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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5240

[Filed: July 20, 2021]

Argued November 2, 2020 Decided July 20, 2021

KEVIN OWEN MCCARTHY, THE HONORABLE, IN HIS OFFICIAL CAPACITY AS HOUSE MINORITY LEADER AND MEMBER OF THE UNITED STATES HOUSE OF REPRESENTATIVES FOR THE CALIFORNIA 23RD CONGRESSIONAL DISTRICT, ET AL.,	)
APPELLANTS	)
v.	)
NANCY PELOSI, THE HONORABLE, IN HER OFFICIAL CAPACITY AS SPEAKER OF THE HOUSE OF REPRESENTATIVES AND MEMBER OF THE UNITED STATES HOUSE OF REPRESENTATIVES FOR THE CALIFORNIA 12TH CONGRESSIONAL DISTRICT, ET AL.,	)
APPELLEES	)

Appeal from the United States District Court
for the District of Columbia
(No. 1:20-cv-01395)

Charles J. Cooper argued the cause for appellants. With him on the briefs were *Michael W. Kirk*, *Harold S. Reeves*, *J. Joel Alicea*, *Steven J. Lindsay*, and *Elliot S. Berke*.

John C. Eastman and *Anthony T. Caso* were on the brief for *amici curiae* Center for Constitutional Jurisprudence, et al. in support of appellants.

Douglas N. Letter, General Counsel, U.S. House of Representatives, argued the cause for appellees. With him on the brief were *Todd B. Tatelman*, Principal Deputy General Counsel, *Megan Barbero* and *Josephine T. Morse*, Deputy General Counsel, *Adam A. Grogg*, Assistant General Counsel, *William E. Havemann*, Associate General Counsel, *Michael R. Dreeben*, *Samantha M. Goldstein*, *Kendall Turner*, *Ephraim A. McDowell*, *Anna O. Mohan*, and *Alec Schierenbeck*.

Before: SRINIVASAN, *Chief Judge*, ROGERS and WALKER, *Circuit Judges*.

Opinion for the court filed by *Chief Judge* SRINIVASAN.

SRINIVASAN, *Chief Judge*: In response to the COVID-19 pandemic, the House of Representatives adopted a Resolution enabling Members who are unable to attend proceedings in person to cast their votes and mark their presence by proxy. A number of Representatives and constituents challenge the constitutionality of the Resolution. They argue that various constitutional provisions compel in-person participation by Representatives in all circumstances, including during a pandemic.

The district court dismissed the suit for lack of jurisdiction. The court concluded that the Resolution and its implementation lie within the immunity for legislative acts conferred by the Constitution's Speech or Debate Clause. We agree, and we thus affirm the district court's dismissal of the case.

I.

A.

In March 2020, the World Health Organization declared COVID-19 a pandemic. H. Rep. No. 116- 420, at 2 (2020). In response to the unprecedented public-health crisis, the United States House of Representatives adopted House Resolution 965 in May 2020. The Resolution establishes a process under which House Members can cast their votes and mark their presence by proxy if they cannot personally attend proceedings due to the public-health emergency. *See* H.R. 965 (May 15, 2020).

The Resolution states:

> [A]t any time after the Speaker or the Speaker's designee is notified by the Sergeant-at-Arms, in consultation with the Attending Physician, that a public health emergency due to a novel coronavirus is in effect, the Speaker or the Speaker's designee, in consultation with the Minority Leader or the Minority Leader's designee, may designate a period (hereafter in this resolution referred to as a "covered period") during which a Member who is designated by another Member as a proxy . . . may cast the

> vote of such other Member or record the presence of such other Member in the House.

Id. § 1(a). A covered period automatically ends in 45 days, but the Speaker or her designee may extend the period for an additional 45 days if the Speaker "receives further notification from the Sergeant-at-Arms, in consultation with the Attending Physician, that the public health emergency due to a novel coronavirus remains in effect." *Id*. § 1(b)(1)–(2).

Any Member "whose presence is recorded by a designated proxy," or whose vote is cast by a proxy, "shall be counted for the purpose of establishing a quorum." *Id*. § 3(b). To designate a proxy, a Member submits to the Clerk of the House a "signed letter . . . specifying by name the Member who is [so] designated." *Id*. § 2(a)(1). The letter must state that the Member designating a proxy is unable to attend proceedings in person because of the public-health emergency. *Id*. § 2(a)(1); Remote Voting by Proxy Regulations Pursuant to House Resolution 965 § A.1.i, 166 Cong. Rec. H2257 (daily ed. May 15, 2020).

Members cannot grant a "general proxy" giving another Member blanket authority to vote for them. Instead, a Member acting as a proxy must "obtain an exact instruction" in writing that is specific to a particular vote or quorum call. H.R. 965 § 3(c)(1), (c)(6). And if the instruction pertains to a bill whose text subsequently changes, no proxy vote can be cast unless there is a new instruction. Remote Voting by Proxy Regulations § C.4, 166 Cong. Rec. H2257.

A Member can act as a proxy for a maximum of ten other Members at any one time. H.R. 965 § 2(a)(4). Members serving as proxies must announce on the House floor which remote Members they represent and what instructions they have received. *Id.* § 3(c)(2). The Clerk of the House maintains a publicly available list of proxy designations. *Id.* § 2(b).

B.

On May 20, 2020, Speaker of the House Nancy Pelosi authorized proxy voting pursuant to the Resolution for a period of 45 days. There have since been several extensions, the most recent of which expires on August 17, 2021. Press Release, *Dear Colleague to All Members on Extension of Remote Voting 'Covered Period,'* SPEAKER OF THE HOUSE NANCY PELOSI (June 28, 2021), https://www.speaker.gov/newsroom/62821-0.

On May 26, 2020, House Minority Leader Kevin McCarthy—along with dozens of other Representatives and several constituents—challenged the constitutionality of the Resolution in a lawsuit against Speaker Pelosi, the Clerk of the House, and the House Sergeant-at-Arms. The suit contends that various constitutional provisions require Members to be physically present on the House floor in order to count towards a quorum and cast votes. The plaintiffs seek a declaration that House Resolution 965 is unconstitutional, as well as preliminary and permanent injunctions barring the defendants from implementing proxy voting in the House.

The defendants moved to dismiss the action, arguing that it is precluded by the Constitution's Speech or Debate Clause, and alternatively, that the plaintiffs lack standing to bring it. The district court granted the motion on the ground that the Speech or Debate Clause bars consideration of the suit. The plaintiffs now appeal.

II.

The defendants argue that we should not reach the merits of the constitutional challenge in this case for the same two reasons they advanced in the district court: first, the Speech or Debate Clause prevents us from considering the challenge; and second, the plaintiffs lack standing. Both those arguments state jurisdictional objections. *See Rangel v. Boehner*, 785 F.3d 19, 22 (D.C. Cir. 2015). And while we must resolve jurisdictional questions before we can address the merits of a dispute, we can take up jurisdictional issues in any order. *Id.*; *see Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007). We opt to begin with the question of Speech-or-Debate-Clause immunity. Because we agree with the district court that the Clause bars consideration of the plaintiffs' suit, we have no need to consider whether they have standing.

The Speech or Debate Clause states that "Senators and Representatives . . . for any Speech or Debate in either House . . . shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1. The Speech or Debate Clause occasioned neither speech nor debate at the Constitutional Convention: the Clause gained approval "without discussion and without opposition."

