No. _____

IN THE
Supreme Court of the United States

AARON J. SCHOCK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Constitution's Rulemaking Clause grants exclusive jurisdiction to the House of Representatives to "determine the Rules of its Proceedings." Article I, § 5, cl. 2. The Constitution's Speech or Debate Clause provides that "for any Speech or Debate in either House, [Senators and Members of the House of Representatives] shall not be questioned in any other Place." Article I, § 6, cl.1. Former Congressman Aaron Schock appealed the district court's denial of his motion to dismiss an indictment on both Rulemaking and Speech or Debate Clause grounds. The Seventh Circuit held that it lacked jurisdiction to consider the Rulemaking Clause claim in an acknowledged circuit split, and rejected his Speech or Debate Clause on the merits.

The Questions Presented are as follows:

I. May a member of the Legislative Branch immediately appeal from the denial of his motion to dismiss an indictment on the ground that it violates the separation of powers protected by the Constitution's Rulemaking Clause?

a. Is such a claim immediately appealable by virtue of the collateral order doctrine where it invokes a claim of non-justiciability and separation of powers immunity and as a result cannot be redressed after a trial?

b. Is there pendent appellate jurisdiction doctrine to hear such a claim because of its relationship with an immediately appealable Speech or

Debate Clause claim, or is that doctrine categorically unavailable in criminal cases?

II. Does the Speech or Debate Clause provide a legislator with immunity from criminal charges that are founded in part on the content of internal House of Representatives communications concerning the interpretation, application or administration of Rules of the Proceedings?

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INTRODUCTION

This case presents two separation of powers questions, the answers to which are fundamental to maintaining the delicate constitutional balance between the coordinate branches of our government. They have arisen in this case because the Executive seeks to prosecute a Member of the Legislative Branch based on the Executive's unilateral interpretation of ambiguous rules of the House of Representatives.

The first question presented concerns the Constitution's Rulemaking Clause, which provides that only the House may determine the rules of its proceedings. Prior to the decision of the Seventh Circuit below, there was no dispute among the courts of appeals that ambiguous House rules were non-justiciable in criminal prosecutions and that such matters were subject to immediate appeal. The Seventh Circuit, however, held that there is no pretrial appellate jurisdiction over such a claim, analogizing the Legislative Branch's constitutional authority to determine its rules to Microsoft Corporation's authority to create policies for employee travel reimbursement. The result is a square and acknowledged split among the courts of appeals on a matter of pressing consequence to the constitutional separation of powers: whether a Member of the House must run the gauntlet of trial—almost certainly being forced to relinquish his constitutional office as a result of facing reelection under indictment—in order to gain review of his claim that the indictment presents a non-justiciable question committed to the authority of the House for which he is entitled to individual immunity.

The second question presented involves the Constitution's Speech or Debate Clause. It asks the related question of whether the House's exercise of its exclusive constitutional rulemaking authority falls under the protections of the Constitution's Speech or Debate Clause.

The indictment did not charge Schock with a bribery or corruption scheme, but instead with obtaining certain reimbursements from his House annual official allowance that the government contends were not authorized under the House's internal rules. These internal rules are central to the adjudication of the indictment, which references them no less than thirty times and the government has consistently proclaimed its intent to rely on these allegations in its case in chief. The cited rules concern everything from whether a given mile of travel was personal, official, or campaign-related, to whether a lighting fixture is a decoration, furniture, furnishing, or equipment. Not only does the indictment ask a jury to interpret the rule's ambiguities, but it also requires second guessing after-the-fact the determinations by the House that the expenses were reimbursable.

Any indictment that relies on ambiguous standards of conduct to establish violations of law offends due process protections. But one that also relies on purported violations of ambiguous House rules compounds that transgression by also giving offense to separation of powers principles because the Executive has thereby commandeered the Rulemaking authority the Constitution reserves exclusively to the Legislative Branch. The purported violations of House rules

are central to the adjudication of the indictment because the fraudulent scheme it alleges is to improperly obtain approval of reimbursement expenses, which itself turns on what House rules establish as reimbursable expenditures. Indeed, those rules are the only source of authority for what is a reimbursable official expense, and it is the House's constitutional authority to make and administer those rules that the Executive seeks—with the assistance of the Judicial Branch—to usurp.

After the district court denied Schock's motion to dismiss the indictment in relevant part, the Seventh Circuit refused to consider the merits of Schock's Rulemaking Clause appeal, holding that aspect of the district court's decision was neither a final decision under the collateral order doctrine, nor reviewable under pendent appellate jurisdiction. The Seventh Circuit considered his Speech or Debate Clause arguments on the merits, but summarily held that the Clause did not cover anything other than the actual "formulation" of rules, and thus this case did not implicate the Clause's protections.

The Seventh Circuit acknowledged that it created a split with four other courts of appeals in holding that the Rulemaking Clause claim was not appealable under the collateral order doctrine. The D.C. Circuit has reached the opposite holding on precisely the same issue, and the Second, Ninth, and Eleventh Circuits have all held that separation of powers claims of immunity are appealable collateral orders. The decision below also deepened an existing split by holding that it lacked pendent appellate jurisdiction because that form of jurisdiction is categorically unavailable in the

criminal context. While the D.C., Second, and Tenth Circuits have held the same, the Third and Eleventh have disagreed—and the Third Circuit has done so in nearly identical circumstances as those present here.

The Seventh Circuit also erred in rejecting Schock's Speech or Debate Clause claim, noting simply that the House's Rulemaking Clause authority is limited to its initial formulation of its rules. The process of "determining," that is, making, interpreting, and administering the rules of the House, is one of a few authorities reserved exclusively to Congress by the Constitution. As this Court has already established, that reservation brings Rulemaking Clause activity within the legislative function that is protected from Executive interference under established Speech or Debate Clause principles.

