No. 18-406

IN THE
Supreme Court of the United States

AARON J. SCHOCK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

In opposing review, the government attempts to minimize a multi-circuit split on a critical separation of powers immunity issue that the Seventh Circuit expressly recognized it created. But the government does acknowledge a square split with the D.C. Circuit, and its efforts to avoid the wider split recognized by the Seventh Circuit rely on purported distinctions the courts themselves have not found significant. Allowing the circuit split to stand would mean that the Executive, exercising authority to choose a forum, can effectively determine whether a Member of Congress has a pretrial appeal on a separation of powers issue.

Apparently recognizing the weakness of its position, the government diverts to the merits. It posits that separation of powers immunity can never justify a pretrial appeal, despite that position squarely implicating constitutional limitations on the judiciary's authority to adjudicate the merits of the case. Continuing its derogation of the separation of powers, the government all but denies Congress's power to determine the rules of its proceedings, echoing the Seventh Circuit's likening constitutionally empowered Congressional rules to Microsoft's internal policies. The government distracts from the questions presented by characterizing further argument on the merits (and the underlying issues) as presenting "vehicle" problems. It does so despite having asserted to the courts below that this case squarely implicates the separation of powers issues that warrant review.

The Executive's decision to prosecute a Member of Congress based on its interpretation of ambiguous

House rules is enough to raise serious separation of powers concerns. However, the Executive's actions require the Judiciary to ratify that interpretation, further straining the separation of powers. To prevent these violations, Schock respectfully requests that this Court grant review.

ARGUMENT

I. The Seventh Circuit created a wide split on the pretrial appealability of separation of powers immunity claims.

The Seventh Circuit recognized it created a circuit split with the Second, Ninth, Eleventh, and D.C. Circuits. App. 4-5. The government says the Seventh Circuit was wrong and that it only created a split with the D.C. Circuit. Opp. 14-16. The Seventh Circuit was right, and the government mischaracterizes the scope of the split.

Although the Second, Ninth, and Eleventh Circuit decisions did not involve the Rulemaking Clause, the reasoning of these decisions turned on the existence of a separation of powers claim raised by a member of a coequal branch—the precise circumstance here—and not on the specific nature of that claim. In *United States v. Myers*, the Second Circuit held that "[i]f, 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." 635 F.2d 932, 935 (2d Cir. 1980). Contrary to the government's assertion, the Second Circuit held it had

jurisdiction over a general separation of powers claim. *Id.* at 936-39. Similarly, both of the cases the government characterizes as limited to judicial immunity were predicated on broad separation of powers principles. *See United States v. Hastings*, 681 F.2d 706, 708-09 (11th Cir. 1982) (pointing to "significant issues of interbranch comity and separation of powers"); *United States v. Claiborne*, 727 F.2d 842, 844 (9th Cir. 1984). Both cases cited *Myers* to support their holdings. *See id.*; *Hastings*, 681 F.2d at 709.

The government also notes these cases were decided before *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989). But *Midland* did not concern the appealability of a separation of powers issue, and this Court has since recognized that the collateral order doctrine had been invoked in both civil and criminal cases where "some particular value of a high order was marshaled in support of the interest in avoiding trial [such as] honoring the separation of powers." *Will v. Hallock*, 546 U.S. 345, 352 (2006). After *Midland*, the D.C. Circuit understood *Myers*, *Hastings*, and *Claiborne*—which remain good law in their respective circuits—as standing for the proposition that orders "denying a defendant's claim of immunity based on principles of separation of powers" are "immediately appealable." *United States v. Durenberger*, 48 F.3d 1239, 1242 (D.C. Cir. 1995).

Regardless of its attempt to construe away this plain split in authority, the government recognizes, as it must, that the Seventh Circuit's decision is in square conflict with the D.C. Circuit's post-*Midland* decision *United States v. Rostenkowski*, 59 F.3d 1291

(D.C. Cir. 1995). Opp. 14-15. This split alone is sufficient to warrant review, because *Rostenkowski* is the leading case regarding Rulemaking Clause immunity and—up until the Seventh Circuit's decision—had been uniformly followed in other cases in which the issue was presented. Moreover, a split with the D.C. Circuit on the appealability of separation of powers immunity claims creates an untenable position for legislators who perform their work in their home district and the District of Columbia.

