No. _____

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

EMERGENCY APPLICATION FOR INJUNCTION PENDING APPEAL

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Applicants are Laurel D. Libby, representing District 90 in the Maine House of Representatives, and District 90 constituents Ronald P. Lebel, Wendy Munsell, Jason Levesque, Bernice Fraser, Rene Fraser, and Donald Dubuc. Applicants are Plaintiff-Appellants in the proceedings below.

Respondents are 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, and are Defendant-Appellees in the proceedings below.

The proceedings below are:

1. *Libby et al. v. Fecteau et al.*, No. 1:25-cv-00083-MRD (D. Me.). The district court denied Applicants' preliminary injunction motion on April 18, 2025, and Applicants' motion for an injunction pending appeal on April 21, 2025. App.3-33, 75-76.
2. *Libby et al. v. Fecteau et al.*, No. 25-1385 (1st Cir.). The First Circuit denied Applicants' motion for an injunction pending appeal on April 25, 2025. App.1-2.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicants represent that they do not have any parent entities and do not issue stock.

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TO THE HONORABLE KETANJI BROWN JACKSON, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIRST CIRCUIT:

Not every emergency application filed in this Court presents a true emergency. This one does. Maine State Representative Laurel Libby spoke out on social media about an intensely debated issue—the participation of transgender athletes in girls' high school sports. Maine requires girls to compete alongside transgender athletes; Libby criticized that policy after a transgender athlete won the girls' pole vault at the state track-and-field championship. Displeased with Libby's criticism, the Maine House voted along party lines to censure her.

The verbal censure (unwise as it may be) is not what Applicants challenge here. It's what happened next. The Speaker declared Libby was barred from speaking *or voting* until she recants her view. This means her thousands of constituents in Maine House District 90 are now without a voice or vote for every bill coming to the House floor for the rest of her elected term, which runs through 2026. They are disenfranchised. Libby and her district had no vote on the State's $11 billion budget, had no vote on a proposed constitutional amendment, and will have no vote on hundreds more proposed laws including—most ironically—whether Maine should change its current policy of requiring girls to compete alongside transgender athletes.

In this application, Petitioners seek an injunction pending appeal requiring the Clerk to count Libby's votes. That interim relief simply restores the status quo of equal representation, bringing the Maine House back into conformity with every other State and Congress. Petitioners respectfully request that relief before **May 6, 2025**, when the House convenes yet another floor session where every legislator but

Libby may vote. Alternatively, the Court could set this application for oral argument in its previously announced May sitting. *See* Order, *Trump v. Casa, Inc.*, No. 24A884, *Trump v. Washington*, No. 24A885, *Trump v. New Jersey*, No. 24A886 (Apr. 17, 2025) (deferring consideration of stay applications pending oral argument); *see also, e.g.*, *Ohio v. EPA*, 144 S. Ct. 538 (2023) (same); *NFIB v. Dep't of Labor, OSHA*, 142 S. Ct. 736 (2021) (same).

The ongoing and indefinite denial of Libby's voting rights is unprecedented. Most telling, the U.S. House of Representatives long ago determined—consistent with the "weight of authority"—that it cannot constitutionally prohibit a member from voting. *Jefferson's Manual and Rules of the House of Representatives* §672 (118th Cong., 2023), https://perma.cc/U78W-KZ2G. The member's vote is not her own; it belongs to her district. And depriving an entire district of representation is no more constitutional than excluding that district from a redistricting plan in the first place. *Reynolds v. Sims*, 377 U.S. 533 (1964); *see Michel v. Anderson*, 14 F.3d 623, 630 (D.C. Cir. 1994) (making the self-evident observation that the House cannot lawfully "deprive any *member* of the right to vote in the Committee of the Whole"). This Court has squarely rejected other legislatures' efforts to disenfranchise voters by refusing to allow their chosen representatives to vote. *See Bond v. Floyd,* 385 U.S. 116 (1966); *Powell v. McCormack*, 395 U.S. 486 (1969). The same rules apply in Maine.

And still, Respondents remain steadfast in their refusal to count any floor vote cast by Representative Libby on behalf of her thousands of constituents. Going on 63 days, the Clerk has marked her district on roll call votes not as a "Yes" or "No" but as

a "Z." So Representative Libby and her constituents did the only thing they could: they sought judicial review.

The lower courts said there was nothing they could do. They held that legislative immunity precluded judicial review of the Clerk's refusal to count votes. That flouts this Court's decisions. The Clerk is responsible for his acts, even if precipitated by a legislator's directive, no different than the sergeant-at-arms in *Kilbourn v. Thompson*, 103 U.S. 168, 200-05 (1880), or the U.S. House Clerk in *Powell*, 395 U.S. at 494, 503-06. Moreover, applying legislative immunity in this case turns that doctrine on its head. Legislative immunity is a "shield" limited to "what is necessary to preserve the integrity of the legislative process." *United States v. Brewster*, 408 U.S. 501, 517 (1972). Immunity ensures legislators "enjoy the fullest liberty of speech" by prohibiting judicial inquiry into "motives" for legislation—not for legislators' convenience but for "the public good." *Tenney v. Brandhove*, 341 U.S. 367, 373-79 (1951). In contrast, Respondents here invoke immunity so they can continue to silence debate, disenfranchise a lawfully elected member of the House, and deny equal representation to her constituents. They would have this Court transform the shield of legislative immunity into a republic-destroying sword.

Without emergency relief from this Court, Maine House District 90's residents are without equal representation for the rest of their chosen legislator's term. Respondents say that's just the price of legislative immunity; they insist a plaintiff cannot challenge anything related to "tallying votes." That logic—blessed by the courts below—sets a dangerous precedent. If any act related to "tallying votes" triggers

immunity, nothing prevents another legislative body from voting along party lines to suspend a duly elected legislator's voting rights because:

- she does not join the legislative prayer beginning the day;
- she does not give appropriate thanks for the President's policies;
- she represents an area deemed "too rural" or "too urban," or she's deemed "too old" or "too young," or "too Democrat" or "too Republican";
- she refuses to apologize for a controversial column she wrote decades ago in her college newspaper;
- she criticizes the Speaker's sponsored legislation at her town hall;
- or simply because she is a woman, she is Catholic, she is Korean-American, or any other reason for singling her out.

Relief is warranted in these extraordinary circumstances. Applicants are unaware of any decision since *Powell* in which a duly elected legislator has been stripped of her vote—and her constituents stripped of their representation—for the duration of her term because of the views she holds. This Court can and should order the Clerk to count Libby's vote (as it did in *Powell*) pending further appellate review in the First Circuit and in this Court.

OPINIONS BELOW

The First Circuit issued its order on April 25, 2025. It is reproduced at App.1-2. The District Court issued its opinion and order on April 18, 2025. It is reproduced at App.3-33.

JURISDICTION

This Court has jurisdiction over this application for an injunction pending appeal. 28 U.S.C. §§1254(1), 1651(a). The district court denied Applicants' motion for a preliminary injunction on April 18, 2025. Applicants appealed the same day,

§1292(a)(1), and their appeal is pending in the First Circuit. This Court will have jurisdiction over that appeal, §1254(1), and an injunction pending appeal is in aid of this Court's future jurisdiction given the ongoing irreparable harm as the legislative session continues, §1651(a). *See, e.g.*, *Chrysafis v. Marks*, 141 S. Ct. 2482, 2482 (2021).