The questions presented are of vital importance to the separation of powers and warrant this Court's review. Unlike the decision below, this Court and other courts of appeals have consistently held that separation of powers claims brought by a member of a coequal branch are immediately appealable. To hold otherwise and allow the Executive to go forward with a trial would give the Executive a powerful lever, inconsistent with our constitutional system, over the Legislative Branch. That lever threatens both houses of Congress, but it is particularly dangerous in the case of a Member of the House of Representatives, who must seek election every two years. That lever may also be especially concerning when given to the hands of 93 U.S. Attorneys, who would be free to refashion House Rules as part of indictments that, like the one here, use interpretations of those rules as standards of

conduct that are the predicate for violations of broad criminal statutes of general application.

These important questions arise in a precedential decision that resolved them on broad legal bases. This case is thus an excellent vehicle for addressing them. This Court should grant review.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Seventh Circuit affirming the judgment of the district court is reported at 891 F.3d 334 and reproduced at App. 1-13. The order of the U.S. District Court for the Central District of Illinois granting in part and denying in part Petitioner's motion to dismiss is unreported but may be found at 2017 WL 4780614, and is reproduced at App. 13-65.

JURISDICTION

The Court of Appeals entered judgment on May 30, 2018. On August 23, 2018, Justice Kagan granted Schock's application to extend the time to file a petition for a writ of certiorari to September 27, 2018. No. 18A194. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The U.S. Constitution's Rulemaking Clause is found in Article I, § 5, cl. 2, which provides:

> *Each House may determine the Rules of its Proceedings*, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

(Emphasis added.)

The U.S. Constitution's Speech or Debate Clause is found in Article I, § 6, cl.1, which provides:

> The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; *and for any Speech or Debate in either House, they shall not be questioned in any other Place.*

(Emphasis added.)

STATEMENT

I. Factual Background and Proceedings in the District Court

Petitioner Aaron Schock was first elected to serve as a United States Representative for the 18th Congressional District of Illinois in 2008 at age 27, and was re-elected three times, serving from January 2009 until he resigned in March 2015 following a series of debilitating but unproven media accusations.

On November 10, 2016, a grand jury returned a twenty-four count indictment against Schock, including mail and wire fraud and false statement charges. All counts charge conduct that allegedly occurred while Schock was in office.

The indictment alleges no corruption of office, sale of favors, or the like. Rather, multiple counts are based on garden variety issues typically arising in connection with Members' Representational Allowance ("MRA") expense reimbursement requests.[1] These requests were allegedly submitted on Schock's behalf. After review and sometimes discourse with the House's Office of Finance, an entity the House has established for administering the MRA, they were paid. The MRA is a set amount of funding that each Member is allocated each year. Members do not generally access the fund directly, but seek reimbursement for their "official" expenses from their MRA through the Chief Administrative Office ("CAO"), to which the Committee on House Administration has delegated authority over the MRA, and its Office of Finance.

The use of a Member's allocated internal allowance has long been internally regulated by rules that are ambiguous by design. The source of rules cited most frequently in the indictment is the Members' Congressional Handbook, which the Committee on

[1] Other counts do not stem directly from MRA reimbursements, but are no less nitpicking. For instance, one count charges Schock with anticipatory obstruction, a 20-year felony, for publicly reporting to the Federal Election Commission the cost of a car as a "Transportation Expense" on the theory that it should have instead been labeled a "vehicle purchase."

House Administration promulgates pursuant to its delegated authority from the House. The Handbook's basic guideline is that "[o]rdinary and necessary expenses . . . in support of the conduct of the Member's official and representational duties . . . are reimbursable." 17-3277 Seventh Circuit ECF No. 16 (7th Cir. Appendix) at SA92. The Committee defines "ordinary and necessary" as those that are "reasonable." *Id.* The Handbook also makes clear that a great deal of discretion rests with the Members themselves. Its preface explains that the Handbook comprises guidelines that assist Members in determining whether expenses are reimbursable. Accordingly, the Handbook contains broad descriptions and examples of reimbursable expenses. *Id.* at SA103-12. It also notes that "*the Member* must determine the primary purpose for the expenditure." *Id.* at SA92 (emphasis added). As the indictment in this case demonstrates, administration under these ambiguous rules often entails discussion between a Member's office and the guiding Office of Finance as to the rules' meaning, requirements and applicability.

Schock moved the district court to dismiss the indictment on the grounds that it violated the Constitution's Rulemaking and Speech or Debate Clauses. In its opinion addressing both this motion and two other of Schock's motions to dismiss, the district court noted that the case was "rife with potential issues related to the separation of powers" and dismissed one of the wire fraud counts as non-justiciable under the Rulemaking Clause because it was based on an ambiguous House rule, under the reasoning of *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995). App. 16, 38. The government did not pursue an appeal of

this ruling. The district court declined at that time to dismiss other counts under the Rulemaking Clause and reserved the question for subsequent review, stating that it was possible that the government may be able to prove its case at trial without reference to the rules cited in the indictment. App. 28.

As to the Speech or Debate Clause, the district court also rejected Schock's arguments, reasoning that as it had already concluded, the government "need not establish the appropriateness of the House disbursements at issue" and thus no evidence regarding interpretation of House rules was necessary. App. 48.

II. Proceedings in the Seventh Circuit

Schock appealed the district court's denial of his motion to dismiss the indictment under the Rulemaking and Speech or Debate Clauses. On appeal, the government disavowed the district court's reasoning under the Rulemaking Clause, stating that "the district court was mistaken in suggesting that the House regulations are not 'necessary' to the government's case." 7th Cir. ECF No. 27 (Government's Br.) at 55. Affirming its intent to rely on the rules at trial, the government primarily contended that the court lacked jurisdiction over Schock's Rulemaking Clause arguments and that *Rostenkowski* was wrongly decided.

The Seventh Circuit affirmed the decision of the district court, ruling that it lacked jurisdiction to hear an interlocutory appeal of the Rulemaking Clause issue and that Speech or Debate Clause protections were not implicated.

