No. 24A1051

In the Supreme Court of the United States

LAUREL LIBBY, ET AL.,

Applicants,

v.

RYAN M. FECTEAU, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE MAINE HOUSE OF REPRESENTATIVES, ET AL.,

Respondents.

ON APPLICATION FOR INJUNCTIVE RELIEF PENDING APPEAL TO THE U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICUS CURIAE* STATE OF WEST VIRGINIA AND 14 OTHER STATES IN SUPPORT OF APPLICANTS

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INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

Perhaps a little too often, applicants come to this Court warning that some decision being challenged is poised to undermine (or even end) our republican form of government. This time, though, the shoe fits.

The Speaker of the Maine House of Representatives stripped Representative Laurel Libby of her power to vote on behalf of her constituents. By all accounts, he did so because of what Representative Libby said publicly about a matter of debate. Representative Libby cannot vote on behalf of her district or speak on the floor of the House until she recants her views to the Speaker's satisfaction. Until then, her voice—her *district's* voice—is silenced, as the Clerk will ignore her votes at the Speaker's behest. "[T]he distinguishing feature" of the republican form of government "is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies." *Duncan* v. *McCall*, 139 U.S. 449, 461 (1891). Right now, the people of Auburn and Minot have no such rights.

One might've thought that this situation would be quickly corrected below. But the district court was unwilling to look past legislative immunity and intervene, principally because "the sanction ultimately reflected the will of the majority." App.32. It also took solace in the fact that Representative Libby could continue to enjoy collateral privileges like "legislative staff," "offices," and "meal allowances." App.32. The First Circuit then endorsed that reasoning in a summary order. App.1. Yet the right to equal representation "can hardly be infringed simply because a majority of the people choose that it be." *Lucas* v. *Forty-Fourth Gen. Assembly of the State of Colo.*, 377 U.S. 713, 736-37 (1964). And that

right becomes a farce if legislators can demote one of their duly elected colleagues to little more than an informal observer without fear of any judicial response.

To be sure, legislative immunity is an important protection "to insure that the legislative function may be performed independently without fear of outside interference." *Supreme Ct. of Va.* v. *Consumers Union of the U.S., Inc.*, 446 U.S. 719, 731 (1980). Courts should not lightly disregard it. But the doctrine also cannot become a shield for actions that directly *attack* the legislative function. Rare as those instances may be, courts must not be shy when legislators move beyond ordinary politics and begin dismantling elements as fundamental as a legislator's right to vote. It would be a perverse result indeed if a doctrine meant to protect "[f]reedom of speech and action in the legislature" was instead used to erase Representative Libby's ability to speak and act in the Legislature. *Tenney* v. *Brandhove*, 341 U.S. 367, 372 (1951).

So the Court should grant the injunction pending appeal, and it need not even tread any new ground to do so. Although the lower courts were fixed on legislative immunity, they were doubly mistaken in thinking it applied. For one, barring Representative Libby from voting was not a legislative act to which legislative immunity applies. For another, even if it were a legislative act, the House's voting bar against Representative Libby is of such "extraordinary character" that immunity should not apply. *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1880). With immunity put aside, it becomes plain enough that Representative Libby is entitled to immediate relief, as she has already explained well. Appl. 24-38. The House's actions directly implicate both the First and Fourteenth

Amendments. And not even the lower courts seemed to question the harm that Representative Libby and her constituents will suffer from these damaging actions.

"It is absolutely opposed to the fundamental principles of our Government," Charles Evans Hughes once said, "for a majority to undertake to deny representation to a minority through its representatives elected by ballots lawfully cast." *Hughes Upholds Socialists' Rights*, N.Y. TIMES, Jan. 10, 1920, at A1. The statement remains just as true a century later. The Court should grant the application and confirm as much.

SUMMARY OF THE ARGUMENT

Although both the district court and the circuit court relied on legislative immunity to avoid addressing the merits of Representative Libby's claims, that doctrine cannot apply here.