United States v. Johnson, 383 U.S. 169, 177 (1966); *Rangel*, 785 F.3d at 22.

The central object of the Speech or Debate Clause is to protect the "independence and integrity of the legislature." *Johnson*, 383 U.S. at 178. The Clause does so by preventing "intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Gravel v. United States*, 408 U.S. 606, 617 (1972).

While the Clause by terms prohibits "Speech or Debate in either House" from being "questioned in any other Place," *see* U.S. CONST. Art. I, sec. 6, it is long settled that the Clause's protections range beyond just the acts of speaking and debating. To "confine the protections of the Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view." *Gravel*, 408 U.S. at 617. Rather, the "Supreme Court has consistently read the Speech or Debate Clause 'broadly' to achieve its purposes." *Rangel*, 785 F.3d at 23 (quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 (1975)); *see Gravel*, 408 U.S. at 624.

Of particular salience, the Clause applies not just to speech and debate in the literal sense, but to all "legislative acts." *Doe v. McMillan*, 412 U.S. 306, 311–12 (1973). Legislative acts are those "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880); *see Gravel*, 408 U.S. at 624. Consequently, while the "heart of the Clause is speech or debate in either House," the Clause reaches matters forming "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." *Gravel*, 408 U.S. at 625.

Additionally, although the Clause's terms expressly prohibit questioning of "Senators or Representatives" in connection with legislative acts, it is well established that the Clause's protections extend to Congressional aides and staff. *See id.* at 618, 621; *Rangel*, 785 F.3d at 24–25. The Clause applies to aides and staff "insofar as [their] conduct . . . would be a protected legislative act if performed by [a] Member." *Gravel*, 408 U.S. at 618. The "key consideration, Supreme Court decisions teach, is the act presented for examination, not the actor." *Walker v. Jones*, 733 F.2d 923, 929 (D.C. Cir. 1984).

Here, the acts presented for examination are quintessentially legislative acts falling squarely within the Clause's ambit. The challenged Resolution enables Members to cast votes by proxy, and the "act of voting" is necessarily a legislative act—i.e., something "done in a session of the House by one of its members in relation to the business before it." *Gravel*, 408 U.S. at 617 (quoting *Kilbourn*, 103 U.S. at 204); *see id.* at 624 ("voting by Members" is "protected"); *Walker*, 733 F.2d at 929 (Clause covers "such activity integral to lawmaking as voting").

House rules governing how Members may cast their votes thus concern core legislative acts. And here, the acts sought to be enjoined by the plaintiffs' suit all

involve implementation of proxy voting pursuant to the Resolution. The suit seeks to bar: (i) the Sergeant-at-Arms from notifying the Speaker of the existence of a public health emergency due to COVID-19—the triggering condition for proxy voting under the Resolution; (ii) the Speaker from designating a covered period in which proxy voting will be permitted; (iii) the Clerk from accepting proxy letters from Members and maintaining a proxy list; and (iv) the Clerk from tabulating and recording proxy votes and counting proxy Members as present for quorum purposes.

Because those actions all effectuate proxy voting under the Resolution, they form "an integral part of the . . . processes by which Members participate in . . . House proceedings with respect to the . . . passage or rejection of proposed legislation." *Gravel*, 408 U.S. at 625. Indeed, we are hard-pressed to conceive of matters more integrally part of the legislative process than the rules governing how Members can cast their votes on legislation and mark their presence for purposes of establishing a legislative quorum.

Our decision in *Consumers Union of United States, Inc. v. Periodical Correspondents' Association*, 515 F.2d 1341 (D.C. Cir. 1975), provides an instructive frame of reference. *Consumers Union* involved a challenge to congressional rules requiring members of the press to apply to gain access to the House and Senate press galleries. *Id*. at 1342, 1344–45. We found the challenge barred by the Speech or Debate Clause, concluding that administration of seating in the press galleries is a legislative act. *Id*. at 1350.

We explained that, under the Supreme Court's decision in *Gravel*, legislative acts for purposes of Speech-or-Debate-Clause immunity include both (i) matters pertaining "to the consideration and passage or rejection of proposed legislation," and (ii) "other matters which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625; *Consumers Union*, 515 F.2d at 1349–50. Administration of seating in the press galleries, we specifically acknowledged, did not fall within the first of those categories. *Consumers Union*, 515 F.2d at 1350. But we concluded it fell within the second category, explaining that "*Gravel* . . . in delineating legislative acts, . . . said that . . . the Clause [also] applied to 'other matters which the Constitution places within the jurisdiction of either House.'" *Id.* at 1351 (quoting *Gravel*, 408 U.S. at 625).

This case, if anything, more centrally involves legislative acts than did *Consumers Union*. As in that case, the challenged actions here fall within *Gravel*'s second category, i.e., matters that the Constitution places within the House's jurisdiction: the House adopted its rules for proxy voting under its power to "determine the Rules of its Proceedings," U.S. CONST. art. I, § 5, cl. 2. But while both this case and *Consumers Union* thus implicate *Gravel*'s second category, this case, unlike *Consumers Union*, also implicates *Gravel*'s first category: rules enabling proxy voting squarely concern "the direct business of passage or rejection of proposed legislation." *Consumers Union*, 515 F.2d at 1351; *see Gravel*, 408 U.S. at 625. If the Speech or Debate Clause covers the administration of

seating in the press galleries, in short, it must also cover the administration of voting by Members.

A comparison between this case and the circumstances we faced in *Walker v. Jones*, 733 F.2d 923, is also illuminating. *Walker* involved a suit brought by the general manager of the House Restaurant System alleging that a House Member had terminated her employment because of her gender. *Id.* at 925. We rejected the House Member's contention that the Speech or Debate Clause barred the suit. "To characterize personnel actions related to [food] services as 'legislative' in character," we determined, "is to stretch the meaning of the word beyond sensible proportion." *Id.* at 931. By the same token, to characterize actions related to the casting of votes by Members as *not* "legislative" in character, we believe, would be to resist the meaning of the word beyond sensible proportion.

In arguing nonetheless that the Speech or Debate Clause does not bar their suit, the plaintiffs in this case seek to draw a fundamental divide between the enactment of legislation and the execution of it. As the plaintiffs see it, the acts of voting on and adopting the Resolution lie within the Clause's zone of immunity, but acts undertaken in implementing the Resolution do not. In their view, then, the Clause does not insulate from judicial review the conduct they seek to enjoin—e.g., the Sergeant-at-Arms's notifying the Speaker of a public health emergency, the Speaker's ensuing designation of a period in which proxy voting may occur, and the Clerk's acceptance of proxy letters and counting of proxy votes. Those actions, in the

plaintiffs' conception, merely implement the Resolution and thus fall outside the Speech or Debate Clause's protections.

That argument does not withstand scrutiny. The salient distinction under the Speech or Debate Clause is not between enacting legislation and executing it. The pivotal distinction instead is between legislative acts and non-legislative acts. So in *Consumers Union*, the Clause encompassed not just the promulgation of the rules governing seating in the press galleries, but also the administration and enforcement of those rules. *See* 515 F.2d at 1350–51. The suit there sought to address, among other things, a specific decision to deny access to a particular publication in implementation of the challenged rules. *See id.* at 1345–46. That action fell within the Clause's protections, and we accordingly spoke of the Clause's applicability to conduct "enforcing internal rules of Congress" or "execut[ing] . . . internal rules." *Id.* at 1350–51. The Clause, then, encompasses the execution of legislation when the executing actions themselves constitute legislative acts. That was true in *Consumers Union* and is no less—and, if anything, more—true here.