Writing for the panel, Judge Easterbrook first addressed Schock's Speech or Debate Clause claim and affirmed for what it deemed "a simple reason," which was that "the indictment arises out of applications for reimbursements, which are not speeches, debates, or any other part of the legislative process." App. 2. As to the Rulemaking Clause, the court did not decide whether it would adopt the reasoning of *Rostenkowski* to hold that a sufficiently ambiguous House rule is non-justiciable, though in dicta the court suggested skepticism of that reasoning. App. 4. Instead, it ruled that it lacked jurisdiction to consider an appeal of the issue. A legislator's Rulemaking Clause appeal does not satisfy the collateral order doctrine, the Seventh Circuit held, because "[n]either the separation of powers generally, nor the Rulemaking Clause in particular, establishes a personal immunity from prosecution or trial." App. 5. The court also held that it lacked pendent appellate jurisdiction because it was unavailable in criminal cases. App. 10.

REASONS FOR GRANTING THE PETITION

The decision below created one split and deepened another when it held that the district court's denial of Schock's motion to dismiss under the Rulemaking Clause was not immediately appealable. First, it held that Schock's Rulemaking Clause appeal does not independently implicate a final decision under the collateral order doctrine, rejecting the decisions of "[f]our courts of appeals [which] have concluded that criminal defendants may take interlocutory appeals to make arguments about the

separation of powers." App. 4-5. As it thus expressly recognized, the Seventh Circuit created a split with not only the D.C. Circuit, which has held that a Rulemaking Clause claim like Schock's is immediately appealable, but also with the Second, Ninth, and Eleventh Circuits, which have recognized that members of coequal branches need not endure trial to vindicate other separation of powers claims.

Second, the Seventh Circuit held that although it had jurisdiction under this Court's precedents to resolve Schock's Speech or Debate Clause claim, it lacked pendent appellate jurisdiction over Schock's related Rulemaking Clause claim. It held that pendent jurisdiction does not exist in criminal cases, deepening an existing split on this issue: the Second, Tenth, and D.C. Circuits have held the same, while the Third and Eleventh Circuits have allowed pendent appellate jurisdiction in criminal cases.

The Seventh Circuit joined the wrong side of both circuit splits. Likening House rules to the internal employee policies of a private corporation, it failed to appreciate the substantial separation of powers issues at stake in this prosecution. It also erred when it rejected Schock's Speech or Debate Clause claim on the merits. This Court has held that Speech or Debate Clause immunity extends to all matters which the Constitution reserves to the House's jurisdiction. Though the Rulemaking Clause is such a matter, the Seventh Circuit rejected Schock's argument that the House or a Member's interpretation or application of House rules is rulemaking activity that the Speech or Debate Clause protects.

I. The Seventh Circuit created a split as to whether an appeal raising a separation of powers protection like the Rulemaking Clause satisfies the collateral order doctrine.

A. The Seventh Circuit's ruling is in acknowledged conflict with the D.C., Second, Ninth, and Eleventh Circuits.

The Seventh Circuit noted that its holding that Schock's Rulemaking Clause appeal was not immediately appealable under the collateral order doctrine "creates a conflict among the circuits about interlocutory appeals, in criminal cases, based on institutional arguments about the separation of powers." App. 9. Its decision created a direct split with the D.C. Circuit on the precise separation of powers issue in this case—the Rulemaking Clause. It also created a broader split with additional courts of appeals concerning the appealability of separation of powers claims, of which Article I's Rulemaking Clause is but one manifestation, as it "concern[s] the allocation of official power among the three coequal branches of our Government." *Clinton v. Jones*, 520 U.S. 681, 699 (1997).

First, in both *United States v. Durenberger*, 48 F.3d 1239 (D.C. Cir. 1995), and *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), the D.C. Circuit held that it had jurisdiction under the collateral order doctrine to consider appeals based on

the Rulemaking Clause. In *Durenberger*, a former Senator pursued an interlocutory appeal of the district court's denial of his motion to dismiss the indictment under the Rulemaking Clause, arguing that "he cannot be held to answer criminal charges when his liability depends on judicial usurpation of the Senate's exclusive right to formulate its internal rules." 48 F.3d at 1242. Similarly, in *Rostenkowski*, a former Congressman appealed the district court's denial of his pretrial motion to dismiss the indictment. 59 F.3d at 1296. He argued that the prosecution of the indictment unconstitutionally depended on judicial interpretation of ambiguous rules of the House of Representatives. *Id.* at 1307.

The D.C. Circuit concluded that it had jurisdiction to consider the former legislators' interlocutory appeals. In *Rostenkowski*, the court stated that it "clearly" had jurisdiction, reasoning that the Rulemaking Clause arguments were similar to the Speech or Debate Clause arguments that were clearly appealable under this Court's precedent. Both forms of immunity "should protect legislators from the burden of litigation and diversion from congressional duties." *Id.* at 1297 (citation omitted). *See also Durenberger*, 48 F.3d at 1242 (holding that the Rulemaking Clause confers "the freedom from the obligation to endure a criminal trial").

In contrast to *Durenberger* and *Rostenkowski*, the Seventh Circuit held that Schock's "interlocutory appeal must be dismissed to the extent it involves the Rulemaking Clause." App. 9. The reasoning of the Seventh and D.C. Circuits are indistinguishable on any grounds other than a clear disagreement on the

law, and the Seventh Circuit did not claim otherwise. Instead, it rejected the D.C. Circuit's analogy to the Speech or Debate Clause, asserting that the Speech or Debate Clause confers "personal" rights, while the Rulemaking Clause concerns only "institutional" rights which, it concluded, do not implicate a right not to be tried. App. 5.

Second, the Seventh Circuit created a broader but no less squarely implicated split as to whether "defendants may take interlocutory appeals to make arguments about the separation of powers" more generally. *Id.* Citing cases from the D.C., Second, Ninth, and Eleventh Circuits, the decision below noted that "[f]our courts of appeals" had allowed such interlocutory appeals, but that those decisions "do not persuade us on that broad proposition." *Id.* at 4-5.[2] All of those courts have heard interlocutory appeals brought by members of one of the three coequal branches raising separation of powers concerns.

