No. 23-566

IN THE

Supreme Court of the United States

THOMAS MASSIE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ET AL., PETITIONERS,

v.

SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, IN HIS OFFICIAL CAPACITY, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

House Resolution 38, when it was in effect, regulated the conduct of Members of the U.S. House of Representatives when they were in the Hall of the House (also called the House Chamber). The Resolution required Members to wear a mask in the House Chamber, directing the imposition of fines against those failing to comply with the masking policy. The questions presented are:

1. Whether the Speech or Debate Clause bars a suit challenging House Resolution 38 filed against a House Member and House employees.

2. Whether House Resolution 38 violates the Twenty-Seventh Amendment to the U.S. Constitution.

3. Whether House Resolution 38 violates Article I, Sections 6 and 7 of the U.S. Constitution.

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JURISDICTION

The judgment of the court of appeals was entered on June 30, 2023. On September 1, 2023, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including November 21, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioners seek this Court's review of a House of Representatives (House) rule no longer in effect that required Members to wear a mask in the House Chamber. The rule was controversial, and all Members of the current House Leadership voted against it. But this case is not about the wisdom of the rule or whether it was based on sound science. Rather, it is about whether Petitioners' claims are subject to judicial review. The district court held that the Constitution's Speech or Debate Clause bars the action and dismissed the complaint. The court of appeals unanimously affirmed.

I. The House's Constitutional Authority Over Its Rules

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. The Constitution delegates to the House and Senate each broad discretion to effectuate these legislative 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." *Id.* art. I, § 5, cl. 2. Absent a conflict with an express constitutional requirement or a violation of "fundamental rights," the rulemaking power of each body is plenary and beyond judicial review. *United States v. Ballin*, 144 U.S. 1, 5 (1892).

II. COVID-19 and House Resolution 38

During the 117th Congress, the House adopted House Resolution 38 (Resolution), which required Members to wear a mask while in the House Chamber and directed that fines be imposed on those who did not. House Resolution 38 was one of the measures the House implemented in response to the COVID-19 pandemic. It generated significant controversy within the House and was approved by a narrow vote of 222 to 204. *See* 167 Cong. Rec. H132-33 (daily ed. Jan. 12, 2021). Along with Petitioners (who are current House Members), all of the Members who comprise the current House Leadership opposed the Resolution. *Id.* at H133. Mask-wearing has not been required in the House Chamber since February 2022 and is not required today.

A. On January 12, 2021, the Resolution was introduced, and it was adopted by the full House the same day. *See* H. Res. 38, 117th Cong. (2021); 167 Cong. Rec. H132-33 (daily ed. Jan. 12, 2021). The Resolution stated that the "Sergeant-at-Arms is authorized and directed to impose a fine against a Member . . . for the failure to wear a mask in contravention of the Speaker's announced policies of January 4, 2021." H. Res. 38, § 4(a)(1). The January 4,

2021 policies referred to in the Resolution required wearing a mask at all times (during a covered period) in the House Chamber.[1] 167 Cong. Rec. H19, H40-41 (daily ed. Jan. 4, 2021).

The Resolution mandated a $500 fine for a first offense and a $2,500 fine for any subsequent offense. H. Res. 38, § 4(a)(2) (incorporating by reference House Rule II.3(g), Rules of the U.S. House of Representatives, 117th Cong. (2021) (House Rules)[2]). A Member could appeal his or her fine to the House Committee on Ethics, which by majority vote could overturn it. *See* House Rule II.3(g)(3)(B)-(C) (incorporated by reference in H. Res. 38, § 4(a)(2)). If the fine was not overturned on appeal, the Chief Administrative Officer of the House was directed to "deduct the amount of any fine . . . from the net salary otherwise due the Member." House Rule II.4(d)(1) (incorporated by reference in H. Res. 38, § 4(a)(2)).

B. On May 11, 2021, then-Speaker Nancy Pelosi clarified that "while masks continue to be required in the [House Chamber], Members are permitted to remove their masks temporarily while under recognition." 167 Cong. Rec. H2157 (daily ed. May 11, 2021).

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[1] A covered period was a period designated by the Speaker that allowed Members to vote remotely by proxy because "a public health emergency due to a novel coronavirus is in effect." *See* H. Res. 965, 116th Cong. § 1(a) (2020); H. Res. 8, 117th Cong. § 3(s) (2021) (noting that "House Resolution 965, One Hundred Sixteenth Congress, shall apply in the One Hundred Seventeenth Congress" with certain modifications that are not relevant here); *see also* 167 Cong. Rec. H40 (daily ed. Jan. 4, 2021) (noting that "[t]he Chair's announced policies . . . will apply during the pendency of a covered period pursuant to section 3(s) of House Resolution 8").

[2] *Available at* https://perma.cc/Z6VU-K6UJ**.**

Consequently, as of May 11, 2021, the Resolution required under penalty of fine that all Members wear masks while present in the House Chamber except when recognized to speak.

