No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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November 21, 2023

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QUESTIONS PRESENTED

1. Whether Speech or Debate immunity precludes any and all claims by a Member of Congress against congressional administrative officials who administer pay, where such claims are pay claims?

2. Whether reductions of Members' compensation violate the Twenty-Seventh Amendment, where such reductions occur pursuant to rules that were enacted in the same session, and without an intervening election?

3. Whether Article I, §§ 6 and 7 are violated where the compensation of Members of Congress is reduced pursuant to a House Rule, rather than through laws duly enacted and presented to the President?

PARTIES TO THE PROCEEDING

The following individuals and entities were Plaintiffs before the trial court and Appellants in the District of Columbia Circuit: Hon. Thomas Massie, in his individual and official capacities, Hon. Marjorie Taylor Greene, in her individual and official capacities, and Hon. Ralph Norman, in his individual and official capacities.

The following individuals are Defendants before the trial court and Appellees in the District of Columbia Circuit: Hon. Nancy Pelosi, in her official capacity only, William J. Walker, in his official capacity as Sergeant at Arms of the U.S. House of Representatives, and Catherine Szpindor, in her official capacity as Chief Administrative Officer of the U.S. House of Representatives.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, the undersigned counsel state that none of the Petitioners are publicly traded companies or have parent entities that are publicly traded companies.

STATEMENT OF RELATED PROCEEDINGS

There are no related proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Plaintiffs Hon. Thomas Massie respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The District of Columbia Circuit Court of Appeals opinion that is the subject of this petition for a writ of certiorari is the *Opinion* and *Judgment,* entered June 30, 2023, by the United States Court of Appeals for the District of Columbia Circuit in Case No. 22-5058 (App.1–App.1-35), and is reported at *Massie v. Pelosi,* 72 F.4th 319 (D.C. Cir. 2023).

The *Opinion* in the United States District Court, District of Columbia, entered March 9, 2022, granting Respondents' motion to dismiss (App.36-App.70), is reported in at *Massie v. Pelosi*, 590 F.Supp.3d 196 (D.D.C. 2022).

STATEMENT OF JURISDICTION

Jurisdiction is vested in this Court pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c). This Petition was timely filed under the terms of Supreme Court Rule 13(1) and (3).

The Opinion and Judgment of the District of Columbia Circuit Court of Appeals was entered on June 30, 2023. (App.1-App.35). On August 21, 2023, the Chief Justice entered an order extending the deadline to file a petition for a writ of certiorari to November 21, 2023. Case No. 23A190.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. U.S. Const. amend XXVII.

B. H. Res. 38

Relevant provisions are included in the Appendix at Appendix E.

STATEMENT OF THE CASE

A. INTRODUCTION

One of the few provisions of the Constitution with no interpretation from this Court is the Twenty-Seventh Amendment. The practical nature of this anti-corruption Amendment renders the occurrence of a circuit split on the matter impossible. But this measure, designed to ensure the independence of members of Congress, the people's legislative body, must have effect.

This case involves an attempt to vary the pay of members of Congress without an intervening election because of their decision to act in accordance with the values of the overwhelming majority of their constituency. After the 2020 election, the House of Representatives imposed a rule (here one directed at mask enforcement) with an automatic pay deduction as its sole enforcement mechanism. Petitioners are three members of Congress who, on May 18 and May 19, 2021, entered the House floor without masks in order to vote. As a consequence, Petitioners received a pay deduction in the amount of $500. In response, Petitioners sued, seeking review of whether Respondents' conduct violated the Twenty-Seventh Amendment.

The District of Columbia Circuit Court of appeals held that the Speech or Debate Clause barred the suit, avoiding a merits review of the case.

Petitioners seek review of three issues: First, whether Speech or Debate immunity precludes any and all claims by a Member of Congress against congressional administrative officials who administer pay, where such claims are pay claims? Second, whether reductions of Members' compensation violate the Twenty-Seventh Amendment, where such reductions occur pursuant to rules that were enacted in the same session, and without an intervening election? And third, whether Article I, §§ 6 and 7 are violated where the compensation of Members of Congress is reduced pursuant to a House Rule, rather than through laws duly enacted in a previous session?

