No. 24-10386

IN THE

United States Court of Appeals for the Fifth Circuit

STATE OF TEXAS,

Plaintiff-Appellee,

v.

MERRICK GARLAND, U.S. ATTORNEY GENERAL, ET AL.

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas, No. 5:23-cv-034-H
Before the Honorable James Wesley Hendrix

BRIEF FOR *AMICI CURIAE* LEGAL HISTORIANS AND LEGISLATION PROFESSORS IN SUPPORT OF DEFENDANTS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

1. Number and style of case: *Texas v. Garland, et al.*, 24-10386.

2. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae James J. Brudney, William N. Eskridge, Jr., Dan Farber, John Ferejohn, Giuliana Perrone, Noah Rosenblum, and Deborah A. Widiss are legal historians, legislation professors, and experts on the Constitution. They have written extensively on the Constitution's original meaning and its interpretation with special focus on congressional powers, and they have an interest in supporting interpretations of the Constitution that are consistent with Framing Era understandings and longstanding government practice.

INTRODUCTION

Responding to the deadly threat of COVID in May 2020, the House of Representatives allowed members to "cast their votes and mark their presence by proxy." *McCarthy v. Pelosi*, 5 F.4th 34, 36 (D.C. Cir. 2021). Under the H.R. Res. 965, 116th Cong. (2020) (the "Proxy Rule"), during a public health emergency, a House member who could not be physically present could select one of her colleagues as a proxy. The proxy could then cast votes on the member's behalf—but only with the member's "exact instruction" and under the member's careful

[1] The parties to this appeal have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no party's counsel authored this brief, and that no one other than *amici* or their counsel contributed money toward this brief.

supervision. *Id.* The Proxy Rule also allowed members voting by proxy to be "counted for the purpose of establishing a quorum." *Id*.

Relying on the Proxy Rule, the House enacted the Consolidated Appropriations Act in December 2022, an omnibus law that funded all three branches of the federal government. The Appropriations Act included the Pregnant Workers Fairness Act (PWFA), a bipartisan measure that requires covered employers to provide reasonable accommodations to pregnant workers—for example, allowing pregnant workers to sit instead of standing, providing a uniform and safety equipment that fit, and granting leave for healthcare appointments. The vast majority of the House—431 of 435 members—voted on the Appropriations Act. The State of Texas nonetheless challenged the PWFA's constitutionality because 226 members voted by proxy.

Overwhelming historical evidence demonstrates that the Proxy Rule complies with the constitutional requirements because the Quorum Clause has only one rule: each House of Congress must have "a Majority" "to do Business." U.S. Const. art. I, § 5, cl. 1. And here, *more than 99%* of the House voted on the Appropriations Act. The Framers drafted the Quorum Clause because they wanted an alternative to the English antimajoritarian practices, which permitted a handful of lawmakers to legislate for the entire nation. The Framers, however, did not debate the merits of proxy as opposed to in-person voting and did not prescribe any particular method

"for ascertaining the presence of a majority." *United States v. Ballin*, 144 U.S. 1, 5-6 (1892).

That was intentional. The Framers—who had just lived through the Revolutionary War—well understood that Congress would need to adjust its procedural rules over time to ensure that legislative business could be done in "ever-changing circumstances over centuries." *NLRB v. Noel Canning*, 573 U.S. 513, 534 (2014). The Framers thus added a Rules of Proceedings Clause, directing Congress to "determine" all other "Rules of its Proceedings" for itself. U.S. Const. art. I, § 5, cl. 2. And that is exactly what Congress has done for more than 200 years: it has repeatedly modified its quorum-counting rules to ensure that Congress can continue to legislate during national emergencies like the Civil War and 9/11. This history and tradition has long "guide[d]" the interpretation of the Quorum Clause. *See Noel Canning*, 573 U.S. at 572 (Scalia, J., concurring in judgment)—indeed, the Supreme Court has never invalidated a Congressional action for violating the Clause. The Proxy Rule followed that tradition to a tee.