The three decisions principally relied on by the plaintiffs—*Kilbourn*, 103 U.S. 168, *Dombrowski v. Eastland*, 387 U.S. 82 (1967), and *Powell v. McCormack*, 395 U.S. 486 (1969)—are not to the contrary. In each of those cases, "the speech or debate privilege was held unavailable to certain House and committee employees." *Gravel*, 408 U.S. at 618 (discussing *Kilbourn*, *Dombrowski*, and *Powell*). As the Supreme Court has explained in specific reference to

those three decisions, they "do not hold that persons . . . are beyond the protection of the Clause when they perform or aid in the performance of legislative acts." *Id.* The Court thus necessarily considered the persons whose conduct was at issue in those cases to have been uninvolved "in the performance of legislative acts."

To be sure, the acts in question in those cases could be described as the execution of legislative action. *See id.* at 618–20. *Kilbourn*, for instance, concerned a House employee's arrest of a particular person in execution of a resolution authorizing the arrest of that individual. *Id.* at 618. And conduct carrying out legislation is beyond the Speech or Debate Clause's compass when it is not itself a legislative act, as was the case in *Kilbourn*: the arrest was not "an integral part" of the "processes by which Members participate in . . . 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." *Id.* at 625.

But whereas the resolution in *Kilbourn* authorized the arrest of a third party, the resolution in this case establishes internal rules governing the casting of votes by Members. And conduct implementing the latter resolution—including the Clerk's counting and recording of proxy votes—is itself a legislative act, pertaining directly "to the consideration and passage or rejection of proposed legislation." *Id.* That conduct thus falls comfortably within the immunity afforded by the Speech or Debate Clause.

* * * * *

For the foregoing reasons, the judgment of the district court is affirmed.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 20-1395 (RC)

Re Document Nos. 8, 16

[Filed: August 6, 2020]

HON. KEVIN OWEN MCCARTHY, *et al.*,

Plaintiffs,

v.

HON. NANCY PELOSI, *et al.*,

Defendants.

MEMORANDUM OPINION

GRANTING DEFENDANTS' MOTION TO DISMISS; DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

On May 15, 2020, in response to the global health crisis caused by the COVID-19 pandemic, the United States House of Representatives (the "House") adopted House Resolution 965, 116th Congress ("H. Res. 965"). The adopted resolution creates a framework by which

Members of the House may designate proxies to cast votes on their behalf based on their explicit instructions. Plaintiffs—a group of House Members and constituents—filed suit seeking declaratory judgment that H. Res. 965 is unconstitutional and an injunction against its continued use in the House. Plaintiffs argue the resolution violates the Quorum Requirement, the Yeas and Nays Requirement, the nondelegation doctrine, and the general structure of the United States Constitution, which they maintain require actual physical presence to do the business of the House. Am. Compl. ¶¶ 264–287, ECF No. 7. Defendants urge the Court not to reach the merits of the case, arguing that various threshold doctrines bar review of Plaintiffs' claims. Because the Court finds that Defendants are immune from suit under the Speech or Debate Clause of the Constitution, it does not reach the merits and grants Defendants' Motion to Dismiss.

II. BACKGROUND

COVID-19 is a "severe acute respiratory illness," caused by a novel coronavirus discovered in 2019, with no known cure, effective treatment, or vaccine. *S. Bay United Pentecostal Church*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (mem.). Millions of people across the United States and the world have been infected and hundreds of thousands have died from the disease. *See* Ctrs. for Disease Control and Prevention ("CDC"), *Coronavirus Disease 2019 (COVID-19): Cases in the U.S.* (Aug. 1, 2020), https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html. To prevent the spread of

infection, the CDC recommends keeping at least six feet distance between individuals who do not live in the same household. *See* CDC, *Coronavirus Disease 2019 (COVID-19): How to Protect Yourself & Others* (July 31, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html. During the pandemic, Congress had continued working and has passed relief bills aimed at addressing the public health emergency,[1] but Members have not been immune from the diseases' spread. *See* Defs.' Opp'n Mot. Prelim. Inj. ("Defs.' Opp'n") at 13, ECF No. 16-1 (noting that eight Members of Congress have contracted the virus).

House Regulation 965 relates directly to COVID-19 and the novel coronavirus that causes the disease. Specifically, H. Res. 965 allows the Speaker, after notification "by the Sergeant-at-Arms, in consultation with the Attending Physician, that a public health emergency due to a novel coronavirus is in effect," to designate a period of time "during which a Member who is designated by another Member as a proxy . . . may cast the vote of such other Member or record the presence of such other Member in the House." H. Res. 965 § 1(a). The period of time designated by the speaker terminates after 45 days but may be extended if the public health emergency remains in effect. *Id.*

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[1] *See* Coronavirus Preparedness and Response Supplemental Appropriations Act, Pub. L. No. 116-123, 134 Stat. 146 (2020); Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020); Coronavirus Aid, Relief and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020); Paycheck Protection and Health Care Enhancement Act, Pub. L. No. 116-139, 134 Stat. 620 (2020).

§ 1(b). Proxies are designated by Members submitting a signed letter to the Clerk that specifies the Member serving as the proxy. *Id.* § 2(a)(2). Designation may be revoked at any time by submitting a signed letter to the Clerk and is automatically revoked after a vote or a recording of the absent Member's presence. *Id.* A Member may be designated as a proxy for only up to ten other Members and the Clerk is charged with maintaining a list of all designations. *Id.* § 2(a)(4)–(b). Members who have designated proxies are "counted for the purpose of establishing a quorum under the rules of the House." *Id.* § 3(b). Members serving as proxies must (1) obtain "exact instruction from the other Member with respect to such vote or quorum call," (2) "announce the intended vote or recorded presence pursuant to the exact instruction received from the other Member," and (3) "cast such vote or record such presence pursuant to the exact instruction received from the other Member." *Id.* § 3(c).[2]

Plaintiffs sued on May 26, 2020 and filed an amended complaint on May 29, 2020. *See* Am. Compl. On the same day, they filed for a preliminary injunction and for entry of a permanent injunction and final judgment. *See* Pls.' Mot. for Prelim. Inj. ("Pls.' Mot."), ECF No. Defendants filed their opposition and a motion to dismiss on June 19, 2020. *See* Defs.' Opp'n. The parties agree that the case presents purely legal questions regarding the justiciability of Plaintiffs' claims and the correct interpretation of the

[2] Defendants noted during oral argument that, as of July 24, 2020, a quorum has been reached without counting the Members voting by proxy.

Constitution. The Court held oral argument on July 24, 2020 and has now fully considered the parties' arguments.

III. ANALYSIS

Defendants argue that the Court should not reach the merits of Plaintiffs' claims for three primary reasons. First, Defendants claim that Plaintiffs lack standing because H. Res. 965 does not result in vote dilution, the injury claimed by Plaintiffs. Second, Defendants argue that Plaintiffs lack standing under *Raines v. Byrd*, 521 U.S. 811 (1997). Third, Defendants argue that the Speech or Debate Clause bars the suit. The Court addresses each argument in turn but relies only on the third to dismiss Plaintiffs' Amended Complaint.

