No. 23-

IN THE

Supreme Court of the United States

ANDREW S. CLYDE, *et al.*,

Petitioners,

v.

WILLIAM J. WALKER, *et al.*,

Respondents.

ON PETITION FOR A 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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QUESTIONS PRESENTED

The Constitution's Speech or Debate Clause provides in pertinent part that, "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." Art. I, § 6, cl.1. The Behavior Clause of the Constitution provides that, "[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." Art. I, § 5, cl.2. And the Constitution's Twenty-Seventh Amendment 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." Amend. XXVII.

1. Whether the Speech or Debate Clause creates a jurisdictional bar to judicial consideration of whether internal congressional rules or practices violate other textual provisions of the Constitution?

2. Whether the immunity from suit created by the Speech or Debate Clause extends to administrative functions within Congress like payroll deductions and floor security that are not core legislative activities?

3. Whether the Twenty-Seventh Amendment to the Constitution prohibits the U.S. House of Representatives from reducing Members' compensation by deducting punitive fines from their salaries before the Members receive those salaries?

PARTIES TO THE PROCEEDING & RULE 29.6 STATEMENT

Petitioners Andrew Clyde, Louie Gohmert, and Lloyd Smucker were all Members of the U.S. House of Representatives in the 117th Congress, and bring suit both Individually and in their Official Capacities.

Respondents William J. Walker and Catherine Szpindor are sued in their Official Capacities as Employees of the U.S. House of Representatives.

Petitioners are individuals without corporate status.

RELATED CASES

Clyde v. Walker, Civ. Act. No. 21-1605 (TJK), U.S. District Court for the District of Columbia, Judgment entered Aug. 1, 2022.

Clyde v. Walker, No. 22-5263, U.S. Court of Appeals for the District of Columbia Circuit, Judgment entered Oct. 20, 2023.

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The court of appeals' unreported opinion is available at 2023 WL 6939987 (per curiam). Pet. App. 1a-7a. The district court's opinion is reported at 619 F.Supp.3d 193 (D.D.C. 2022). Pet. App. 8a-22a.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 2023. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

U.S. CONST., Art. I, § 6, cl. 1. Pet. App. 23a.

U.S. CONST. Amend. XXVII. Pet. App. 24a.

STATEMENT

This case is about when federal courts can avoid deciding cases about the internal functioning of the Houses of Congress when a constitutional provision was arguably violated. The D.C. Circuit regarded these claims as immune from judicial scrutiny, going against 140 years of this Court's precedents. While the judiciary may prefer not to hear such a case, there are significant implications to federal courts avoiding deciding important questions that are part of the text of the Constitution, even if they arise from internal congressional rules.

The D.C. Circuit held that the Speech and Debate Clause is a jurisdictional bar. This Court has never held

the Speech or Debate Clause to be a jurisdictional bar to constitutional challenges of congressional procedures. Indeed, this Court has rejected that proposition when it has taken such cases on the merits. Most notably, the D.C. Circuit's aversion to such suits is squarely in conflict with this Court's seminal decision in *Powell v. McCormack*, 395 U.S. 486 (1969), in which this Court reviewed a constitutional claim arising from the House's internal vote denying a Member his seat and his salary.

In February 2021, the U.S. House of Representatives passed a rule requiring the House Sergeant at Arms to impose massive fines ($5,000 for the first offense, $10,000 for subsequent offenses) against Members who failed to complete security screenings, and requiring the House's Chief Administrative Officer to deduct those fines from the salaries of Members who did not pay the fines before the Members ever received their salaries. Petitioners—Members of Congress at the time—were all fined. Many Members were denied the ability to vote on matters before the House while they waited to pass through the required security measures.

Petitioners sought judicial review of the House Rule, asserting that the reduction of their salaries before they ever received them constituted a "varying" of their compensation in violation of the Twenty-Seventh Amendment. They also argued that violating the screening protocol to perform their representative duties could not, in the absence of conduct disruptive to the legislative process, constitute punishable "disorderly Behaviour."

The D.C. Circuit held that the Speech or Debate Clause "operates as a jurisdictional bar" to the judiciary's

consideration of claims arising from legislative acts "regardless of their alleged unconstitutionality." The court defined "legislative acts" as any act by the House emanating from its powers under the Rules and Discipline Clauses of Article I.

The D.C. Circuit's interpretation of the Speech or Debate Clause as a jurisdictional bar to the judicial consideration of constitutional challenges of internal congressional rules and procedures is contrary to this Court's precedents, dating at least from *United States v. Ballin*, 144 U.S. 1 (1892). *Ballin* established that the House is generally entitled to judicial deference in its internal rulemaking, but that deference falls away when it ignores constitutional restraints, violates fundamental rights, or enforces rules not rationally connected to their claimed objectives. The D.C. Circuit's holding is inconsistent with *Ballin*'s strictures. This Court has *never* held the Speech or Debate Clause to be a jurisdictional bar to constitutional challenges of congressional procedures. Indeed, the Court has rejected that proposition when it has taken such cases on the merits. Most notably, the D.C. Circuit's aversion to such suits is squarely in conflict with this Court's seminal decision in *Powell v. McCormack*, 395 U.S. 486 (1969). *Powell* concerned the House's internal vote denying a Member his seat and his salary. Nonetheless, this Court held both that it had subject matter jurisdiction to hear the case and that the Speech or Debate Clause was no bar to the justiciability of claims against congressional employees who have violated textual commands of the Constitution.

The D.C. Circuit's all-encompassing construction of Speech or Debate Clause immunity is at odds with this

Court's long-standing instruction that the Clause applies only to core legislative activities like voting, speaking during congressional proceedings, and investigations. This case challenges the automatic deduction of fines from Members' salaries. The D.C. Circuit held those deductions to be a "legislative act" immune from judicial scrutiny because they are performed pursuant to the House's internal authority under the Rulemaking and Discipline Clauses. The Third Circuit, however, has split from that view, instead holding that the payroll function is purely ministerial and not a legislative act covered by Speech or Debate immunity.

Moreover, this Court has never addressed the Twenty-Seventh Amendment's protections. The Amendment prevents "varying" compensation. The Members' compensation here was unquestionably "varied." As with judicial compensation, the Founders sought to protect the ability of Members to exercise independent judgment without financial coercion and to allow persons of modest means to serve in the National legislature. This case presents that very issue.

This Court should grant review to re-establish the right of litigants to ask courts to determine whether Congress is acting constitutionally, an admittedly difficult question under our system of separation of powers. But this Court has done it many times before. Under the D.C. Circuit's rationale, no challenge to unconstitutional actions by the Houses of Congress based on internal rules and procedures can be brought because *every* such action is performed pursuant to the Rulemaking and Discipline Clause. This unbounded view of "legislative acts" means that no congressional variances of salary accomplished

by rule (instead of statute) can *ever* be heard. The D.C. Circuit's precedent-defying jurisdictional reinterpretation of the Speech or Debate Clause will place large swathes of unconstitutional congressional conduct beyond remedy. The Court should take this opportunity to correct the D.C. Circuit's abdication of the judicial function, repair the circuit split, and ensure that the Twenty-Seventh Amendment is not a constitutional nullity.

1. Petitioners were Members of the U.S. House of Representatives in the 117th Congress as members of the then-minority opposition party Republican Caucus. Congressmen Andrew Clyde (Georgia 9) and Lloyd Smucker (Pennsylvania 11) currently serve in the 118th Congress, while Louie Gohmert (Texas 1) did not seek reelection. Am. Compl. ¶¶ 1–3, Dist. Ct. D.E. 9. Their Amended Complaint alleges that their congressional compensation was "varied" in violation of the Twenty-Seventh Amendment by the House deducting fines from their salaries prior to those salaries being received. *Id.* ¶¶ 30–35.

Respondents Sergeant at Arms William Walker ("SAA") and Chief Administrative Officer ("CAO") Catherine Szpindor were senior employees of the U.S. House of Representatives in the 117th Congress. Under House Resolution 73, SAA Walker was responsible for implementing the security procedures at the entrances to the House chamber, including assessing the fines called for under House Resolution 73. CAO Szpindor controlled the payment of salaries to members of the House of Representatives. Both individuals were accountable to Speaker Pelosi. *Id.* ¶¶ 4–5, 8–10.

On February 2, 2021, the House passed H.R. 73, directing the Sergeant at Arms to impose a $5,000 fine against any member for "failure to complete security screening for entrance to the House Chamber," and a $10,000 fine for any subsequent violation. H.R. 73, 117th Congress, 1st Sess., § 1(a)(1)–(2), *Imposition of Fines for Failure to Complete Security Screening for Entrance to House Chamber* (2021) (hereafter, the "Screening Rule"). Upon notice of an alleged Screening Rule violation, the Member could appeal the charge to the House Ethics Committee. *Id.* § 1(a)(3) and (b). The Member had 90 days from the time a violation was determined with finality—either because he didn't contest it, or by the Committee's determination that he violated the rule—to pay the fine. *Id.* § 1(c)(1) and (2). The CAO was required to deduct the fine from a Member's salary who did not pay the fine within 90 days. *Id.* § 1(c)(1). Am. Compl. ¶¶ 8–10, Dist. Ct. D.E. 9. The Sergeant at Arms implemented the Screening Rule by placing magnetometers at the House Chamber entrances. *Id.* ¶ 11.

As alleged in the Amended Complaint, Congressman Clyde entered the House Chamber on February 3, 2021, without passing through a magnetometer. Then-Acting Sergeant at Arms Timothy Blodgett notified Congressman Clyde on February 5, 2021, that Clyde would be fined $5,000 for violating the Screening Rule. In contrast, on February 4, 2021, then-Speaker Nancy Pelosi, the leader of the House Democratic majority, violated the Screening Rule by entering the House Chamber via a door in the Speaker's Lobby, without subjecting herself to the magnetometers. The security personnel under the Sergeant at Arms's authority made no effort to force her to be screened or to restrain her

from entering the Chamber. The Sergeant at Arms did not ever issue her a citation, her violation was never referred to the House Ethics Committee, and she was not fined. Similar violations without repercussions were committed by senior Democratic leaders, Congresswoman Maxine Waters (California 43), then-Chairwoman of the House Financial Services Committee, Congressman Jamie Raskin (Maryland 8), and Congresswoman Nydia Velazquez (New York 7), then-Chairwoman of the House Small Business Committee. *Id.* ¶¶ 12–17.

