No. 24A1051

IN THE
Supreme Court of the United States

LAUREL D. LIBBY, RONALD P. LEBEL, WENDY MUNSELL, JASON LEVESQUE, BERNICE FRASER, RENE FRASER, AND DONALDO DUBUC,

Plaintiffs-Applicants

v.

RYAN M. FECTEAU, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE MAINE HOUSE OF REPRESENTATIVES, AND ROBERT B. HUNT, IN HIS OFFICIAL CAPACITY AS CLERK OF THE HOUSE,

Defendants-Respondents.

OPPOSITION OF RESPONDENTS TO EMERGENCY APPLICATION FOR INJUNCTION PENDING APPEAL

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PRELIMINARY STATEMENT

After Maine State Representative Laurel Libby targeted a Maine high-school student on social media, she was found by a majority of her fellow Maine House members to have breached Maine's Legislative Code of Ethics and was censured. Like other censures of Maine House members, the censure resolution required Rep. Libby to apologize for her conduct—*not* recant her views. Rep. Libby has steadfastly refused to comply with this modest punishment, which is designed to restore the integrity and reputation of the body. Her refusal places her in breach of a centuries-old rule of the Maine House, Rule 401(11), that Rep. Libby previously agreed, along with all of her House colleagues, would govern House proceedings. Rule 401(11) provides that a member found by the body to be in breach of its rules may not participate in floor debates or vote on matters before the full House until they have "made satisfaction," i.e., here, apologized for their breach. Now, Rep. Libby and several of her constituents ("Applicants") point to her self-inflicted injury as the basis for this Court to enter an injunction against the Clerk of the Maine House, requiring him—in direct violation of House Rules—to tally her vote in future floor roll-call votes while their appeal to the First Circuit Court of Appeals proceeds on an expedited basis.

Applicants ask this Court, through its emergency docket, to insert itself into this intra-parliamentary dispute and, for the first time, pierce legislative immunity for core legislative acts. The doctrine of legislative immunity has long safeguarded legislative bodies against federal-court intervention in "field[s] where legislators traditionally have power to act." *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951);

Applicants are seeking court intervention in precisely such a field. The power of a legislative body to punish its members has been recognized in the common law since ancient times and has been enshrined in the U.S. Constitution and many state constitutions, including Maine's, since the birth of our republic. Likewise, the act of tallying a floor vote to determine whether a measure succeeds or fails is an integral act in the legislative process. An injunction directing how such processes may unfold would be contrary to the policy of insulating legislative activity from "outside interference" that undergirds this Court's immunity jurisprudence. *Supreme Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732 (1980).

Applicants would have the Court sharply depart from its current jurisprudence, which recognizes the absolute immunity of state legislators and staff for legislative acts, and replace it with a meager substitute, in which the bedrock power of state and federal legislative bodies to "punish [their] members for disorderly behavior," Me. Const. art. IV, pt. 3, § 4, would become subject to the oversight of federal courts. The Court should decline to issue such an unprecedented order, especially on "a short fuse without benefit of full briefing and oral argument." *Does 1–3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring).

Even if immunity did not apply, Applicants have not shown the indisputably clear entitlement to relief necessary to obtain emergency relief from this Court. Applicants' Equal Protection argument overstates the burden on Applicants, by failing to acknowledge the plethora of formal and informal privileges Rep. Libby retains (and is currently wielding) to shape legislation. Meanwhile, Applicants give short shrift to the compelling interest of the Maine House of Representatives in

protecting its reputation and integrity and deterring future violations of its ethical rules. Rep. Libby's First Amendment retaliation claim similarly stumbles given the longstanding and widespread historical practice of legislative bodies imposing discipline such as forced apology, suspension, and even imprisonment, that may interfere with a member's ability to vote.

If the above were not enough, Applicants also have failed to demonstrate why their underlying appeal is certworthy given this Court's rejection of petitions for certiorari in several recent cases in which legislative immunity was found to bar similar attacks by state and federal legislators to their body's internal rules. Nor can Applicants demonstrate that the public interest favors their position given the strong public policy against judicial interference in the internal workings of state legislative bodies.

Respondents respectfully request that the application be denied.

FACTUAL BACKGROUND

A. Maine's Constitution and the Maine House of Representatives' Rules.

The Maine House of Representatives is one body of the State's bicameral Legislature. Me. Const. art. IV, pt. 1, § 1 (mandating both a Senate and a House). The Maine House is led by the Speaker of the House, who is selected by House members. Me. Const. art. IV, pt. 1, § 7. Unlike the U.S. Constitution, the Maine Constitution requires the Maine House to elect a Clerk, *id.*, who is charged with various legislative duties, including keeping a journal of what is done in the House and noting the

answers of members when a vote is taken. *See* Respondents' Appendix ("R.A.") 19–20.

Under Maine's Constitution, "[e]ach House may determine the rules of its proceedings" and "punish its members for disorderly behavior." Me. Const. art. IV, pt. 3, § 4; *accord* U.S. Const. art. I, § 5, cl. 2 (providing the same). Under this authority, the Maine House, on December 4, 2024, adopted the rules of procedure to govern its business during the 132nd Maine Legislature. R.A. 2. The Maine House adopted its rules by the unanimous consent of its members, including Rep. Libby. *Id*.

Rule 401 of the current Maine House Rules governs the rights and duties of members. Subsection 11 of this rule provides that "When any member is guilty of a breach of any of the rules and orders of the House and the House has determined that the member has violated a rule or order, that member may not be allowed to vote or speak, unless by way of excuse for the breach, until the member has made satisfaction." R.A. 22. A version of this rule has been included in the Rules of the Maine House since Maine's separation from Massachusetts in 1820. R.A. 49. The Massachusetts House of Representatives used a similar rule since at least 1802.[1]

The Maine Legislature also jointly adopted a Code of Ethics. R.A. 3, 29. Under the Code of Ethics "[a] Maine Legislator is charged with civility and responsible conduct inside and outside of the State House commensurate with the trust placed in that Legislator by the electorate." R.A. 29. The Code further provides that "[i]n a free

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[1] *See* Massachusetts House Rules, ¶ 28 (1802), *available at* https://tinyurl.com/y584ht25; *see also Coffin v. Coffin*, 4 Mass. 1, 22 (1808) (quoting rule).

government, a Legislator is entrusted with the security, safety, health, prosperity, respect and general well-being of those the Legislator serves and with whom the Legislator serves." *Id.* The Code requires Legislators to be "ever mindful of the ordinary citizen who might otherwise be unrepresented" and to "endeavor conscientiously to pursue the highest standards of legislative conduct inside and outside of the State House." *Id.*

B. The censure of Rep. Laurel Libby.

On the evening of February 17, 2025, Maine State Representative Laurel Libby used her official Representative Laurel Libby Facebook account to post about a recent high school track event in Maine. Applicants' Appendix ("A.A. ") 45–46; R.A. 4. This was not a post offering congratulations to the event's participants and winners. Instead, Rep. Libby targeted one of the high school students who had competed in the event because that student is transgender. R.A. 4. Rep. Libby identified the student's high school, identified the student by their current name and previous name, and posted photos of the student, embellished with yellow lines encircling them from head to toe. A.A. 46. The post quickly went viral. A.A. 48; R.A. 4.

Speaker Fecteau saw Rep. Libby's post the morning of February 18, 2025. R.A. 4. He was immediately concerned about the student's safety and welfare and sent a letter to Rep. Libby, writing:

> I was recently alerted to a post on social media in which you not only depict a high school student via photos, but you share the student's name and school.
>
> Expressing policy differences is one thing, but it is absolutely uncalled for to put students at the center of political firestorms, which in turn risks their health and safety.

> I am asking you to take the post down. Please find a way to express your political opinions that is void of using students as fodder. . . .

R.A. 4, 30. Rep. Libby and Speaker Fecteau spoke by phone later that evening, but Rep. Libby refused to take down her post. R.A. 4.