Setting aside the plain text of the Quorum Clause, volumes of evidence about the original meaning of that text, and centuries of Congressional practice, the District Court *inferred* a "physical-presence requirement" from other clauses in the Constitution. ROA.1373. The court acknowledged that the Quorum Clause itself does not require members "to be physically present." *Id.* Instead, the court divined

its physical-presence rule from the Compulsion Clause, which empowers the House and Senate to "compel the Attendance" of their "absent" colleagues so that Congress can meet the quorum requirements and perform its legislative duties. U.S. Const. art. I, § 5, cl. 1. As the District Court saw it, the terms "Attendance" and "absent" in that clause refer exclusively to *physical* attendance and absence, and if the Compulsion Clause requires physical presence, it held the Quorum Clause must too.

That holding is as wrong as it is unprecedented. For starters, "Attendance" and "absent" have never referred invariably to physical presence. At the Framing, as today, they denoted attention, communication, and participation. And there is good reason why the Framers chose such broad words. The Compulsion Clause was designed to work in tandem with the Quorum Clause to root out minority rule: The Framers worried that the majority quorum requirement would allow a minority faction to "bust" the quorum and prevent a legislative majority from passing laws. Empowering Congress to compel members' attendance solved that problem. So once again, the Framers' focus was on safeguarding majoritarian practices, not debating what kind of participation counts as attendance.

In any case, it would be entirely ahistorical to read the Compulsion Clause, which *expands* Congress's power to legislate, in a way that *constrains* Congress's ability to act under the Quorum Clause. It would be exceedingly dangerous, too: Congress's legislative powers are critical to the United States' survival during

national emergencies, especially crises that are so sweeping and horrific that they preclude lawmakers from gathering in one place. It is inconceivable that the Framers would so pinion Congress's power after the Revolutionary War—and that they would do so by implication, through an eleven-word Clause that says nothing at all about physical presence. This Court should reverse.

ARGUMENT

I. THE ORIGINAL MEANING OF "A QUORUM TO DO BUSINESS" PERMITS CONGRESS TO COUNT MEMBERS VOTING BY PROXY TOWARDS A QUORUM.

The Constitution permits each House to "determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. This power has long been exercised by every legislature from the "humblest assembly of men" to the most powerful "councils of the nation." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 837 (1833). Without it, "it would be utterly impracticable to transact the business of the nation." *Id.* The Rules of Proceedings Clause thus confers a "broad delegation of authority to [Congress] to determine how and when to conduct … business," and to adapt its rules "to ever-changing circumstances." *Noel Canning*, 573 U.S. at 534, 550.

The only limitation on Congress's authority to determine its procedural rules is that Congress may not "ignore [other] constitutional restraints or violate fundamental rights." *Ballin*, 144 U.S. at 5; *Noel Canning*, 573 U.S. at 551. So the

question in this case is whether the Quorum Clause expressly *prohibits* the House from counting members voting by proxy towards a quorum. A faithful historical reading of the Quorum Clause makes clear it does no such thing. And while Framing Era legislatures generally did not permit proxy voting, that was a function of technological limitations, not constitutional concerns.

A. The Constitution gives Congress broad authority to make rules about its own proceedings.

All agree that Congress may not transgress constitutional boundaries. "But within these limitations all matters of method are open to the determination of the house" and Senate. *Ballin*, 144 U.S. at 5. So from the start, courts have afforded Congress broad authority to craft its own rules and procedures. In *Ballin*, for example, the Supreme Court confirmed that the House may prescribe any "method for ascertaining the presence of a majority" so long as there is "a reasonable relation between" the method "and the result which is sought to be attained." *Id*. at 5-6. The Court thus declined to invalidate a quorum rule simply because "some other way would be better, more accurate, or even more just" or because another rule has been "in force for a length of time." *Id.* at 5.

Ballin's deferential approach has been the rule ever since. In *Noel Canning*, for example, the Supreme Court affirmed the Senate's "determination about what constitutes a session," because the Constitution gives Congress "extensive control" over its procedures. 573 U.S. at 550-551. The Ninth Circuit approved Congress's

practice of presenting bills for presidential signature after adjournment *sine die*, reasoning that a court owes "extreme deference" to "reasonable procedures Congress has ordained for its internal business." *Mester Mfg. Co. v. INS*, 879 F.2d 561, 571 (9th Cir. 1989). And the Tenth rejected a constitutional challenge to the Congressional Review Act, which created an expedited process for Congress to repeal administrative rules, citing "a highly deferential standard of review." *Citizens for Constitutional Integrity v. United States*, 57 F.4th 750, 767 (10th Cir. 2023) (cleaned up). "Where there are plausible reasons for Congress' action," the court said, "our inquiry is at an end." *Id.* (citation omitted); *see also United States v. Durenberger*, 48 F.3d 1239, 1243 (D.C. Cir. 1995) (courts ought not "impose judicially-formulated rules of conduct on the legislative branch").