If this split stands, whether a Member may immediately appeal a separation of powers immunity claim will depend on where that Member was indicted, allowing the Executive to forum shop. The uncertainty created by this split is deleterious to the comity and dignity owed between coequal branches, warranting review.

II. The Rulemaking Clause confers legislative immunity against any other branch interpreting House rules.

The government devotes most of its argument to the merits. It contends that the Seventh Circuit correctly diverged from *Rostenkowski* in holding that Schock's Rulemaking Clause claim was not immediately appealable. It does not attempt to defend the Seventh Circuit's unsupportable distinction between "personal" and "institutional" immunity. Instead, it primarily argues that, for the collateral order doctrine to apply in a criminal case, there must be "express textual prohibitions against imposing

legal consequences" to satisfy the collateral order doctrine. Opp. 12.

The Rulemaking Clause provides the "express textual prohibition" the government would require. If this case proceeds, a district judge and jury would effectively "determine" the rules of Congress's proceedings just as they would "question" a Member in a place other than Congress. In any event, *Midland* states only that there must be "an explicit . . . constitutional guarantee that trial will not occur." 489 U.S. at 801. The Court did not confront a separation of powers claim, which may arise from the structure of the government as much as from any particular textual provision. Contrary to the government's magic words approach, effectuating the separation of powers demands an analysis of the purposes of the structural protections the Founders wove throughout the Constitution. *I.N.S. v. Chadha*, 462 U.S. 919, 946 (1983). This Court has rejected, in the civil context, an argument that language like the Speech or Debate Clause is required for immunity: "a specific textual basis has not been considered a prerequisite to the recognition of immunity;" for example, "[n]o provision expressly confers judicial immunity." *See Nixon v. Fitzgerald*, 457 U.S. 731, 750 n.31 (1982).

III. The government points to no vehicle problems other than its rehashing of the merits.

The government says this case is a poor vehicle. None of its reasons present actual vehicle problems, and none are persuasive. It would be error to argue that a defendant has no right to appeal an adverse

double jeopardy immunity ruling on the ground that the defendant will not ultimately prevail on the merits. Likewise, to state that the rules at issue are not ambiguous or that they are not rules at all erroneously points to the ultimate merits, not to whether Schock's claims are subject to interlocutory appeal. It is notable that the district court *in this case* dismissed one of the counts of the Indictment based on the *Rostenkowski* decision and the government chose not to appeal. So, to the extent the government suggests Schock's claims are not well founded, its argument is belied by this case's history.

First, the government takes the extraordinary position that the Rulemaking Clause confers only the power to draft and publish rules: Congress's Rulemaking power ends before the ink is dry. The Rulemaking Clause provides Congress the power to "determine," not just make, the rules for its proceedings, and thus provides robust protection against the other Branches interpreting ambiguous House rules. The government's position conflicts with this Court's foundational decision regarding the Rulemaking Clause, which decision the government does not cite, let alone analyze. In *United States v. Ballin*, this Court held that congressional rules are "absolute and beyond the challenge of any other body or tribunal" and the power to determine those rules "is a continuous power, always subject to be exercised by the house." 144 U.S. 1, 5 (1892). The only limitations on this power are Congress (1) "may not by its rules ignore constitutional restraints" or (2) "violate fundamental rights." *Id.*

The cases the government cites for the proposition that ambiguous House rules are justiciable merely apply the *Ballin* limitations. Both *Christoffel v. United States*, 338 U.S. 84 (1949), and *Yellin v. United States*, 374 U.S. 109 (1963), "involved the rights of witnesses before congressional committees, and therefore fell under the fundamental rights exception discussed in *Ballin*." John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE. W. RES. L. REV. 489, 533 (2001). They also do not involve rules the Court found ambiguous. In *Yellin*, the Court found the rule at issue "quite explicit." 374 U.S. at 114-15. In *United States v. Smith*, it held "the meaning of the rules" to be "free from doubt." 286 U.S. 6, 43 (1932). These cases thus do not remotely suggest that a court may adjudicate ambiguous House rules.