On February 5, 2021, Congressman Clyde again entered the House Chamber, this time passing through a magnetometer, but without allowing himself to be detained for a secondary screening by security personnel, saying, "I have to vote," as his official phone had set off the magnetometer. Sergeant at Arms Blodgett notified Congressman Clyde on Feb. 8, 2021, that he would be fined an additional $10,000 for violating the Screening Rule a second time. *Id.* ¶¶ 18–19.

On February 3, 2021, then-Congressman Gohmert was screened upon entry to the House Chamber without incident. He later left the Chamber through the Speaker's Lobby to the men's bathroom adjacent to the Speaker's Lobby—just feet from a security post. Security personnel were present but did not request him to re-submit to screening prior to re-entering the Chamber. He repeated that course of action the next day, but the security personnel then requested that Congressman Gohmert submit to another screening; however, Gohmert informed them that he had already been screened and proceeded back into the House Chamber. Then-Acting Sergeant at Arms Blodgett subsequently notified him that he had

violated the Screening Rule by entering the Chamber without screening and would be fined $5,000. *Id.* ¶¶ 20–23.

On May 19, 2021, a vote was called for the final passage of H.R. 1629. Congressman Smucker was then away from the Capitol grounds, and he returned to vote just before the vote closed. Knowing that he could miss the vote, Congressman Smucker ran to the Chamber and communicated to the security personnel at the entrance that he would quickly vote—within their line of sight— and return to complete the magnetometer screening, which he did. He believed at the time that, had he delayed his vote to accommodate the Screening Rule, he would have missed the vote on H.R. 1629, thereby failing his first duty to his constituents. Nonetheless, Sergeant at Arms Walker notified Congressman Smucker that he had violated the Screening Rule by entering the House Chamber without being screened and would be fined $5,000. *Id.* ¶¶ 24–26. All three Members appealed their fines to the House Ethics Committee making several arguments, including that the Screening Rule and its fines were being selectively enforced against only Republicans and not against Speaker Pelosi or other Democrats, and that such fines reduced a Member's salary in the same session in which it was passed. The Ethics Committee denied their appeals, affirming Clyde's $15,000 fine and $5,000 each for Smucker and Gohmert. After their unsuccessful appeals, CAO Szpindor was required pursuant to H.R. 73 § 1(c)(1) to take the fines directly from the Members' congressional salaries. *Id.* ¶¶ 19, 23, 26.

On April 14, 2021, Congressman Clyde was in his legislative office when a vote was called. The magnetometer went off, and he was required to be re-screened prior to

his entry. The voting system shut down just prior to him being able to press the voting button.[1] Other Members who missed votes due to being delayed by the magnetometer screening include Republican Representatives Michael Burgess (Texas 26), Lauren Boebert (Colorado 3), Jeff Duncan (South Carolina 3), Chris Smith (New Jersey 4), and Brad Wenstrup (Ohio 2). *Id.* ¶¶ 28–29.

2. Petitioners Clyde and Gohmert filed suit on June 13, 2021, seeking declaratory and injunctive relief against Sergeant at Arms Walker and CAO Szpindor in their official capacities from enforcing H.R. 73 as violative of the U.S. Constitution's Twenty-Seventh Amendment and the Discipline Clause, Article I, § 5, cl.2.[2] Compl., Dist. Ct. D.E. 1. An Amended Complaint was filed July 15, 2021, to add Congressman Smucker. Am. Compl., Dist. Ct. D.E. 9. The Representatives alleged that reducing their salaries by deducting the fines before they ever received the salaries was a "variance" of their compensation in violation of the Twenty-Seventh Amendment. Further, they alleged that the House lacked authority to punish them for (purportedly) violating the Screening Rule because those infractions involved no disruptive conduct and thus did not constitute "disorderly Behaviour" within the Discipline Clause's original meaning. *Id.* ¶¶ 30–41.

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1. The House Speaker controls how long the voting period will be kept open. Elizabeth Rybicki, CRS Report No. 98-988, *Voting and Quorum Procedures in the House of Representatives* 7-8 (March 20, 2023).

2. Count II of both complaints also asserted violations of the Arrest Clause, U.S. Const. Art. I, § 6, cl. 1, which were not pursued on appeal.

The district court dismissed the case for lack of subject matter jurisdiction under the Constitution's Speech or Debate Clause, Article I, § 6, cl.1. Judgment, Dist. Ct. D.E. 21; Opinion Order, Dist. Ct. D.E.22. The court concluded that the House's actions were "legislative acts" protected by the Clause that could not be judicially reviewed. The court did not address parties' merits arguments of whether the Screening Rule violated either the Twenty-Seventh Amendment or the Discipline Clause. *Id.*; Pet. App. 9a–22a.

3. The D.C. Circuit affirmed per curiam, holding that "the Speech or Debate Clause operates as a jurisdictional bar when the actions upon which a plaintiff sought to predicate liability were legislative acts. The Clause's immunity from suit is jurisdictional and prohibits the judiciary from questioning speech, debate, or legislative acts that fall within the Clause's coverage." Pet. App. 4a. Like the district court, the D.C. Circuit held that "issuing a fine and deducting it from paychecks" were "legislative acts" because they were done pursuant to the internal procedures the House had established as permitted by Article I's Rules and Discipline Clauses. Accordingly, it held that the Clause rendered the House's acts "absolutely" immune from suit "regardless of their alleged unconstitutionality." *Id.* 5a–7a.

ARGUMENT

I. CONTRARY TO THE D.C. CIRCUIT'S OPINION, THIS COURT HAS CLEARLY HELD THAT THE SPEECH OR DEBATE CLAUSE DOES NOT CREATE A JURISDICTIONAL BAR TO JUDICIAL CONSIDERATION OF CONSTITUTIONAL CHALLENGES OF INTERNAL CONGRESSIONAL ACTS

A. The D.C. Circuit's Holding is against this Court's Precedents and Makes Many Previously Justiciable Clauses of the Constitution Unjusticiable.

This case should be controlled by *Powell v. McCormack*, which expressly held that the Court could consider Congressman Powell's request that the Sergeant at Arms "disburse funds," i.e., his congressional salary. 395 U.S. 486, 504 (1969). If the D.C. Circuit below was correct in asserting that any question related to the legislative function is beyond the federal courts' subject matter jurisdiction, *Powell* could not have been decided. *Powell* is one of this Court's seminal Speech or Debate Clause cases, and over 140 years of Supreme Court precedent make clear that the Speech or Debate Clause is not—by itself—a bar to justiciability. There is no instance in which a party's reliance upon the Clause was held by this Court to deprive federal courts of jurisdiction to consider the issue on the merits. The D.C. Circuit's dismissal of this case on subject matter jurisdiction grounds is directly contrary to this Court's precedents. The D.C. Circuit's belief that it lacks subject matter jurisdiction to consider the Members' constitutional claims merely because they

emanate from a legislative body, *see Clyde* Pet. App. 4a–7a, is untenable in the face of uniform Supreme Court precedents to the contrary. Were the D.C. Circuit correct in that conclusion, none of the discussed cases could have been decided at all, regardless of this Court's ultimate determinations.

In *Powell*, Congressman Powell was prevented from taking his seat in violation of the Qualifications Clause of Article I, § 5, cl.1 and sought declaratory relief against the House employees tasked with implementing the House's arguably unconstitutional decision. Powell sought a declaratory judgment that the House Sergeant at Arms had unconstitutionally withheld his congressional salary and an injunction ordering the Sergeant at Arms to provide that salary. *Powell*, 395 U.S. at 493–94. Addressing arguments identical to those invoked by the D.C. Circuit below, *Powell* expressly held both that the Court had subject matter jurisdiction to hear the case and that the Speech or Debate Clause is no bar to justiciability to claims against congressional employees who have violated textual commands of the Constitution. *Id.* at 500–06, 512–16, 550. The Court concluded that Powell had been unconstitutionally excluded from taking his seat in the House of Representatives and remanded the consideration of equitable relief for ordering the release of his back pay to the lower courts. *Id.* at 550.

But the D.C. Circuit below rationalized dismissing this case on jurisdictional grounds because "the challenged acts are 'legislative' . . . because they involve matters the Constitution places within the jurisdiction of the House," and "fines for violations of the [Screening Rule] are an aspect of Congress' power to punish its Members for disorderly Behaviour." *Clyde*, Pet. App.

5a (cleaned up). *Powell* rejected that logic, observing that, "Respondents assert that the Speech or Debate Clause of the Constitution, Art. I, § 6, is an absolute bar to [Congressman Powell's suit]." *Powell*, 395 U.S. at 501. But, the Court held, legislative immunity does not bar all judicial review of legislative acts. "That issue was settled . . . expressly in *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881), the first of this Court's cases interpreting the reach of the Speech or Debate Clause." *Powell*, 395 U.S. at 503. "The purpose of the [Clause's] protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions."[3] *Id.* at 505. Thus, legislative employees who commit unconstitutional acts, even at the direction of Congress itself, can be held liable for their acts. *Id.* at 504–05. It would be odd if this were not true.