In short, a court can invalidate the Proxy Rule only if the Constitution "express[ly]" directs it to do so. *Mester*, 879 F.2d at 571.

B. As originally understood, the Quorum Clause simply requires a majority to do business; it does not prescribe any particular method for determining whether a majority is present.

The eleven-word Quorum Clause provides only that "a Majority of each [House] shall constitute a Quorum to do Business." U.S. Const. art. I, § 5, cl. 1. In the Framing Era, a "quorum" meant "a number of any officers as is sufficient to do business." 2 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785).

So the only thing the Constitution requires "is the presence of a majority"; it leaves all else "within the competency of the house." *Ballin*, 144 U.S. at 6.

Historical evidence from the Framing Era explains the reason behind this minimal command. The Quorum Clause was a product of the Framers' debates about an English practice which set the quorum at just 45 of 600 members in the House of Commons. 2 Story, § 834. Thomas Jefferson argued that practice was anti-democratic because it put power in "the hands of the smallest rag of [the] delegation." Thomas Jefferson, *Notes on the State of Virginia*, Query 13, 121-129 (1784). Many agreed, believing that a majority quorum rule "would be a pleasing ground of confidence to the people that no law or burden could be imposed on them, by a few men." 2 Records of the Federal Convention of 1787, at 253 (Max Farrand ed., 1911) ("2 Farrand") (Oliver Ellsworth). Other Framers defended the English practice, proposing to "leav[e] it to the Legislature to fix the Quorum, as in Great Britain, where the requisite number is small." *Id.* at 251 (John Mercer). But Jefferson's view prevailed, and so the Quorum Clause was ratified.

The Framers also worried about the other end of the problem. A prevalent tactic during the Founding Era was "secession" or "quorum-busting," whereby a minority faction would refuse to engage with legislative business to prevent a majority from passing any laws to "extort … some unjust & selfish measure." *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, 1039 (2006). The Framers were concerned that a majority quorum requirement would make secession even easier, perpetuating the very problem of minority rule that the Quorum Clause was meant to fix. As James Madison put it, the "baneful practice of secessions" allowed minority factions to grind legislative business to a halt, causing the "ruin of popular governments." *The Federalist* No. 58. The Framers thus added a Compulsion Clause, authorizing a "smaller Number" of legislators to "compel the Attendance of absent Members" to reach a quorum. U.S. Const., art. I, § 5, cl. 1. The Compulsion Clause "guard[s] against" recalcitrant minority factions, serving the same majoritarian purpose as the Quorum Clause. 2 Farrand at 253 (Oliver Ellsworth).

Here again, the Framers did not specify *how* Congress should ensure a majority's presence. Instead, they chose general terms like "Attendance" and "absent," which at the time denoted ability to participate in a task and communicate with others. "Absent," for example, meant "inattentive" and "at such a distance as to prevent communication." 1 Noah Webster, *An American Dictionary of the English Language* (1828) ("Webster's Dictionary"); *accord* 1 Samuel Johnson, *A Dictionary of the English Language* (1773) ("Johnson's Dictionary"). Similarly, "to attend" was defined as "present for some duty," Webster's Dictionary, and "within

reach or call," Johnson's Dictionary. And "attendance" meant "attention," "regard," Johnson's Dictionary, and "careful application of mind," Webster's Dictionary.