C. On May 18 and 19, 2021, each Petitioner entered the House Chamber while not wearing a mask. Pet. App. 91. After each occasion, the House Sergeant-at-Arms notified the respective Member that he or she would be fined for violating House Resolution 38. *Id.* at 94. Petitioners then appealed each violation to the House Committee on Ethics. *Id.* at 95. A majority of the House Committee on Ethics did not vote in favor of their appeals, and the appeals were thus denied. *Id.* Petitioners then received notifications from the Office of the Chief Administrative Officer that the amount of their fines would be deducted from their net salary disbursement. *Id.* at 24.

D. On February 28, 2022, the Speaker of the House pro tempore announced that "masks are no longer required in the [House Chamber]." 168 Cong. Rec. H1151 (daily ed. Feb. 28, 2022). He "further note[d] that all Members and staff may continue to wear masks at their discretion." *Id.* This announcement did not affect the fines previously assessed to any Member for violating the mask policy, including Petitioners' fines. Masks are not currently required in the House Chamber.

III. Member Compensation

Article I, Section 6 of 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. I, § 6, cl. 1. Before the early 1990s, Congress periodically enacted legislation to alter its compensation. *See* Cong. Rsch. Serv., 97-

1011, Salaries of Members of Congress: Recent Actions and Historical Tables 2 (2023) (CRS Report 97-1011).[3]

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

Since Fiscal Year 1983, Member salaries have not been funded through the annual appropriations process but rather by a permanent appropriation. *See id.* at 1. House Members are paid on a monthly basis. *See* 2 U.S.C. § 5301. Their paychecks reflect numerous voluntary and required deductions from their salary, including deductions for federal retirement benefits, Thrift Savings Plan contributions, health and life insurance contributions, federal and state taxes, and Social Security.

IV. Procedural History

A. Petitioners filed their complaint against then-Speaker Pelosi, then-House Sergeant-at-Arms William Walker, and Chief Administrative Officer Catherine

[3] *Available at* https://perma.cc/VW7Z-MMMP.

Szpindor.[4] Pet. App. 79-123. The complaint alleges (as relevant here) that House Resolution 38's enforcement mechanism (a fine) violates the Twenty-Seventh Amendment and Article I, Section 6 (the Ascertainment Clause) and Section 7 (the Presentment Clause) of the Constitution. *Id.* at 103-110. Petitioners seek both declaratory and injunctive relief, including an order requiring Respondents to return any fines that have been deducted from their paychecks. *Id.* at 110.

B. The district court granted Respondents' motion to dismiss, holding that the Speech or Debate Clause precluded Petitioners' suit. *Id.* at 12. The district court determined that the challenged actions were "quintessentially legislative acts falling squarely within the [Speech or Debate] Clause's ambit[,]" *id.* at 31 (second alteration in original) (quoting *McCarthy v. Pelosi*, 5 F.4th 34, 39 (D.C. Cir. 2021)), for two independent reasons: (1) "they regulate Members' conduct in the House Chamber as Members participate in the 'consideration and passage or rejection of proposed legislation[;]'" and (2) "they fall within the House's authority to enact rules regarding its legislative process and to discipline Members for noncompliance, which are 'matters which the Constitution places within the jurisdiction of [the] House[,]'" *id.* (second and third alterations in original) (quoting *Gravel v. United States*, 408 U.S. 606, 625 (1972)).

The district court concluded that, "by delegating authority to the Speaker to 'preserve order and decorum,' . . . and passing House Resolution 38 to compel Members to abide by the House's mask policy,

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[4] Mike Johnson is the current Speaker of the House, and William McFarland is the current Sergeant-at-Arms. Each is automatically substituted as a party. *See* Sup. Ct. R. 35.3.

. . . the House is regulating 'the very atmosphere in which lawmaking deliberations occur.'" *Id.* at 46 (citations omitted). The court further concluded that the Respondents' "actions also constitute 'other matters which the Constitution places within the jurisdiction of either House[,]' *Gravel*, 408 U.S. at 625, because the House's authority to establish the rules of the House and to discipline Members for non-compliance with those rules, including through the actions challenged in this case, stems from the Constitution itself." *Id.* at 47-48 (alteration in original).

Although this Court has made clear that a plaintiff cannot plead around Speech or Debate Clause immunity by alleging that an act is unlawful, *see, e.g.*, *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 508-10 (1975), the district court read the Court's decision in *United States v. Ballin*, 144 U.S. 1 (1892), as requiring it to consider the merits of Petitioners' constitutional claims. *See* Pet. App. 50 n.14 (concluding that Speech or Debate Clause immunity turned on whether House Resolution 38 "exceeded the House's rulemaking and disciplinary authority" by "violat[ing] other constitutional provisions").

The district court therefore proceeded to reject Petitioners' argument that the fines violated the Twenty-Seventh Amendment. *Id.* at 51-60. The court determined that the term "compensation for . . . services" as used in that Amendment refers to a Member's salary, and that because a fine does not reduce such salary, the Amendment was not violated. *Id.* at 57-60. The court also rejected the claim that the fines violated the Ascertainment and Presentment Clauses for the same reason: the fines did not reduce Petitioners' "compensation for their services." *Id.* at 60-61.

