No. _____

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

PETITION FOR WRIT OF CERTIORARI

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September 9, 2021

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QUESTIONS PRESENTED

In May 2020, the U.S. House of Representatives passed a resolution to allow Members to cast floor votes by proxy. The unprecedented resolution permits a single Member to vote on behalf of 10 absent Members. In this action against the Speaker, the Clerk, and the Sergeant-at-Arms in their official capacities, Petitioners ask for a declaration that the proxy voting resolution is unconstitutional, as well as injunctive relief.

The court below ruled that the Speech or Debate Clause insulated the resolution from review. Contravening this Court's precedents, it held that collecting proxy letters, making public health declarations, and other acts by House employees necessary to effectuate the resolution were privileged acts. Eluding constitutional scrutiny, the House's practice of operating *in absentia* continues.

The questions presented are:

(1) Does the Speech and Debate Clause foreclose judicial review of the constitutionality of the proxy voting resolution in this action against the Speaker, the Clerk, and the Sergeant-at-Arms?

(2) Is the proxy voting resolution unconstitutional?

PARTIES TO THE PROCEEDING

Petitioners are the Hon. Kevin Owen McCarthy and the Hon. Charles Eugene Roy of the U.S. House of Representatives, as well as Clayton D. Campbell, Mickie J. Niland, Isabel Albarado Rubio, Lorine Spratt, and James Shipley Swayze. Petitioners were plaintiffs in the district court and appellants on appeal.[1]

Respondents are the Hon. Nancy Pelosi, in her official capacity as Speaker of the House, Cheryl L. Johnson, in her official capacity as Clerk of the House, and William J. Walker, in his official capacity as Sergeant-at-Arms of the House.[2] Respondents were defendants in the district court and appellees on appeal.

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[1] Additional House Members were plaintiffs and appellees in the courts below. They are listed at CADC Joint App. 19-47.

[2] On April 26, 2021, Major General William J. Walker replaced Paul D. Irving, who was a defendant and appellee in the courts below in his official capacity as the Sergeant-at-Arms.

CORPORATE DISCLOSURE STATEMENT

Petitioners and Respondents are individuals.

STATEMENT OF RELATED PROCEEDINGS

This case arises from *McCarthy, et al. v. Pelosi, et al.*, No. 20-5240 (D.C. Cir.) (opinion issued July 20, 2021), and *McCarthy, et al. v. Pelosi*, *et al.*, No. 1:20-cv-01395-RC (D.D.C.) (judgment issued Aug. 6, 2020). Petitioners are not aware of any directly related cases in state or federal courts.

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INTRODUCTION

Congress convenes in person. For 231 years, the People's representatives and agents assembled face-to-face to deliberate and otherwise "do [the] Business" of their respective Houses. U.S. Const. art. I, §5; The Federalist No. 14, 94-100 (Madison) (C. Rossiter ed. 1999). The alternative—absent Members voting by proxy—was not unknown to the Founders. In deliberations over the Articles of Confederation and at the Constitutional Convention, there were proposals to permit proxy voting. They were rejected both times. Since then, as constitutionally prescribed, only Members actually present within the halls of Congress could cast their votes. Nothing shook that uninterrupted tradition—not the Yellow Fever epidemic, not the burning of the Capitol in the War of 1812, not the Civil War, not the Spanish Flu, not two World Wars, not the 9/11 terrorist attacks.

That all changed last May. For the first time in this country's history, *absent* House Members started casting floor votes. House Resolution 965 purports to permit absent Members to delegate another Member to vote on their behalf. Through their delegate, the absent Members can vote "present" and otherwise cast a vote as if they were on the floor. And a single delegate can cast the votes of 10 absent Members—meaning it takes no more than 20 present Members to (unconstitutionally) do the business of the House nowadays. So far, more than 300 absent Members have sent letters appointing another Member to vote on their behalf to the House Clerk. And yet, this patently unconstitutional practice has and will continue to go unchecked.

With some irony, the court below concluded that the Speech or Debate Clause foreclosed judicial review of the constitutionality of proxy voting (which itself curtails "Speech or Debate" in the House). That decision takes a radically broad view of the Speech or Debate Clause. The court concluded that any acts related to voting were privileged—including here, the Clerk's collection of proxy letters from absent Members or declarations by the Speaker and Sergeant-at-Arms that proxy voting should continue. By that logic, there would be no stopping *any* voting rule adopted by the House. Even if the House were to refuse to count votes cast by women—a hypothetical Respondents' counsel offered at argument—the Speech or Debate Clause would require dismissal.

That defies this Court's decisions, the Constitution's text, and two centuries of tradition. The Speech or Debate Clause insures legislative independence, not supremacy. And when Congress "by its rules ignore[s] constitutional restraints," it is well within this Court's power to declare it so. *United States v. Ballin*, 144 U.S. 1, 5 (1892); *Powell v. McCormack*, 395 U.S. 486, 505-06 (1969).

OPINIONS BELOW

The opinion and order by the U.S. District Court for the District of Columbia is published at 480 F.Supp.3d 28 and is reproduced at Pet.App.15-36. The decision of the U.S. Court of Appeals for the District of Columbia Circuit is published at 5 F.4th 34 and is reproduced at Pet.App.1-14.

JURISDICTION

The D.C. Circuit issued its opinion on July 20, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution's Speech or Debate clause states in relevant part:

> The Senators and Representatives … shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; *and for any Speech or Debate in either House, they shall not be questioned in any other Place*.

Art. I, §6, cl. 1 (emphasis added).

The Quorum clause states:

> Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Art. I, §5, cl. 1

House Resolution 965 (2020), prescribing proxy voting, is reproduced at Pet.App.39-49.[3]

STATEMENT OF THE CASE

A. Speech or Debate Clause History

1. The Constitution privileges "any Speech or Debate in either House" by Senators and Representatives. Art. I, §6. The clause mirrors its predecessor in Article V of the Articles of Confederation: "Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress[.]" That, in turn, mirrored the English Bill of Rights of 1689.

The English analog "was the culmination of a long struggle for parliamentary supremacy" and "a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators." *United States v. Johnson*, 383 U.S. 169, 178 (1966). 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 the English Speech or Debate Clause. *Id.* at 182.