B. FACTUAL BACKGROUND

As noted, the underlying matter involved three members of Congress receiving pay deductions for their refusal to wear a face mask in violation of H. Res. 38. (Pl.'s Verified Compl, RE#1, App. 79-125). No disorderly conduct occurred. *Id.* The refusal to wear a mask did not result in a disruption of congressional business. *Id.* Ultimately administrative cases were filed and opened. *Id.*

Plaintiffs appealed these fines to the House Ethics Committee, but in votes split along party lines between Democrats and Republicans, the Committee denied each appeal.[1] (*Id.* at ¶32, App. 95). On July 22,

1 In pursuing their partisan weaponization of the mask rule, four of the five Democratic members who sat in judgment and adjudicated Representative Greene's appeal refused to recuse

2021, Plaintiff Massie received a *Deduction of Fine Imposed Pursuant to House Resolution 38* memorandum, which read in relevant part:

> … The Chief Administrative Officer is responsible for deducting the amount of any fine levied under House Resolution 38 and House Rule II, clause 3(g) from the net salary otherwise due to the Member, Delegate, or Resident Commissioner. I am including a copy of the Committee on Ethics and Sergeant at Arms notices for your records.
>
> The full amount of the fine, **$500.00,** will be deducted from your July 2021 payroll (to be disbursed August 1).

(*Id.* at ¶44, App. 101-102, 113-114).

The remaining Plaintiffs received correspondence materially similar to that in Exhibit A. (*Id.* at ¶45, App. 102). Respondents issued these fine notices and unconstitutionally reduced Plaintiffs' compensation during the pendency of this matter. (*Id.* at ¶46, App. 102).

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themselves despite having previously signed a resolution calling for her expulsion from Congress. https://www.congress.gov/bill/117th-congress/house-resolution/260/text?r=55&s=1 (last visited 11/06/2023); https://ethics.house.gov/about/committee-members (last visited 11/06/2023).

C. THE PROCEEDINGS BELOW

Petitioners sued, alleging various constitutional violations, including a claim for the Twenty-Seventh Amendment Violation. (Pl.'s Verified Compl, RE#1, App. 79-123). Subject matter jurisdiction over Petitioners' claims are grounded on 28 U.S.C. § 1331, 28 U.S.C. § 1346(a) and 18 U.S.C. § 1291.

The District Court decided the case on a FRCP 12(b)(1) Motion to Dismiss, challenging the court's jurisdiction to decide the case on the grounds of Speech or Debate Immunity. U.S. Const. art. 1, § 6, cl. 1. The D.C. Circuit views jurisdictional challenges as "threshold challenges to the court's jurisdiction[,]" requiring the court to address jurisdiction before any merits review. *Morrow v. United States*, 835 F.2d 902, 906 (D.C. Cir. 1987).

On a motion to dismiss, the court must determine whether the complaint alleges a cause of action upon which a court has jurisdiction by "'accept[ing] as true all of the factual allegations contained in the complaint' and draw[ing] all reasonable inferences in favor of the plaintiff." *Schmidt v. U.S. Capitol Police Bd.*, 826 F.Supp.2d59, 65 (D.D.C. 2011) (quoting *Brown v. District of Columbia*, 514 F.3d 1279, 1283 (D.C. Cir. 2008). The *Opinion* in the United States District Court, District of Columbia, entered March 9, 2022, granting Respondents' motion to dismiss (App.36-App.70), is reported in at *Massie v. Pelosi*, 590 F.Supp.3d 196 (D.D.C. 2022). A timely appeal was taken to the D.C. Circuit, which had jurisdiction over Petitioners' appeal under 28 U.S.C. § 1291.

On June 30, 2023, the D.C. Circuit entered an opinion that is the subject of this petition for a writ of certiorari and is reported at *Massie v. Pelosi,* 72 F.4th 319 (D.C. Cir. 2023).