Two courts—the D.C. and Second Circuits—have held that a member of the legislative branch raising a separation of powers claim of immunity has the right to an immediate appeal. In *United States v. Myers*, 635 F.2d 932 (2d Cir. 1980), the Second Circuit heard the interlocutory appeal of a Congressman arising from the district court's denial of his motion to

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[2] The Seventh Circuit incorrectly described all four of the cases it cited as involving appeals by "criminal defendants." App. 4-5. In fact, *United States v. Rose*, 28 F.3d 181, 186 (D.C. Cir. 1994), involved a defendant in a *civil* case though the court found the distinction between the civil and criminal legislator defendant irrelevant.

dismiss criminal bribery charges on general separation of powers grounds. It held: "If, because of the separation of powers, a particular prosecution of a Member of Congress is constitutionally prohibited, the policies underlying that doctrine require that the Congressman be shielded from standing trial." *Id.* at 935. Similarly, in *United States v. Rose*, 28 F.3d 181, 186 (D.C. Cir. 1994), the court cited *Myers* with approval and held that the Congressman had a right of interlocutory appeal because "separation of powers immunity should protect legislators from the burden of litigation and diversion from congressional duties."

Two other courts cited in the decision below—the Ninth and Eleventh Circuits—reached the same result in the context of judicial immunity, another aspect of separation of powers. The Eleventh Circuit, in *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982), held that a federal judge charged with conspiracy and obstruction of justice had an immediate appeal right after the district court denied his motion to quash the indictment based on judicial immunity. It concluded that the judge's assertion of judicial immunity "involves significant issues of interbranch comity and separation of powers," which rights would be "rendered meaningless by the impending trial." *Id.* at 708-09. The Ninth Circuit subsequently adopted this rationale in similar circumstances in *United States v. Claiborne*, 727 F.2d 842, 844-45 (9th Cir. 1984), a case also referenced with disapproval in the decision below.

All of these decisions remain good law in their respective circuits, and the Seventh Circuit did not endeavor to distinguish them on any grounds other

than a disagreement on the law: whether the separation of powers confers an institutional or a personal immunity. This clear disagreement among the courts of appeals warrants this Court's review.

B. A Rulemaking Clause claim raised by a member of the legislative branch carries a right of immediate appeal.

The Seventh Circuit erroneously concluded that it lacked jurisdiction under 28 U.S.C. § 1291 to consider Schock's Rulemaking Clause challenge to the indictment. Section 1291 provides that the courts of appeals "have jurisdiction of appeals from all final decisions of the district courts," which this Court has interpreted to include collateral rulings "that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995). The government did not dispute the satisfaction of the first two factors in this case, and the decision below likewise concerns only the third factor.

Article I's Rulemaking Clause, which states that "[e]ach House may determine the Rules of its Proceedings," U.S. Const. Article I, § 5, cl. 2, embodies separation of powers protections that must be vindicated pretrial to effectuate their full scope. This Court has never addressed whether a Rulemaking Clause claim of immunity is "effectively unreviewable on appeal," but its precedents concerning the separation of powers and official immunities show that it is, for several reasons.

First, if the House rules relied upon in an indictment are ambiguous—as they are plausibly contended to be here—their resolution in a criminal proceeding presents a political question that is nonjusticiable by any court under *Baker v. Carr*, 369 U.S. 186, 217 (1962). Schock's motion to dismiss the indictment contended that the Rulemaking Clause bars prosecution based on charges that require the interpretation of ambiguous House rules as presenting non-justiciable issues. *See Rostenkowski*, 59 F.3d at 1306; *United States v. Menendez*, 831 F.3d 155, 175 (3d Cir. 2016) (noting that "some Senate Rules may be non-justiciable because they are so vague that the Judicial Branch would essentially make rules for the Senate (and thereby violate the Rulemaking Clause) if it tried to interpret them"), *cert. denied*, 137 S. Ct. 1332 (2017). Where rules are sufficiently ambiguous, there are "no judicially discoverable and manageable standards for resolving" those ambiguities. *Rostenkowski*, 59 F.3d at 1304-06 (quoting *Baker*, 369 U.S. at 217). And "for a court to interpret a House Rule in the absence of 'judicially discoverable and manageable standards' would require the court to make 'an initial policy determination of a kind clearly for nonjudicial discretion.'" *Id.* at 1307. Ambiguous rules are thus non-justiciable and confer immunity from a trial where adjudication would require those rules to be interpreted, for their interpretation by another branch is rewriting them, which intrudes upon the House's exclusive prerogative to regulate its proceedings. *Id.* at 1297.

Second, the Court has consistently emphasized that "honoring the separation of powers" is a "particular value of a high order" that carries an "interest in

avoiding trial." *Will v. Hallock*, 546 U.S. 345, 352–53 (2006).[3] The Rulemaking Clause, "a classic example of a demonstrable textual commitment to another branch of government," is a critical embodiment of the separation of powers. *Rangel v. Boehner*, 20 F. Supp. 3d 148, 168-69 (D.D.C. 2013), *aff'd*, 785 F.3d 19 (D.C. Cir. 2015). The Clause establishes a Rulemaking power that is both "continuous" and "absolute and beyond the challenge of any other body or tribunal." *United States v. Ballin*, 144 U.S. 1, 5 (1892).

Where a trial against a legislator would entail the two coordinate branches rewriting the rules for the legislative branch's own proceedings, even the specter of such a trial poses a severe threat to the autonomy of the legislative branch. "[I]t is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *Hallock*, 546 U.S. at 353 (citation omitted). Separation of powers protections like the Rulemaking Clause constitute such a substantial public interest. For instance, in *Helstoski v. Meanor*, 442 U.S. 500 (1979), the Court held that a former Congressman's Speech or Debate Clause claim was immediately appealable. It reasoned that "if a Member is to avoid *exposure* to being questioned for acts done in either House and thereby enjoy the full protection of the

[3] Separation of powers protections do not dissipate when an individual charged with conduct allegedly occurring while in office leaves that office. *See, e.g.*, *United States v. Brewster*, 408 U.S. 501, 502 (1972). Indeed, the fact that Schock left office proves the point that it is practically impossible for a Member of the House to defend such charges and retain his elected office.