After *Powell*, in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), a Senate committee's investigatory subpoena to a bank was challenged and the Clause invoked as a defense to the suit. All of the justices—in the majority, concurrence, or dissent—expressly held the question of the Clause's applicability to be properly before the Court. The majority opinion held, "[t]he question to be resolved is whether the actions of the petitioners fall within the sphere of legitimate legislative activity. If they do, the petitioners 'shall not be questioned in any other Place' about those

3. The Clause's "fundamental purpose" is to "free[] the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." *Gravel*, 408 U.S. at 618.

activities since the prohibitions of the Speech or Debate Clause are absolute[,]" and that "the Court of Appeals correctly held that the District Court properly entertained this action initially." *Id.* at 513 and n.14 (cleaned up). Concurring for three justices, Justice Marshall observed, "the District Court properly entertained the action in order to provide a forum in which respondent could assert its constitutional objections . . . a court's inquiry . . . is necessarily quite limited once defendants entitled to do so invoke [the Clause's privilege]." *Id.* at 514. In dissent, Justice Douglas wrote that the Clause's immunity could be denied to those "within the reach of judicial process." *Id.* at 518. No justice remotely suggested the Court lacked subject matter jurisdiction to consider the case, even though *Eastland*'s ultimate holding was that the Clause provided "complete immunity" for the Members and committee chief counsel at whom the suit was directed. *Id.* at 495–96, 507.

The Court's Speech or Debate cases have been consistent on this point in the 140 years since *Kilbourn*. In *Gravel v. United States*, another of the Court's significant explications of the Clause, the Court faced the question of whether the Clause immunized a congressional aide, acting on a senator's behalf, from testifying before a grand jury. 408 U.S. 606, 613 (1972). The Court explicitly held, "we are of the view that both the question of the aide's immunity and the extent of that immunity are properly before us in this case." *Id.* at 628 n.17. No justice, whether in majority or dissent, suggested that the Clause's invocation deprived the Court of subject matter jurisdiction. *See id.*, generally and esp. at 618–20, 624–25.

The D.C. Circuit compounded its misapprehension of the Clause's coverage in assuming that "legislative

acts" means any internal congressional act. This Court has resoundingly rejected that interpretation: While "[i]t is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts," "[t]he only reasonable reading of the Clause, consistent with its history and purpose, is that it does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs, but not part of the legislative process itself." *United States v. Brewster*, 408 U.S. 501, 525, 528 (1972). In other words, passing an internal rule about security is not necessarily "legislation." Thus, the *Brewster* Court explicitly stated it "has jurisdiction to hear this appeal." *Id.* at 507. While three justices dissented from the majority's construction of the Speech or Debate Clause, none contended the Court lacked jurisdiction to consider the matter. *See id.* at 529–50 (Brennan, J., dissenting), 551–63 (White, J., dissenting.).

Applying a fact-specific analysis in each case, this Court has held the Clause gives absolute immunity for members and staff, *Eastland*, 421 U.S. at 495–96, 507, provided immunity for members, but not staff, *Powell*, 395 U.S. at 506, allowed no immunity for members or staff, *Hutchison v. Proxmire*, 443 U.S. 111, 131, 133 (1979), embraced immunity for core legislative acts like congressmen making speeches on the floor, *United States v. Johnson*, 383 U.S. 169, 185 (1966), but not for non-legislative acts like a staffer conducting an unlawful search on behalf of a committee investigation, *Dombrowski v. Eastland*, 387 U.S. 82, 82–83, 85 (1967), or – similar to the instant case– the House doorkeeper denying a duly elected member access to the House chamber. *Powell*, 395 U.S. at 493–94, 550. Notwithstanding the D.C. Circuit's current

view that these cases are beyond judicial scrutiny, this Court heard all those cases and rendered merits decisions on the underlying constitutional challenges without the Speech or Debate Clause rendering them non-justiciable.

B. The D.C. Circuit's "Jurisdictional Bar" Theory Would Prevent Judicial Review of Significant Constitutional Questions.

House rules, or their implementation, are subject to judicial review where a plausible constitutional violation is alleged. The D.C. Circuit's view of the Speech or Debate Clause creates an absolute jurisdictional bar to judicial consideration of any act simply because it is the subject of a rule or practice internal to a house of Congress. Were that the case, *none* of the following scenarios could be subject to judicial review, as all plainly fall within the Rules and Discipline Clause that the D.C. Circuit deems the final word on what constitutes a "legislative act[:]" "Each House may determine the Rules of its Proceedings" and "punish its Members for disorderly Behaviour." Art. I, § 5, cl.2.

For instance, under the D.C. Circuit's "jurisdictional bar," as discussed *supra*, this Court could not have heard *Powell*, a Member of Congress' challenge to the House's refusal to seat him and pay his salary for reasons not specified in the Constitution. This Court could not have considered an external challenge to the Senate's own understanding of when it was "in session" or what constitutes a "recess." *But see Noel Canning*, 573 U.S. at 530–33, 550–53. The D.C. Circuit's logic would preclude any complaint that a revenue statute did not comply with the Origination Clause. Art. I, § 7, cl. 1. *But see United States v. Munoz-Flores*, 495 U.S. 385, 389–97 (1990) (holding the judiciary had an independent obligation to

ensure that the political branches complied with textual constitutional provisions).

That logic would also have prevented any challenge to a legislative veto, whereby either house of Congress could, by simple internal resolution not subject to bicameralism or presentment, undo an executive branch act. *But see INS v. Chadha*, 462 U.S. 919, 926–27, 941–43, 952, 958 (1983). Third parties would be barred from challenging illegal searches by congressional staffers conducted pursuant to a congressional committee's investigation (itself a legislative act). *But see Dombrowski v. Eastland*, 387 U.S. 82 (1967). Likewise, there could be no liability against congressional employees taking unlawful action pursuant to a vote of the House ordering an unconstitutional act, even though the vote itself is concededly a legislative act. *But see Kilbourne*, 103 U.S. at 181–205.

The D.C. Circuit's interpretation of the Speech or Debate Clause as a bar to judicial review of actions internal to either house of Congress is wholly inconsistent with the Article III obligation to give all constitutional commands effect.

C. No Case from this Court Describes the Speech or Debate Clause as a "Jurisdictional Bar," Although the D.C. Circuit Has Misinterpreted it for Seventeen Years.

The circuit held below, "[T]he Speech or Debate Clause operates as a *jurisdictional bar* when 'the actions upon which a plaintiff sought to predicate liability were legislative acts.'" *Clyde*, Pet. App. 4a (emphasis added) (quoting *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 13 (D.C. Cir. 2006) (en banc) (cleaned up)

(quoting *Doe v. McMillan*, 412 U.S. 306, 318 (1973) (quoting *Gravel*, 408 U.S. at 618)). That assertion cannot be squared with this Court's precedents, particularly in light of the D.C. Circuit's expansive view of what constitute 'legislative acts.'

First, regardless of whether a challenged congressional rule or practice falls within the general rubric of a "legislative act," it must still otherwise be consistent with the rest of the Constitution. *United States v. Ballin*, 144 U.S. 1, 5 (1892) (*reaff'd*, *NLRB v. Noel Canning*, 573 U.S. 513, 551 (2014)). Hence, for example, although the House *debated* and *voted* not to seat Congressman Powell—as "legislative" an act as can be imagined—the Court nonetheless took up his case and found that act to violate another provision of the Constitution, the Qualifications Clause. *Powell*, 395 U.S. at 514, 519–48. Second, though Members of Congress cannot be held liable for voting and speaking in favor of unconstitutional measures, congressional employees can be held liable and enjoined from carrying out such measures. *Gravel*, 408 U.S. at 618–22; *Powell*, 395 U.S. at 506; *Dombrowski*, 387 U.S. at 84; *Kilbourn*, 103 U.S. at 200, 202.

Moreover, neither *McMillan* nor *Gravel* describe the Speech or Debate Clause as being "jurisdictional" in the sense of depriving the courts of the ability to consider the case on the merits. *McMillan* used the term "jurisdiction" to describe the scope of the Clause's reach, including congressional investigations as within the meaning of the "legislative acts" covered by the Clause because it is a core function of the legislative process. 412 U.S. at 313, 318. *Gravel*'s mention of "jurisdiction," moreover, was the opposite of the D.C. Circuit's conclusion here; the Clause is not a complete barrier to adjudicating

anything Congress does internally: "Legislative acts are not all-encompassing." 408 U.S. at 606. "[T]hey must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation." *Id.* (cleaned up).

The D.C. Circuit's error here appears to stem from the loose use of the term "jurisdiction," in tandem with a failure to consistently discern the difference between a "legislative act" and a "congressional act" in its Speech or Debate jurisprudence over the past seventeen years. Describing the Clause as "jurisdictional" is nomenclature created by the *Fields* opinion. *See* 459 F.3d at 13. But the *Fields* court correctly ascertained that the employment discrimination claims alleged therein did not constitute legislative acts (though the Clause might preclude certain acts or evidence from being introduced in support of those claims). *Id.* at 13–14.

In *Howard v. Chief Administrative Officer of the U.S. House of Representatives*, another employment discrimination case against the House, the circuit repeated its "jurisdictional bar" formulation from *Fields*, but again correctly discerned that the Clause was inapplicable where "legislative acts" were not in question. 720 F.3d 929, 412 (2013). The term was used again in *Rangel v. Boehner*, wherein then-Congressman Rangel sued other House Members and employees, challenging the procedures by which the House had censured him. 785 F.3d 19, 21–22 (D.C. Cir. 2015). Correctly applying this Court's (and its own) precedents, the circuit determined that the House's procedures to investigate and censure its Members were legislative acts readily within the Clause's protections

for House Members and their alter ego employees. *Id.* at 23–25. Citing *Howard*, the circuit unnecessarily referred to the Clause's effect as "jurisdictional," *id.* at 22, while also describing it as an "immunity" under this Court's precedents. *Id.* at 23–25.