The government also contends that the rules at issue in this case are not rules within the meaning of the Rulemaking Clause. The Seventh Circuit disagreed, noting that "[t]he rules about reimbursable expenses were adopted under [the Rulemaking] clause," and so did *Rostenkowski*. App. 3; *Rostenkowski*, 59 F.3d at 1307-12. These courts were correct. Like the rules governing congressional press galleries, the rules governing the Members' Representational Allowance ("MRA") are internal rules that are "an integral part of the legislative machinery." *Consumers Union of U.S., Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341, 1350-51 (D.C. Cir. 1975). Essential to carrying out legislative functions, the rules governing the MRA are made and enforced by the congressional bodies

exercising delegated rulemaking authority. Rules for determining MRA reimbursements are set out in the Member's Congressional Handbook, promulgated by the Committee on House Administration pursuant to delegated authority. App. 68; *see* Amicus Br. of Former General Counsels at 4-5. The mere fact that these wholly internal rules govern money appropriated by legislation does not change their character as "Rules of Proceedings" under Article I. The government's view is at odds with four former House counsel who recognize the danger of its position. *See generally* Amicus Br.

Third, the government argues the rules the Indictment relies on are not ambiguous. This is an issue that both the district court and the Seventh Circuit avoided deciding as to the relevant counts. The rules assuredly are ambiguous, but demonstrating this demands a detailed analysis of the rules that neither the district court nor the Seventh Circuit performed. The very charges the government selects to illustrate its position instead show the necessity of interpreting ambiguous rules. Opp. 17-18. For instance, the government states that the crux of a redecoration charge is that the rules did not permit reimbursement for furniture in D.C. offices and for decorations of more than "nominal value." Thus, whether the reimbursement could be authorized turns on whether an item is furniture or a decoration, and the only item the Indictment specified was a $5,000 chandelier. App. 71, 89. If it is furniture, the rules allow reimbursement for certain furniture. If it is a decoration, the rules in place when Schock was in office did not define "nominal value." After he left office, Congress revised them, suggesting an

appropriate threshold of at least $5,000. Seventh Circuit Case No. 17-3277, ECF No. 15 (Opening Brief) at 37.

The final "vehicle" issue the government references is that even if the rules are ambiguous, they need not be interpreted in this case. The government contradicts its prior statements. In its response to the underlying motion to dismiss, the government stated the rules were "necessary and proper" to establish the elements of materiality and intent. C.D. Illinois Case No. 3:16-cr-30061, ECF No. 97 (Government's Response) at 51. On appeal, the government argued that "the district court was mistaken in suggesting that the House regulations are not 'necessary' to the government's case." Seventh Circuit Case No. 17-3277, ECF No. 27 (Response Brief) at 55. The government further asserted that the House rules were "important" and "highly probative." *Id.*

The Indictment references House rules no less than thirty times for the "proper uses" of MRA funds and incorporates these rules into every substantive count. *See* App. C. It is clear from these charges that a court or jury must interpret and fix the meaning of ambiguous House rules. To determine whether Schock committed fraud, the jury will have to find both that he intended to defraud the House and that the statements made in carrying out the alleged scheme to obtain improper reimbursements were material. These propositions cannot be established in a vacuum: the jury will have to be instructed, or will have to decide, what reimbursements were allowed (relevant to intent) and what was required to obtain reimbursement (relevant to materiality). Similarly,

Schock must have the option of raising these issues in his defense, which would likewise necessitate interpretation of ambiguous House rules.

