ORAL ARGUMENT NOT YET SCHEDULED
No. 20-5240

In The United States Court Of Appeals For The District Of Columbia Circuit

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

Plaintiffs-Appellants,

v.

HON. NANCY PELOSI, *et al.*,

Defendants-Appellees.

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OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
No. 1:20-cv-01395-RC

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties

Plaintiffs-Appellants are Hon. Kevin Owen McCarthy, Hon. Charles Eugene Roy, Hon. Stephen Joseph Scalise, Hon. Elizabeth Lynne Cheney, Hon. James Daniel Jordan, Hon. James Michael Johnson, Hon. Thomas Jeffrey Cole, Hon. Rodney Lee Davis, Hon. Andrew Steven Biggs, Hon. Russell Mark Fulcher, Hon. Warren Earl Davidson, Hon. Michael Jonathan Cloud, Hon. Mark Edward Green, Hon. Jody Brownlow Hice, Hon. Debra Kay Lesko, Hon. Andrew Peter Harris, Hon. Jeffrey Darren Duncan, Hon. Ronald Jack Wright, Hon. Scott Gordon Perry, Hon. Bradley Roberts Byrne, Hon. Glen Clay Higgins, Hon. Michael Clifton Burgess, Hon. Theodore Scott Yoho, Hon. Howard Griffith, Hon. Lance Carter Gooden, Hon. Gregory Francis Murphy, Hon. Norvell Granger, Hon. Glenn William Thompson Jr., Hon. Earl Leroy Carter, Hon. Douglas Lee LaMalfa, Hon. Lee Michael Zeldin, Hon. George Edward Bell Holding, Hon. Michael Ray Turner, Hon. Robert Joseph Wittman, Hon. Kenneth Michael Conaway, Hon. Frederick B. Keller, Hon. David S. Schweikert, Hon. William Gregory Steube, Hon. Gregory Joseph Pence, Hon. Guy Lorin Reschenthaler, Hon. Michael Dennis Rogers, Hon. Gary James Palmer, Hon. Barry Dean Loudermilk, Hon. William Leslie Johnson, Hon. Thomas Miller

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Gregory Paul Walden, Hon. Robert William Bishop, Hon. John Warren Bergman, Hon. William Hose Flores Sr., Hon. Steven Charles Watkins Jr., Hon. Scott Randall Tipton, Hon. George Joseph Kelly, Hon. David Phillip Roe, Hon. Jason Thomas Smith, Hon. Paul Mitchell III, Hon. Jenniffer Aydin Gonzalez-Colon, Hon. Eric Alan Crawford, Hon. Benjamin Lee Cline, Hon. Ralph Lee Abraham Jr., Hon. Brian Philip Babin, Hon. Kelly Michael Armstrong, Hon. Jacqueline R. Walorski, Hon. Steven McCarty Palazzo, Hon. Paul Anthony Gosar, Hon. William Ballard Hurd, Hon. Steven Arnold King, Hon. Virginia Ann Foxx, Hon. William Joseph Posey, Hon. Samuel Bruce Graves Jr., Hon. William Robert Woodall III, Hon. Bruce Eugene Westerman, Hon. Thomas P. Tiffany, Hon. Nicholas Van Campen Taylor, Hon. Bryan George Steil, Hon. Peter Allen Stauber, Hon. Frank James Sensenbrenner Jr., Hon. John Henry Rutherford, Hon. John Williams Rose, Hon. Martha Kehres Roby, Hon. Peter Graham Olson, Hon. Daniel Milton Newhouse, Hon. Daniel P. Meuser, Hon. Roger Wayne Marshall, Hon. David Frank Kustoff, Hon. John Patrick Joyce, Hon. Richard Lane Hudson, Hon. Joseph Albert Hollingsworth III, Hon. Vicky Jo Hartzler, Hon. James Lee Hagedorn, Hon. Steven Brett Guthrie, Hon. Glenn S. Grothman, Hon. Garret Neal Graves, Hon. Michael John Gallagher, Hon. Thomas Earl Emmer Jr., Hon. Scott Eugene DesJarlais, Hon. Daniel Reed Crenshaw, Hon. John Rice Carter, Hon. Larry Dean Bucshon, Hon. Susan Lynn Wiant Brooks, Hon. Gus Michael Bilirakis, Hon. Donald John Bacon,

Hon. Jodey Cook Arrington, Lorine Spratt, Mickie J. Niland, Isabel Albarado Rubio, James Shipley Swayze, and Clayton D. Campbell.

Defendants-Appellees are Hon. Nancy Pelosi, Cheryl L. Johnson, and Paul D. Irving.

B. Rulings Under Review

The rulings under review are the Order, Doc. 30 (Aug. 6, 2020), and Memorandum Opinion, Doc. 31 (Aug. 6, 2020), in *McCarthy v. Pelosi*, No. 20-1395, — F. Supp. 3d —, 2020 WL 4530611 (D.D.C. 2020) (Rudolph Contreras, J.), granting Defendants-Appellees' motion to dismiss, Doc. 16 (June 19, 2020), and denying Plaintiffs-Appellants' motion for a preliminary or permanent injunction, Doc. 8 (May 29, 2020). *See* JA 114 (Order); JA 115–32 (Memorandum Opinion).

C. Related Cases

This case has not previously been before this Court or any other. Counsel for Plaintiffs-Appellants are unaware of any other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

Dated: August 31, 2020

s/Charles J. Cooper
Charles J. Cooper
Counsel for Plaintiffs-Appellants

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JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. The court granted Defendants' motion to dismiss on August 6, 2020, and appellants filed their notice of appeal on August 7, 2020. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the Speech or Debate Clause insulates from constitutional challenge the enforcement of any congressional resolution relating to voting in the United States House of Representatives.
2. Whether House Members and/or their constituents have Article III standing to challenge the enforcement of a House Resolution that dilutes their votes through an unconstitutional proxy-voting system.
3. Whether proxy voting in the House of Representatives violates the Constitution.

INTRODUCTION

In 1787, when the People of the United States were "called upon to deliberate on a new Constitution for the United States of America," THE FEDERALIST NO. 1, at 33 (Alexander Hamilton) (Garry Wills ed., 1982), many questioned whether the new government the Constitution proposed to create could successfully govern a country encompassing so large an expanse of territory. In James Madison's view, that

objection misunderstood the critical distinction between a democracy and a republic. "[I]n a democracy, *the people meet* and exercise the government *in person*; in a republic, they *assemble* and administer it *by their representatives and agents*." THE FEDERALIST NO. 14, *supra*, at 100 (emphases added). And "the natural limit of a republic is that distance from the centre which will barely allow the *representatives to meet* as often as may be necessary for the administration of public affairs." *Id.* at 101 (emphases added). 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." *Id.* at 101. There was, therefore, no reason to fear that the Congress established by the new Constitution would fail to assemble in person to govern the United States.

Madison's confidence proved to be well-founded, until May 15, 2020. For over 231 years, the Members of Congress have assembled in person, as a deliberative body, to conduct the People's business. Through a war that reduced the Capitol Building to a smoldering ruin and an epidemic that wiped out almost ten percent of the population of the Nation's capital, neither House of Congress had *ever* authorized its Members to cast a vote on the floor unless they were *actually present* in their respective Houses. But on May 15, a partisan majority of the United States

House of Representatives voted to adopt House Resolution 965 ("H. Res. 965"), thereby authorizing Members to vote from the floor of the House by proxy. There is a reason that Congress has never before done what H. Res. 965 purports to do: it is patently unconstitutional. The text of the Constitution; the uninterrupted tradition of constitutional practice by Congress; and the decisions of the United States Supreme Court unambiguously demonstrate that Members of Congress *must be present in person* in their respective chambers if they wish to be counted as part of a quorum necessary to do business and cast a recorded vote.

But rather than halt this ongoing constitutional violation, the district court below instead dismissed Appellants' complaint for lack of subject-matter jurisdiction. It held that the administrative acts necessary to implement proxy voting under H. Res. 965 are "legislative acts" immunized from judicial challenge by the Speech or Debate Clause. The district court's reasoning shields from review not only the enforcement of H. Res. 965, but also any House rule with any relation to congressional voting, no matter how palpably unconstitutional. To take an admittedly extreme example, under the district court's ruling, the House could pass a rule flatly prohibiting women Members from voting on the House floor, and women Members would not be able to sue the Clerk of the House who refuses to count their votes.

The Constitution does not countenance—let alone demand—such a startling and unacceptable result, one that the district court acknowledged but refused to address. The district court should have followed the well-established distinction between acts like H. Res. 965 itself that are "legislative" in nature, and are thus immune from judicial review, and those acts that merely execute a legislative measure already adopted, which are not immune. Following that approach, the district court should have recognized that the Defendants' actions dictated by H. Res. 965 are executory, not legislative, and therefore unprotected by the Speech or Debate Clause. Its contrary holding runs directly against Supreme Court and D.C. Circuit precedent and should be reversed.

Once the Court concludes that the federal courts have subject-matter jurisdiction over this dispute, it should proceed to resolve the merits and, following the plain meaning of the Constitution, hold H. Res. 965 unconstitutional. This case does not turn on any disputed facts or the need to develop an evidentiary record, and so the Court should put a clear end to proxy voting and permanently enjoin enforcement of H. Res. 965.

