No. 23-566

In the Supreme Court of the United States

HON. THOMAS MASSIE, HON. RALPH NORMAN, and HON. MARJORIE TAYLOR GREENE, in their individual and official capacities,
Petitioners,

v.

HON. NANCY PELOSI, WILLIAM J. WALKER, and CATHERINE SZPINDOR, in their official capacities only,
Respondents.

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

REPLY BRIEF OF PETITIONERS

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I. Respondents' Brief ignores the existence of *Powell v. McCormack*, and relies on inapposite case law to demand an unwarranted immunity.

Respondents act as if *Powell v. McCormack* is no longer good law, or at least they apply an analysis that would render the case a dead letter. 395 U.S. 486 (1969). Respondents instead attempt to rely on *U.S. v. Ballin* to support the assertion that the rulemaking procedures of Congress is nonjusticiable, so long as a fundamental right is not implicated. 144 U.S. 1, 5 (1892). What Respondents ignore, however, is the fact that pay claims are, under this Court's precedent, subject to judicial review. *Powell*, 395 U.S., at 501-506. And they ignore that here we are dealing with fundamental rights contained in the Twenty Seventh Amendment.

Even before *Ballin*, this Court made clear that Congress cannot exceed the limits of the Constitution in the enforcement of its rules. *Kilbourn v. Thompson*, 103 U.S. 168 (1880). "It has long been settled . . . that rules of Congress and its committees are judicially cognizable." *Yellin v. United States*, 374 U.S. 109, 114 (1963) (internal citations omitted). *Kilbourn* was a case involving an unconstitutional seizure by a staffer, carrying out an order of Congress. 103 U.S. 168 This Court held that Speech or Debate immunity did not apply, at least not to the enforcer who was enforcing the unconstitutional rule. *Id.*

Ballin is also easily distinguishable from the case at hand, as the House Rule in dispute in that case was that of Congress's authority to make a quorum call. *Ballin*, 144 U.S., at 5. It would be an entirely

different analysis if we were dealing with a challenge to internal procedures, or a censure, a reprimand, a quorum call, or the release of a house journal that condemned the Petitioners, or even, with a 2/3 vote, a measure expelling the Petitioners. All of those actions are well within the ambit of Speech or Debate immunity. But here we deal with a pay claim. The Court of Appeals (and the district court) found that this was not justiciable under Speech or Debate Immunity, yet this Court previously held to the contrary in *Powell*, and found claims justiciable and not subject to Speech or Debate or Immunity claims against the House Sergeant Arms "from refusing to pay Powell his salary." *Powell*, 395 U.S 486, 494, 504-505. That is *exactly* this case.

However, *Ballin* is instructive to this case. In *Ballin*, a house rule was affirmed as a legitimate means of counting a quorum as required by the U.S. Constitution. 144 U.S., at 5-6 (citing U.S. Const. Art. I, § 5). The *Ballin* court upheld the rule because "[t]he Constitution has prescribed no method of making this determination [of whether a quorum is present], and it is therefore within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact. It may prescribe answer to roll-call as the only method of determination; or require the passage of members between tellers, and their count as the sole test; or the count of the Speaker or the clerk, and an announcement from the desk of the names of those who are present. Any one of these methods, it must be conceded, is reasonably certain of ascertaining the fact, and as there is no constitutional method prescribed, and ***no constitutional inhibition of any of those***, and no violation of

fundamental rights in any, it follows that the house may adopt either or all, or it may provide for a combination of any two of the methods." *Id.* (emphasis added).

This Court expressly held in *Ballin* that the houses of Congress "may not by [their] rules ignore constitutional restraints or violate fundamental rights." 144 U.S. at 5. That is precisely what is happening here because, as demonstrated *infra*, House Resolution 38 plainly violates the Twenty Seventh Amendment's textual prohibition on Congressional pay variances without intervening elections. Any claim that *Ballin* precludes review of this case simply misapplies *Ballin* and disregards the Twenty Seventh Amendment's textual prohibition of Respondents' conduct at issue in this case.

