No. 21-395

In the Supreme Court of the United States

KEVIN OWEN MCCARTHY, ET AL.,

Petitioners,

v.

NANCY PELOSI, in her official capacity as Speaker of the House, CHERYL L. JOHNSON, in her official capacity as Clerk of the House, & WILLIAM J. WALKER, in his official capacity as Sergeant-at-Arms,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Days ago, the Sergeant-at-Arms issued yet another authorization to continue proxy voting.[1] Authorization in hand, the Speaker of the House extended proxy voting for the twelfth time.[2] Absent House Members have now been casting unconstitutional floor votes for one and a half years.

Petitioners and Respondents agree on several ground rules. For example, the Speech or Debate Clause protects only "legislative acts," (BIO 16-17), not all acts that involve the legislative branch (Pet. 14-17). Or that a private party could challenge the constitutionality of proxy voting. BIO 26-27. Individual Petitioners have done so here. Pet. 29. Or as another example, that proxy voting would require explaining away many different constitutional provisions. BIO 28-31. All such provisions anticipate that House Members will be present to vote. Pet. 31-33.

But Petitioners cannot agree that House Resolution 965 gets a free pass from constitutional scrutiny. Respondents cannot evade this Court's review. Just as this Court has previously considered the constitutionality of congressional acts in the face of meritless standing or Speech or Debate Clause arguments, the Court here should consider the exceptionally important question of the constitutionality of proxy voting. The House does not have the last word about

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[1] W. Walker, Letter to N. Pelosi (Nov. 12, 2021), bit.ly/3ondEyq.

[2] N. Pelosi, *Dear Colleague to All Members on Extension of Remote Voting 'Covered Period'*, Speaker of the House (Nov. 12, 2021), bit.ly/3c8nsGZ.

whether it may operate *in absentia*. The petition should be granted.

I. Standing is not an obstacle to review.

Respondents are wrong that standing is an obstacle to review. Respondents make only one argument—that Petitioners do not have standing to "pursue their claims under this Court's decision in *Raines v. Byrd*, 521 U.S. 811 (1997)." BIO 24. The courts below did not adopt that sweeping argument. Pet.App.6, 24-30. The injuries-in-fact alleged here are in a different category than the institutional injury in *Raines*. Standing, as in every case, turns on the particulars of the case. *Warth v. Seldin*, 422 U.S. 490, 500 (1975). And Respondents' "[g]eneralizations about standing to sue are largely worthless as such." *Assoc. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151 (1970).

For the reasons that follow, Petitioners have standing. Even if that were in doubt, standing should not be an obstacle to review because the Court could grant the petition and resolve any standing question on the way to resolving the underlying and indisputably important constitutional question. *See, e.g.*, *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2195-97 (2020); *Sec'y of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 954-59 (1984); *see also Powell v. McCormack*, 395 U.S. 486, 495-500, 512-14 (1969) (considering Article III mootness and jurisdiction); *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 573 U.S. 990 (2014) (postponing jurisdiction to consider both standing and underlying elections clause question).

A. Congressmembers' standing

In *Raines*, this Court distinguished the precise injury alleged here. Individual Congressmembers in *Raines* challenged the Line-Item Veto Act as an unconstitutional power grab by the Executive Branch. 521 U.S. at 814-15. That injury was an "institutional injury (the diminution of legislative power)" suffered by Congress as a whole and thus could be raised only by Congress as a whole. *Id*. at 821; *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953-54 (2019) ("a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole"). Respondents' extended discussion of *Raines* would be relevant had Petitioners asserted, *on behalf of Congress*, an injury suffered by the body as a whole. But that is not the injury Petitioners allege here.

Petitioners' votes have been repeatedly nullified by unconstitutionally cast proxy votes. Petitioners have "alleged that they voted [against] a specific bill, that there were sufficient votes [not] to pass the bill, and that the bill was nonetheless deemed [passed]"—a cognizable injury expressly distinguished in *Raines*, 521 U.S. at 823-24 & n.6. Petitioners have not simply "lost [a] vote." *Id.* at 824. But for the unconstitutional proxy votes, bills they voted against would have failed in the House. *See* Pet. 8.