It is true, of course, that other definitions of "Attendance" and "absent" referred to physical presence. *E.g.*, Johnson's Dictionary (defining "attend," among others, as being "present with, upon a summons"). But recall that the question in this case is whether the Constitution *forbids* counting proxy votes towards a quorum. Because physical presence is "not the only possible" meaning of "Attendance" and "absent," the Compulsion Clause does not prohibit the Proxy Rule. *See Noel Canning*, 573 U.S. at 538; *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 683-684 (2010) (a "quorum" is simply "the number of members of a larger body that must participate for the valid transaction of business).[2]

"The Framers could have done it differently." *Chiafalo v. Washington*, 591 U.S. 578, 590 (2020). They were familiar with proxy voting from the elections context. *Id.* at 591. The English Parliament also permitted proxy voting in the House

[2] The Supreme Court has always read "attendance" broadly. In *Hurtado v. United States*, for example, the Court held that when a statute uses the phrase "attending in court," but "does not speak in terms of 'physical' … attendance," courts should not "engraft such a restriction upon the statute" because "attendance" does not automatically require "physical presence." 410 U.S. 578, 584-585 (1973); *see also South Dakota v. Wayfair*, 585 U.S. 162, 181 (2018) ("a business may be present in a State in a meaningful way without that presence being physical" (quotation marks and citation omitted)); *Freeman v. Bee Mach. Co.*, 319 U.S. 448, 454 (1943) (a person can be "found" in district even where not present in a "physical" sense).

of Lords since the 1600s. HL Hansard, 9 May 1837, Col.768 ("Hansard"), https://perma.cc/D28A-ZA9J (Thomas Slingsby Duncombe). And Maryland too had permitted proxy voting in its assemblies. *See* Susan Rosenfeld Falb, *Proxy Voting in Early Maryland Assemblies*, 73 MD. Hist. Mag. 217 (Sept. 1978), https://perma.cc/V5Y7-V9GF. If the Framers wanted to take proxy voting off the table, they could have easily done so. Yet "no language of that kind made it into the document they drafted." *Chiafalo*, 591 U.S. at 591. That resolves the question.

C. While Framing Era legislatures did not use proxy voting, that practice reflected then-existing technological limitations, not constitutional concerns.

Early American legislatures barred proxy voting because of logistical constraints. In the late 1700s, it could take weeks or months for a missive from a proxy to reach its destination.[3] Those technological limitations meant that when a member designated another to vote on his behalf, he was effectively giving a blank check for "general voting on all legislative measures," an outcome "intolerable" in a democracy. Hansard at Col.766 (Tennyson D'Eyncourt); *accord id.* at Col.770 (Thomas Wakley) (noting it could take "weeks or months" for "pieces of paper …

[3] As just one example of the technological limitations in the Framing Era, consider the 1815 Battle of New Orleans, which resulted in more than 2,000 deaths. It occurred weeks after the United States and England agreed to end the War of 1812 because news of the treaty had not yet reached the generals. James A. Carr, *The Battle of New Orleans and the Treaty of Ghent*, 3 Diplomatic Hist. 273, 273-282 (1979).

authori[zing] any member of a legislative body to vote for another" to reach the Parliament). There were also rampant authentication issues—as Parliament Member Thomas Slingsby Duncombe once put it, a legislator voting by proxy in the early 1800s was quite "possibly in the grave" when his proxy cast a vote on his behalf. *Id.* at Col.76.

Modern technology has obviated those concerns. Telephone, email, and Zoom conferences ensure Congressmembers can "yield" their "attention" to the matters being discussed, Johnson's Dictionary, and "communicate" with the chamber, Webster's Dictionary, even if they are not physically present in the Capitol. Contemporaneous news coverage allows members to monitor their proxies to ensure they follow instructions. And Congress officials can instantly resolve authentication issues by calling a remote member directly.

Harnessing these technological innovations, the Proxy Rule creates robust guardrails that ensure each voting member's active participation in lawmaking. "Before a Member's presence may be recorded by proxy during a quorum call," the member must give the proxy an "exact instruction" on how to vote. Remote Voting by Proxy Regulations §§ C.2, C.3, 166 Cong. Rec. H2257. That instruction must specify whether the member "intend[s] to vote yea, nay, or present on the specific text or matter at hand." *Id.* The Majority Leader must give remote members "24-hours' notice before any vote on the final disposition of bills" to ensure they have

time to familiarize themselves with the bill and draft an informed instruction. *Id.* at § E.1. And if a bill's language "changes after such instruction is received," the proxy must wait for further instructions before casting a ballot. *Id.* at § C.4. Indeed, Representatives Ocasio-Cortez (New York) and Rogers (Kentucky) changed their votes on the Appropriations Act in real time while voting by proxy. 117 Cong. Rec. H10529 (Dec. 23, 2022). The Proxy Rule is thus miles away from the blank-check voting that raised concerns in the Framing Era. Far from undermining majority rule, the Proxy Rule ensures that the acts of the House reflect the "opinion of a majority of the representative body," 2 Story § 834, by enabling the participation of members who are otherwise unable to vote. *See* Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. Chi. L. Rev. 361, 407 (2004) ("proxy voting," like quorum rules, "bolsters majoritarianism").