But the American version of the Clause was not without limits. In Thomas Jefferson's words, a

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[3] In January 2021, the current Congress readopted proxy-voting by reference to H. Res. 965. *See* H. Res. 8 §3(s) (2021), bit.ly/3mkLMvj.

legislator's privilege was "restrained to things done in the House in a Parliamentary course," not "to exceed the bounds and limits of his place and duty." *Hutchinson v. Proxmire*, 443 U.S. 111, 125 (1979) (quoting T. Jefferson, A Manual of Parliamentary Practice 20 (1854), reprinted in The Complete Jefferson 704 (Padover 1943)). As Justice James Wilson explained, those limits are "defined and ascertained in our constitutions," different than our English predecessors. *Id*. (quoting 2 J. Wilson, Works 35 (Andrews 1896)).

Before and after the Founding, many States adopted their own Speech or Debate Clause analogs and today look to this Court's decisions to interpret them. *See Tenney v. Brandhove*, 341 U.S. 367, 373-75 & n.5 (1951).

B. Unprecedented Proxy Voting

1. More than two centuries ago, the Framers rejected proxy voting in favor of bringing representatives together, face-to-face to debate and do the business of Congress. Benjamin Franklin proposed proxy voting in the Articles of Confederation, and it was rejected. Proposed Articles of Confederation, Art. VIII (July 21, 1775), reprinted in The Papers of Benjamin Franklin, vol. 22 (Yale 1982); *see* Articles of Confederation art. V. And those at the Constitutional Convention similarly opted for a constitutional framework requiring a quorum of Congress to physically assemble to "do Business," versus voting by proxy. *Compare* Records of the Federal Convention of 1787 (Farrand's Records), vol. 3, 620, *with* U.S. Const. art. I, §5.

2. In the modern Congress, Rule III prohibits any Member from authorizing "any other person to cast the vote of such Member or record the presence of such Member." Rule III(2)(a). Under the rule, "[n]o other person may cast a Member's vote or record a Member's presence in the House." Rule III(2)(b).

3. That all changed in May 2020 when the House passed House Resolution 965. The resolution purports to allow absent Members to vote by delegating another Member to vote on his or her behalf. Pet.App.39. The delegate may cast the absent Member's vote and record their presence as if they were there, even though the absent Member is not in fact present. Pet.App.39.

Absent Members need only submit a letter to the Clerk of the House to designate another Member as their proxy. Pet.App.40. The Clerk maintains a publicly available list of proxies. Pet.App.41.[4]

The resolution permits a single Member to vote for up to 10 Members concurrently. Pet.App.41. To vote on behalf of an absent Member (or 10 absent Members), the proxy designee "obtain[s] an exact instruction from the other Member with respect to such vote or quorum call," in accordance with regulations adopted along with the resolution. Pet.App.42. The absent Member provides a "written voting instruction," "which may be in electronic form." 166 Cong. Rec. H2257 (daily ed. May 15, 2020). Staff can also transmit the Member's voting instruction if the Member confirms it by phone. *Id*. Consistent with

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[4] *See* Proxy Letters, Clerk, U.S. House of Representatives ("Clerk"), bit.ly/3ei2vZ1.

these regulations, an absent Member need only text her votes to her proxy designee, and the proxy designee may cast her vote as if she were physically present. Such voting instructions—whether sent by text message or confirmed by phone or transmitted in some other "electronic form"—are not archived or publicly available.

The resolution also contains a section titled "Determination of Quorum." That section states that absent House members who vote by proxy "shall be counted for the purpose of establishing a quorum under the rules of the House." Pet.App.42.

The Speaker has extended proxy voting—initially authorized for only 45 days—ten consecutive times. Extending it requires the involvement of the Sergeant-at-Arms. The Sergeant-at-Arms, "in consultation with the Attending Physician," notifies the Speaker "that the public health emergency due to a novel coronavirus remains in effect." Pet.App.40.[5] Once he does so, the Speaker may extend proxy voting for another 45 days. Pet.App.40. Weeks ago, the Sergeant-at-Arms did just that (again).[6] And the Speaker extended proxy voting (again).[7]

The first proxy votes were cast shortly after the resolution's adoption. On May 27, 2020, for the first time in this country's history, dozens of House

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[5] *See, e.g.*, W. Walker, Letter to N. Pelosi (Aug. 13, 2021), bit.ly/3kQkpai.

[6] *Id.*

[7] N. Pelosi, *Dear Colleague to All Members on Extension of Remote Voting 'Covered Period'*, Speaker of the House (Aug. 13, 2021), bit.ly/3DLgFiT.

Members cast votes on behalf of 70 absent Members.[8] (Indeed, some Members cast votes for six or seven absent Members at one time.[9]) Now, more than a year into proxy voting, more than 300 members have submitted letters to the Clerk purporting to delegate their votes to other Members as proxies.[10] Members have even voted "present" by proxy.[11]

Proxy votes have been outcome determinative. For example, on the first day of proxy voting, the House voted on a bill to amend the Foreign Intelligence Surveillance Act. It purportedly passed by a vote of 228-189.[12] But absent the 70 unconstitutional proxy votes, the bill failed 159-188.[13] Similarly, a recent vote on one of the appropriations bills purportedly passed by a vote of 219-208. But 27 votes were cast by proxy; excluding the unconstitutional proxies, the bill failed 198-202.[14] In these circumstances and others, proxy votes have nullified votes cast by Members who refuse to cast unconstitutional proxy votes.

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[8] *See, e.g.*, Roll Call 112, bit.ly/2GfZJrL; Members Recorded Pursuant to H. Res. 965 Roll Call No. 112 ("Roll Call 112 Proxy List"), Clerk (May 27, 2020), bit.ly/3AYiSoX.

[9] *Id.*

[10] See Proxy Letters, *supra.*

[11] Roll Call 156, Clerk, bit.ly/381AML1; Roll Call 156 Proxy List, Clerk (May 20, 2021), bit.ly/3glLVuU.

[12] *See* Roll Call 112, *supra*; Roll Call 112 Proxy List, *supra.*

[13] *Id.*

[14] Roll Call 247, Clerk, bit.ly/3mnHyDj; Roll Call 247 Proxy List, Clerk (July 29, 2021), bit.ly/3y12XEF.

