

No. 21-395

In the
Supreme Court of the United States

KEVIN OWEN MCCARTHY, ET AL.,
Petitioners,

v.

NANCY PELOSI, IN HER OFFICIAL CAPACITY AS SPEAKER
OF THE HOUSE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the District of Co-
lumbia Circuit

**BRIEF OF *AMICUS CURIAE* CENTER FOR
CONSTITUTIONAL JURISPRUDENCE
IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii
INTEREST OF AMICUS CURIAE.....1
SUMMARY OF ARGUMENT.....1
REASONS FOR GRANTING THE WRIT.....2
 I. The Judicial Branch Has an Obligation to
 Exercise its Power to Review Violations of the
 Constitution in Cases or Controversies.2
 II. Article I of the Constitution Only Permits
 Congress to Exercise its Power through In-
 Person Sessions. 5
CONCLUSION.....10

TABLE OF AUTHORITIES

Cases

<i>Bond v. United States</i> , 564 U.S. 211 (2011).....	2
<i>Bowsher v. Synar</i> , 478 U.S. 714 (1986).....	3
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1975).....	4
<i>Chicot Cty. v. Sherwood</i> , 148 U.S. 529 (1893).....	4
<i>Clinton v. New York</i> , 524 U.S. 417 (1998).....	3
<i>Coffin v. Coffin</i> , 4 Mass. 1 (1808)	9
<i>Cohens v. State of Virginia</i> , 19 U.S. 264 (1821).....	4
<i>Colorado River Water Conservation Dist. v. United States</i> , 424 U.S. 800 (1976).....	4
<i>Dep't of Transp. v. Ass'n of Am. Railroads</i> , 575 U.S. 43 (2015).....	3
<i>Kilbourn v. Thompson</i> , 103 U.S. 168 (1880).....	5
<i>N.L.R.B. v. Noel Canning</i> , 573 U.S. 513 (2014).....	2, 4
<i>Perez v. Mortgage Bankers Ass'n</i> , 575 U.S. 92 (2015).....	2, 4

<i>Seila Law LLC v. Consumer Financial Protection Bureau</i> , 140 S.Ct. 2183 (2020).....	4
<i>United States v. Balin</i> , 144 U.S. 1 (1892).....	8
<i>United States v. Brewster</i> , 408 U.S. 501 (1972).....	9
<i>United States v. Johnson</i> , 383 U.S. 169 (1966).....	10
<i>Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.</i> , 454 U.S. 464 (1982).....	4
Other Authorities	
Adams, John, <i>Novanglus No. IV</i>	9
Blackstone, William, COMMENTARIES ON THE LAWS OF ENGLAND.....	9
Corpus of Founding Era American English	7
Franklin, Benjamin, Proposed Articles of Confederation, (1775)	6
Hamburger, Philip, <i>Chevron Bias</i> , 84 Geo. Wash. L.Rev. 1187 (2016)	3
Josiah Quincy’s Argument for the Defense, December 3, 1770.....	7
Letter to George Washington from Brigadier General William Maxwell, December 29, 1776	7
Madison, James, <i>Federalist No. 51</i> , THE FEDERALIST PAPERS, Gideon Edition (Liberty Fund 2001).....	2, 3
Records of the Federal Convention of 1787 (Farrand’s Records)	6

Story, Joseph, COMMENTARIES ON THE CONSTITUTION (1833)	3, 7, 8, 9
The Constitutions of the Sixteen States which Compose the Confederated Republic of America, According to the Latest Amendments (Manning & Loring, 1797)	7
Statutes	
Articles of Confederation, 1 Stat. 4 (1778)	6
Declaration of Independence, 1 Stat. 1 (1776)	5
Rules	
Rule 37.6	1

INTEREST OF AMICUS CURIAE¹

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the foundational proposition that the judiciary is obligated to enforce the structural provisions of the Constitution because those provisions are the primary means of protecting liberty.

SUMMARY OF ARGUMENT

The structure of the Constitution, more than any provision of the Bill of Rights, is the primary protection of individual liberty and against tyranny. Yet that structural protection fails if the judiciary declines to enforce the provisions of the Constitution against the other branches of government. That is especially true in this case.