To be sure, the Framers likely considered physical presence a key aspect of a member's meaningful participation in the legislative process. But there is a difference between the "original meaning" of the Constitution's text and the Framers' "expectations about how the text would apply." *United States v. Rahimi*, 144 S. Ct. 1889, 1925 n.* (2024) (Barrett, J., concurring). "The question is not: Did the Founders at the time think" that Congress would prefer a particular legislative practice? *Noel Canning*, 573 U.S. at 533. It is instead: "Did the Founders intend to restrict" Congress "to the form of congressional [practice] then prevalent"? *Id.*

Because the Framers did not "reduce their thoughts" about proxy voting "to the printed page," *Chiafalo*, 591 U.S. at 592, their "expectations about how the text would apply" do not "control," *Rahimi*, 144 S. Ct. at 1935 n.* (Barrett, J., concurring). Nothing about the original meaning of the Quorum Clause's text or early American legislative practice precludes Congress from allowing quorum-by-proxy today.

II. HUNDREDS OF YEARS OF CONGRESSIONAL PRACTICE CONFIRM THAT CONGRESS MAY CONSTITUTIONALLY COUNT MEMBERS VOTING BY PROXY TOWARDS A QUORUM.

"[W]here a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide" the interpretation of the Constitution's text. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 36 (2022) (quoting *Noel Canning*, 573 U.S. at 572); *see also Marbury v. Madison*, 1 Cranch 137, 177 (1803). As James Madison wrote, it "was foreseen at the birth of the Constitution" that "a regular course of practice" would "liquidate & settle the meaning" of constitutional terms. Letter to Spencer Roane (Sept. 2, 1819), in 8 *The Writings of James Madison* 450 (G. Hunt ed. 1908).

History and tradition carry even more weight where a court reviews "a constitutionally delineated prerogative of the Legislative Branch." *Harrington v. Bush*, 553 F.2d 190, 214 (D.C. Cir. 1977). A court "cannot provide a second opinion on what is the best procedure" where Congress "has institutionally determined and

redetermined" that issue for hundreds of years. *Gregg v. Barrett*, 771 F.2d 539, 549 (D.C. Cir. 1985). In this case, more than 200 years of consistent practice confirm that Congress has broad power to adjust its quorum-counting rules, and that the Constitution imposes no physical-presence requirement that would constrain that broad power.

A. Congress has repeatedly adjusted its quorum-counting rules to ensure that it can continue to legislate during national emergencies.

Changes to quorum-counting rules are nothing new. In the Nation's first half-century, Congress calculated the quorum by using the maximum possible number of representatives as the denominator—that is, "for the House, the legally apportioned number of seats and, for the Senate, twice the number of states currently admitted to the Union." Williams, 48 Wm. & Mary L. Rev. at 1056. But it became near-impossible to achieve "a quorum based on the majority of all apportioned … seats" during the Civil War, because seceding States refused to send representatives to Congress. *Id.* at 1057.

Congress debated the legal status of seceded states and the implications of their status on the quorum requirements. Some Congressmembers argued that secession annihilated statehood, but others disagreed that states could "secede at will." Giuliana Perrone, *Nothing More Than Freedom* 117-118 (2023). In 1862, the Supreme Court confirmed that seceding states were "enemies, though not foreigners." *The Amy Warwick*, 67 U.S. 653, 674 (1862); *see also Texas v. White*,

74 U.S. 700, 726 (1868) (secessions were "absolutely null"). That meant each seceding State "continued to be a State," *Texas*, 74 U.S. at 726, and the number of allocated seats remained the same. Rather than allow the country's legislative business to grind to a halt, however, the House and Senate adjusted: They changed their quorum rules so that the denominator comprised the Senators and Representatives that were "chosen," rather than the total possible number of seats. *See* Journal of the House of Representatives, 37th Cong., 1st Sess. 117 (1861); Cong. Globe, 38th Cong., 1st Sess. 2085 (1864).