I. Respondents can invoke legislative immunity only as to legislative acts. And not everything done by a legislator is a legislative act. Here, preventing Representative Libby from voting was not legislative. It was not integral to passing legislation. It also was not an essential part of other aspects of the House's jurisdiction. While a legislative body can discipline its members, it cannot go so far as to suspend a member and deprive him or her of voting power. What's more, the voting bar is more like an administrative action than a legislative one. And immunizing that action also would serve none of the doctrine's ordinary purposes.

II. Even if one could say this suspension was a legislative act, it is of such extraordinary character that it cannot be protected. The act strikes at a legislator's most important function: voting. Representative Libby's suspension disenfranchises all of

District 90's voters. And it does so as retribution for the very sort of speech that a legislator *must* offer—speech on one of the important issues of the day.

ARGUMENT

I. LEGISLATIVE IMMUNITY DOES NOT APPLY HERE BECAUSE THE VOTING BAR IS NOT A PROTECTED LEGISLATIVE ACT.

For at least two independent reasons, the lower courts erred in thinking that the House's actions implicated legislative immunity. First, the Clerk is not performing a legislative act when he refuses to count Representative Libby's votes. And second, the House cannot invoke immunity because it would be inconsistent with the doctrine's purpose.

A. Legislative immunity is a common-law privilege that finds its "roots" in the Constitution's Speech or Debate Clause. *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967); see also U.S. CONST. art. I, § 6, cl. 1. It applies to "shield" legislators and their functionaries from suit, *United States* v. *Brewster*, 408 U.S. 501, 517 (1972), so that "legislative function[s] may be performed independently without fear of outside interference," *Consumers Union*, 446 U.S. at 731. The immunity ultimately exists to "protect the public good." *Lake Country Ests., Inc.* v. *Tahoe Reg'l Plan. Agency*, 440 U.S. 391, 405 (1979) (cleaned up).

But the limits of legislative immunity are "finite," *Doe* v. *McMillan*, 412 U.S. 306, 317 (1973), for it "does not . . . bar all judicial review of legislative acts," *Powell* v. *McCormack*, 395 U.S. 486, 503 (1969). Although the privilege cements legislators' "independence," it stops short of transforming legislators into "super-citizens" above the law. *Brewster*, 408 U.S. at 507-08, 516. Legislative immunity covers only what is "necessary to preserve the integrity of the legislative process"—and no more. *Id.* at 517; see also, e.g., *Kent* v. *Ohio House of Representatives Democratic Caucus*, 33 F.4th 359, 365 (6th Cir. 2022)

(Sutton, J.) (explaining how the doctrine "immunizes lawmakers from lawsuits that would indirectly impair their freedom to engage in tasks that are indispensable ingredients of lawmaking" (cleaned up)).

To that end, protected "[l]egislative acts are not all-encompassing." *Gravel* v. *United States*, 408 U.S. 606, 625 (1972). Legislative acts are those "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1880). But they do not include all conduct "casually or incidentally related to legislative affairs." *Brewster*, 408 U.S. at 528. Rather, immunity turns on the "nature of the act." *Bogan* v. *Scott-Harris*, 523 U.S. 44, 54 (1998). It attaches only where the act is an "integral part of the deliberative and communicative processes" related to official proceedings, "passage or rejection of proposed legislation," or "other matters" constitutionally within the legislatures' "jurisdiction." *Gravel*, 408 U.S. at 625. And courts have stressed that protected acts must be legislative in both form (in that they were integral steps) and substance (in that they "bore all the hallmarks of tradition legislation, including whether they reflected discretionary, policymaking decisions"). *State Emps. Bargaining Agent Coal.* v. *Rowland*, 494 F.3d 71, 89 (2d Cir. 2007) (cleaned up); accord *Church* v. *Missouri*, 913 F.3d 736, 751 (8th Cir. 2019).

