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 DONALD DUBUC,

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,

Respondents.

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

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR INJUNCTION PENDING APPEAL

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REPLY

Applicants seek interim relief pending appeal only against the Maine House Clerk to count District 90's votes like every other statehouse district in America. It would be a remarkable break from history to permit the continued disenfranchisement of thousands of Americans for their chosen representative's protected speech. There is "an exceptional need for immediate relief" because the ongoing harm is "irreversible." *Labrador v. Poe*, 144 S. Ct. 921, 934 (2024) (Jackson, J., dissenting). There can be no do-over for the hundreds of votes taking place in the Maine House, for which District 90 will not be counted. While Applicants' initial request for relief before the May 6 floor session has passed, the Court can still redress the ongoing irreparable harm compounding with every ensuing floor session.[1] Allowing Representative Libby's vote to count on some bills is better than none.

Respondents have no conceivable interest in punishing a legislator by denying her district the equal representation that the Constitution guarantees. The U.S. House and state legislatures everywhere verbally censure or otherwise punish legislators in ways that do not indefinitely disenfranchise constituents. *Infra* nn.5-6. Shrugging off a legislator's power to vote as one of a "plethora" of privileges, Resp.2,

[1] Applicants filed this emergency application on April 28, 2025, and requested relief by May 6. Application 1-2. On May 1, Justice Jackson called for a response by May 8. Applicants filed this reply within 24 hours of that response. Since filing the application, Representative Libby has been excluded from 20 roll-call votes, plus countless other voice votes on bills and amendments, over four separate floor sessions. Today marks day 74 of the Clerk's refusal to count her district's votes.

As for Respondents' suggestion to wait for the First Circuit, Resp.38-39, there is nothing to wait on. The motions panel already denied an injunction pending appeal to have District 90's votes count after considering Applicants' likelihood of success on the merits. App.1-2; *see infra* II.A.

is little different than saying Justices of this Court cannot decide cases—but no problem, because they can hire law clerks, take a salary, or attend the State of the Union.

Respondents' fix—"Just apologize for what you said!"—is no fix at all. Respondents retaliated against Libby because they disapproved of her speech drawing attention to the widely debated issue of fairness in girls' sports. Application 28-34. Respondents now insist on exacerbating that harm by requiring an apology as a "condition" of restoring District 90's equal representation. Resp.22. The Speaker cannot insist on an apology to his satisfaction—compelling speech conforming to his preferred viewpoint, *infra* I.C.2.a—any more than Speaker Johnson could insist on congressmembers' declaring "Trump is Making America Great Again" as a condition of voting.

Libby's constituents elected her to vote on their behalf for her elected term. An injunction pending appeal simply restores her ability to perform that essential duty. The Constitution's promise of equal representation is not conditioned on whether the majority party approves of a legislator's speech. In our republic, legislators have the "widest latitude to express their views on issues of policy," even "controversial political questions," for their constituents. *Bond v. Floyd*, 385 U.S. 116, 135-37 (1966).

I. Respondents' Merits Arguments Are Contrary to Precedent and History.

A. Legislative Immunity Is Inapplicable.

1. Respondents' version of legislative immunity is limitless. Respondents say immunity applies if a suit challenges "tallying" votes or anything "occur[ring] on the floor." Resp.2, 20. So imagine the following resolution: "Whereas understanding legislation requires a Harvard degree: RESOLVED, that only legislators with a Harvard degree may vote." The clerk stops counting votes cast by legislators who didn't go to

Harvard. Their constituents sue to restore their equal representation. Under Respondents' rule, there's nothing courts can do. That challenge to vote "tallying" must give way to immunity. The House majority has the last word; it is supreme.

Thankfully, that is not the version of legislative immunity that American courts apply today.[2] Legislative immunity is "not supremacy." *United States v. Brewster*, 408 U.S. 501, 508 (1972). It does not cover all "conduct *relating* to the legislative process." *Id.* at 515. It is not a sword to destroy equal representation. It is a shield protecting *every* legislator from being "withdrawn from his seat by a summons" so as not to deprive "the people, whom he represents, [of] their voice in debate and vote." II Joseph Story, *Commentaries on the Constitution of the United States* §857 (1833).