STATEMENT

I. Factual Background

On January 9, 2019, the United States House of Representatives voted to adopt the Rules of the One Hundred Sixteenth Congress. *See* H. Res. 6, 116th Cong. (2019) (enacted). Rule III(2) of the House Rules states:

> (a) A Member may not authorize any other person to cast the vote of such Member or record the presence of such Member in the House or the Committee of the Whole House on the state of the Union.
>
> (b) No other person may cast a Member's vote or record a Member's presence in the House or the Committee of the Whole House on the state of the Union.

House Rule III(2) was not a historical aberration: "House rules have *never* authorized proxy voting on the floor" of the House. CHRISTOPHER M. DAVIS, CONG. RES. SERV., IN11372, THE PRIOR PRACTICE OF PROXY VOTING IN HOUSE COMMITTEE 1 (May 1, 2020) (emphasis added), https://bit.ly/2TNRSoU.

In March 2020, the Speaker of the House of Representatives, Defendant Nancy Pelosi, requested a report from Representative James McGovern, the Chairman of the Committee on Rules, "concerning Member voting during the COVID-19 pandemic." Hon. James P. McGovern, *Dear Colleague: Report Examining Voting Options During the COVID-19 Pandemic*, HOUSE OF REPRESENTATIVES COMM. ON RULES (Mar. 23, 2020), https://bit.ly/2Z7NnJu. The subsequent report observed that "[d]uring the 1918 Influenza Pandemic, the House

did not adopt a method of remote voting—e.g. by telegraph or correspondence." HOUSE COMM. ON RULES, MAJORITY STAFF REP. EXAMINING VOTING OPTIONS DURING THE COVID-19 PANDEMIC 2 (Mar. 23, 2020), https://bit.ly/2Z57GY2. The report also catalogued various options for continuing the business of the House notwithstanding the ongoing pandemic and opined that "[b]y far the best option is to use the existing House rules and current practices," such as unanimous consent agreements and longer voting periods. *Id.*

The report then considered options that would involve changing the House Rules, including proxy voting, whereby "an absent Member gives a present Member their proxy to cast an actual vote for them, for a prescribed period of time." *Id.* at 5. Noting that "proxy voting on the Floor would be unprecedented," *id*. at 5 n.4, the report continued that proxy voting "could raise some of the same constitutional questions as remote voting—namely, whether a Member must be physically present in the chamber to vote," *id.* at 5.

On May 13, Chairman McGovern introduced H. Res. 965. Section 1(a) authorizes proxy voting on the floor of the House:

> 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.

Section 1(b)(1) states that, "[e]xcept 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." Section 1(b)(2) gives the Speaker or her designee the option to extend the proxy-voting period if she "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."

Under Section 2(a)(1) of H. Res. 965, "to designate another Member as a proxy for purposes of section 1, [a] 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." Section 2(a)(4) limits the number of Members who may be represented by a single proxy to 10 Members. And Section 3(b) instructs that "[a]ny 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."

On May 15, 2020, the House passed H. Res. 965 by a highly partisan vote of 217 to 189. Shortly thereafter, the Sergeant-at-Arms of the House, Defendant Paul D. Irving, notified Speaker Pelosi "that a public health emergency due to a novel coronavirus is in effect," H. Res. 965 § 1(a), and on May 20, the Speaker authorized proxy voting on the floor of the House for a period of 45 days, *see* Press Release,

SPEAKER OF THE HOUSE (May 20, 2020), https://bit.ly/2ZuEmdQ. Defendant Pelosi later extended the proxy voting until August 18, 2020, *see* Press Release, SPEAKER OF THE HOUSE (June 29, 2020), https://bit.ly/2QxeA2N, and extended it again until October 2, 2020, *see* Melania Zanona, *Dems Get a New Rallying Cry*, POLITICO: HUDDLE (Aug. 18, 2020), https://politi.co/34uO8Px.

As of today, 125 Members have submitted letters to the Clerk purporting to delegate their votes to other Members as proxies. *See Proxy Letters (116th Congress, 2nd Session)*, CLERK, U.S. HOUSE OF REPRESENTATIVES, https://bit.ly/3ei2vZ1 (last visited Aug. 31, 2020). And proxy votes have been cast on numerous measures and have been decisive to the outcome of a number of votes. To name just one, on May 27, H. Res. 981 (to amend the Foreign Intelligence Surveillance Act of 1978), purportedly passed the House 228–189. *See Roll Call 112*, https://bit.ly/2GfZJrL. However, 70 of the votes in favor of the measure were cast by proxy; absent the unconstitutional proxies, the amendment failed 159-189. Other examples abound. *See, e.g.*, *Roll Call 179* (Aug. 22, 2020), https://bit.ly/3hJNBNg; *Roll Call 180* (Aug. 22, 2020), https://bit.ly/2DgEqFe; *Roll Call 181* (Aug. 22, 2020), https://bit.ly/2YPcFej.

II. Prior Proceedings

On May 29, 2020, Appellants—160 Members of Congress who had vowed to refuse to vote by proxy or to serve as a proxy for any other Member of the House ("Representative Appellants") and five private citizens who are constituents ("Constituent Appellants")—filed an Amended Complaint to enjoin the administrative implementation of proxy voting in the House, seeking declaratory and injunctive relief against Speaker Pelosi; Cheryl L. Johnson, the Clerk of the House; and Sergeant-at-Arms Irving. On the same day, Appellants moved to preliminarily and permanently enjoin acts by these Defendants performed to implement proxy voting.

Defendants opposed Appellants' motion and moved to dismiss. Defendants argued, among other things, that Appellants lacked Article III standing and that their suit was barred by the Speech or Debate Clause of Article I, Section 6. *See* Defs.' Opp'n Br., Doc. 15 (D.D.C. June 19, 2020).

The district court dismissed Appellants' complaint on August 6. Although the district court first engaged in a lengthy discussion of Article III standing, *see* JA 118–27, it ultimately did not resolve the issue, *see* JA 122, 127, holding instead that the Speech or Debate Clause presented an independent jurisdictional hurdle barring Appellants' claims. The district court held that this Court's decision in *Consumers Union of the United States, Inc. v. Periodical Correspondents' Ass'n*,

515 F.2d 1341 (D.C. Cir. 1975), "control[led]" the case and required dismissal. *See* JA 131.

SUMMARY OF ARGUMENT

The Speech or Debate Clause does not bar Appellants' constitutional challenge to the enforcement of H. Res. 965 because the Supreme Court and this Court have long recognized the "key distinction . . . between legislative speech or debate . . . on the one hand, and executing a legislative order, or carry out [legislative] directions, on the other hand." *Walker v. Jones*, 733 F.2d 923, 931 (D.C. Cir. 1984). The actions Defendants must undertake to enforce H. Res. 965 merely execute or carry out the House's legislative order and therefore fall beyond the immunity created by the Speech or Debate Clause. The district court's sole justification for dismissing the case—this Court's prior decision in *Consumers Union*—is clearly distinguishable from the present action and, in any event, the district court's reading of the decision brings it into conflict with settled and controlling Supreme Court and D.C. Circuit precedent.

Nor does Article III's standing requirement pose any barrier to Appellants' suit. Representative Appellants' injury-in-fact is straightforward: because H. Res. 965 purports to count the votes of Members who cannot constitutionally cast a vote—because they are not actually *present* in the House chamber—it necessarily dilutes the voting power of those Members who vote without the use of proxies.

Their standing thus falls squarely within *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994), which held that when Members of Congress and/or their constituents assert "that their voting power has been diluted," they "have suffered an Article III injury." *Id.* at 625. While Defendants argued below that *Michel* and related vote-dilution cases have since been overruled by the Supreme Court's decision in *Raines v. Byrd*, 521 U.S. 811 (1997), the district court was rightly "not convinced that *Michel* has been overruled" by *Raines* with respect to Members' standing, JA 127, a conclusion that this Court resoundingly confirmed less than a month ago in *Committee on the Judiciary of the United States House of Representatives v. McGahn*, — F.3d —, 2020 WL 4556761 (D.C. Cir. Aug. 7, 2020) (en banc). And even if *Raines* did preclude Representative Appellants' theory of standing under *Michel*, it does not in any way impede Constituent Appellants from bringing suit to protect against the dilution of their own voting power.

Finally, because the merits of this urgent dispute turn on a pure question of law based on undisputed facts, the Court should address the constitutionality of proxy voting in the first instance and order that enforcement of H. Res. 965 be preliminarily and permanently enjoined. The plain text of the Constitution, in provision after provision, leaves no doubt—none—that Members of Congress must actually be *present* in their respective Houses to be counted toward satisfying the quorum requirement and to cast a recorded vote. Indeed, never before in the 231-

year existence of the United States Congress, through war and peace, through contagion and crises, has either House of Congress authorized its Members to vote by proxy. "[S]ometimes the most telling indication of a severe constitutional problem . . . is the lack of historical precedent for Congress's action." *NFIB v. Sebelius*, 567 U.S. 519, 549 (2012) (opinion of Roberts, C.J.) (cleaned up); *see also NLRB v. Noel Canning*, 573 U.S. 513, 522–26 (2014). That is certainly true here. The plain text of the Constitution, unbroken congressional practice, and the constitutional structure undergirding our republican form of government unite in condemning proxy voting as unconstitutional.