Employees and functionaries are not insulated from this standard. Even if an immune legislator directs them to act, surrogates enjoy protection only if their actions are separately legislative in nature, too. See *Gravel*, 408 U.S. at 620-21. In *Kilbourn*, for example, the Court refused to extend immunity to a sergeant-at-arms who complied with a legislative order and executed an illegal arrest. See 103 U.S. at 205; see also *Eastland*, 387

U.S. at 84-85 (shielding, in part, subcommittee counsel who gathered records for hearing); *Powell*, 395 U.S. at 504-06 (1969) (denying immunity for House employees who executed the improper exclusion of a representative-elect).

B. Taking these principles together, neither the Speaker nor the Clerk is performing a legislative act when blocking Representative Libby from casting votes on pending legislation. The district court reasoned otherwise by noting that the Speaker acted in compliance with a rule after a vote on the House floor. App.19. But the fact that a "legislator may vote on an issue . . . does not necessarily determine that he or she was acting in a legislative capacity." *Smith* v. *Lomax*, 45 F.3d 402, 406 (11th Cir. 1995) (cleaned up). Likewise, legislative immunity "does not turn on whether an action is in some general sense 'official.'" *In re Sealed Case*, 80 F.4th 355, 364-65 (D.C. Cir. 2023) (Rao, J.). A proper analysis calls for a closer look.

To begin, Representative Libby's exile from the House is not "integral" to the "deliberative" or "communicative processes" of legislating. *Gravel*, 408 U.S. at 625. Short of expulsion (where the member's vote can then be replaced), invalidating a member's vote is not, and cannot be, "essential" to any democratic legislative process, which depends on fair and equal representation. *Id.*; *Reynolds* v. *Sims*, 377 U.S. 533, 560-61 (1964) (describing "the fundamental principle of representative government in this country" as "one of equal representation for equal numbers of people"). A lawmaker's vote is not his own in our representative system of government; votes belong to the people. *Nev. Comm'n on Ethics* v. *Carrigan*, 564 U.S. 117, 126 (2011). Denying a representative's vote thus disenfranchises citizens and threatens the legitimacy of the legislative process at both the state and federal

levels. Annulling a member's vote is not an integral step in the legislative process but an act in service of undermining it. And "policymaking" is nowhere to be found in that decision, either; the suspension instead deprives the policymaking process of views from Representative Libby and her constituents, weakening the "[r]ich public debate" that is an "essential precondition for the exercise of . . . [the] sovereign prerogative." Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 786 (1987).

Next, the Clerk's refusal to count Representative Libby's votes is not "integral" to the "deliberative" or "communicative processes" of any "other matter" within the legislature's jurisdiction. *Gravel*, 408 U.S. at 625. Although all state legislatures have the power to censure or otherwise punish members, they are constitutionally barred from stripping voting rights as part of that process. See *Reynolds*, 377 U.S. at 564-65 (explaining that the Constitution guarantees equal representation); *Hous. Cmty. Coll. Sys.* v. *Wilson*, 595 U.S. 468, 475-76 (2022) (detailing censure authority). Thus, as Representative Libby notes, "[t]he prevailing view is that members of the legislature do not have the power to suspend members and therefore deprive them of the right to vote." *Boquist* v. *Courtney*, 32 F.4th 764, 783 (9th Cir. 2022). The district court therefore erred in concluding that suspension fell "within the legitimate legislative sphere." App.19 (cleaned up).

The refusal to count Representative Libby's votes also lacks the traditional "hallmarks" of a legislative act. *Bogan*, 523 U.S. at 55. Recording votes is nondiscretionary and does not involve "policymaking decision[s]." *Id.* Meanwhile, the refusal will not have "prospective implications that reach well beyond the particular occupant of the office." *Id.* at 56. And the refusal does not implicate some generally applicable policy; the House has