C. The court of appeals affirmed, holding that "[b]oth the adoption and execution of the Resolution

are legislative acts over which the Speech or Debate Clause confers immunity." *Id.* at 2. It explained that "[t]he House enacted the Resolution pursuant to its constitutional authority to 'determine the Rules of its Proceedings' and to 'punish its Members for disorderly Behaviour.'" *Id.* at 6 (quoting U.S. Const. art. I, § 5, cl. 2). As a result, "[t]he enactment of the Resolution and its enforcement are squarely within the jurisdiction of the House, and therefore are legislative acts." *Id.*

The court of appeals noted that House Resolution 38 "regulates the conduct of Members on the House floor. Therefore, its adoption was a legislative act protected by the Speech or Debate Clause." *Id.* at 7. It also emphasized that the "imposition of a fine for violating the Resolution is a legislative act that may not be questioned in this court" because "[f]ining [M]embers for the violation of a House rule is an aspect of Congress' power to 'punish its Members for disorderly Behavior.'" *Id.* (quoting U.S. Const. art. I, § 5, cl. 2).

The court of appeals, unlike the district court, held that it could not consider the merits of Petitioners' constitutional claims. *Id.* at 9. "Because the adoption and enforcement of the Resolution were legislative acts," and thus covered by Speech or Debate Clause immunity, the court of appeals could not "pass on their constitutionality." *Id.*

ARGUMENT

Petitioners have presented this case as an opportunity for the Court to interpret the Twenty-Seventh Amendment. But the court of appeals did not reach the merits of Petitioners' constitutional claims. Its decision rested solely on the Speech or Debate Clause, and it correctly applied this Court's longstanding precedent on Speech or Debate Clause immunity.

Petitioners are thus seeking review of a court of appeals decision that is consistent with this Court's precedent for the primary purpose of reaching an issue that the court below did not.

Looking beyond that problem, this Court, as a matter of interbranch comity, should not review an internal House rule that is no longer in effect and that regulated the conduct of Members while they were in the House Chamber. And in any event, Petitioners' underlying constitutional claims are meritless. The Court should deny the petition for a writ of certiorari.

I. The Decision of the Court of Appeals Is Correct and Does Not Conflict with Any Decision of This Court

A. The Speech or Debate Clause states 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 Clause plays a critical role in "protecti[ng] . . . the independence and integrity of the legislature." *United States v. Johnson*, 383 U.S. 169, 178 (1966). Indeed, the Clause is designed to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Gravel*, 408 U.S. at 617. The Clause also prevents litigation distractions that may "disrupt the legislative function." *Eastland*, 421 U.S. at 503. This Court has "[w]ithout exception . . . read the Speech or Debate Clause broadly to effectuate its purposes," which "is to [e]nsure that the legislative function the Constitution allocates to Congress may be performed independently." *Id.* at 501-02.

This Court's precedent shows that Speech or Debate Clause immunity extends beyond literal speech or debate. The privilege covers all "legislative acts,"

which this Court has said are those that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings" either (1) "with respect to the consideration and passage or rejection of proposed legislation" or (2) "with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625.

Where it applies, the privilege is an "absolute bar" to suit; courts do not examine the merits or wisdom of the legislative act, even when it is alleged that the act is unconstitutional. *Eastland*, 421 U.S. at 503, 509-10. Simply put, "[t]he wisdom of congressional approach or methodology is not open to judicial veto." *Id.* at 509 (citation omitted).

Additionally, under this Court's well-established precedent, the privilege extends beyond just "Senators and Representatives" themselves and covers aides and other Congressional staff. "[F]or the purpose of construing the privilege[,] a Member and his aide are to be 'treated as one[.]' . . . [Staff] must be treated as [Members'] alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause . . . will inevitably be diminished and frustrated." *Gravel*, 408 U.S. at 616-17 (citations omitted).

B. The court of appeals correctly held that both the adoption and the execution of House Resolution 38 fall within *Gravel*'s definition of legislative act because they "are squarely within the jurisdiction of the House." Pet. App. 6. *See also id.* at 7 n.3 (deciding the case "under *Gravel*'s second category" and "concluding the challenged acts are committed by the Constitution to the House"); *Gravel*, 408 U.S. at 625.

Relying on this Court's precedent, the court of appeals properly noted that "[t]he House is 'expressly empower[ed]' to enact internal rules and punish members for violating those rules." Pet. App. 6 (second alteration in original) (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 189-90 (1880)); *see also id.* (explaining that the House has the "constitutional authority to 'determine the Rules of its Proceedings' and to 'punish its Members for disorderly Behaviour'" (quoting U.S. Const. art. I, § 5, cl. 2)). Furthermore, the court of appeals correctly concluded that "[t]he House enacted the Resolution pursuant to [that] constitutional authority," *id.*, and that "it regulates the conduct of Members on the House floor," *id.* at 7. Thus, adopting the rule and executing it (by fining those who don't comply) fall squarely within *Gravel*'s definition of a legislative act. *See Gravel*, 408 U.S. at 625.

While the court of appeals did not need to reach the issue, Pet. App. 7 n.3, the adoption and enforcement of House Resolution 38 also qualify as legislative acts under *Gravel*'s first category. As the district court concluded (Pet. App. 32), they involved "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." *Gravel*, 408 U.S. at 625. House Resolution 38 directly regulated the conduct of Members while they were in the House Chamber debating and voting on bills.