C. Proceedings before the District Court

1. In May 2020, Petitioners initiated this suit to challenge the constitutionality of the proxy voting resolution. Petitioners include both House Members and individual constituents. Of the individuals, four are constituents of Members who have refused to cast unconstitutional proxy votes, and one is a constituent of a Member who has proxied his vote to others.[15] Petitioners filed their complaint against the Speaker of the House, the Clerk of the House, and the Sergeant-at-Arms in their official capacities.

Petitioners seek a declaration that the resolution is unconstitutional. The complaint alleges that the proxy voting scheme violates various constitutional provisions requiring Members to be present to "do Business." U.S. Const. art. I, §5. The complaint also alleges that proxy voting violates Article I's nondelegation doctrine and constitutional structure by allowing one Member to delegate his or her nondelegable legislative power to another Member. *See* U.S. Const. art. I, §1.

Petitioners' complaint also seeks prospective injunctive relief. Petitioners ask for an injunction to stop House employees from carrying out different administrative tasks related to the proxy voting resolution and to prohibit the extension of the proxy voting period. For example, Petitioners ask to enjoin the Sergeant-at-Arms from notifying the Speaker that a public health emergency remains in effect (a prerequisite for extending). And they ask to enjoin the

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[15] CADC Joint App. 106-110 (constituent affidavits); *see also* Proxy Letters, *supra* (Rep. Crist proxy letters).

Clerk from accepting letters from absent Members designating another Member as their proxy, or recording absent Members' votes in the Journal.

Respondents moved to dismiss, arguing that the court should not reach the merits of the suit. They argued that the Speech or Debate Clause insulated the resolution from judicial review, no matter its constitutionality, and they claimed that no one had standing to sue. Pet.App.6.

2. The district court granted Respondents' motion to dismiss. Pet.App.37. The court did not conclude one way or another whether Respondents' arguments with respect to the Members' standing had merit and said nothing about the individual constituents. Pet.App.30.

The district court instead concluded that the Speech or Debate Clause foreclosed it from considering the constitutionality of H. Res. 965. The court observed that "'voting by Members is a quintessential legislative act'" and concluded that "the regulation of *how* votes may be cast" was thus "'legislative'" too. Pet.App.31, 35 (emphasis added). The district court relied on the D.C. Circuit's decision in *Consumers Union of United States, Inc. v. Periodical Correspondents' Association*, 515 F.2d 1341 (D.C. Cir. 1975), a decision concluding that the Speech or Debate Clause precluded a challenge to congressional rules for press passes. Pet.App.33-36. The court reasoned that "[i]f rules controlling access to the press galleries are 'an integral part of the legislative machinery'" (as the D.C. Circuit said they were in *Consumers Union*), then "rules controlling how Members vote are even more so." Pet.App.34-35.

The court acknowledged Petitioners' argument that *Consumers Union* was an "outlier" but stated it was bound to abide by it. Pet.App.35.

D. Proceedings on Appeal

The D.C. Circuit affirmed. The court agreed that the resolution's constitutionality was beyond review. The court concluded that the administrative actions by Respondents (for example, writing letters about public health emergencies) were entitled to the same immunity as the casting of votes by Members themselves. Pet.App.13.

The court observed that the "'act of voting'" itself "is necessarily a legislative act." Pet.App.8. From there, the court concluded that a voting-related resolution was also a legislative act. Pet.App.8. And from there, the court concluded that any acts related to that resolution were legislative acts too. Pet.App.8-9. The Court said it was "hard-pressed to conceive of matters more integrally part of the legislative process" than the voting-related resolution. Pet.App.9.

The D.C. Circuit rejected the distinction between legislators' "enactment of legislation" and later acts pertaining to "the execution" of that legislation—for example, when the Clerk accepts proxy letters. Pet.App.11-12. The court acknowledged the potential conflict with this Court's decisions. It agreed *Kilbourn v. Thompson*, 103 U.S. 168 (1880), *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (*per curiam*), and *Powell v. McCormack*, 395 U.S. 486 (1969), distinguished between legislative action itself (immune) and later acts to effectuate legislative action (not immune). Pet.App.12-13. But the court of appeals dismissed

that same distinction here: "The salient distinction under the Speech or Debate Clause is not between enacting legislation and executing it" but instead between legislative and non-legislative acts. Pet.App.12. The court attempted to square *Kilbourn* but said nothing further about *Dombrowski* or *Powell*. Regarding *Kilbourn*, the court said "the resolution in *Kilbourn* authorized the arrest of a third party," whereas the resolution here "establishes internal rules governing the casting of votes by Members." Pet.App.13. Without further explanation, the court concluded effectuating the former was not a "legislative act" whereas acts effectuating the latter was because it was part of the legislative process. Pet.App.13.

Finding the resolution completely insulated from judicial review, the court of appeals did not reach the merits of Petitioners' claims. The court also stated it had "no need" to consider Respondents' standing arguments, Pet.App.6, which would have required the court to find that every House Member and every individual constituent lacked standing.

REASONS FOR GRANTING THE PETITION

This petition raises a recurring and important question about the limits of legislative immunity, upon which there is disagreement in the lower courts. *See* S. Ct. R. 10. It also raises a question of exceptional national importance about the constitutionality of the House's unprecedented practice of allowing absent Members to vote by proxy. *See id*.

1. On the question of legislative immunity, the decision below directly contradicts this Court's Speech

or Debate Clause decisions. It also sows further confusion in the lower courts regarding the Clause's limits. The D.C. Circuit concluded that the constitutionality of H. Res. 965 was judicially unreviewable, despite this Court's repeated refrain that "[l]egislative immunity does not, of course, bar all judicial review of legislative acts." *Powell*, 395 U.S. at 503; *see also Gravel v. United States*, 408 U.S. 606, 625 (1972) (legislative immunity is "not all-encompassing"). This Court has never deployed the Speech or Debate Clause to insulate resolutions or other enactments from judicial review altogether. Petitioners may challenge the constitutionality of proxy voting in a suit against those who *administer* the proxy voting scheme, just as plaintiffs in *Powell* and *Kilbourn* could challenge the constitutionality of the resolutions at issue in those cases in actions against House employees. The D.C. Circuit's decision is irreconcilable with these precedents and others.

2. The decision below not only gets the Speech or Debate Clause wrong, it does so at the cost of insulating a question of exceptional national importance. The House does not have the last word on whether it may operate *in absentia.* The Constitution does. And when the House "by its rules ignore[s] constitutional restraints or violate[s] fundamental rights," *Ballin*, 144 U.S. at 5, 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); *Kilbourn*, 103 U.S. at 199; *Gravel*, 408 U.S. at 620. Here, multiple constitutional provisions confirm that it is constitutionally illegitimate for absent Members to "do [the] Business" of the House. U.S.