That injury is continuing. For example, in late September, the House purportedly passed the "Women's Health Protection Act" by a vote of 218 to 211.[3] But 30

[3] Roll Call 295, Clerk of the U.S. House of Representatives ("Clerk"), bit.ly/3Ddljpm.

votes in favor of the Act (and 16 votes against) were unconstitutional proxy votes. Including only the votes constitutionally cast by those present, the Act failed by a vote of 188 to 195.[4] Likewise, the House purportedly passed the "Extending Government Funding and Delivering Emergency Assistance Act" by a vote of 220 to 211 in September.[5] But 21 votes in favor of the Act (and 9 votes against) were unconstitutional proxy votes. Including only the votes constitutionally cast, the Act failed by a vote of 199 to 202.[6]

The nullification of Petitioners' votes is not merely hypothetical; it has transpired again and again. That injury is sufficient to challenge the constitutionality of the proxy voting resolution. *See, e.g.*, *Coleman v. Miller*, 307 U.S. 433, 438 (1939) (alleging legislators' votes not to ratify constitutional amendment had "been overridden and virtually held for not"); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 544 n.7 (1986) (explaining that school board member could "allege that his vote was diluted or rendered nugatory under state law" and could bring an action on behalf of himself "to protect the effectiveness of his vote" even though he could not bring an action on behalf of the school board (quotation marks and alterations omitted)).

Respondents disagree. They contend that Petitioners need only vote by proxy like everyone else. BIO 25.

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[4] Roll Call 295 Proxy List, Clerk (Sept. 24, 2021), bit.ly/3DeisMX.

[5] Roll Call 267, Clerk, bit.ly/30guS8i.

[6] Roll Call 267 Proxy List, Clerk (Sept. 21, 2021), bit.ly/3c99sfV.

They assert that proxy voting applies "equally" to everyone and that it was "Petitioners' decision to forgo proxy voting." BIO 25. That is a peculiar argument as far as standing goes. Petitioners' constitutional claim must be taken as true. *See Warth*, 422 U.S. at 501 ("reviewing courts must accept as true all material allegations of the complaint"); *Coleman*, 307 U.S. at 438. Applied here, casting a vote while absent from the House would be unconstitutional. Thus, according to Respondents, Petitioners need only resort to unconstitutional self-help to redress their injury. That is wrong. A choice between violating one's oath or resigning oneself to nullified votes and diluted representation is no choice at all. *See, e.g.*, *Bd. of Edu. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 241 n.5 (1968).

In sum, while Respondents are correct that *Raines* would preclude individual Members from asserting an institutional injury on behalf of the legislature (*e.g.*, the loss of legislative power in an interbranch dispute with the executive), that is not the injury alleged here. Petitioners' Article III injury is the nullification of their own votes by unconstitutionally cast proxy votes. On its own terms, *Raines* does not foreclose Petitioners' suit predicated on that injury.

B. Constituents' standing

Even if the Petitioner-Congressmembers did not have standing under *Raines*, the Petitioner-Constituents also have standing to challenge the resolution. Petitioners include voters in districts represented by Congressmembers who have never cast an

unconstitutional proxy vote.[7] As a result, the constituents' representation has been repeatedly diluted in the House by virtue of their Congressmembers' playing by different rules (the Constitution) than those who vote by proxy.

Respondents' only argument regarding the constituents' standing is that their injury is "derivative" of the Congressmembers' injury and, as such, is not cognizable. BIO 27. Respondents fret that *Raines* could be circumvented merely by "recast[ing]" suits "as constituent vote-dilution suits" brought by individuals. BIO 27. That is no response at all. Inherent in standing is that one individual may be able to sue while another may not. Even Respondents posit that a private party could challenge the House rule, though a Congressmember could not. BIO 26-27.[8]

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[7] The remaining Petitioner is a constituent of a House Member who has repeatedly voted by proxy, allowing others to vote on his behalf. Pet. 9. That Petitioner has suffered the unlawful delegation of legislative power that only his representative is empowered to exercise on his behalf, not some other representative who has not been lawfully elected to represent him. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