BACKGROUND AND PROCEDURAL HISTORY

A. There were 151 voting members in the Maine House of Representatives when the legislative session began. Now there are only 150. In late February, Respondents stopped counting District 90's votes—all because of something District 90's representative said on Facebook. No legislature has tried to disenfranchise a colleague's constituents in retaliation for her speech since this Court rejected similar attempts more than a half-century ago in *Bond v. Floyd,* 385 U.S. 116 (1966), and *Powell v. McCormack*, 395 U.S. 486 (1969).

Representative Laurel Libby has represented District 90 since 2020. App.34, 40. A mother of five and a registered nurse, Libby regularly advocates for protecting Maine girls in athletics. App.38. She is an outspoken critic of Maine's policies requiring its schools to allow transgender athletes to participate in girls' sports. *Id.*

Libby is not alone in her views. Girls' sports have been at the forefront of public debate. Americans of varying political views oppose transgender athletes in girls' sports. *E.g.*, Jackson Thompson, *NYT poll finds majority of Democrats oppose transgender athletes in women's sports*, N.Y. Post (Jan. 19, 2025), https://perma.cc/FZ8G-WHYB. More than half the States now restrict girls' sports to girls. Movement Advancement Project, *LGBTQ Youth: Bans on Transgender Youth Participation in Sports* (2025), https://perma.cc/C69P-2CNS. And one of the White

House's first priorities was an executive order chiding educational programs that permit transgender athletes in girls' sports. Exec. Order No. 14,201, 90 Fed. Reg. 9,279 (Feb. 5, 2025). The executive order drew praise from countless parents and athletes. App.44-45.

Maine has gone the opposite way. Maine law prohibits "[e]xclud[ing] a person from participation in" any "extracurricular … activity" or "[d]eny[ing] a person equal opportunity in athletic programs" based on "gender identity." 5 MRS §4602(1)(A)-(B). In public high schools, a transgender athlete need only "declare their gender identity" to participate in girls' sports and "[n]o medical records or official documents shall be requested or required to establish a student's gender identity." Me. Principals' Ass'n, *2024-2025 Handbook* 40, https://perma.cc/923N-PW6Z.

In February, Libby took to Facebook to call attention to Maine's policy, borne out at this year's high school track-and-field state championship. App.45-46. The championship was a public event; the names, schools, and podium photos of participants were widely broadcast and readily accessible online. App.47. Libby re-posted already-public, truthful information showing the first-place girls' pole vaulter previously competed in boys' pole vault. App.45-46. That first-place finish propelled the athlete's high school team to win the girls' state championship by one point. App.47.[1]

[1] The fact that the winning athlete was transgender was also no secret in Maine's public high school sports community. It was the subject of correspondence from at least one other coach to the organizer of Maine's high school track meets in advance of the state championship. *See, e.g.*, Dan Zaksheske, *Trans-Identifying Male Athlete Wins Maine State Title In Girls' Pole-Vaulting*, OutKick (Feb. 19, 2025), https://perma.cc/8A83-9EZ8.

Libby's post put Maine's policy in the national spotlight, prompting federal investigations regarding Maine's noncompliance with the White House's executive order and federal law. App.48-50. Days later, Libby's colleagues in the Maine House censured her along a party-line vote of 75 to 70. App.52. The censure resolution faulted Libby for bringing "national attention" to Maine. H.R. Res. 1, 132nd Leg., 1st Reg. Sess. (Me. 2025), https://perma.cc/JU85-VNTS. It denounced Libby's "statement criticizing the participation of transgender students in high school sports" as "reprehensible" and "incompatible with her duty and responsibilities as a Member of this House." *Id.* The resolution required Libby to "publicly apologize." *Id.*

Dissenting House members criticized the resolution as "a mockery of the censure process," "set[ting] a standard … that the majority party, when they're displeased with a social media post that upsets them, can censure a member of the minority party." App.53. Other representatives raised free-speech concerns and sought clarification on whether members who reposted Libby's post can "expect censures to come forth on them as well." App.54. The Speaker disclaimed knowledge of "any other censures." *Id.*

After the censure resolution passed, the Speaker summoned Libby to the well of the House chamber and demanded she apologize. App.54. When Libby refused to recant her views, the Speaker found her in violation of Maine House Rule 401(11), providing that a member "guilty of a breach of any of the rules and orders of the House … may not be allowed to vote or speak … until the member has made satisfaction." App.54-55. Since then, the Speaker has stopped Libby from speaking on any

bill, including a recent debate on an equal rights amendment proposed for the state constitution. *Archived Hearings & Meetings: House Chamber* 11:31:50-11:32:27 AM, Me. Leg. (Apr. 23, 2025, 10:00 AM), https://bit.ly/3EGfZ3G; App.34, 36, 39.

Most relevant for this application, the Clerk has not counted a single vote for District 90 and will not do so for the rest of Libby's elected term, running through 2026. App.34, 36, 39. District 90 is simply recorded as a "Z" on every roll-call vote. *See, e.g.*, H.R. Roll Call No. 75 - LD 303, 132nd Leg., 1st Spec. Sess. (Me. Apr. 8, 2025), https://perma.cc/4EDE-4EVT. District 90 had no vote on the State's $11 billion biennial budget. App.36. District 90 will have no vote on bills their own representative sponsored. App.36, 59. District 90 will have no vote on whether Maine should change its policy and limit girls' sports to girls. App.58. And District 90 will have no vote on the 1,800-plus bills coming before the House in the coming months, let alone every other bill that will come before the House before the end of Libby's term. App.34-36, 58-59.[2]

That refusal to count a duly elected legislator's vote is unprecedented in Maine. Only three other legislators have been censured in Maine's 200-year history; no other legislator has had his or her vote not counted as punishment, let alone for the rest of his or her elected term. The past verbal censures involved conduct disrupting

[2] In the courts below, Respondents put *no* limit on how long Representative Libby could be barred from speaking or voting except to say that the current Legislature cannot bind a future one. D. Ct. Doc. 28, at 19 (Apr. 1, 2025). Nothing in their position would prevent the next Legislature's majority from immediately reimposing the same punishment on Libby for the entirety of her next term. Conversely, had the House had the political support to expel Libby, the same punishment could not be re-imposed if she were re-elected. Me. Const. art. IV, pt. 3, §4.

legislative proceedings. The House censured two members last year for floor statements about the 2023 Lewiston mass shooting. H.R. Res. 1, 131st Leg., 2d Reg. Sess. (Me. 2024), https://perma.cc/8YC3-6RY3; H.R. Res. 2, 131st Leg., 2d Reg. Sess. (Me. 2024), https://perma.cc/S63W-3XJF. Years earlier, the House censured a representative for "verbally abus[ing]" female senators outside the House chamber. Legis. Rec. H-145-49, 120th Leg., 1st Reg. Sess. (Me. 2001), https://perma.cc/GL5C-FVY7.