Const. art. I, §5. Certiorari is warranted so that the Court can resolve that exceptionally important question.

I. The Decision Below Contravenes this Court's Speech or Debate Clause Decisions.

Certiorari is warranted because the decision below directly contradicts this Court's decisions in *Kilbourn v. Thompson*, 103 U.S. 168 (1880), *Powell v. McCormack*, 395 U.S. 486 (1969), *United States v. Brewster*, 408 U.S. 501 (1972), and others involving the Speech or Debate Clause in three ways. First, it mistakes privileged legislative acts as any acts that are part of the legislative process, Pet.App.9, even though the Clause does not shield every act related to the legislative process. Second, it expressly rejects the well-accepted distinction between privileged acts by legislators (or their aides) and non-privileged acts by congressional employees. Third, it forgets that the Clause historically privileged only official acts of congressmembers, not acts such as proxy voting that are definitionally *ultra vires*.

A. The Speech or Debate Clause takes a limited view of privileged acts, while the decision below does not.

1. The Speech or Debate Clause, privileging "any Speech or Debate in either House," "does not … bar all judicial review of legislative acts." *Powell*, 395 U.S. at 503; U.S. Const. art. I, §6. Its scope is narrower, consistent with the Clause's historical origins to "insur[e] the independence of individual legislators." *Brewster*, 408 U.S. at 507. The Clause specifically "insure[s] that legislators are not distracted from or

hindered in the performance of their legislative tasks by being called into court to defend their actions." *Powell*, 395 U.S. at 505. It therefore cloaks *legislators* in legislative immunity for their legislative acts. And it sometimes shields the *legislator's staff*, to the extent they are acting in place of the legislator himself. *See Gravel*, 408 U.S. at 618. But not always. *See Dombrowski*, 387 U.S. at 85. Careful not to stray too far from the Clause's textual emphasis on "Speech or Debate," a privileged legislative act must be "an integral part of the deliberative and communicative processes" of the Members themselves. *Gravel*, 408 U.S. at 625; *see also, e.g.*, *Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301, 1319 (10th Cir. 2004) ("'communicative processes' referred to in *Gravel* are only those within Congress itself"). Accordingly, judicial inquiry into legislators' "motives or intentions" or "legislative judgment" is off-limits. *Johnson*, 383 U.S. at 185; *Doe v. McMillan*, 412 U.S. 306, 313 (1973).

The Clause does not, however, cloak everything *related* to legislators' legislative acts in immunity. *See Brewster*, 408 U.S. at 515-16. That would impermissibly "forestall judicial review of legislative action" altogether, contrary to this Court's observation that the Speech or Debate Clause assures "legislative independence, not supremacy." *Powell*, 395 U.S. at 505; *Brewster*, 408 U.S. at 508; *see also Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 112-13 (2015) (Thomas, J., concurring in the judgment) (judiciary has an obligation "to provide a judicial check on the other branches"). Taking perhaps the most famous example—even when the House Clerk,

the Sergeant-at-Arms, and the Doorkeeper were "acting pursuant to express orders of the House" to keep Representative Adam Clayton Powell from voting, that did "not bar judicial review of the constitutionality of the underlying legislative decision" to exclude him from the House. *Powell*, 395 U.S. at 504. Even when a resolution is "clearly legislative in nature," its constitutionality is reviewable so long as legislators (or their motivations) are not on trial. *Gravel*, 408 U.S. at 618.

2. The decision below mistakes true legislative acts, such as a legislator's vote, for everything *related* to that legislative act of voting. According to the D.C. Circuit, "[T]he 'act of voting' is necessarily a legislative act," so "House rules governing how Members may cast their votes thus concern core legislative acts." Pet.App.8. The premise is correct, but the conclusion immunizing everything related to voting does not follow. "In no case has this Court ever treated the Clause as protecting all conduct relating to the legislative process." *Brewster*, 408 U.S. at 515.

While the legislator's actual "act of voting" is a legislative act, not everything relating to voting is. The legislator's vote is protected as part of the Speech or Debate Clause's protection of an independent legislature. Accordingly, "*how* [a senator] acted, voted, or decided" or what his "motivation for those acts" could not be prosecuted in *Brewster*. *Id.* at 525, 527 (emphasis added). Likewise, a legislator's "motives" for a floor speech were off-limits in *Johnson*. 383 U.S. at 185. But it does not follow that generally applicable voting rules, or those effectuating them, are also off limits. The ministerial acts by the Clerk or Sergeant-

at-Arms to effectuate those rules are not acts that are "an integral part of the deliberative and communicative processes" of the Members themselves. *Gravel*, 408 U.S. at 625. The Clerk's acts are, at best, related to the legislator's deliberative process (while the public health declarations by the Sergeant-at-Arms can hardly be called that). Contrary to the decision below, such acts are not themselves legislative acts. They are not immune, even though "related to the legislative process." *Brewster*, 408 U.S. at 516.

B. The decision below ignores a whole category of this Court's cases.

The decision below is irreconcilable with this Court's cases involving congressional employees who are *involved* in the legislative process but who are not themselves performing immune legislative acts. Contrary to the court's leap in logic, Pet.App.8, even if voting itself is "legislative in nature," the deciding question is whether Respondents' actions to facilitate and extend proxy voting are themselves "legislative acts." *See Gravel*, 408 U.S. at 618, 625. Obviously not—the mere existence of a House resolution does not immunize all related actions. *See id.* at 618; *Kilbourn*, 103 U.S. at 202. Not even when they relate to voting. *See Powell*, 395 U.S. at 493. Such cases fall outside the Speech or Debate Clause. They do not put individual Members' votes on trial, nor do they challenge Members' "motives or intentions." *Johnson*, 383 U.S. at 183-85. Indisputably, "relief could be afforded without proof of a legislative act or the motives or purposes underlying such an act." *Gravel*, 408 U.S. at 621.