C. While the court of appeals correctly concluded that this Court's decision in *Gravel* controlled the outcome,[5] the petition does not even cite to *Gravel*.

[5] To be sure, the court of appeals also relied on its own decision in *McCarthy v. Pelosi*, 5 F.4th 34 (D.C. Cir. 2021), *see* Pet. App. 4, 6-7, but *McCarthy* itself relied on this Court's definition of

Indeed, rather than pointing to any flaw in that court's obvious conclusion that House Resolution 38 is "squarely within the jurisdiction of the House," Pet. App. 6, Petitioners instead attack the enforcement mechanism for the masking rule. Although the Constitution expressly gives the House the power to "punish its Members for disorderly Behaviour," U.S. Const. art. I, § 5, cl. 2, Petitioners seem to argue that punishment in the form of a fine is subject to judicial review, *see* Pet. 7.

Petitioners concede that "[a] censure, a reprimand, the release of a House journal that condemned the Petitioners, or even, with a 2/3 vote, a measure expelling the Petitioners would be actions well within the ambit of Speech or Debate immunity"; yet, in their view, enforcing a rule with a fine is not. *See id.* But if these other forms of punishment would be covered by Speech or Debate Clause immunity because they constitute legislative acts—and they would because they fall comfortably within Congress's constitutional authority to discipline its Members—it is difficult to understand why a fine would not.

The artificial distinction Petitioners try to draw lacks support in this Court's Speech or Debate Clause

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legislative act in holding that the challenged acts were protected by the Speech or Debate Clause, *see McCarthy*, 5 F.4th at 39 ("The challenged Resolution enables Members to cast votes by proxy, and the 'act of voting' is necessarily a legislative act—i.e., something 'done in a session of the House by one of its members in relation to the business before it.'" (quoting *Gravel*, 408 U.S. at 617)); *id.* at 40 ("[T]he challenged actions here [also] fall within *Gravel*'s second category, i.e., matters that the Constitution places within the House's jurisdiction: the House adopted its rules for proxy voting under its power to 'determine the Rules of its Proceedings . . . .'" (citation omitted)).

jurisprudence. Precedent teaches that the relevant distinction is between legislative acts and non-legislative acts, not between fines and other forms of discipline. *See Gravel*, 408 U.S. at 625. Indeed, so long as an act is (as most relevant here) "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings" "with respect to other matters which the Constitution places within the jurisdiction of either House," it is protected. *See id.* That is true even if the act is performed by a House employee (instead of a Member), *see id.* at 616-17, and even if a plaintiff alleges (like Petitioners do here) that the act is unconstitutional, *see Eastland*, 421 U.S. at 510 ("Congressmen and their aides are immune from liability for their actions within the 'legislative sphere,' . . . even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional . . . ." (citations omitted)), or that the act was taken for an improper purpose, *see id.* at 508-09; *Johnson*, 383 U.S. at 185.[6]

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[6] This Court's decision in *Kilbourn v. Thompson*, 103 U.S. 168 (1880), does not stand for the proposition, as Petitioners argue (Pet. 7), that Speech or Debate Clause immunity does not apply when Congress allegedly violates the Constitution in enforcing its rules. Rather, a legislative act was not at issue in *Kilbourn*. *See Gravel*, 408 U.S. at 618 ("Those cases [referring to both *Powell* and *Kilbourn*] do not hold that persons other than Members of Congress are beyond the protection of the Clause *when they perform or aid in the performance of legislative acts*." (emphasis added)); *see also McCarthy*, 5 F.4th at 41 ("And conduct carrying out legislation is beyond the Speech or Debate Clause's compass when it is not itself a legislative act, as was the case in *Kilbourn* . . . ."). Thus, *Kilbourn* does not indicate that a legislative act that executes a House rule loses Speech or Debate Clause protection if a plaintiff simply alleges a constitutional violation.

Contrary to Petitioners' claim (Pet. 6-7), *Powell v. McCormack*, 395 U.S 486 (1969), nowhere supports carving disciplinary fines out from the definition of a legislative act. *Powell* involved a House resolution that prevented a duly elected House Member from taking his seat. 395 U.S. at 490, 493. The Member-elect sued, naming not only Members in their official capacity but also other House employees, including the Sergeant-at-Arms who allegedly refused to pay the Member-elect's salary and the Doorkeeper who allegedly threatened to deny him admission into the House Chamber. *Id*. This Court ultimately held that while the "action may be dismissed against the Congressmen[,] petitioners [there were] entitled to maintain their action against House employees." *Id.* at 506.