instead singled out Representative Libby and District 90 constituents. Courts often find that such a laser focus is compelling evidence that an act is *not* legislative. See, e.g., *EEOC* v. *Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 184 (4th Cir. 2011) (Wilkinson, J.) ("Legislative acts, the ones for which the immunity and privilege are granted, typically involve the adoption of prospective, legislative-type rules, rules that establish a general policy affecting the larger population." (cleaned up)); *Bechard* v. *Rappold*, 287 F.3d 827, 829 (9th Cir. 2002) (holding certain actions not legislatively immune because they "involved ad hoc decisionmaking rather than the formulation of policy and . . . affected only [one person] rather than affecting a large number of people"); see also Shane Coughlin, S*peaking of the Speech or Debate Clause: Revising State Legislative Immunity*, 98 NOTRE DAME L. REV. REFLECTION 50, 69 (2022) ("[I]n the context of state legislators claiming an ouster due to policies adopted by the majority, courts should assess whether a rule is neutral and generally applicable."). Further, while passing the censure resolution, which "place[d] administration" in the "hands" of the Speaker and the Clerk, "may have been a legislative act," how the Speaker and the Clerk "in fact administrate is not." *Selene* v. *Legislature of Idaho*, 514 F. Supp. 3d 1243, 1253 (D. Idaho 2021).

Even courts that take a broad view of legislative immunity have refused to recognize the right to suspend a member as a "legislative act." *Whitener* v. *McWatters*, for instance, found that a board of supervisors took a legislative act when it censured a board member and took away his committee assignments. 112 F.3d 740, 744 (4th Cir. 1997). At the same time, the court distinguished between internal disciplinary actions like censure and reassignment (legislative) and any "power to exclude those elected" (not). *Id.*; see also *In*

re Chapman, 166 U.S. 661, 668 (1897) (recognizing Congress's "inherent power of self-protection" but pointedly omitting suspension of voting rights from the list of those powers); *Gamrat* v. *McBroom*, 822 F. App'x 331, 334 (6th Cir. 2020) (finding that an expulsion was a legislative activity principally because expulsion was expressly provided for in the Michigan Constitution). The Maine House's action against Representative Libby falls firmly in the latter camp; although the district court emphasized that Representative Libby had formally been permitted to retain her seat, App.27-28, the practical effect was the same as expelling her (except that she can't now be replaced). See *Expulsion*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("An ejectment or banishment, either through *depriving someone of a benefit* or by forcibly evicting the person." (emphasis added)); see also *Rash-Aldridge* v. *Ramirez*, 96 F.3d 117, 119 (5th Cir. 1996) (distinguishing an effort to "remove [a city council member] from her seat on the council []or take away any privileges of that office"). Serving on committees and the like does not grant Representative Libby the privileges of membership. *Michel* v. *Anderson*, 14 F.3d 623, 632 (D.C. Cir. 1994).

More recent history confirms the same. No State other than Maine has shown an interest in a power grab of this kind. Every other State understands that the constitutional guardrails guaranteeing voting privileges to representatives are absolute. They also appreciate that those guardrails reinforce, rather undermine, the due functioning of the legislature. So not a single state legislature in recent years has taken away voting rights from a representative while punishing him or her. See, e.g., Micah Drew & Keila Szpaller, *Montana Republican Party Censures Nine GOP Senators; No Longer Considers Them Republicans*, DAILY MONTANAN (Apr. 4, 2025, 7:43 PM), https://tinyurl.com/5frvczrv (no

loss of voting privileges for nine censured Montanan senators who collaborated with Democrat colleagues); Kiara Alfonseca, *Rep. Zooey Zephyr, Transgender Legislator Censured in Montana, Wins Reelection*, ABC NEWS (Nov. 6, 2024, 10:27 AM), https://tinyurl.com/yc6z7cv8 (bar from house floor but no loss of voting privileges for Montana state representative who voiced opposition to medical treatment for transgender youth); James Brooks, *Alaska House Censures Rep. Eastman for Comments About the Economic 'Benefit' of Child Abuse Deaths*, ALASKA BEACON (Feb. 22, 2023, 3:51 PM), https://tinyurl.com/3r2d8fdt (no loss of voting privileges for Alaskan representative who was censured three times); *Arkansas Lawmaker Censured for Swearing at Colleague*, AP NEWS (Feb. 9, 2021, 7:28 PM), https://tinyurl.com/fdtnj9a9 (no loss of voting privileges for Arkansas senator who used profanity toward a colleague); Christina Caron & Liam Stack, *Maryland House of Delegates Censures Mary Ann Lisanti for Using Racist Slur*, N.Y. TIMES (Feb. 28, 2019), https://tinyurl.com/bdcsryce (agreement to give up leadership role and participate in sensitivity training for Maryland representative who used racial slur).