For example, in *Kilbourn* the Court considered whether the House could constitutionally order the arrest and imprisonment of a contumacious witness. 103 U.S. at 181-82. Pursuant to a House resolution, the Sergeant-at-Arms arrested the witness. *Id.* at 196. The Sergeant-at-Arms could not escape the suit merely because he acted pursuant to the resolution. *Id.* at 200. Quoting the English case of *Stockdale v. Hansard*, this Court endorsed the distinction between a suit against a House Member for his legislative acts and a suit against a legislative employee for his related acts: "So if the speaker by authority of the House order an illegal act, though that authority shall exempt him from question, his order shall 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 decision below is diametrically opposed to *Kilbourn*. The resolution authorizing the arrest in *Kilbourn* "was clearly legislative in nature," no different than the resolution authorizing the proxy voting rule here. *Gravel*, 408 U.S. at 618. The acts taken by the Sergeant-at-Arms were in furtherance of that resolution, just as the acts taken by the Clerk and Sergeant-at-Arms are in furtherance of the resolution here. The D.C. Circuit's attempt to distinguish the two is *ipse dixit*. The court simply declared that the arrest in *Kilbourn* was "not itself a legislative act" whereas the acts at issue here are. Pet.App.13. The court offered no explanation for why the Sergeant-at-Arms's certifying an ongoing public health emergency could possibly be a "legislative act" here but arresting a

witness in contempt of a House proceeding in *Kilbourn* was not. Because there is no explanation.

Similarly in *Powell*, the House passed a resolution forbidding Representative Adam Clayton Powell from taking his congressional seat after Powell misused his committee's funds. 395 U.S. at 489-91. Powell and some of his constituents sought a declaration that the House resolution excluding him was unconstitutional. *Id.* at 493-94. They also sought injunctive relief against the Clerk for refusing to tally his vote, the Sergeant-at-Arms for refusing to pay his salary, and the Doorkeeper for denying him admission to the chamber. *Id.* Even though Powell's exclusion was rooted in a quintessentially legislative act—fellow Members' voting to exclude him—and even though the Constitution empowers the House to determine "qualifications" with the authority to "expel," U.S. Const. art. I, §5, this Court reached the merits of the constitutional claim. *Id.* at 550.

Powell, too, stands for the obvious point that the Speech or Debate Clause does not shield all conduct *related* to legislative acts. In *Powell*, the House Members were dismissed, but the Clerk, the Sergeant-at-Arms, and the Doorkeeper remained as defendants. *Id.* at 505-06 & n.26 ("[W]e need not decide whether … petitioners would be entitled to maintain this action solely against members of Congress where no agents participated in the challenged action and no other remedy was available."). In this Court's words, "[t]hat House employees are acting pursuant to express orders of the House does not bar judicial review of the constitutionality of the underlying legislative decision." *Id.* at 504.

Powell should have resolved this case. *Powell* refused to dismiss the House employees from the suit even though their conduct was integrally related to Representative Powell's ability to vote and otherwise participate in the legislative process. 395 U.S. at 493. But here, without addressing *Powell*, the D.C. Circuit concluded that "the Clerk's counting and recording of proxy votes [] is itself a legislative act" shielded by the Speech or Debate Clause. Pet.App.13. Counting votes is *related* to legislative acts but is not itself a legislative act (nor is receiving letters or declaring a public health emergency)—*Powell* makes that clear. And while such acts might be part of the legislative process, "[i]n no case" has this Court prophylactically extended the Clause to protect all such acts "relating to the legislative process." *Brewster*, 408 U.S. at 515.

The same distinction re-appears in *Dombrowki*. While a legislator's own aides can claim immunity in limited circumstances, the Court has been more circumspect when non-legislators are defendants. *See Tenney*, 341 U.S. at 378. In *Dombrowski*, counsel for a Senate subcommittee was sued for unlawfully seizing records for a subcommittee meeting. 387 U.S. at 83. He was required to face a trial, even though the subcommittee ratified the subpoenas for the records. *Id.* at 84-85.

And it re-appears again in *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980). That case involved the delegation of legislative power to the Virginia court to make disciplinary rules for lawyers. *Id.* at 722. The court was entitled legislative immunity for writing the rules, just as individual legislators would be entitled

immunity for passing a house resolution. *Id.* at 731. But this Court held that the suit could nevertheless proceed because the court also had *enforcement* authority, and any legislative immunity did not extend to that enforcement authority. *Id.* at 734, 736. Here too—the legislative act of creating the resolution does not foreclose a challenge against those implementing it.

The court of appeals did not grapple with any of these decisions. They compel the opposite result. While legislators cannot be brought to defend themselves for *voting* for the proxy voting rule, those effectuating it can be.

C. The decision below has no meaningful limits.

Finally, the decision below conflicts with the historical understanding of the Speech or Debate Clause in America, as contemporaneously described by the Founders. As Jefferson put it, that privilege was "restrained to things done in the House in a Parliamentary course." *Hutchinson*, 443 U.S. at 125 (quoting Jefferson, *supra*, 20). Members, let alone House employees, did not have any "privilege *contra morem parliamentarium*, to exceed the bounds and limits of his place and duty." *Id.*; *see also Coffin v. Coffin*, 4 Mass. 1, 29-31 (1808) ("to consider every malicious slander … as within [a representative's] privilege, because it was uttered in the walls of the representatives' chamber to another member, but not uttered in executing his official duty, would be to extend the privilege farther than was intended by the people … and would render the representatives' chamber a sanctuary for calumny"). As Justice Wilson

explained, those parliamentary powers and corresponding privileges "are defined and ascertained in our constitutions. The arcana of privilege, and the arcana of prerogative, are equally unknown in our system of jurisprudence." *Hutchinson*, 443 U.S. at 125 (quoting Wilson, *supra*, 35); *accord Long v. Ansell*, 293 U.S. 76, 82 (1934) (refusing to shield Senator Huey Long from summons for complaint relating to floor speech). A century later in *Kilbourn*, this Court similarly acknowledged that legislators themselves might engage in conduct that is of such "an extraordinary character" that the Speech or Debate Clause would not shield them from suit: "It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible." 103 U.S. at 204.

Applied here, proxy voting is definitionally "'*contra morem parliamentarium*, exceed[ing] the bounds and limits of [House Members'] place and duty.'" *Hutchinson*, 443 U.S. at 125. Allowing the House to operate *in absentia* contravenes the Constitution's express requirements for in-person, deliberative congressional bodies. Part III.A, *infra.* The Speech or Debate Clause cannot immunize acts that, by their very nature, render House activity unofficial. *See, e.g.*, *Romer v. Colo. Gen. Assembly*, 810 P.2d 215, 225 (Colo. 1991) ("speech or debate clause does not apply" if procedure not "within the sphere of legitimate activity").