[8] Respondents quibble with *when* a private party could challenge proxy voting. They assert that a private party cannot challenge proxy voting now but might challenge proxy voting later by suing to invalidate an Act passed with proxy votes. BIO 26-27. But they simultaneously suggest that *no* party could challenge proxy voting later on, citing *Marshall Field v. Clark*, 143 U.S. 649 (1892), as a doctrine "restricting judicial review." BIO 27. In *Marshall Field*, this Court confirmed that once a bill is signed by the Speaker and the President of the Senate, "its authentication as a bill that has passed congress should be deemed complete and unimpeachable." 143 U.S. at 672. Applied here, it is hardly clear that already-enacted legislation could be unwound based on how

Respondents' argument contravenes this Court's cases. An individual suffers an Article III injury when her representation is diluted. In our representative democracy, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). That vote dilution is sufficient to confer standing. In *Department of Commerce v. U.S. House of Representatives*, for example, Indiana residents challenged a new apportionment methodology that the U.S. Census Bureau planned to use for the upcoming census. 525 U.S. 316, 320 (1999). They alleged that the new methodology would undercount Hoosiers, leaving them with one fewer representative in the House. *Id.* at 331-32. This Court concluded that the possible undercounting "undoubtedly satisfies the injury-in-fact requirement of Article III standing" because the "Indiana residents' votes will be diluted." *Id.*; *accord Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992) (plurality op.) (similar); *Gray v. Sanders*, 372 U.S. 368, 375 & n.7 (1963) ("appellee, like any person whose right to vote is impaired, has standing to sue" (citations omitted)); *Baker v. Carr*, 369 U.S. 186, 208 (1962) (describing "impairment result[ing] from dilution by a false tally").

Similarly in *Michel v. Anderson*, the D.C. Circuit concluded that individual constituents had standing to sue over a House voting rule that allowed additional House Delegates from U.S. territories to vote during

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it passed. *Marshall Field* confirms that Petitioners' challenge here to the proxy voting resolution itself—versus a challenge to an already-enrolled bill—is proper.

certain proceedings, thereby diluting the plaintiffs' representation by their House Representatives. 14 F.3d 623, 626 (D.C. Cir. 1994). That dilution of representation was a cognizable injury, just as "[i]t 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." *Id.*

Applied here, the Petitioner-Constituents' representation is diluted—in some cases, defeated—every time a House Member unconstitutionally casts a proxy vote (or 10 proxy votes) in place of absent Members who otherwise could not vote. These individual Petitioners have standing to enjoin unconstitutional proxy voting.

II. Respondents repeat the same error as the D.C. Circuit regarding the Speech or Debate Clause.

Respondents prove Petitioners' point regarding the wrongness of the D.C. Circuit's decision. Respondents again conflate anything *related* to a legislative act as a legislative act for purposes of the Speech or Debate Clause. *See* BIO 16. Taken to its logical extreme, their version of the Speech or Debate Clause would foreclose any challenge having anything to do with Congress. Who could conceive of "matters more integrally part of the legislative process" than legislation itself? BIO 16 (quoting Pet.App.9). It is the culmination of the legislative process. Is legislation now beyond review? Of course not.

There is no basis to mistake the particular acts challenged here as legislative acts. This suit challenges acts relating to the *mechanics* of proxy voting—

receiving letters, declaring public health emergencies, recording votes in the journal, and so forth. It is ultimately a challenge to "voting procedures," as Respondents concede. BIO 19. It is not a challenge to any particular legislator's vote or a legislator's motivations behind it. Challenging *how* votes are cast is a far cry from *why* a vote is cast. This challenge in no way threatens legislators' "legislative independence" or requires proof of their "motives or purposes underlying" a legislative act. *Gravel v. United States*, 408 U.S. 606, 621 (1972).

Respondents also have no answer to Petitioners' argument that this challenge is indistinguishable from those in *Kilbourn*, *Powell*, and others. Pet. 17-21. They merely assert that those cases turned on "the non-legislative nature of the challenged conduct." BIO 22. So does this one. For example, Respondents say it was "non-legislative" for the Doorkeeper and the Clerk in *Powell* to "physically exclud[e] a Member from the legislative process," stopping him from casting votes. BIO 22; *see Powell*, 395 U.S. at 493-94. It necessarily follows here that actions by the Clerk and others (*e.g.*, accepting proxy letters or making public health declarations) are "non-legislative" too, even if they relate to voting. Similarly, Respondents assert that in *Kilbourn v. Thompson*, 103 U.S. 168 (1880), it was "non-legislative" to "carry[] out an arrest *after* the relevant legislative process was complete." BIO 21. Of course, that "legislative process" culminated in a resolution directing the Sergeant-at-Arms to carry out the arrest in furtherance of the House investigation. *See Kilbourn*, 103 U.S. at 196; *Gravel*, 408 U.S. at 620. Here too, the "legislative process" culminated in a