In the House, this change was "not challenged" by a single representative. Williams, 48 Wm. & Mary L. Rev. at 1059 (citing Journal of the House of Representatives, 37th Cong., 1st Sess. 117 (1861)). In the Senate, only Garrett Davis of Kentucky argued the change was unconstitutional because such a rule had never been enacted before. Cong. Globe, 38th Cong., 1st Sess. 2086 (1864). But other Senators disagreed. Reverdy Johnson explained that "in the absence of any express [constitutional] provision" to the contrary, the Senate could enact the quorum rules that "the business of the country demands," because "the government [must] go on." Cong. Globe, 38th Cong., 1st Sess. 2086 (1864). John Sherman added: "The framers of the Government never intended that their schemes should be broken up and this Government disorganized by the absence of the representatives of some of the States caused by death, secession, or anything of that kind." Cong. Globe, 38th

Cong., 1st Sess. 2051 (1864). In the end, the Senate overwhelmingly voted to change the quorum rule.

Operating under these adjusted rules, the Civil War and Reconstruction Congresses enacted some of the most consequential legal reforms in American history, including the Civil Rights Act of 1871 (which, among others, provides for § 1983 suits) as well as constitutional Amendments to abolish slavery, guarantee equal protection of the laws, and bar race discrimination in voting. *See* U.S. Const. amend. XII-XV. Those quorum rules remain in place today. *Standing Rules of the Senate*, S. Doc. No. 106-15 (2000); Jefferson's Manual, 116th Cong., 2d Sess., H. Doc. No. 116-177, § 53, https://perma.cc/4277-BT48.

The Civil War Era is not the only time when the House adjusted its quorum rules. It did so again in 1890, this time changing the way it calculated the numerator. Since the First Congress, the House calculated the numerator based on the members who actually voted on a bill. Williams, 48 Wm. & Mary L. Rev. at 1069. But during a period of intense partisan gridlock in 1890, the Democratic minority busted the quorum by "simply refusing to vote and requiring the Republicans to establish a quorum with their members alone." *Id.* at 1070. In response, Republicans changed the rules so that the numerator included all members "present and refusing to vote." 21 Cong. Rec. 949-951 (1890). As discussed, the Supreme Court rejected a constitutional challenge to this rule in *Ballin*.

The House revised its quorum rules once more in 2004 to prepare for future emergencies in light of the 9/11 attacks. Under the 2004 rules—which remain in force today—the Speaker may reduce the number needed for a quorum to include only non-incapacitated members after a catastrophic event. Rule XX.5(c)(4)(A), Rules of the U.S. House of Representatives, 116th Cong. (2019), https://perma.cc/J2SG-ZNDP.

As the Supreme Court's recent decision in *Rahimi* makes clear, "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our … tradition." 144 S. Ct. at 1898. In the Quorum Clause context, those principles are clear: "The constitution has prescribed no method of making this determination, and it is therefore within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact." *Ballin*, 144 U.S. at 6.

Consider what a contrary, rigid approach to the Quorum Clause would look like. The Constitution vests Congress with the power to "raise and support Armies," "declare War," "coin" and "borrow" money, "define and punish ... Offences against the Law of Nations," "provide and maintain'' the Navy, regulate ''the Militia," and suspend the writ of habeas corpus. U.S. Const. art. I, §§ 8-9. These legislative powers are "indispensable means of handling crises." Saikrishna Prakash, *The Sweeping Domestic War Powers of Congress*, 113 Mich. L. Rev. 1337, 1350 (2015)

("Prakash"). Yet a crisis can easily prevent Congressmembers from assembling at the Capitol. It is "simply inconceivable" that the Framers, drafting the Constitution on the heels of the Revolutionary War, would impose requirements so restrictive as to prohibit legislation when it is needed most. *See* Continuity of Congress: An Examination of the Existing Quorum Requirement and the Mass Incapacitation of Members: Hearing Before the H. Comm. on Rules, 108th Cong. 2d Sess. 35 (Apr. 29, 2004) (testimony of Former Solicitor General Walter Dellinger), https://perma.cc/P3DW-8XYS. It is even more improbable that the Framers would do so by means of an eleven-word clause that does nothing more than require "a Majority" "to do Business." U.S. Const. art. I, § 5, cl. 1.