The circuit again characterized the Clause as "jurisdictional" in *McCarthy v. Pelosi*, a challenge to the House's adoption of an internal rule permitting Members to vote by proxy. 5 F.4th 34, 36–38 (2021). There, however, the circuit appears to have departed from the Speech-or-Debate framework dictated by this Court's precedents. Without further detail, *McCarthy* states the plaintiffs allege, "various constitutional provisions require Members to be physically present on the House floor in order to count towards a quorum and cast votes." *Id.* at 38. The opinion does not discuss the alleged constitutional infirmities. Instead, *McCarthy* asserts that because voting is a legislative act, the Clause jurisdictionally precluded the circuit from even evaluating any constitutional challenge to that voting procedure. *Id.* at 38–39.[4] That conclusion cannot be squared with this

4. Petitioners offer no view of whether *McCarthy*'s ultimate conclusion dismissing the proxy voting challenge was correct; only that the analytical framework was at odds with how this Court has applied the Speech or Debate Clause. If, for example, the *McCarthy* plaintiffs had raised a colorable claim that the Quorum Clause, Art. I, § 5, cl.1, was being violated by the House's Proxy Voting Rule (which cannot be discerned from the circuit's truncated opinion), the courts were obligated to consider the question on the merits. *See Ballin*, 144 U.S. at 5; *Gravel*, 408 U.S. at 620–21. So too, courts must consider whether there are specific textual constitutional provisions that take precedence over more general provisions. *See Stop the Beach Renourishment, Inc. v. Florida Dept. of Env. Protection*, 560 U.S. 702, 721 (2010).

Court's jurisprudence analyzing the Clause's applicability on a case-by-case basis.

More recently, *Massie v. Pelosi* was a challenge to a mandatory mask rule for House Members during COVID-19 that imposed fines upon violators, fines deducted directly from their salaries before they were paid. 72 F.4th 319, 320–21 (2023). The *Massie* plaintiffs brought numerous constitutional challenges to the Mask Rule, including that the fining mechanism violated the Twenty-Seventh Amendment. *Id.* at 31. Adding to *McCarthy*'s analytical errors, the *Massie* court erroneously declared the Mask Rule to be a legislative act simply because it was a congressional activity voted on by the House. *Id.* at 322–23. As explained in Part II, *infra*, this Court has repeatedly defined "legislative acts" as limited to the functions of legislating, such as speaking, voting, communicating, and investigating. Administrative functions within the houses of Congress, regardless of their desirability, are not core legislative activities. The Speech or Debate Clause was inapposite in *Massie*, and the court should have conducted an analysis under *Ballin* as to whether any other constitutional provision precluded the House from regulating hygiene under the Rules Clause. Thus, as in *McCarthy*, the D.C. Circuit failed both to consider the constitutional challenges presented to it (asserting a jurisdictional bar to doing so), and to make the mandatory distinction between Members supporting unconstitutional rules and congressional employees executing them. *Id.* at 322–24. All of *Massie*'s analytical errors were replicated in *Clyde* below, where the D.C. Circuit erroneously declared (1) the purely administrative activities of security screening and payroll deduction to be "legislative acts;" (2) that because the case involved

"legislative acts," the court lacked jurisdiction to consider the constitutional challenges under the Discipline Clause and the Twenty-Seventh Amendment; and (3) jurisdiction was likewise lacking to determine if congressional employees had acted unconstitutionally. Pet. App. 4a–7a.

D. The Speech or Debate Clause Creates a Potential Immunity, Not a Bar to Justiciability, for Congressional Actions.

The Clause creates an individual privilege for Members, not collectively for the outcomes of congressional action. *See In re Sealed Case*, 80 F.4th 355, 375 (D.C. Cir. 2023) (Katsas, J., concurring) (citing, *e.g.*, *Coffin v. Coffin*, 4 Mass. 1, 27 (1808)). This Court characterizes the Speech or Debate Clause as a legislative immunity doctrine. *See, e.g.*, *Powell*, 395 U.S. at 503; *Gravel*, 408 U.S. at 620, 626, 628 n.17; *see also* 648, 660–61 (Brennan, J., dissenting) (also describing the Clause as creating an "immunity"); *McMillan*, 412 U.S. at 307, 314–16, 318, 320, 324–25; *see also* 326–27, 330 (Douglas, J., concurring) (also describing the Clause as creating an "immunity") and 339, 343 (Rehnquist, J., concurring in part and dissenting in part) (same); *Hutchison*, 443 U.S. at 123, 127, 131–32; *see also* 136 (Brennan, J., dissenting) (also describing the Clause as creating an "immunity"). Immunity doctrines are generally considered *a waivable defense, not an absolute jurisdictional limitation* on a court's judicial authority. *Siegert v. Gilley*, 500 U.S. 226, 231 (1991) ("qualified immunity is a defense"); *Gravel*, 408 U.S. at 621–22 (suggesting that a Member of Congress could waive or repudiate an aide's Speech or Debate immunity); *see also United States v. Heltoski*, 442 U.S. 477, 493 (1979) (suggesting that an individual member of Congress might be able to waive Speech or Debate immunity "by

an explicit and unequivocal expression"). As this Court's precedents demonstrate, a party's invocation of the Speech or Debate Clause is no impediment to a court's exercise of jurisdiction over the case, or to its justiciability. Like any other constitutional provision, a court must determine if and how it applies to the facts at hand.

II. ADMINISTERING PAYROLL & SECURITY SCREENING ARE NOT CORE LEGISLATIVE ACTS COVERED BY THE SPEECH OR DEBATE CLAUSE.

The congressional staff functions at issue—conducting payroll deductions and security screenings—are purely administrative in nature, and not "legislative acts" within the Speech or Debate Clause's ambit. The constitutional test for speech or debate tracks the common-sense notion that the vast array of administrative functions performed by the House do not fall within the Speech or Debate Clause unless they are integral to the core legislative functions of deliberation and communication among members concerning the public's business. The Clause simply does not reach conduct "that is in no wise [sic] related to the due functioning of the legislative process." *Gravel*, 408 U.S. at 625.

In general, the Supreme Court has followed a functional approach to legislative immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 810–11 (1982) (holding the courts' functional approach to immunity cannot extend that immunity beyond the core purpose being protected). The Speech or Debate Clause does not insulate legislative functionaries carrying out non-legislative tasks from suit. *McMillan*, 412 U.S. 306, 315 (1973). Congressional

employees may accrue Speech or Debate immunity from suit "insofar as the conduct of the [employee] would be a protected legislative act if performed by the Member himself."[5] *Gravel*, 408 U.S. at 618. "The key consideration, the Supreme Court cases teach, is the *act* presented for examination, not the *actor*." *Walker v. Jones*, 733 F.2d 923, 929 (D.C. Cir. 1984) (Ginsburg, J.) (emphasis added).

"The heart of the [Speech or Debate] Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an *integral part of the deliberative and communicative processes* by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625 (emphasis added).

Clause-protected "legislative acts" include preparing committee reports, conducting hearings and investigations, committee staff using documents for official business, communications between a congressman and his staff regarding legislative business, selecting witnesses, bill drafting, staff members' preparations for legislative activities, and, of course, speaking within the House, and voting. *See Rangel*, 785 F.3d at 24–25 (collecting cases); *Johnson*, 383 U.S. at 185.

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5. The D.C. Circuit defined "legislative acts" as those "regulat[ing] the conduct of Members on the House floor." *Clyde*, 2023 WL 6939987 at *2 (quoting *Massie*, 72 F.4th at 323). That is not a definition supported by this Court's Speech or Debate Clause jurisprudence.

By contrast, numerous activities well within the normal course of congressional functions have been held *not* to be protected by the Speech or Debate Clause: contacting executive branch employees and agencies and seeking to influence them, privately publishing documents obtained in the course of congressional duties, *Gravel*, 408 U.S. at 624–26; assisting in obtaining government contracts, preparing constituent newsletters, *Brewster*, 408 U.S. at 512–13; as well as press releases, speeches and documents delivered outside of Congress. *McMillan*, 412 U.S. at 317. Moreover, non-legislative functions occurring within the legislative branch, such as an opening prayer by a chaplain employed by the House, or personnel actions in the course of superintending congressional food service facilities, are also plainly not subject to the Clause's immunity. *See, e.g.*, *Barker v. Conroy*, 921 F.3d 1118 (D.C. Cir. 2019); *Walker*, 733 F.2d at 930–32.

As then-Judge Ginsburg pointed out in *Walker,* the argument that every administrative function performed by the House falls within the Speech or Debate Clause is "far-fetched." 733 F.2d at 931. The Clause's "fundamental purpose" is to "free the legislator from executive and judicial oversight that realistically threatens to control his conduct *as a legislator*." *Id.* (quoting *Gravel*, 408 U.S. at 618) (emphasis added). Services "not peculiar to a Congress member's work qua legislator may advance a member's general welfare," but is not "legislative in character," and "not reasonably described as work that significantly informs or influences our nation's laws." *Walker*, 733 F.2d at 931 (cleaned up).

The D.C. Circuit pointed to no contrary case from this Court suggesting that administrative functions of security

and payroll might constitute "legislative acts." Nor could it, because notwithstanding its contrary suggestion that the Clause extends to every internal House act resulting from its rules, "the Clause has not been extended beyond the legislative sphere." *Gravel*, 408 U.S. at 624–25.

Payroll operations are not remotely "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings," nor do they constitute "other matters which the Constitution places within the jurisdiction of the House." *Id.*

The D.C. Circuit's holding that House payroll administration is a "legislative act" conflicts directly with the Third Circuit's determination on that same question in *In re Grand Jury Proceedings*, 563 F.2d 577 (1977). *Grand Jury* squarely held that legislative payroll is a merely ministerial activity not within the Clause's ambit. *Id.* at 585. Construing the Pennsylvania Constitution's Speech or Debate Immunity as being the same found in the Federal Constitution, the Third Circuit rejected the Pennsylvania Senate's contention that it was immune from providing its payroll records in response to a grand jury subpoena. *Id.* "Such an expansion of the privilege would give it wider coverage than the Speech or Debate Clause and provide more of a safeguard than is necessary to preserve legislative independence and integrity." *Id.* While payroll evidence is "tangentially related to the legislative function, [it] is so peripheral as not to be covered by the privilege. *The legislative function is separate and distinct from that of compensation of the office and the ministerial work to prepare payrolls*[.]" *Id.* (emphasis added). Rejecting the D.C. Circuit's notion here that payroll is a "legislative

act," *Grand Jury* concluded, "[t]his clerical work must be performed regardless of the position that any legislator may wish to take on issues of public importance." *Id.*

"The only reasonable reading of the Clause, consistent with its history and purpose, is that it does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself." *Brewster*, 408 U.S. at 528. Administering payroll may well be an important function for House operations, but the function's importance does not convert it into a legislative activity, much less speech or debate. *See Walker*, 733 F.2d at 931. Accordingly, the Speech or Debate Clause has no applicability to the payroll deduction complained of here.