A. Standing

To establish standing under Article III of the Constitution, Plaintiffs—both the Members and constituent Plaintiffs—must demonstrate that: (1) they have suffered an injury that is both "concrete and particularized" and "actual or imminent," rather than conjectural or hypothetical; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a court decision in their favor. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). When assessing Plaintiffs' standing, the Court "must assume they will prevail on the merits of their constitutional claims." *LaRoque v. Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011) (citing *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1105 (D.C. Cir. 2006)).

1. Vote Dilution

To establish the injury element of standing, Plaintiffs argue that allowing Members to vote by proxy dilutes their voting power. Am. Compl. ¶¶ 258–60. Because H. Res. 965 allows a Member to serve as a proxy for up to ten other Members, Plaintiffs claim that the Member serving as a proxy has a disproportionate share of voting power relative to the Members physically present not serving as proxies. Plaintiffs put forth the following hypothetical to demonstrate:

> Suppose 200 Members vote on a measure on the floor of the House and another 50 absent Members purport to vote by proxy under the H. Res. 965. If the Court assumes, as it must, that the proxy rule is unconstitutional, the proxy votes, as a matter of simple arithmetic, dilute the voting power of each of the Representative Plaintiffs from 1/200 of the House's power to 1/250, indisputably inflicting a concrete injury.

Pls.' Reply at 3, ECF No. 24. The rule, Plaintiffs claim, effectively amplifies the voting power of Members serving as proxies and diminishes the power of Members physically present voting only for themselves.

Defendants respond that H. Res. 965 does not result in vote dilution because the text of the rule "makes clear that each Member is entitled to one and only one vote." Defs.' Opp'n at Plaintiffs, they argue, "urge the Court to ignore House Resolution 965's text and interpret it to mean that some Members are entitled to cast multiple votes." *Id.* at 23. In response to Plaintiffs'

hypothetical, Defendants say "each Member is constitutionally entitled to one vote out of the total number of House Members (up to 435). Under the House's rules, all Members receive that share . . . [Under H. Res. 965], Plaintiffs' votes weigh no less than before." Defs.' Reply at 3, ECF. No. 26. Because the proxy voting rules do not change Plaintiffs' share of the vote relative to the House as a whole, Defendants say that the alleged injury of vote dilution cannot be established.

In *Michel v. Anderson*,[3] the D.C. Circuit considered whether a House rule that granted delegates from Puerto Rico, Guam, the Virgin Islands, American Samoa, and the District of Columbia a right to vote in the Committee of the Whole violated the Constitution. 14 F.3d 623, 624–25 (D.C. Cir. 1994). The court took as a given that Members of Congress had "standing to assert their voting power has been diluted." *Id.* at 625 (citing *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1982)). Instead, the court focused on whether the constituent plaintiffs had standing to raise what the defendants called "a generalized abstract grievance" about their Members' voting power. *Id.* at 626. Finding the constituent plaintiffs did have standing, the court stated "it is difficult to understand why voters would not have standing to raise a claim that their vote was diluted because previously they had a right to elect a representative who cast one of 435 votes, whereas now

[3] Whether *Michel* and other cases on legislative standing cited here remain good law in the D.C. Circuit is discussed in Section III.A.2. below.

their vote elects a representative whose vote is worth only one in 440." *Id.*

In *Vander Jagt*, the court considered a claim from Members alleging that their voting power had been diluted "by providing them with fewer seats on House committees and subcommittees than they are proportionally owed." 699 F.2d at 1167. Explaining the Members' claim, the court stated that "[e]ven though Republicans constituted 44.14% of the House and Democrats 55.86%, Republicans were given only 40% of the seats on the Budget Committee and the Appropriations Committee, only 34.29% of the Ways and Means Committee seats, and only 31.25% of the Rules Committee seats." *Id.* The court found standing had been established based on the allegations that "as legislators and as voters their political power has been diluted." *Id.* at 1168.

In *Skaggs v. Carle*, a group of Members and constituents challenged a House rule that required a three-fifths majority, instead of a simple majority, to pass any bill containing an income tax increase. 110 F.3d 831, 833 (D.C. Cir. 1997). The plaintiffs argued they had "standing to challenge the dilution of a Representative's vote from one of 218 to one of 261 needed (assuming that all 435 Members vote) for the House to pass an income tax increase." *Id.* at 834. The court, following *Michel*, held "that vote dilution is itself a cognizable injury" but that the challenged rule did not in fact dilute voting power because a simple majority could vote to bypass the new requirement. *Id.* at 835. While the dissenting judge disagreed with this holding, he described the vote dilution injury similarly

as "dilution of [Representatives'] votes from 1/218th to 1/261st of the votes necessary to pass a tax increase." *Id.* at 837 (Edwards, C.J., dissenting).

Michel, *Vander Jagt*, and *Skaggs* all speak of voting power, and consequently the dilution of that voting power, in similar terms; a Members' voting power is defined relative to the entire congressional body. *See Michel*, 14 F.3d at 626 ("a representative who cast one of 435 votes . . . is [now] worth only one in 440"); *Vander Jagt*, 699 F.2d at 1167 (noting smaller percentages of committee seats "[e]ven though Republicans constituted 44.14% *of the House* and Democrats 55.86%") (emphasis added); *Skaggs*, 110 F.3d at 834 ("the dilution of a Representative's vote from one of 218 to one of 261 needed (assuming that all 435 Members vote)"). The Court understands Plaintiffs argument to require a slightly different definition. Rather than allege a dilution of voting power relative to the entire House, Plaintiffs allege dilution of voting power relative to Members physically present for a particular vote. This formulation of the injury requires assuming that Members are entitled to a share of the vote defined by the number of Members voting in the House chamber. This theory of vote dilution assumes that Members' voting power is dynamic; for one vote, where some are absent, a Member may enjoy 1/400th share while for another vote, where all are present, the share shrinks to 1/435th share. The Court accepts that, as a practical reality, when fewer votes are counted each vote carries more weight. But that does not mean Members' voting power should necessarily be defined dynamically.

The parties do not cite, and the Court has not found, any cases adopting Plaintiffs' theory of vote dilution. Every case discussed by the parties defines Member voting power relative to the entire congressional body. The Court has doubts whether Members should be entitled to any more than 1/435th share of the voting power in the House. *See Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125–26 (2011) ("A legislator's vote is the commitment of *his apportioned share* of the legislature's power to the passage or defeat of a particular proposal.") (emphasis added). Indeed, one could argue that choosing to abstain or to be entirely absent for a particular vote are methods of expressing that share of congressional power; it is not clear that Members should be subtracted from the denominator when they are not present. However, because the Court relies on other jurisdictional grounds to dismiss this case, it need not resolve whether Plaintiffs' formulation of the vote dilution injury gives rise to standing.

2. *Raines v. Byrd*

Raines stands for the principle that an "abstract dilution of institutional legislative power" cannot establish an injury for the purposes of Article III standing. 521 U.S. at 826. In a line of cases predating *Raines*, the D.C. Circuit repeatedly found that Members of Congress had standing to challenge actions that allegedly diminished the institutional power of Congress. *See e.g.*, *Moore v. U.S. House of Representatives*, 733 F.2d 946, 952–54 (D.C. Cir. 1984) (finding Members had standing to challenge alleged interference with House right to originate bills for raising revenue); *Kennedy v. Sampson*, 511 F.2d 430,

432–33 (D.C. Cir. 1974) (finding Senator had standing to challenge pocket veto). In many of these cases, rather than dismissing the action under the rubric of standing, the court held that the cases were nonjusticiable as a matter of remedial discretion animated by separation-of-powers concerns. *See Moore*, 733 F.2d at 956; *Vander Jagt*, 699 F.2d at 1174–75.