The Maine House reconvened in session on February 25, 2025.[2] R.A. 4. At the end of the day's session, a member introduced a resolution to censure Rep. Libby because her Facebook post was a violation of Maine's Legislative Code of Ethics. R.A. 4–5. The resolution explained that transgender individuals are "four times more likely to be victims of violence"; "numerous replies to" the aforementioned post "suggested that harm should come to the young athlete"; and, that as a result of Rep. Libby's post, the school district "has had to increase security at the school causing unnecessary stress and disruption to other students, parents, teachers and school support staff and the entire community." R.A. 31. Rep. Libby not only refused to take down her post, despite being made aware that it was endangering a child, but amplified the post "by appearing on national television and radio broadcasts." R.A. 31; *see* A.A. 48.

After debate, the Maine House passed the censure resolution by a vote of 75-70. R.A. 5. The censure required that Rep. Libby "accept full responsibility for the incident and publicly apologize to the House and to the people of the State of Maine." R.A. 32. Following enactment, Speaker Fecteau called Rep. Libby to the well of the

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[2] The Maine Legislature was not in session the week of February 17, 2025, to February 21, 2025; no work sessions, public hearings, or sessions of either legislative body occurred during this time period. R.A. 4.

House, formally admonished her for breach of the Code of Ethics, and provided her with an opportunity to apologize. R.A. 5. After Rep. Libby refused to apologize, the Speaker ruled her in violation of House Rule 401(11). *Id*. Although every ruling of the Speaker is subject to appeal to the full House, R.A. 17, no member appealed the Speaker's ruling to body, including Rep. Libby, at that time. R.A. 5. Since then, the full House has twice voted against suspending the application of Rule 401(11) to Rep. Libby. R.A. 8.

At present, Rep. Libby cannot participate in just *two* activities: floor debates and votes on matters under consideration by the full Maine House. R.A. 5. Those restrictions will end once she apologizes, if the Maine House votes by two-thirds to dispense with Rule 401(11), or when the 132nd Maine Legislature ends. *Id.*; *see SC Testing Tech., Inc. v. Dep't of Env't Prot.*, 688 A.2d 421, 425 (Me. 1996) ("[t]he [Maine] Legislature may not enact a law that purports to bind a future Legislature"). In the meantime, Rep. Libby retains all other legislative privileges and continues to enjoy considerable means to advance and oppose legislation and otherwise represent her constituents. R.A. 6.

Rep. Libby may be present on the House floor during debates and votes and is permitted to engage in procedural actions, such as making motions and raising objections, as long as she does not participate in the debate on such procedural actions. R.A. 7. She can, for example, move to amend a bill or to indefinitely postpone a bill (which, if approved, defeats it) or move for a roll call vote on a measure before the House. *Id.* For example, on March 20, 2025, Rep. Libby introduced by motion eight separate proposed amendments to the State's biennial budget, L.D. 609, which

motions will be recorded in the House Journal. R.A. 8. During other House sessions, Rep. Libby has moved for reconsideration of a House action[3] and requested the Clerk read a fiscal note on a bill under consideration by the body.[4]

Rep. Libby can sponsor and co-sponsor bills and resolutions. R.A. 6. As of April 1, 2025, Rep. Libby was the primary sponsor of 11 bills and the co-sponsor of 29 bills. *Id*. Since April 1, 2025, Rep. Libby has sponsored three additional bills.[5] Rep. Libby may present her bills to the relevant committee of jurisdiction and testify at public hearings concerning any legislation, R.A. 6; she has presented to committees on bills she sponsored on March 4, 2025,[6] March 5, 2025,[7] and April 15, 2025.[8]

Rep. Libby retains her existing committee assignment, which is to the Joint Standing Committee on Labor (the "Labor Committee"). R.A. 6. Rep. Libby may

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[3] *Archived Hearings & Meetings: House Chamber*, 132nd Me. Leg., 12:01:37–12:02:15 PM (Me. House Apr. 8, 2025), https://tinyurl.com/ywe5mped.

[4] *Archived Hearings & Meetings: House Chamber*, 132nd Me. Leg., 11:49:05–11:50:25 AM (Me. House Apr. 22, 2025), https://tinyurl.com/mwdhe946.

[5] L.D. 1563 (132nd Me. Legis. 2025) ("An Act to Establish Content Standards for Legislation"); L.D. 1880 (132nd Me. Legis. 2025) ("An Act to Require Photographic Identification for Voting"); L.D. 1899 (132nd Me. Legis. 2025) ("An Act to Eliminate Taxation on Health Care Spending").

[6] *See Me. Leg. Archived Hearings & Meetings: Room 211, Ener., Utils. & Tech. Comm.*, 132nd Legis., at 3:01:19-3:13:08 p.m. (Mar. 4, 2025) (oral testimony of Rep. Libby on L.D. 444, "An Act to Lower Energy Costs by Repealing the Law Setting Out the State's Goals for Consumption of Electricity from Renewable Resources"), https://tinyurl.com/2jk9rbrp.

[7] R.A. 6; *see Me. Leg. Archived Hearings & Meetings: Room 127, Tax. Comm.*, 132nd Legis., at 3:34:50-3:56:10 p.m. (Mar. 5, 2025) (oral testimony of Rep. Libby on L.D. 671, "An Act to Abolish the Maine Income Tax and Establish a Zero-based Budget"), https://tinyurl.com/5dnnp7bn.

[8] *See Me. Leg. Archived Hearings & Meetings: Room126, Transp. Comm.*, 132nd Legis., at 2:00:34-2:11:14 p.m. (Apr. 15, 2025) (oral testimony of Rep. Libby on L.D. 160, "An Act to Eliminate REAL ID Requirements in Maine"), https://tinyurl.com/4avubm5y.

continue to fully participate in the activities of the Labor Committee, including (a) participating at public hearings and work sessions, and (b) voting on motions, including motions to amend legislation referred to the Labor Committee and motions to report referred legislation back to its originating chamber as "Ought to Pass," "Out to Pass as Amended," or "Ought Not to Pass." R.A. 6–7. Rep. Libby can prevent legislation referred to the Labor Committee from being fast-tracked for consideration by the House by voting against that bill in her committee votes. R.A. 7. Rep. Libby attended public hearings or work session of the Labor Committee on March 4, 2025, R.A. 39; April 23, 2025;[9] and May 7, 2025.[10]

Rep. Libby can lobby other members to support or oppose legislation in any setting other than formal debate on the floor of the House and to participate in legislative caucus meetings. R.A. 6.

Rep. Libby remains eligible to receive financial benefits provided to Maine legislators. She continues to receive her full compensation as a member of the Legislature, including her salary stipend and any benefits she might receive. R.A. 7. She remains eligible for her constituent service allowance, which defrays the cost of communicating with and providing services to her constituents, and is paid out at the beginning and end of the legislative session. R.A. 8. Rep. Libby is also entitled to travel-related expenses and meal allowances. *Id.*

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[9] *See Me. Leg. Archived Hearings & Meetings: Room 202, Labor Comm.*, 132nd Legis., at 1:03:21-8:53:39 p.m. (Apr. 23, 2025), https://tinyurl.com/yc4rx79a.
[10] *See Me. Leg. Archived Hearings & Meetings: Room 202, Labor Comm.*, 132nd Legis. at 1:43:30-2:59:47 p.m. and 4:30:22-5:11:27 p.m. (May 7, 2025), https://tinyurl.com/3xxjuz4u.

Rep. Libby may continue to use non-partisan legislative staff and offices to support her work as a legislator to the same extent as before the censure. R.A. 7. She continues to have access to the services offered by the Maine Revisor of Statutes, the Maine House Clerk's Office, and the Office of Policy and Legal Analysis. *Id*. The censure also does not limit Rep. Libby's access to partisan legislative staff. *Id*.