The distinction between legislative acts (where Clause immunity applies), as opposed to their execution (where it does not), is well-established. As then-Judge Ginsburg pointed out, "The Supreme Court has drawn a key distinction, 'between legislative speech or debate and associated matters such as voting and committee reports and proceedings,' on the one hand, and 'executing a legislative order,' or 'carrying out legislative directions,' on the other hand. The former, the Supreme Court has emphasized, is what the Speech or Debate Clause shields." *Walker*, 733 F.2d at 931–32 (cleaned up) (citing *Gravel*, 408 U.S. at 620–21; *Doe v. McMillan*, 412 U.S. 306, 314–15 (1973)). Carrying out a decision, "even if the decision itself is properly called 'legislative,' is not cloaked with Speech or Debate immunity, for execution or carrying out directions post-dates what the Clause protects—the *process* leading up to the issuance of legislative directions." *Walker*, 733 F.2d at 932 (emphasis in original). Members of Congress

may have immunity for discussing and voting for an unconstitutional rule, like the automatic fine deduction at issue here. But congressional employees, like the Sergeant at Arms and Chief Administrative Officer, are not immune from a judicial order forbidding the rule's implementation.

III. A STRAIGHT-FORWARD TEXTUAL INTERPRETATION OF THE TWENTY-SEVENTH AMENDMENT SHOWS THAT THE FINES "VARIED" MEMBERS' ACTUAL COMPENSATION, AND THIS COURT SHOULD REVIEW THE MEANING OF THAT CONSTITUTIONAL PROVISION

As argued above, this Court can and should hear cases about legislative functions where a specific provision of the Constitution has been alleged to have been violated. The Members here have had their compensation "varied," which, at a minimum, is contrary to the text of the Twenty-Seventh Amendment.

A. A Primary Purpose of the Twenty-Seventh Amendment is to Prevent Congressional Salaries From Being Decreased, a Practice the Founders Expressly Recognized Could Be Used to Threaten the Integrity and Independence of Members and Dissuade Individuals of Modest Means from Serving in Congress.

What is today known as the Twenty-Seventh Amendment began its odyssey to enactment 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. Two more states ratified it through 1978. *Id.* at 534, 537. A cascade of state ratifications began in 1983, and it became the Twenty-Seventh Amendment to the Constitution in 1992. *Id.* at 537, 539 n.214.

While the Amendment is commonly thought of today as a limitation on Congress's ability to vote itself a pay raise, that was but one animating purpose. Rather, it prohibits any law "*varying* the compensation," not just those that increase it.

The Founders were greatly concerned that diminishing congressional pay could be used to pressure Members from exercising independent judgment and to prevent qualified men of modest means from serving in the new national legislature. The founding generation was well-aware of the practice of House of Commons candidates promising to reduce (or even eliminate) their wages to garner popularity with their constituents, which had that very effect. *Sleeper* at 500–01.[6] Americans in the 1770s and 1780s found such conduct debasing to the notion of representative government. *Id.* at 501.[7]

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

7. 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).

During the Continental Congresses and into the Articles of Confederation period, state legislatures responsible for paying their congressional delegates used that leverage to punish Congress for ignoring state interests, and those delegates were an easy target for fiscal belt-tightening during the post-Revolution's poor economy. *Sleeper* at 501–02.[8] Delegates endured lengthy waits to be paid, if at all. "Even those 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.[9]

Hence, the new national legislature's independence and stability was a major concern at the 1787 Constitutional Convention. *Id.*[10] In discussing how congressional pay should be set in the context of debating what eventually became known as the Constitution's "Ascertainment Clause,"[11] the delegates avidly debated the potential

8. 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).

9. *See* sources cited *supra,* note 8.

10. 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).

11. "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.

harms of insufficient congressional remuneration, or its potential diminishment.

Echoing the well-known concern about House of Commons candidates seeking voter favor by promising to cut their pay, Massachusetts delegate Elbridge Gerry noted as "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." 1 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 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.* (emphasis added).

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 House of Commons' sorry history of manipulating pay. Congressman 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." Debates in the House of Representatives (Aug. 14, 1789), in The Congressional Register, Aug. 14, 1789.

Plainly, Revolutionary dismay over Parliamentary reductions in pay, the Founders' understanding of the way national legislators could be dissuaded from independent judgment, and the threat of excluding those of modest means from public service all informed the Twenty-Seventh Amendment's enactment. Those critical concerns are precisely what underlie this case: salary manipulation by the House Democratic Majority to deprive Republican Members of their political independence and financial ability to serve. "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 pay, and that such a decrease would be a real injury providing standing under the Twenty-Seventh Amendment). The Amendment was enacted not just to prevent congressional self-dealing by pay increases, but to protect Members from pay *decreases* being used as an instrument for either political pressure or exclusion.

B. House Resolution 73 Varies Compensation in Violation of the Twenty-Seventh Amendment.

House Resolution 73 "varies compensation" of the Members by specifically and explicitly targeting their salary. "If a Member… against whom a fine is imposed

by the Sergeant-at-Arms under [this resolution] has not paid the fine prior to the expiration of the [relevant time period], the Chief Administrative Officer *shall* deduct the amount of the fine from the net salary otherwise due the Member." H.Res. 73, § 1(c)(1) (emphasis added). The fines are specifically directed against Members' salaries; Section 1(d) of the Resolution explicitly forecloses other ways Members might have paid the fines in question—leaving only their salary or other personal funds to answer. This ensures maximum pressure is brought to bear on Members who rely on their Congressional salary as their primary means of support.

Respondents mistakenly argued below that "fines imposed and collected pursuant to House Resolution 73 do not change the 'compensation for services' of House Members." While the fines may not change the underlying salary level of $174,000 per annum, it defies logic (and math) to suggest that deducting money—$5,000 or $15,000 per Congressman—does not vary, i.e., reduce, those Members' actual compensation for their services. The fine reduces the Member's salary before he ever receives it.

The Amendment's protection against congressional salary diminution mirrors the similar protection provided by the Judicial Compensation Clause. Art. III, § 1. As this Court observed in *United States v. Hatter*, which concerned the constitutionality of particular tax increases upon certain classes of then-sitting federal judges, the Clause's purpose is to protect judicial independence from Congress by preventing Congress from reducing judicial compensation. 532 U.S. 557 (2001). Likewise, a foundational purpose of the Twenty-Seventh Amendment is to prevent congressional majorities from coercing congressional minorities with salary reductions. *Hatter*

speaks to that threat in the judicial context, observing that "discriminatory taxes" or other "indirect measures that . . . reduce take-home pay" would violate the Clause's protection against salary reduction. *Id.* at 569, 571, 576. That is precisely what is occurring here in the legislative context: indirect measures, i.e., fines, are being used to reduce the take-home pay of targeted Representatives, one of the very abuses the Twenty-Seventh Amendment is designed to prevent. Indeed, a majority of one House of Congress has accomplished by mere internal rule that which could not be accomplished by statute: Reduction of targeted Members' salaries without an intervening election.

Before 1992, Congress plainly had the authority under the Discipline Clause to fine Members and deduct those fines directly from Members' salaries. The Twenty-Seventh Amendment now precludes that collection method, at least for punitive fines deducted without a Member's consent.[12] Rights specifically identified in the Constitution take precedence over more general provisions. *See, e.g.*, *Albright v. Oliver*, 510 U.S. 266, 273 (1994). The Twenty-Seventh Amendment prohibits deducting fines from a Member's salary before he receives it because that diminution is a variance of his compensation, regardless of how it is labeled or the rationale for doing so. Like any other creditor, the House may collect its fines by means other than salary reductions.

12. Petitioners take no position here on salary deductions for absences, restitutional fines, or individual court-ordered garnishments, as such circumstances may be governed by considerations not relevant to this case.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED OCTOBER 20, 2023

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5263
September Term, 2023

ANDREW S. CLYDE, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE U.S. HOUSE OF REPRESENTATIVES; LOUIE GOHMERT, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE U.S. HOUSE OF REPRESENTATIVES; LLOYD SMUCKER, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE U.S. HOUSE OF REPRESENTATIVES,

Appellants,

v.

WILLIAM J. WALKER, IN HIS OFFICIAL CAPACITY AS SERGEANT AT ARMS OF THE U.S. HOUSE OF REPRESENTATIVES; CATHERINE SZPINDOR, IN HER OFFICIAL CAPACITY AS CHIEF ADMINISTRATIVE OFFICER OF THE U.S. HOUSE OF REPRESENTATIVES,

Appellees.

FILED ON: OCTOBER 20, 2023

Appendix A

Appeal from the United States District Court for the District of Columbia (No. 1:21-cv-01605)

Before: SRINIVASAN, *Chief Judge*, and RAO and CHILDS, *Circuit Judges*.

JUDGMENT

This case was considered on the record from the United States District Court for the District of Columbia and on the briefs and oral arguments of the parties. The court has afforded the issues full consideration and determined they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is hereby:

ORDERED and **ADJUDGED** that the district court's order be affirmed.