STANDARD OF REVIEW

The district court's dismissal of Appellants' complaint based on legislative immunity under the Speech and Debate Clause is a jurisdictional ruling that this Court reviews de novo. *See Rangel v. Boehner*, 785 F.3d 19, 22 (D.C. Cir. 2015).

ARGUMENT

I. Appellants' Suit Is Not Barred by the Speech or Debate Clause.

The Speech or Debate Clause provides: "[F]or any Speech or Debate in either House, [Members] shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1. It was "designed to preserve legislative independence, not supremacy." *United States v. Brewster*, 408 U.S. 501, 508 (1972). Thus, "the Speech or Debate Clause has finite limits," *Doe v. McMillan*, 412 U.S. 306, 317 (1973): it "does not

extend beyond what is necessary to preserve the integrity of the legislative process," *Barker v. Conroy*, 921 F.3d 1118, 1127 (D.C. Cir. 2019). Accordingly, the Supreme Court "has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). Those asserting immunity under the Speech or Debate Clause bear the burden of demonstrating its applicability. *United States v. Rostenkowski*, 59 F.3d 1291, 1300 (D.C. Cir.), *opinion supplemented on denial of reh'g*, 68 F.3d 489 (D.C. Cir. 1995).

Although the Clause refers only to "Speech or Debate," the Supreme Court has read the provision to extend to all "legislative acts." *McMillan*, 412 U.S. at 312. And because immunity under the Clause turns upon the character of "the act presented for examination, not the actor," *Walker*, 733 F.2d at 929, congressional aides can also claim immunity "insofar as the[ir] conduct . . . would be a protected legislative act if performed by the Member himself," *Gravel v. United States*, 408 U.S. 606, 618 (1972). In defining what constitutes "legislative acts," the Supreme Court has made clear that "[l]egislative acts are not all-encompassing," but must instead be, in the formulation from *Gravel* that has become rote, "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." *Id.* at 625. And "[i]n no case has [the Supreme Court] ever treated the Clause as protecting all conduct *relating* to the legislative process." *Brewster*, 408 U.S. at 515 (emphasis added). That is because "[t]he Speech or Debate Clause does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions." *Id.* at 528; *see also Chastain v. Sundquist*, 833 F.2d 311, 314 (D.C. Cir. 1987).

In keeping with these principles, the Supreme Court has consistently distinguished between legislative acts and actions performed in *implementing* or *executing* legislative acts. For example, in the landmark case of *Kilbourn v. Thompson*, 103 U.S. 168 (1880), the Supreme Court held that the Speech or Debate Clause did not bar a false-imprisonment lawsuit against the House Sergeant-at-Arms even though "the Sergeant-at-Arms was executing a legislative order, the issuance of which fell within the Speech or Debate Clause." *Gravel*, 408 U.S. at 620. In *Dombrowski v. Eastland*, 387 U.S. 82 (1967), the Court likewise held that Speech or Debate Clause immunity did not "shield [committee counsel] from answering . . . charges of conspiring to violate the Constitutional rights of private parties" by "carry[ing] out an illegal seizure of records that the Committee sought for its own proceedings." *Gravel*, 408 U.S. at 619–20. Even though the committee's directive was within "the sphere of legitimate legislative activity," the committee counsel's acts in executing it were not immunized. *Dombrowski*, 387 U.S. at 85. And in *Powell*

v. McCormack, 395 U.S. 486 (1969), the Supreme Court upheld a Member's claim that the Clerk and Doorkeeper of the House had unconstitutionally barred him from voting on the House floor, even though the congressional officers "were merely carrying out directions that were protected by the Speech or Debate Clause." *Gravel*, 408 U.S. at 621; *see also Powell*, 395 U.S. at 505 n.24.

Thus, in each of these cases, the Court held that the Speech or Debate Clause does *not* immunize actions taken in *executing* a legislative directive, even if the *enactment* of that legislative directive is immune under the Speech or Debate Clause. As the Supreme Court explained in *Gravel*: "In [*Kilbourn*, *Dombrowski*, and *Powell*], protecting the rights of others may have to some extent frustrated a planned or completed legislative act; but relief could be afforded without proof of a legislative act or the motives or purposes underlying such an act." 408 U.S. at 621.

Following these binding precedents, this Court has emphasized that "[t]he Supreme Court has drawn a key distinction . . . between legislative speech or debate and associated matters such as voting and committee reports and proceedings, on the one hand, and *executing* a legislative order, or *carrying out* [legislative] directions, on the other hand." *Walker*, 733 F.2d at 931 (emphasis added). The *Walker* Court continued: "The former, the Supreme Court has emphasized, is what the Speech or Debate Clause shields. But its precedent, the Court has cautioned, reflect[s] a decidedly jaundiced view toward extending the Clause to shield the latter." *Id.*

at 931–32 (quotation marks omitted); *see also Common Cause v. Biden*, 748 F.3d 1280, 1284–85 (D.C. Cir. 2014). Indeed, the Supreme Court has *never* accorded Speech or Debate immunity to the actions of a legislative official who was merely *executing* a legislative directive. In this sense, legislative immunity is closely analogous to *sovereign* immunity, which permits suits against executive officers who carry out an unconstitutional legislative scheme, even though a suit directly against the sovereign is barred. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326–27 (2015).

Defendants' actions at issue in this case are unquestionably on the "execution" side of the line drawn by Supreme Court precedent, as recognized by this Court in *Walker*. The injunctive relief requested by Appellants relates to specific administrative tasks that these Defendants—and only these Defendants—are charged with executing under H. Res. 965. *See* JA 102–03. In performing their tasks, Defendants are acting in a purely *executive* capacity. To be sure, the execution of H. Res. 965, and the proxy voting system it permits, *relate* to the legislative act of voting, just as the actions in *Kilbourn*, *Dombrowski*, and *Powell* all *related* to legislative acts. But as those cases demonstrate, it is blackletter law that the Speech or Debate Clause does not apply merely because an action *relates* to a legislative act. *See Brewster*, 408 U.S. at 512–16.

Turning back to the decision below, although the district court acknowledged *Kilbourn* and *Powell*, it never even *attempted* to reconcile those cases with its holding. Nor could it have done so. There is no principle of law that would bar Appellants' suit here while allowing the suits in those Supreme Court cases to move forward.

Ignoring this dispositive problem entirely, the district court based its conclusion exclusively on this Court's decision in *Consumers Union*. The district court conceded that this Court in *Walker* had "recognized the distinction [between legislative acts and acts performed in execution of legislative acts] explained by Plaintiffs," JA 129, but the court nonetheless maintained that *Consumers Union* "controls" this case because "rules controlling how Members vote are" a "regulation of the very atmosphere in which lawmaking deliberations occur," and are therefore "legislative." JA 131 (quotations omitted).

The district court's analysis was deeply flawed. While the district court focused on whether *H. Res. 965* was a legislative act, the relevant question is whether *Defendants' actions* in *executing* H. Res. 965 are legislative acts. It was clear that the House resolution in *Kilbourn*, the committee subpoena in *Dombrowski*, and the House resolution in *Powell* were legislative acts, but in all three of those cases, the relevant point was that *the actions of congressional officers in executing* the legislative directives were not immune. The same is true here: notwithstanding that

H. Res. 965 is a legislative act, *Defendants' actions implementing H. Res. 965* are not.

Consumers Union is not to the contrary. That case concerned regulating access of the press to the House and Senate chambers, a function that had historically been performed by the Members themselves. But in 1916, the House delegated to the Periodical Correspondents' Association ("the Association") the task of administering the rules governing access to the galleries. 515 F.2d at 1344–45. An organization, Consumers Union, sued the Association and the House and Senate Sergeants-at-Arms, alleging that its denial of access pursuant to the press-gallery rules violated the First Amendment both facially and as-applied to Consumers Union. *See id.* at 1345–46.

The Court in *Consumers Union* began its analysis by considering whether the case presented a "political question" that was "not justiciable in federal court because of the separation of powers." *Id.* at 1346 (quoting *Powell*, 395 U.S. at 517). Citing the Constitution's textual commitment to Congress of the power to "determine the Rules of its Proceedings," U.S. CONST. art. I, § 5, cl. 2, the Court concluded that "[t]he manner of assuring independence of those accredited from such [lobbying or advocacy] groups or interests is for the Congress to determine *as a matter of constitutional power*." *Consumers Union*, 515 F.2d at 1347 (emphasis added).