Clause, his challenge to the indictment must be reviewable before exposure to trial occurs." *Id.* at 508 (alterations in original omitted) (internal quotations and citation omitted). *See also Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982) (holding that a defense of absolute presidential immunity in a civil suit falls within the collateral order doctrine where there is a sufficiently great "danger[] of intrusion on the authority and functions of the [coequal] Branch").

This case demonstrates why a legislator must have immunity from trial and the ability to immediately appeal a Rulemaking Clause claim in order to effectuate the constitutional independence of congressional authority to make and administer its own rules. The decision below gave the green light to a trial where the proof of a given charge will depend on the jury's determination, for example, of whether the House was correct to accept a voucher as sufficiently documented, necessitating instruction to the jury on the proper interpretation of the rules. There is no doubt that the government will rely on these rules because the government has so stated consistently in the proceedings below. It expressed that intent in the indictment, in its briefing, and in oral argument on appeal, stating that "with respect to the mileage counts, the government believes that the rules are extremely helpful to prove the materiality and his intent." Oral Argument at 25:34, http://media.ca7.uscourts.gov/sound/2018/me.17-3277.17-3277_04_18_2018.mp3.

As with other separation of powers protections, "unless review were available before the defendant

was exposed to trial, the right invoked would be substantially diluted." *United States v. Rossman*, 940 F.2d 535, 536 (9th Cir. 1991). The very discretion inherent in the rules at issue here would be circumscribed by the uncertainty of competing interpretations existing between indictment and final judgment. Pre-trial resolution is necessary to maintain the independence of the Legislative Branch from the Executive and Judicial Branch's interference in its internal processes. This is particularly so for a Member of the House. Unlike a life tenure Article III judge, a Senator, or even a President, a Member is subject to reelection every two years. Facing trial to vindicate the protections guarded by the separation of powers will almost always entail pending trial during their reelection.

Third, similar concerns that underlie this Court's holding that a denial of qualified immunity is immediately appealable apply here. Immunity from trial and immediate appealability are warranted to guard against "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (citation omitted). If—as Schock asserts here—the Executive is constitutionally precluded from in effect rewriting the rules of the House through interpretation, that claim must also be subject to pretrial resolution as a trial would interfere with the constitutional office of the Member in a way that cannot be corrected by appeal after trial. Where a police officer is protected from suit (and entitled to pretrial appeal) when his actions did not violate clear constitutional law, the same

rationale should apply to a Member of a coequal branch seeking to vindicate an express constitutional interest.

In the face of these precedents, the Seventh Circuit reasoned that the Rulemaking Clause is, like the separation of powers generally, an "institutional doctrine rather than a personal one." App. 5. That conclusion is constitutionally and logically unsupportable. The Legislative Branch exists solely as a body of elected individuals who, under the Constitution, when assembled, become a branch of government. The very interference with the Legislative Branch that the separation of powers is meant to protect would be severely compromised if individual members subject to a separation of powers intrusion were powerless to seek timely redress for it.

This Court has never adopted this *ipse dixit* distinction between "personal" and "institutional" separation of powers protections, including in *Midland Asphalt Corp. v. United States*, the case the decision below relied upon most heavily. 489 U.S. 794 (1989). In the decision below, the Seventh Circuit simply ignored the vastly different interests at stake in that case and in one involving the vindication of separation of powers claims.

Midland rejected the immediate appealability of a corporation's claim that the indictment must be dismissed for an alleged violation of Federal Rule of Criminal Procedure 6(e)(2), which prohibits the public disclosure of matters before the grand jury. The case involved neither a defendant who was a member of a coequal branch nor any separation of powers questions.

The Court noted that the rule's text "contains no hint that a governmental violation of its prescriptions gives rise to a right not to stand trial." *Id.* at 802. Here, by contrast, the Rulemaking Clause contains an absolute prohibition of any other branch writing the rules of proceedings for the Legislative Branch. Such rewriting that would often occur in the black box of the jury at trial is likely to be effectively unreviewable after trial and, in any event, the harm to the separation of powers has already occurred and cannot be corrected on appeal.

Both the burden and threat of trial substantially dilute the express separation of powers guarantees of the Constitution's Rulemaking Clause. The decision below and its reliance on cases arising outside the context of the separation of powers cannot be reconciled with existing precedent recognizing that such substantial interests must be vindicated on appeal.

II. The decision below deepens a split on whether pendent appellate jurisdiction is available in a criminal case.

A. The decision below, along with decisions of the Second, Tenth, and D.C. Circuits, foreclose pendent appellate jurisdiction in criminal cases, in direct conflict with the Third and Eleventh Circuits.

The Seventh Circuit also addressed whether it had pendent appellate jurisdiction over the Rulemaking Clause aspect of Schock's appeal, based

on its link with his immediately appealable Speech or Debate Clause claim. App. 10. It held that under this Court's decision in *Abney v. United States*, 431 U.S. 651 (1977), pendent appellate jurisdiction is categorically unavailable in any criminal case, as its scope "is limited to compelling situations in civil cases." App. 10 (stating that *Abney* "did not employ the phrase 'pendent appellate jurisdiction' but effectively foreclosed its use in criminal prosecutions").

