22. If the Court addresses the constitutional merits, its review would likewise be *de novo*. *See Patchak v. Jewell*, 828 F.3d 995, 1001 (D.C. Cir. 2016).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE SPEECH OR DEBATE CLAUSE BARS APPELLANTS' SUIT

A. The Speech Or Debate Clause Protects Legislative Acts That Are An Integral Part Of The House's Deliberative And Communicative Processes

The Speech or Debate Clause provides that, "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const., Art. I, § 6, cl. 1. The "central object" of the Clause is to protect the "independence and integrity of the legislature." *McCarthy*, 5 F.4th at 38 (citation omitted). The Clause is intended, among other purposes, to prevent litigation distractions that may "disrupt the legislative function," *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975), and it protects Members and congressional staff "not only from the consequences of litigation's results *but also from the burden of defending themselves*." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (emphasis added).

The Supreme Court has "consistently read the Speech or Debate Clause 'broadly' to achieve its purposes." *Rangel*, 785 F.3d at 23 (quoting *Eastland*, 421 U.S. at 501). It is thus "long settled" that the Clause's protections apply "not just to speech and debate in the literal sense, but to all 'legislative acts.'" *McCarthy*, 5 F.4th at 38-39 (quoting *Doe v. McMillan*, 412 U.S. 306, 311-12 (1973)).

"Legislative acts" are those that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings[.]" *Gravel*, 408 U.S. at 625. Such acts "include both (i) matters pertaining 'to the consideration and passage or rejection of proposed legislation,' and (ii) 'other matters which the Constitution places within the jurisdiction of either House.'" *McCarthy*, 5 F.4th at 40 (quoting *Gravel*, 408 U.S. at 625). Where it applies, the Clause is an "absolute bar" to suit, including when a legislative act is alleged to be in violation of the Constitution. *Eastland*, 421 U.S. at 503, 509-10; *McCarthy*, 5 F.4th at 38.

Further, it is "well established that the Clause's protections extend to Congressional aides and staff." *McCarthy*, 5 F.4th at 39; *see Rangel*, 785 F.3d at 25. Specifically, the Clause "applies to aides and staff 'insofar as their conduct … would be a protected legislative act if performed by a Member.'" *McCarthy*, 5 F.4th at 39 (quoting *Gravel*, 408 U.S. at 618). The "key consideration, Supreme Court decisions teach, is the act presented for examination, not the actor." *Id.* (citation omitted).

B. The Challenged Acts Are Immune Under Long-standing Supreme Court And D.C. Circuit Precedent

The Speech or Debate Clause bars Appellants' suit because, as the district court held, the challenged acts here are undeniably legislative. JA26-JA28.

1. The Rulemaking Clause of the Constitution provides that the House may "determine the Rules of its Proceedings," and the Discipline Clause provides that the House may "punish its Members for disorderly Behaviour." U.S. Const., Art. I, § 5, cl. 2. The Constitution thus specifically grants to Congress the authority to adopt its own rules and to discipline its Members. Accordingly, the House's adoption of House Resolution 73, and the enforcement and administration of that rule, are all legislative acts that are an "integral part" of "matters which the Constitution places within the jurisdiction of [the] House." *Gravel*, 408 U.S. at 625.

This is particularly true here, where as the district court noted, House Resolution 73 "regulate[d] 'the very atmosphere in which lawmaking deliberations occur.'" JA26. This Court's decision in *Consumers Union* is the case most directly on point. There, a magazine publisher challenged congressional rules requiring members of the press to apply to gain access to the House and Senate press galleries. 515 F.2d at 1342. This Court held that, in excluding the plaintiff publisher from the press galleries, the defendants were "enforcing internal rules of Congress validly enacted under authority specifically granted to the Congress and within the scope of authority appropriately delegated by it," and thus had engaged in "legislative" acts. *Id.* at 1350-51. Although not "the legislative process itself," *id.* at 1348, the "execution of internal rules" governing admittance to the press

galleries overlooking the House Floor is "identified with"—and protects—"the legislative process," *id.* at 1351. Accordingly, the defendants' actions "were an integral part of [both] the legislative machinery" and the "'deliberative and communicative processes'" of Congress. *Id.* at 1350 (quoting *Gravel*, 408 U.S. at 625).

Moreover, in *Barker v. Conroy*, 921 F.3d 1118, 1128 (D.C. Cir. 2019), this Court explained that in *Consumers Union*, "the Speech or Debate clause barred [it] from hearing the suit" "because the ... denial of the organization's application involved 'regulation of the very atmosphere in which *lawmaking deliberations* occur.'" *Barker*, 921 F.3d at 1128 (quoting *Walker v. Jones*, 733 F.2d 923 at 930) (emphasis added in *Barker*).