The Court did not rest its conclusion that Consumers Union's suit was nonjusticiable solely on the political-question doctrine, but rather proceeded to consider the question of immunity under the Speech or Debate Clause. *Id.* at 1348. Noting that "[f]or many years the Congress itself had directly controlled the seating of the press within its halls," the Court found that the Association was "engaging in a sense in acts generally done in relation to the business before Congress." *Id.* at 1350. In other words, the historical role of Representatives and Senators themselves in controlling access of the press—which dated to the Founding—lent support to the notion that the Association was acting in a "sphere of legislative activity" because it was performing "delegated legislative functions" that "were an integral part of the legislative machinery." *Id.*

The Court insisted, however, that its Speech or Debate Clause analysis was *not* independent of its earlier political-question-doctrine analysis:

> By reason of circumstances peculiar to this case, we find it unnecessary *and, indeed, improper* to consider the constitutional commitment of power over internal rules to the Congress and the Congressional immunity by virtue of the Speech or Debate Clause in isolation from each other. The execution of internal rules is so identified with the legislative process as to lend additional force to the historic legislative treatment of the subject of the rule in question.

Id. at 1351 (emphasis added). Even the Court's mandate reversing the lower court "remanded [the case] with direction for its dismissal as one not justiciable by reason of the textually demonstrable commitment of such rules to the legislative branch of

government *and* in view of immunity conferred by the Speech or Debate Clause of the Constitution." *Id.* (emphasis added).

Thus, *Consumers Union* did *not* hold that the Speech or Debate Clause, standing alone, immunizes congressional officers who are merely executing a legislative act. Nor could it have, since doing so would have brought this Court into direct conflict with *Kilbourn*, *Dombrowski*, and *Powell*. Rather, *Consumers Union* held that, under the unique facts of that case involving a longstanding historical practice of Congress, the Speech or Debate Clause *in combination with* the political question doctrine barred the suit. Here, there is no similar historical practice supporting proxy voting, which is indisputably unprecedented. Nor have Defendants argued that the political question doctrine applies, likely because such an argument is precluded by cases post-dating *Consumers Union*. *See, e.g.*, *Nixon v. United States*, 506 U.S. 224, 237 (1993), *Barker v. Conroy*, 921 F.3d 1118, 1126 (D.C. Cir. 2019), *Michel v. Anderson*, 14 F.3d 623, 627 (D.C. Cir. 1994); *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1172–77 (D.C. Cir. 1982). *Consumers Union*'s holding is therefore inapplicable.

Moreover, *Consumers Union* devoted almost no analysis to the Speech or Debate immunity of the Sergeants-at-Arms, who were merely executing the Association's directives and were, therefore, arguably in the same position as the

congressional officers in *Kilbourn*, *Dombrowski*, *Powell*, and this case. In a cryptic, two-sentence footnote, the Court said:

> It is not necessary to consider the situation of the Sergeants at Arms separately from that of the Association. Manifestly, if performing legislative acts, the Sergeants at Arms would have immunity at least equal to that of the Association, and there is no claim that they took any affirmative action against appellee or did anything more than acquiesce in the decision of the Association.

515 F.2d at 1345 n.8. The first point—that the Sergeants-at-Arms would enjoy at least some form of legislative immunity "if performing legislative acts"—was a truism, of course, and the Court did not assert that the Sergeants-at-Arms were, in fact, performing legislative acts. And given the absence of any claim that the Sergeants-at-Arms "took any affirmative action against" Consumers Union, it appears that Consumers Union may have even lacked standing to seek declaratory relief against the Sergeants-at-Arms. And the relevant issue was whether performed *actions* by the Sergeants-at-Arms, if any, in carrying out the Association's directive were *legislative* acts. And on that crucial question, the Court never acknowledged the distinction between legislative acts and acts taken in their execution, a distinction that this Court would emphasize less than a decade later is "key" to the Speech or Debate analysis. *Walker*, 733 F.2d at 931.

Thus, in holding that *Consumers Union* bars this lawsuit, the court below necessarily interpreted a cryptic, two-sentence footnote comprised of extraneous reasoning as having *sub silentio* brought this Court's precedent into direct conflict

with at least three prior Supreme Court holdings and with this Court's *own* subsequent interpretation of that Supreme Court precedent in *Walker*, even though *Walker* apparently saw no reason to think that *Consumers Union* violated the "key distinction" between legislative acts and their execution. *See id.* at 930–31. Simultaneously, the district court had to ignore *Consumers Union*'s description of its holding as *not* being based on the Speech or Debate Clause alone, as well as the sharp difference between the Founding-era historical precedent of the acts at issue in *Consumers Union* and the unprecedented actions in this case. In short, to say that *Consumers Union* controls this case—as the district court did—is to make this Court's Speech or Debate Clause jurisprudence incoherent.

What is more, the district court's sharp deviation from well-established Speech or Debate Clause principles has far-reaching and untenable consequences. If the Speech or Debate Clause applies whenever a legislative directive relates to voting—even if the defendants are merely performing administrative tasks in *executing* the legislative directive in question—it *necessarily* follows that the Clause would bar any suit by Members challenging the constitutionality of any House rule concerning voting. For example, a rule "in which 'first-term Members were not allowed to vote on appropriations bills,' " *Raines*, 521 U.S. at 824 n.7, would be shielded from judicial review. Even more extreme examples, such as rules forbidding women or Black Members from voting, would likewise be safe from

challenge by the excluded Members under the decision below. The district court acknowledged these "troubling" hypotheticals, yet it offered *not a word* to distinguish them. JA 131 n.6. But there can be no doubt that the district court's holding, if sustained by this Court, would entail such "troubling" outcomes. That has never been the law of legislative immunity, and this Court need not, and should not, make it so.

II. Appellants Have Standing To Challenge Acts Implementing H. Res. 965.

The court below discussed at length—but did not resolve—whether Appellants have "suffered an "injury in fact that is both fairly traceable to the challenged action and likely to be redressed by a favorable decision." *Louie v. Dickson*, 964 F.3d 50, 54 (D.C. Cir. 2020) (quotation marks omitted). Under binding Circuit precedent, it is clear that both Representative Appellants and Constituent Appellants have Article III standing to challenge implementation of H. Res. 965 because proxy voting causes a dilution of their voting power that would be redressed by a favorable decision.

A. Representative Appellants Have Alleged a Cognizable Injury.

1. Proxy Voting Injures Representative Appellants by Diluting Their Voting Power.

It is well established, across multiple contexts, that the dilution of voting power is a cognizable injury because the right to cast a vote "can be denied by a debasement or dilution . . . just as effectively as by wholly prohibiting [its] exercise."

Reynolds v. Sims, 377 U.S. 533, 555 (1964) (state legislative redistricting); *see also, e.g.*, *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331–32 (1999) (census allocation of representatives); *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992) (plurality opinion) (same); *Gray v. Sanders*, 372 U.S. 368, 375 (1963) (vote counting in primaries).

Accordingly, this Court squarely held in *Michel v. Anderson* that when Members of Congress assert "that their voting power has been diluted," they "have suffered an Article III injury." 14 F.3d at 625. There, Members challenged the mathematically certain dilution of their voting strength caused by a House rule allowing the five territorial House delegates to vote in the Committee of the Whole. By allowing five constitutionally invalid votes to be counted, the rule diluted each Members' vote from "one of 435 votes" to "only one in 440."[1] *Id.* at 626; *see also Vander Jagt*, 699 F.2d at 1168–71; *Skaggs v. Carle*, 110 F.3d 831, 834 (D.C. Cir. 1997) ("The lesson of *Michel* is that vote dilution is itself a cognizable injury regardless whether it has yet affected a legislative outcome.").

Here, "in assessing plaintiffs' standing, [courts] must assume they will prevail on the merits of their constitutional claims." *LaRoque v. Holder*, 650 F.3d 777, 785

[1] On the merits, the Court upheld the rule because a savings clause—requiring an automatic de novo vote in the House itself whenever the votes of the territorial delegates were decisive in the Committee of the Whole—rendered the delegates' votes "largely symbolic." *Michel*, 14 F.3d at 632.

(D.C. Cir. 2011). It necessarily follows, then, that when the House counts, for example, 11 votes cast by Representative Doe, he is *in fact* casting those 11 votes *on behalf of himself*, since he *cannot* constitutionally cast votes on behalf of *another Member*. The ten constitutionally *invalid* votes cast by Member Doe acting as proxy necessarily dilute the voting strength of those Members—like Representative Appellants—who cast only a single *valid* vote.

The district court below accepted that "that vote dilution is itself a cognizable injury," JA 121 (quotation omitted), but it interpreted this Court's prior congressional vote-dilution cases to define Members' voting power "relative to the entire [435-Member] congressional body," rather than "relative to Members physically present for a particular vote," *id.*, because "it is not clear that Members should be subtracted from the denominator when they are not present," JA 122.

The district court's concern about what it called "dynamic" voting power—that each Member is "entitled to a share of the vote defined by the number of Members [present and] voting in the House chamber," JA 121—was misplaced. Consider the following hypothetical: suppose that a House resolution passes with 110 Yeas over 109 Nays, with 216 Members absent and not casting a vote. Each Member's voting strength is 1/219. If Members' relative voting strength is measured by including the 216 absent, nonvoting Members, then the Yeas would represent only 110/435 of the voting power in the House—far fewer than the majority

necessary to pass the resolution. But what matters is not the count of *all Members*; only a majority *of those present* and voting is necessary to legislate (assuming the presence of a quorum). Only if the Yeas' collective voting share was 110/219 would they have the power to pass laws by a simple majority.