The refusal to count a duly elected legislator's vote for publicly stating a viewpoint is also unprecedented elsewhere. Legislatures everywhere discipline members with verbal censures. *Hous. Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 475-76 (2022); *see, e.g.*, U.S. Const. art. I, §5, cl. 2. But legislatures nowhere—except Maine—do so by disenfranchising member's constituents for the rest of the member's elected term. Congress allows only verbal censures or reprimands absent a two-thirds vote for expulsion. *See generally* Jack Maskell, Cong. Rsch. Serv., *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives* (2016), https://perma.cc/T2P8-5Q55; Jack Maskell, Cong. Rsch. Serv., *Expulsion and Censure Actions Taken by the Full Senate Against Members* (2008), https://perma.cc/996R-GS2M. The U.S. House and others recognize the "constitutional impediments" for the greater punishment of depriving a member of the right to vote, given the destruction it would cause "to representation of the constituents of the Member's district." 3 *Deschler's Precedents of the United States House of Representatives* Ch.12 §§15-15.1 (1994), https://perma.cc/M3ZL-9P9R; *see also, e.g.*, 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).

B. Libby, joined by six constituents, sued to restore District 90's voice and vote in the House after it became apparent that Libby's unprecedented punishment would continue indefinitely. App.55, 58-59, 65. They alleged violations of the First and Fourteenth Amendments and the Guarantee Clause against the House Speaker and House Clerk. App.41, 59-64.

The district court denied Applicants' preliminary injunction motion, which sought to restore Libby's ability to speak and vote for the ongoing legislative session. The court held legislative immunity precluded any relief because the Speaker's "sanction" was a "legislative act" and District 90's disenfranchisement was not so "extraordinary" to overcome immunity. App.4. The district court distinguished *Bond* and *Powell* because "Representative Libby has not been disqualified or expelled from her seat." App.27-28. The district court declined to conduct "a separate analysis" of the Clerk's refusal to count Libby's votes, in part because his actions came at the Speaker's direction. App.28-29. Nor did the court engage with any of the logical implications of its decision, declining to consider "hypothetical scenarios." App.26. The district court acknowledged that denying a representative her vote indefinitely was "a weighty sword to wield" but was not moved because it "reflected the will of the majority of the House members." App.32. The district court denied an injunction pending appeal for the same reasons. App.75-76.

Applicants appealed to the First Circuit and sought emergency relief limited to the Clerk to count Libby's votes while the appeal was pending. The motions panel denied Applicants' motion for an injunction pending appeal in a two-paragraph order. App.1. Citing only two First Circuit cases, the panel said that Applicants did not show "a sufficient likelihood of success" or "that injunctive relief pending appeal is in order" without further explanation. *Id.* (citing *Cushing v. Packard*, 30 F.4th 27 (1st Cir. 2022) (en banc); *Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622 (1st Cir. 1995)). *Cushing* involved a challenge to the New Hampshire House Speaker's generally applicable policy refusing to allow remote voting during the COVID-19 pandemic. 30 F.4th at 49-53. *Harwood* involved a Rhode Island House rule banning lobbyists and lobbying from the House floor during floor sessions. 69 F.3d at 631-35. Neither of those generally applicable policies involved the singling out of a legislator and the disenfranchisement of her district. The panel also made no effort to address or explain how its decision squared with this Court's decisions in *Kilbourn*, *Bond*, or *Powell*.

ARGUMENT

This Court has issued injunctions pending appeal when applicants show (1) they are likely to prevail on the merits, (2) denying relief would lead to irreparable injury, and (3) granting relief would not harm the public interest. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16 (2020) (per curiam) (enjoining restrictions of religious services); *see also, e.g.*, *Tandon v. Newsom*, 593 U.S. 61, 64 (2021) (per curiam) (same); *Chrysafis v. Marks*, 141 S. Ct. 2482, 2482 (2021) (enjoining state COVID-19 eviction defense). The Court may issue an injunction "based on all the circumstances of the case," without its order "be[ing] construed as an

expression of the Court's views on the merits" for the ongoing appeal. *Little Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171 (2014); *accord Wheaton Coll. v. Burwell*, 573 U.S. 958 (2014). The injunction simply preserves the status quo—here, the status quo of equal representation for all Mainers—while the appeal is pending. *See, e.g.*, *Chrysafis*, 141 S. Ct. at 2482 (granting injunction to restore pre-pandemic law).

The refusal to count a duly elected legislator's vote for the rest of her term is a paradigmatic example of "critical and exigent circumstances" with "indisputably clear" constitutional violations making immediate interim relief appropriate. *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312 (1986) (Scalia, J., in chambers). An injunction pending appeal is in aid of this Court's future jurisdiction. 28 U.S.C. §1651(a). Only this Court can correct the refusal to acknowledge its precedents in the courts below. Absent this Court's intervention, Libby's district will be without equal representation in the Maine House simply for Libby's view shared on Facebook. The Constitution does not tolerate Respondents' unprecedented punishment for Libby's speech on a debated issue of exceptional importance.

I. Applicants Are Likely to Prevail on the Merits.

A. Legislative Immunity Is No Bar to This Challenge to Restore District 90's Equal Representation.

The notion that legislative immunity bars this challenge to restore District 90's equal representation is as strange as the notion that presidential immunity bars habeas corpus actions. And yet the courts below deemed themselves powerless to remedy District 90's disenfranchisement. The First Circuit likened the Clerk's refusal to

count Libby's votes to circuit cases involving modest lobbying restrictions or requirements that all legislators be physically present to vote. App.1 (citing only *Cushing v. Packard*, 30 F.4th 27 (1st Cir. 2022) (en banc); *Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622 (1st Cir. 1995)). It said nothing about this Court's decisions. A half-century ago, this Court rejected the same immunity arguments by a U.S. House Clerk who refused to count a lawfully elected legislator's votes. *Powell v. McCormack*, 395 U.S. 486, 494, 504-06 (1969). Consistent with *Powell*, this Court has never treated legislative immunity as a limitless doctrine of legislative "supremacy." *United States v. Brewster*, 408 U.S. 501, 508 (1972). Here too, legislators don't get to decide their colleague's votes don't count and then claim immunity. That is no legislative act; it is the antithesis of it.

1. "Legislative immunity does not … bar all judicial review of legislative acts." *Powell*, 395 U.S. at 503. It covers only "purely legislative activities," *Brewster*, 408 U.S. at 512, meaning acts "integral" to the "deliberative and communicative processes" of members, *Gravel v. United States*, 408 U.S. 606, 625 (1972). It does not immunize any and all acts undertaken by a legislator or staff, even if directed by a vote or by a resolution. *See, e.g.*, *Powell*, 395 U.S. at 503-06; *Kilbourn v. Thompson*, 103 U.S. 168, 200-05 (1880); *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967) (per curiam); *accord Gravel*, 408 U.S. at 620-21. Nor does it broadly immunize any and all "conduct *relating* to the legislative process." *Brewster*, 408 U.S. at 515. This Court has "carefully distinguished between what is only 'related to the due functioning of the

legislative process,' and what constitutes the legislative process entitled to immunity." *Hutchinson v. Proxmire*, 443 U.S. 111, 131 (1979).