C. Litigation underlying the Application.

1. Applicants filed a four-count complaint on March 11, 2025, against Speaker Fecteau and Clerk Hunt in their official capacities only, along with a motion for a preliminary injunction. A.A. 38–66. Applicants claim that the censure of Rep. Libby violates Rep. Libby's First Amendment rights and Applicants' rights under the Fourteenth Amendment and the Guaranty Clause. A.A. 59–66. Their motion sought an order against both the Speaker and the Clerk requiring them to permit Rep. Libby to speak and vote on the House floor. D. Ct. Doc. 8 at 20 (Mar. 11, 2025).

After expedited briefing, the district court denied Applicants' motion for a preliminary injunction on April 19, 2025. A.A. 3–33. The district court concluded that Applicants' claims were barred by absolute legislative immunity. A.A. 33.

The court reasoned that all the acts challenged by Applicants were legislative in nature because they were "done in a session of the House by one of its members in relation to the business before it." A.A. 19 (quoting *Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 630 (1st Cir. 1995) (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880))). Accordingly, the conduct fell "within the legitimate legislative sphere" protected by legislative immunity. A.A. 19 (quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975) (cleaned up)). The trial court also

concluded that the circumstances presented were not "of an extraordinary character" as to pierce legislative immunity. A.A. 20–26. The district court thus denied the motion and a motion for injunction pending appeal. A.A. 33.

2. Applicants appealed to the United States Court of Appeals for the First Circuit and filed a motion in the First Circuit for an injunction pending appeal. On appeal, Applicants narrowed their request for relief. They dropped their request for relief against the Speaker and dropped their request to enjoin Respondents from enforcing Rule 401(11)'s prohibition on floor debate. They sought only relief against Clerk Hunt and only an order requiring the Clerk to tally Rep. Libby's votes. Cir. Ct. Doc. 118274925 at 3 (Apr. 21, 2025). The First Circuit panel denied the motion without argument on April 25, 2025, A.A. 1, and ordered expedited briefing in accordance with the parties' agreed-upon briefing schedule. Cir. Ct. Doc. 118279723 (May 1, 2025). Briefing will be complete on or before May 30, 2025, and oral argument is currently scheduled for June 5, 2025. *Id.*; Cir. Ct. Doc. 118280809 (May 5, 2025).

ARGUMENT

An injunction from this Court is "extraordinary relief" that "'demands a significantly higher justification than a request for a stay, because unlike a stay, an injunction 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.'" *Respect Me. PAC v. McKee*, 562 U.S. 996, 996 (2010) (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)). "[S]uch power is to be

used sparingly." *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403 (2012) (quotation marks omitted).

To obtain such relief, the applicant must show that the "legal rights at issue" in the underlying dispute are "indisputably clear" and in their favor, *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers), such that this Court is reasonably likely to grant certiorari and reverse any judgment adverse to the applicant entered upon the completion of lower-court proceedings. Stephen M. Shapiro et al., *Supreme Court Practice* § 17.13(b) (10th ed. 2013); *see Does 1–3*, 142 S. Ct. at 18 (Barrett, J., concurring). And, as with injunctive relief generally, the applicant must also satisfy all of the remaining factors relevant for such relief, namely "that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest," *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)—the latter two factors merging where, as here, the injunction would run against the government, see *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Applicants have not met this demanding burden in connection with their application for an injunction pending appeal against Clerk Hunt. The application should therefore be denied.

I. Applicants are unlikely to succeed on the merits of their appeal.

A. Applicants' claims are barred by legislative immunity.

1. "The purpose of [legislative] immunity is to insure that the legislative function may be performed independently without fear of outside interference," *Consumers Union*, 446 U.S. at 731, including "intimidation by the executive and

accountability before a possibly hostile judiciary." *United States v. Johnson*, 383 U.S. 169, 181 (1966). While the privilege derives from the Speech and Debate Clause, U.S. Const. Art. I, § 6, cl. 1, its reach is not limited to speech and debate.

Instead, and contrary to Applicants' cramped view, Mot. at 12–15, legislative immunity also protects any action "in a field where legislators traditionally have power to act," *Tenney*, 341 U.S. at 379, or an "integral step[] in the legislative process," *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998). *See also Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880) (legislative acts are those "things generally done in a session of the House by one of its members in relation to the business before it"). It therefore applies to the "deliberative and communicative processes by which Members participate in committee and House proceedings with respect to" either "the consideration and passage or rejection of proposed legislation" or "other matters which the Constitution places within the jurisdiction of either House." *Gravel v. United States*, 408 U.S. 606, 625 (1972). Moreover, the immunity extends to legislative staff and aides "when they perform or aid in the performance of legislative acts." *Id.* at 618. This is so because

> it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos.

Id. at 616–17; *accord Eastland*, 421 U.S. at 507 ("We draw no distinction between the Members and the Chief Counsel.").

In determining whether challenged conduct is protected by legislative immunity, "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Bogan*, 523 U.S. at 54 (rejecting Court of Appeals position that conduct "was not legislative because their actions were specifically targeted at respondent"); *Tenney*, 341 U.S. at 377 ("The claim of an unworthy purpose does not destroy the privilege."). For example, *Tenney* held that legislative immunity barred a suit against state legislators even as to allegations that defendants intended "to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights." 341 U.S. at 371; *accord Bogan*, 523 U.S. at 46–47, 55 (holding legislative immunity barred a First Amendment retaliation claim).

This Court's decisions primarily have addressed the first category of conduct in *Gravel*, i.e., "the consideration and passage or rejection of proposed legislation." 408 U.S. at 625. The Court's "cases have read the Speech or Debate Clause broadly to effectuate its purposes," i.e., "to insure that the legislative function the Constitution allocates to Congress may be performed independently." *Eastland*, 421 U.S. at 501–02. The Court has thus explained that in addition to "speech" and "voting," *Gravel*, 408 U.S. at 626, legislative immunity protects, as legislative acts, the introduction of legislation, *Bogan*, 523 U.S. at 55; statements made during a legislative subcommittee, *Tenney*, 341 U.S. at 371, 376–77; investigations by a Congressional subcommittee and issuance of Congressional subpoenas, *Eastland*, 421 U.S. at 504; holding legislative committee hearings and preparing legislative

reports, *Doe v. McMillan*, 412 U.S. 306, 313 (1973), and conduct at legislative subcommittee meetings, *Gravel*, 408 U.S. at 615–16.

The Courts of Appeals have fleshed out *Gravel*'s second category—"other matters which the Constitution places within the jurisdiction of either House." *Id.* at 625. For example, the Fourth, Sixth, and District of Columbia Circuits have held that punishments imposed by legislative bodies on their members are legislative acts, and persons are immune from suit for engaging in those acts.[11] The Third, Sixth, and Seventh Circuits have held that allocating party resources and excluding a member from a party caucus are also legislative acts.[12] And the First and District of Columbia Circuits have held that the adoption and enforcement of legislative rules are likewise legislative acts protected by legislative immunity, even if those rules affect member

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[11] *Whitener v. McWatters*, 112 F.3d 740, 741, 744 (4th Cir. 1997) (holding "a legislative body's discipline of one of its members is a core legislative act" and concluding "disciplinary action taken by [a county legislative body] against one of its members" was protected by legislative immunity); *Gamrat v. McBroom*, 822 F. App'x 331, 334 (6th Cir. 2020) ("the House's expulsion of Gamrat was legislative activity, regardless of any bad faith, and Gamrat cannot sue the House Defendants for participating in that process"), *cert. denied* 141 S. Ct. 1700 (2021); *Rangel v. Boehner*, 785 F.3d 19, 24 (D.C. Cir. 2015) (holding House disciplinary proceedings are legislative acts that "fall comfortably within the scope of the Speech or Debate Clause"), *cert. denied* 577 U.S. 873 (2015).