2. Respondents' rule for immunity operates at too high a level of generality. If immunity applies whenever defendants trace their challenged acts to the "power … to punish" members or "tallying a floor vote," Resp.2, or conduct "occur[ring] on the floor … *during* the legislative process," Resp.20, then this Court was wrong in *Kilbourn*, *Powell*, and *Gravel*. In *Kilbourn v. Thompson*, it did not matter that the House could "determine the rules of its proceedings," that there was a House "resolution … authorizing the investigation," or a "warrant of the speaker" for Kilbourn's arrest. 103 U.S. 168, 182, 196 (1880). Those precipitating events did not render the sergeant-at-arms' acts immune. *Id.* at 199-202; *see Powell v. McCormack*, 395 U.S. 486, 504-05 (1969) (stating *Kilbourn* "decisively settles" that officials cannot claim immunity even

[2] Respondents are wrong that the "privilege" they claim does not "derives" from the U.S. Constitution's Speech or Debate Clause. *Contra* Resp.13. State legislative immunity in federal courts is a function of federal common law derived from English practice. *See* Application 14; *Tenney v. Brandhove*, 341 U.S. 367, 372-75 (1951).

though "acting pursuant to express orders of the House"). In *Powell*, it did not matter that the Clerk or others acted pursuant to "House Resolution No. 1" or "House Resolution No. 278" or "a majority vote of the House." 395 U.S. at 490-93. In *Gravel v. United States*, it did not matter that the senator acted in his "official capacity" or that committee proceedings precipitated his acts when those acts were "in no way essential to the deliberations of the Senate." 408 U.S. 606, 624-26 (1972).[3] In *Gravel*'s words, this Court's cases "reflect a decidedly jaundiced view" of immunity and do *not* "privilege illegal or unconstitutional conduct beyond that essential" to legislating. *Id.* at 620. There is no immunity for "execut[ing] an invalid resolution." *Id.* at 621.

3. That precedent, corroborated by history, makes legislative immunity irrelevant to this suit to *restore* District 90's vote. Cases involving indisputably legislative acts such as introducing legislation or holding committee hearings are inapposite. *Contra* Resp.14. In *Bogan v. Scott-Harris*, for instance, the Court held the "introduction" of budget legislation and "voting for an ordinance" were immune. 523 U.S. 44, 55 (1998); *see* Application 19 (collecting cases involving congressional investigations, hearings, committee reports, or motives for floor speeches). Applicants here do not challenge legislators' votes or other standard fare, but instead the ongoing refusal to count Libby's vote in retaliation for her protected speech.

Likewise, arguments that the state constitution establishes the office of the clerk are irrelevant. *Contra* Resp.3, 17. The U.S. Constitution's requirements of the

[3] No reading of *Gravel* supports Respondents' suggestion (at 18-19) that *Gravel* abrogated *Kilbourn* and *Powell*. *Gravel* reaffirmed them. *See* 408 U.S. at 618 (agreeing *Kilbourn* "afforded no protection for those who made the arrest," even though at the House's direction); *id.* at 620 (describing *Powell* as confirming "judicial power … to afford relief against House aides" implementing "invalid resolutions").

Clerk made no difference in *Powell*, 395 U.S. at 494. *See, e.g.*, U.S. Const. art. I, §2, cl. 5 & §5, cl. 3. Whatever the clerk's other responsibilities, he does not decide one legislator's vote counts more than another; the state and federal constitutions already count those votes equally. *See* Application 15-17.

History confirms that refusing to count Libby's vote is no legislative act. *Id.* Legislators historically claimed immunity *for their own votes*. *See Kilbourn*, 103 U.S. at 204. Such "act[s] of voting," *id.*, cannot be equated with the *refusal* to count duly elected legislators' votes. *Contra* Resp.19-20. There is no history for Respondents' anti-democratic claim that refusing to tally Libby's votes is "integral" to the House's "deliberative and communicative processes." *Gravel*, 408 U.S. at 625. Legislators are entrusted to cast votes "for … constituents," reflecting their "apportioned share of the legislature's power to the passage or defeat of a particular proposal." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125-26 (2011). Refusing a legislator her apportioned share because the Democratic majority disapproves of her speech—what Respondents call "following the will of the Maine House," Resp.21[4]—dismantles "the legislative process" and legislators' "independence," *contra Brewster*, 408 U.S. at 507.