* * *

In February 2021, the United States House of Representatives adopted House Resolution 73, which required Members to complete security screening before entering the House Chamber and authorized fines for any Member who failed to complete such screening. H. Res. 73, 117th Cong. § 1(a)(1), 167 Cong. Rec. H274–75 (daily ed. Feb. 2, 2021).[1] Representatives Andrew Clyde, Louie Gohmert, and Lloyd Smucker refused to complete the mandated security screening before entering the House

1. H.R. 73 expired at the end of the 117th Congress.

Chamber.[2] Pursuant to the Resolution, the Sergeant at Arms levied fines against each Representative, which were deducted from their net salaries by the Chief Administrative Officer.

The Representatives sued the Sergeant at Arms and the Chief Administrative Officer. They maintained the Resolution violated the Twenty-Seventh Amendment and the Discipline Clause and challenged its enforcement. The district court held the suit barred by the Speech or Debate Clause and dismissed for lack of subject matter jurisdiction. *Clyde v. Walker*, 619 F. Supp. 3d 193, 199–201 (D.D.C. 2022). The Representatives timely appealed.[3]

I.

The Representatives first contend the district court erred when it dismissed their complaint for lack of subject matter jurisdiction. They maintain that Speech or Debate Clause immunity operates as an affirmative defense rather than as a jurisdictional bar.[4] We disagree.

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2. These facts are taken from the complaint, which we accept as true for purposes of reviewing the district court's order granting the Sergeant at Arms and Chief Administrative Officer's motion to dismiss. *See Bernhardt v. Islamic Republic of Iran*, 47 F.4th 856, 861 (D.C. Cir. 2022).

3. Although Louie Gohmert is no longer a representative, he faces an ongoing pocketbook injury—a $5,000 fine—so his claims are not moot. *See, e.g.*, *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

4. This case concerns only the Speech or Debate Clause's immunity from suit and does not implicate the other protections recognized as flowing from the Clause, such as its evidentiary

Appendix A

The Speech or Debate Clause provides: "Senators and Representatives ... for any Speech or Debate in either House ... shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1. In our system of separated powers, the Clause is "one manifestation of the [Constitution's] 'practical security' for ensuring the independence of the legislature." *United States v. Johnson*, 383 U.S. 169, 179 (1966) (quoting THE FEDERALIST NO. 48, at 332 (James Madison) (Jacob E. Cooke ed., 1961)). The Clause provides this security by "prevent[ing] intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Gravel v. United States*, 408 U.S. 606, 617 (1972).

"[T]he Speech or Debate Clause operates as a jurisdictional bar when 'the actions upon which a plaintiff sought to predicate liability were legislative acts.'" *Fields v. Off. of Eddie Bernice Johnson*, 459 F.3d 1, 13 (D.C. Cir. 2006) (en banc) (cleaned up) (quoting *Doe v. McMillan*, 412 U.S. 306, 318 (1973)); *see also In re Sealed Case*, 80 F.4th 355, 362 (D.C. Cir. 2023); *Massie v. Pelosi*, 72 F.4th 319, 321 (D.C. Cir. 2023); *Rangel v. Boehner*, 785 F.3d 19, 22 (D.C. Cir. 2015); *Howard v. Off. of Chief Admin. Officer of U.S. House of Representatives*, 720 F.3d 939, 941 (D.C. Cir. 2013). The Clause's immunity from suit is jurisdictional and prohibits the judiciary from "question[ing]" speech, debate, or legislative acts that fall within the Clause's coverage. U.S. CONST. art. I, § 6, cl. 1.

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and testimonial privileges. Those privileges shield Members against certain forms of questioning but do not deprive the court of jurisdiction. *See Massie v. Pelosi*, 72 F.4th 319, 321 n.1 (D.C. Cir. 2023).

II.

We next consider whether the challenged acts fall within the Clause's ambit. The Representatives maintain the defendants may be sued because issuing a fine and deducting it from paychecks were merely "administrative activities that are not speech, debate, or core legislative [acts]."

"Beyond actual speech or debate, an act is considered 'legislative' only if it is 'an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to' either: (1) 'the consideration and passage or rejection of proposed legislation' or (2) 'other matters which the Constitution places within the jurisdiction of either House.'" *Massie*, 72 F.4th at 322 (quoting *Gravel*, 408 U.S. at 625).

The challenged acts are "legislative" within the meaning of *Gravel*'s second prong because they involve matters the Constitution places within the jurisdiction of the House. The Constitution vests "[e]ach House" with the authority to "determine the Rules of its Proceedings" and "punish its Members for disorderly Behaviour." U.S. CONST. art. I, § 5, cl. 2. We have recently held that the adoption and execution of a House Resolution are legislative acts implicating the House's power pursuant to the Rules and Discipline Clauses. In *McCarthy v. Pelosi*, Representatives challenged a House Resolution permitting voting by proxy. 5 F.4th 34, 38 (D.C. Cir. 2021). We held that "the House adopted its rules for proxy voting under its power to 'determine the Rules of its Proceedings.'" *Id.* at 40 (quoting U.S. CONST. art. I, § 5, cl. 2). Although the challenged acts

"involve[d] *implementation* of proxy voting pursuant to the Resolution," they were nonetheless "integral" to the "processes by which Members participate in … House proceedings." *Id.* at 39 (emphasis added) (quoting *Gravel*, 408 U.S. at 625). And in *Massie*, Representatives challenged a House Resolution that required wearing masks in the House Chamber, and, as in this case, violations resulted in fines deducted from Members' salaries. 72 F.4th at 321. We held that the Resolution was a legislative act because, "like the proxy voting rule, [the mask rule] regulates the conduct of Members on the House floor." *Id.* at 323. And we emphasized that fines for violations of the Resolution are "an aspect of Congress' power to 'punish its Members for disorderly Behaviour' … that may not be questioned in this court." *Id.* (quoting U.S. CONST. art. I, § 5, cl. 2).

The suit here is indistinguishable from *Massie* and *McCarthy*. The House enacted Resolution 73 pursuant to the Rules Clause, and the Resolution "regulates the conduct of Members on the House floor." *Massie*, 72 F.4th at 321. When the Representatives failed to comply with the security procedures required by the Resolution, the Sergeant at Arms issued a fine and the Chief Administrative Officer deducted the fine from their paychecks. "The [Sergeant at Arms] engaged in a legislative act when he fined the Representatives for violating the Resolution, and the Chief Administrative Officer engaged in a legislative act when she deducted those fines from the Representatives' salaries." *Id.* at 323. Both acts are protected by the Speech or Debate Clause.

The Representatives resist this conclusion and maintain that House Rules are reviewable whenever "a

plausible constitutional violation is alleged." We rejected that argument in *Massie*, and we do so again today. *Id.* at 323–24. To safeguard congressional independence, the Clause's "immunity from suit is 'absolute,'" shielding protected legislative acts regardless of their alleged unconstitutionality. *Id.* (quoting *Rangel*, 785 F.3d at 24); *see also In re Sealed Case*, 80 F.4th at 362; *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 509–10 (1975).

* * *

When executing House Resolution 73, the defendants were engaged in legislative acts. They are therefore entitled to Speech or Debate Clause immunity, and we lack jurisdiction to consider the merits of the Representatives' claims.

For the foregoing reasons, we affirm. Pursuant to D.C. Circuit Rule 36(d), this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. See FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED AUGUST 1, 2022

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 21-1605 (TJK)

ANDREW S. CLYDE *et al.*,

Plaintiffs,

v.

WILLIAM J. WALKER *et al.*,

Defendants.

August 1, 2022, Decided;
August 1, 2022, Filed

MEMORANDUM OPINION

Three Members of the United States House of Representatives sued the Sergeant at Arms of the House of Representatives and the Chief Administrative Officer of the House of Representatives—collectively, the "House Officers"—to challenge a House Rule requiring Members to pass through security screening before entering the House Chamber in the United States Capitol. The House Officers move to dismiss. As explained further

below, the Constitution's Speech or Debate Clause bars the Members' claims, so the Court will grant the House Officers' motion and dismiss this case for lack of subject matter jurisdiction.

I. Background

This Court and others have recounted the details about the attack on the United States Capitol on January 6, 2021. *See, e.g., Republican Nat'l Committee v. Pelosi*, No. 22-cv-659 (TJK), 2022 U.S. Dist. LEXIS 78501, 2022 WL 1294509, at *1 (D.D.C. May 1, 2022); *Trump v. Thompson*, 20 F.4th 10, 17-19, 455 U.S. App. D.C. 49 (D.C. Cir. 2021). About a week after that, Acting Sergeant at Arms of the House of Representatives Timothy Paul Blodgett issued a memorandum requiring House Members, among others, to undergo security screening when entering the House Chamber inside the Capitol. *See* 167 Cong. Rec. H119, H119 (daily ed. Jan. 11, 2021); ECF No. 14 at 13 & n.4.

On February 2, 2021, the House adopted House Resolution 73, formally imposing this security-screening requirement and establishing a protocol for its enforcement. *See* H.R. Res. 73, 117th Cong. § 1(a)(1), 167 Cong. Rec. H265, H274-75 (daily ed. Feb. 2, 2021). The Resolution instructs the Sergeant at Arms to fine a Member failing to comply with the security-screening requirement $5,000 for a first offense and $10,000 for any subsequent offense. *Id.* § 1(a)(2). Any Member fined may appeal the fine to the House Committee on Ethics, and such fine will be upheld "unless the appeal is agreed to by a majority of the Committee." *Id.* § 1(b)(1), (b)(2). If the fine is

upheld and the Member does not pay it within a certain period, the Chief Administrative Officer of the House of Representatives—Catherine Szpindor, at all times relevant here, *see* 167 Cong. Rec. H1, H9 (daily ed. Jan. 3, 2021)—is instructed to "deduct the amount of the fine from the net salary otherwise due the Member." H.R. Res. 73, § 1(c)(1). The Resolution authorizes the Sergeant at Arms and the Chief Administrative Officer to "establish policies and procedures" to implement it. *Id.* § 1(e). The Acting Sergeant at Arms allegedly implemented the Resolution by installing freestanding magnetometers at the entrances to the House Chamber and equipping security personnel stationed at those entrances with handheld magnetometers. ECF No. 9 ¶ 11.