The court below strayed far from this historical limitation. The D.C. Circuit's rule places any "actions

related to the casting of votes" beyond review. Pet.App.11. That rule is limitless, permitting any defendant to claim absolute immunity for House procedures violating the Constitution's express limitations. The D.C. Circuit's version of the Speech or Debate Clause would foreclose not only this suit, but also others challenging unmistakably unconstitutional voting schemes. It would foreclose, for example, a constitutional challenge to a proxy voting scheme that permitted Republicans to vote by proxy but not Democrats, or westerners to vote by proxy but not easterners. At argument, Respondents' counsel even agreed that the Speech or Debate Clause ought to foreclose a suit against House employees if the House adopted a voting rule excluding women Members or particular legislators.[16] According to the courts below and Respondents here, the Speech or Debate Clause would give Congress the last word on any such schemes—making even the Clerk who records the votes immune. There is no basis in the

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[16] CADC Oral Argument 51:12-38 (rejecting suit could be brought against Sergeant-at-Arms to challenge hypothetical rule excluding women). Counsel added, "[T]here would be, very likely, a remedy for a plaintiff … affected … by a law passed and individual members were discriminated against" in a suit against "the Executive Branch, which would be carrying out the law." *Id.* 50:31-58. That contravenes *Powell* and other decisions. And the proffered solution is at odds with this Court's statement in *Ballin*. In a suit against the Executive about an already-enacted law, this Court refused to "refer to the journal for the purpose of impeaching a statute properly authenticated and approved, and then supplement and strengthen that impeachment by parol evidence that … other facts existed which, if stated on the journal, would give force to the impeachment." 144 U.S. at 4.

Clause's text or history to support such a radical rewriting of our separation of powers. There is no derivative immunity for resolutions so far exceeding Congress's constitutional bounds. *See Hutchinson*, 443 U.S. at 125; *Kilbourn*, 103 U.S. at 202.

* * *

The decision below errs by treating any acts related to the legislative process as immune "legislative acts." Pet.App.8-9, 11. That is not and has never been the rule. *See Brewster*, 408 U.S. at 515. The House employees fall well outside of the Speech or Debate Clause's reach, no different than the Sergeant-at-Arms in *Kilbourn* or the Clerk, Doorkeeper, and Sergeant-at-Arms in *Powell*. Nor can any Respondent claim derivative immunity for a resolution that so far exceeds the bounds and limits of the House. *Hutchinson*, 443 U.S. at 125.

II. The Decision Below Sows Confusion Among the Lower Courts About the Speech or Debate Clause's Scope.

Certiorari is also warranted because the decision below deepens disagreement among the lower courts when it comes to defining "legislative acts." This case is an excellent vehicle to resolve that confusion.

A. The decision below conflicts with other lower court decisions.

1. The D.C. Circuit and the First Circuit (relying on the D.C. Circuit) have taken an overly broad view of the Speech or Debate Clause's scope. The decision below relies on and repeats an error from *Consumers Union*, 515 F.2d at 1341. While this Court has limited "legislative acts" to those "integral" to the

"deliberative or communicative processes" of Members themselves, *Gravel*, 408 U.S. at 625, the D.C. Circuit in *Consumers Union* and other decisions immunized acts "integral" to the legislative process in general. Pet.App.9 (rule "integrally part of the legislative process"); *Consumers Union*, 515 F.2d at 1350 (press passes "were an integral part of the legislative machinery").

Relying on *Consumers Union*, the First Circuit adopted the D.C. Circuit's overbroad conception of "legislative acts" in *National Association of Social Workers v. Harwood*, 69 F.3d 622, 632-33 (1st Cir. 1995). In a suit brought against the Rhode Island House Speaker and the Doorkeeper to challenge a House rule, the First Circuit decided that both were immune because they "did nothing more or less than to interpret and enforce" the rule. *See id.* at 631. Relying on *Consumers Union*, the court stated, "We are not alone in our view of a legislature's House as its castle." *Id.* at 632. Judge Lynch dissented, explaining that "[t]here is no immunity for practices that simply relate to legislative activities." *Id.* at 639. The dissent concluded that "legislative immunity does not reach enforcement of the House Rule because such enforcement is not 'an integral part of the *deliberative* and *communicative* processes'" of the House even though it might affect the "legislative process" more broadly. *Id.* at 640 (emphasis added).

2. The Tenth Circuit, on the other hand, took a narrower view of "legislative acts" in *Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301 (10th Cir. 2004). The court rejected the argument that personnel decisions are "'legislative acts'" under

Gravel's umbrella, even if the fired employee's duties were an "'integral part of the legislative process.'" *Id.* at 1318-19.[17] The Court rejected that a staffer's discussions with constituents made her an alter ego of the senator: privileged "'communicative processes' … are only those within Congress itself." *Id.* at 1319. Here too, the Clause privileges the votes cast in Congress itself, not House employees' acts related to voting. *Accord id.* at 1315 ("even if there had been a legislative act—say, a committee resolution—directing a discriminatory action against Plaintiff, only the vote itself would be protected").

Relying on this Court's precedents, state supreme courts have likewise distinguished between true legislative acts and the legislative process more generally. In *Sweeney v. Tucker*, 375 A.2d 698 (Pa. 1977), the Pennsylvania Supreme Court considered claims about a legislator's unlawful expulsion. *Id.* at 497-98. The House comptroller (who had stopped paying the legislator's salary) was one of the named defendants. *Id.* at 503. The court rejected the comptroller's Speech or Debate Clause defense. *Id.* at 506-07; *see also id.* at 503-05 (equating Pennsylvania Speech or Debate Clause with federal clause). The

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[17] The Tenth Circuit specifically criticized the D.C. Circuit's decision in *Browning v. Clerk*, 789 F.2d 923 (D.C. Cir. 1986). *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1 (D.C. Cir. 2006) (en banc), later overruled *Browning*. But *Fields* was only a temporary and only partial course correction. The decision below returns to the overbroad conception that anything *related* to the legislative process is immune. *See* Pet.App.8-9, 11; *cf. Fields*, 459 F.3d at 32 (Brown, J., concurring in the judgment) (criticizing "hypothesiz[ing] long cause-and-effect chains by which remote events somehow affect legislative decisions").

court concluded that "[e]ven where an action against a legislator is barred by the Speech or Debate Clause, legislative employees who participate in unconstitutional activity are responsible for their actions," even though they "are acting pursuant to express orders of the legislature." *Id.* at 506 (citing *Powell* and *Kilbourn*). Similarly, in *Baker v. Fletcher*, 204 S.W.3d 589 (Ky. 2006), citizens filed a complaint alleging that the general assembly failed to enact a constitutionally required balanced-budget bill. *Id.* at 591. The court explained that assembly members could not be defendants, but that the plaintiffs "could have named the Clerk of each House (for certifying the passage of the budget bill) or any other official actor who took part in the process." *Id.* at 596.