REASONS FOR GRANTING THE WRIT

A. This Court should resolve the Extent of Speech or Debate Immunity to ensure that explicit provisions of the U.S. Constitution designed to regulate Congress may be enforced in the Halls of Congress

As an initial matter, the D.C. Circuit's opinion plainly violates this Court's own precedent. Rule 10(c). *Powell v. McCormack*, 395 U.S 486 (1969), is instructive. In *Powell,* Congress sought to exclude Representative Powell from being seated in the enforcement of its rules, but, *inter alia*, this Court rejected House Respondents' arguments that Speech or Debate Immunity precluded the challenge. *Id.* at 501-06. The *Powell* Court held: "[w]e reject the proffered distinctions." *Id.* at 504. "That House employees are acting pursuant to express orders of the House does not bar judicial review of the constitutionality of the underlying legislative decision." *Id.* "Respondents' suggestions thus ask us to distinguish between affirmative acts of House employees and situations in which the House orders its employees not to act or between actions for damages and claims for salary." *Id.* "We can find no basis in either the history of the Speech or Debate Clause or our cases for either distinction." *Id.* This Court expressly found in *Powell* that the Sergeant at Arms was not immune under the Speech or Debate Clause for claims regarding the pay due to

Congressman Powell, even though the Sergeant at Arms acted in enforcement of rules of the House. *Id.* So too here.

The *Powell* Court further held that such exclusions were unconstitutional when done for reasons beyond the limits of the Qualifications Clause. *Id*. Yet *Powell* was not groundbreaking. This Court has not been hesitant to prevent violations of the Constitution through House or Senate Rules. *United States v. Ballin*, 144 U.S. 1, 5 (1892) ("It may not by its rules ignore constitutional restraints or violate fundamental rights…"). *Powell* also stands for the proposition that Speech or Debate Immunity does not shield Congress in a way that renders pay claims non-justiciable. 395 U.S 486 at 501-506. Again, in *Kilbourn v. Thompson*, 103 U.S. 168 (1880) this Court held that Congress cannot exceed the limits of the Constitution in enforcement of its rules. "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).

A censure, a reprimand, the release of a House journal that condemned the Petitioners, or even, with a 2/3 vote, a measure expelling the Petitioners would be actions well within the ambit of Speech or Debate immunity. But here we deal with a pay claim. The D.C. Circuit (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 that claims could be had against the Sergeant Arms "from refusing to pay Powell his salary," *Powell*, 395 U.S 486, 494, 504-505.

Further, the D.C. Circuit's opinion plainly violates its own precedent so broadly that it departs from the accepted and usual course of judicial proceedings. Rule 10(a). In *Boehner v. Anderson*, the D.C. Circuit reversed a District Court dismissal claiming former Congressman John Boehner did not have standing to present Twenty-Seventh Amendment challenges to laws affecting his salary. 30 F.3d 156 (D.C. Cir. 1994).

The D.C. Circuit's opinion ultimately places no limits on Speech or Debate Immunity. *See generally, Massie*, 72 F.4th 319. To let the D.C. Circuit's opinion stand would be to render the Twenty-Seventh Amendment non-justiciable in violation of this Court and the D.C. Circuit's own precedents and to open the floodgates to unfathomable discipline. The House Rules, under this Doctrine, could impose physical punishment, flogging, or even more medieval forms of punishment, upon members and, under the D.C. Circuit's precedent, no judicial remedy would be available, the Eighth Amendment notwithstanding.

This is of pressing importance because Congress has *already* attempted to impose financial punishment upon a member of Congress for engaging in conduct that represents his constituency. Representative Anna Paulina Luna introduced a privileged resolution forcing a vote not only on a censure of Representative Adam Schiff, but also a fine of $16 million for his statements made about former President Donald Trump, and ongoing investigations.[2] Congress ultimately rejected the

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2 https://apnews.com/article/house-censure-schiff-russia-

fine.[3] But for the consciousness this case has raised on the matter of financial punishment of members of Congress as a means to degrade their independence and ability to represent their district, the fine of Representative Schiff may have passed.

Thus, the decision below meets several of the Rule 10 considerations for the grant of certiorari: (a) the D.C. Circuit's decision below has so far departed from the accepted and usual course of judicial proceedings by violating this Court's and the D.C. Circuit's own precedent in such a way to warrant this Court's supervision; and (b) the D.C. Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

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investigation-trump-c3e7e2c3ce34a689f7c305581cb41b5a (last accessed 11/06/2023)

3 Petitioner Massie, in fact, voted against the fine of Rep. Schiff and even explained that it was concern that the fine violated the Twenty-Seventh Amendment that prompted his NAY vote on the censure. (https://twitter.com/RepThomasMassie/status/1668967474165891073 (last accessed 11/06/2023)).

B. H. Res. 38 Plainly violates the Twenty-Seventh Amendment and this Court should review this matter to ensure the independence of members of Congress.