[12] *Youngblood v. DeWeese*, 352 F.3d 836, 841–42 (3d Cir. 2003) ("allocating the total appropriation for office staffing among the Democratic house members are 'within the sphere of legitimate, legislative activity'" (quoting *Tenney*, 341 U.S. at 376)); *Kent v. Ohio House of Representatives Democratic Caucus*, 33 F.4th 359, 366 (6th Cir. 2022) (concluding control of caucus membership and allocating caucus resources are legislative acts protected by legislative immunity); *McCann v. Brady*, 909 F.3d 193, 194, 197–98 (7th Cir. 2018) (allocation of partisan staff resources protected by legislative immunity).

voting.[13] Applicants' narrow focus on conduct on the House floor is at odds with these precedents. Mot. at 14–15.

2. All of the conduct challenged by Applicants are legislative acts that are protected by legislative immunity. The House adopted the resolution censuring Rep. Libby pursuant to its constitutional authority to "punish its members for disorderly behavior." Me. Const. art. IV, pt. 3, § 4; *accord* U.S. Const. art. I, § 5, cl. 2 (providing the same). The House adopted its rules pursuant to its constitutional authority to "determine the rules of its proceedings." Me. Const. art. IV, pt. 3, § 4; *accord* U.S. Const. art. I, § 5, cl. 2 (providing the same). The censure resolution and the adoption and application of House Rule 401(11)—all of which resulted from votes of the entire Maine House—are squarely within the jurisdiction of the House and are legislative acts. *See Massie v. Pelosi*, 72 F.4th 319, 322–3 (D.C. Cir. 2023), *cert. denied* 144 S. Ct. 1005 (2024); *Rangel v. Boehner*, 785 F.3d 19, 24 (D.C. Cir. 2015), *cert. denied* 577 U.S. 873 (2015). Indeed, each act challenged by Applicants in this case, from the censure resolution to the tallying of votes by the clerk, has been "done in a session of the

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[13] *Cushing v. Packard*, 30 F.4th 27, 49 (1st Cir. 2022) (en banc) (enforcement of House rule precluding remote participation in House proceedings, including voting, by Speaker of New Hampshire House of Representatives constituted "legislative act" protected by legislative immunity), *cert. denied* 143 S. Ct. 308 (2021); *Nat'l Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 625 (1st Cir. 1995) (legislators and legislative aides protected by legislative immunity for enforcing a legislative rule); see *Massie v. Pelosi*, 72 F.4th 319, 322–23 (D.C. Cir. 2023) (adoption and enforcement of a House rule were legislative acts), *cert. denied* 144 S. Ct. 1005 (2024); *McCarthy v. Pelosi*, 5 F.4th 34, 39–41 (D.C. Cir. 2021) (concluding legislative immunity barred review of enactment or enforcement of resolution that enabled United States House Members to cast votes by proxy), *cert. denied* 142 S. Ct. 897 (2022).

House by one [or more] of its members in relation to the business before it." *Kilbourn*, 103 U.S. at 204.

It does not matter that Applicants now only seek relief against the Clerk, and only as to vote tallying. Applicants' bid to carve out the Clerk's tally from the legislative process ignores the larger context. First, the Clerk is not a mere "employee" of the Maine House. Maine's Constitution requires that House members elect both a Speaker *and* a Clerk. Me. Const. art. IV, pt. 1, § 7. Indeed, the House *elected* Clerk Hunt to the position on December 4, 2024.[14] Further, the House must "keep a journal, and from time to time publish its proceedings" that includes vote counts on roll call votes. Me. Const. art. IV, pt. 3, § 5. In other words, the recordation of House members' votes (or lack thereof) is also legislative conduct—regardless of whether an individual legislator or the Clerk tallies the vote.[15] *Gravel*, 408 U.S. at 625 (legislative acts include "other matters which the Constitution places within the jurisdiction of either House"). In any event, because passing legislation and voting are core legislative acts, *id.* at 625–26, the Court should reject Applicants' dubious claim that tallying votes, i.e., an "integral" step in the process by which the Maine House determines whether a measure has been passed, is somehow not a legislative act, *Bogan*, 523 U.S. at 55. Mot. at 15–16.

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[14] *Me. Leg. Archived Hearings & Meetings: House Chamber*, 132nd Legis., at 11:59:24 a.m. to 12:41:30 p.m. (December 4, 2024), https://tinyurl.com/4f7bwjh7.

[15] Only roll call votes must be included in the House's journal. Me. Const. art. IV, pt. 3, § 5. Failure to request a roll call vote on a measure brought to the floor is deemed to be consent to the measure. R.A. 2.

Nor does it not matter that the application of these rules and principles precludes Rep. Libby from voting on the House floor or engaging in debate on the House floor. The relevant distinction is between legislative acts and nonlegislative acts, not between forms of discipline. *See Gravel*, 408 U.S. at 625. As long as an act is with respect to "the consideration and passage or rejection of proposed legislation" or "other matters which the Constitution places within the jurisdiction of either House," it is protected. *Id.* That remains true when the act is performed by the Maine House Clerk (instead of a Representative), *see id.* at 616–17, and even if a plaintiff alleges (like Applicants do here) that the challenged conduct is unconstitutional. Legislators "and their aides are immune from liability for their actions within the legislative sphere, even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes." *Eastland*, 421 U.S. at 510 (cleaned up).

3. Applicants insist that relief is available against the Clerk, but their view on this Court's precedents on legislative immunity is frozen in 1969. Both *Kilbourn*, 103 U.S. 168, and *Powell v. McCormack*, 395 U.S. 486 (1969), upon which Applicants heavily rely, predate this Court's decision in *Gravel*. *Gravel* confirmed "that the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." 408 U.S. at 618. *Powell* had rejected this reasoning, just three years earlier. 395 U.S. at 505–06.

Decisions after *Gravel* have focused on the "nature of the act" challenged, *Bogan*, 523 U.S. at 54, and not the identity of the actor, to determine if legislative

immunity attaches. *See, e.g.*, *Eastland*, 421 U.S. at 504–07; *Doe*, 412 U.S. at 311–18. Indeed, *Gravel* distinguished *Kilbourn* based on the nature of the act challenged: voting to adopt a resolution to arrest Kilbourn was protected because it "was clearly legislative in nature," but the act of arresting Kilbourn clearly was not legislative and therefore not protected. 408 U.S. at 618–19 (citing *Kilbourn*, 103 U.S. at 200–04). While the arrest was executed in *Kilbourn* by the House Sergeant-at-Arms, that conduct would not have been protected by legislative immunity even if it had been undertaken by a legislator.

It is true that *Powell* said that injunctive relief could be obtained against the House Sergeant-at-Arms, the Doorkeeper and the Clerk. 395 U.S. at 504. But *Gravel* calls into question this aspect of the decision. In subsequent cases, this Court has distinguished *Powell* and carefully limited its reach. *See, e.g.*, *Gravel*, 408 U.S. at 620. Indeed, both *Powell* and *Bond v. Floyd*, 385 U.S. 116 (1966),[16] are best understood as qualifications cases, which prohibit legislative bodies from imposing additional requirements on members-elect that are not stated in the governing constitution before they are seated or sworn in. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 787–88 (1995) (explaining *Powell* "reviewed the history and text of the Qualifications Clauses in a case involving an attempted exclusion of a duly elected Member of Congress"); *Nixon v. United States*, 506 U.S. 224, 236–38 (1993) (explaining *Powell* addressed the qualifications of a member-elect).

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[16] *Bond* itself did not address the issue of legislative immunity, and neither *Bond* nor *Powell* addressed the ability of a legislative body to punish one of its members.

Applicants also rely on *Consumers Union*, 446 U.S. 719, to claim that an injunction can run against Clerk Hunt because he is simply enforcing the Maine House rules. Mot. at 20. But the critical distinction in *Consumers Union*, that the Virgina Supreme Court both adopted rules, and then enforced them through separate administrative or judicial proceedings, *see* 446 U.S. at 734, is not present here. Instead, all of the conduct challenged by Applicants occurs on the floor of the Maine House *during* the legislative process.