Finally, state courts have rejected Speech or Debate Clause defenses in cases challenging the constitutionality of a legislative body's generally applicable rules or practices. For example, the Colorado Supreme Court rejected legislators' arguments that its veto procedure was immune, even though such procedures were intrinsic to the legislative process. *Romer*, 810 P.2d at 224-25. The court concluded that when "an action challenges the constitutionality of the procedure employed to enact the legislation, it is incumbent on the judiciary to resolve whether the challenged actions fall within the sphere of legitimate legislative activity. If not, the speech or debate clause does not apply." *Id.* at 225; *accord Powell*, 395 U.S. at 506 (courts are "competent and proper … to consider whether … legislature's[] proceedings are in conformity with the Constitution and laws"). Similarly, Pennsylvania plaintiffs alleged

that the general assembly violated the constitution when enacting a bill in *Pennsylvania AFL-CIO v. Commonwealth*, 691 A.2d 1023, 1025 (Pa. Commw. Ct. 1997) (en banc), *aff'd* 757 A.2d 917 (2000). Likening the case to *Powell*, the court explained that the action was not barred by Pennsylvania's Speech or Debate Clause analog. *Id* at 1034*; accord Williams v. State Legis. of Idaho*, 722 P.2d 465 (Idaho 1986) (action by state auditor against legislature for failure to appropriate funds).

B. This case is a ready vehicle for clarifying the Speech or Debate Clause's limits.

This case is an excellent vehicle for the Court to clarify its previous formulations describing the Speech or Debate Clause's scope.[18] The D.C. Circuit has seized on broader *dicta*, while other courts have

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[18] *See, e.g.*, *United States v. Helstoski*, 442 U.S. 477, 489 (1979) (protecting "acts that occur in the regular course of the legislative process" and "the motivation for those acts" and "preclud[ing] any showing of how [a legislator] acted, voted, or decided" (quotation marks omitted)); *Gravel*, 408 U.S. at 625 ("The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."); *Brewster*, 408 U.S. at 512 ("Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts."); *Johnson*, 383 U.S. at 180 ("[A] charge ... that the Congressman's conduct was improperly motivated ... is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry.").

abided by the Clause's historically rooted limits. The diverging approaches warrant this Court's clarification.

Both questions presented in this case touch on the Clause's meaning, and both are pure questions of law. Respondents raised only one other defense below, arguing that Petitioners lacked standing. Understandably, neither court decided that question. *See* Pet.App.6, 30. Doing so would have required finding that *both* the Members *and* the individual constituents lacked standing. There would have been no basis for such a decision. *See, e.g.*, *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 n.7 (1986); *Coleman v. Miller*, 307 U.S. 433, 438 (1939); *see also, e.g.*, *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331-32 (1999) (constituent standing); *Michel v. Anderson*, 14 F.3d 623, 625-26 (D.C. Cir. 1994) (same). The Speech or Debate Clause question is thus ripe for this Court's review.

III. The Constitution Does Not Permit the House to Operate *in Absentia.*

Certiorari is also warranted given the exceptional importance of the underlying issue—whether the House may "do Business" with Members casting votes *in absentia.* U.S. Const. art. I, §5. The proxy voting scheme changes the very nature of the House from a face-to-face, deliberative body to an absent one. It also taints every bill. But once recorded in the House Journal, the *ultra vires* proxy votes cannot be undone. *See Ballin*, 144 U.S. at 4.

The House is free to make its own rules, but only within the Constitution's limits. *Id.* at 5; *Michel*, 14 F.3d at 627 ("There are limitations to the House's rulemaking power, and Art. I, §2 is such a limit."). When the House exceeds these limits, "the legality of its action" is subject to judicial review. *Kilbourn*, 103 U.S. at 199.

To say otherwise endorses congressional supremacy. Congress does not "possess directly or indirectly, an overruling influence over the other[branches] in the administration of their respective powers." Federalist No. 48, 305 (Madison) (Rossiter). For example, no one would seriously doubt this Court's power to tell Congress that it misunderstood "commerce" in enacting legislation exceeding its commerce clause power. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995); U.S. Const. art. I, §8. Nor could Congress seat a 29-year-old in the Senate; even though the Constitution empowers each House as "the Judge of the … Qualifications of its own Members," Article I no less requires that Senators meet the Constitution's age requirements. U.S. Const. art. I, §3, cl. 3, §5, cl. 1.

Here too, it is well within this Court's power to ask whether the House's proxy voting rule has run afoul of Article I's express limitations. *See Ballin*, 144 U.S. at 5; *see also Perez*, 575 U.S. at 112-13, 118 (Thomas, J., concurring in the judgment). The Constitution answers that question with a resounding yes. As does the unbroken tradition of in-person voting.

A. Constitutional text prohibits absentee voting.

The Constitution requires Congress to meet in person. For starters, the word "Congress" itself meant "[a] meeting" at the time of the Founding, meaning an "assembly" or coming "face to face."[19]

Article I's Quorum Clause contains an express limitation that the House must have a "Quorum to do Business." U.S. Const. art. I, §5. In context, the Quorum Clause plainly requires physically present Members:

> Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute *a Quorum to do Business*; but a smaller Number may adjourn from day to day, and may be authorized to *compel the Attendance of absent Members*, in such Manner, and under such Penalties as each House may provide.