They did not. The Framers recognized the "necessity for action" during the "emergencies of [the] nation," *The Federalist* No. 22 (A. Hamilton), and chose Congress as the "repository of [the] crisis power," Prakash, 113 Mich. L. Rev. at 1350. That choice must be respected, for "[e]very government ought to contain in itself the means of its own preservation," *The Federalist* No. 59 (A. Hamilton); *see also* Michael Stokes Paulsen, *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257, 1275 (2004) ("for any actor attempting to interpret and apply the Constitution faithfully, the idea that provisions of the Constitution should be construed, where possible, to avoid grave harm to the nation, is a useful and a valid principle for choosing between plausible readings of ambiguous constitutional commands"). The

Supreme Court, too, has long cautioned lower courts against converting the Constitution into a "suicide pact." *Haig v. Agee*, 453 U.S. 280, 309-310 (1981) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963)). And yet that is exactly what the District Court's rule will do if left in place.

B. Centuries-long practice of voting by unanimous consent confirms that the Constitution imposes no physical presence requirement.

The longstanding Congressional practice of unanimous consent confirms that the Quorum Clause does not require physical presence. Under this practice, Congress presumes that a quorum exists whenever members unanimously agree on a bill or a resolution, even when it is *obvious* that "fewer than a majority of Members" are physically present in the chamber. William McKay & Charles W. Johnson, *Parliament and Congress, Representation and Scrutiny in the Twenty-First Century* 85 (2010). That presumption holds unless a member makes "a point of no quorum," and business is done by a voice vote without a tally being recorded. 5 *Deschler's Precedents of the House of Representatives* (covering 1936-2013), ch. 20, § 1.3, https://perma.cc/TS6Y-4K65.

The Senate has "been conducting routine business by unanimous consensus since 1789." U.S. Senate, The First Unanimous Consent Agreement, https://perma.cc/WT8Z-N3LZ. The House began doing so in 1832. Jefferson's Manual, 118th Cong. H. Doc. No. 117-161, https://perma.cc/V6DZ-SEYK. And both Houses have used the rule for some of the most significant lawmaking in this

Nation's history. For example, "the Senate confirmed most U.S. circuit and district court nominations by unanimous consent or by voice vote." Cong. Research Serv., Judicial Nomination Statistics & Analysis: U.S. Circuit & District Courts, 1977-2022, 33 (Apr. 3, 2023), https://perma.cc/2SK5-SB9L. And the House has passed thousands of bills, including the Religious Freedom Restoration Act—a "super statute" critical to protecting religious exercise, *see Bostock v. Clayton County*, 590 U.S. 644, 682 (2020); House Session, May 11, 1993, C-SPAN, https://perma.cc/E4A2-ZU5R (1:30:00); Library of Congress, https://www.congress.gov/u/cnXIcXdIj_axjr0I4X_U6. If physical presence is required, "thousands of" statutes and judicial appointments will become "illegitimate" overnight. *Noel Canning*, 573 U.S. at 556. That cannot be right.

In fact, the Supreme Court has long assumed the practice *is* constitutional. *See id.* at 553-554 (the Senate may "pass[] a bill by unanimous consent" even when "the Senate Chamber [i]s, according to C-SPAN coverage, almost empty"). If the practice of unanimous consent does not need to abide the physical-presence requirement, neither does the Proxy Rule.

III. THE DISTRICT COURT'S CONTRARY CONCLUSION IS WRONG.

The District Court held that the original meaning of the Quorum Clause imposes a "physical-presence requirement." ROA.1373. Nothing the Framers wrote in the Constitution or said during the constitutional debates supports that reading.

First, though the District Court purported to begin with "the text" of the Quorum Clause, ROA.1373 (capitalization altered), the court ignored that text entirely and focused on the Compulsion Clause instead. It then plucked selective definitions of the words "Attendance" and "absent" from the Framing-Era dictionaries and concluded that they "often had a physical component to" them. ROA.1373-75. And because the "physical-presence requirement" in the Compulsion Clause would otherwise "serve no purpose," the court ascribed the same requirement to the Quorum Clause. ROA.1373.