Powell does not stand for the sweeping proposition that anything that can be characterized as a "pay claim[]" (Pet. 7) against a House employee falls outside of Speech or Debate Clause immunity. *Powell*, among other things, involved a backpay issue. It did not involve a challenge, like Petitioners' lawsuit here, to a House rule that was enforced by fining those who failed to comply. *Powell* stands for the unremarkable proposition that an act is protected only if it is a legislative act, and the act at issue there (the wholesale exclusion of a Member) was not. Indeed, in *Gravel*, this Court explained that *Powell* "do[es] not hold that persons other than Members of Congress are beyond the protection of the Clause *when they perform or aid in the performance of legislative acts*." 408 U.S. at 618 (emphasis added). And the D.C. Circuit recently relied on *Gravel* in reading *Powell* this way. *See McCarthy*, 5 F.4th at 41 ("The [Supreme] Court thus necessarily considered the persons whose conduct was at issue in [*Powell*] to have been uninvolved 'in the performance of legislative acts.'"). The petitioners there filed a

petition for a writ of certiorari and argued, like Petitioners do here, that the D.C. Circuit's decision contradicted this Court's decision in *Powell*. *See* Petition for Writ of Certiorari at 14, *McCarthy v. Pelosi*, 142 S. Ct. 897 (2022) (No. 21-395), 2021 WL 4150422. This Court denied that petition, *McCarthy v. Pelosi*, 142 S. Ct. 897 (2022), and it should do the same here.

In sum, the adoption and enforcement of House Resolution 38 are legislative acts, and the decision of the court of appeals does not conflict with *Powell*.

D. Unable to point to any circuit split, Petitioners claim (Pet. 8) that the decision of the court of appeals conflicts with another D.C. Circuit decision: *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994). That case, which did not address the Speech or Debate Clause, has no bearing here.[7]

Boehner involved a Member-led challenge to a federal statute, the Ethics Reform Act, which set up a mechanism for an annual cost of living adjustment for Member salaries. *See* 30 F.3d at 158-59. The court of appeals in *Boehner* held that a Member "ha[d] standing to challenge the operation of a law that directly determines his rate of pay," *id.* at 160, and it considered (and ultimately rejected) the merits of the Member's Twenty-Seventh Amendment claim, *id.* at 161-62. Unlike this case, *Boehner* did not involve a challenge to the adoption or enforcement of a House rule that governed Member conduct in the House Chamber. Unsurprisingly, Speech or Debate Clause immunity was not part of that case. Indeed, the President of the United States was a defendant in *Boehner*. *See id.* at 158. The decision of the court of appeals here thus

[7] For the same reason, this Court's decision in *Yellin v. United States*, 374 U.S. 109 (1963), is inapposite. *See* Pet. 7 (citing *Yellin*).

does not conflict with *Boehner*, which stands for the straightforward proposition that a House Member has standing to raise a Twenty-Seventh Amendment claim against a federal statute that affects his rate of pay.

* * *

In sum, the court of appeals correctly held that both adopting and enforcing House Resolution 38 are legislative acts protected by the Speech of Debate Clause. And it correctly applied this Court's precedent in doing so.[8]

II. This Case Is Not a Good Vehicle for Addressing Petitioners' Claims

As a matter of interbranch comity, this Court should not choose to involve itself in the internal operations of the House absent extraordinary circumstances. No such circumstances are present here. Indeed, there are compelling reasons that counsel against this Court wading into this internal House dispute. The rule that is being challenged is a paradigmatic example of an internal House issue—it governed Member conduct in the House Chamber—and it is no longer in effect. In addition, the court of appeals did not evaluate the substantive constitutional issues that comprise the gravamen of the petition.

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[8] As mentioned above, *supra* at 7, the district court read this Court's decision in *Ballin* as essentially merging the Speech or Debate Clause analysis with the merits. That reading is incorrect. There was no Congressional party in *Ballin*, and that case did not involve the Speech or Debate Clause. The district court's reading of *Ballin* conflicts with this Court's precedent that holds the Speech or Debate Clause is an "absolute bar" to suit. *See Eastland*, 421 U.S. at 503. The court of appeals, which did not analyze *Ballin*, correctly concluded that it could not consider the merits of Petitioners' claims.

A. This Court's review of a coordinate branch's internal rule necessarily implicates the separation of powers. *See, e.g.*, *Johnson*, 383 U.S. at 178 (Judiciary should not "possess[,] directly or indirectly, an overruling influence over the [Congress] in the administration of [its] respective powers"). And the Court should not risk encroaching on the House's constitutional authority, *cf. Davis v. Passman*, 442 U.S. 228, 251 (1979) (Powell, J., dissenting) (arguing that the Court "intru[ded] upon the legitimate powers of Members of Congress"), to review a House rule that has not been in effect since February 2022.

At its core, this case is about an internal rule that regulated Members' conduct when they were present in the House Chamber, the venue that is central to the House's legislative and deliberative functions. The House adopted House Resolution 38 under its express constitutional authority to make its own rules and to discipline its Members. Out of interbranch comity, the Court should approach any request to review such a rule with substantial caution. *Cf. id.* at 252 (Powell, J., dissenting) (arguing that "principles of comity and separation of powers should require a federal court to stay its hand"). Just as Congress should be extremely reluctant to intervene in this Court's internal rules governing conduct in its courtroom, so too should this Court be very hesitant to involve itself in the House's internal rules governing the House Chamber.[9]

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[9] Relatedly, Chief Justice Roberts recently declined to testify at a Senate Judiciary Committee "hearing regarding the ethical rules that govern the Justices of the Supreme Court and potential reforms to those rules." *See* Press Release, Senate Judiciary Comm., *Durbin Invites Chief Justice Roberts to Testify Before the Judiciary Committee Regarding Supreme Court Ethics* (Apr. 20, 2023), *available at* https://perma.cc/GK3Z-6YXJ**.** In his letter

Here, principles of comity and respect for the separation of powers are especially weighty: House Resolution 38 has not been in effect for almost two years. Nor is there any reason to think the House will adopt a similar rule during the remainder of the 118th Congress. As noted, all of the current House Leadership opposed House Resolution 38. *See supra* at 2. Thus, "the respect due to a co-ordinate branch of the government," *Marshall Field & Co. v. Clark*, 143 U.S. 649, 673 (1892), strongly counsels against reviewing an internal House rule that, due to the operation of the political process, is no longer on the books.