The Twenty-Seventh Amendment plainly states that "No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened." U.S. Const., Amend. XXVII.

A primary purpose of the Twenty-Seventh Amendment is to prevent the reduction of congressional salaries without an intervening election because the Founders expressly recognized the majority could misuse its power to threaten the integrity and independence of Members, thus dissuading individuals of modest means from serving in Congress. What is known today as the Twenty-Seventh Amendment began as the second amendment in the original Bill of Rights draft proposed by James Madison and adopted by the First Congress in 1789. *See generally,* Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497, 521-31 (Dec. 1992) ("*Sleeper*"). Between 1789 and 1791, this "compensation amendment" was ratified by only six states, making it ineligible to join the ten amendments that were approved as the Bill of Rights. *Id.* at 532-33. In response to a large (and retroactive) pay increase Congress granted itself in 1873, Ohio added its name to the states ratifying the amendment that year. *Id.* at 534. Then, nothing else happened with the amendment until 1978, when Wyoming ratified it. *Id.* at 537. Next, Maine ratified the amendment in

1983, and that began a cascade of state ratifications,[4] with Michigan providing the 38th approval necessary to make it, in 1992, the Twenty-Seventh Amendment to the Constitution. *Id.* at 537, 539 n.214.

While the Twenty-Seventh Amendment is commonly, but wrongly, thought of today as merely a limitation on Congress' ability to vote itself a pay raise (as will be demonstrated below), that was merely one of its purposes. Ignoring this historical reality, the District Court fell into the trap of elevating this purported intent behind enactment of the law over the clear and unambiguous language of the law. Regardless, had pay raises been the only concern behind enactment, the language would have stated as much. However, the amendment's plain language prohibits any law "varying the compensation," not just those that increase it.

American understanding of British parliamentary practice is vital to construing the purpose of the Constitution adopted in 1787. *See, e.g, Timbs v. Indiana*, 139 S.Ct. 682, 695 (2019) (Thomas, J. concurring) (looking to Parliamentary practice in construing the meaning of the Eighth Amendment's Excessive Fines Clause); *U.S. v. Cabrales*, 524 U.S. 1 n.1 (1998) (Ginsburg, J.) (in construing Constitution's criminal venue requirement, pointing to American colonists' negative reaction to Parliament's practice of

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4 The sudden interest in the Twenty-Seventh Amendment was driven by a sophomore at the University of Texas-Austin who, while looking for a paper topic for a government class, discovered that the proposed amendment could be ratified because, unlike for later amendment proposals, Congress had put no time limit on state ratifications. *Sleeper*, 61 FORDHAM L. REV. at 536-37.

hauling Americans to Britain for trial); *Engel v. Vitale*, 370 U.S. 421, 425-27 (1962) (in construing Establishment Clause, discussing Americans' negative reaction to Parliament dictating religious practices); *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927) (noting Parliamentary power in determining congressional constitutional authority to compel witness testimony).

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. *Sleeper* at 500-01.[5] 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.[6]

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5 Citing 1 Edward Porritt with Annie G. Porritt, The Unreformed House of Commons: Parliamentary Representation Before 1832, at 151-203 (1909).

6 Citing 1 Poritt. at 96-98; The Eighteenth-Century Constitution: 1688-1815, at 151-52 (E. Neville Williams ed., 1960); Bernard Bailyn, The Ideological Origins of the American Revolution 46-51, 85-93, 130-138 (enlarged ed. 1992).

Similarly relevant in ascertaining constitutional intent is the Founders' understanding of the colonial and state legislative practices prior to 1789. *See, e.g., Kisor v. Wilkie*, 139 S.Ct. 2400, 2437 (2019) (Gorsuch, J., concurring) (noting colonial legislative interference with judicial independence in the context of evaluating permissible deference under the Constitution executive rulemaking); *Horne v. Dept. of Agric.,* 576 U.S. 351, 359 (2015) (analyzing Takings Clause with

reference to the New York Legislature's reaction to property seizures by the Continental Army); *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure, Ltd.,* 536 U.S. 88, 94-95 (2002) (analyzing Article III's alienage jurisdiction with reference to state legislatures' practices during and after the Revolutionary War).