Respondents then turn to *Gravel v. United States*, 408 U.S. 606 (1972) to support their limitless construction of Speech or Debate Immunity. *Gravel* involved a grand jury investigation into the Pentagon Papers, and subpoenas issued to Congressional staffers, who resisted those subpoenas on Speech or Debate Immunity grounds. *Gravel* held that aides to members of Congress also possess Speech or Debate Immunity from questioning. *Id.* at 616-618. But *Gravel* re-affirmed *Powell*, and explained that there was a "judicial power to determine the validity of legislative actions impinging on individual rights," which was implicated in the exclusion and denial of pay due to a member/member-elect. *Id.* at 620. In fact, *Gravel* explained that this Court's prior "cases reflect a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional

conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings." *Id.*

Here, of course, executive control of legislative speech or debate is not implicated. Instead, as in *Powell*, and as *Gravel* explained and analyzed *Powell*, we have a question of whether the judiciary has the "judicial power to determine the validity of legislative actions impinging on individual rights." *Id.* *Gravel* and *Powell* answer this question in the affirmative. So too here.

In fact, *Gravel* made the point that the Court of Appeals and Respondents wholly ignore: "In *Kilbourn*-type situations, both aide and Member should be immune with respect to committee and House action leading to the illegal resolution." *Id.* "On the other hand, no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen." *Id.* "Neither they nor their aides should be immune from liability or questioning in such circumstances." *Id.*

While House Resolution 38 is a legislative enactment, its enforcement method was *solely* through the use of a pay variance – here a deduction – that violated a textually defined inhibition on Congress's authority contained in the United States Constitution. *Gravel*, 408 U.S., at 625; *but see*, *Ballin*, 144 U.S., at 5, 6 (Congress "may not by [their] rules ignore constitutional restraints or violate fundamental

rights"); *Yellin*, 374 U.S., at 114 (1963) ("It has long been settled . . . that rules of Congress and its committees are judicially cognizable"); *Powell*, 395 U.S., at 501-506.

Gravel made clear that, regarding *enactments* of Congress, members are *absolutely* immune from liability, but *enforcement* action of unconstitutional enactments are not subject to immunity. *Gravel*, 408 U.S., at 618-24. Here, Petitioners filed suit challenging the enforcement of House Resolution 38, not its enactment. In fact, the *Gravel* court expressly affirmed the portions of *Powell* in which the Court held that members of Congress and their staff may be held liable to the extent in which they "participated in the challenged action." *Id.*, at 620 (citing *Powell*, 395 U.S., at 506, n. 26).

Respondents claim that Petitioners' concession that a censure, reprimand, or expulsion (with the requisite vote) would be protected by Speech or Debate Immunity demonstrates that they should be entitled to immunity here. Not so. As explained *supra*, Speech or Debate Immunity does not confer immunity to enforcement mechanisms that violate the U.S. Constitution. *Ballin*, 144 U.S., at 5-6; *Kilbourn*, 103 U.S.; *Yellin*, 374 U.S., at 114.

Even more stunningly, Respondents claim, in a footnote (perhaps because they know the assertion they make is false), that *Kilbourn* does not support the proposition that Speech or Debate immunity does not apply when Congress violates the Constitution in enforcing its rules. Respondents' Motion at 13 (citing *Gravel*, 408 U.S., at 618). *Gravel*, however, disagrees with Respondents' assertion. *Gravel*, 408 U.S., at 621

(emphasis added). In other words, *Gravel* held that if members of Congress themselves enforce an unconstitutional rule, that enforcement action is not protected by Speech or Debate Immunity. This is dispositive, as the Respondents themselves enforced House Resolution 38 through an unconstitutional pay deduction. Even under the most reading of *Gravel* most favorable to Respondents, Speech or Debate Immunity is not appropriate here.