The Constitution requires Senators and Representatives to meet in person in order to conduct the people's business. The Framers considered and rejected the idea of proxy voting. Instead, the Assembly Clause and the Quorum Clause require physical presence of Representatives and Senators at sessions of Congress. That requirement of physical presence is supported by the Privilege from Arrest and Speech or Debate Clauses. This Court should grant review to

¹ All parties were notified of and have consented to the filing of this brief. Respondents waived objections to late notice. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

uphold the duty of the judiciary to enforce the structural provisions of the Constitution requiring that Congress conduct its business in person.

REASONS FOR GRANTING THE WRIT

I. **The Judicial Branch Has an Obligation to Exercise its Power to Review Violations of the Constitution in Cases or Controversies.**

Our Constitution has a peculiar design. There are three distinct branches exercising distinct powers – but those powers are separated in curious ways. This is in recognition of the tendency for one branch of government or another to seek to concentrate power, even if only by gradual encroachment. James Madison, *Federalist No. 51*, THE FEDERALIST PAPERS, Gideon Edition (Liberty Fund 2001) at 268-69. Thus, the structure relies on each branch jealously guarding its own power and not allowing other branches to usurp any of its authority. *Id.* In this way, the Framers thought to create a government that would control itself. *Id.* The ultimate object of all of these opposed powers was to protect individual liberty. *Bond v. United States*, 564 U.S. 211, 222-23 (2011). The Constitution does not protect the interests of the separate branches as an end in itself. The entire purpose is to protect liberty. *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 118 (2015) (Thomas, J. concurring in the judgment); *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 571 (2014) (Scalia, J. concurring in the judgment). Concentration of power has always been understood to result in the loss of liberty. James Madison, *Federalist*

51, *supra* at 269; *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 73 (2015) (Thomas, J., concurring in the judgment); *Clinton v. New York*, 524 U.S. 417, 450 (1998); *Bowsher v. Synar*, 478 U.S. 714, 722 (1986).

This system requires each branch to assert its own constitutional power. The political branches can usually be counted on to protect their power. The members of those branches must stand before the voters periodically and demonstrate how they used the authority assigned to them by the Constitution. That motivation does not apply to the courts, however. Yet “due execution” of the judicial power is “fundamental to a free government.” Joseph Story, COMMENTARIES ON THE CONSTITUTION, § 1570 (1833), reprinted in THE FOUNDER’S CONSTITUTION, vol. 4 at p. 201. The judiciary is the defense against the political branches upsetting the delicate balance of power in the structure of the Constitution. If the Constitution is to be the supreme law of the land, the judicial branch must be willing to rule that laws or government actions that violate the Constitution are themselves void. *Id.* But if the judiciary refuses to exercise its power the result will be that the political branches will usurp power and there will be no remedy “within the reach of the citizens.” *Id.*

This is why judges “cannot delegate their judgment.” Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L.Rev. 1187, 1199 n. 35 (2016). When one of the political branches is alleged to have acted outside of its constitutional power the courts must decide the case (so long as there is a case or controversy). The courts cannot shrink from a confrontation with a co-equal branch of government. See *Valley Forge Christian College v. Americans United for Separation of*

Church and State, Inc., 454 U.S. 464, 474 (1982); *Perez*, 575 U.S. at 112-13 (Thomas, J. concurring) (noting that the judiciary has an obligation “to provide a check on the other branches”). If a case is within the jurisdiction of the court, the court *must* exercise its jurisdiction. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *Chicot Cty. v. Sherwood*, 148 U.S. 529, 534 (1893); *Cohens v. State of Virginia*, 19 U.S. 264, 404 (1821).

The courts have accepted their role to enforce the limits of the Constitution against the political branches. Just last year, the Supreme Court struck down a provision of law that sought to insulate an officer of the United States from the President’s power of removal. *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S.Ct. 2183, 2191-92 (2020). Similarly, the Court has ruled that the President has no power to declare that Congress is in recess. *Noel Canning*, 573 U.S. at 550-51. And the Court rejected attempts by Congress to assign its members the power to make appointments of inferior officers. *Buckley v. Valeo*, 424 U.S. 1, 126-29 (1975). In the course of that decision, this Court emphasized that Congress had no power to require the courts to take up matters outside of their constitutional jurisdiction. *Id.* at 11.