Here, House Resolution 73 quite literally addressed the "very atmosphere in which lawmaking deliberations occur." The security screening and its enforcement via a system of monetary fines was a means of addressing Members' concerns about the "very atmosphere in which lawmaking deliberations occur," and their worries that weapons may be brought to the House Chamber. *See Walker*, 733 F.2d at 930 (noting that in *Consumers Union* "the arrangements in question were intended to shield members of Congress"). To be sure, reasonable people, including Appellants, may disagree with fears that led to the imposition of security screening and/or the wisdom of imposing fines for violations of House Resolution

73. Indeed, each of the Members comprising the current House Leadership voted against the Resolution in the 117th Congress, and the current House majority elected to adopt rules that did not reimpose those measures. But that does not give this Court the authority to interfere with the administration and enforcement of an internal House Resolution governing Member discipline for conduct while entering the House Chamber, which was adopted by a majority of the full House pursuant to its specific constitutional authority.

As the district court properly concluded, the security screening was plainly a legislative act absolutely protected by the Clause. JA26. Given that the Speech or Debate Clause protects against challenges to regulations that govern access to the House *press galleries*, it surely also protects against challenges to security regulations that govern access to the House *Chamber* itself, the very place where the House meets to consider legislation and conduct business.

2. Appellants cannot circumvent the Speech or Debate Clause simply by suing the Sergeant at Arms and the Chief Administrative Officer for their execution of House Resolution 73. In *McCarthy v. Pelosi*, this Court held that the Appellants' lawsuit challenging the proxy voting rules was barred by the Speech or Debate Clause. 5 F.4th at 41. In so holding, this Court rejected the argument that "the acts of voting on and adopting the Resolution lie within the Clause's zone of

immunity, but acts undertaken in implementing the Resolution do not." *Id.* at 40-41.

Contrary to Appellants' insistence (Br. 37) that there is a "distinction between legislative acts and execution thereon," this Court has instructed that "[t]he salient distinction under the Speech or Debate Clause is not between enacting legislation and executing it"; the relevant distinction "instead is between legislative acts and non-legislative acts." *McCarthy*, 5 F.4th at 41. This Court in *McCarthy* noted that in *Consumers Union* it dismissed the suit against the Sergeants at Arms of both Houses of Congress because the Clause "encompassed not just the promulgation of the rules governing seating in the press galleries, but also the administration and enforcement of those rules." *Id.*; *see also Consumers Union*, 515 F.2d at 1350-51. *McCarthy* thus reaffirmed that the Clause applies to actions "executing" or "enforcing" the "internal rules of Congress." 5 F.4th at 41. The *McCarthy* Court noted that "the executing actions themselves constitute[d] legislative acts" and thus the acts themselves and the individuals responsible for carrying them out were both shielded from judicial review. *Id.* at 41.

Similarly, in *Rangel*, this Court held that the Speech or Debate Clause prohibited a Member's suit against other Members, committee staff, and the Clerk of the House challenging his censure as a violation of House Rules and the Due Process Clause. 785 F.3d at 23-25. Relying on the Discipline Clause, this Court

reasoned that the execution of congressional discipline is "a 'legislative' matter that 'the Constitution places within the jurisdiction of the House.'" *Id.* at 23 (quoting *Gravel*, 408 U.S. at 625).

Moreover, if the Clause could be avoided merely by naming administrative and ministerial House Officers and staff as defendants, its protections would be meaningless. Such an "'administrative defendant' exception would swallow the immunity rule whole." *Schilling v. Pelosi*, --- F. Supp. 3d ---, 2022 WL 4745988, at *9 (D.D.C. 2022). Just as in *McCarthy*, *Consumers Union*, and other cases, the challenged acts here constituting the execution of House Resolution 73 are themselves legislative acts pertaining directly to the internal rules and the discipline of Members—matters "that the Constitution places within the jurisdiction of [the] House." *Gravel*, 408 U.S. at 625.

C. Appellants' Efforts To Avoid Speech Or Debate Immunity Fail

Appellants' raise numerous arguments in an attempt to bring this case outside of the ambit of the Speech or Debate Clause; none are persuasive.