At the points where Respondents do acknowledge the existence of *Powell*, their analysis falls flat. While it is correct that *Powell* was *partially* about a House resolution that prevented a duly elected House Member from taking his seat, it is *also* about the claims Powell had against the Sergeant Arms "from refusing to pay Powell his salary." *Powell*, 395 U.S., at 494, 504-505. At the most basic level, *Powell* supports the proposition that pay claims must be justiciable and are not rendered nonjusticiable through Speech or Debate Immunity. *Id*., at 501-506. While Respondents claim that the facts are different in terms of the backpay issue, Respondents fail to recognize that the *only* enforcement mechanism of House Resolution 38 was the withholding of pay from these members of Congress. This case is on all fours with *Powell*.

Respondents, next resort to *McCarthy v. Pelosi*, 5 F.4th 34 (D.C. Cir. 2021), another case challenging a house resolution, in which the District of Columbia Circuit applied Speech or Debate Immunity. The facts of that case are entirely different as it only involved internal voting procedures, and did not infringe upon the individual rights of members, as was the case in

Powell, and is the case here. Again, here, there is Rather, they challenge the enactment of House Resolution 38. The nature of this pay claim is sufficient to put it on all fours with *Powell*, unlike *McCarthy*.

Respondents turn to *Boehner v. Anderson* and argue it was not a Speech or Debate Immunity case, but it was a Twenty Seventh Amendment case, and the D.C. Circuit did review the merits of Congressman Boehner's claim. 30 F.3d 156 (D.C. Cir. 1994). If Speech or Debate immunity applied, surely the case would have been dismissed *sua sponte* for lack of subject matter jurisdiction. The District Court in this case held that there was no subject matter jurisdiction as a result of Speech or Debate Immunity. *Massie v. Pelosi*, 590 F. Supp. 3d 196, 231 (D.D.C. 2022). *Boehner* conflicts with the decision below.

Respondents advance a shallow, incomplete, and repeatedly rejected view of Speech or Debate Immunity that ignores the well-established, centuries-long precedent showing that Speech or Debate Immunity does not protect acts of enforcement otherwise prohibited by the United States Constitution. Adoption of Respondents view of Speech or Debate absolutism ultimately places no limits on Speech or Debate Immunity. To let the Court of Appeals opinion stand would be to render the Twenty-Seventh Amendment non-justiciable in violation of this Court's own precedents and to open the floodgates to extraordinarily troubling and unconstitutional discipline. The House Rules, under this expansive view of Speech of Debate Immunity, could impose physical punishment, flogging, or even more medieval

forms of punishment, upon members and, under the precedent below, no judicial remedy would be available, the Eighth Amendment notwithstanding. That is not the law, and review should be granted to state as much.

II. This case is an appropriate vehicle for review, and this Court has already granted review in a similarly postured case in *Powell*

Respondents suggest that this petition is not an appropriate vehicle for review of the substantive legal issues.

First, Respondents contend that deciding the merits of this case would violate Separation of powers, relying in part on *U.S. v. Johnson*, 383 U.S. 169, 178 (1966). (Respondents' Brief at 17). This is the exact reasoning (and even one of the same cases) upon which district court in *Powell* relied. *Powell v. McCormack*, 266 F. Supp. 354, 356-58 (D.D.C. 1967). This Court rejected that argument. *Powell*, 395 U.S. at 501-506.

Respondents next argue that because the Resolution is no longer in effect, that it is inappropriate for this Court to review the merits of House Resolution 38. (Respondents Brief at 17). This falls flat for several reasons, but particularly important is the fact that Petitioners' pay deductions have never been restored. Indeed, that was one of the forms of relief sought and obtained in *Powell*, 395 U.S. 486.

Petitioners *actually* had their pay varied – here reduced – because of their noncompliance with House Resolution 38, in violation of the 27th Amendment.

Infra. Respondents imply that there is no redressability, but they are incorrect. Mere repeal of an unconstitutional policy is not enough to render a case moot, where, as here, there is a pocketbook harm that has not been remedied. *See generally, Uzuegbnam v. Preczewski*, 141 S. Ct. 792 (2021).