The origins of legislative immunity can be traced back to England and the promise that "the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament" in the English Bill of Civil Rights of 1689. *United States v. Johnson*, 383 U.S. 169, 178 (1966) (quoting 1 W. & M., Sess. 2, c. 2). Before then, Tudor and Stuart monarchs used criminal and civil laws "to suppress and intimidate critical legislators" in Parliament. *Id.* The Crown used its power, with "judges [who] were often lackeys of the Stuart monarchs," to imprison members of Parliament for seditious libel. *Id.* at 181-82. It was that "chief fear" over "the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum" that motivated England's parliamentary immunity. *Id.* at 182.

At the Founding, America embraced legislative immunity at the state and national level. *See Tenney v. Brandhove*, 341 U.S. 367, 372-75 & n.5 (1951). But the American version had its limits. A legislator's privilege was "restrained to things done in the House in a Parliamentary course," Thomas Jefferson said, not "to exceed the bounds and limits of his place and duty." *Hutchinson*, 443 U.S. at 125 (quoting T. Jefferson, *A Manual of Parliamentary Practice* 20 (1854), *reprinted in The Complete Jefferson* 704 (S. Padover ed. 1943)). Those limits are "defined and ascertained in our constitutions." *Id.* (quoting 2 J. Wilson, *Works* 35 (J. Andrews ed. 1896)).

Still today, the twin aims of legislative immunity are protecting "the integrity of the legislative process" and ensuring "the independence of individual legislators," not cementing legislative "supremacy." *Brewster*, 408 U.S. at 507-08. Immunity allows legislators to "enjoy the fullest liberty of speech" on the floor. *Tenney*, 341 U.S. at 373. When plaintiffs challenge the constitutionality of legislation, for instance, immunity precludes them from commencing a judicial inquiry into a legislator's "motives" for legislation, *id.* at 377, or whether his "conduct" on the floor "was improperly motivated," *Johnson*, 383 U.S. at 180. These protections are not for the legislator's own "private indulgence but for the public good." *Tenney*, 341 U.S. at 377. At its core, immunity protects a legislator from being "withdrawn from his seat by a summons," depriving "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). The version of immunity deployed in the courts below—precluding judicial review of the denial of District 90's constituents' voice and vote—distorts the doctrine beyond recognition.

2. The Clerk's refusal to count Libby's votes for the rest of her term is no "legislative act." *Gravel*, 408 U.S. at 621; *see Powell*, 395 U.S. at 503-05. It defies all logic to say the refusal to tally her votes is "integral" to the "deliberative and communicative processes" of the Maine House. *Gravel*, 408 U.S. at 625.

The refusal to count an elected representative's vote is anything but "essential to legislating." *Gravel*, 408 U.S. at 621. Denying Libby's vote is antithetical to the legislative process as it has always been understood. Our "representative government

is in essence self-government through the medium of elected representatives of the people." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). Legislators serve "as political representatives executing the legislative process." *Coleman v. Miller*, 307 U.S. 433, 470 (1939) (opinion of Frankfurter, J.). A legislator's vote "is not personal to the legislator but belongs to the people." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126 (2011); *see Moore v. U.S. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring) ("the powers of the office belong to the people"). A legislator casts his vote "as trustee for his constituents." *Carrigan*, 564 U.S. at 126. That "vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal." *Id.* at 125-26.

In carrying out their legislative duties, legislators do not get to decide how much their colleague's votes count. That is not a matter that "the Constitution places within the jurisdiction of either House" and thus is not a "legislative act." *Gravel*, 408 U.S. at 621, 625. The Maine Constitution already decided Libby was qualified for office and demands a two-thirds vote for her expulsion. Me. Const. art. IV, pt. 1, §4 & pt. 3, §4; *see also, e.g.*, *Bond v. Floyd*, 385 U.S. 116, 130-31 (1966) (rejecting Georgia legislature's asserted power to decide whether representative took state constitution's required oath "with sincerity" and rejecting "that there should be no judicial review of the legislature's power to judge whether a prospective member may conscientiously take the oath required by the State and Federal Constitutions"); *Powell*, 395 U.S. at 550 (holding Congress possesses no power to exclude duly elected representatives who satisfy the constitutional prerequisites for office). And the U.S.

Constitution already decided how much Libby's vote counts: equally. *See Reynolds*, 377 U.S. at 560-61 (describing "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State"); *see also Michel v. Anderson*, 14 F.3d 623, 630 (D.C. Cir. 1994). It is no "legislative act" for the Clerk, the Speaker, or even the House majority to revise these constitutional guardrails already in place. Absent the two-thirds vote for her expulsion, Libby's vote counts just the same as her colleagues' votes.

Respondents' invocation of immunity also inverts the doctrine's purpose. Their version of immunity would destroy, rather than "protect," "the integrity of the legislative process" in Maine. *Brewster*, 408 U.S. at 507. And it surely would not ensure legislators' "independence." *Id.* Respondents, with the imprimatur of the courts below, send the opposite message: speak your mind, offend a narrow majority, lose your vote indefinitely, and kiss judicial review goodbye.

Worst of all, Respondents' invocation of immunity harms the very people it is meant to protect. Immunity is for a legislator's constituents, not a legislator or legislative officials for their own convenience. *Tenney*, 341 U.S. at 377; *see, e.g.*, *Coffin v. Coffin*, 4 Mass. 1, 29 (1808) (legislative immunity "should not unreasonably prejudice the rights of private citizens"). Respondents convert the shield of immunity into a sword, eliminating District 90's equal representation in the House for the rest of its chosen legislator's elected term. *But see* Story, *Commentaries* §857.

3. The decision below is irreconcilable with this Court's decisions in *Kilbourn* and *Powell*. Denying relief, the First Circuit cited inapposite circuit cases—none of which involved the confiscation of a legislator's right to vote—and said nothing about this Court's precedent. App.1. Little different than this Court's decisions in *Kilbourn* and *Powell*, the federal courts here have the power to restore District 90's equal representation by granting relief only against the Clerk to have Libby's votes count. Time and again, this Court has said immunity does not bar such an action simply because the Clerk's acts were precipitated by a House resolution or rule. Legislative officials are not immune for acts not "essential to legislating" even if undertaken under the auspices of a "resolution," *Gravel*, 408 U.S. at 621, including the Clerk's act of counting (or not counting) votes, *Powell*, 395 U.S. at 504-06.

In *Kilbourn*, for example, immunity did not bar a suit against the House's sergeant-at-arms who arrested the plaintiff pursuant to a House resolution. 103 U.S. at 200, 205. This Court distinguished between a suit against a legislator for supporting the resolution and a suit against the sergeant-at-arms for enforcing it, which could "no more justify the person who executed it than King Charles's warrant for levying ship-money could justify his revenue officer." *Id.* at 202. The sergeant-at-arms "was held liable" for merely "execut[ing] the House Resolution." *Powell*, 395 U.S. at 505. Legislative immunity "could not be construed to immunize an illegal arrest even though directed by an immune legislative act." *Gravel*, 408 U.S. at 619. "[R]elief could be afforded without proof of a legislative act or the motives or purposes underlying such an act." *Id.* at 621. And the Court went on to grant relief, invalidating the arrest

because the House had exceeded its constitutional powers. *Kilbourn*, 103 U.S. at 192-96.