No legislative body since *Powell* has claimed the *refusal* to count a legislator's vote is an immune legislative act. The Georgia House did not even raise immunity in *Bond*, instead conceding that the federal judiciary could "test[] the exclusion" of a legislator on "clearly unconstitutional grounds." 385 U.S. at 130. The U.S. House and

[4] The invocation of the House's "will" is out of step with Maine residents, who generally side with Libby on the issue of fairness in girls' sports by a 2-1 margin. *See* Bonnie Bishop, *Poll: More Mainers against transgender athletes in women's sports*, WMTW (Mar. 27, 2025), https://perma.cc/2BP8-DA89.

state legislatures disclaim any punitive power to refuse to count duly elected legislators' votes.[5] Countless more anticipate punishments like censures, fines, or loss of committee or leadership positions—short of denying equal representation to legislators' constituents. States' Br.9-10.[6] Formal expulsion, by a super-majority, is how legislators are stripped of their voting rights; importantly, such expulsions create vacancies filled quickly by special elections to restore constituents' representation. 3 *Deschler's Precedents* Ch.12 §15.1; *see, e.g.*, *Monserrate v. N.Y. Senate*, 599 F.3d 148, 155 (2d Cir. 2010) (expulsion remedied by a special election). Respondents have no history of refusing to count votes as "essential to legislating." *Gravel*, 408 U.S. 621; *see Boquist v. Courtney*, 32 F.4th 764, 783 (9th Cir. 2022) (Ikuta, J.) ("prevailing view" that legislators "do not have the power" to deny colleagues' "right to vote").

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[5] 3 *Deschler's Precedents of the United States House of Representatives* Ch.12 §§15-15.1 (1994), https://perma.cc/M3ZL-9P9R (recognizing "constitutional impediments" to depriving members' right to vote); Wis. Leg. Ref. Bureau, *Discipline in the Wisconsin Legislature: A History of Reprimand, Censure, Suspension, and Expulsion* 4 (2020), https://perma.cc/FK4F-JF6L (similar); Idaho H.R. R. 45(6) (prohibiting punishments that "deny[] a legislative district representation via floor votes"); Mont. H.R. R. H20-20(2)(d)-(e) (2025) (barring punishments that would "prohibit the offending member from voting on any measure before the House"); Pa. H.R. R. 47 (2025) (member criminally indicted "shall otherwise continue to function as a [member], including voting"); Pa. S. R. 35(a) (2025) (same).

[6] *See* Ala. H.R. R. 55; Alaska Stat. §24.60.178; Ark. H.R. R. 91 (2023); Ark. S. R. 9.6 (2025); Colo. H.R. R. 49(f) (2024); Colo. S. R. 43(f) (2024); Fla. S. R. 1.43(2) (2024); Ga. H.R. R. 164.4-164.5 (2025); Ga. S. R. 9-1.2(b)-(c) (2025); Idaho S. R. 52(F); Ill. H.R. R. 51.5(c), 96(b)-(d) (2025); Ill. S. R. 11-1(a) (2025); Ind. H.R. R. 43.1 (2025); Ind. S. R. 14(e) (2025); Kan. H.R. R. 4903 (2023); Kan. S. R. 76 (2025); Ky. H.R. R. 23 (2024); Ky. S. R. 23 (2024); Mass. H.R. R. 16 (2025); Mich. H.R. R. 74(8) (2025); Mich. S. R. 1.311; Minn. H.R. R. 2.30 (2023); Minn. S. R. 55.9 (2025); Miss. H.R. R. 20; Miss. S. R. 31; Mo. H.R. R. 85 (2025); Mo. S. R. 78 (2025); Mont. S. R. S20-20(4) (2025); Neb. Leg. R. 2 §8 (2025); Nev. Assemb. R. 20 (2023); Nev. S. R. 21(1) (2025); N.H. H.R. R. 15 (2025); N.H. S. R. 1-5 (2025); N.J. Assemb. R. 7:6 (2024); N.J. S. R. 7:6 (2024); N.M. H.R. R. 9-13-6.1; N.M. S. R. 9-13-4; N.C. H.R. R. 9(b) (2025); N.D. H.R. R. 304 (2025); N.D. S. R. 304 (2025); Ohio H.R. R. 53(a) (2025); Ohio S. R. 76 (2025); Okla. S. R. 8-30(G) (2025); Or. H.R. R. 3.20(3), 6.35(1)-(2), 20.01(3) (2025); Or. S. R. 3.33(8), 6.35(1)-(2) (2025); R.I. H.R. R. 46(g), 48(e)-(f) (2025); R.I. S. R. 10.21 (2025); S.C. H.R. R. 4.16(F)(a) (2025); S.D. H.R. R. H6-7-H6-8; S.D. S. R. S8-7-S8-8; Tenn. H.R. R. 19 (2025); Tenn. S. R. 15 (2025); Tex. H.R. R. 5(3)(d), 5(33) (2025); Tex. S. R. 4.09 (2025); Utah H.R. R. HR4-2-103; Utah S. R. SR4-2-103; Vt. H.R. R. 90 (2025); Vt. S. R. 101-02 (2025); Va. H.D. R. 58 (2024); Va. S. R. 18(h), 53(b) (2024); Wash. Leg. Jt. R. 1 (2025); W.Va. H.D. R. 35; Wis. Assemb. R. 21, 43(3) (2025); Wyo. Leg. Jt. R. 22-1(m)(iii) (2025); *see also, e.g.*, Resp.15 & n.11 (cases involving verbal censures, committee assignments, and expulsion).