Having "never had occasion to rule on the question of legislative standing" raised by these cases, 521 U.S. at 820, the Supreme Court in *Raines* considered whether Members of Congress had standing to challenge the Line Item Veto Act, *id.* at 814. The Line Item Veto Act allowed the President to cancel certain spending and tax benefit measures after he had signed a bill into law. *Id.* Relying on D.C. Circuit precedent, the lower courts had found the Members had standing to bring suit because they claimed that the legislation diluted their Article I voting power—they claimed the line item veto allowed the President to circumvent Congress's right to vote on legislation prior to becoming law. *Id.* at 816–17. Emphasizing the "especially rigorous" standing inquiry required when reviewing the constitutionality of the actions of another branch of the Federal Government, *id.* at 819–20, the Court rejected the claim that an "institutional injury (the diminution of legislative power)" gives rise to standing, *id.* at 821. The Court found that the Members "ha[d] not been singled out for specially unfavorable treatment" and that their claim was not "that they ha[d] been deprived of something to which they *personally* [were] entitled." *Id.* (emphasis in original). "[T]he abstract dilution of institutional legislative power" was not sufficient to support standing under Article III. *Id.* at 826.

The parties dispute the scope of *Raines* and its application to the present case. Defendants argue that *Raines* and its progeny "establish that individual legislators cannot sue based on an alleged dilution of their voting power." Defs.' Opp'n at 24. They claim that Plaintiffs' alleged injury—dilution of voting power—is the exact injury rejected in *Raines*. *Id.* at 25. Furthermore, and central to their position, Defendants argue *Raines* overruled *Michel*, the primary case relied on by Plaintiffs to show standing. *Id.* at 28–29. Defendants note that *Raines* cited *Michel* as a case the district court below relied on to find standing before overturning that finding and "rejecting an approach that would base standing on 'the abstract dilution of institutional legislative power.'" *Id.* at 28 (quoting *Raines*, 521 U.S. at 826). Defendants claim that the holding in *Raines* squarely contradicts *Michel* and therefore *Michel* is no longer good law. *Id.* at 29.

Plaintiffs disagree. They state that "Defendants cite no D.C. Circuit decision endorsing their view, which is not surprising because the D.C. Circuit has never said—much less held—that *Raines* abrogated *Michel* or *Vander Jagt*." Pls.' Reply at 5. Plaintiffs maintain that the Court must follow *Michel* unless "Supreme Court precedent 'eviscerates' the circuit precedent, such that the two decisions are 'incompatible with' each other." *Id.* at 5–6 (quoting *Perry v. Merit Sys. Prot. Bd.*, 829 F.3d 760, 764 (D.C. Cir. 2016), *rev'd on other grounds*, 137 S. Ct. 1975 (2017)). Plaintiffs argue *Raines* and *Michel* can coexist because *Raines* only foreclosed claims of an "institutional injury" in an interbranch, as opposed to intrabranch, context. Pls.' Reply at 7–9. D.C. Circuit cases following *Raines* make clear, they say,

that the "holding is limited to situations in which Members seek to vindicate the powers of Congress *as an institution*, usually against a perceived attack on Congress's powers by the President." *Id.* at 8 (emphasis in original).

Language in *Raines* and the D.C. Circuit cases applying its holding lend support to Plaintiffs' view. First, *Raines* left undisturbed the holding in *Coleman v. Miller*, 307 U.S. 433 (1939). The *Raines* Court explained that the legislators in *Coleman* had standing to sue because the votes there "were deprived of all validity."[4] 521 U.S. at 822. While Plaintiffs have not alleged a complete deprivation of their votes, the *Raines* Court's treatment of *Coleman* carves out space for at least some cases involving legislative standing to move forward. Second, and more importantly for Plaintiffs, the *Raines* Court noted that the Members at issue in that case were "unable to show that their vote was denied or nullified in a discriminatory manner (in the sense that their vote was denied its full validity in relation to the votes of their colleagues)," so hypotheticals such as a law "in which first-term Members were not allowed to vote on appropriations bills" were inapplicable. *Id.* at 824 n.7 (internal quotations omitted). Arguably, such hypotheticals are

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[4] *Coleman v. Miller* involved state legislators challenging Kansas's adoption of the Child Labor Amendment to the Constitution where the legislative body had been evenly split on the question, which would normally defeat the resolution, but the Lieutenant Governor cast the deciding vote. 307 U.S. 433, 435–36. The Court found that the plaintiffs had standing, stating that they "ha[d] a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id.* at 438.

relevant to this case, even if proxy voting is not discriminatory in the same manner. Such hypotheticals involve internal House rules that change the voting power of Members relative to other Members. If Plaintiffs' vote dilution theory is accepted, then they have alleged that "their vote was denied its full validity in relation to the votes of their colleagues." *Id.* Moreover, *Raines* does not specifically state that *Michel* was overruled.

In *Chenoweth v. Clinton*, the D.C. Circuit considered the impact of *Raines* on the circuit's legislative standing precedent. 181 F.3d 112, 115–16 (D.C. Cir. 1999). Lending support to Plaintiffs' interbranch/intrabranch distinction, *Chenoweth* involved Members challenging a Presidential Executive Order and alleging a diminution of legislative power. *Id.* at 112–13. The court stated that the injury the plaintiffs claimed, "a dilution of their authority as legislators," was "precisely the harm we held in *Moore* and *Kennedy* to be cognizable under Article III . . . [but] also, however, identical to the injury the Court in *Raines* deprecated as 'widely dispersed' and 'abstract.'" *Id.* at 115. As such, the court found that "the portions of our legislative standing cases upon which the current plaintiffs rely are untenable in light of *Raines*." *Id.* Notably, *Chenoweth* does not mention *Michel* or *Vander Jagt* as cases repudiated by *Raines*.

In *Campbell v. Clinton*, Members challenged the President's use of U.S. military forces in Yugoslavia as violating the War Powers Clause of the Constitution and thereby diminishing their legislative power. 203 F.3d 19, 19 (D.C. Cir. 2000). Applying *Raines*, the court

found that the Members lacked standing, in large part because of the "political self-help available to congressmen." *Id.* at 24. Lending support to Plaintiffs' reading of *Raines*, the court noted an exception to *Raines* may exist where, as in *Coleman*, legislators' votes are entirely nullified. *Id.* at 23. More importantly for Plaintiffs, *Campbell* cites *Michel* as a type of claim that *Raines* did not foreclose. *Id.* at 21 n.2 ("The Court [in *Raines*] did not decide whether congressmen would have standing to challenge actions of Congress which diminished their institutional role. *Cf. Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1992) (congressmen had standing to challenge House rule which diluted their vote in Committee of the Whole)."). *Campbell's* treatment of *Michel* suggests that it survived *Raines* and remains binding precedent on this Court.