Similarly in *Powell*, immunity did not bar a suit against the House clerk for refusing to tally a representative's vote, the sergeant-at-arms for refusing to pay his salary, or the doorkeeper for denying him admission to the chamber—even though all those acts were taken pursuant to a resolution excluding the representative. 395 U.S. at 494, 504-06. As the Court explained, "[t]hat House employees are acting pursuant to express orders of the House does not bar judicial review." *Id.* at 504. Staff, including the clerk, "are responsible for their acts," *id.*, and nothing bars this Court from "determin[ing] the validity of legislative actions" and "afford[ing] relief" after the implementation of an "invalid resolution[]," *Gravel*, 408 U.S. at 620.

As for instances where this Court has recognized legislative immunity, the immunized acts in such cases bear no resemblance to the Clerk's ongoing refusal to count Libby's votes. Excluding Libby's district is anything but "essential" to the House's internal "deliberations." *Gravel*, 408 U.S. at 625; *cf. Doe v. McMillan*, 412 U.S. 306, 313 (1973) (holding immunity protected acts of committee "authorizing an investigation," "holding hearings," "preparing a report," and "authorizing the publication and distribution of that report"); *Tenney*, 341 U.S. at 377-79 (applying immunity in action challenging purpose behind legislative committee hearing); *Johnson*, 383 U.S. at 184 (applying immunity to legislator's "motives underlying" floor speech). Unlike these cases, Applicants' challenge does not turn on any inquiry into legislative motives. Even if it did, there would be no investigation of motive required before the

Court could grant Applicants' requested relief to restore District 90's vote. *See Gravel*, 408 U.S. at 621. There is no dispute that District 90 has lost its vote because of Representative Libby's speech and the views she refuses to recant; her speech is the plainly stated basis of the censure leading to the further punishment of disenfranchisement. *Infra* I.C.

Kilbourn and *Powell* control here, but the First Circuit ignored them. The existence of some House resolution or rule does not foreclose this suit to restore District 90's vote. *See Powell*, 395 U.S. at 504-06; *see also Sup. Ct. of Va. v. Consumers Union of U.S.*, 446 U.S. 719, 734-36 (1980) (holding "enforcement" of unconstitutional state bar rules was not immunized even if decision to adopt those rules was legislative). Because injunctive relief would run against the Clerk "in a purely non-legislative capacity," there is "no reason why [he] should be entitled to legislative immunity simply because the harm alleged originated, in some sense, with a legislative act." *State Emps. Bargaining Agent Coal. v. Rowland,* 494 F.3d 71, 89 (2d Cir. 2007) (Cabranes, J.) (citing *Kilbourn*, 103 U.S. at 196-205); *accord Powell*, 395 U.S. 504-06. A vote on any precipitating censure resolution or House rules cannot in and of itself insulate Respondents' acts of disenfranchising District 90. *Gravel*, 408 U.S. at 618-21.

The First Circuit's reliance on inapposite circuit precedent is no substitute for this Court's decisions. The court likened the extraordinary circumstances here to the procedural rules challenged in *Harwood*, 69 F.3d 622, and *Cushing*, 30 F.4th 27. *Harwood* concerned a rule excluding lobbyists and lobbying from the House floor during House sessions. 69 F.3d at 632. *Cushing* concerned generally applicable voting

procedures requiring all legislators to be present to vote, and barring "remote participation" for all legislators. 30 F.4th at 49. The "legitimate legislative purposes" of the policies at issue in these cases were plain. *Harwood*, 69 F.3d at 634. The *Cushing* policy required House business to take place on the House floor, not remotely, for all legislators. 30 F.4th at 49. And the *Harwood* policy saw to it that such House business would be uninhibited by lobbyists. 69 F.3d at 632. Neither case involved singling out a specific legislator to strip her district of a vote for the rest of her elected term. *See id.*; *Cushing*, 30 F.4th at 51 (distinguishing circumstances "target[ing]" particular legislators). And neither purported to overrule, by circuit court decision, this Court's discussion of why such acts were not immune in *Kilbourn* or *Powell*.

4. Even if Respondents were correct that the Clerk's refusal to tally District 90's votes were a "legislative act" for which immunity would ordinarily attach, the circumstances here fit within the exception for acts "of an extraordinary character" for which immunity does not apply. *Kilbourn*, 103 U.S. at 204.

Because of views she shared online on her own time, Libby became the target of invidious viewpoint discrimination, *see Rosenberger v. Rector & Visitors of UVA*, 515 U.S. 819, 829 (1995), irreconcilable with this Court's decision in *Bond*, overturning the Georgia House's exclusion of a legislator for espousing a viewpoint the majority rejected, 385 U.S. at 135-37; *infra* I.C. As a result, Libby and her constituents have lost their right to equal representation in the House. *Infra* I.B. And when Libby and her constituents sought the judiciary's help to redress those harms, Respondents turned around and invoked immunity.

Respondents' abuse of the doctrine of legislative immunity warrants the application of *Kilbourn*'s exception for actions of an "extraordinary character." 103 U.S. at 204. The Framers were "well aware" of "the abuses that could flow from too sweeping safeguards" for legislators. *Brewster*, 408 U.S. at 517. To guard against those abuses, legislative immunity operates only as a "shield" protecting "what is necessary to preserve the integrity of the legislative process," *id.*, not as a sword to destroy it. But here, Respondents' sweeping assertion of legislative immunity looks more like the tyranny it was intended to guard against. Just as English monarchs used executive power "to suppress and intimidate critical legislators" in Parliament, *Johnson*, 383 U.S. at 178, Respondents have set out "to police" speech of members well beyond "the legislative function" that they disfavor, *Brewster*, 408 U.S. at 519, by denying Representative Libby her most critical legislative powers to debate and vote on legislation. The resulting disenfranchisement "run[s] counter to our fundamental ideas of democratic government." *Reynolds*, 377 U.S. at 564.

Worse, "the voters" cannot "be the ultimate reliance for discouraging or correcting such abuse[]" here. *Tenney*, 341 U.S. at 378. Mainers in District 90 cannot vote out the Speaker or replace the Clerk. Nor can Mainers in District 90 restore their equal representation with a special election—after all, the House lacked the two-thirds support necessary to expel Libby, trigger a vacancy, and fill that vacancy by special election. Me. Const. art. IV, pt. 1, §6 & pt. 3, §4. Instead, Respondents have silenced Libby and confiscated her vote without any redress for her constituents. For at least the rest of her term, Respondents will prohibit District 90's chosen

representative from exercising the very freedom of thought and legislative action that legislative immunity is intended to protect. Legislative immunity "support[s] the rights of the people," including District 90's constituents, "by enabling their representatives to execute the functions of their office without fear of prosecutions." *Tenney*, 341 U.S. at 373-74. Respondents have turned that protection on its head, depriving "the people" in District 90 of "their voice in debate and vote." Story, *Commentaries* §857.

If immunity precludes any review of the Clerk's refusal to count District 90's votes, then immunity is "all-encompassing." *Contra Gravel*, 408 U.S. at 625. There is no rational way to distinguish this case from any future case where a legislator, or a legislative majority, directs a Clerk not to count another legislator's vote. By Respondents' logic, they could silence legislators based on their race, sex, religion, marital status, age, political affiliation, or any other basis, and then claim immunity so long as a resolution precipitated those restrictions. If immunity puts Respondents "above the Constitution" here, *Harwood*, 69 F.3d at 638 (Lynch, J., dissenting), so too in those circumstances.