4. Despite instruction from this Court that the "privilege" of legislative immunity "should be read broadly," *Johnson*, 383 U.S. at 179, Applicants contend that this case falls within the potential exception to legislative immunity for acts "of an extraordinary character." *Kilbourn*, 103 U.S. at 204. *Kilbourn* identified two examples of conduct that might pierce the immunity and impose liability: if a legislative body "imitated the Long Parliament in the execution of the Chief Magistrate of the nation" or "follow[ed] the example of the French Assembly in assuming the function of a court for capital punishment." *Id.* at 204–05. No court that has considered *Kilbourn*'s "of an extraordinary character" language has ever concluded that the facts presented warranted application of the exception.[17] The present case is no different.

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[17] *Tenney*, 341 U.S. at 378–79; *Gravel*, 408 U.S. at 619; *Cushing*, 30 F.4th at 50–53; *Harwood*, 69 F.3d at 634–35, *United States v. Johnson*, 337 F.2d 180, 186–91 (4th Cir. 1964) (accepting a bribe for a House floor speech was protected by legislative immunity), *aff'd* 383 U.S. 169 (1966); *Agnew v. Moody*, 330 F.2d 868, 869 (9th Cir. 1964); *Tolman v. Finneran*, 171 F. Supp. 2d 31, 36 (D. Mass. 2001) ("The failure, even if unconstitutional, to appropriate funds for an election reform does not constitute a

First, and as the district court recognized, A.A. 23, Respondents are following the will of the Maine House, as expressed through its rules and acts. *See Cushing v. Packard*, 30 F.4th 27, 51 (1st Cir. 2022) (en banc), *cert. denied* 143 S. Ct. 308 (2021). The Maine House Rules were adopted by unanimous consent. R.A. 2. House Rule 401(11) has been a rule of the Maine House since 1820, R.A. 43, 49, and has been applied at least three times in modern history, A.A. 53; *see* n.21, *infra*. No member objected to the Speaker's ruling on February 25, 2025, that found Rep. Libby in violation of House Rule 401(11), including Rep. Libby. R.A. 2. Nevertheless, since February 25, 2025, two votes have been taken on the floor of the Maine House to suspend application of House Rule 401(11) to Rep. Libby. R.A. 8. Neither vote succeeded. R.A. 8. Should these circumstances change by a vote of the body, Respondents will act accordingly.

Second, although Rep. Libby cannot currently engage in certain acts, those acts are narrowly prescribed. Mot. at 22. Applicants' overwrought claims that Respondents are prohibiting Rep. Libby's "freedom of thought" or silencing her voice are baseless. Mot. at 23. Rep. Libby has continued her advocacy regarding transgender student athletes, including appearing with the Attorney General at press conference on April 16, 2025.[18] *See also* A.A. 48. Moreover, Rep. Libby is not

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flagrant violation of a fundamental constitutional protection so extraordinary as to abrogate legislative immunity."); *Kansas v. Neufeld*, 926 P.2d 1325, 1341 (Kan. 1996) (concluding House floor conversations among legislators inadmissible in one of those legislator's blackmail prosecution).

[18] Department of Justice, *Attorney General Bondi Announces Lawsuit Against Maine*, C-SPAN (Apr. 16, 2025), *available at* https://tinyurl.com/54mr6tm5.

precluded from, among other acts, sponsoring and co-sponsoring legislation, committee work, presenting motions on the House floor, lobbying other members, participating in legislative caucuses, and testifying on bills in public hearings. R.A. 6–8. Rep. Libby can still affect the passage of legislation by calling for a roll call vote on measures or legislation that would otherwise pass upon the consent of the body. R.A. 7. And Rep. Libby could vote and debate on the House floor again if she complied with the censure resolution and apologized—a condition of ordinary character that is within Rep. Libby's control.

Applicants' "parade of horribles" thus does not move the needle. Mot. at 3–4, 23. Legislative immunity is not limitless, but "[w]hatever may be the outer limits of the doctrine," "it is clear that the instant case is not so extreme as to cross (or even closely approach) the border." *Harwood*, 69 F.3d at 634 (rejecting similar arguments as Applicants make here). As the district court recognized, A.A. 21–26, this case is far from the "high bar that *Kilbourn* plainly intended to set for stripping seemingly protected acts from the cover [legislative] immunity confers." *Cushing*, 30 F.4th at 52.

5. Applicants contend that Respondents are abusing the doctrine of legislative immunity, turning a shield into a sword. Mot at 3, 21–24. Respondents counter that this case demonstrates, at a fundamental level, the purposes of legislative immunity. "[T]hroughout United States history, the privilege [of legislative immunity] has been recognized as an important protection of the independence and integrity of the legislature." *Johnson*, 383 U.S. at 178. It also "reinforc[es] the separation of powers so deliberately established by the Founders." *Id.* While Applicants frame their request in lofty (and sometimes hyperbolic) rhetoric, they ask this Court to interfere

in the daily operations of the Maine House of Representatives and set aside a rule that has governed the Maine House for more than two centuries. This Court should decline their request. *See McCann v. Brady*, 909 F.3d 193, 194, 198 (7th Cir. 2018) ("The Speech or Debate Clause, and the doctrine of legislative immunity on which it rests, essentially tells the courts to stay out of the internal workings of the legislative process."); *Monserrate v. New York State Senate*, 599 F.3d 148, 157 (2d Cir. 2010) ("Prudence dictates that a federal court should exercise a respectful reluctance to interfere in the measures taken by a state legislature to regulate its affairs, discipline its members, and protect its integrity and good name.").

Doing so does not put Respondents "above the Constitution," Mot. at 23, but enables them to serve the public without fear of suit or personal liability. "[A] private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Consumers Union*, 446 U.S. at 733 (quoting *Eastland*, 421 U.S. at 503). Legislators must be "immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." *Tenney*, 341 U.S. at 377. Nevertheless, "[o]ne must not expect uncommon courage even in legislators," *id.*, as "the risk of liability" may "deter an official from proper action, " *Sable v. Myers*, 563 F.3d 1120, 1123–24 (10th Cir. 2009).

And while legislative immunity can insulate conduct that would be deemed unconstitutional in other contexts, *Massie*, 72 F.4th at 323–24 ("[i]mmunity attaches even if a plaintiff alleges that a member has violated internal rules or the Constitution"), that is by design. "[T]he risk of such abuse was 'the conscious choice

of the Framers' buttressed and justified by history." *Eastland*, 421 U.S. at 510 (quoting *United States v. Brewster*, 408 U.S. 501, 516 (1972)). "[I]n order to preserve other values, they wrote the privilege so that it tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens." *Brewster*, 408 U.S. at 517. Application of the doctrine here supports the doctrine's central purpose: legislative independence. *Eastland*, 421 U.S. at 510–11.

B. Applicants have not shown an indisputably clear likelihood of success on their Fourteenth Amendment claims

1. Because legislative immunity provides an absolute shield to Respondents, the Court need not consider the merits of Applicants' Fourteenth Amendment and First Amendment claims. But even if the Court were to disagree on immunity, Applicants have not shown a clear likelihood of success on the substance of those claims.

As at least two circuits have recognized, the appropriate framework for analyzing an Equal Protection claim against the imposition of a legislative punishment is the same flexible standard used for evaluating voting and ballot access laws set forth by this Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). *See Monserrate*, 599 F.3d at 154-155; *Peeper v. Callaway Cnty. Ambulance Dist.*, 122 F.3d 619, 623 (8th Cir. 1997). Applying this standard makes sense given that "[a]n individual's right to be a candidate for public office under the First and Fourteenth Amendments is nearly identical to one's right to hold that office." *Peeper*, 122 F.3d at 622; *accord Monserrate*, 599 F.3d at 155 ("it

seems clear enough that this flexible framework . . . is not limited to the pre-vote context").

Under the *Anderson-Burdick* framework, it is an "erroneous assumption" that any law burdening the right to vote "must be subject to strict scrutiny." *Burdick*, 504 U.S. at 432. Rather, to determine whether such laws are consistent with equal protection, the Court must weigh

> the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.