Here again, the decision below squarely implicates a split among the Courts of Appeals. *See United States v. Bergrin*, 682 F.3d 261, 277 n.20 (3d Cir. 2012) (recognizing that "there is a split in authority as to whether that doctrine [of pendent appellate jurisdiction] applies in criminal cases"); *see also United States v. Decinces*, 808 F.3d 785, 792 n.4 (9th Cir. 2015) (recognizing split but declining to weigh in). Contrary to the decision below, after the Court's decision in *Abney* both the Third and Eleventh Circuits have held that pendent appellate jurisdiction is available in the criminal context. The Third Circuit reached such a conclusion in nearly identical circumstances to those present here. In *United States v. Menendez*, Senator Menendez appealed the district court's denial of his motion to dismiss bribery charges under both the Speech or Debate and Rulemaking Clauses, the latter on the grounds that the Ethics Act could not be constitutionally applied to a Senator where the Rulemaking Clause commits the power to establish ethical standards to the Senate alone. 831 F.3d at 174. After recognizing that it had jurisdiction to consider Senator Menendez's Speech or Debate Clause arguments, the Third Circuit held that "[u]nder the specific circumstances here, we have

pendent appellate jurisdiction over Senator Menendez's separation-of-powers claims" and proceeded to consider his Rulemaking Clause argument. *Id.* at 164.

The Eleventh Circuit has also exercised pendent appellate jurisdiction in a criminal appeal. In *United States v. Lopez-Lukis*, 102 F.3d 1164, 1167 n.10 (11th Cir. 1997), the court had appellate jurisdiction for the government's interlocutory appeal of the district court's suppression of evidence under 18 U.S.C. § 3731. The Eleventh Circuit held that it had pendent appellate jurisdiction to review the district court's decision striking a paragraph of the indictment, which was not covered by Section 3731. *Id.* Discussing this Court's decision in *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995), it held that the two appellate issues were "so closely related" that "the application of pendent jurisdiction is proper." 102 F.3d at 1167 n.10.[4]

By contrast, like the Seventh Circuit in the decision below, the Second, Tenth, and D.C. Circuits have also foreclosed pendent jurisdiction in criminal appeals. In *United States v. Ferguson*, the Second Circuit held that it lacked appellate jurisdiction over a denial of a motion for a judgment of acquittal raised by the defendant in a cross appeal, referencing *Abney* as support for its holding that "there is no pendent

[4] It is notable that *Lopez-Lukis* arose in the context of the *government*'s appeal of both aspects of the district court's decision. Here, the government did not argue below that pendent appellate jurisdiction was categorically unavailable in criminal cases, but rather that the criteria for pendent jurisdiction were not satisfied.

appellate jurisdiction in criminal cases." 246 F.3d 129, 138 (2d Cir. 2001). Also citing *Abney*, in several criminal cases the Tenth Circuit has held that it had "no 'pendent' appellate jurisdiction. Rather, every issue presented on appeal must itself fall within *Cohen*'s collateral-order exception." *United States v. Wittig*, 575 F.3d 1085, 1095 (10th Cir. 2009) (internal quotation omitted); *see also United States v. Angilau*, 717 F.3d 781, 786 (10th Cir. 2013); *United States v. Wampler*, 624 F.3d 1330, 1335 (10th Cir. 2010). Finally, the D.C. Circuit rejected a defendant's cross appeal under *Abney*, recognizing that although the relevant language "is only dictum, we think it right to take it literally." *United States v. Hsia*, 176 F.3d 517, 526-27 (D.C. Cir. 1999).

B. The Seventh Circuit erred in holding pendent appellate jurisdiction unavailable in the circumstances here.

In the decision below, the Seventh Circuit—like the other courts of appeals that have foreclosed pendent appellate jurisdiction in the criminal context—relied heavily on this Court's decision in *Abney v. United States*. App. 10. However, these decisions erroneously exaggerate the scope of *Abney,* a decision that is best read only as foreclosing any sort of automatic piggybacking. As this Court has subsequently explained, *Abney*'s language is best read as generally disfavoring "a rule loosely allowing pendent appellate jurisdiction." *Swint*, 514 U.S. at 49.

The defendants in *Abney* had moved pretrial to dismiss the indictment on both double jeopardy and

sufficiency grounds. After the district court denied their motion, the defendants appealed, and the court of appeals affirmed on the merits. This Court first held that the double jeopardy aspect of the district court's decision was immediately appealable as a "final decision" under 28 U.S.C. § 1291. 431 U.S. at 661-62. The Court then addressed whether the denial of the motion to dismiss on sufficiency grounds was immediately appealable, stating that "such claims are appealable if, and only if, they too fall within *Cohen*'s collateral-order exception to the final-judgment rule." 431 U.S. at 662-63. It reasoned that "[a]ny other rule would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to conviction and sentence." *Id.* at 663.

But *Abney* itself recognized that "*Cohen*'s collateral order exception is equally applicable in both civil and criminal proceedings," *id.* at 659 n.4, and this Court has subsequently rejected any distinction in pendent appellate jurisdiction between criminal and civil cases. In *Swint*, the Court dismissed the argument "that *Abney* should control in criminal cases only," instead extending it to "civil cases as well." 514 U.S. at 49-50. But the test regarding pendent appellate jurisdiction that *Swint* then established did not reject pendent appellate jurisdiction altogether—the natural result of an extension of *Abney if* the Seventh Circuit's reading of *Abney* were correct. Instead, it limited its potential application to decisions "inextricably intertwined with" the immediately appealable decision, or where "review of the former decision was

necessary to ensure meaningful review of the latter." *Id.* at 51.

Other than by reference to *Abney*, the Seventh Circuit justified its categorical approach by reference to *Midland*, 489 U.S. 794, but that decision did not concern pendent appellate jurisdiction. Though the Court has elsewhere noted that "the compelling interest in prompt trials" in the criminal context justifies a "strict" application of the collateral-order exception, *Flanagan v. United States*, 465 U.S. 259, 265-66 (1984), pendent jurisdiction only applies when an appeal that has independently satisfied the collateral order exception is already underway. Here, Schock was undisputedly entitled to appeal the denial of his motion to dismiss based on Speech or Debate immunity, *Helstoski v. Meanor*, 442 U.S. 500 (1979), and thus extension of the appeal to include his Rulemaking Clause claim would allow for a more, not less, efficient resolution of the case.