On February 3, Representative Andrew Clyde allegedly entered the House Chamber without passing through a magnetometer or being screened by security personnel, and a few days later the Acting Sergeant at Arms issued him a $5,000 fine for violating the Resolution. ECF No. 9 ¶ 12. On February 5, Representative Clyde allegedly entered the House Chamber by passing through a magnetometer, but he refused to be "detained for a secondary screening" by security personnel, and a few days later the Acting Sergeant at Arms issued him a $10,000 fine for violating the Resolution. *Id.* ¶ 18. Representative Clyde appealed the fines, but the Committee on Ethics upheld them. *Id.* ¶ 19.

On February 4, Representative Louie Gohmert allegedly went through security screening "without incident" before entering the House Chamber, later exited

the House Chamber briefly "in full view" of the security personnel stationed at that exit, then reentered the House Chamber without submitting to another security screening. ECF No. 9 ¶ 21. The next day, the Acting Sergeant at Arms issued him a $5,000 for violating the Resolution. *Id.* ¶ 22. Representative Gohmert appealed the fine, but the Committee on Ethics upheld it. *Id.* ¶ 23.

On May 19, Representative Lloyd Smucker allegedly entered the House Chamber hurriedly to vote on a bill he feared he had "only seconds" left to vote on, telling security personnel stationed at the entrance he passed through that he would vote "within their line of sight" and then return to go through security screening. ECF No. 9 ¶ 24.[1] The next day, the Sergeant at Arms—by then, William J. Walker had been sworn into the office, *see* 167 Cong. Rec. H2111, H2111 (daily ed. Apr. 26, 2021)—issued him a $5,000 fine for violating the Resolution. ECF No. 9 ¶ 25. Representative Smucker appealed the fine, but the Committee on Ethics upheld it. *Id.* ¶ 26.

Representatives Clyde, Gohmert, and Smucker then sued the Sergeant at Arms and the Chief Administrative Officer in their official capacities. ECF No. 9 at 1-2; *id.* ¶¶ 4-5. They brought three constitutional claims to challenge implementation of the Resolution: (1) a claim against the Sergeant at Arms under the Arrest Clause, *id.* ¶¶ 38, 40-41 (discussing U.S. Const. art. I, § 6, cl. 1); (2) a claim against the Sergeant at Arms under the

1. Several Members, including Representative Clyde, have allegedly missed votes because the security screening delayed their entry into the House Chamber. ECF No. 9 ¶¶ 28-29.

Discipline Clause, *id.* ¶¶ 37, 39, 41 (discussing U.S. Const. art. I, § 5, cl. 2); and (3) a claim against both the Sergeant at Arms and the Chief Administrative Officer under the Twenty-Seventh Amendment, *id.* ¶¶ 30-31, 34 (discussing U.S. Const. amend. XXVII). They sought declaratory and injunctive relief. *Id.* ¶¶ 35, 41.

The House Officers move to dismiss, arguing that the Speech or Debate Clause of Article I, Section 6 of the Constitution deprives this Court of subject matter jurisdiction over the Members' claims and that, even if not, the Members have failed to state a claim. *See* ECF No. 14. The Members oppose the motion. *See* ECF No. 15.[2]

II. Legal Standard

"Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). "It is to be presumed that a cause lies outside this limited jurisdiction," and the "party asserting jurisdiction" bears the burden of "establishing the contrary." *See id.*; *Moran v. U.S. Capitol Police Bd.*, 820 F. Supp. 2d 48, 53 (D.D.C. 2011) (citing

2. The Members also move for a hearing on the motion. ECF No. 15 at 43; ECF No. 17; *see* LCvR 7(f). Whether to conduct one is "within the discretion of the Court." LCvR 7(f). Here, holding a hearing will not assist the Court's resolution of the motion because the parties' filings sufficiently address the clear, purely legal issues presented. *See Ndoromo v. Barr*, 486 F. Supp. 3d 388, 395 (D.D.C. 2020); *Borum v. Brentwood Vill., LLC*, No. 16-cv-1723 (RC), 2020 U.S. Dist. LEXIS 54840, 2020 WL 1508906, at *15 n.25 (D.D.C. Mar. 30, 2020). Thus, the Court will deny the Members' motion.

Lujan v. Def. of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). The Court must dismiss an action if it lacks subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1), (h)(3). When a defendant raises a jurisdictional immunity from suit as a bar to claims, the plaintiff must overcome that defense to avoid dismissal. *See Jackson v. Bush*, 448 F. Supp. 2d 198, 200 (D.D.C. 2006).

III. Analysis

The House Officers move to dismiss the Members' claims against them for lack of subject matter jurisdiction under the Speech or Debate Clause. The Clause bars the Members' claims, so the Court will grant the motion and dismiss the case for lack of subject matter jurisdiction.

The Speech or Debate Clause provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. Its purpose is "to preserve the independence and thereby the integrity of the legislative process." *United States v. Brewster*, 408 U.S. 501, 524, 92 S. Ct. 2531, 33 L. Ed. 2d 507 (1972). It "serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502, 95 S. Ct. 1813, 44 L. Ed. 2d 324 (1975) (internal quotation marks omitted). When it applies, the Clause provides "absolute immunity from civil suit," including suits seeking only declaratory or injunctive relief, even in the face of allegations that the challenged actions were nefariously motivated or violated the Constitution. *See*

Rangel v. Boehner, 785 F.3d 19, 23, 415 U.S. App. D.C. 60 (D.C. Cir. 2015); *Eastland*, 421 U.S. at 496, 502-03, 508-10. And in our Circuit, the Clause is a subject matter jurisdictional bar. *See Judicial Watch, Inc. v. Schiff*, 998 F.3d 989, 993, 452 U.S. App. D.C. 308 (D.C. Cir. 2021).

It is "well established that the Clause's protections extend to Congressional aides and staff." *McCarthy v. Pelosi*, 5 F.4th 34, 39, 453 U.S. App. D.C. 305 (D.C. Cir. 2021), *cert. denied*, 142 S. Ct. 897, 211 L. Ed. 2d 604 (2022); *see also Eastland*, 421 U.S. at 495, 512; *Rangel*, 785 F.3d at 25. This is because the "key consideration" under the Clause "is the act presented for examination, not the actor." *McCarthy*, 5 F.4th at 39 (internal quotation marks omitted).

As for the acts protected by the Clause, the "Supreme Court has consistently read the Speech or Debate Clause 'broadly' to achieve its purposes." *See Rangel*, 785 F.3d at 23 (quoting *Eastland*, 421 U.S. at 501). Thus, although the Clause speaks of "Speech or Debate," it protects all "legislative acts." *Doe v. McMillan*, 412 U.S. 306, 312, 93 S. Ct. 2018, 36 L. Ed. 2d 912 (1973). And "legislative acts for purposes of Speech-or-Debate-Clause immunity include both (i) matters pertaining 'to the consideration and passage or rejection of proposed legislation,' and (ii) 'other matters which the Constitution places within the jurisdiction of either House.'" *McCarthy*, 5 F.4th at 40 (quoting *Gravel v. United States*, 408 U.S. 606, 625, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972)). In other words, whether an act is protected by the Clause turns on whether the act is "integral" to the "business" constitutionally committed

to the House—legislating, of course, but also other matters such as executing internal rules and disciplining Members. *See Walker v. Jones*, 733 F.2d 923, 929, 236 U.S. App. D.C. 92 (D.C. Cir. 1984); *see also Consumers Union of U.S., Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341, 1343, 1351, 169 U.S. App. D.C. 370 (D.C. Cir. 1975) (citing the Rule-making Clause, U.S. Const. art. I, § 5, cl. 2); *Rangel*, 785 F.3d at 23 (citing the Discipline Clause, U.S. Const. art. I, § 5, cl. 2).

Here, each challenged act of the House Officers qualifies as a legislative act. *See Gravel*, 408 U.S. at 625. Thus, the Speech or Debate Clause bars the Members' claims.

First, the Members assert that the security screening violates the Arrest Clause because it is an "arrest" absent "treason," "felony," or "breach of the peace." *See* U.S. Const. art. I, § 6, cl. 1 ("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 . . . ."). But this security screening is a legislative act. For one, being performed at the entrances to the House Chamber, the security screening regulates "the very atmosphere in which lawmaking deliberations occur," which courts have found makes an act legislative. *See Walker*, 733 F.2d at 930 (discussing *Consumers Union*, 515 F.2d at 1347 & n.12, 1350); *see also Massie v. Pelosi*, 590 F. Supp. 3d 196, 2022 U.S. Dist. LEXIS 41944, 2022 WL 703942, at *12-14 (D.D.C. Mar. 9, 2022), *appeal docketed*, No. 22-5058 (D.C.

Cir. Mar. 14, 2022) (concluding the same about a House mask mandate inside the House Chamber). Also, the screening is done in "execution of internal rules" of the House—the Resolution. *See Consumers Union*, 515 F.2d at 1351. And the "'execution of internal rules'" like this one "is 'legislative.'" *See Rangel*, 785 F.3d at 24 (quoting *Consumers Union*, 515 F.2d at 1351). Thus, the security screening qualifies as a legislative act, and the Members' Arrest Clause claim against the Sergeant at Arms is barred. *See McCarthy*, 5 F.4th at 40.