From 1774 until the Constitution's ratification in 1789, during the Continental Congresses, and into the period of the Articles of Confederation, state legislatures that were responsible for paying congressional delegates used that leverage to punish those delegates for ignoring state interests. And those delegates were an easy target for fiscal belt-tightening during the poor economy that followed the American Revolution. *Sleeper* at 501- 02.[7] Delegates had to wait longer and longer to be paid, if at all. "Even those

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7 Citing Jack P. Greene, The Quest for Power (1963); Edmund Cody Burnett, The Continental Congress 420, 421, 425, 629, 650, 710, 713 (1941); Richard B. Morris, The Forging of the Union, 1781-1789, at 91-94 (1987); Jack N. Rakove, The Beginnings of National Politics: An Interpretive History of the Continental Congress 235-38 (1979).

delegates who had independent means, and thus did not rely on the small salaries paid by the states, did not accept this situation lightly. Notable American politicians began to write scathing letters to their home states, demanding to know how long they were to serve their country without being paid for it." *Id.* at 502.

Hence, the new national legislature's independence and stability was a major concern at the 1787 Constitutional Convention. *Id.*[8] In discussing how congressional pay should be set (in the context of debating what eventually became known as the Constitution's "Ascertainment Clause"[9]), the delegates avidly debated the potential harms of both insufficient congressional remuneration and its potential diminishment. These discussions are therefore highly relevant in ascertaining the Founders' concerns regarding congressional compensation as they highlight the error made by the District Court. *See, e.g., Rucho v. Common Cause*, 139 S.Ct. 2484, 2495 (2019) (referring to the Convention debate in ascertaining the authority granted under Article I's Election Clause); *U.S. Term Limits v. Thonrton*, 514 U.S. 779, 790-91 (1995) (same regarding Article I's Qualifications Clause); *Weiss v. U.S.*, 510 U.S. 163, 187 n.2 (1994) (Souter, J.,

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8 Citing 1 The Records of the Federal Convention of 1787, at 20-22 (Max Farrand ed., 1937) (all references are to James Madison's notes unless otherwise indicated).

9 "The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States." U.S. Const., art. 1, § 6, cl.1.

concurring) (same regarding the Appointments Clause); *Singer v. U.S.*, 380 U.S. 24, 31 (1965) (same regarding Article III's criminal venue requirement and the Sixth Amendment); *Sch. Dist. of Abingon Twp. v. Schemp*, 374 U.S. 203, 254 n.19 (1963) (Brennan, J., concurring) (same regarding the First Amendment).

Echoing the well-known concern about House of Commons candidates seeking voter favor by promising to cut their pay, Massachusetts delegate Elbridge Gerry[10] noted that "one principal evil" of democracy was "the want of due provision for those employed in the administration of Governnt [sic]. It would seem to be a maxim of democracy to starve the public servants." The Records of the Federal Convention of 1787, at 48 (Max Farrand ed., 1937).

Virginia delegate George Mason raised the problematic history of low pay discouraging capable men from public service, "[t]he parsimony of the States might reduce the provision so low as had already happened in choosing delegates to Congress, the question would be not who were most fit to be chosen, but who were most willing to serve." *Id* at 216. Nathaniel Gorham of Massachusetts and Edmund Randolph of Virginia both raised the threat to congressional independence created by the possibility of salary reductions. Gorham pointed out that state legislatures "were always paring down salaries in

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10 Later Governor of Massachusetts, Gerry gifted his name to the American political lexicon in the word "gerrymandering." *See generally, https://www.smithsonianmag.com/history/where-didterm-gerrymander-come-180964118/*.

such a manner as to keep out of offices men most capable of executing the functions of them." *Id* at 372. Randolph, in turn, stressed that "[i]f the States were to pay the members of the Natl. Legislature, a dependence would be created that would vitiate the whole System." *Id.*

With the proposed Constitution setting no restraint on either increasing or decreasing congressional salaries, it became the second of Madison's proposed amendments in the Bill of Rights he offered in the First Congress. As in the Constitutional Convention, Representatives discussed the sorry history of the House of Commons manipulating wages. Congressman Theodore Sedgwick stated that "'designing men'… … might reduce the wages very low, much lower than it was possible for any gentleman to serve without injury to his private affairs, in order to procure popularity at home, provided a diminution of pay was looked upon as a desirable thing; it might also be done in order to prevent men of shining and disinterested abilities, but of indigent circumstances, from rendering their fellow citizens those services they are well able to perform, and render a seat in this house less eligible than it ought to be." Debates in the House of Representatives (Aug. 14, 1789), in The Congressional Register, Aug. 14, 1789.