In this case, petitioners challenge the proxy voting rule in the House of Representatives as contrary to the Constitution. As demonstrated below, the Constitution contemplates only in-person voting. Several provisions of Article I of the Constitution only make sense in light of such a requirement. Yet the court below ruled that the Speech or Debate Clause of Article I, §6 forbids the judiciary from enforcing these provisions of the Constitution. This case does not challenge the content of legislative debates. Instead, it

seeks to preserve the forum for those debates. The Speech or Debate Clause is, in fact, one of the provisions of the Constitution that help prove that proxy voting in the House (or the Senate, for that matter), is not a constitutionally permissible procedure. This Court should reverse the ruling of the court below and issue a decision on the merits of the complaint.

II. Article I of the Constitution Only Permits Congress to Exercise its Power through In-Person Sessions.

Although the House of Representatives is free to make its own rules, “the legality of its action” is subject to judicial review. *See Kilbourn v. Thompson*, 103 U.S. 168, 199 (1880). The text of the Constitution clearly contemplates that Congress will only meet in person to accomplish the business of the people. This Court has the power to enforce the constitutional limits on the House of Representatives and to rule that proxy voting is unconstitutional.

At the time of the Founding, the practice was for legislative bodies to meet in person. The Declaration of Independence complained that the British Crown took advantage of this practice to harass the colonists: “He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures.” Declaration of Independence, 1 Stat. 1 (1776). This campaign of harassment would not have worked if legislative delegates could appear and vote through proxies.

The Founders were, of course, aware of the concept of “proxy” voting. Benjamin Franklin’s proposed

Articles of Confederation included a provision for proxy voting when a delegate was “necessarily absent.” Benjamin Franklin, Proposed Articles of Confederation, Art. VIII (1775), reprinted in *THE PAPERS OF BENJAMIN FRANKLIN*, vol. 22 (Yale University Press, 1982) at 120-25. Franklin’s proposal was not adopted, however, and delegates were instead required to meet in person. Articles of Confederation, 1 Stat. 4, art. 5, §§1, 3 (1778).

There were also various proposals to include an explicit provision allowing proxy voting in the House and the Senate. Records of the Federal Convention of 1787 (Farrand’s Records), vol. 3, p. 620, 622. None of those proposals were adopted. Instead, the Assembly Clause of Article I commands Senators and Congressional Representatives to meet in person. The Quorum Clause also requires personal attendance of a specific number of representatives before the House or the Senate may conduct business. Clauses providing for privilege from arrest and immunity for the content of speeches while in session provide the necessary protection for the required in-person sessions. The Constitution does not permit Congress to transact its business by proxy.

Article I, § 5 requires Congress to “assemble” at least once per year. The word “assemble” is also used in the First Amendment.² In both places it can only mean a physical presence. At the time of the Founding, the word “assemble” was consistently used to denote a physical gathering. *E.g.*, The Constitutions of the Sixteen States which Compose the Confederated

² “Congress shall make no law respecting ... the right of the people peaceably to assemble.”

Republic of America, According to the Latest Amendments (Manning & Loring, 1797); Letter to George Washington from Brigadier General William Maxwell, December 29, 1776, reprinted in *THE PAPERS OF GEORGE WASHINGTON, REVOLUTIONARY WAR SERIES*, vol. 7, pp 480-82; Josiah Quincy's Argument for the Defense, December 3, 1770, reprinted in *THE ADAMS PAPERS*, vol. 3, pp 226-41. A search of the Corpus of Founding Era American English (<https://lawcorpus.byu.edu/cofea>) reveals that in 500 instances (the maximum search result) of the use of the word "assemble," each instance shows "assemble" as meaning a physical gathering. The plain meaning of Article I, § 5 requires Congress to meet in person.