4. For similar reasons, Respondents' cited circuit cases about *other* forms of punishment or generally applicable voting rules are inapposite. Resp.15-16 & nn.11-13. No court has held "punishment" taking the form of refusal to count a duly elected legislators' vote for the rest of her term is a legislative act, let alone an immune act. *E.g.*, *Whitener v. McWatters*, 112 F.3d 740, 744 (4th Cir. 1997) (distinguishing "power to punish members" from "power to exclude those elected," which "compromis[es] the principle that citizens may choose their representatives"). As for Respondents' cited cases involving voting rules, none singled out an individual legislator for her vote to count less, or not at all. Indeed, the First Circuit distinguished generally applicable voting rules (*i.e.*, prohibiting remote voting) from those "target[ing]" particular legislators. *Cushing v. Packard*, 30 F.4th 27, 51 (1st Cir. 2022) (en banc).

Respondents mistake this Court's denial of certiorari in those inapposite cases as a rejection of Applicants' arguments here. Resp.3, 37. The denial of equal representation for thousands of Americans is cert-worthy. This Court has not hesitated to redress constitutional violations, especially when this Court's precedents have been ignored or distinguished away as they have been here. *See, e.g.*, *Bond*, 385 U.S. at 137; *Powell*, 395 U.S. at 489; *Wis. Legis. v. Wis. Elections Comm'n*, 595 U.S. 398, 401 (2022) (summarily reversing "legal error" in applying Court's decisions); *Carson v. Makin*, 596 U.S. 767, 782 (2022) (similar).

5. Even if the Clerk's refusal to count Libby's vote could be deemed a "legislative act," it is of such "extraordinary character" that judicial review is warranted. *Kilbourn*, 103 U.S. at 204; *see* States' Br.13-17. *Kilbourn* did not purport to limit that

exception to capital punishment. *Contra* Resp.20. And as Respondents implicitly acknowledge, no cited cases considering whether legislative acts were sufficiently "extraordinary" entailed disenfranchising a district. Resp.20 n.17 (committee hearings, appropriating funds, "floor conversations"). If Respondents are right that immunity precludes review of vote "tallying" here, Resp.2, then it precludes review of every refusal to tally votes cast by legislators that the reigning majority simply does not like. Application 4, 23. That transformation of immunity from a shield protecting "the public good," *Tenney*, 341 U.S. at 377, into a sword destroying equal representation defies history, precedent, and the promise of representative democracy.

B. The Fourteenth Amendment Violation Is Self-Evident.

1. Respondents try to balance away the guarantee of equal representation in the Maine House by equating the refusal to count District 90's votes with ballot-access restrictions. Resp.24-25 (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992)). They say the "burden" foisted on District 90's constituents is "reasonable," likening it to Libby's not receiving "plum committee assignments." Resp.26, 29. Legislators are not guaranteed committee work; but every legislator is elected for her ability "to vote in the full House." *Michel v. Anderson*, 14 F.3d 623, 630-32 (D.C. Cir. 1994) (distinguishing territorial delegates' committee work from House membership); *see Carrigan*, 564 U.S. at 125-26. Just as this Court would not apply *Anderson-Burdick* balancing to a claim that voters' representation is diluted due to malapportionment, it ought not apply to the present claim that voters' representation has been denied entirely. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (asking only whether seats were equally apportioned, not whether

malapportionment was burdensome); *Michel*, 14 F.3d at 626 ("It could not be argued seriously that voters would not have an injury if their congressman was not permitted to vote at all on the House floor."). Such "balancing" of the "incommensurate" interests asserted here is "more like judging whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1998) (Scalia, J., concurring). There is no comparing the denial of equal representation for District 90 to Respondents' nebulous interest in the House's "reputation and integrity." Resp.26.