The criteria set forth in *Swint* adequately guard against overly expansive appellate jurisdiction, and serve as an essential mechanism for courts to address closely related issues on appeal. The availability of pendent appellate jurisdiction is particularly important where a member of a coequal branch raises multiple separation of powers arguments grounded on closely related constitutional protections. In *Clinton v. Jones*, for instance, the Court held that the exercise of pendent appellate jurisdiction was appropriate where the district court's "ruling that the President was protected by a temporary immunity . . . was 'inex-

tricably intertwined' . . . with its decision that a discretionary stay having the same effect might be proper." 520 U.S. at 707 n.41.

Similarly, Schock's Rulemaking and Speech or Debate Clause arguments are "inextricably intertwined," and review of the Rulemaking aspect is necessary to meaningful review of the Speech or Debate aspect. Schock's Speech or Debate Clause claims are based solely on Rulemaking activity. The crux of the Seventh Circuit's reasoning rejecting his Speech or Debate Clause argument was a judgment about what constitutes Rulemaking: that "[s]ubmitting a claim under established rules differs from the formulation of those rules." App. 3. That conclusion is wrong because it ignores the import of the Rulemaking Clause's text—an empowerment to "determine" the House's rules, not merely make them—but it also demonstrates that even the Seventh Circuit thought the two issues inextricably intertwined. Schock's claim that the Speech or Debate Clause protects the interpretation and application of House rules may have particular force where those rules are ambiguous, a determination that is the crux of his Rulemaking Clause claim.

III. The decision below violates this Court's Speech or Debate Clause jurisprudence.

The second question presented concerns the Constitution's Speech or Debate Clause, which provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." Article I, § 6, cl. 1. The Speech or Debate Clause provides individual Members

and their staff with legal immunity for their activities in the "legislative sphere." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975). It "was designed to assure a coequal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process." *Gravel v. United States*, 408 U.S. 606, 616 (1972). The Clause has as "its fundamental purpose [the] freeing [of] the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." *Id.* at 618.

It is undisputed that the scope of the Speech or Debate Clause's protections reaches beyond its "heart"—a legislator's actual "speech or debate in either House"—to "other matters which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625. That extension to "other matters" is necessary to fully guarantee the Legislative Branch's freedom from oversight by the other branches, as it takes more than speech on the House floor to carry out the legislative function. In his motion to dismiss the indictment, Schock contended that the indictment violates this separation of powers protection because it seeks to question Schock in a criminal court concerning Rulemaking Clause activity, which is indisputably such a "matter[] which the Constitution places within the jurisdiction of either House."

The indictment bases charges on Schock's and the House's determination of what House rules require for reimbursements in the MRA process, as

well as on communications between Schock and his aides about the scope and application of relevant House rules. For instance, the indictment alleges that vouchers for mileage reimbursement contained "little or no documentation," even though the House itself accepted the vouchers as facially compliant with House rules. App. 77. The indictment also alleges that Schock engaged in a "cover up" by meeting with House officials in 2015 and asking for guidance on the application of House rules, and references as the means of an offense otherwise innocent discourse between Schock and member of his staff regarding how to submit a voucher for reimbursement in a manner that complies with House rules. App. 90.

Unlike its decision with respect to the Rulemaking Clause, the Seventh Circuit resolved Schock's Speech or Debate Clause claim on the merits. In affirming the district court's decision denying Schock's motion to dismiss under the Clause, however, it erroneously adopted a cramped view of the Clause's protections, in conflict with this Court's precedents. The Seventh Circuit held that the Speech or Debate Clause's immunization of Rulemaking activity extends only to "the making of each chamber's rules about reimbursement," and not to Schock's "[s]ubmitting a claim under established rules." App. 2-3. This categorical determination represents arbitrary line-drawing that is contrary to this Court's Speech or Debate Clause jurisprudence and insufficiently protective of the legislative process. Instead, this Court has held that that the Clause applies to all matters within the "legislative sphere." *Eastland*, 421 U.S. at 503-04. With respect to the Rulemaking power specifically, this Court has

emphasized that it is not for a court to decide whether one rule of the House is less meriting of respect than another: "all matters of method are open to the determination of the house." *Ballin*, 144 U.S. at 5.

Indeed, the Seventh Circuit's ruling confining the Constitutional authority to the initial formulation of rules ignores the text of the Rulemaking Clause. The House's authority to "determine the Rules of its Proceedings" is greater than mere rule drafting. "The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the [constitutional] limitations suggested, absolute and beyond the challenge of any other body or tribunal." *Ballin*, 144 U.S. at 5. *See also In re Grand Jury Subpoenas*, 571 F.3d 1200, 1203-04 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (finding that it "water[s] down the constitutional text" to decide that "a Member's speech in a congressional disciplinary proceeding warrants [Speech or Debate] protection only if [that] committee is inquiring into a Member's 'exercise of his official powers'" (citation omitted)).

The Seventh Circuit's error allows a dangerous intrusion by the Executive into the Legislative Branch's processes, warranting this Court's review. *See* Sup. Ct. R. 10(c). Though the Court has also held that the Speech or Debate Clause "does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs," the communications charged in the indictment are a critical aspect of the House's Rulemaking authority. *United States v. Brewster*, 408 U.S. 501, 528 (1972). Where the House has created rules that potentially govern nearly every

aspect of a legislator's official activities, the application of those rules does not bear a mere "casual" or "incidental" relationship to legislative affairs.

Moreover, the rules, as the House has written them, cannot be applied without a Member, his staff, and the delegated House entities having the freedom to communicate about them without fear of being questioned on those communications elsewhere. This is particularly so where, given the nature of a legislator's official activities, the rules at issue are intentionally stated as "guidelines that assist Members in determining whether expenses are reimbursable" and contain "broad descriptions of reimbursable expenses," rather that strict regulations. 7th Cir. Appendix at SA92. Utilizing internal House interpretation, administration and application of these often ambiguous rules in an indictment is directly questioning in another place that which is within the "legislative sphere" that the Speech or Debate Clause protects.