Now suppose that two Nay votes are cast by proxy, and that the resolution therefore fails by 110 to 111. If the proxy votes are constitutionally invalid (as they are), the voting strength of each Member casting a valid vote is diluted from 1/219 to 1/221. And the collective voting strength of the Yea voters has been diluted *decisively*. The point is that the legislative weight accorded to each Member's vote by the Constitution is entirely dependent on how many Members actually participate in any given vote (assuming the presence of a quorum). *See The National Prohibition Cases*, 253 U.S. 350, 386 (1920) (explaining that the two-thirds vote in each congressional chamber required for proposing a constitutional amendment "is a vote of two-thirds of the members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership, present and absent"). And regardless of how many Members cast a vote for any given measure, *whenever* even a single Member purports to cast a constitutionally *invalid* vote by proxy, the Members who cast *valid* in-person votes necessarily suffer vote dilution. While the precise *degree* of vote dilution may change from vote to vote, the *fact* of vote dilution is constant whenever proxy voting is permitted.

Finally, even assuming the soundness of the district court's inclination to keep the denominator constant at 435 when Members of Congress are physically absent, Appellants still suffer vote dilution under the proxy voting system. Vote dilution occurs from proxy voting whether one changes the numerator of a voting share or the denominator. For example, if 430 present Members cast valid votes on a bill but one of the present Members also casts five proxy votes for his absent colleagues, that Member has cast *six* votes on behalf of himself; his voting share is therefore 6/435, which dilutes his other colleagues' 1/435 shares. Even if the proxy voting system does not change the denominator of any Member's voting share, it must necessarily change the *numerator* of some Members' shares in such a way to amplify their voting power relative to their colleagues.

The district court's concerns about Appellants' theory of vote dilution thus do not withstand scrutiny, and Appellants clearly suffer a concrete and particularized harm because of the proxy voting system erected by H. Res. 965.

2. *Raines v. Byrd* Does Not Cast Doubt on Representative Appellants' Article III Standing.

Defendants did not dispute below that precedents like *Michel* and *Vander Jagt* squarely hold that the dilution of Representative Appellants' voting power constitutes a cognizable injury under Article III. Instead, Defendants argued that the Supreme Court's decision in *Raines v. Byrd*, 521 U.S. 811, "overruled" *Michel* (and, presumably, *Vander Jagt*). Doc. 15 at 28. Although the district court did not fully

"resolve *Raines*'s applicability to this case," it was right "not [to be] convinced that *Michel* has been overruled." JA 127.

Defendants below came nowhere close to carrying their heavy burden of showing that *Raines* "effectively overrules, *i.e.*, eviscerates" *Michel* and *Vander Jagt*. *United States v. Williams*, 194 F.3d 100, 105 (D.C. Cir. 1999), *abrogated on other grounds by Apprendi v. New Jersey*, 530 U.S. 466 (2000); *see also United States v. Dorcely*, 454 F.3d 366, 373 n.4 (D.C. Cir. 2006). This Court has never implied—much less held—that *Raines* abrogated *Michel* or *Vander Jagt*. To the contrary, the Court has instead said, correctly, that *Raines* and *Michel* address different questions and, thus, are entirely compatible: "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. 1994) (congressmen had standing to challenge House rule which diluted their vote in Committee of the Whole)." *Campbell v. Clinton*, 203 F.3d 19, 21 n.2 (D.C. Cir. 2000) (emphasis added). And although Defendants argued below that *Campbell*'s statement distinguishing *Michel* and *Raines* is "dicta," Doc. 15 at 29 n.30, even if that were true, Defendants cited no authority holding that *Michel* is *not* binding law in this Circuit.[2]

[2] Defendants invoked *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999), which held that *Raines* had abrogated much of the standing analysis in a few pre-*Raines* D.C. Circuit decisions. *See* Doc. 15 at 28. But, conspicuously, *Chenoweth*

Moreover, *Michel* and *Vander Jagt* are readily distinguishable from *Raines*. *Raines* was a constitutional challenge by Members of Congress to the Line Item Veto Act. The plaintiffs alleged that, by giving the President the authority to "cancel" specific appropriations, the Act "unconstitutionally expands the President's power" at the expense of Congress's power and, as a result, diminished the voting power of the plaintiffs as Members of Congress. 521 U.S. at 816–17. The Supreme Court rejected that theory of standing, holding that such an "*institutional injury*" to Congress as a whole was neither concrete nor particularized. *Id.* at 821 (emphasis added). It was not particularized because plaintiffs "ha[d] not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies." *Id.* Rather, the alleged *institutional* injury "necessarily damage[d] *all* Members of Congress and both Houses of Congress equally." *Id.* (emphasis added). Likewise, the injury was also not concrete, since the injury "r[an] (in a sense) with the Member's seat" and "would be possessed by his successor" if the Member "were to retire." *Id.*

Since *Raines* was decided, both the Supreme Court and this Court have repeatedly characterized its holding as limited to situations in which Members of Congress allege an injury to Congress *as a whole*—i.e., an "*institutional* injury." *Id.*

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did *not* mention *Michel*, and it cited *Vander Jagt* for a different proposition. *See* 181 F.3d at 115.

at 821 (emphasis added); *see id.* at 829 (the Court "attach[ed] some importance to the fact that [the plaintiffs] ha[d] not been authorized to represent their respective Houses of Congress"); *see also, e.g.*, *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019) (citing *Raines* for the proposition that "individual members lack standing to assert the institutional interests of a legislature."); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664 (2015); *Blumenthal v. Trump*, 949 F.3d 14, 17 (D.C. Cir. 2020)

Indeed, just weeks ago, this Court sitting en banc synthesized this case law, explaining that *Raines* was a "narrow" decision with "clear limits" and that the Court has thus only "relied on it to hold that unauthorized legislators lack standing to *sue the President to vindicate injuries to the legislative bodies* of which they are a part." *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, — F.3d —, 2020 WL 4556761, at *12, *13, *15 (D.C. Cir. 2020) (en banc) (emphasis added). *Raines*'s holding is thus limited to situations in which individual Members seek to vindicate the powers of Congress *as an institution*, usually against a perceived attack on Congress's powers by the President.

That is clearly not *this* case. Representative Appellants do not allege that H. Res. 965 injures Congress as a whole; they allege that proxy voting specifically injures *them* personally, by diluting the power of *their* votes relative to the power that they would have had absent application of the challenged proxy rule. In stark

contrast with *Raines*, the injury here is both particularized *and* concrete: it afflicts these specific Members, not Congress as a whole. In this way, this case fits squarely within the category of cases that *Raines* itself excluded from its holding: cases in which Members' votes were "denied [their] full validity *in relation to the votes of their colleagues*." *Raines*, 521 U.S. at 824 n.7 (emphasis added). The district court itself recognized as much. *See* JA 125 ("If [Representative Appellants'] 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.' " (quoting *Raines*, 521 U.S. at 824 n.7)).

Michel and *Vander Jagt* are thus consistent with *Raines*. In both cases, the plaintiff-Members alleged that House rules had unconstitutionally reduced *their* voting power, not the power of Congress *as an institution* in relation to the Executive Branch, and that they were injured by the action of their fellow Members, not by the action of the President. This is exactly the distinction between *Michel* and *Raines* that the Court drew in *Campbell* and *McGahn*. Because *Michel* and *Vander Jagt* are fully consistent with *Raines*, Representative Appellants have Article III standing.

B. Constituent Appellants Have Alleged Cognizable Injuries.

Even if *Raines* effectively overruled *Michel* and barred Representative Appellants' standing, Constituent Appellants independently have standing to challenge H. Res. 965. *Raines*'s reasoning simply does not carry over to the standing of *individual voters*. There is no question that the dilution of a citizen's voting power

is a cognizable injury. *See Dep't of Commerce*, 525 U.S. at 331–32; *Franklin*, 505 U.S. at 802 (plurality opinion). And it is readily apparent that the injury of Constituent Appellants is particularized: only constituents of present Members who cast only their own votes (or, in the case of Appellant Swayze, whose absent Member delegates his voting power to a proxy) will suffer the dilution of their voting power. Their injury is therefore not a "generalized grievance" that "is plainly undifferentiated and common to all members of the public." *United States v. Richardson*, 418 U.S. 166, 176–77 (1974).

Accordingly, the Court in *Michel* held that the constituent plaintiffs had standing to challenge the constitutionality of the House rule that diluted their Members' voting power. *See* 14 F.3d at 626. Moreover, *Michel*'s holding with respect to constituent standing was not "predicated on its premise that the Members themselves had standing." Doc. 15 at 31–32. *Michel* left open the possibility that, even if the Members' claim might ultimately be nonjusticiable for different reasons, *that did not in any way affect* the standing of the constituent plaintiffs. *See* 14 F.3d at 626. Thus, regardless of what this Court concludes about the effect of *Raines* on *Michel*'s holding with respect to the standing of Members of Congress, *Michel*'s holding with respect to the standing of individual voters remains good law because *Raines* never once discussed this aspect of *Michel*.

Finally, it is important to fully grasp the dire implications of accepting Defendants' argument that Appellants lack standing to challenge the dilution of their voting power inherent in counting proxy votes. For such a ruling, as with the district court's decision upholding Defendants' Speech or Debate Clause jurisdictional defense, would necessarily mean that *any* House rule governing voting, including the troubling hypothetical rules discussed above, would be insulated from challenge by Members and their Constituents. That surely cannot be the law.