Second, the Members assert that fining them for violating the Resolution amounts to "punish[ment]" absent any "disorderly behavior" and thus is unconstitutional under the Discipline Clause. *See* U.S. Const. art. I, § 5, cl. 2 ("Each House may . . . punish its members for disorderly behavior . . . ."). But imposing these fines also qualifies as a legislative act. At the very least, this is so because the fines are imposed in "execution of internal rules" of the House and to discipline Members for violating those internal rules. *See Consumers Union*, 515 F.2d at 1351; *Rangel*, 785 F.3d at 24. Also, the fines are an integral "part of the scheme" that the House has adopted to regulate "Members' behavior" in the lawmaking "'atmosphere'"—it is the mechanism that the House has chosen to enforce the security-screening requirement. *See Massie*, 2022 U.S. Dist. LEXIS 41944, 2022 WL 703942, at *11-12, *14 (quoting *Walker*, 733 F.2d at 930). That the fines at issue were subsequently "ratified" by the House Committee on Ethics confirms "their occurrence within the scope of the legislative process." *See Consumers Union*, 515 F.2d at 1351. Thus, the imposition of these fines is a legislative

act, and the Members' Discipline Clause claim against the Sergeant at Arms is barred. *See McCarthy*, 5 F.4th at 40.

Third, the Members assert that imposing fines on them and then deducting those fines from their salaries "var[ies]" their "compensation" before an "election of Representatives . . . intervened" following adoption of the "law" under which the fines are imposed and deducted, violating the Twenty-Seventh Amendment. *See* U.S. Const. amend. XXVII ("No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened."). But these actions too qualify as legislative acts. As just discussed, the fines are imposed in "execution of internal rules" of the House and to discipline Members for violating those internal rules, as is the assessment of the fines. *See Consumers Union*, 515 F.2d at 1351; *Rangel*, 785 F.3d at 24. Further, the imposition and deduction of these fines are an integral "part of the scheme" that the House has adopted to regulate "Members' behavior" in the lawmaking "'atmosphere'"—they are the mechanisms that the House has chosen to enforce the security-screening requirement. *See Massie*, 2022 U.S. Dist. LEXIS 41944, 2022 WL 703942, at *11-12, *14 (quoting *Walker*, 733 F.2d at 930). Thus, the House Officers' imposition and assessment of fines are "legislative acts," and the Members' Twenty-Seventh Amendment claim against the House Officers is barred. *See McCarthy*, 5 F.4th at 40.

The Members raise several counterarguments, but all are foreclosed by precedent.

First, the Members contend that the acts they challenge—"security screening" and "administering payroll"—are not legislative acts for Speech or Debate Clause purposes because they are "administrative functions." ECF No. 15 at 16, 19. Without question, "[a]uxiliary services" provided by congressional staff that are "not closely connected to the business" constitutionally committed to the House—for example, attending to "food service, medical care, physical fitness needs, parking, and haircutting" for Members—do not qualify as legislative acts even though they "promote [legislators'] comfort and convenience in carrying out Article I business." *See Walker*, 733 F.2d at 929, 931. But in characterizing the acts they challenge as generic "administrative functions of security and payroll," the Members ignore their context. *See* ECF No. 15 at 19. As discussed above, the security screening, fining, and salary deductions challenged here have a direct nexus to, and are part of an overall scheme regulating, Members' behavior in the lawmaking atmosphere on the House floor. *See also Massie*, 2022 U.S. Dist. LEXIS 41944, 2022 WL 703942, at *12-14. Thus, these acts qualify as legislative acts even though, considered at a high degree of generality and divorced from their context, they are "administrative functions."

Second, invoking a line of authority, the Members assert that the Court should distinguish between "legislative acts and execution thereon" in determining whether the Clause applies. ECF No. 15 at 22-25 (discussing *Gravel*, 408 U.S. 606; *Powell v. McCormack*, 395 U.S. 486, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 87 S. Ct. 1425, 18 L. Ed. 2d 577 (1967) (per curiam); *Kilbourn v. Thompson*, 103

U.S. 168, 26 L. Ed. 377 (1880); and *Walker*, 733 F.2d 923). They argue that while "Members of Congress may have immunity for discussing and voting for an unconstitutional rule," "congressional employees . . . are not immune from a judicial order forbidding the implementation of such a rule." ECF No. 15 at 25.

Recently, however, other House Members relied on this same line of cases to make this same argument—unsuccessfully. *See, e.g., McCarthy*, 5 F.4th at 40-41; *Massie*, 2022 U.S. Dist. LEXIS 41944, 2022 WL 703942, at *13. In *McCarthy*, for instance, in the face of a constitutional challenge brought by some House Members to another House resolution, the D.C. Circuit rejected the argument that "the acts of voting on and adopting the Resolution lie within the Clause's zone of immunity, but acts undertaken in implementing the Resolution do not." 5 F.4th at 40-41. It did so because, it held, the "salient distinction under the Speech or Debate Clause is not between enacting legislation and executing it" but between "legislative acts and non-legislative acts." *Id.* at 41. The *McCarthy* court thus concluded that the Clause encompasses the "execution" of congressional directives so long as the "executing actions themselves constitute legislative acts." *Id.* And it explained that the line of authority in question establishes only that "conduct carrying out" congressional directives "is beyond the Speech or Debate Clause's compass when it is not itself a legislative act." *See id.*[3] As discussed above, the steps the

3. The *McCarthy* court discussed *Walker, see McCarthy*, 5 F.4th at 40, but it did not explicitly address the *Walker* court's observation, relied on by the Members here, that the "execution of a decision, even

House Officers took to carry out the Resolution qualify as "legislative acts" themselves. *See McCarthy*, 5 F.4th at 41. Thus, the Clause "encompasses the[ir] execution" of the Resolution. *See id.*; *see also Massie*, 2022 U.S. Dist. LEXIS 41944, 2022 WL 703942, at *13-14.

Third, the Members argue that "House rules are susceptible to judicial review" under *United States v.*

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if the decision itself is properly called 'legislative,' is not cloaked with Speech or Debate immunity" because "execution or carrying out directions post-dates what the Clause protects—the *process* leading up to the issuance of legislative directions," *see Walker*, 733 F.2d at 932. That said, the *McCarthy* court considered the same line of cases from which the *Walker* court derived that observation and concluded that it did not establish the per se decision/execution distinction that the Members urge here. *Compare McCarthy*, 5 F.4th at 40-41, *with Walker*, 733 F.2d at 931-32 & n.11. The Court reads *Walker* consistently with *McCarthy* to mean only that acts that execute legislative acts are not automatically protected under the Clause "merely because" the executing acts "relate to the underlying decision." *See Walker*, 733 F.2d at 943 (MacKinnon, J., concurring in part and dissenting in part) (agreeing with and restating the "majority's distinction"). However, acts that execute legislative acts *are* protected under the Clause when the executing acts themselves are also legislative acts. *See McCarthy*, 5 F.4th at 41. Further, reading *Walker* this way reconciles it with *Consumers Union*, which considered the same line of authority yet "spoke of the Clause's applicability to conduct 'enforcing internal rules of Congress' or 'executing . . . internal rules,'" thus precluding a per se decision/execution distinction. *See McCarthy*, 5 F.4th at 41 (brackets omitted) (quoting *Consumers Union*, 515 F.2d at 1350-51). In any event, *Consumers Union* predates *Walker*, so the Court must follow *Consumers Union* to the extent *Walker* conflicts with it on this point. *See, e.g., Sierra Club v. Jackson*, 648 F.3d 848, 854, 396 U.S. App. D.C. 297 (D.C. Cir. 2011).

Ballin, 144 U.S. 1, 12 S. Ct. 507, 36 L. Ed. 321 (1892), and its progeny whenever a House rule is alleged to "ignore constitutional restraints," "violate fundamental rights," or lack "a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained." ECF No. 15 at 13-15 (quoting *Ballin*, 144 U.S. at 5). This is true, at times—but not when the Speech or Debate Clause bars the challenge. *Consumers Union*—on which the Members rely to make this argument, *see* ECF No. 15 at 13—shows as much. 515 F.2d 1341, 169 U.S. App. D.C. 370.[4] There, the court suggested that the plaintiff's constitutional challenge to a congressional rule might have been justiciable under *Ballin*—but even so, it could "not reach the merits" of that challenge because "despite the claim of constitutional violation," the Clause rendered the matter "yet nonjusticiable." *See id.* at 1347-48, 1348 n.16. *McCarthy* reinforces this point. 5 F.4th 34, 453 U.S. App. D.C. 305. The *McCarthy* court held that the Clause barred the suit without considering the merits of the House Members' constitutional challenge to the House resolution at issue in that case. *Id.* at 38-41; *see*

4. The Members also rely on *Boehner v. Anderson*, 30 F.3d 156, 160, 308 U.S. App. D.C. 94 (D.C. Cir. 1994), to argue that their claims are "judicially cognizable." *See* ECF No. 15 at 14, 19-20. The *Boehner* court held that a Member of Congress had standing to bring a Twenty-Seventh Amendment claim against the Clerk of the House of Representatives (among others), and it did not exercise its "equitable discretion" to decline jurisdiction. 30 F.3d at 160-61. But it did not hold that the claim was justiciable even though the Speech or Debate Clause applied. In fact, the Clerk apparently never invoked the Clause because the *Boehner* court never even considered whether it applied. *Id.* at 161.

also Rangel, 785 F.3d at 23-24 (holding that the Clause barred a constitutional challenge to a House disciplinary proceeding because the proceeding was "a 'legislative' matter that 'the Constitution places within the jurisdiction of [the] House,'" without addressing the merits of the challenge (quoting *Gravel*, 408 U.S. at 625)). Thus, where, as here, the Clause applies, judicial review is precluded even if it would otherwise be available under *Ballin*.

IV. Conclusion

For these reasons, the Court will dismiss this case for lack of subject matter jurisdiction. A separate order will issue.

/s/ Timothy J. Kelly
TIMOTHY J. KELLY
United States District Judge

Date: August 1, 2022

APPENDIX C — RELEVANT STATUTES

U.S.C.A. Const. Art. I § 6, cl. 1

Section 6, Clause 1. Compensation of Members; Privilege from Arrest

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. They 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.

Appendix C

U.S.C.A. Const. Amend. XXVII

Amendment XXVII. Compensation of Senators and Representatives

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.