B. As the court of appeals correctly concluded, when Speech or Debate Clause immunity is at issue, a court may review the merits of a claim only if it concludes that immunity does not apply. The court of appeals therefore did not pass on the substantive constitutional claims to which Petitioners devote over three-quarters of their argument for why this Court should grant their petition. *See* Pet. App. 9 (explaining that the court could not "pass on the[] constitutionality" of adopting and enforcing House Resolution 38 because both are protected by the Speech or Debate Clause). As a result, Petitioners' request that this Court review the merits of their Twenty-Seventh Amendment and Article 1, Section 6 and 7 arguments is contrary to this Court's frequent admonition that it is "a court of

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declining the invitation to testify about the Court's internal approach to ethics issues, Chief Justice Roberts flagged "separation of powers concerns and the importance of preserving judicial independence." *See* Letter from John Roberts, Chief Just., U.S. Sup. Ct., to Richard J. Durbin, Senator, Chair of the Senate Comm. on the Judiciary, at 1 (Apr. 25, 2023), *available at* https://perma.cc/GU6U-RFNJ**.** For the separation of powers to be preserved, both judicial and legislative independence must be respected.

review, not of first view.'" *See Brownback v. King*, 141 S. Ct. 740, 747 n.4 (2021) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)); *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592, 595 (2020) (same); *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2056 (2019) ("As we have said many times before, we are a court of 'review,' not of 'first view.'" (citation omitted)). This case is thus not an appropriate vehicle for this court to examine the substantive constitutional claims that form the foundation of the petition. *See, e.g.*, Pet. 1 (first sentence of Statement of the Case: "One of the few provisions of the Constitution with no interpretation from this Court is the Twenty-Seventh Amendment.").

III. House Resolution 38, Although Objectionable to Current House Leadership, Is Constitutional

Vehicle issues aside, the Resolution is constitutional. House Resolution 38 does not change Members' salary, which is set by federal statute; it only imposes a penalty in the form of a fine on those Members who violate a House rule. It does not, in other words, reduce the compensation Members receive for serving in the House. Consequently, House Resolution 38 does not violate the Twenty-Seventh Amendment or the Ascertainment Clause, both of which set certain requirements that apply only to laws related to compensation.

A. The Resolution Does Not Violate the Twenty-Seventh Amendment

Petitioners claim that the enforcement of House Resolution 38 violates the Twenty-Seventh Amendment, which provides that "[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives

shall have intervened." U.S. Const. amend. XXVII. This Amendment was intended to augment the Ascertainment Clause, which states 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." *Id.* 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. By its plain text, the Twenty-Seventh Amendment does not apply to House Resolution 38 for two reasons: (a) the fines at issue do not vary Member "compensation" for their services and (b) House Resolution 38 is not a "law" within the meaning of that Amendment.

a. *First*, a fine imposed under House Resolution 38 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 wear a mask in 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) ("salary or wages . . . payment for services rendered"); 2 The Records of the Federal Convention of 1787, at 44-45 (Max Farrand ed., 1911) (using "salaries" and "compensation" interchangeably). As the district court concluded, Founding-era dictionaries essentially defined "compensation" as "the provision of 'something equivalent'" to the services rendered. *See* Pet. App. 54-55 (citation omitted).[10]

A fine imposed under House Resolution 38 against a Member for violating House rules did not change the "compensation" that Member received for his or her "services" within the meaning of the Twenty-Seventh Amendment. House Resolution 38 affected a Member's finances only conditionally: a Member was fined, and the fine was deducted from the Member's salary, only for failing to wear a mask in the House Chamber in violation of the applicable House rule. *See* H. Res. 38; *see also* 2 U.S.C. § 4523 (providing specific authorization for such salary deductions since 1934). It did not change a Member's salary.

This reading of compensation and service is consistent 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 a rule infraction, which

[10] 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*, Samuel Johnson, A Dictionary of the English Language (1785) (defining "service" as "[e]mployment; business").

is wholly separate from the services for which he or she was compensated, is another matter entirely.

The method by which the House chooses to collect the fine does not change the equation. When a Member's fine is deducted from his or her paycheck, the House is simply collecting a debt that the Member owes the House; it is not reducing his or her salary. When the fine is deducted directly from his or her paycheck, that affects only the "net" amount received, not the "gross" amount of his or her compensation. Petitioners' claims (Pet. 21, 22) that House Resolution 38 "target[s] [Members'] salary" and "explicitly forecloses other ways Members might pay the fines" do not indicate that a Member's compensation for services has changed. Indeed, pursuant to Petitioners' argument, any change in the deductions that are made from a Member's paycheck for a wide variety of reasons would implicate the Twenty-Seventh Amendment. But that constitutional provision was not designed to micromanage the House's payroll administration and in fact does not do so. In sum, the method by which the fine is enforced does not change its character and is of no constitutional significance; it is still a penalty that does not alter the Member's gross salary.