1. Appellants argue (Br. 11-20) that the district court erred in dismissing their complaint for lack of subject matter jurisdiction. To support this position, Appellants rely (Br. 13-16) on several cases, including *Powell v. McCormack*, 395 U.S. 486 (1969), *Kilbourn v. Thompson*, 103 U.S. 168 (1880), and numerous others, for the mistaken proposition that the "Speech or Debate Clause is no bar to

justiciability to claims against congressional employees who have violated textual commands of the Constitution." Br. 12 (citing *Powell*, 395 U.S. at 512-16, 550). At best, Appellants appear to misapply the relevant precedents, and at worst, they misunderstand the role that the Clause plays in determining subject matter jurisdiction.

The Supreme Court's analysis in *Gravel v. United States* is instructive and disproves Appellants' theory. In *Gravel*, the Supreme Court—conducting the same analysis as the district court did here—held that the Clause's immunity protects non-Member Congressional aides who perform "protected legislative act[s]." 408 U.S. at 618. In so holding, the Supreme Court explained that the non-Member defendants in cases like *Kilbourn* and *Powell* did not have Speech or Debate immunity because their conduct was not legislative in nature. *Id.* at 618-21; *see id.* at 624 n.15 ("This Court has not hesitated to sustain the rights of private individuals when it found Congress was *acting outside its legislative role*." (emphasis added)). The Sergeant-at-Arms in *Kilbourn* could be sued for carrying out an arrest *after* the relevant legislative process was complete and thus outside the bounds of the legislative sphere, and the Doorkeeper and Clerk in *Powell* could be sued for physically preventing a Member from taking the seat to which he had been duly elected.

Thus, in those cases the litigation could proceed because "relief could be afforded without proof of a legislative act or the motives or purposes underlying such an act[,]" and judicial review posed "[n]o threat to legislative independence." *Id.* at 621; *see Eastland*, 421 U.S. at 508 (explaining that "the arrest by the Sergeant at Arms was held unprotected in *Kilbourn* ... because it was not essential to legislating" (internal quotation marks omitted)).

Phrased another way, the reason those cases could proceed, and this one cannot, is because in both *Powell* and *Kilbourn* it was determined there was no legislative act at issue.[12] Here, by contrast, the district court correctly held that the challenged actions were legislative and, therefore, the court lacked subject matter jurisdiction over Appellees. JA31.

Similarly, and contrary to Appellants' assertion (Br. 13), the district court did not conclude that "any question related to the legislative function is beyond the federal courts' subject matter jurisdiction." Rather, its analysis was entirely consistent with precedent of both the Supreme Court and this Court, which requires there to be an analysis of "the plaintiff's complaint to determine whether the plaintiff seeks to hold" a congressional defendant "liable for protected legislative

[12] This is also the case for other cases cited by Appellants, specifically *United States v. Brewster*, 408 U.S. 501 (1972) (Br. 16) and *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (Br. 17 n.2).

actions." *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985); *see Rangel*, 785 F.3d at 23.

When applying Speech or Debate Clause immunity, courts are directed to assess the "nature of the act" to determine "whether, stripped of all considerations of intent and motive … [the challenged] actions [a]re legislative." *Bogan v. Scott-Harris*, 523 U.S. 44, 54-55 (1998); *see also McCarthy*, 5 F.4th at 39. Once the legislative-act test is met, "that is the end of the matter" for the courts. *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 861 (D.C. Cir. 1988). "An act does not lose its legislative character simply because a plaintiff alleges that it violated the House Rules … or even the Constitution … Such is the nature of absolute immunity, which is—in a word—absolute." *Rangel*, 785 F.3d at 24 (internal citations omitted).

Here, the district court properly analyzed and applied the protections of the Speech or Debate Clause to the actions challenged. *See* JA26-JA28. Once the district court determined the actions of both the Sergeant at Arms and Chief Administrative Officer to be legislative, it correctly concluded that it lacked subject matter jurisdiction and declined to address the merits of the Appellants' claims because the Clause's immunity applied. *See* JA31.

Finally, Appellants' attempt (Br. 19) to dismiss numerous holdings of this Court regarding the jurisdictional nature of the Speech or Debate Clause as "*dicta*,

not essential to their decisions," is wrong. This Court has made clear that Speech or Debate Clause immunity does indeed serve as a bar on federal courts' subject-matter jurisdiction. *See, e.g.*, *McCarthy*, 5 F.4th at 37 (affirming the district court's dismissal for "lack of jurisdiction" based on the Speech or Debate Clause); *Jud. Watch, Inc. v. Schiff ("Schiff")*, 998 F.3d 989, 990 (D.C. Cir. 2021) (affirming the district court's dismissal for "lack of subject-matter jurisdiction" because the Speech or Debate Clause "bars this lawsuit"). Moreover, contrary to the assertions of the Appellants, this Court has also regularly grouped Speech or Debate Clause immunity together with quintessential doctrines of jurisdiction, like Article III standing and the political question doctrine. *See Ass'n of Am. Physicians & Surgeons, Inc. v. Schiff*, 23 F.4th 1028, 1032, 1035 (D.C. Cir. 2022) ("Because appellants have not established that they have Article III standing, the court *need not reach the separate jurisdictional issue* of Representative Schiff's immunity under the Speech or Debate Clause." (emphasis added)); *McCarthy*, 5 F.4th at 38; *Rangel*, 785 F.3d at 22.