III. Proxy Voting in Congress Is Unconstitutional.

Many landmark cases in our constitutional history have presented difficult questions involving vaguely worded constitutional provisions, inconsistent constitutional practices by the political branches, or tensions among Supreme Court precedents. This is not one of those cases. Unambiguous text, unbroken history, and consistent precedent all inexorably compel the same conclusion: Members of Congress must be *actually present* in the halls of their respective Houses to be counted for the purpose of satisfying the quorum requirement to do business and for the purpose of casting a recorded vote on legislation. Because H. Res. 965 violates this previously unquestioned principle, it is patently unconstitutional. And because "[a] remand to the district court would be a waste of judicial resources," *Mendoza v. Perez*, 754 F.3d 1002, 1020 (D.C. Cir. 2014), this Court should proceed to decide the constitutional question raised by Appellants' amended complaint.

A. Proxy Voting Is Inconsistent with the Constitution's Clear Text.

From Article I to the Twenty-Third Amendment, in provision after provision, the Constitution makes clear that the lawmaking powers of the People are vested in a deliberative body assembling *in person*. Some of those provisions are specific to the First Congress. Article I, Section 2, Clause 3 states: "Enumeration shall be made within three Years after *the first Meeting* of the Congress of the United States . . . ." (emphasis added). This "Meeting" meant, at the Founding just as today, a "face to face" encounter. 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773), https://bit.ly/31BN3TZ. Likewise, Article I, Section 3, Clause 2 provides: "Immediately after they *shall be assembled* in Consequence of the first Election, they shall be divided as equally as may be into three Classes." (emphasis added). At the Founding, just as today, "assemble" meant "[t]o bring together *in one place*," 1 JOHNSON, *supra* (emphasis added), https://bit.ly/31DuXkE, and "assembled" meant "[c]ollected into a body; congregated," 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), https://bit.ly/3cCDTd2. There is no doubt, then, that the First Congress was expressly required to meet *in person* to comply with Article I. *See District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (relying on the Johnson and Webster dictionaries to establish constitutional meaning).

Consistent with the requirements imposed on the First Congress, numerous other provisions applicable to *all* Congresses demonstrate that the Constitution requires Members' *actual presence* in the halls of Congress to be counted toward establishing a quorum and to cast a recorded vote.

1. The Quorum Clause

Article I, Section 5, Clause 1 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.

(emphases added). The quorum requirement of Article I is absolute: only with a quorum may either House "do Business."

While the Supreme Court has never confronted proxy voting—it has never existed in Congress—its discussion of the quorum requirement in *United States v. Ballin*, 144 U.S. 1 (1892), is instructive. There, the plaintiff challenged the constitutionality of a statute as having been enacted despite the absence of the quorum required to "do business." *See id.* at 1–3. A new House rule, which had been enacted the day before the House voted on the challenged statute, provided that Members of the House who were "in the hall of the house" but nevertheless did not vote could be counted toward the quorum requirement. *Id.* at 5. The Speaker of the House had invoked this new rule to deem the bill validly passed with a quorum. *Id.*

The Supreme Court observed that, although "[t]he constitution empowers each house to determine its rules of proceedings," the House "may not by its rules ignore constitutional restraints or violate fundamental rights." *Id.* One of those restraints, the Court said, was the quorum requirement: "All that the constitution requires is the *presence* of a majority, and when that majority are *present* the power of the house arises." *Id.* at 6 (emphases added). Because "[t]he constitution has prescribed no method of making th[e] determination" of whether a majority of Members are present, it was "within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact" that a majority are *present*. *Id.* And because the Clerk, in reliance on the new House rule, had entered into the Journal of the House "that at the time of the roll-call there were present 212 members of the house, more than a quorum," the Court held that the bill was enacted pursuant to a constitutional quorum. *Id.* at 5.

The key point in *Ballin*, then, was that—however broad the House's authority to set its own rules might be—the Quorum Clause limits that authority, requiring "the *presence* of a majority" actually "in the hall of the house." *Id.*[3] And "presence"—from the Founding to today—means "[n]ot absent; *face to face*; being

[3] *Ballin*'s interpretation of the quorum requirement was reiterated in *Christoffel v. United States*, 338 U.S. 84 (1949), in which the Supreme Court held that a "quorum" in the context of House proceedings requires "actual[] physical[] presen[ce]." *Id.* at 89; *see also United States v. Reinecke*, 524 F.2d 435, 439–40 (D.C. Cir. 1975) (applying *Christoffel* in a similar context).

at hand," 2 JOHNSON, *supra* (emphasis added); *see also* 2 WEBSTER, *supra*, https://bit.ly/2De6EAu.

This understanding of the Quorum Clause comports with the original understanding shared by the Founders. Because a quorum is a prerequisite for congressional business, there was disagreement among the Framers about how high to set the threshold for a quorum, given the widely varying distances that Members would have to travel to attend the assembly. Those concerns reflected the universal understanding that Members of Congress could be counted toward satisfying the quorum requirement only if they were *actually present* in their respective Houses. *See* John Bryan Williams, *How to Survive A Terrorist Attack: The Constitution's Majority Quorum Requirement and the Continuity of Congress*, 48 WM. & MARY L. REV. 1025, 1038–41 (2006). The Founders agreed to set the number of Members necessary for a quorum at a majority only "after [Edmund] Randolph and [James] Madison added language giving the houses the power to compel members to attend sessions when a quorum was lacking." *Id.* at 1041. Accordingly, the Constitution grants each House of Congress the power "to compel *the Attendance* of absent Members" to satisfy the quorum requirement. U.S. CONST. art. I, § 5, cl. 1 (emphasis added).

That did not mean compelling Members to send a letter to the Clerk of the House allowing *someone else* to count toward the quorum in their stead. Rather, at

the Founding, "attend" was "[t]o be present with, upon a summons," 1 JOHNSON, *supra*; *see also* 1 WEBSTER, *supra*, and to be "present," in turn, meant "[n]ot absent; *face to face*; being at hand," 2 JOHNSON, *supra* (emphasis added); *see also* 2 WEBSTER, *supra* ("Being before the face or near; being in company.").

Indeed, the only other provision of the Constitution that uses the word "attendance" confirms that it refers to actual presence. Article I, Section 6, Clause 1 provides:

> 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*.

(emphases added); *see Heller*, 554 U.S. at 579–80 (examining the use of the same phrase in multiple constitutional provisions to determine its meaning); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170–73 (2012) (canon of consistent usage). If Members could attend a session of Congress by mailing a letter to the Clerk of the House, the phrases "going to and returning from the same" and "in any other Place" would immunize Members of Congress "from Arrest" *anywhere in the country*. "[W]hen the Constitution was adopted, arrests in civil suits were still common in America." *Long v. Ansell*, 293 U.S. 76, 83 (1934). It is inconceivable that the Founders would have conferred such sweeping immunity.

Article I, Section 5, Clause 1 thus authorizes the Houses of Congress to force Members to come "face to face" with each other to satisfy the quorum requirement. Of course, this power would have been superfluous—just as the Founders' concern about the geographic impact of a high quorum requirement would have been nonsensical—if Members were *not* required to be actually present in order to be counted toward a quorum.

Even an *exception* to the quorum requirement—allowing that "a smaller Number may adjourn from day to day," U.S. CONST. art. I, § 5, cl. 1—reinforces the requirement's in-person nature. Two other provisions of the Constitution use the word "adjourn," and it clearly connotes a *physical* act in both of them. Article II, Section 3 states, in relevant part: "[The President] may, on extraordinary Occasions, *convene* both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may *adjourn* them to such Time as he shall think proper…." (emphases added). At the Founding, just as today, "to convene" was synonymous with "to assemble," 1 JOHNSON, *supra*; *see also* 1 WEBSTER, *supra*, which (as noted above) meant "[t]o bring together *in one place*," 1 JOHNSON, *supra*. "Adjourn," as used in this clause, is the opposite of "convene," meaning that the President may release Members of Congress to leave the "one place" they have gathered. Similarly, Article I, Section 5, Clause 4 states: "Neither House, during the Session of Congress, shall, without the Consent of the other,

adjourn for more than three days, nor *to any other Place* than that in which the two Houses *shall be sitting*." (emphases added). Consistent with Article II, Section 3, when Houses of Congress "adjourn" under this provision, they must remain in the "Place" where they collectively are "sitting."

Because H. Res. 965 specifically authorizes absent Members to be counted toward the quorum requirement, it is unconstitutional.

2. The Yeas and Nays Requirement

Article I, Section 5, Clause 3 requires Members to cast *recorded* votes whenever a sufficient number "of those Present" request such a vote: "Each House shall keep a Journal of its Proceedings . . . and 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." (emphasis added). Like the quorum requirement, the Yeas and Nays requirement clearly mandates *in person* attendance by Members.

That ordinary meaning is confirmed by other provisions of the Constitution that use the word "present." Article I, Section 3, Clause 6 states:

> The Senate shall have the sole Power to try all Impeachments. When *sitting* for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall *preside*: And no Person shall be convicted without the Concurrence of two thirds *of the Members present*. (emphases added).