resolution directing House employees to carry out proxy voting. Effectuating the House resolution in *Kilbourn* is no different than effectuating House Resolution 965 here. If the House employees' actions in *Powell* and *Kilbourn* are beyond the Speech or Debate Clause, the House employees' actions here are too.

The need for the Court's intervention is clear. Contrary to the version of the Speech or Debate Clause now adopted by the D.C. Circuit, "[i]n no case has this Court ever treated the Clause as protecting all conduct *relating to* the legislative process." *United States v. Brewster*, 408 U.S. 501, 515 (1972) (emphasis added); *see Gravel*, 408 U.S. at 620-21 (explaining that *Kilbourn*, *Eastland*, and *Powell* all might have "frustrated a planned or completed legislative act" but were still beyond the Speech or Debate Clause). The Clause protects only those acts integral to the "deliberative and communicative processes by which Members participate" in the House. *Gravel*, 408 U.S. at 625. Courts have disagreed about what all that entails. Pet. 24-28.[9] And courts would be well-served by this Court's clarification that not every act involving someone employed by Congress—be it receiving letters, recording absent votes, making proclamations about public health emergencies, and the like—can be re-labeled a "legislative act."

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[9] Respondents assert that state-court decisions "turn on state law" and thus cannot give rise to a conflict of authority. BIO 23-24. To the contrary, state-court decisions, including those cited in the petition, routinely rely on this Court's precedents because their Speech or Debate Clause analogs are co-extensive with the federal clause. *See Tenney v. Brandhove*, 341 U.S. 367, 372-75 & n.5 (1951) (summarizing state analogs).

The Court's clarification is especially warranted here. Respondents, along with the courts below, distort this Court's precedents and expand the meaning of the Speech or Debate Clause beyond its textual and historical limits. The distortion comes at an unacceptable cost—insulating the indisputably important question about the unconstitutionality of House Resolution 965 from any judicial scrutiny.

III. This Court can and should interpret the Constitution.

Respondents argue that the constitutionality of proxy voting is also not properly before this Court. BIO 27. That is a pure question of law. This Court is fully capable of interpreting the Constitution to answer it.

Tellingly, Respondents focus all of their remaining arguments on the merits of the constitutionality of proxy voting. BIO 28-34. For example, they contend that the practice of "unanimous consent" (whereby the House assumes it will have a quorum "unless a Member questions it") shows that proxy voting is constitutional. BIO 32-33. For a multitude of reasons that can be fully briefed and argued by the parties at the merits stage, neither the text nor history supports Respondents. Voting by absent House Members is unprecedented. With respect to unanimous consent, for example, any Member may object.[10] And never has an *absent* Member purported to cast a floor vote by unanimous consent, thereby canceling out the votes of those actually present.[11] But when it comes to proxy

[10] Deschler's Precedents, vol. 7, ch. 23, §45.

[11] House Rule III; *see also* House Rule XX.

voting, no Member may demand that others be present. And repeatedly, those unconstitutionally absent have canceled out the votes of those constitutionally present.

This Court was unequivocal in *United States v. Ballin*, 144 U.S. 1 (1892). The House does not have unlimited power to make its own rules: "It may not by its rules ignore constitutional restraints." *Id.* at 5. Within those constitutional guardrails, "it is … within the competency of the house to prescribe any method which shall be reasonably certain to ascertain" whether there is "the *presence* of a majority" for a quorum. *Id.* at 6 (emphasis added). But it is *not* for the House to deconstruct those constitutionally prescribed guardrails, as House Resolution 965 does. Congressmembers who vote "present" by "proxy" on pending legislation highlights the absurdity of Respondents' position.[12] The Constitution requires that House Members be present to conduct the business of the House, including to vote. The House does not have the last word on that question.

[12] Roll Call 156, Clerk, bit.ly/30zmuBr.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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