Undertaking an assessment of the merits of Appellants' claims would effectively vitiate the protections of the Clause and squarely conflict with the multiple cases—such as *Consumers Union*, *Rangel*, *Schiff*, and *McCarthy*—in which this Court has dismissed cases on Speech or Debate grounds without inquiring into the merits of the constitutional violations alleged by Appellants.

See, e.g., *Rangel*, 785 F.3d at 25 ("An act does not lose its legislative character simply because a plaintiff alleges that it violated the House Rules … or even the Constitution."). If a court had to evaluate the merits of a lawsuit before determining whether Speech or Debate Clause immunity applied, the Clause would not provide much protection at all, contrary to the clear intention of the Framers of the Constitution.

2. Appellants' reliance (Br. 21-25) on *United States v. Ballin*—which is not a Speech or Debate Clause case—is also misplaced. Appellants' reading of *Ballin* to require judicial review where "the House has ignored express constitutional restrains upon its rulemaking authority" (Br. 22) (alteration omitted) runs headlong into not only *Consumers Union* but also multiple other precedents of this Court. In *Consumers Union*, the losing plaintiff "relied primarily" on *Ballin*, 515 F.2d at 1348 n.13, yet this Court concluded that the Speech or Debate Clause barred the action, *id.* at 1348-51. The same analysis dictates the same result here.

In *Rangel*, this Court rejected the "familiar argument—made in almost every Speech or Debate case" that because the alleged conduct was arguably illegal or unconstitutional it is not covered by the Clause. 785 F.3d at 24 (citations omitted). Thus, the *Rangel* Court held that the Speech or Debate Clause prohibited a Member's suit against other Members, committee staff, and the Clerk of the House

challenging his censure as a violation of House Rules and the Due Process Clause. *Id.* at 23-25.

The hodgepodge of additional cases upon which Appellants rely (Br. 22-23) are of no moment. Both *Yellin v. United States*, 374 U.S. 109 (1963), and *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), are criminal cases, and do not implicate the Speech or Debate Clause concerns involved when a plaintiff challenges congressional action. *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994) was "a straightforward challenge to the constitutionality of a public law that directly affect[ed] [one's] private interest as a government employee," raising "no dispute properly within the domain of the legislative branch." *Id.* at 160 (internal quotation marks omitted). *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), involved a dispute between a Senator and the Executive Branch regarding the scope of the so-called "pocket veto." And in both *Moore v. U.S. House of Representatives*, 733 F.2d 946, 954 n.39 (D.C. Cir. 1984), and *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1171-72 (D.C. Cir. 1983), this Court expressly refrained from deciding whether the relevant lawsuits were barred by the Speech or Debate Clause.

In sum, the district court's conclusion that the Speech or Debate Clause absolutely protects the Sergeant at Arms and Chief Administrative Officer from suit is wholly consistent with both *Ballin* and other Rulemaking Clause cases.

3. Appellants' efforts to distinguish *Consumers Union* and rely on *Barker* also fail. As an initial matter, Appellants note (Br. 30) that the instant case involves allegations of "constitutional limitations on congressional rules not present in *Consumers Union*." But the Appellants in *Consumers Union* also alleged constitutional violations: specifically, a denial of equal protection and due process, as well as an assertion that the rule in question violated the First Amendment. *See* 515 F.2d at 1342.

Appellants claim (Br. 31) that the district court erred when relying on the discussion of *Consumers Union* in *Walker v. Jones*, which discussed the "regulation of the very atmosphere in which lawmaking deliberations occur". 733 F.2d at 930. Appellants argue that the rules at issue in *Consumers Union* were designed to preserve legislators' independence from outside influences, a consideration they believe is not at issue here. *Consumers Union*, however, indicated only that "[t]he manner of assuring independence of those accredited from such groups or interests is for the Congress to determine as a matter of constitutional power." 515 F.2d at 1347. It did not remotely suggest that this is the *only* goal in furtherance of which Congress can exercise its rulemaking power over the atmosphere in which legislative deliberations occur and enjoy the protection of the Speech or Debate Clause.