There is nothing novel about Applicants' position. Decades ago, the Georgia House agreed that if a legislator were excluded "on racial or other clearly unconstitutional grounds," the federal judiciary could "test[] the exclusion." *Bond*, 385 U.S. at 130. The only novel argument is the lower courts' agreement with Respondents that different rules apply in Maine. Where a legislature "by its rules ignore[s] constitutional restraints or violate[s] fundamental rights," *United States v. Ballin*, 144 U.S.

1, 5 (1892), it is "emphatically the province and duty of the judicial department" to say so, *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 177 (1803); *see Kilbourn*, 103 U.S. at 199. It is "competent and proper" for this Court to consider whether the refusal to count District 90's votes is "in conformity with the Constitution." *Powell*, 395 U.S. at 506.

B. Applicants' Fourteenth Amendment Claim is Clear and Indisputable.

The Equal Protection Clause demands "equal state legislative representation." *Reynolds*, 377 U.S. at 568. That requirement of equality is denied "by wholly prohibiting the free exercise of the franchise" or "by a debasement or dilution of the weight of a citizen's vote." *Id.* at 555; *see Wesberry v. Sanders*, 376 U.S. 1, 7 (1964) ("when qualified voters elect members of [a legislature] each vote [must] be given as much weight as any other vote"). "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry*, 376 U.S. at 17; *see Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1885) (voting "is regarded as a fundamental political right, because [it is] preservative of all rights").

That guarantee of equal representation would be an empty promise if voters' chosen representative was later prohibited from voting on their behalf on the House floor. *See Michel*, 14 F.3d at 626. But exactly that has transpired in Maine. District 90's representation has not simply been "diluted," as this Court's voting rights cases have used that term. *See, e.g.*, *Reynolds*, 377 U.S. at 562-63. District 90 has been *entirely disenfranchised* by the refusal to count Representative Libby's votes

indefinitely. That ongoing deprivation of equal representation in the Maine House violates the Fourteenth Amendment.

By denying Representative Libby her vote, Respondents forgot that Libby does not vote only for herself. Her vote "belongs to the people" of District 90. *Carrigan*, 564 U.S. at 126. She casts her votes "as trustee for [her] constituents." *Id.* That "vote is the commitment of [her] apportioned share of the legislature's power to the passage or defeat of a particular proposal." *Id.* at 125-26. Thus, "[r]estrictions on a public official's participation … infringe upon voters' rights to be represented." *Peeper v. Callaway Cnty. Ambulance Dist.*, 122 F.3d 619, 623 (8th Cir. 1997).

Informed by these principles inherent in our system of representative democracy, the U.S. House does not strip members of their voting rights. The House recognizes that would unconstitutionally deprive constituents of their representative vote. *See* 3 *Deschler's Precedents of the United States House of Representatives* Ch.12 §§15-15.1 (1994), https://perma.cc/M3ZL-9P9R. By allowing only verbal censures, the House takes care to "preserve the right to representation of the constituents of the Member's district." *Id.* §15.1. The U.S. House recognizes that denying members their ability to vote will "deprive[] the district, which the Member was elected to represent, of representation," "effectively disenfranchis[ing]" those "who elected that person to represent them" and "undermin[ing] the basic interest of a constituency in their representative government." *Id.*

Meanwhile, in Maine, the Clerk's refusal to count Representative Libby's vote creates two classes of voters: a) those in District 90, who do not count for roll-call

votes and b) those in every other district, who do. Respondents' act "contracts the value of some votes and expands that of others." *Wesberry*, 376 U.S. at 7; *see, e.g.*, *Kucinich v. Forbes*, 432 F. Supp. 1101, 1116-17 (N.D. Ohio 1977) (holding suspension of councilmember violated equal-protection "right to representation"); *Ammond v. McGahn*, 390 F. Supp. 655, 660 (D.N.J. 1975) (excluding state senator from caucus such that she could not "effectively participate fully in the legislative process" "deprived her constituents of the Equal Protection of the law" (citing *Reynolds*, 377 U.S. at 555)), *rev'd on mootness grounds*, 532 F.2d 325 (3d Cir. 1976). This total exclusion of District 90 from floor votes is incompatible with any understanding of republican government. *See Evenwel v. Abbott*, 578 U.S. 54, 81-87 (2016) (Thomas, J., concurring).

District 90's lack of equal representation, promised to last at least until the end of Representative Libby's term, is no different than if District 90's voters couldn't participate "on an equal basis with other citizens" across Maine on election day. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). That the "dilution occurs after the voters' representative is elected" is immaterial. *Michel*, 14 F.3d at 626. Equal protection applies to "the initial allocation of the franchise" and "the manner of its exercise." *Bush v. Gore*, 531 U.S. 98, 104 (2000). "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 104-05. As the D.C. Circuit has observed, "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." *Michel*, 14 F.3d at 626. Just

as the Maine House could not reduce the strength of District 90's vote by one-half, it cannot reduce District 90's vote to nothing. *See Reynolds*, 377 U.S. at 555-58.

It is no answer to point to incidental benefits of office that Libby retains, as the district court did. App.31-32. The court accepted Respondents' argument that any burden on District 90's constituents was modest because she may still attend committee meetings and receive a salary, never mind that she cannot speak or vote on the House floor. *Id.* Those incidents are no substitute for a legislator's "executing the legislative process" through her vote on legislation. *Carrigan*, 564 U.S. at 126. A legislator who cannot vote is like a judge who cannot hear or decide cases; no one would confuse the judge's ability to attend judicial conferences or hire law clerks as a substitute for the exercise of core judicial power.

Without this Court's intervention, District 90's residents have no equal representation in the House—indefinitely. And there is no political solution for Defendants' unconstitutional acts. If the House had the two-thirds support to expel Representative Libby, a special election could have restored District 90's vote; and if Libby were then re-elected, the Maine Constitution would preclude Respondents from imposing the same punishment. *See* Me. Const. art. IV, pt. 1, §6 & pt. 3, §4. But the House did not have the votes to expel Libby, and so Respondents effectuated a *de facto* expulsion instead, denying District 90's constituents "the right of the people to choose their own officers" based on "the sudden impulses of mere majorities," exceeding their powers "limited by" the Maine Constitution. *Duncan v. McCall*, 139 U.S. 449, 461 (1891). Representative Libby remains District 90's representative with no

constitutional mechanism to restore her vote unless, contrary to our most basic First Amendment freedoms, she recants her views to the Speaker's liking.[3] *See* 3 *Deschler's Precedents* Ch.12 §15.1 (explaining "there can be no replacement for the punished member" absent expulsion, so "a constituency would be left without a voice … for the duration of the Congress").

The ongoing disenfranchisement of District 90 exemplifies the Framers' concern that "unchecked majorities could lead to tyranny of the majority." *Evenwel*, 578 U.S. at 84 (Thomas, J., concurring). Denying Libby's vote violates the Fourteenth Amendment's guarantee of equal representation.