The government's opposition could easily mislead the reader to conclude that Schock has been tried and convicted for heinous crimes of moral turpitude where, in fact, he is simply bearing the accusations of a prosecutor that he was not entitled under House rules to a handful out of multiple hundreds of reimbursements sought by his office over nearly six years. A case where the Executive alleges that activity wholly internal to the Congress is criminal, based on its own interpretation of Congressional rules, is the ideal vehicle to resolve the separation of powers and appealability questions presented here. The government seeks to elide the separation of powers issues inherent in its Indictment and instead frame this case as a garden-variety false claim. A reasonable reading of the Indictment demonstrates the necessity of interpreting ambiguous House rules in this case, which the government has previously confirmed in its own filings.

IV. The Seventh Circuit's decision deepens a split over whether pendent appellate jurisdiction is available in criminal cases.

The government also attempts to minimize a circuit split as to the second question presented. The split on this question of law is obvious: in criminal appeals, the Third and Eleventh Circuits have held that they had pendent appellate jurisdiction over issues related to the one they held to be immediately appealable. The Seventh Circuit, and a number of

others, have held that pendent appellate jurisdiction is categorically unavailable in criminal cases. Although the government observes that the Eleventh Circuit decision involved different underlying legal issues than this case, that difference is irrelevant. For purposes of the split, all that matters is whether the case was a criminal appeal.

This split is important, as the Third Circuit's recent expansion of the split in nearly identical circumstances demonstrates. *United States v. Menendez*, 831 F.3d 155, 164 (3d Cir. 2016). Moreover, this case is the appropriate vehicle to address that split, because Schock's Speech or Debate Clause claim invokes the Rulemaking Clause to inform the scope of protected legislative activity. Indeed, the government argues the Speech or Debate Clause does not apply because Schock's alleged conduct falls outside of the Rulemaking Clause. Opp. 25. Accordingly, Schock's Rulemaking Clause arguments are "inextricably interwined" with his Speech or Debate Clause claims, and review of those arguments is "necessary to ensure meaningful review" of the Speech or Debate Clause claims. *Swint v. Chambers County Com'n*, 514 U.S. 35, 51 (1995).

V. This Court should grant certiorari to review Schock's Speech or Debate Clause claim.

The government argues that the Court should not review the Speech or Debate question presented because, if Schock's conduct was criminal, it cannot fall under Speech or Debate protections. This circular argument must fail where the threshold question is

whether participating in internal House processes under House Rules essential for the operation of Schock's office is within the Legislative sphere for which he cannot "be questioned in any other place." U.S. Const. art. I, § 6, cl. 1. An immunity confers no protection if it can be defeated merely because the government asserts that underlying conduct was criminal. Whether a congressional office voucher for reimbursement is a valid claim must be determined under relevant House rules. The government chose to rely on those rules as a basis for alleging fraud in a reimbursement process that is squarely within the Legislative sphere protected by the Speech or Debate Clause.

This Court has said unequivocally that "other matters which the Constitution places within the jurisdiction of either House" are within the protected Legislative sphere. *Gravel v. United States*, 408 U.S. 606, 625 (1972). The textual commitment of the Rulemaking authority to the House is surely such a matter, because the Legislature functions only through the official activity of its members. *Cf. In re Grand Jury Subpoenas*, 571 F.3d 1200, 1204-05 (D.C. Cir. 2009) (noting the intersection of the Speech or Debate and Rulemaking Clauses and agreeing with majority's holding that testimony given to an ethics committee was protected) (Kavanaugh, J., concurring). House Rules, including those promulgated to finance and facilitate the members' official functioning through their offices, are on their face essential to the performance of the legislative function. As amici state, the legislative sphere "necessarily includes congressional rulemaking." Amicus Br. 4. And rulemaking includes the process through which those

rules are applied and enforced. The Seventh Circuit's contrary conclusion derogates the primary constitutional protection for an independent, coequal branch of government, warranting this Court's review.

CONCLUSION

For the reasons stated above, Schock respectfully requests that this Court grant a writ of certiorari.

Respectfully submitted,

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