Furthermore, Appellants misunderstand the purpose of the Speech or Debate Clause. The Clause functions not only to protect lawmakers from outside individuals, but also to ensure "the independence of the legislature," *United States v. Johnson*, 383 U.S. 169, 178 (1966), and "to prevent … accountability before a possibly hostile judiciary," *Gravel*, 408 U.S. at 617—a concern that became relevant here the moment Appellants filed suit.

Turning to *Barker*, Appellants ignore the relevant factual contrast with the present case. In *Barker*, this Court rejected a Speech or Debate Clause defense to a lawsuit by an atheist whom the House Chaplain declined to invite to deliver a secular invocation. *See* 921 F.3d at 1121. The Court distinguished *Consumers Union* by noting that "any rules pertaining to the opening prayer—an event that occurs at the very beginning of the legislative session before any deliberating whatsoever—could not similarly be said to regulate 'the very atmosphere in which lawmaking deliberations occur.'" *Id.* at 1128 (quoting *Walker*, 733 F.2d at 930). This distinction is decisive: whereas the opening prayer ends before deliberations begin, the action that House Resolution 73 regulated—completion of security screening prior to entry to the House Chamber to protect the safety and security of all Members—pervaded the entirety of House deliberations, which frequently involves Members entering, exiting, and re-entering the House Chamber between

votes and during floor debates. Thus, the rule was intended to ensure a secure atmosphere in the Chamber for the entirety of the House's official business.

4. Appellants' argument (Br. 27-29) that security screening and administering payroll are not legislative functions protected by the Speech or Debate Clause also fails. The relevant question is not whether these activities *per se* are covered by the Clause, but whether, as the district court noted, these functions taken here in their proper context, JA28, have a direct connection to and are part of the "administration and enforcement of … rules" regulating the Members' behavior in the lawmaking atmosphere on the House Floor. *McCarthy*, 5 F.4th at 41. As discussed above, *see supra* at 6-11, because House Resolution 73 was a means of addressing the "very atmosphere in which lawmaking deliberations occur," *Walker*, 733 F.2d at 930, its administration and enforcement is "part of an overall scheme regulating" behavior on the House Floor. JA28. Accordingly, this suit is foreclosed by the Speech or Debate Clause.

II. APPELLANTS FAIL TO STATE A CLAIM

Although the district court declined to examine the merits of Appellants' constitutional claims, they have briefed those issues before this Court. While Appellees address those merits below, if the framework of the Speech or Debate Clause is applied properly, this Court need not reach these other issues.

A. The Rule Does Not Violate The Twenty-Seventh Amendment

Appellants allege that enforcement of House Resolution 73 violates the Twenty-Seventh Amendment, which provides: "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. This amendment was intended to augment the Ascertainment Clause, which provides that "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. I, § 6, cl. 1; *see* Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 Fordham L. Rev. 497, 502 (1992). Although the Amendment was introduced in Congress by James Madison in 1789, it was not ratified by the requisite three-fourths of the States until 1992. *See* Bernstein, *supra* at 539. From the First Congress through the Amendment's ratification, proponents were animated by concerns about the actual or seeming impropriety of having the sitting Congress adjust its own pay. *See id.* at 522-42.

1. The Plain Language Of The Twenty-Seventh Amendment Does Not Cover House Resolution 73

By its plain text, the Twenty-Seventh Amendment does not apply to House Resolution 73 for two reasons: (1) the fines at issue do not vary Member

"compensation" for their services; and (2) House Resolution 73 is not a "law" within the meaning of that amendment.

First, a fine imposed pursuant to House Resolution 73 does not "vary the compensation for the services" of Members within the meaning of the Twenty-Seventh Amendment. A fine is a "pecuniary criminal punishment or civil penalty payable to the public treasury." *Fine*, Black's Law Dictionary (11th ed. 2019).

Here, the fine was a penalty for the failure to comply with a requirement to complete security screening prior to entry into the House Chamber. By contrast, "compensation" has long been understood to mean payment for services rendered. *See, e.g.*, *Compensation*, Black's Law Dictionary (11th ed. 2019) ("Remuneration and other benefits received in return for services rendered; esp., salary or wages."); *Compensation*, Oxford English Dictionary (2d ed. 1989) ("[S]alary or wages … payment for services rendered."); 2 The Records of the Federal Convention of 1787 44-45 (Max Farrand ed., 1911) (using "salaries" and "compensation" interchangeably).