Petitioners argue that referring to House Resolution 38's enforcement mechanism as a fine is "congressional word play," and they claim that "[c]ourts must look beyond labels and look at what is actually going on." *See* Pet. 23. But this is no labeling gambit; the penalties at issue here bear all the hallmarks of fines. They were imposed for violations of a House rule. When imposed, they created a debt that was owed to the House. And the House chose to collect that debt by deducting it from Members' paychecks. The fines did not, as the district court noted, modify the compensa-

tion set by the relevant statute. Pet. App. 58; *id.* at 59-60 n.18 (stating that Petitioners "offer no support for the proposition that 'compensation[,]' as it is used in the Ascertainment Clause and the Twenty-Seventh Amendment, refers to the amount that they receive in their paychecks, as opposed to the congressional salary established by law" (alteration in original) (emphasis and citation omitted)). Thus, this Court's conclusion in *NFIB v. Sebelius*, 567 U.S. 519, 563 (2012), that the penalty imposed by the Affordable Care Act on certain uninsured people "looks like a tax in many respects," *id.*, does not support Petitioners' argument. Here, we are dealing with a fine that looks like a fine. Indeed, to return to the example of professional athletes, fines imposed by the National Football League are similarly deducted from a player's paycheck.[11]

Additionally, Petitioners' novel reading—which taken to its logical conclusion requires holding that any new deduction or change in a deduction from Members' gross pay triggers the Twenty-Seventh Amendment—would conflict with other provisions of the Constitution. The Court should not embrace such a radical reading. The word "compensation" also appears in the Ascertainment Clause, which provides that "[t]he 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.[12] As Petitioners concede (Pet. 25 n.14), the

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[11] *See Accountability: Fines & Appeals*, NFL Football Operations, *available at* https://perma.cc/DP6R-DFMC (explaining that "the league withholds the amount of the fine from the player's next check").

[12] Petitioners do not suggest that the word "compensation" in the Twenty-Seventh Amendment carries a different meaning than the same word, applying to the same people, in the

phrase "ascertained by Law" refers to laws enacted through the process of bicameralism and presentment. *See Humphrey v. Baker*, 848 F.2d 211, 214-15 (D.C. Cir. 1988) (holding that statutory delegation of authority to President to set Congressional salaries, subject to Congressional disapproval, did not violate Ascertainment Clause where "the procedures eventuating in the specific figures were set" by legislation).

Under Petitioners' theory that a fine reduces "compensation," as that term is used in the Constitution, the Ascertainment Clause would prevent the assessment of any fine upon a Member without a statute approved by both the House and the Senate, followed by presentment to the President. Indeed, Petitioners argue as much (Pet. 25) in support of their claim that their fines violate the Ascertainment Clause and the Presentment Clause, U.S. Const. art. I, § 7, cl. 2. But this argument runs headlong into the Discipline Clause, which provides that "*[e]ach House* may . . . punish its Members for disorderly Behaviour." *See* 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.").

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 irreconcilable the Discipline Clause and the

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Ascertainment Clause. Rather, they emphasize (Pet. 14-15) that the same concerns animated the drafting of both provisions.

Ascertainment Clause. 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 (mentioning, in dicta, "the power of punishment in either House by fine").

b. *Second*, a House rule, like House Resolution 38, is not a "law" within the meaning of the Twenty-Seventh Amendment. Petitioners note other contexts in which enactments other than those satisfying the constitutional bicameralism-and-presentment process are treated as a "law" (Pet. 18-21), but the question here is whether "law" has such a meaning *in the Twenty-Seventh Amendment*.[13] It does not.

The word "law" in the Twenty-Seventh Amendment means "the product of the legislative process"—that is, it must be passed by both chambers of Congress and is either signed by the President or takes effect when Congress overrides the President's veto. *See Boehner*, 30 F.3d at 161. Thus, House Resolution 38—which was adopted by the House alone, not via bicameralism and presentment—is not a "law" within the meaning of the Twenty-Seventh Amendment.

As explained above, 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 says that Congressional compensation shall be "ascertained by law," *see Humphrey*, 848 F.2d at 215; *see also* GianCarlo Canaparo & Paul J. Larkin, Jr., *The Twenty-Seventh Amendment: Meaning*

[13] Likewise, whether a Congressional rule is "subject to the provisions of the Constitution," *see* Pet. 18; *id.* at 20-21, sheds no light on the meaning of the word "law" in the Twenty-Seventh Amendment.

and Application, Harv. J.L. & Pub. Pol'y, Sept. 2, 2021, at 9-11.[14] Indeed, even Petitioners concede that the word "law" in the Ascertainment Clause means statutes that comply with the bicameralism-and-presentment requirements. *See* Pet. 25 n.14 ("[W]hen looking at the meaning of the term 'Law,' in Article I, Section 6, and Article I, Section 7, the term refers to enactments of bills by Congress that have been presented to the President."). They are thus forced to argue that the same word has different meanings in the Twenty-Seventh Amendment and the Ascertainment Clause.[15] But it makes far more sense to give the word "law" in the Twenty-Seventh Amendment—which was introduced by James Madison in the First Congress as a supplement