2. Even if *Anderson-Burdick* applied, the refusal to count District 90's vote triggers strict scrutiny, as Respondents' own cited case acknowledges. *Peeper v. Callaway Cnty. Ambulance Dist.*, 122 F.3d 619, 623 n.5 (8th Cir. 1997); *see also Dunn v. Blumstein*, 405 U.S. 330, 334-37 (1972). Libby's floor vote is how she "execut[es] the legislative process." *Carrigan*, 564 U.S. at 125; *see* App.35-36. Incidental privileges—*e.g.*, getting paid, having a staff, or "lobby[ing] other members," Resp.9-10—are no substitute for her legislative power, just as hiring law clerks or attending judicial conferences would be no substitute for this Court's exercise of its judicial power.

Respondents flunk strict scrutiny. Their purported interest is the House's "reputation and integrity." Resp.25. History and contemporary practice show there are more narrowly tailored responses, including verbal censures, loss of committee assignments, or fines. *Supra* nn.5-6; *see* States' Br.9-10 (collecting recent examples).[7]

[7] Nor can Respondents equate this case to *Monserrate*. *Contra* Resp.30-31. Monserrate was *expelled* after his domestic violence indictment, and a special election quickly followed. 599 F.3d at 152-53. But here, a bare majority lacking the votes to expel simply eliminated District 90's vote. There will be no special election to "reduce" any temporary "burden imposed on voting rights." *Id.* at 155.

Respondents instead chose the most untailored path, having refused for more than 70 days to count Libby's votes. No "integrity" interest can justify that unprecedented refusal to count a duly elected legislator's votes for the rest of her term. *See Buckley v. ACLF*, 525 U.S. 182, 196 (1999) (interest for restricting ballot initiatives was served by other means).

C. The First Amendment Violation Is Plain.

1. There is still no dispute that Libby's post was lawful, protected speech and that her votes won't count because of it.[8] Respondents claim Libby "targeted" a track-and-field champion, Resp.1, but they do not say her speech was unprotected, nor could they.[9] Libby brought attention to Maine's sports policy by re-posting public information from a statewide high school sports event. App.45-48, 51. The "name[s] and image[s]," Resp.26, were first names and public podium photos, without any threats or incitement. App.46-47, 51. Presumably because the Speaker himself has taken to social media to post photos of state cheerleading champions, App.56, Respondents fault Libby's post by distinguishing it as one not "offering congratulations to the event's participants and winners," Resp.5. That Respondents view Libby's speech as "offensive or disagreeable," *Texas v. Johnson*, 491 U.S. 397, 414 (1989), "misguided,

[8] Applicants have never asserted a "First Amendment right to vote on legislation." *Contra* Resp.31. Applicants assert Libby cannot be retaliated against for her speech, just as the Georgia House could not retaliate against Representative Julian Bond for his speech. *Bond*, 385 U.S. 116.

[9] *See, e.g.*, *Counterman v. Colorado*, 600 U.S. 66, 74 (2023) (unprotected "[t]rue threats are serious expressions conveying that a speaker means to commit an act of unlawful violence" (cleaned up)); *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) ("political hyperbole" not a true threat); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975) (publishing sexual assault victim's already-public identity was protected First Amendment expression); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 105-06 (1979) (publishing names of minors charged as juvenile offenders was protected); *Fla. Star v. B.J.F.,* 491 U.S. 524, 526 (1989) (similar); *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 607-08 (1982) (rejecting state interest in "safeguarding the physical and psychological well-being of a minor" where names "were already in the public record").

or even hurtful," *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574 (1995), is not a basis for punishing it. It's "a reason for according it constitutional protection." *Hustler Mag. v. Falwell*, 485 U.S. 46, 55 (1988).