An even more recent example, *Blumenthal v. Trump*, yet again involves a dispute between Congress and the President, not a dispute between Members of Congress. 949 F.3d 14, 19 (D.C. Cir. 2020). There, Members argued that their institutional role had been diminished because the President failed to obtain congressional consent before receiving Emoluments. *Id.* Because the claim was "based entirely on the loss of political power," the court could "resolve th[e] case by simply applying *Raines*." *Id.* According to the court, "only an institution can assert an institutional injury provided the injury is not 'wholly abstract and widely dispersed.'" *Id.* at 19–20 (citing *Raines*, 521 U.S. at 829). Like *Chenoweth* and *Campbell*, *Blumenthal* involved an interbranch dispute with Members alleging an injury to Congress as a whole. As such, the facts do not mirror the present case.

The broad principles undergirding *Raines*, *Chenoweth*, *Campbell*, and *Blumenthal* could be applied to this case, but the Court is not convinced that *Michel* has been overruled. *Raines* carved out space for claims like *Coleman*, where Members' votes are stripped of all validity. 521 U.S. 823–24. *Raines* also did not rule on the viability of a claim about a House rule in which "first-term Members were not allowed to vote on appropriations bills," or other similar rules. *Id.* at 824 n.7. And *Campbell* clarified, while citing *Michel*, that *Raines* "did not decide whether congressmen would have standing to challenge actions of Congress which diminished their institutional role." 203 F.3d at 21 n.2. On the other hand, many portions of *Raines* suggest that this case falls within its logic. *See* 521 U.S. at 819–20 ("our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional"); *id.* at 821 ("appellees have not been singled out for specially unfavorable treatment"); *id.* ("appellees do not claim that they have been deprived of something to which they *personally* are entitled"); *id.* at 826 ("There is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here."). Be that as it may, as a matter of district court restraint, the Court cannot contradict circuit precedent because *Michel* was not necessarily eviscerated by *Raines*. However, because an independent jurisdictional hurdle bars this claim, the Court need not resolve *Raines's* applicability to this case.

B. Speech or Debate Clause

The Speech or Debate Clause of the Constitution (the "Clause") states that "for any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. The Clause "reflects the Founders' belief in legislative independence." *Rangel v. Boehner*, 785 F.3d 19, 23 (D.C. Cir. 2015) (citing *United States v. Brewster*, 408 U.S. 501, 524 (1972)). The Clause "provides absolute immunity from civil suit" and has been consistently read "broadly to achieve its purposes." *Id.* (internal quotations omitted) (citing *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501–03 (1975)). To this end, the Clause does not only apply to actual "Speech or Debate," but also to all "legislative acts." *Doe v. McMillan*, 412 U.S. 306, 312 (1973). "Legislative acts" are "generally done in a session of the House by one of its members in relation to the business before it," *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880), and "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," *Gravel v. United States*, 408 U.S. 606, 625 (1972). The Clause extends to aides and congressional staff carrying out legislative acts. *See Rangel*, 785 F.3d at 24–25.

Defendants argue that Plaintiffs' challenge of H. Res. 965 falls squarely within the scope of the Clause's grant of immunity. Defendants claim the proxy vote rules regulate voting and "voting by Members is a quintessential legislative act." Defs.'

Opp'n at 35. And Defendants say that Plaintiffs' pleading against "the Speaker, the Clerk, and the Sergeant-at-Arms for their *administration* of the proxy voting rules," does not change the application of the Clause because "execution of internal House rules is a 'legislative' act entitled to . . . immunity." *Id.* (emphasis in original). Defendants rely primarily on *Consumers Union* to argue that "enforcing internal rules of Congress validly enacted under authority specifically granted to the Congress" enjoys protection under the Clause. *Id.* (quoting *Consumers Union v. Periodical Correspondents' Ass'n*, 515 F.2d 1341, 1350 (D.C. Cir. 1975)).

Plaintiffs draw a distinction between actual legislative acts and "*executing* a legislative order, or carrying out [legislative] directions." Pls.' Reply at 16 (quoting *Walker v. Jones*, 733 F.2d 923, 931 (D.C. Cir. 1984) (alterations in second source). They point to *Kilbourn*, where the Supreme Court held that the Clause did not bar a false imprisonment suit against the House Sergeant-at-Arms for carrying out an arrest that the Court found was illegal. *Id.* at 15 (citing *Kilbourn*, 103 U.S. at 196). Plaintiffs say *Powell* also supports their position because the Court allowed claims against House employees—acting based on instructions from Members—to move forward. *Id.* at 16 (citing *Powell v. McCormack*, 395 U.S. 486, 504–06 (1969)). Administration of the proxy voting rules, Plaintiffs claim, falls "unquestionably on the 'execution' side of the line." *Id.* at 17. They further argue that construing H. Res. 965 as integral to the legislative process rejects the historical fact that proxy voting has never been used. *Id.* at 17–18. Finally, Plaintiffs say

that *Consumers Union*, which Plaintiffs' counsel acknowledged is Defendants' best case during oral argument, is "readily distinguishable" because the plaintiff there brought an as-applied challenge and because the rule at issue there, as opposed to proxy voting, had a long history of use in Congress. *See id.* at 19.

It is true that, in *Walker v. Jones*, the D.C. Circuit recognized the distinction explained by Plaintiffs. The court highlighted the "decidedly jaundiced view toward extending the Clause" to shield "executing a legislative order," or "carrying out [legislative] directions." *Walker*, 733 F.2d at 931–32 (quoting *Gravel*, 408 U.S. at 620–21(internal quotations omitted)). But the court also stated that "[t]he key consideration, Supreme Court decisions teach, is the act presented for examination, not the actor. Activities integral to the legislative process may not be examined." *Id.* at 929. In *Walker*, the court found that extending the Clause's protection to the hiring and firing of a food service manager would "stretch the meaning of the word ["legislative"] beyond sensible proportion." *Id.* at 931. But this case does not involve a matter so far removed from the legislative process. Applying the Clause here to the administration of rules governing how Members can vote on legislation by proxy does not stretch the meaning of the word "legislative" in a similar way or in any way at all.

Consumers Union offers further guidance on the scope of the Clause. There, the plaintiff sued the Sergeants-at-Arms of both the House and Senate challenging the constitutionality of rules governing

access to the press galleries of each chamber. 515 F.2d at 1342–46. The plaintiff had been denied the accreditation required to access the press galleries and alleged that the rules governing the galleries violated the First Amendment. *Id.* at 1342. The Sergeants-at-Arms—like the Clerk and Sergeant-at-Arms in this case—were ultimately responsible for enforcing the rules. *Id.* at 1345. The district court below had determined "that legislative immunity by virtue of the Speech or Debate Clause did not attach to the appellants who were non-members of Congress." *Id.* at 1346. But the D.C. Circuit reversed, finding that the rules at issue were "matters committed by the Constitution to the Legislative Department" and therefore the Speech or Debate Clause barred the suit. *Id.* The court found that even though the defendants "were not engaged in the consideration and passage or rejection of proposed legislation," the Clause protected them because "[t]hey were enforcing internal rules of Congress validly enacted under authority specifically granted to the Congress and within the scope of authority appropriately delegated by it." *Id.* at 1350. Controlling who had access to the press galleries constituted functions that "were an integral part of the legislative machinery." *Id.*

The Court finds that *Consumers Union* controls; Plaintiffs' efforts to distinguish the case are unconvincing.[5] If rules controlling access to the press