Relatedly, "service" is "[t]he official work or duty that one is required to perform." *Service*, Black's Law Dictionary (11th ed. 2019); *see also Service*, A Dictionary of the English Language, Samuel Johnson (1785) (defining "service" as "[e]mployment; business").

A fine imposed pursuant to House Resolution 73 against a particular House Member for violating binding House rules does not change that Member's "compensation" for his or her "services" within the meaning of the Twenty-Seventh Amendment. House Resolution 73 affects a Member's finances only conditionally: A Member is fined, and the fine is deducted from the Member's salary only for failing to complete the required security screening in violation of the applicable House rule and failing to pay the fine within the specific time period. *See* H. Res. 73; *see also* 2 U.S.C. § 4523 (providing specific authorization for such salary deductions since 1934).

This reading accords with how these terms are used in everyday life. If a professional athlete who earns $10 million per year is fined $50,000 for violating a team or league rule, we do not say that his or her "compensation" for services rendered has been reduced to $9,950,000. His or her compensation for services performed remains the same; the punishment for an infraction, which is wholly separate from the services for which he or she was compensated, is another matter entirely. Even if the fine is deducted directly from his or her paycheck, that only effects the "net" amount received, not the "gross" amount of his or her compensation. Appellants themselves admit this is the proper understanding when they note (Br. 48) that "the fines may not change the underlying salary level of $174,000 per annum."

Appellants cite no cases to support their position because none exist.[13] Further, Appellants' novel reading of "varies compensation" (Br. 47-48) conflicts with other provisions of the Constitution. The word "compensation" also appears in the Ascertainment Clause, which provides that "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. I, § 6, cl. 1. As this Court has held, the phrase "ascertained by Law" refers to laws

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[13] While Appellants do not raise the case, *United States v. Hatter*, 532 U.S. 557 (2001), provides no support for their position. In that case, the Court held that the Judicial Compensation Clause, U.S. Const., Art. III, § 1, rendered unconstitutional a law that increased tax burdens for a group consisting almost exclusively of then-sitting federal judges. 532 U.S. at 572-78. Were it otherwise, the Court concluded, Congress could conduct an end-run around the Judicial Compensation Clause under the guise of taxation. *See id.* *Hatter* logically suggests that Congress could not, consistent with the Twenty-Seventh Amendment, immediately impose a tax, or create an exemption from a tax, that applied only to Members of Congress as a class. Such a tax would, in essence, "vary[]" Members' "compensation for their services" and thus implicate the Amendment.

But a fine is entirely distinct from a tax. To begin with, the fines under House Resolution 73 were assessed against individuals, not against Members of Congress as a class. Moreover, the fines that were imposed here did not target Members of Congress "for their services," but rather for a violation of a House rule. A Member who wished to avoid the fine could have done so simply by completing the security screening prior to entering the House Chamber—as nearly every Member in fact did. Furthermore, the Judicial Compensation Clause has a different purpose than the Twenty-Seventh Amendment: to protect "judicial independence" from Congress. *See id.* at 571. The same purpose does not underlie the Twenty-Seventh Amendment: it would be illogical to speak of Congress preserving its independence from itself.

enacted through the process of bicameralism and presentment. *See Humphrey v. Baker*, 848 F.2d 211, 213-15 (D.C. Cir. 1988) (holding that statutory delegation of authority to the President to set congressional salaries, subject to congressional disapproval, did not violate the Ascertainment Clause where "the procedures eventuating in the specific figures" were set by legislation).

Thus, *if* Appellants were correct that a fine reduces "compensation," as that term is used in the Constitution, then the Ascertainment Clause would prevent the assessment of any fine without a statute approved by both the House and the Senate, followed by presentment to the President. But this position runs headlong into the Discipline Clause, which provides that "*[e]ach House* may … punish its Members for disorderly Behaviour … ." U.S. Const., Art. I, § 5, cl. 2 (emphasis added); *see also Kilbourn*, 103 U.S. at 189-90 ("[T]he Constitution expressly empowers *each House* to punish its own members for disorderly behavior," even including "imprisonment … for refusal to obey some rule on that subject made by the House for the preservation of order." (emphasis added)). Thus, because the Discipline Clause allows fines to be imposed by each house acting alone, whereas *the Ascertainment Clause requires "compensation" to be determined by both Houses*, such fines cannot be considered to affect Members' "compensation" without rendering the Discipline Clause and the Ascertainment Clause irreconcilable. The most logical way to give effect to both clauses is to read

"compensation" as unaffected by disciplinary fines. *See Kilbourn*, 103 U.S. at 189-90 (noting, in an action brought for false imprisonment, that each House also has the power to impose fines); *cf. Anderson v. Dunn*, 19 U.S. 204, 228 (1821) (recognizing Congress's right to levy fines for contempt of Congress).