The conduct charged in the Indictment is purely internal to the House, and in such circumstances the Court has readily found that Speech or Debate immunity applies. For example, in *United States v. Johnson*, the Court held that a conspiracy to defraud charge could not be premised on a Member's speech in Congress, though it allowed that his external outreach to the Department of Justice would not fall under the Speech or Debate Clause. 383 U.S. 169, 172 (1966). The line-drawing in *Doe v. McMillan* is also instructive. 412 U.S. 306 (1973). There, the Court distinguished between the internal compilation of a report, which did fall under the Speech or Debate

Clause, and the publication and distribution of the material report to the public at large, which it held was not protected by the Speech or Debate Clause.

The decision below erred by narrowly constricting the Speech or Debate Clause's broad protection of matters the Constitution has committed to the House's exclusive jurisdiction.

IV. This case is of exceptional importance to the separation of powers.

This Court should also review the decision below because it presents issues of critical importance to the separation of powers. If uncorrected, the Seventh Circuit's decision will threaten the independence of the legislative function by granting the Executive undue power over its coequal Legislative Branch.

The government's reliance on the rules that the House has enacted to govern its proceedings forms the core of both Schock's Rulemaking Clause and Speech or Debate Clause claims. The Seventh Circuit thought these rules no different from internal employee policies of Microsoft Corporation, App. 3-4, demonstrating its fundamental lack of appreciation for the separation of powers implications of this prosecution. The rules at issue here are created pursuant to Congress's constitutionally-granted authority, and broadly govern nearly every aspect of a Member's official activities in support of his or her legislative functions, such as reimbursable travel, pay and benefits for staff, and communication with

constituents such as town hall meetings and advertisements. 7th Cir. Appendix at SA88-126.

Because of the rules' broad scope, Members operate with them in the background on a daily basis. Both the questions presented are thus of utmost importance to Members and to the exercise of their duties free from undue Executive over-reaching into internal House business. The decision below gives the Executive the extraordinary leverage to force a Member to endure a criminal investigation and trial for charges that rest on ambiguous rules of the House, such as whether a given trip was undertaken for official, personal, or campaign purposes. *See Rostenkowski*, 59 F.3d at 1312 (finding "the line between 'official work' and 'personal services' particularly difficult to draw").

To require a member of the Legislative Branch to run the gauntlet of trial to vindicate the Rulemaking interest is an affront to a legislator's independence from undue intrusion and influence by its coequal branches. Investigations alone can take down a political figure; indictments are often a political death sentence. It is no coincidence that many of the Speech or Debate or Rulemaking Clause precedents involve Senators or Congressmen who have already lost that position before any final judgment in the case. *See, e.g.*, *Helstoski*, 442 U.S. 500, *Brewster*, 408 U.S. 501, *Rostenkowski*, 59 F.3d 1291, *Durenberger*, 48 F.3d 1239, *United States v. Jefferson*, 634 F. Supp. 2d 595 (E.D. Va. 2009). The decision below gives a prosecutor the power to effectively run a member of their coequal branch out of office or at least substantially hobble any effort to remain, a dangerous precedent in our system

of separation of powers. *See Myers*, 635 F.2d at 935-36 ("[T]he doctrine of separation of powers serves as a vital check . . . for the right of the people to be fully and fearlessly represented by their elected Senators and Congressmen."). Even a typical investigation—let alone a trial—will easily outlast the two year term of a Congressman, let alone his or her resources.

Finally, it is notable that in a federal criminal case, but particularly in one such as this, the Executive often has the ability to pick among different fora in which to bring the case. For example, much of the conduct charged in the Indictment occurred in Washington, D.C., but the Executive brought this prosecution in Schock's home district of Illinois. The fact that there are multiple available fora, which fora may render different results on the issue, highlights the need for this Court's review.

V. This case is an ideal vehicle for considering the questions presented.

This case is an excellent vehicle for resolving the conflicts among the circuits with respect to the appealability of a Rulemaking Clause claim as well as correcting the error in the decision below with respect to the Speech or Debate Clause claim. The Seventh Circuit directly addressed each issue in a published, precedential opinion. With respect to the question of immediate appealability under the collateral order doctrine, it expressly acknowledged its divergence with opinions of other circuits and noted that it circulated the opinion among the active members of the court on that basis. *See* App. 9; 7th Cir. R. 40(e).

Further, the Court rested its decision on both constitutional issues on broad legal pronouncements rather than on factual distinctions unique to this case, holding, for instance, that 1) general separation of powers claims other than the Speech or Debate Clause do not merit an interlocutory appeal, 2) pendent appellate jurisdiction is never available in a criminal case, and 3) a Member's applications for reimbursements never merit Speech or Debate protection. App. 2, 5, & 10.

These purely legal issues are of great consequence to the outcome of this case. Schock argued in the district court that prevailing on the merits of either constitutional claim would warrant dismissal of the entire indictment, a proposition with which the district court expressed tentative agreement though it did not ultimately reach the issue. App. 49-50. Schock's prevailing on either claim would at a minimum lead to the dismissal of certain individual counts.

With respect to the Rulemaking Clause, the underlying merits issue (whether or to what extent courts may interpret ambiguous congressional rules) that the Seventh Circuit avoided through its jurisdictional decision will be of great consequence when resolved. Though the government has contested whether the rules are ambiguous as applied to this case, there has been no resolution of the merits of that claim on appeal because of the ruling below. Here, it is apparent that Schock's Rulemaking Clause claim is not contrived, as the indictment repeatedly references House rules and the government has consistently

asserted that it will rely on the rules cited in the indictment as material evidence in its case in chief, disavowing the district court's reasoning to the contrary. *E.g.*, 7th Cir. Appendix at SA261-62. Although the district court did not decide whether or not the rules cited in the remaining counts are ambiguous, Schock's claims of ambiguity are substantial. For example, two of the government's charges turn on whether a chandelier is furniture, equipment, or a decoration within the meaning of the House rules, and, if a decoration, whether $5,000 is of "nominal" value where the House expressly set that same threshold after Schock left office. *Id.* at SA191. Schock should not be forced to endure a trial where the jury is asked to resolve this and similar questions.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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