Altogether, both a functional and historical perspective show that Representative Libby's censure is a bridge too far. *Powell* confirms as much. There, the Court refused to extend legislative immunity to House employees who carried out the illegal exclusion of representative-elect Adam Powell. *Powell*, 395 U.S. at 505-06. The Clerk of the House who threatened to refuse to work for Powell, the Sergeant-at-Arms who refused to pay Powell's salary, and the Doorkeeper who threatened to deny Powell admission to the House chamber had not engaged in legislative acts, despite being directed by one. *Id.* at 493. This case is no different. The Maine House has effectively closed its doors to Representative Libby,

even if she can sit in a few committee meetings or keep the key to her office. As in *Powell*, Representative Libby cannot speak on any bills, and she cannot vote. And as in *Powell*, the Clerk's actions are simple executions of the body's command—Representative Libby's censure.

So applying any ordinary understanding, Respondents' actions are not legislative acts justifying use of legislative immunity.

C. Beyond these tests, legislative immunity also depends on purpose and context. See *Forrester* v. *White*, 484 U.S. 219, 224 (1988) (noting that the Court must not "extend the scope of the protection further than its purposes require"); *Cushing* v. *Packard*, 30 F.4th 27, 52 (1st Cir. 2022) (finding that legislative immunity "must be sensitive to context"). Those concepts weigh against labelling the Maine legislators' acts "legislative," too.

Legislative immunity is supposed to "shield [legislators] from political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box." *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181. But if immunity reaches the conduct here, then legislators will gain a new, dangerous, and "outside-the-box" weapon in their political arsenal. They may use voting rights as collateral for compliance. They could rescind their political opponents' voting power. And they could do so with impunity, safe in the knowledge that they could not be held judicially accountable. These results would pervert, rather than protect, the "integrity of the legislative process." *Brewster*, 408 U.S. at 507, 517; see also *Cushing*, 30 F.4th at 57 (Thompson, J., dissenting) ("If legislative immunity is meant to enable and encourage a representative of the public[] to discharge his

public[] trust with firmness and success, then it seems contradictory that the immunity would protect some legislators' decision to effectively preclude other legislators from discharging their duties." (cleaned up)).

When applied to *state* legislators, legislative immunity has also sometimes been described as an important protection of federalism. See, e.g., Steven N. Sherr, *Freedom and Federalism: The First Amendment's Protection of Legislative Voting*, 101 YALE L.J. 233, 238 (1991). And certainly, the States here are great fans of federalism. Yet a simple insistence that a legislator must be allowed to vote is no real threat to federalism. A State would retain all the same sovereign powers both before and after such a declaration is made.

Lastly, courts have recognized that legislative immunity serves a pragmatic purpose of limiting distractions from legislators' work. *Consumers Union*, 446 U.S. at 733. But again, the straightforward question of disenfranchisement here—and the equally straightforward remedy of reseating Representative Libby in full—will not require complicated, distracting proceedings or invite serial, abusive litigation. Cf. *Trump* v. *United States*, 603 U.S. 593, 640 (2024) (imagining how a "broad [criminal] statute" might be wielded against a president while evaluating the president's immunity); *Clinton* v. *Jones*, 520 U.S. 681, 702 (1997) (considering "the relatively narrow compass of the issues raised in this particular case" when deciding whether immunity from civil suit should apply to prevent undue interference with presidential functions). As this very application reflects, the matter can be resolved on an undisputed record with no legislator involvement and no reason for delay. See, e.g., *Larsen* v. *Senate*, 152 F.3d 240, 253 (3d Cir. 1998) (distinguishing

an impermissible remedy from an order that "merely direct[s] the seating of a properly elected legislator").