"Sitting," as used in this context, meant "[a] session; the *actual presence* or meeting of any body of men *in their seats*, clothed with authority to transact business . . . [as]

a *sitting* of the house of commons," 2 WEBSTER, *supra* (first two emphases added); *see also* 4 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (9th ed. 1805), https://bit.ly/3grSE4S. Thus, when the clause speaks of the "Members present," it is plainly referring to the "actual presence" of Senators "in their seats."

Similarly, the Treaty Clause, Article II, Section 2, Clause 2 states in relevant part: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds *of the Senators present* concur." (emphasis added). It is followed immediately within the same section by the Recess Appointments Clause, which empowers the President to "fill up all Vacancies that may happen during *the Recess* of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. CONST. art. II, § 2, cl. 3 (emphasis added). Thus, whereas the Treaty Clause describes the President's powers when the Senate is *not* in recess, the Recess Appointments Clause describes the additional power of the President when the Senate *is* in recess. And "recess," at the Founding, meant "[r]etirement; retreat; withdrawing; secession," or "*[d]eparture*." 2 JOHNSON, *supra* (emphasis added); *see also* 2 WEBSTER, *supra* ("[a] withdrawing or retiring; a moving back;" "[d]eparture"). The necessary implication, then, is that, while the President has certain powers that come into being when, and because, Members have *departed* the seat of government (Clause 3), his powers are more limited when Senators are "present" (Clause 2) and able therefore to "do Business."

Finally, the plain meaning of the text of the Yeas and Nays Clause is reinforced by the Veto Clause, the only other provision of the Constitution that uses the phrase "[Y]eas and Nays." Article I, Section 7, Clause 2 requires Congress to "determine[] by yeas and Nays" whether to override a presidential veto when the President "return[s]" a bill to Congress. But it also allows the President to "pocket veto" a bill by refusing to sign it within the constitutionally allotted ten-day period *if* "the Congress by their Adjournment prevent its Return." The pocket-veto rule makes sense only if actual assembly is the opposite of adjournment, for if actual presence were not necessary for Congress to convene, there would be no reason why it could not reassemble at *any* time no matter *where* its Members are located. And it therefore would make no sense to exempt periods of adjournment from the clause's requirement that a bill "shall be a Law" if not returned within the ten-day period.

The short of it is this: for a Member to cast a recorded vote, the Member must be actually present on the floor of the House. Because H. Res. 965 authorizes Members to cast recorded votes *without* being actually present in the House to cast their votes personally, it is unconstitutional.

B. History Confirms that Proxy Voting Is Unconstitutional.

Because the text of the Constitution unambiguously prohibits Members from participating by proxy in quorum calls and from voting from the floor, H. Res. 965 is unconstitutional, period. But this dispositive textual evidence of the meaning of

the Constitution is confirmed by Congress's unbroken 231-year-long practice of requiring despite the dangers of war and pestilence, *in person* quorum calls and voting. *See The Pocket Veto Case*, 279 U.S. 655, 689 (1929); *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014).

1. The Yellow Fever Epidemic of 1793

Less than two years after ratification of the Bill of Rights, the Third Congress faced the Yellow Fever Epidemic, which wiped out *nearly ten percent* of the population of the City of Philadelphia—then the seat of the Federal Government. *See* J.M. POWELL, BRING OUT YOUR DEAD: THE GREAT PLAGUE OF YELLOW FEVER IN PHILADELPHIA IN 1793 at vi, 242–47, 282 (1949). Although President Washington considered moving the location of Congress, then-Representative Madison, then-Secretary of State Jefferson, and then-Secretary of the Treasury Hamilton all counseled that the President lacked such authority and that, in Jefferson's words, "Congress must meet in Philadelphia, even if it be in the open [fields], to adjourn themselves to some other place." Letter from Thomas Jefferson to George Washington (Oct. 17, 1793), NAT'L ARCHIVES, https://bit.ly/36OxOs9; *see also* Letter from James Madison to George Washington (Oct. 24, 1793), NAT'L ARCHIVES, https://bit.ly/2Mjx057; Letter from Alexander Hamilton to George Washington (Oct. 24, 1793), NAT'L ARCHIVES, https://bit.ly/3gydIqb. While Madison, Jefferson, and Hamilton did not always agree, they all read the

Constitution to require the Members of Congress to assemble in person at the seat of government to do the People's business, despite the contagion that awaited them.

In the end, the House convened in Philadelphia on December 2, "being the day appointed for the annual meeting of Congress," and "a quorum, consisting of a majority of the whole number, being present," proceeded to conduct the business of government. It remained in session in the city through June 9 of the following year. *See* H.R. JOURNAL, 3d Cong., 1st Sess. 3–4 (1793), https://bit.ly/2XaHI3N. There is no evidence to suggest that any thought or consideration was given by anyone to the ready expedient of simply adopting a rule permitting voting by proxy, even though proxy voting was a familiar legislative practice at the time of the Founding. *See generally* Susan Rosenfeld Falb, *Proxy Voting in Early Maryland Assemblies*, 73 MD. HIST. MAG. 217 (Sept. 1978), https://bit.ly/3dbj4Wv.

2. The War of 1812

On September 19, 1814, less than one month after British troops had reduced all but one of the capital city's major public buildings, including the Capitol itself, to rubble, the Thirteenth Congress convened in special session at Blodgett's "Great Hotel." Harold H. Burton and Thomas E. Waggaman, *The Story of the Place: Where First and A Streets Formerly Met at What Is Now the Site of the Supreme Court Building*, 51/52 RECS. OF THE COLUM. HIST. SOC'Y 138, 141–42 (1951/1952). Two days later, the House of Representatives rejected a proposal to remove the seat of

government from the District by a vote of 83 to 54. *Id.* at 142. The House remained in temporary quarters throughout the Thirteenth, Fourteenth, and Fifteenth Congresses, and the Members continued to assemble in person. *Id*.

3. The Civil War

The same was true during the Civil War, when the seat of government itself, and the journey to and from the Capitol, were fraught with risk from attack by Confederate forces. Despite that risk, on April 15, 1861, just three days after the first shots were fired at Fort Sumter, Abraham Lincoln summoned the "Senators and Representatives . . . to assemble at their respective Chambers, at 12 O'Clock, noon on Thursday, the fourth day of July next." ABRAHAM LINCOLN, PROCLAMATION (Apr. 15, 1861), https://bit.ly/3ecYGUV. And the Members so assembled in the Capitol that following Independence Day, and they continued to meet throughout the war, even as battles raged on fields surrounding the seat of government.

4. The 1918 Spanish Flu Pandemic

The global 1918 Spanish Flu Pandemic killed over 50 million people, including 675,000 Americans, when the Nation's population was some 103 million. Still, the Members reassembled when the new Congress convened on the first Monday of December 1919. 56 CONG. REC. 11380 (Oct. 19, 1918). The House continued to meet in Washington during the Sixty-Fifth Congress, even as Members fell ill with Spanish Flu, some fatally. *See* 57 CONG. REC. 3533 (Feb. 16, 1919);

WILLIAM P. BORLAND, MEMORIAL ADDRESSES 11 (Mar. 2, 1919), https://bit.ly/2Xrwh6G; *see also* History, *Sick Days*, HISTORY, ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES (Dec. 17, 2018), https://bit.ly/2A0iP1U.

5. The 9/11 Attacks

Finally, even on September 11, 2001, when terrorists crashed passenger airplanes into the World Trade Center and the Pentagon, Congress assembled, refusing to bow to the threat of another terrorist attack. In the years following the 9/11 tragedy, Congress has considered many scenarios to address the continuity of Congress, including the expedited election to the House of Members in extraordinary circumstances. It has not, however, seriously considered proxy voting. *See, e.g.*, R. ERIC PETERSEN & SULA P. RICHARDSON, CONG. RES. SERV., RL32958, CONTINUITY OF CONGRESS: ENACTED AND PROPOSED FEDERAL STATUTES FOR EXPEDITED ELECTION TO THE HOUSE IN EXTRAORDINARY CIRCUMSTANCES (Aug. 9, 2005), https://bit.ly/2ZyToyU.

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In sum, over the course of 231 years, neither House of Congress has *ever* authorized an absent Member to cast a vote on the floor, whether by mail, telegraph, electronics, proxy, or other means. Nor has either House even considered, it appears, such a procedure. DAVIS, *supra*, at 1 ("House rules have *never* authorized proxy voting on the floor" of the House. (emphasis added)). The unbroken American

tradition of in-person assembly and voting in Congress confirms the unambiguous text of the Constitution: proxy voting by Members of either House of Congress is unconstitutional.

C. Constitutional Structure also Precludes Proxy Voting.

Under well-established principles, congressional power may not be exercised in a way that would violate the Constitution's essential structural framework. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 566 (1995); *New York v. United States*, 505 U.S. 144, 161–66 (1992). Proxy voting undermines constitutional structure in two ways. First, it violates the constitutional norm of nondelegation of legislative power. And second, it cannot be squared with the Constitution's framework establishing a republican form of government.