C. Applicants' First Amendment Retaliation Claim Has Gone Uncontested.

Respondents have never seriously contested that the ongoing refusal to count District 90's votes as punishment for Representative Libby's speech constitutes First Amendment retaliation. *See Hous. Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 477 (2022) (describing retaliation claims). They have not contested that Libby's criticism of Maine's policy of requiring high school girls to compete alongside transgender athletes is protected speech. Libby expressed "ideas for the bringing about of political and social changes." *Roth v. United States*, 354 U.S. 476, 484 (1957). And she did so

[3] The Speaker's attempt to force such an apology as a condition of voting only compounds the ongoing constitutional violations. *See, e.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013) (unconstitutional conditions doctrine bars coercively withholding benefits from those who exercise fundamental rights); *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 796-97 (1988) (First Amendment "necessarily compris[es] the decision of both what to say and what not to say"). The option to recant wasn't good enough in *Bond*, and it's not good enough here either. *See Bond*, 385 U.S. at 128 (noting that when Bond refused to "recant" his criticism of the Vietnam War, the Georgia House continued to exclude him).

on social media, "the most important place[] … for the exchange of views" today. *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017). Nor have Respondents contested that, but for her criticism and her refusal to recant that criticism, she could be voting. *See Nieves v. Bartlett*, 587 U.S. 391, 398-99 (2019). At most, all Respondents have done is gesture at the argument that refusing to tally Libby's votes for the rest of her elected term might not be material adverse action. But Respondents know they can never fully embrace that argument without asking this Court to overrule its decision in *Bond*.

1. Respondents' retaliation for Libby's speech is indistinguishable from the retaliation held unconstitutional in *Bond*. After Julian Bond was elected to the Georgia House, he said in a radio interview that he didn't "believe in" the Vietnam War and that it was "hypocritical" to fight for liberty "in other places" but "not guarantee[] liberty to citizens inside the continental United States," and he endorsed a statement that "[t]he murder of Samuel Young in Tuskegee" was "no different than the murder of peasants in Viet Nam" and that "[t]he United States is no respector of persons or law when such persons or laws run counter to its needs and desires." *Bond*, 385 U.S. at 119-22. Before Bond was seated, 75 legislators petitioned that his statements made him unfit for office, including because they brought "discredit and disrespect on the House." *Id.* at 123. When Bond came to the House to be sworn in, "the clerk refused to administer the oath." *Id.* And the Georgia House, by vote of 184 to 12, adopted a resolution prohibiting Bond from taking the oath and serving as his district's representative. *Id.* at 125. So Bond sued, and he won. *Id.* at 125, 136-37.

This Court held that disqualifying Bond from the Georgia House violated his First Amendment right of free expression. *Bond*, 385 U.S. at 137. Along the way, this Court rejected that elected officials' speech is held to a higher standard than ordinary citizens: "The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." *Id.* at 135-36. The Court observed that "[l]egislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them." *Id.* at 136-37.

The same First Amendment interests prevail here. Respondents' unprecedented punishment, denying District 90's chosen representative her ability to speak or vote on the House floor for the rest of her term, is no different than the Georgia House's *ex ante* refusal to seat Bond as his district's chosen representative. Both accomplish the same end: denying the legislator's constituents their right to "be represented in governmental debates by the person they have elected to represent them." *Bond*, 385 U.S. at 136-37.

2. This Court's recent decision in *Wilson* confirms that Applicants' First Amendment retaliation claim is likely to succeed on the merits. In *Wilson*, this Court was laser-focused on a legislative body's purely *verbal* censure, and whether legislative colleagues' words alone could be the basis of a First Amendment retaliation claim. *See* 595 U.S. at 474 ("[T]he only question before us remains the narrow one on

which we granted certiorari: Does Mr. Wilson possess an actionable First Amendment claim arising from the Board's purely verbal censure?"); *id.* at 478 ("the only adverse action at issue before us is itself a form of speech from Mr. Wilson's colleagues"—the verbal censure—"that concerns the conduct of public office"). The Court expressly did not lump "censures accompanied by punishments" into its judgment. *Id.* at 480; *see id.* at 482 ("Our case is a narrow one. It involves a censure of one member of an elected body by other members of the same body. It does not involve expulsion, exclusion, or any other form of punishment.").

Most relevant here is how this Court distinguished the verbal censure at issue in *Wilson* from the punishment in *Bond*. The former involved only "counterspeech from colleagues" condemning Wilson's imprudence, while the latter "implicated not only the speech" of Bond, "it also implicated the franchise of his constituents." *Wilson*, 595 U.S. at 481. Those "forms of discipline 'are not fungible' under our Constitution." *Id.* (quoting *Powell*, 395 U.S. at 512).

History makes all the difference in distinguishing the verbal censure in *Wilson* and the greater punishment here, akin to *Bond*. For as much as "elected bodies in this country have long exercised the power to censure their members" with "a purely verbal censure," *Wilson*, 595 U.S. at 475, there is no equivalent historical precedent for depriving members their voting rights as Respondents have done here.

Longtime congressional practice illustrates the distinction. There is an unbroken history of verbal censures in Congress, *Wilson*, 595 U.S. at 475-76, but the U.S. House does not consider itself to have an additional punitive power "to deprive a

Member of the right to vote," *Jefferson's Manual and Rules of the House of Representatives* §672 (118th Cong., 2023), https://perma.cc/U78W-KZ2G. The Speaker "has denied" his "own power to deprive a Member of the constitutional right to vote," *id.*, even where members are in the custody of the Sergeant-at-Arms, 5 *Hinds' Precedents of the House of Representatives of the United States* §5937 (1907), https://perma.cc/CJ3H-SVNF. Denying a member the right to cast votes on behalf of her district would "deprive[] the district, which the Member was elected to represent, of representation," "effectively disenfranchis[ing]" them. 3 *Deschler's Precedents* Ch.12 §§15-15.1.

Maine is an outlier among the U.S. House and other legislatures, recognizing the "constitutional impediments" to depriving a sitting member of her right to vote. 3 *Deschler's Precedents* Ch.12 §§15-15.1. In rejecting a proposed mandatory deprivation of voting rights for members convicted of certain crimes, the U.S. House observed the need to "preserve the right to representation of the constituents of the Member's district." *Id.* §15.1; *see also, e.g.*, Wis. Leg. Ref. Bureau, *Discipline in the Wisconsin Legislature: A History of Reprimand, Censure, Suspension, and Expulsion* 4 (2020), https://perma.cc/FK4F-JF6L (recognizing the "legal problems with suspending legislators" because the suspended legislator's district "loses its representation"). Commentators have long observed the same. *See* Gerald T. McLaughlin, *Congressional Self-Discipline: The Power to Expel, to Exclude and to Punish*, 41 Fordham L. Rev. 43, 60 (1972) (suspension "robs" a district "of its right to congressional representation"); D.S. Hobbs, *Comment on* Powell v. McCormack, 17 U.C.L.A. L. Rev. 129, 152

(1969) ("suspension deprives the suspended member's district of representation"). In this litigation, Respondents have identified only two other state legislative bodies with similar rules allowing the denial of a member's voting rights, in theory. *See* D. Ct. Doc.28, at 2-3 & n.3. In practice, Respondents have identified no instances in which those States applied such rules, especially not as punishment for a member's speech on her own time, on social media, on issues of public importance, well beyond the legislative chamber. Maine's rule is an outlier, and its application here puts it on an island.