The "public good" is best served by allowing a legislator to work. *Lake Country Ests.*, 440 U.S. at 405. The Court should therefore grant an injunction pending appeal so that Representative Libby can do just that.

II. LEGISLATIVE IMMUNITY DOES NOT APPLY HERE BECAUSE OF THE VOTING BAR'S EXTRAORDINARY CHARACTER.

The Court has noted before that legislative immunity may not shield even legislative acts when they prove to be of "extraordinary character"—that is, they constitute "utter perversion[s]" of the legislative powers. *Kilbourn*, 103 U.S. at 204-05. This exception may apply when legislative acts are "so flagrantly violative of fundamental constitutional protections that traditional notions of legislative immunity would not deter judicial intervention." *Cushing*, 30 F.4th at 50 (cleaned up). Put differently, "[i]t may be that at some point, when a legislature acts in a wholly irresponsible and undemocratic manner, its immunity for 'legislative' acts dissipates." *Bryan* v. *City of Madison*, 213 F.3d 267, 274 (5th Cir. 2000); cf. *Ex parte Virginia*, 100 U.S. 339, 348 (1879) ("We do not perceive how holding an office under a State, and claiming to act for the State, can relieve the holder from obligation to obey the Constitution of the United States.").

The acts taken against Representative Libby are indeed a *flagrant* violation of our constitutional right to equal representation. Representative Libby suffered a "personal injury" when she was "barred from exercising [her] right to vote on bills." *Kerr* v. *Hickenlooper*, 824 F.3d 1207, 1216 (10th Cir. 2016); see also *Robinson Township* v. *Commonwealth*, 84 A.3d 1054, 1055 (Pa. 2014) (explaining that legislators have a "right to

vote on legislation"). But more importantly, her constituents were directly injured, too. "The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places." *Reynolds*, 377 U.S. at 568. The "right to equal representation in a State legislature and the right to vote for State legislators . . . [a]re regarded as of primary importance in a democratic society." *Brouwer* v. *Bronkema*, 141 N.W.2d 98, 107 (Mich. 1966). And both rights are plainly "shortchanged" when a "neighboring district, of equal population" is granted more votes in the legislature. *Bd. of Estimate* v. *Morris*, 489 U.S. 688, 698 (1989). After all, "the people exercise [their] sovereign power through their elected representatives in the [legislature]." *Cmty. Success Initiative* v. *Moore*, 886 S.E.2d 16, 31 (N.C. 2023).

Despite what the district court said, leaving Representative Libby nominally in her seat isn't good enough, either. "When a legislator cannot appear[,] the people whom the legislator represents lose their voice in debate and *vote*." *State* v. *Beno*, 341 N.W.2d 668, 676 (Wis. 1984) (emphasis added). It is the "right to vote [that] freely enables legislators to consummate their duty to their constituents." *Miller* v. *Hull*, 878 F.2d 523, 533 (1st Cir. 1989) (cleaned up). Without a vote, "all of the people of [the representative's] district . . . who voted for him, . . . who voted against him, . . . who chose not to vote, [and] . . . who were not eligible to vote" are silenced. *Davids* v. *Akers*, 549 F.2d 120, 124 (9th Cir. 1977); see also Gerald T. McLaughlin, *Congressional Self-Discipline: The Power to Expel, to Exclude, and to Punish*, 41 FORDHAM L. REV. 43, 60 (1972) ("During the period of suspension, a member's constituents are deprived of the services of their representative without the power to send someone else in his place. Suspension then robs a segment of the population

of its right to . . . representation."). It is through the vote that the legislator acts as "trustee" for his constituents. *Carrigan*, 564 U.S. at 126.