Nondelegation. Article I, Section 1 begins: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." If there is one bright-line rule in the jurisprudence of nondelegation, it is that Congress may not delegate its legislative authority to private individuals or other private entities. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 60–62 (2015) (Alito, J., concurring).

It necessarily follows from this principle that a Member of Congress cannot delegate his or her vote to another. *See 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). Like all legislative powers, "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." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125–26 (2011). "The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it." *Id.* at 126. And as the representative of the People who elected him or her, exercising power that belongs to them, the Member has no authority to *delegate* the voting power that the Member holds "as trustee for his constituents." *Id.*

Yet the proxy-voting system established by H. Res. 965 is *premised* on the ability of Members to delegate their voting power to someone else, someone who by definition was *not* chosen by the voters through election. And if H. Res. 965 is constitutional, nothing would logically prevent the House from allowing Members to unconstitutionally delegate their votes to *anyone*—to a family member; to a member of their staffs, *contra Carter Coal*, 298 U.S. at 311; to an officer of the Executive Branch, *contra* U.S. CONST. art. I, § 6, cl. 2; or even to an individual who does not meet the Constitution's qualifications for election to, and service in, the Members' seat, *contra* U.S. CONST. art. I, § 2, cl. 2.

And it matters not at all that the proxy Member has no discretion to depart from the absent Member's voting instructions. A Member's legislative power to cast

a constitutionally valid vote requires more than deciding *how* to vote; it requires the Member to *actually be present* to vote.[4] By tasking a proxy to be present in his or her stead, a Member delegates his or her legislative power to cast a constitutionally valid vote. The fact that proxy voting allows for such patent violations of the Constitution absent affirmative restrictions elsewhere in the Constitution underscores the profound dissonance that it introduces into the Constitution's harmony.

Republican Government. As demonstrated at length above, the Framers designed Congress to be a *deliberative body* that *convenes* and assembles *in person* at *the seat of government* to debate, decide, and carry out the People's business. Indeed, the ratification debates confirm that actual presence was a fundamental principle of the republican form of government established by the proposed Constitution. Referring specifically to the House of Representatives, James Madison in *The Federalist* described "[t]he scheme of representation[] as a *substitute* for a

[4] Moreover, the premise that proxy Members have "no discretion" is dubious, because many House votes occur spontaneously. Consider, for example, the recent vote on whether to recommit the "Delivering for America Act" to the Appropriations Committee with instructions to report the bill back to the House with a specific amendment from Member Comer. *See* 166 CONG. REC. H4296–97 (Aug. 22, 2020). The motion to recommit was not public before it was presented on the House floor. It strains credulity to maintain that each of the 68 absent Members who purported to vote against the motion, *see Roll Call 181: Bill Number H.R. 8015*, CLERK, U.S. HOUSE OF REPRESENTATIVES (Aug. 22, 2020), https://bit.ly/2YPcFej, considered the merits of Member Comer's proposed amendment to the bill and tendered to their proxies specific instructions on how to vote on the motion.

meeting of the citizens *in person*." THE FEDERALIST NO. 52, *supra*, at 327 (emphases added). As Madison explained it, while the People in a "democracy" "meet and exercise the government *in person*" the People in a "republic" "assemble and administer it *by their representatives and agents*." THE FEDERALIST NO. 14, *supra*, at 100 (emphases added). It was precisely this characteristic that Madison attributed to the House of Representatives—its "substitut[ion]" of representatives of the citizens "for a meeting of the citizens *in person*," THE FEDERALIST NO. 52, *supra*, at 327 (emphasis added)—that was essential to the republican form of government that embodied "the fundamental principles of the Revolution," THE FEDERALIST NO. 39, *supra*, at 240.

Because actual presence is essential to the constitutional design, rejecting that principle creates numerous anomalies, as previously detailed, throughout the Constitution. Again, if the requirement that Members be "present" in Congress is satisfied by merely sending a letter, why does Article I, Section 5, Clause 1 authorize Congress to *arrest and physically bring* "absent" Members to the halls of Congress? *See* 4 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 3015–17 (1907), https://bit.ly/3ce83m8. Such nonsensical examples could be multiplied *ad nauseum*, but the point is obvious: the republican structure of the Constitution is premised on the principle that Members of Congress will assemble in person to represent their constituents as they "do Business." Because H. Res. 965

cannot be reconciled with the principles and structure of our constitutional system, it is invalid.

IV. Equity Demands that Enforcement of H. Res. 965 Be Enjoined.

A. Plaintiffs Are Likely To Suffer Irreparable Injury Absent an Injunction.

The second prong of the preliminary-injunction test "requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (emphasis omitted). That standard is easily met here.

As explained above, under this Court's decision in *Michel*, both Representative and Constituent Appellants are injured by the dilution of their voting power caused by H. Res. 965. *See supra* Part II.A. These injuries are ongoing, as Defendant Pelosi has extended the proxy-voting period through October 2, 2020. And they are irreparable absent the requested injunctive relief. *See Reynolds*, 377 U.S. at 555, 566; *Baker v. Carr*, 369 U.S. 186, 208 (1962). Just as the dilution of a citizen's voting power in a particular election cannot be remedied *after* an election, the dilution of Representative and Constituent Appellants' voting powers cannot be remedied once a quorum call or proxy vote has occurred. If, for instance, the House deems the quorum requirement satisfied based on proxy "attendance," that constitutional injury cannot be undone once it occurs; the lack of a quorum *at that moment in time*—a moment when it was unconstitutional for the House to conduct

legislative business—cannot be remedied by the existence of a constitutional quorum *later*. Nor could a bill, resolution, or motion approved by the House using proxy votes be *un*-approved by the House later. Once these injuries are recorded in the House Journal, they cannot be questioned or expunged. *See Ballin*, 144 U.S. at 4; *see also* 4 HINDS, *supra*, §§ 2961–62, https://bit.ly/2LYo3ha. And because these injuries are ongoing, preliminary-injunctive relief is appropriate, *see* 11A CHARLES A. WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. § 2948.1 (3d ed. 2020). Moreover, legislation enacted with decisive proxy votes will inevitably be subject to constitutional challenge, and the uncertainty surrounding the validity of such legislation, and even the ability to challenge it in court, harms not only Appellants but all legislators and citizens alike.

Finally, the harm being done to the nature of Congress and the Republic is difficult to overstate. The stakes in this case are high: will Congress continue to be the deliberative institution it has been for 231 years, where the People's elected representatives assemble, debate, persuade, compromise, horse-trade, and legislate *together*? Or will it be forever changed into an institution in which its Members can literally "mail it in"? Each day that the House continues its violation of the Constitution and the unbroken historical tradition of in-person voting by Members is another tear in the constitutional fabric. Immediate injunctive relief is urgently necessary.

B. The Remaining Factors Favor an Injunction.

The final two factors—the balance of equities and the public interest—likewise favor the entry of an injunction. "[E]nforcement of an unconstitutional law is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013); *see also Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 335 (D.C. Cir. 2018). That is especially true here, where the ongoing constitutional violations threaten to fundamentally transform the very nature of Congress as a deliberative body. Moreover, the uncertain constitutionality of any statute enacted with decisive proxy votes does great harm to the public, creating confusion and diminished respect for the law. All this stands on one side of the balance, yet the only thing weighing on the other side is simply a return to the *status quo ante* that prevailed *for 231 uninterrupted years*, even (as noted above) when the House faced far worse dangers than now confront the Nation. Indeed, the Senate has continued to meet and vote *in person*. The balance of equities thus tips heavily toward an injunction.

C. The Court Should Order Entry of a Permanent Injunction and Final Judgment.

For all the foregoing reasons, Plaintiffs are entitled to preliminary-injunctive relief, but it would make little sense to stop the analysis there. This case presents pure questions of law arising out of a few undisputed facts. Under these circumstances, there is no reason for this Court to delay entry of a permanent

injunction and final judgment. *See Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017).

If the Court concludes at this stage that H. Res. 965 is unconstitutional (as it should), it should exercise its "power to dispose of this case 'as may be just under the circumstances,' " and "obviate further and entirely unnecessary proceedings below," *Grosso v. United States*, 390 U.S. 62, 71–72 (1968) (quoting 28 U.S.C. § 2106); *see also Indep. Bankers Ass'n of Am. v. Heimann*, 613 F.2d 1164, 1167 (D.C. Cir. 1979), by remanding the case with instructions to enter a permanent injunction against Defendants' acts implementing H. Res. 965.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's judgment dismissing Appellants' complaint and remand with instructions for the district court to enter a permanent injunction enjoining Defendants from implementing H. Res. 965.

Dated: August 31, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) and D.C. Circuit Rule 28(c) because this brief contains 12,991 words excluding parts of the brief exempted by FED. R. APP. P. 32(f) and D.C. Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 ProPlus in 14-point Times New Roman Font.

Dated: August 31, 2020

s/Charles J. Cooper
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STATUTORY ADDENDUM

STATUTORY ADDENDUM

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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 minor-

ity 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.

CERTIFICATE OF SERVICE

I certify that on August 31, 2020, I filed the foregoing document via the appellate CM/ECF system of the United States Court of Appeals for the District of Columbia Circuit. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 31, 2020

s/Charles J. Cooper
Charles J. Cooper
Counsel for Plaintiffs-Appellants