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[5] Plaintiffs suggested that *Consumers Union* could be distinguished because the plaintiff only brought an as-applied challenge whereas here Plaintiffs challenge the validity of the proxy voting rules "*in toto*." Pls.' Reply at 19. The Court does not find this distinction

galleries are "an integral part of the legislative machinery," rules controlling how Members vote are even more so. *Id.* The proxy voting rules constitute "regulation of the very atmosphere in which lawmaking deliberations occur." *Walker*, 733 F.2d at 930 (discussing *Consumers Union*). Plaintiffs' claim that *Consumers Union* should not apply because proxy voting has never been used before, Pls.' Reply at 19–20, does not change the fact that it has become part of "the legislative machinery" by which the House operates today, *Consumers Union*, 515 F.2d at 1350. And the House unquestionably has the authority, under the Constitution, to "determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. The Court can conceive of few other actions, besides actually debating, speaking, or voting, that could more accurately be described as "legislative" than the regulation of how votes may be cast. And Plaintiffs' suggestion during oral argument that *Consumers Union* is an outlier case does not change that it is binding precedent for this Court and has been reaffirmed in subsequent cases. *See Barker v. Conroy*, 921 F.3d 1118, 1127– 28 (D.C. Cir. 2019); *Rangel*, 785 F.3d at 24 (quoting *Consumers Union*, 515 F.2d at 1351) ("Congress's 'execution of internal rules' is

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convincing. As Defendants note, the plaintiff in *Consumers Union* did put forth a facial challenge to the rules, *see* 515 F.2d at 1345–46, and "[a]n act does not lose its legislative character simply because a plaintiff alleges that it violated . . . the Constitution." Defs.' Reply at 11 (quoting *Rangel*, 785 F.3d at 24 (citations omitted)).

'legislative'").[6] This Court is no freer to contradict *Consumers Union* because it may be an outlier than it is to contradict *Michel* because it may have been implicitly overruled by *Raines*.

IV. CONCLUSION

For the foregoing reasons, the Court finds that Defendants are immune from suit under the Speech or Debate Clause and therefore **GRANTS** Defendants' Motion to Dismiss and **DENIES** Plaintiffs' Motion for Preliminary Injunction. An order consistent with this Memorandum Opinion is separately and contemporaneously issued.

Dated: August 6, 2020

RUDOLPH CONTRERAS
United States District Judge

[6] The implications of the broad immunity conferred by the Clause, while important for ensuring an independent legislative body, may be troubling. *See Brewster*, 408 U.S. at 516 ("[T]he Clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to slander and even destroy others with impunity."). But the present case does not involve hypothetical rules, discussed at oral argument, that deprive Members of votes on a discriminatory basis. Therefore, the Court need not decide whether immunity would apply in a such a case.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 20-1395 (RC)

Re Document Nos. 8, 16

[Filed: August 6, 2020]

HON. KEVIN OWEN MCCARTHY, *et al.*,	)
	)
Plaintiffs,	)
	)
v.	)
	)
HON. NANCY PELOSI, *et al.*,	)
	)
Defendants.	)
	)

ORDER

GRANTING DEFENDANTS' MOTION TO DISMISS; DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

For the reasons stated in the Court's Memorandum Opinion separately and contemporaneously issued, Defendants' motion to dismiss (ECF No. 16) is **GRANTED**; Plaintiffs' motion for preliminary injunction (ECF No. 8) is **DENIED**.

SO ORDERED.

Dated: August 6, 2020

RUDOLPH CONTRERAS
United States District Judge

APPENDIX D

H. Res. 965

In the House of Representatives, U. S.,
May 15, 2020.

Resolved,

SECTION 1. AUTHORIZATION OF REMOTE VOTING BY PROXY DURING PUBLIC HEALTH EMERGENCY DUE TO NOVEL CORONAVIRUS.

(a) AUTHORIZATION.—Notwithstanding rule III, at any time after the Speaker or the Speaker's designee is notified by the Sergeant-at-Arms, in consultation with the Attending Physician, that a public health emergency due to a novel coronavirus is in effect, the Speaker or the Speaker's designee, in consultation with the Minority Leader or the Minority Leader's designee, may designate a period (hereafter in this resolution referred to as a "covered period") during which a Member who is designated by another Member as a proxy in accordance with section 2 may cast the vote of such other Member or record the presence of such other Member in the House.

(b) LENGTH OF COVERED PERIOD.—

(1) IN GENERAL.—Except as provided in paragraphs (2) and (3), a covered period shall terminate 45 days after the Speaker or the Speaker's designee designates such period.

(2) EXTENSION.—If, during a covered period, the Speaker or the Speaker's designee receives further notification from the Sergeant-at-Arms, in consultation with the Attending Physician, that the public health emergency due to a novel coronavirus remains in effect, the Speaker or the Speaker's designee, in consultation with the Minority Leader or the Minority Leader's designee, may extend the covered period for an additional 45 days.

(3) EARLY TERMINATION.—If, during a covered period, the Speaker or the Speaker's designee receives further notification by the Sergeant-at-Arms, in consultation with the Attending Physician, that the public health emergency due to a novel coronavirus is no longer in effect, the Speaker or the Speaker's designee shall terminate the covered period.

SEC. 2. PROCESS FOR DESIGNATION OF PROXIES.

(a) IN GENERAL.—

(1) DESIGNATION BY SIGNED LETTER.—In order for a Member to designate another Member as a proxy for purposes of section 1, the Member shall submit to the Clerk a signed letter (which may be in electronic form) specifying by name the Member who is designated for such purposes.

(2) ALTERATION OR REVOCATION OF DESIGNATION.—

(A) IN GENERAL.—At any time after submitting a letter to designate a proxy under paragraph (1), a Member may submit to the

Clerk a signed letter (which may be in electronic form) altering or revoking the designation.

(B) AUTOMATIC REVOCATION UPON CASTING OF VOTE OR RECORDING OF PRESENCE.—If during a covered period, a Member who has designated another Member as a proxy under this section casts the Member's own vote or records the Member's own presence in the House, the Member shall be considered to have revoked the designation of any proxy under this subsection with respect to such covered period.

(3) NOTIFICATION.—Upon receipt of a letter submitted by a Member pursuant to paragraphs (1) or (2), the Clerk shall notify the Speaker, the majority leader, the Minority Leader, and the other Member or Members involved of the designation, alteration, or revocation.

(4) LIMITATION.—A Member may not be designated as a proxy under this section for more than 10 Members concurrently.

(b) MAINTENANCE AND AVAILABILITY OF LIST OF DESIGNATIONS.—The Clerk shall maintain an updated list of the designations, alterations, and revocations submitted or in effect under subsection (a), and shall make such list publicly available in electronic form and available during any vote conducted pursuant to section 3.

SEC. 3. PROCESS FOR VOTING DURING COVERED PERIODS.

(a) RECORDED VOTES ORDERED.—

(1) IN GENERAL.—Notwithstanding clause 6 of rule I, during a covered period, the yeas and nays shall be considered as ordered on any vote on which a recorded vote or the yeas and nays are requested, or which is objected to under clause 6 of rule XX.

(2) INDICATIONS OF PROXY STATUS.—In the case of a vote by electronic device, a Member who casts a vote or records a presence as a designated proxy for another Member under this resolution shall do so by ballot card, indicating on the ballot card "by proxy".