It only adds actionable insult to injury that the House stripped Representative Libby of her vote because of political speech directed at constituents and made outside the House. Representative Libby spoke out about biological boys competing in girls' sports—an issue that even the district court acknowledged is being "fiercely debat[ed]" "around the country." App.3. Indeed, at least three petitions for certiorari touching on that issue are before this Court right now. See Petition for Certiorari, *Little* v. *Hecox*, No. 24-38 (S. Ct. July 11, 2024); Petition for Certiorari, *West Virginia* v. *B.P.J.*, No. 24-43 (S. Ct. July 11, 2024); Petition for Certiorari, *Peterson* v. *Jane Doe*, No. 24-449 (S. Ct. Oct. 17, 2024). And Maine is no different—the issue has prompted both proposed legislation and a lawsuit from the U.S. Department of Justice. See Complaint, *United States* v. *Me. Dep't of Educ.*, No. 1:25-cv-00173-JCN (D. Me. Apr. 16, 2025), ECF No. 1. So it was expected that Representative Libby would comment on the issue.

"[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). For all sorts of reasons, then, "[l]egislators have an obligation to take positions on controversial political questions." *Bond* v. *Floyd*, 385 U.S. 116, 136 (1966). Given all that, it's unsurprising that "federal courts have not hesitated to enjoin" legislative bodies when "elected officials have been excluded or suspended from [those] bodies for the exercise of their right of free speech." *Gewertz* v. *Jackman*, 467 F. Supp. 1047, 1057 (D.N.J. 1979). These courts have recognized that "[i]n our system of government only the electorate in [the legislator's] ward

are permitted to judge him and punish him for his expression of ideas and opinions." *Kucinich* v. *Forbes*, 432 F. Supp. 1101, 1117 (N.D. Ohio 1977). The district court should have recognized the same here.

The district court instead seemed to believe that these egregious acts could still not trigger the extraordinary-character exception because they were effected through legislative rules and a vote. App.4, 18-19, 23. That's an odd position, as the States themselves have long recognized that "[a] legislature may not, even in the exercise of its 'absolute' internal rulemaking authority, violate constitutional limitations." *Burt* v. *Speaker of the House of Representatives*, 243 A.3d 609, 614 (N.H. 2020); accord *League of Women Voters of Honolulu* v. *State*, 499 P.3d 382, 392–93 (Haw. 2021); *Des Moines Register* v. *Dwyer*, 542 N.W.2d 491, 496 (Iowa 1996); cf. *United States* v. *Ballin*, 144 U.S. 1, 5 (1892) ("The constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights."). Worse still, the court appeared to reject out of hand the idea that constitutional violations can *ever* overcome legislative immunity. App.24-25. It never weighed the flagrancy of the violation here, apparently because it thought that fact irrelevant. But that's a dangerous path indeed. If the district court is right on that point, then Representative Libby's parade of unconstitutional horribles will be on the march in due time. Appl. 4. "History should teach us then, that in times of high emotional excitement" "attempts will always be made to drive . . . out" "minority parties and groups." *Barenblatt* v. *United States*, 360 U.S. 109, 151 (1959) (Black, J., dissenting). The decision below invites those attempts to start now.

The district court fretted about being "the first case to clear the high bar for applying [the extraordinary character] exception." App.26. But the prospect that this case could be the first isn't evidence that the exception is illusory—it's a testament to the atypicality of what the House did here. The principle that members can't be unilaterally stripped of voting rights has been recognized through all of our nation's existence. About 250 years ago, early Americans declared that it was "altogether repugnant to the principles of the constitution" to "proceed to suspend a member duly returned" and "deprive" the member of "essential rights." LUTHER S. CUSHING, REPORTS OF CONTROVERTED ELECTIONS IN THE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF MASSACHUSETTS 18 (1853) (describing 1784 election). And about two months ago, a modern American judge found that a similar effort to impose an "indefinite suspension of voting rights" was a "severe" and unjustifiable "burden on voting rights." *Schwartz* v. *New York*, No. 603475/2024, 2025 WL 779524, at *5 (N.Y. Sup. Ct. Mar. 5, 2025). The district court should have joined the centuries-long chorus and held the same here. Because it failed to do so, it's now up to this Court to remedy this ugly situation.

CONCLUSION

The Court should grant the application for an injunction pending appeal.

Respectfully submitted.

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