Burdick, 504 U.S. at 434 (cleaned up). Although there is no "litmus-paper test," "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788–89. Strict scrutiny applies only if a restriction is deemed "severe." *Burdick*, 504 U.S. at 434.

2. Here, application of Rule 401(11) satisfies *Anderson-Burdick* balancing because the Maine House's regulatory interests are compelling and the restrictions imposed by Rule 401(11) are reasonable and non-discriminatory. First, "[i]t is fundamental that a legislature has an important interest in upholding its reputation and integrity." *Monserrate*, 599 F.3d at 155; *see In re Chapman*, 166 U.S. 661, 668 (1897) (highlighting the authority of U.S. Senate to "vindicate itself from aspersion" and "reproach" from its members' misbehavior). Rep. Libby inflicted considerable damage on the Maine House's reputation and integrity. Maine's Legislative Code of Ethics obliges members to protect the "security, safety, health, prosperity, respect and general well-being" of those they serve." R.A. 29. In violation of that Code, Rep.

Libby targeted a child and, without the child's or their parents' consent, nationally publicized their name, school, and photograph, in the course of condemning the child's participation in a sports event. Rep. Libby did so despite the child's right under Maine law to participate in the activity "without discrimination" on the basis of their gender identity. ME. REV. STAT. ANN. tit. 5, § 4602 (Pamph. 2025). Given such egregious facts, the Maine House had a strong interest in repairing the damage to its reputation and integrity by holding Rep. Libby to account for her misconduct.

On the other side of the ledger, the burden on Applicants is reasonable and non-discriminatory. To the extent Rep. Libby's constituents are burdened by the application Rule 401(11), it is because Rep. Libby refuses to abide by the very rules that she, along with every other member of the House, approved at the outset of the session. R.A. 2. Rep. Libby can cure her constituents' alleged injury at any time by simply following the Rule's requirement and apologizing for her breach. And, contrary to Rep. Libby's assertion, the required apology is not that she "recant[] her views" on transgender athletes. Mot. at 28. Rather, as the censure resolution makes clear, she need only apologize for her use of the name and image of a child in a manner that "could result in serious harm" to the child. R.A. 31–32.

Even assuming *arguendo* that Rep. Libby's ability to end her punishment at any time could not be considered, the burden on her constituents is still reasonable. The district court found that Rep. Libby remains free to further the interests of her constituents in many ways: she can sponsor legislation, testify at hearings, deliberate and vote in her assigned committee, make motions on the House floor, and use legislative staff and services. A.A. 32. Applicants disparage and downplay these

privileges, comparing Rep. Libby to "a judge who cannot hear or decide cases." Mot. at 27. But the ability to sponsor legislation is considerably more consequential than the ability to "attend judicial conferences or hire law clerks." *Id.* The same goes for legislative privileges such as shaping and approving legislation in committee and making floor motions and objections. A.A. 31-32; R.A. 6-8. While floor votes may be one way to "execute[] the legislative process," Mot. at 27 (quoting *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126 (2011)),[19] so too do these other privileges. Indeed, Rep. Libby has confirmed the importance of these privileges by exercising many of them since her censure. *See* p.7–10, *supra*.

Nor is the burden imposed by Rule 401(11) discriminatory. Just like a neutral ballot-access law, such as a residency requirement or a signature-gathering requirement, Rule 401(11) applies equally to all members of the Maine House. *See Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 10 (1982) (concluding that procedure for making interim appointments to vacant legislative seats satisfied equal protection where the provision "applie[d] uniformly to all legislative vacancies, whenever they arise"). Any member who breaches House rules, regardless of seniority or party affiliation, is subject to the Rule's requirement to "ma[k]e satisfaction" to avoid loss of voting and debating privileges. R.A. 22. Similarly, all Maine voters are subject to the risk that, if they elect a candidate who both engages in misconduct and refuses to make satisfaction, the consequences specified in Rule 401(11) will result.

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[19] Ironically, the quote from *Carrigan* relied upon by Applicants is itself derived from Justice Frankfurter's concurrence in *Coleman v. Miller*, in which he decries judicial interference in "intra-parliamentary controversies." 307 U.S. 433, 469-70 (1939).

3. Applicants make no attempt to apply *Anderson-Burdick* balancing. Instead, they rely on a strained analogy to case law holding that legislative districts must be drawn to be roughly equal in population. *See* Mot. at 24 (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)). According to Applicants, preventing Rep. Libby from voting or debating on the House floor until she apologizes for her misconduct results in her constituents being "*entirely disenfranchised*," or at least having their voting rights "diluted" in the same manner as if they lived in unconstitutionally malapportioned legislative districts. Mot. at 24.

Not one of the decisions of this Court cited by Applicants suggest that legislative punishments should be analyzed like malapportioned legislative districts. *Bush v. Gore*, cited by Applicants for this proposition, Mot. at 26, in fact stands for the less remarkable proposition that, if a state decides to hold an election, it must administer it in a manner that treats voters equally. 531 U.S. 98, 105 (2000). The sole Court of Appeals decision Applicants cite in support of their "dilution" theory merely suggests, in dicta, that voting restrictions on legislators may be sufficient to confer standing on constituents to challenge those restrictions—which is not at issue here. *Michel v. Anderson*, 14 F.3d 623, 626 (D.C. Cir. 1994). That decision goes on to conclude that, though the plaintiffs had standing, their claim failed on the merits. *Id.* at 630–32.

Applicants' "vote dilution" theory is ultimately flawed because it relies on conflating two distinguishable acts: voting in a popular election and voting on the floor of a legislative body. While the ballot box is the only way for voters to choose their representatives, legislators have many powers, both formal and informal, by

which they can advance legislation and further the interests of their districts. *See* A.A. 31–32. Voting on the floor is just one.

Nor is perfect equality between legislators a realistic goal. Skilled or influential legislators may be given plum committee assignments and leadership positions, while others may be relegated to the proverbial back bench. It is not "vote dilution" if some members are assigned to a powerful committee and others are not, even if service on the committee disproportionately benefits those members' districts. Similarly, when a legislator breaches the rules of their legislative body, it should not be considered "vote dilution" for the body to exercise its punishment authority in a manner calculated to restore its integrity and reputation and deter future violations.

Moreover, even if Rule 401(11) could be analyzed as "vote dilution," this Court has recognized that sufficiently strong governmental interests can justify population disparities between districts. *See Brown v. Thomson*, 462 U.S. 835, 844–48 (1983) (upholding apportionment where population disparities resulted from "consistent and nondiscriminatory application of a legitimate state policy"). As already argued, the House's compelling interests in enforcing its rules and protecting its reputation and integrity justify the limited and conditional punishment imposed on Rep. Libby, even under a "vote dilution" analysis.

4. The two 1970s district court decisions Applicantss cite in support of their position should be given no weight. Mot. at 26 (citing *Kucinich v. Forbes*, 432 F. Supp. 1101 (N.D. Ohio 1977), and *Ammond v. McGahn*, 390 F. Supp. 655 (D.N.J. 1975), *rev'd on mootness grounds*, 532 F.2d 325 (3d Cir. 1976)). Those cases predate *Anderson* and *Burdick* and thus do not apply the appropriate analysis. Moreover,

Kucinich involved a complete suspension of a councilmember, unlike the more limited and conditional sanction at issue here, and *Ammond* was, as Applicants note, reversed as moot by the Third Circuit.