In the colonies, there was no "unanimity" that legislatures could "exclude members indefinitely from their seats" because common law "guaranteed" exercise of "the franchise." Mary Patterson Clarke, *Parliamentary Privilege in the American Colonies* 200 (Da Capo Press ed. 1971); *see, e.g.*, *Gray v. Sanders*, 372 U.S. 368, 375 n.7 (1963) (recognizing common law right). That view has held true today. "[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) (Ikuta, J.); *accord Jefferson's Manual* §672 (describing "the weight of authority" that legislatures cannot prohibit censured members from voting).

Consistent with history, the Maine House may verbally censure its members. There is no First Amendment interest in "silenc[ing] other representatives." *Wilson*, 595 U.S. at 478. For that reason, the "countervailing speech" of a verbal censure in *Wilson* did not "abridge" Wilson's speech rights: "[H]istory suggests a different understanding of the First Amendment—one permitting '[f]ree speech on both sides and

for every faction on any side.'" *Id.* at 477 (quoting *Thomas v. Collins*, 323 U.S. 516, 547 (1945) (Jackson, J., concurring)). That verbal "censure did not prevent Mr. Wilson from doing his job" or "deny him any privilege of office," and so could not "have materially deterred an elected official like Mr. Wilson from exercising his own right to speak." *Id.* at 479.

But the circumstances here are altogether different. Taking *Wilson*'s logic and applying it to these circumstances requires the Court to reach the opposite result. Libby herself has been silenced. Her district has been disenfranchised. And the very essence of the unprecedented punishment is to "prevent [her] from doing [her] job" and "deny [her]" the most central "privilege of office": the privilege of voting. *Wilson*, 595 U.S. at 479; *see Carrigan*, 564 U.S. at 125-26. Following *Wilson* and *Bond*, there is no room to doubt that Representative Libby has suffered unconstitutional retaliation simply for speaking her mind.

II. It Is Undisputed Libby and Her Constituents Will Suffer Irreparable Harm Absent This Court's Intervention.

Absent an injunction pending appeal, District 90 is without a vote as several hundreds of bills come to the House floor. This constitutes irreparable harm, and Respondents have promised it will continue indefinitely. Consider what happened a week ago. A proposed amendment to the Maine Constitution was up for a vote and debate—an equal rights amendment. Not only were Representative Libby and her constituents deprived of their vote on the amendment, but they were also unable to have a voice at all on the floor regarding it. Far from letting Representative Libby speak on the importance of equal rights of women, the Speaker declined to allow

Libby even to pose a question "through the chair." *Archived Hearings & Meetings: House Chamber* 11:31:50-11:32:27 AM, Me. Leg. (Apr. 23, 2025, 10:00 AM) https://bit.ly/3EGfZ3G. He explained that such questions were "a course of debate" from which Libby was "precluded." *Id.* The same has been true and will be true for every other consequential measure before the House, even bills and amendments Libby herself sponsors, for the rest of Libby's term.

As for Applicants' Fourteenth Amendment harms, each day that Libby is deprived of her vote, she is unable to act "as a trustee for [her] constituents," *Carrigan*, 564 U.S. at 126, depriving them of the "fundamental principle of representative government." *Reynolds*, 377 U.S. at 560-61; *see also Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (recognizing "strong interest in exercising the 'fundamental political right' to vote" in election-day context). This deprivation is irreparable. Applicants cannot "obtain adequate relief through an appeal" for each vote taken between now and then. *Hollingsworth v. Perry*, 558 U.S. 183, 195 (2010). Libby cannot go back and vote on each of the several hundreds of bills being brought to the floor this session (or any of the bills presented in subsequent sessions during the rest of her term). Put simply, "there can be no do-over and no redress" for Libby's uncounted votes and District 90's lack of representation during the rest of her term. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). An injunction is "essential to prevent great, immediate, and irreparable loss" of Applicants' "constitutional rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

As for the First Amendment harms, irreparable harm is established because Libby is likely to succeed on the merits of her First Amendment claim. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Catholic Diocese*, 592 U.S. at 19 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.)). And here, Respondents' retaliatory actions are not for "minimal periods." *Id.* Respondents' refusal to count Representative Libby's votes is entering the third month, all for a Facebook post from February.

III. The Balance of Equities Favors the Restoration of Applicants' Voting Rights and Is in the Public Interest.

The balance of the equities and the public interest decisively favor an injunction reinstating District 90's "apportioned share of the legislature's power." *Carrigan*, 564 U.S. at 126. Respondents have no conceivable interest in denying an entire House district equal representation in the House. Respondents' stated interest below was merely the desire to "be able to punish" a "contumacious[]" member. D. Ct. Doc. 28, at 20 (Apr. 1, 2025). Unlike the irreparable disenfranchisement of District 90, Respondents' stated interest could be served by a purely verbal censure as in Congress or other States. Or Respondents' asserted interest could be served in additional ways not indefinitely depriving an entire district of its voting power. Surely any interest in "punishing" a member for making a Facebook post was satisfied over the last two months. Having never imposed such a punishment before, Respondents cannot show their interest "would be imperiled by employing less restrictive measures." *Tandon*, 593 U.S. at 64 (cleaned up).

Even if Respondents continue to insist on that most severe and unprecedented punishment—denying equal representation to District 90's constituents—they could reinstate that punishment at the conclusion of appellate review. There is no reason they must disenfranchise District 90's constituents *now*. Absent immediate relief, District 90's residents will be "foreclosed" from having a say in legislation coming before the House, while the "harm, if any," to Respondents "can be fully cured by a fair and objective determination of the merits of the controversy." *Reynolds v. Int'l Amateur Athletic Fed'n*, 505 U.S. 1301, 1302 (1992) (Stevens, J., in chambers) (granting stay to allow athlete to compete in Olympic trials).

On the other side of the scale, an injunction that Libby's vote "be counted equally," consistent with all legislators' votes across the country, preserves the most "fundamental principle of representative government." *Reynolds*, 377 U.S. at 560. An injunction pending appeal simply returns District 90 to the status quo before Respondents' unprecedented acts to deprive District 90 of equal representation. Without an injunction, Libby and District 90 are unrepresented in the House for the duration of this appeal. There is "not an adequate substitute for the intangible" loss of Libby's ability to vote and advocate for her constituents on the House floor this session. *Reynolds*, 505 U.S. at 1302 (Stevens, J., in chambers). This is exactly the "critical and exigent circumstance[]" that warrants immediate relief. *Williams v. Rhodes*, 89 S. Ct. 1, 2 (1968) (Stewart, J., in chambers).

The public interest also favors Applicants. Enjoining unconstitutional conduct "is the highest public interest." *United States v. Raines*, 362 U.S. 17, 27 (1960). "[T]he

public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties." *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995). Moreover, the public's "[c]onfidence in the integrity of our electoral processes," which is "essential to the functioning of our participatory democracy," is best served when all Mainers are represented in the State House. *Purcell*, 549 U.S. at 4. The public interest lies with ensuring all citizens can exercise the "fundamental political right" to "participate … on an equal basis with other citizens in the jurisdiction." *Dunn*, 405 U.S. at 336. That can be served only by granting an injunction pending appeal preventing District 90's votes in the state house from being discarded.

CONCLUSION

For the foregoing reasons, Applicants respectfully request an injunction pending appeal to restore District 90's equal representation in the Maine House of Representatives.

Respectfully submitted,

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