Thus, diminution of salary was as much a consideration for the Founders as were pay raises. *See, e.g., Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1903 (2021) ("Since the First Congress also framed and approved the Bill of Rights, we have often said that its apparent understanding of the scope of

those rights is entitled to great respect."). The Founders well understood, in proposing what later was ratified as the Twenty-Seventh Amendment, that financial means should not be used to coerce national legislators from independent judgment, and financial means should not be used in an attempt to exclude those of modest means from public service. Those foundational concerns are precisely what underlie this case: using financial pressure, through the manipulation of salary by the House Democratic Majority, to deprive Republican Members, and only Republican Members, of their political independence.

"In the general course of human nature, a power over a man's subsistence amounts to a power over his will." Alexander Hamilton, *Federalist Paper No. 79* (May 28, 1788). *See also Schaffer v. Clinton*, 240 F.3d 878, 884-85 (10th Cir. 2001) (noting that Hamilton was speaking of ***a decrease in compensation***, and that such a decrease would be a real injury providing standing under the Twenty-Seventh Amendment). Simply put, the historical record is crystal clear that the Twenty-Seventh Amendment was enacted not just to prevent congressional pay increases through self-dealing, but just as importantly, to protect Members from pay *decreases* being used as an instrument for either political pressure or exclusion.

House Resolution 38 is a "Law" that Varies Compensation in Violation of the Twenty-Seventh Amendment. The text and tradition of a constitutional provision control its interpretation. See, e.g,, *Torres v. Madrid,* 141 S.Ct. 989, 995-96 (2021) (referencing a dictionary definition from 1828

when examining the meaning of the term "seizure" in the Fourth Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008) (the Constitution's "words and phrases were used in their normal and ordinary as distinguished from technical meaning," as understood by ordinary voters); *see also, Callins v. Collins*, 510 U.S. 1141 (1994) (Scalia, J., concurring) (examining the text of the fifth amendment when defining the scope of a prohibition on the death penalty).

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 recognize that a congressional rule is a "law" subject to the provisions of the Constitution. *Yellin v. United States*, 374 U.S. 109, 143-144 (1963); *Watkins v. United States*, 354 U.S. 178, 188 (1957); *U.S. v. Ballin*, 144 U.S. 1, 5 (1892). "The Bill of Rights is applicable to . . . all forms of governmental action." *Watkins*, 354 U.S. at 188. Where constitutional rights are violated, the judiciary has warrant to interfere with Congress's internal procedures. *Exxon Corp. v. FTC*, 589 F.2d 582, 590 (D.C. Cir. 1978) (citing *Yellin v. United States*, 374 U.S. 109, 143-144 (1963).

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. Unambiguous House rules, such as the mandatory payroll deduction of punitive fines required under H.Res. 38, are plainly subject to judicial review. *U.S. v. Rostenkowski*, 59 F.3d 1291, 1307 (D.C. Cir. 1995).

Like the houses of Congress, the federal courts are empowered to enact their own rules, and this Court has held that a local court rule was a "law" for purposes of the federal perjury statute. *U.S. v. Hvass*, 355 U.S. 570, 574-75 (1958). Incorporating the common understanding that a "rule" issued by a governmental institution with binding effect is a "law," the *Hvass* Court explained:

> The phrase 'a law of the United States,' as used in the perjury statute, is not limited to statutes, but includes as well Rules and Regulations which have been lawfully authorized and have a clear legislative base. 28 U.S.C. § 2071 provides: 'The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.' . . . These statutes and Rule 83 leave no room to doubt that the District Court was lawfully authorized to prescribe its local rules and that they have a clear legislative base. *Id.* at 575-76 (citations omitted); *accord, Columbia Broadcasting System, Inc. v.*

> *U.S.*, 316 U.S. 407, 416 (1942) (an agency rule that has binding legal effect on those it regulates is a "law").

Here, the House issued a rule with binding legal effect on its Members (which is why we are here), and that makes it a "law" for purposes of constitutional scrutiny. "When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 829 (2015) (Roberts, C. J., dissenting); *cf. Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 60 (2014); *Law v. Siegel*, 571 U.S. 415, 422 (2014).