The Assembly Clause only requires one meeting per year. Additional meetings are left to the discretion of each House of Congress according to its own rules. The purpose of this discretion was to recognize that many members lived a significant distance from the place where Congress would meet. "[I]t was obvious, that from the nature of their duties, and the distance of their abodes, the members of congress ought not to be brought together at shorter periods, unless upon the most pressing exigencies." Joseph Story, *COMMENTARIES*, § 827. The built-in discretion for setting subsequent meetings was based on the need for physical presence of the members in order to conduct business. The Constitution does not permit appearance by proxy.

Likewise, the Quorum Clause also commands the physical presence of Senators and Representatives. Section 5 of Article I requires the presence of a majority of the members of each House in order to conduct business. Physical presence is required, but each House can determine how to record that presence.

United States v. Balin, 144 U.S. 1, 5-6 (1892). A proxy, however, is not a physical presence. Again, there is a very practical purpose to the requirement rooted in structural rules of the Constitution protecting liberty. The requirement of the physical presence of a majority fosters deliberation and protects against laws contrary to the “deliberate opinion of a majority of the representative body.” Joseph Story, COMMENTARIES, § 832.

Members cannot deliberate by proxy. The legislative branch is structured so that the opinions of citizens from all parts of the nation can be heard and deliberated. Each Member of the House represents the citizens of his district but is sworn to act for the good of the entire nation. Only by meeting in person to exchange views, to debate, and to listen can the Members fulfill the obligations they have under the Constitution. The Quorum Clause ensures at least a majority of the representatives are physically present to deliberate on the people’s business. A proxy cannot substitute for the physical presence required by the Quorum Clause.

Two Clauses of Article I, Privilege from Arrest and the Speech or Debate Clauses, create the conditions necessary for physical meetings. Without the requirement for physical presence, they have no purpose.

Article I, § 6 grants to Representatives and Senators a privilege from arrest (excepting certain crimes) while they are travelling to and from a session of Congress or during their attendance at a session. This privilege is in aid of the physical presence required by the Assembly and Quorum Clauses. The privilege exists because the Member has “superior du-

ties to perform in another place.” Joseph Story, COMMENTARIES, § 857. Significantly, Justice Story went on to note that when a Member is unable to attend because of a summons, “the people, whom he represents, lose their voice in debate and vote, *as they do in his voluntary absence.*” *Id.* (emphasis added).

If the majority of the House had the power to dispense with the requirement of physical presence, there would be no reason for this provision. It would create in Members of Congress a special privilege wholly unrelated to their obligations as representatives of the people. Their election would become a privilege of class akin a Title of Nobility – something that the original colonists had fled to the wilderness to avoid. John Adams, *Novanglus No. IV*, reprinted in THE REVOLUTIONARY WRITINGS OF JOHN ADAMS (Liberty Fund 2000) at 184. The privilege against arrest is not a benefit for legislators. It is instead “to support the rights of the people, by enabling their representatives to execute the functions of their office.” *Coffin v. Coffin*, 4 Mass. 1, 27 (1808); see Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, 1:159-61, reprinted in THE FOUNDER’S CONSTITUTION, vol. 2, p. 321.

The Speech or Debate Clause serves the same purpose. That clause immunizes Representatives and Senators from arrest or prosecution based on the content of their statements while participating in a Session of Congress. As this Court noted, the immunity granted by this Clause is not for the personal benefit of the Member of Congress. It is only to “protect the integrity of the legislative process.” *United States v. Brewster*, 408 U.S. 501, 507 (1972). Any prosecution that is based on what a Member of Congress says during a session of Congress is barred by the Speech or Debate Clause. *United States v. Johnson*, 383 U.S.

169, 184-85 (1966). The purpose of this Clause is to allow free debate and deliberation of the people's business. That debate can only occur, however, between Members who are physically present at the session.

CONCLUSION

The Founders understood that one cannot debate a slip of paper, nor does the bare provision of a proxy contribute to deliberation. It does the opposite. The proxy robs Congress, and the people represented, of the required deliberation of the people's business. It converts the House from a representative deliberative body into a mere office for the collection of mail-in ballots. That is why the Framers did not permit Congress to transact its business via proxy. The Framers considered such permission and rejected it. This Court should grant review to exercise its constitutionally-assigned power of review and to hold that the House of Representatives is bound by the structural provisions of the Constitution.

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Respectfully submitted,

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