Second, Respondents maintain that, because the lower courts rested their decisions on Speech or Debate Immunity, as opposed to the merits of the claims, this court should decline to reach the merits. (Respondents' Brief at 18). Again, Respondents ignore *Powell*, as the District Court in *Powell* did not address the merits. *Powell*, 266 F. Supp. 354. And, even though the lower Courts in *Powell* did not rely on the merits, this Court, after rejecting the proposition that Speech or Debate Immunity applied, then reached the merits – in no small part because, as in *Powell*, the issues were fully briefed and raised below.[1] 395 U.S. 486.

III. House Resolution 38 plainly violates the Twenty Seventh Amendment and Sections 6 and 7 of the United States Constitution

Finally, Respondents, while conceding that Petitioners' analysis of the historical interpretation of the Twenty Seventh Amendment is correct, maintain

[1] If this Court, however, decides that the Court of Appeals should address merits arguments before this Court undertakes review, then this case may warrant a Grant, Vacate, and Remand given the lower Courts' flagrant disregard of *Powell*. *Hicks v. U.S.*, 582 U.S. 924 (2017) (Gorsuch, J. concurring) (GVR appropriate when cleansing plain error may yield a different outcome).

that House Resolution 38 does not violate the Twenty Seventh Amendment.

While Respondents claim that no pay variance took place, the *only* manner of enforcing House Resolution 38 was the withholding and deduction from Petitioners' pay. Petitioners were not censured; they were not reprimanded; they were not subjected to expulsion; they were not even fined in the traditional sense, where they must pay the fine with their own money. Rather, Petitioners' pay was varied – deducted – pursuant to the plain text of House Resolution 38. This resolution's enforcement mechanism is plainly a pay variance that took effect without an intervening election.

While Respondents claim that Petitioners were not subjected to a pay variance, but instead a fine, that is mere word play, as the withholding of pay was an actual pay variance, in that the pay at issue never was given to these members, and the purpose of the measure was to pressure members into compliance. One of the Petitioners had nearly a full year's salary deducted – and as a consequence did not receive renumeration for a year. That is the epitome of coercive.

In addition to concerns about pay increases, the Founders were also greatly concerned that diminishing congressional pay could be used to pressure Members from exercising independent judgment, which could prevent qualified men of modest means from serving in the new national legislature. The founding generation was well aware, for instance, of the practice of candidates for the British House of Commons promising to reduce (or

even eliminate!) their wages in order to garner popularity with their constituents, which had that very effect. *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497, 500-01 (Dec. 1992). Americans in the 1770s and 1780s found such conduct debasing to the notion of representative government, and believed it had "led members of Parliament to override the Americans' rights under the British constitution." *Id.* at 501.

Notwithstanding Respondents' arguments to the contrary, House Resolution 38 is a "law" for purposes of the Twenty-Seventh Amendment. By its plain terms, the Amendment applies not just to "statutes," but to "law." Nothing in the text or the history of the Amendment suggests that the words "no law" apply only to statutes enacted pursuant to bicameralism and presentment. The opposite is true. This Court and Congress itself all recognize that a congressional rule is a "law" subject to the provisions of the Constitution. *Yellin*, 374 U.S., at 143-144; *Watkins*, 354 U.S., at 188; *Ballin*, 144 U.S., at 5. "The Bill of Rights is applicable to . . . all forms of governmental action." *Watkins v. United States,* 354 U.S. 178, 188 (1957).

The House Rules are subject to constitutional limitations. The Twenty Seventh Amendment is one such limitation. While Respondents claim Petitioners offer no historical evidence that the Twenty Seventh Amendment modifies the Discipline Clause, the opposite is true. The history Respondents concede to be true as the history of this Amendment, as shown in the Petition, was intended to stop financial pressure

on Members from asserting their independent judgment in lawmaking, which would include punitive disciplinary measures designed to influence that judgment.

IV. Conclusion

The petition should be granted.

Respectfully submitted,

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