(b) DETERMINATION OF QUORUM.—Any Member whose vote is cast or whose presence is recorded by a designated proxy under this resolution shall be counted for the purpose of establishing a quorum under the rules of the House.

(c) INSTRUCTIONS FROM MEMBER AUTHORIZING PROXY.—

(1) RECEIVING INSTRUCTIONS.—Prior to casting the vote or recording the presence of another Member as a designated proxy under this resolution, the Member shall obtain an exact instruction from the other Member with respect to such vote or quorum call, in accordance with the regulations referred to in section 6.

(2) ANNOUNCING INSTRUCTIONS.—Immediately prior to casting the vote or recording the presence of another Member as a designated proxy under this resolution, the Member shall seek recognition from the Chair to announce the intended vote or recorded presence pursuant to the exact instruction received from the other Member under paragraph (1).

(3) FOLLOWING INSTRUCTIONS.—A Member casting the vote or recording the presence of another Member as a designated proxy under this resolution shall cast such vote or record such presence pursuant to the exact instruction received from the other Member under paragraph (1).

SEC. 4. AUTHORIZING REMOTE PROCEEDINGS IN COMMITTEES.

(a) AUTHORIZATION.—During any covered period, and notwithstanding any rule of the House or its committees—

(1) any committee may conduct proceedings remotely in accordance with this section, and any such proceedings conducted remotely shall be considered as official proceedings for all purposes in the House;

(2) committee members may participate remotely during in-person committee proceedings, and committees shall, to the greatest extent practicable, ensure the ability of members to participate remotely;

(3) committee members may cast a vote or record their presence while participating remotely;

(4) committee members participating remotely pursuant to this section shall be counted for the purpose of establishing a quorum under the rules of the House and the committee;

(5) witnesses at committee proceedings may appear remotely;

(6) committee proceedings conducted remotely are deemed to satisfy the requirement of a "place" for purposes of clauses 2(g)(3) and 2(m)(1) of rule XI; and

(7) reports of committees (including those filed as privileged) may be delivered to the Clerk in electronic form, and written and signed views under clause 2(l) of rule XI may be filed in electronic form with the clerk of the committee.

(b) LIMITATION ON BUSINESS MEETINGS.—A committee shall not conduct a meeting remotely or permit remote participation at a meeting under this section until a member of the committee submits for printing in the Congressional Record a letter from a majority of the members of the committee notifying the Speaker that the requirements for conducting a meeting in the regulations referred to in subsection (h) have been met and that the committee is prepared to conduct a remote meeting and permit remote participation.

(c) REMOTE PROCEEDINGS.—Notwithstanding any rule of the House or its committees, during proceedings conducted remotely pursuant to this section—

(1) remote participation shall not be considered absence for purposes of clause 5(c) of rule X or clause 2(d) of rule XI;

(2) the chair may declare a recess subject to the call of the chair at any time to address technical difficulties with respect to such proceedings;

(3) copies of motions, amendments, measures, or other documents submitted to the committee in electronic form as prescribed by the regulations referred to in subsection (h) shall satisfy any requirement for the submission of printed or written documents under the rules of the House or its committees;

(4) the requirement that results of recorded votes be made available by the committee in its offices pursuant to clause 2(e)(1)(B)(i) of rule XI shall not apply;

(5) a committee may manage the consideration of amendments pursuant to the regulations referred to in subsection (h);

(6) counsel shall be permitted to accompany witnesses at a remote proceeding in accordance with the regulations referred to in subsection (h); and

(7) an oath may be administered to a witness remotely for purposes of clause 2(m)(2) of rule XI.

(d) REMOTE PARTICIPANTS DURING IN-PERSON PROCEEDINGS.—All relevant provisions of this section and the regulations referred to in subsection (h) shall

apply to committee members participating remotely during in-person committee proceedings held during any covered period.

(e) TRANSPARENCY FOR MEETINGS AND HEARINGS.—Any committee meeting or hearing that is conducted remotely in accordance with the regulations referred to in subsection (h)—

(1) shall be considered open to the public;

(2) shall be deemed to have satisfied the requirement for non-participatory attendance under clause 2(g)(2)(C) of rule XI; and

(3) shall be deemed to satisfy all requirements for broadcasting and audio and visual coverage under rule V, clause 4 of rule XI, and accompanying committee rules.

(f) SUBPOENAS.—

(1) AUTHORITY.—Any committee or chair thereof empowered to authorize and issue subpoenas may authorize and issue subpoenas for return at a hearing or deposition to be conducted remotely under this section.

(2) USE OF ELECTRONIC SIGNATURE AND SEAL.—During any covered period, authorized and issued subpoenas may be signed in electronic form; and the Clerk may attest and affix the seal of the House to such subpoenas in electronic form.

(g) EXECUTIVE SESSIONS.—

(1) PROHIBITION.—A committee may not conduct closed or executive session proceedings remotely, and members may not participate remotely in closed or executive session proceedings.

(2) MOTION TO CLOSE PROCEEDINGS.—Upon adoption of a motion to close proceedings or to move into executive session with respect to a proceeding conducted remotely under this section, the chair shall declare the committee in recess subject to the call of the chair with respect to such matter until it can reconvene in person.

(3) EXCEPTION.—Paragraphs (1) and (2) do not apply to proceedings of the Committee on Ethics.

(h) REGULATIONS.—This section shall be carried out in accordance with regulations submitted for printing in the Congressional Record by the chair of the Committee on Rules.

(i) APPLICATION TO SUBCOMMITTEES AND SELECT COMMITTEES.—For purposes of this section, the term "committee" or "committees" also includes a subcommittee and a select committee.

SEC. 5. STUDY AND CERTIFICATION OF FEASIBILITY OF REMOTE VOTING IN HOUSE.

(a) STUDY AND CERTIFICATION.—The chair of the Committee on House Administration, in consultation with the ranking minority member, shall study the feasibility of using technology to conduct remote voting in the House, and shall provide certification to the

House upon a determination that operable and secure technology exists to conduct remote voting in the House.

(b) REGULATIONS.—

(1) INITIAL REGULATIONS.—On any legislative day that follows the date on which the chair of the Committee on House Administration provides the certification described in subsection (a), the chair of the Committee on Rules, in consultation with the ranking minority member, shall submit regulations for printing in the Congressional Record that provide for the implementation of remote voting in the House.

(2) SUPPLEMENTAL REGULATIONS.—At any time after submitting the initial regulations under paragraph (1), the chair of the Committee on Rules, in consultation with the ranking minority member, may submit regulations to supplement the initial regulations submitted under such paragraph for printing in the Congressional Record.

(c) IMPLEMENTATION.—Notwithstanding any rule of the House, upon notification of the House by the Speaker after the submission of regulations by the chair of the Committee on Rules under subsection (b)—

(1) Members may cast their votes or record their presence in the House remotely during a covered period;

(2) any Member whose vote is cast or whose presence is recorded remotely under this section

shall be counted for the purpose of establishing a quorum under the rules of the House; and

(3) the casting of votes and the recording of presence remotely under this section shall be subject to the applicable regulations submitted by the chair of the Committee on Rules under subsection (b).

SEC. 6. REGULATIONS.

To the greatest extent practicable, sections 1, 2, and 3 of this resolution shall be carried out in accordance with regulations submitted for printing in the Congressional Record by the chair of the Committee on Rules.

Attest:

Clerk.