The same terminology used in contemporaneously drafted constitutional provisions presumably carry the same meaning. *See U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (reasoning that "the people" is "a term of art employed in select parts of the Constitution and has the same meaning in each part of the Constitution").

No less than John Quincy Adams believed that a House rule was a "law" governed by the strictures of the First Amendment. From 1837 until 1844, the House imposed what was infamously known as the "Gag Rule," whereby any petitions concerning slavery were automatically tabled as off-limits for debate. In December of 1837, during the voting on the Gag Rule in the 25th Congress, rather than answer with a vote, Adams, before he was silenced by calls to order, said "I hold the resolution to be a violation of the Constitution of the United States…" The next day he completed his remark, " … of the rights of my constituents, and of the people of the United States to

petition, and of my right to freedom of speech, as a member of this House." Robert P. Ludlum, "*The Antislavery 'Gag-Rule': History and Argument,*" 26 J. OF NEGRO HIST. No. 2 at 210-11 (April 1941) (internal citation omitted).

Likewise, in *NLRB v. Canning*, 573 U.S. 513 (2014), this Court held, consistent with its earlier jurisprudence on the justiciability of the rules of each chamber, that although the Senate's view as to when it was "in session" under its own rules was entitled to great deference, it is ultimately the judiciary's role to determine if those decisions are consistent with the controlling constitutional provisions. *Id.* at 551-52. The same principal applies here: H.R. 38 is "a law" for purposes of the Twenty-Seventh Amendment, and it's a law that plainly contravenes the requirement that Member compensation not be "varied."

House Resolution 38 "varies compensation" of Members by explicitly targeting their salary. It states: "(2) a fine imposed pursuant to this section shall be treated as though imposed under clause 3(g) of rule II,[11] and shall be administered as though pursuant to clause 4(d) of rule II."[12] That rule specifically targets

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11 That rule states: "(g)(1) The Sergeant-at-Arms is authorized and directed to impose a fine against a Member … for the use of an electronic device … (2) A fine imposed pursuant to this paragraph shall be $500 for a first offense and $2,500 for any subsequent offense." https://rules.house.gov/sites/democrats.rules.house.gov/files/documents/116-House-Rules-Clerk.pdf (last visited 6/9/2022).

12 That Rule states: "(d)(1) … the Chief Administrative Officer shall deduct the amount of any fine levied under clause 3(g) from the net salary otherwise due the Member, Delegate, or the Resident Commissioner. (d)(2) The Chief Administrative Officer is authorized to establish policies

deduction of salary. And the Resolution explicitly forecloses other ways Members might pay the fines in question – leaving only their salary or other personal funds to answer. This ensures maximum pressure is brought to bear on those Members who rely on their congressional salary as their sole or primary means of support.[13]

Respondents cited to fines imposed by the House as far back as 1856, and cases interpreting their legality, which is 136 years before the Twenty-Seventh Amendment was ratified in 1992. As such, that precedent is inapposite. Similarly, unchallenged fines imposed since 1992 have no precedential value to the present case. Rather, *Powell*, 395 U.S 486, is instructive. In *Powell,* Congress sought to exclude Representative Powell from being seated but, *inter alia*, the Supreme Court rejected House Respondents' arguments that prior exclusions of other Members demonstrated the constitutionality of the practice. *Id.* at 541-48. The Supreme Court noted that none of the previously excluded Members had judicially challenged their exclusions. *Id.* The *Powell* Court further held that such exclusions were unconstitutional when done for reasons beyond the

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and procedures for such salary deductions." (last visited 6/9/2022).

13 Petitioners here exemplify the Founders' concern over manipulating pay to exert pressure, as Representative Massie relies on his congressional salary as his primary means of support, while Representative Greene deducts nearly all of her paychecks to pay her federal withholding taxes, as she has the benefit of prior saved income from which she can sustain herself until she files her tax return each year, and then she will receive all of this money back when she receives her income tax refund.

limits of the Qualifications Clause. *Id*. at 550; *see also*, *Ballin*, 144 U.S. at 5.