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

[15] Petitioners claim that a difference in capitalization (with "Law" being capitalized in the Ascertainment Clause but not in the Twenty-Seventh Amendment) shows that the same word has different meanings. *See* Pet. 25 n.14. They offer no support for this claim, nor do they mention that "law" is one of dozens of nouns that are capitalized wherever they appear in the original Constitution but are never capitalized in the amendments. Other such nouns include account, affirmation, age, aid, appointments, authority, ballot, branch, case, cases, census, certificates, choice, citizens, claim, claims, comfort, compensation, consent, conventions, crime, danger, death, debts, department, departments, disability, duties, effect, election, enemies, equity, executive, fact, forces, immunities, importation, inability, indictment, inhabitant, jurisdiction, land, laws, legislation, legislatures, life, majority, manner, member, members, numbers, oath, obligation, office, officer, officers, party, payment, peace, people, persons, place, power, powers, presence, privileges, property, proportion, punishment, purpose, purposes, qualifications, ratification, rebellion, representation, resignation, right, rules, seat, service, services, session, speech, tax, taxes, term, trial, use, value, vote, votes, witnesses, writs, year, and years.

to the Ascertainment Clause—the same meaning that it has in the Ascertainment Clause.

Moreover, the Twenty-Seventh Amendment creates an additional procedural requirement for laws varying Member compensation (when such a law can take effect); thus, the word "law" logically takes on the procedural meaning contemplated in Article I. *See* Canaparo & Larkin, *supra*, at 9-11. In sum, House Resolution 38 is an internal resolution adopted by a single chamber of Congress, not the product of the bicameralism-and-presentment process set out in the Constitution. The Twenty-Seventh Amendment thus does not apply.

2. Moving beyond the plain language, the Twenty-Seventh Amendment's history and purpose confirm that House Resolution 38 does not violate the Amendment.

"According 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, not to regulate individual fines imposed on Members who violate House rules.

Petitioners argue (Pet. 11-17) that the Amendment may also have been motivated by concerns about

reductions (and not simply increases) in salary. Even assuming Petitioners are correct, that concern is irrelevant here.[16] House Resolution 38 did not reduce Members' salaries; it imposed disciplinary fines on Members who did not follow a rule, adopted by the entire House, that governed Member conduct in the House Chamber.

Petitioners offer no reason to conclude that the ratification of the Twenty-Seventh Amendment acted as a back-door restriction on the Discipline Clause, by 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 were to limit the Discipline Clause, which had long been understood to allow each chamber to impose fines, one would expect to find some evidence of that intent. Petitioners provide none.

3. Petitioners' other merits-related arguments for why this Court should grant the petition fall short. For example, Petitioners argue that the decision below "effectively nullifies the Twenty-Seventh Amendment." *See* Pet. 24. That is wrong. The decision below confirms the House's constitutional authority to adopt—and to enforce—its own rules. It does not speak, for example, to a plaintiff's ability to raise a Twenty-Seventh Amendment challenge to a federal statute altering Congressional pay. *See, e.g.*, *Boehner*, 30 F.3d

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[16] Petitioners' claim (Pet. 11) that the "District Court fell into the trap of elevating this purported intent behind enactment of the law [meaning an intent to prevent Congress only from raising its own salary] over the clear and unambiguous language of the law" lacks support in the district court's decision. *See* Pet. App. 53-54 (noting Petitioners' argument that "the background of the Twenty-Seventh Amendment also reflects a concern" related to reducing wages).

at 161-62 (ruling on the merits of a Congressman's Twenty-Seventh Amendment claim).

Petitioners' claim (Pet. 24) that "the D.C. Circuit has decided an important question of federal law" pertaining to the Twenty-Seventh Amendment fares no better: the court of appeals decided only that Speech or Debate Clause immunity does not allow a plaintiff to challenge a House rule (or its enforcement) when that rule (or enforcement) is a legislative act. The court of appeals said nothing about the merits of Petitioners' Twenty-Seventh Amendment claim. Hence, Petitioners' doubts about the possibility of a circuit split (Pet. 23-24) are beside the point.

B. The Resolution Does Not Violate Section 6 or 7 of Article I of the Constitution

Petitioners' argument (Pet. 25-26) that their fines violate the Ascertainment Clause and the Presentment Clause also fails. As explained above, the fines do not reduce Petitioners' "compensation for their Services." *See supra* at 20-25. Their salaries are still "ascertained" pursuant to laws passed by the House and Senate and signed by the President. Petitioners fare no better with their argument (Pet. 26) that their fines are unconstitutional because they were not assessed by "Congress itself." We are unaware of any fine that "Congress itself" has ever assessed upon a Member; Petitioners' argument would invalidate every fine that has ever been issued by either the House or the Senate independently. The Constitution plainly does not require this.

Finally, Petitioners' assertion (Pet. 26) that "the D.C. Circuit has decided an important question of federal law" pertaining to the Ascertainment Clause and

Presentment Clause lacks merit because, again, the decision below did not reach Petitioners' Article I claim.

CONCLUSION

For these reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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