The Second Circuit, however, more recently applied the *Anderson-Burdick* framework to uphold the New York State Senate's expulsion of a member for a misdemeanor domestic violence conviction. *Monserrate*, 599 F.3d at 154–57. After concluding that the expulsion imposed a less-than-severe burden on the plaintiff-constituents, the court rejected their equal protection challenge on grounds that, under the applicable law, "the voters of every Senatorial District are alike subject to the expulsion of their elected representative." *Id.* at 157 (citing *Rodriguez*, 457 U.S. at 10). Because there was no evidence that the expulsion was motivated by "invidious bias against the voters" of the member's district, the member's equal protection claim failed. *Id.*

Rep. Libby's censure similarly was not some bespoke procedure designed to target her constituents. Rule 401(11) applies to all current Maine House members, just as it has applied to every Maine House member in Maine's history as a state. Other members have been subject to censures in recent years for similar conduct. A.A. 53–54. Moreover, while Rep. Libby's punishment may affect her constituents for longer than the member's expulsion in *Monserrate*, *see* Mot. at 27, that consideration must be balanced against the facts that (1) only two of Rep. Libby's many legislative privileges are affected, and (2) Rep. Libby can restore those privileges at any time by simply complying with a rule that she herself agreed to. Thus, the burden calculus,

while different than the one in *Monserrate*, results in the same conclusion of a "less-than-severe" burden. 599 F.3d at 155.

In sum, Applicants are unlikely to prevail on their Equal Protection claim.

C. Applicants have not shown an indisputably clear likelihood of success on their First Amendment claim.

1. This Court has held that a legislator has no First Amendment right to vote on legislation. *See Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126 (2011). It has further held that a censure, by itself, cannot form the basis for a First Amendment retaliation claim. *See Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 479 (2022). Applicants seek to fit their First Amendment retaliation theory within the only area left open by these cases: the extent to which "legislative censures accompanied by punishments," *id.* at 480, can amount to unconstitutional retaliation for speech.

Wilson makes clear that such a claim faces an uphill battle. In considering such a claim, "great weight" must be given "long settled and established practice" concerning the punishment imposed. *Id.* at 474 (quoting *The Pocket Veto Case*, 279 U. S. 655, 689 (1929)). And, as *Wilson* observed, going back to colonial times "assemblies often exercised the power to censure members for views they expressed and actions they took 'both within and without the legislature.'" *Id.* at 475 (quoting D. Bowman & J. Bowman, *Article I, Section 5: Congress' Power to Expel—An Exercise in Self-Restraint*, 29 Syracuse L. Rev. 1071, 1084–1085 (1978)).

Rep. Libby's First Amendment claim is inconsistent with long settled and established practice. Historical practice supports that legislative bodies have the

power to impose punishments on legislators that may disrupt their ability to vote. *See Carrigan*, 564 U.S. at 122–25 (relying in part of the long history of recusal rules in law in this country applicable to legislators, none of which were ever thought to violate the First Amendment). During the colonial era, "many a member was punished by fine, imprisonment, censure, admonition, forced apology, and kneeling at the bar." *See* M.P. Clarke, *Parliamentary Privilege in the American Colonies* 190 (1971) (*Parliamentary Privilege*). Rule 401(11), which imposes consequences for a failure "ma[k]e satisfaction" for misconduct, is a species of "forced apology" rule.

Other past and present legislative bodies across the country also have followed versions of Rule 401(11).[20] And there are many examples of legislative bodies compelling apologies either through formal censure, threat of censure, or threat of investigation. In June of 1838, two members of the U.S. House voluntarily apologized for breach of order and decorum in the face of an impending vote on a resolution that would have required them to "apologize for violating [House] privileges and offending its dignity." 2 A. Hinds, *Precedents of the House of Representatives* § 1648 at 1121–22 (1907) (Hinds). In 1843, the U.S. Senate voted not to censure Senator Tappan for

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[20] *See* Rules and Precedents of the General Assembly of Connecticut, House Rules ¶ 18; Senate Rules ¶ 16 (2023), *available at* https://tinyurl.com/yc9zdn7c; Rules of the Arizona House of Representatives, 56th Legislature, Rule 1(B), *available at* https://tinyurl.com/34xvvj3c; *see also* Rule 26, Standing Rules of the Assembly of the State of Florida (1872), *available at* https://tinyurl.com/4jnec2p3; Rules and Orders, ¶ 26, Journal of the House of Representatives of the Territory of Washington (1854), *available at* https://tinyurl.com/bdz6jkrp; *see also* Rules of Order of the Louisiana Senate, 50th Reg. Sess. § 6.3(D), *available at* https://tinyurl.com/2ve333xa; Rules of Order of the Louisiana House of Representatives, 50th Reg. Sess. § 5.2(D), *available at* https://tinyurl.com/4h6w3v7b.

disclosing confidential treaty materials to a newspaper in part because he "apologized and acknowledged his wrongdoing." A. Butler & W. Wolff, *United States Senate: Election, Expulsion, and Censure Cases 1793–1990* at 47-48 (1995). In 1868, the U.S. House censured a member for offensive words used during debate, which required the member to "retract or explain his words and make a satisfactory apology." Hinds, § 1247 at 798–99; *see also* Hinds, §§ 1257, 1646–47, 1657 at 808–10, 1120–21, 1135–37 (noting other apologies by House members to escape investigation or punishment by the body). In 1917, the Wisconsin Senate voted to censure a member and require him to sign a pre-drafted apology for his conduct; the member was expelled when he refused to sign. Wis. Sen. Journ., 53rd Sess. at 597–601 (1917).

More recent examples also exist. Rep. Libby is the fourth Maine legislator in recent times to be subject to Rule 401(11)'s apology requirement. Two representatives were censured in 2024 for remarks they made on the House floor. Me. H. Jour., 131st Leg., 2d Reg. Sess. at 1723–24 (Apr. 11, 2024). Both apologized. *Id.* In 2001, a representative was censured for verbally abusing another member in the hallway outside the House chamber. Me. H. Jour., 120th Leg., 1st Reg. Sess. at 145 (Feb. 8, 2001). He also apologized.[21] *Id.* at 149. Similarly, the Oklahoma House recently censured a member and stripped them of all committee assignments until they publicly apologized. Okla. H. Jour., 59th Leg., 1st Reg. Sess. at 506–7 (Mar. 7, 2023).

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[21] The resolutions and portions of House journals concerning these censures, which are subject to judicial notice as official legislative records, have been compiled by the Maine Legislature at the following link: https://legislature.maine.gov/discipline-of-maine-legislators.

Applicants wrongly compare Rep. Libby's circumstances to a "suspension." Mot. at 21-33. Their analogy is inapt, given the plethora of legislative privileges she continues to enjoy and because Rep. Libby can restore her privileges at any time by apologizing for her misconduct. Nevertheless, while there was "less unanimity" about the legislature power to "exclude members indefinitely from their seats," the "practical answer to this problem for many years was in favor of legislative supremacy." *Parliamentary Privilege* at 200. Indeed, there are at least two early examples of suspensions of Maine legislators. Around 1784, the Massachusetts House suspended Maine Rep. Jeremiah Learned of Oxford while he was under indictment for "seditiously and riotously opposing the collection of public taxes." Luther S. Cushing, *Reports of Contested Elections* at 13 (1834), *available at* https://tinyurl.com/a5xdkrxv. Similarly, around 1808, Maine Rep. John Waite of Falmouth was "suspended from exercising the duties of a member" based on his conviction for forgery. *Id.* at 50.