2. Nor can Respondents dispute the absence of historical precedent for denying her district a vote for the rest of her elected term. Far from *Wilson* "mak[ing] clear" that Libby "faces an uphill battle," Resp.31, this Court repeatedly said that *Wilson* addressed purely verbal censures alone, *Hous. Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 474-78, 480, 482 (2022), and that "forms of discipline 'are not fungible' under our Constitution," *id.* at 481. The "prevailing view" is that legislatures lack punitive power to deny a district its vote. *Boquist*, 32 F.4th at 783.

a. There is no analogous history supporting Respondents' insistence that Libby just apologize as a "condition" of voting for her district. Resp.22, 32-33. That option was not good enough in *Bond*, so it is not good enough here. 385 U.S. at 128. None of Respondents' cited examples (at 32-33) involved forcing apologies, as a condition for voting, for lawful, protected speech shared outside the statehouse. The congressional examples arose from "an assault" and "offensive words" used "in debate, upon the floor" and leaking confidential materials from executive session.[10] The Wisconsin example arose from "remarks made in the open senate."[11] The Oklahoma example arose from "harboring a fugitive that assaulted an Oklahoma Highway Patrolman."[12] And

[10] 2 *Hinds' Precedents of the House of Representatives of the United States* §§1247, 1648 (1907), https://perma.cc/6DN7-H8M3; Anne M. Butler et al., *United States Senate: Election, Expulsion, and Censure Cases 1793-1990*, at 47-48 (1995).

[11] Wis. S. Journal, 53rd Sess. 597-600 (1917), https://bit.ly/42MV6x0.

[12] Okla. H.R. Journal, 59th Leg., 1st Reg. Sess. 506-07 (Mar. 7, 2023), https://bit.ly/3YEI0PY.

the recent Maine examples were for floor statements and verbally abusing another legislator in the statehouse hallway. Application 8-9.

Distinct from those few examples, forcing an apology here necessarily compels Libby to conform to the House majority's preferred viewpoint as a "condition" of voting.[13] Contrary to Respondents' re-telling, that apology would cover more than the "use of the [first] name and image" from the state championship. Resp.26. The censure resolution was never so limited and demanded an apology for "the incident," including "criticizing the participation of transgender students in high school sports" and bringing "national attention" to Maine.[14] Even if the apology were more limited, it would still be perniciously viewpoint-based. After all, the Speaker posts photos of high school cheerleaders winning the state championship, App.56, and nevertheless demands Libby's apology because she did not similarly "offer[] congratulations," Resp.5. That is textbook viewpoint discrimination. *E.g.*, *Iancu v. Brunetti*, 588 U.S. 388, 393 (2019) (prohibiting "disparagement" is viewpoint discrimination because it permits "positive" but not "derogatory" statements).

b. There is also no analogous history of suspending legislators' voting powers indefinitely for the views they hold. Respondents do not contend any cited suspension provision, Resp.35 n.22, has been deployed in such a way. The "early examples of suspensions of Maine legislators," Resp.34, occurred 200-plus years ago in the

[13] *But see Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, 570 U.S. 205, 214 (2013) (governments "may not deny a benefit to a person on a basis that infringes his constitutionally protected … freedom of speech"); *303 Creative LLC v. Elenis*, 600 U.S. 570, 589 (2023) (finding "impermissible abridgment of the First Amendment[]" where one "must either speak as the State demands or face sanctions for expressing her own beliefs").

[14] H.R. Res. 1, 132nd Leg., 1st Reg. Sess. (Me. 2025), https://perma.cc/JU85-VNTS.

Massachusetts House pending investigations of legislators indicted for crimes.[15] Today, the Massachusetts House authorizes only "reprimand, censure, removal from a committee" or "leadership," or "expulsion" (followed by special election). Mass. H.R. R. 16. As for the cited U.S. Senate example, the question of suspending those senators' "right to vote … was not decided," and senators objected that the punishment deprived their State of "equal suffrage" and "its vote." 2 *Hinds' Precedents* §1665. And while Respondents identify a 1905 Wisconsin suspension, they omit that the attorney general concluded that suspension was without "any authority" and left the district "not represented." 4 Wis. Op. Att'y Gen. 81-84 (1915), https://perma.cc/MCS3-G7S2. States today recognize legislative bodies "cannot prevent a member from voting." *Discipline in the Wisconsin Legislature* 4; *supra* n.5. So does Congress. Denying a member her vote "effectively disenfranchise[s]" the people of that district. 3 *Deschler's Precedents* Ch.12 §15.1.