Respondents and the District Court may call this a fine, but it "looks like a [pay variance] in many respects." *NFIB v. Sebelius*, 567 U.S. 519, 563 (2012). In *Sebelius*, the Court upheld the penalty because it came in the form of a payment "to the IRS when [the violator] pays his taxes." *Id.* It was particularly relevant that the penalty was "collect[ed] … 'in the same manner as taxes.'" *Id.* Consequently, the Supreme Court held the penalty was, based on the manner by which it is collected, a tax. In other words, congressional word play is not enough. Courts must look beyond labels and look at what is actually going on. The penalty here is a reduction in compensation only enforced from the removal from the pay of the member of Congress. This mandate was enforced "in the same manner as" a pay cut. *Id.* It therefore violates the Twenty-Seventh Amendment.

The House is designed to be the people's chamber. As argued *supra*, financial retaliation against members of Congress is a tool by which Members' independence can be degraded. It is crucial that the Twenty-Seventh Amendment be given effect, lest there be another means by which members of Congress are subjected to retaliation for their decision to act in accordance with the desires of their district rather than the desires of the Speaker of the House.

Further, there will *never* be a Circuit Split on the matter of when a Twenty-Seventh Amendment violation is justiciable, let alone when a Twenty-Seventh Amendment violation has even occurred. The only place in which House Rules are established and

in which the House Rules are enforced is Washington D.C. This means that the D.C. Circuit will be the only circuit with jurisdiction to hear appeals from District Courts in cases challenging alleged violations of the Twenty-Seventh Amendment. This Court's supervisory authority is especially important when only one circuit may have jurisdiction on a substantive matter.

The District Court Decision and the D.C. Circuit's opinion affirming dismissal runs the risk of rendering entire provisions of the U.S. Constitution unenforceable and effectively nullifies the Twenty-Seventh Amendment. It is one of the longest standing doctrines in American law that where there is a violation of rights, there must be a remedy. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.").

Thus, the decision below meets several of the Rule 10 considerations for the grant of certiorari: the D.C. Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

C. This Court should review whether the reductions in compensation here violated Article I, §§ 6 and 7

Further, a Claim Has Been Stated for a Violation of Article I, §§ 6 and 7. Article I, Section 6 provides: "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law,[14] and paid out of the Treasury of the United States." Article I, Section 7, Clause 2 requires passage by each house of Congress and Presentment to the President for a law to be passed.

There is no doubt here that the measures in question – passed by only the House – are not "Laws" within the meaning of Article I, Section 7, Clause 2. *Clinton v. City of New York*, 524 U.S. 417 (1998). Respondents claim that the fine – which is taken directly from congressional compensation – does not vary compensation and thus is not violative of the Clause. Again, this is mere word play, as deducting the bottom line on a paycheck is a reduction in compensation. The fact that this reduction in compensation may not be permanent does not change the reality that Petitioners' compensation will be less than what the established Law says it should be, and the fine is therefore an illicit reduction. Further, the fact that the determination of whether or when such

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14 The capitalization of the term "Law," which is not capitalized in the 27th Amendment, takes on an important context in this regard. As opposed to "law," the capitalization of the term refers expressly to the passage of a statute. Thus, when looking at the meaning of the term "Law," in Article I, Section 6, and Article I, Section 7, the term refers to enactments of bills by Congress that have been presented to the President.

salary reductions occur is at the whim of staffers within the House, and not Congress itself, runs afoul of the bedrock principle behind the Ascertainment Clause: accountability. *Humphrey v. Baker*, 848 F.2d 211 (D.D.C. 1988); *Pressler v. Simon*, 428 F. Supp. 302, 305-306 (D.C.D. 1976) (by law in terms of compensation determinations must be passed laws). Thus, Article I, §§ 6 and 7 were violated and the District Court erred in ruling to the contrary. That it was done here in a manner that serves as an end-run around yet other provisions of the United States Constitution designed to ensure member independence is all the more egregious.

Thus, the decision below meets several of the Rule 10 considerations for the grant of certiorari: the D.C. Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

CONCLUSION

The Opinions below render the Twenty-Seventh Amendment a dead letter. Yet, for more than 220 years, the judiciary has not flinched from its role and emphatic duty "to say what the law is." *Marbury v. Madison*, 5 U.S. 137 (1803). Allowing the lower court decisions to stand renders the guaranties of the Twenty-Seventh Amendment hollow – enforcement of it – if it needs to be enforced – will only occur in the manner that occurred below. For that, and all of the foregoing reasons, Petitioners respectfully request that their petition be granted and that a writ of certiorari issue for the three questions presented.

Respectfully submitted,

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