Examples outside of Maine also exist. In 1902, the U.S. Senate found two members in contempt for a physical altercation. A Senate committee described the ruling as having the effect of "suspend[ing] their functions as Senators," a punishment "clearly within the power of the Senate." *See* U.S. Senate, *The Censure Case of John L. McLaurin and Benjamin R. Tillman of South Carolina*, https://www.senate.gov/about/powers-procedures/censure/090Tillman_Laurin.htm. In 1905, the Wisconsin Senate suspended a member for eight months. 1 Wis. Sen. Journ., 47th Sess. at 862–64 (1905). Even though the U.S. House no longer chooses to suspend members, it has recognized that its authority to punish its members for disorderly

behavior is not limited to expulsion or censure, but also includes "fine and suspension." H. Rept. No. 90-27, 90th Cong. 1st Sess., at 28 (1967). And numerous state legislative bodies include suspension of legislators, with or without pay, as an available punishment for its members.[22]

2. Applicants contend that this case is comparable to *Bond v. Floyd*, 385 U.S. 116, in which this Court held that the Georgia House of Representatives could not refuse to seat a duly elected candidate based on his statements criticizing the Vietnam war. Mot. at 29–30. But *Bond* involved a legislature seeking to impose extra-constitutional qualifications on an elected candidate in order to refuse to seat him—thereby completely excluding him from the body. In considering whether a censure could violate the First Amendment, *Wilson* distinguished *Bond*, noting that "the

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[22] Cal. Const. art. IV, §§ 5(2)(A), (B) ("Each house may suspend a Member by motion or resolution" during which time the Member "shall not exercise any of the rights, privileges, duties, or powers of his or her office"); Rules of the Del. House of Rep., 153rd Gen. Assem., § 16(e) (permitting member to be suspended for misconduct by two-thirds vote), *available at* https://tinyurl.com/mr3ppyn3; Rules of the Del. Senate, 153rd Gen. Assem., § 17(h), *available at* https://tinyurl.com/4yr95cs8; Rules of the Haw. House, 33rd Legis., § 29.3 (permitting suspension of a member by two-thirds vote), *available at* https://tinyurl.com/5bcv9f69; Rules of the Haw. Senate, 33rd Legis., § 72 (permitting suspension of a member by two-thirds vote), *available at* https://tinyurl.com/fuwyz56c; Iowa House Code of Ethics, 91st Gen. Assem., § 12(l) (permitting members to be suspended without pay for ethics violations), *available at* https://tinyurl.com/jan4hews; Iowa Sen. Code of Ethics, 91st Gen. Assem., § 19(f) (noting available sanctions for ethics violations includes suspension from membership), *available at*, https://tinyurl.com/4rmw6ewm; Rules of the Mass. Sen., 194th Gen. Ct., Rule 12A (available discipline for Senate Rule violation includes "suspension with or without pay"), *available at* https://tinyurl.com/2cu9a3a3; *Pine v. Commonwealth*, 93 S.E. 652, 655 (Va. 1917) (explaining express legislative power to punish members for disorderly conduct in Virginia Constitution did not "inhibit the house from exercising other powers, such as the suspension of a member, or the imposition of a penalty for neglect of duty").

power to exclude and the power to issue other, lesser forms of discipline 'are not fungible' under our Constitution." 595 U.S. at 481 (quoting *Powell*, 395 U.S. at 512).

Wilson's distinction applies here. While Rule 401(11) imposes more punishment than a pure censure, it is still far less than the complete exclusion at issue in *Bond*. And, as shown above, it is a punishment well supported by history and practice. What is more, unlike in *Bond*, Rule 401(11) applies to Rep. Libby in her capacity as a sitting legislator, not as a mere member-elect who is not yet subject to the body's rules or Legislative Code of Ethics. The Maine House's interest here in enforcing its ethical rules against sitting members is far more compelling than the Georgia House's purported interest in imposing an extra-constitutional qualification on an elected candidate. In short, *Bond* does not support Applicants' First Amendment claim.

D. The district court's preliminary injunction decision is not certworthy.

Finally, Applicants have failed to show a likelihood of success on the merits because they have not demonstrated that their underlying appeal is certworthy. *See Does 1–3*, 142 S. Ct. at 18 (Barrett, J., concurring) (likelihood of success prong requires a "discretionary judgment about whether the Court should grant review in the case."); *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

This matter involves routine application of longstanding legislative immunity principles to a form of legislative punishment that has existed in Maine for centuries. Rule 401(11)'s prohibition on speaking or voting until the member has "made satisfaction" has never been challenged until now since previously censured members

have instead simply apologized for their breaches. *See* p.33 & n.21, *supra*. There is no reason to think disputes over the Rule will become a frequent occurrence. Nor is undersigned aware of any history of legal disputes in the other legislative bodies that follow the same rule. More generally, constitutional challenges to legislative punishments are uncommon. There would appear to be little need for guidance to the lower courts on how to resolve challenges to applications of Rule 401(11) specifically or legislative punishments generally.

Further, Applicants identify no circuit splits or other doctrinal discrepancies that require resolution by this Court. Perhaps reflecting this consensus among the circuits on the contours of legislative immunity, this Court has denied certiorari in recent and significant legislative immunity cases. *See Cushing*, 143 S. Ct. 308 (2022); *McCarthy v. Pelosi,* 142 S. Ct. 897 (2022); *Massie*, 144 S. Ct. 1005 (2024). The Court of Appeals decisions in those cases are outcome-determinative of Applicants' claims. *See* Part I.A, *supra*. Indeed, *Cushing*, as here, involved a claim that the application and enforcement of a legislative rule was preventing members from voting. If none of those cases were certworthy, it is hard to see how the lower courts' decision to straightforwardly follow those decisions here would meet that threshold.

II. The remaining factors support denying an injunction.

A. The public interest cuts strongly against emergency relief

When the government opposes an injunction, consideration of the public interest and the harm to the opposing party merges into a single factor. *See Nken*, 556 U.S. at 435 (discussing the same four-factor test for a stay). "In exercising their sound discretion, courts of equity should pay particular regard for the public

consequences in employing the extraordinary remedy of injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (quotation marks omitted). The relief sought here would have starkly negative public consequences for the independent functioning of a coequal branch of the Maine government.

This Court has repeatedly recognized the strong policy reasons for legislative immunity. The doctrine "insure[s] that the legislative function may be performed independently without fear of outside interference." *Consumers Union*, 446 U.S. at 731; *see Tenney*, 341 U.S. at 377–78; *Johnson*, 383 U.S. at 181. Legislative immunity further recognizes that federal courts should be wary in wading into intra-legislative disputes that are often inherently political. *Tenney*, 341 at 378 ("In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies."); *Cushing*, 30 F.4th at 52 (warning of "warring sides in partisan state legislators' battles improperly enlisting federal judges to participate in them.").

The relief sought by Applicants would insert this Court into the middle of an internal dispute within the Maine House over how it should apply its rules and Code of Ethics to its own members and tally votes on the floor of the chamber. It is difficult to imagine a more intrusive act. Even if the Court were to have doubts as to the applicability of legislative immunity to this dispute—and it should not, *see* Part I.A., *supra*—the important policies underlying immunity counsel against hasty action to compel action by the Maine House Clerk before Applicants' immunity claim is fully considered by the First Circuit.

B. Applicants have not made a clear showing of irreparable harm.

Applicants also fail to make the required "clear showing" of irreparable harm. *Winter*, 555 U.S. at 22. Applicants allege that they are suffering irreparable harm because Rep. Libby is prevented from voting on the legislation that is currently being considered on the floor of the Maine House. Mot. at 35. But undercutting this claim is the fact that Rep. Libby does not need court intervention to remedy this alleged harm; she can restore her full privileges at any time by simply apologizing for her misconduct. As already noted, she need not "recant" any of her views to do so; her apology need only address her decision to publish identifying details of a child.

In addition, emergency action by this Court is unnecessary to address the alleged risk of irreparable harm given the speedy course of proceedings in the lower courts. After the district court quickly ruled on Applicants' motion for preliminary injunction, the First Circuit granted Applicants' request (consented to by Respondents) for expedited briefing of Applicants' appeal. That court has since set oral argument for June 5, 2025—just four weeks from today—and will presumably rule soon thereafter. Even if there is any actionable harm here, the First Circuit can promptly address it.

Finally, absent from Applicants' assertion of irreparable harm is any allegation that Rep. Libby's inability to vote has yet—or is likely to—prove dispositive on any piece of legislation. The record before the lower court showed that, at that point, there had not been a single floor vote that was tied or decided by a one-vote margin since the censure. R.A. 6. The lack of any such votes shows a lack of practical consequences

to Rep. Libby's constituents flowing from the censure and, even if not dispositive by itself, is another fact cutting against relief.

CONCLUSION

Respondents request that the Court deny Applicants' request for an emergency injunction pending appeal.

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Respectfully submitted,

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