c. This case is indistinguishable from *Bond*. *Contra* Resp.35-36. And should the First Circuit again refuse to apply *Bond* or other precedents, that is cert-worthy. *Supra* p.7. Respondents' attempt to limit *Bond* because he was "completely exclud[ed]," Resp.35, does not withstand *Wilson*'s concern that punishments beyond verbal censures could stop a legislator "from doing his job" by denying "*any* privilege of office." 595 U.S. at 479 (emphasis added). Like *Bond*, Libby's punishment "implicate[s] the franchise of [her] constituents," *id.* at 481, denying their right to "be represented … by the person they have elected," *Bond*, 385 U.S. at 136-37. Like *Bond*,

[15] J. H.R. Mass. 13, 18 (1784), https://bit.ly/4ielTqk (suspending indicted member pending trial); J. H.R. Mass. 14-15 (1808), https://bit.ly/42qrzI0 (similar, pending committee investigation).

Libby was punished for speech purportedly bringing "discredit and disrespect on the House." *Id.* at 123. And like *Bond*, noted above, blaming the legislator for not apologizing is no escape-hatch for the House. *Id.* at 128. Ruling for Respondents requires overruling *Bond* and construing *Wilson* to pre-decide what it did "not address." 595 U.S. at 480.

II. The Remaining Equitable Factors Are Beyond Dispute.

The equities favor counting District 90's votes for the time being. There is no basis for deferring to the First Circuit when that court already denied interim relief. *Contra* Resp.39. And while Respondents speculate the First Circuit "will presumably rule soon" after a June argument in the underlying preliminary injunction appeal, Resp.39, the First Circuit's average decision time is between 12 and 14 months.[16] Even if Respondents are correct that this appeal will move swiftly, the injunction can dissolve if they ultimately prevail in this Court. But to defer Applicants' right to be equally represented in the meantime is to deny that right at least for the rest of the ongoing session, ordinarily running through July.[17]

A. For the first time, Respondents dispute irreparable harm because there are no "practical consequences" for District 90's residents. Resp.39. Libby's vote doesn't matter, so goes the argument, because she's in the minority. *Id.* This Court has not been so cavalier with requests to preserve fundamental rights pending appeal.[18]

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[16] *See U.S. Court of Appeals – Judicial Caseload Profile* at 6, FJC, https://perma.cc/DST7-9QND.

[17] *See House Legislative Records*, Me. House of Reps., https://bit.ly/4iBQMVO.

[18] *See, e.g.*, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020) (per curiam); *Tandon v. Newsom*, 593 U.S. 61 (2021) (per curiam); *Chrysafis v. Marks*, 141 S. Ct. 2482, 2482 (2021); *Little Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171 (2014).

Respondents give away the game by insisting Libby "cannot participate in just *two* activities." Resp.2, 7-10, 21-22, 30. They say she can "lobby other members" like a lobbyist, cash her paycheck, or caucus. Resp.9. But speak or vote on her own bills or amendments, or hundreds of others? Forget about it. Resp.7-8. If voting were no big deal, then why for 70-plus days have Respondents refused to tally hers, versus lesser punishments such as withdrawing her committee assignment? Because "participating in debates and voting on the [chamber] floor" are her "primary obligation[s]" in our "representative democracy." *Council on Am. Islamic Rels. v. Ballenger*, 444 F.3d 659, 665 (D.C. Cir. 2006); *accord Carrigan*, 564 U.S. at 125-26; *Bond*, 385 U.S. at 136-37. The punishment is not "narrowly prescribed," Resp.21, and the resulting harm is irreversible. There will be no do-overs for missed votes.

B. The remaining factors favor interim relief. Respondents have no answer to the argument that there are lesser ways to achieve their "punishment" desire or that they could reinstate their draconian punishment later should they prevail. Application 36-38. As for the public interest, Respondents say "[i]t is difficult to imagine a more intrusive act" for the Maine House than granting interim relief. Resp.38. That forgets that immunity is not for legislators themselves but for their constituents, including District 90's. *Tenney*, 341 U.S. at 377. Only in the most Orwellian alternative universe could one contend that Americans' right to be equally represented is contrary to some "public interest" in refusing to count duly elected legislators' votes.

CONCLUSION

Applicants respectfully request modest interim relief requiring District 90's votes to count, just like every other statehouse district, while appeals are pending.

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