Second, Appellants' argument conflicts with this Court's decision in *Boehner v. Anderson*, which elucidated the meaning of the Twenty-Seventh Amendment. Simply put, a House rule, like House Resolution 73, is not a "law" within the meaning of the Twenty-Seventh Amendment.

House Resolution 73 was adopted by the House alone—not via bicameralism and presentment. In *Boehner*, this Court held that, for purposes of the Amendment, a "law" is a "product of the legislative process," and requires "bicameral passage and presentment to the President." 30 F.3d at 161.

Boehner thus implied that a provision setting automatic annual cost of living adjustments for Members of Congress did not violate the Twenty-Seventh Amendment because the annual adjustments themselves were not new "laws." *See id.* While the statute containing the annual adjustment provision (the Ethics Reform Act) was a "law" within the meaning of the Twenty-Seventh Amendment—because it had been passed by both chambers of Congress and signed by President Bush in 1989—the individual annual adjustments were not

adopted via bicameralism and presentment and thus were not new "laws" within the meaning of the Twenty-Seventh Amendment.

Consistent with the reasoning in *Boehner*, there is no "law" at issue in this case to which the Twenty-Seventh Amendment could apply. That amendment establishes an additional procedural requirement for laws varying Member compensation (*i.e.*, *when* such a law can take effect), and thus the word "law" logically takes on the procedural meaning contemplated in Article I. *See* GianCarlo Canaparo & Paul J. Larkin, Jr., *The Twenty-Seventh Amendment: Meaning and Application*, Harv. J.L. & Pub. Pol., Sept. 2, 2021, at 9-11.[14] House Resolution 73 is simply an internal resolution adopted by a single chamber of Congress, not the product of the bicameralism-and-presentment process set out in the Constitution. *See Boehner*, 30 F.3d at 161. The Twenty-Seventh Amendment, therefore, does not apply.

Furthermore, as noted above, *see supra* at 34, there is no question that the Ascertainment Clause, which the Twenty-Seventh Amendment was intended to modify, *see* Bernstein, *supra*, at 502, refers to laws enacted through the process of bicameralism and presentment when it provides that congressional compensation shall be "ascertained by law." *See Humphrey*, 848 F.2d at 215; *see also* Canaparo & Larkin, *supra* at 9-11. Thus, the identical term "law" in the Twenty-Seventh

[14] *Available at* https://perma.cc/L8KA-77SA.

Amendment, introduced by James Madison in the First Congress as a supplement to the Ascertainment Clause, should be given the same meaning.

2. The Twenty-Seventh Amendment's History And Purpose Confirm That House Resolution 73 Does Not Violate The Amendment

This Court has recognized that, "[a]ccording to Madison, and to all the ratifying states that stated their understanding, the purpose of the amendment is to ensure that a congressional pay increase 'cannot be for the particular benefit of those who are concerned with determining the value of the service.'" *Boehner*, 30 F.3d at 159 (quoting James Madison, Speech in the House of Representatives (June 8, 1789), *in* The Congressional Register, June 8, 1789, *reprinted in Creating the Bill of Rights: The Documentary Record from the First Federal Congress* 84 (Helen E. Veit et al., eds., 1991)). In other words, the Twenty-Seventh Amendment was enacted to address seeming and actual impropriety that may exist when a group of individuals sets its own pay. But there is obviously no impropriety—seeming or actual—in fining an individual who defies a House rule.

Appellants suggest (Br. 41-47) that the Amendment may also have been motivated by concerns about *reductions* in salary. They argue (Br. 45) that the Amendment may have been driven in part by concerns that reductions in pay—perhaps enacted to gain popularity with constituents—would mean that "the question would be not who were most fit to be chosen, but who were most willing

to serve" (citation omitted). Whether or not Appellants are correct, that concern is irrelevant here. The fines at issue were imposed only if the Member failed to follow a rule of conduct adopted by the House with the intent to protect the security of Members and House employees.

Appellants offer no reason to conclude that the enactment of the Twenty-Seventh Amendment acted as a back-door restriction on the Discipline Clause, depriving Congress of the ability to impose fines upon Members and have those fines go into effect in a timely fashion. If the Twenty-Seventh Amendment had been intended to limit the Discipline Clause, which has long been understood to allow the imposition of fines, one would expect to find some evidence of such intent. But Appellants provide none.