Id. (emphases added). The power to "compel the Attendance of absent Members" would make little sense if the Constitution did not require physical attendance. Members therefore cannot be "present" by

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[19] 1 Samuel Johnson, A Dictionary of the English Language (4th ed. 1773), bit.ly/31DuXkE; *see also id.* (defining "congressive," deriving from Congress, as a "[m]eeting; encountering; coming together"); 2 Samuel Johnson, A Dictionary of the English Language (4th ed. 1773), bit.ly/31BN3TZ; *accord* U.S. Const. art. I, §2 ("Enumeration shall be made within three Years after *the first Meeting* of the Congress…." (emphasis added)).

proxy. That constitutional requirement marks the outer limit of the House's power to decide how it will record a quorum. *See Ballin*, 144 U.S. at 5. The constitutional minimum requires physical "presence of a majority." *Id.* at 6; *accord N.L.R.B. v. Noel Canning*, 573 U.S. 513, 554 (2014) (discussing "duty of attendance"); *Christoffel v. United States*, 338 U.S. 84, 89 (1949) ("quorum" in House proceedings requires "'actual[] physical[] presen[ce]'").

Other constitutional provisions further confirm that House Members must be physically present. Article I, §4 requires Congress to "assemble" at least once per year, where "assemble" meant "[t]o bring together into one place" or "congregated."[20] *See also* U.S. Const. art. I, §5, cl. 4 (no adjournment "to any other Place than that in which the two Houses shall be sitting"); U.S. Const. art. II, §3 (discussing convening and adjourning Congress).

Similarly, the privileges granted by Article I, §6 require physical presence. Members are privileged from arrest "during their *Attendance* at the Session of their respective Houses, and *in going to and returning from* the same." U.S. Const. art. I, §6, cl. 1 (emphasis added). The privilege—specific to "going" to the House and "returning" home—makes no sense if Members stay home to vote. Similarly, it would make little sense for the Constitution to privilege words spoken "*in* either House," with the added protection that such words "shall not be questioned *in any other Place*," if

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[20] 1 Samuel Johnson, *supra*; 1 Noah Webster, An American Dictionary of the English Language (1828), bit.ly/3cCDTd2 ("To meet or come together; to convene, as a number of individuals").

physical presence were not required. *Id.* (emphasis added). The Speech or Debate Clause thus also anticipates that Members will deliberate *in* the chamber—something Members cannot do when they merely proxy their vote to another member.

Still other constitutional provisions confirm that Members must be present to lawfully vote. The Yeas and Nays requirement discusses counting the votes "of those Present":

> … the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth *of those Present*, be entered on the Journal.

U.S. Const. art. I, §5, cl. 3 (emphasis added). Similarly, Article I's impeachment provision confirms Senate votes must be by two thirds of the "Members present" in a proceeding where "the Chief Justice shall preside." U.S. Const. art I, §3, cl. 6 (emphasis added); *accord* U.S. Const. art. II, §2, cl. 2 (requiring "two thirds of the Senators present" to concur with treaties). Every one of these provisions also requires physical presence; together, they leave no doubt that the proxy voting resolution is unconstitutional many times over.

B. Tradition confirms what the text plainly says.

For 231 years, the legislative branch operated with in-person quorum calls and voting. That unbroken tradition is all the more evidence of the unconstitutionality of the unprecedented proxy voting scheme. *See NFIB v. Sebelius*, 567 U.S. 519, 549 (2012) (opinion of Roberts, C.J.) (noting "lack of

historical precedent"); *see also Noel Canning*, 573 U.S. at 524-26 (putting "significant weight upon historical practice" (emphasis omitted)).

It wasn't as if proxy voting was unknown to the Founders. They rejected it. Experience with the Continental Congress had shown that "the representatives of the States ha[d] been almost continually assembled, and that the members from the most distant States [were] not chargeable with greater intermissions of attendance than those from the States in the neighborhood of Congress." Federalist No. 14, 96 (Madison) (Rossiter). During debates over the Articles of Confederation, Benjamin Franklin proposed proxy voting. His proposal would have allowed those "necessarily absent" to "be allowed to appoint" a "Proxy, who may vote for him." Proposed Articles of Confederation, Art. VIII (July 21, 1775), reprinted in The Papers of Benjamin Franklin, vol. 22 (Yale 1982). It was rejected. *See* Articles of Confederation art. V. Similarly, delegates at the Constitutional Convention rejected proposals that would have allowed Representatives to "vote by proxy"—but only after Madison added language giving Congress the power to compel absent Members' attendance.[21]

In-person voting, as required by the Constitution, continued for more than two centuries thereafter through pandemics and through war. During the Yellow Fever epidemic, Jefferson urged President Washington to keep Congress sitting in plagued

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[21] *See, e.g.*, Records of the Federal Convention of 1787 (Farrand's Records), vol. 3, 620, 622.

Philadelphia (then the capital), even if it meant meeting "in the open f[ie]lds."[22] Days after the attack on Fort Sumter, President Lincoln "summoned" the "Senators and Representatives … *to assemble* at their respective Chambers" on the coming Fourth of July.[23] Likewise, Congress reassembled in the midst of the 1918 Spanish Flu pandemic.[24] And throughout the Cold War, Congress stood ready in the event of a nuclear attack to continue doing business in person in a secret congressional bunker tucked away in West Virginia.[25]

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Permitting proxy voting does violence to the Constitution's text and tradition. Moreover, it creates an unlawful delegation of an absent Member's non-delegable legislative power. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *Bowsher v. Synar*, 478 U.S. 714, 755 (1986) (Stevens, J., concurring in the judgment); *see also Bank One Chi., N.A. v. Midwest Bank & Tr. Co.*, 516 U.S. 264, 279-80 (1996) (Scalia, J., concurring in part and concurring in the judgment). The Framers designed Congress to be a deliberative body that convenes and assembles in person at the seat of government to speak and debate as part of carrying out the People's business. Face-to-face deliberation is part of the House's very DNA. The

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[22] T. Jefferson, Letter to George Washington (Oct. 17, 1793), Nat'l Archives, bit.ly/36OxOs9.

[23] A. Lincoln, Proclamation (Apr. 15, 1861), bit.ly/3ecYGUV (emphasis added).

[24] 57 Cong. Rec. 1, 10 (Dec. 2, 1918).

[25] *The Secret Bunker Congress Never Used*, NPR (Mar. 26, 2011), n.pr/3zcJwKw.

never-before-seen proxy voting scheme is at odds with that, at odds with the Constitution's plain text, and at odds with 231 years of unbroken tradition.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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