B. The Rule Does Not Violate The Discipline Clause

Appellants argue that willfully disobeying a requirement to complete a security screening prior to entering the House Chamber is not "disorderly behavior" and thus is beyond the scope of the Discipline Clause of the Constitution. Appellants' opinion of the merits of House Resolution 73 notwithstanding, the fact remains that millions of Americans regularly encounter similar requirements when, for example, traveling by airplane, entering federal office buildings and courthouses, or attending major sporting events where similar security screening is required upon risk of denial of entry or removal, and possible

penalties, including a fine, for failure to comply. And when, for example, a passenger refuses to submit to security screening at an airport checkpoint, it strains credulity to characterize such conduct as orderly rather than disorderly.

The Discipline Clause provides: "Each House may … punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." U.S. Const., Art. I, § 5, cl. 2. The Discipline Clause gives both houses of Congress "broad official powers" to address, among other things, "violations of internal congressional rules'" and "even purely private conduct by a Member that, in the House's opinion, reflects badly on it as an institution." *In re Grand Jury Subpoenas*, 571 F.3d 1200, 1204 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (quoting Josh Chafetz, Democracy's Privileged Few 210 (2007)). Accordingly, the Discipline Clause "grants expansive authority for each House to discipline and sanction its Members for improper behavior." *Id.* As the Supreme Court noted over 140 years ago, "the Constitution expressly empowers each House to punish its own members for disorderly behavior," whether "by fine or imprisonment," including "for refusal to obey some rule on that subject made by the House for the preservation of order." *Kilbourn*, 103 U.S. at 189-90; *cf. Anderson*, 19 U.S. at 228.

Appellants argue (Br. 50) that the phrase "disorderly behavior" in the Discipline Clause "should be given its ordinary meaning as understood at the time of ratification." Yet the 1785 dictionary cited by Appellants defines "disorderly"

to include "contrary to law." A Dictionary of the English Language, Samuel Johnson (1785). Likewise, the 1991 definition that they proffer defines "disorderly" to include "[c]ontrary to the rules of good order and behavior." Black's Law Dictionary (6th ed. 1991). Similarly, an 1828 dictionary includes "contrary to rules" in its definition of "disorderly," *see Disorderly*, American Dictionary of the English Language, Noah Webster (1828).[15] House Resolution 73 is thus fully consistent with the "expansive authority" granted by the Discipline Clause.

Indeed, the House has in the past imposed far greater fines against Members than the $5,000 per violation, and $10,000 for subsequent violations, at issue here. For instance, in 1969, the House fined a Member $25,000—to be withdrawn from the Member's pay—for various offenses, including the misuse of official committee appropriations, payroll, and expenses. *See* Cong. Rsch. Serv., RL31382, Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives 14 (2016). In 2012, a Member was fined $10,000 in conjunction with her reprimand for misuse of official resources. *See id.* And in 2020, a Member was fined $50,000 in conjunction with his reprimand, also for misuse of official resources.[16]

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[15] A*vailable at* https://perma.cc/JB5C-KWLY.

[16] *See* H. Rep. No. 116-465, at 1-3 (2020).

As the Supreme Court has noted, each chamber's discretion in disciplining its members is "almost unbridled" and "there is no established right to review" of such a decision. *Brewster*, 408 U.S. at 519. The Discipline Clause's "right to expel extends to all cases where the offense is such as in the judgment of the [House or S]enate is inconsistent with the trust and duty of a member." *In re Chapman*, 166 U.S. 661, 669 (1897). As Justice Story wrote regarding the Rulemaking and Disciplinary Clauses: "No person can doubt the propriety of the provision authorizing each house to determine the rules of its own proceedings. … But the power to make rules would be nugatory, unless it was coupled with a power to punish for disorderly behaviour, or disobedience to those rules." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 835 (1833).

Imposing a fine for violating a House rule implementing for the House Chamber security practices common in American life is thus well within the heartland of the Discipline Clause. As Appellants themselves note (Br. 51), "the House plainly may promulgate rules to ensure its safety."

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of dismissal entered by the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B) because this brief contains 9,918 words excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

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

/s/ Todd B. Tatelman
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CERTIFICATE OF SERVICE

I certify that on February 10, 2023, I filed one copy of the foregoing Brief for Appellees via the CM/ECF system of the United States Court of Appeals for the District of Columbia Circuit, which I understand caused service on all registered parties.

/s/ Todd B. Tatelman
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