That is constitutional interpretation backwards. The court *admitted* that the Quorum Clause "[o]n its own … provid[es] solely a number with no real indication of whether this number needed to be physically present." ROA.1373. And it recognized that the Framers' overarching purpose in drafting the Quorum Clause was to "provide 'confidence to the people that no law or burden could be imposed on them, by a few men.'" ROA.1378 (quoting 2 Farrand at 253). That should have been the end of the matter; the Compulsion Clause cannot contradict the Quorum Clause's plain language and "original understanding." *District of Columbia v. Heller*, 554 U.S. 570, 577, 625 (2008).

Indeed, the Supreme Court has already resolved this interpretive question in *Heller*. That case concerned the Second Amendment, which is also "naturally divided into two parts": the "prefatory" militia clause that explains the Amendment's

purpose, and the "operative" clause that confers a substantive right to bear arms. *Id.* at 577. The District argued that the prefatory clause made the Second Amendment inapplicable outside of the militia context, but the Court flatly rejected the argument. The militia clause "does not limit the [operative clause] grammatically," it said, so it cannot affect the scope of the substantive right. *Id.* Just so here. The Compulsion Clause stands alone grammatically and so cannot limit Congress's authority under the Quorum Clause. Reading the Compulsion Clause to constrict the Quorum Clause would be even more improper than in *Heller* because the Compulsion Clause was designed to *expand* Congress's authority to legislate. *See supra* pp. 8-9.

Second, even if the Compulsion Clause could limit Congress's authority to act under the Quorum Clause, the District Court's reading of the Compulsion Clause belied the plain meaning of the words as they were used during the Framing Era. The District Court dismissed any definitions of "Attendance" and "absent" that do not require physical presence, reasoning that "a figurative usage" of these words "would seem odd . . . in the Constitution." ROA.1375. But it is not at all figurative to say that a person is in "attendance" when she is "within reach or call," Johnson's Dictionary, or that she is "absent" when she is "at such a distance as to prevent communication," Webster's Dictionary.

If anything, the so-called "figurative" definitions the District Court dismissed are a better fit for the Quorum Clause than the "physical" definitions the court relied

on. Take "attendance." The court said that the "most common definition" of that word was "the act of waiting on another" or "service." ROA.1374 (citations omitted). The court accordingly concluded that "[t]o serve or wait on another, one typically would need to be in the same place as the person served." *Id.* But it makes little sense to say that a House member must be physically in the same place as her colleagues because the member is "waiting on" or "serv[ing]" those other members. A much more natural interpretation is that a House member is in "attendance" for quorum purposes when she can yield "attention" to legislative business, or when she is "within reach or call." Johnson's Dictionary.

Nor does reading the Quorum Clause to require participation rather than physical presence turn the Compulsion Clause into "mere surplusage." ROA.1371. By authorizing Members to compel attention and participation of other Members, the Compulsion Clause does exactly what the Framers envisioned: it "secure[s] the public from any hazard of passing laws ... against the deliberate opinion of a majority of the representative body." 2 Story § 834.

Third, relying on just one statement by a single delegate, the District Court concluded that the Framers' debates "centered around concerns about the difficulties for a majority of members to be physically present." ROA.1376 (citing 2 Farrand at 253 (George Mason)). That reasoning does not hold up. The vast majority of delegates debated the *number* of legislators necessary for the quorum, not their

physical presence. *See* 2 Farrand at 251 (John Mercer arguing that a majority requirement "will put it in the power of a few by seceding at a critical moment to introduce convulsions, and endanger the Government"); *id.* at 253 (Governeur Morris and Rufus King proposing to "fix the quorum at 33 members in the [House and] 14 in the Senate); *id.* (Elbridge Gerry recommending capping the House's quorum at 50); *id.* (Oliver Ellsworth and James Wilson arguing that a majority quorum rule was necessary to provide "confidence to the people that no law or burden could be imposed on them, by a few men"); *id.* (Daniel Carroll agreeing that the legislature could not be trusted to require a sufficient quorum if not compelled by the Constitution). The District Court was wrong to minimize this historical context.

Regardless, George Mason's concern over the physical distance—that "the Central States could always take care to be on the spot and could wear down the other members," ROA.1378 (cleaned up)—simply reflected the historical reality. As discussed, conducting legislative business by proxy was not logistically practical in 1789. So it made good sense to worry that a lower quorum requirement "would be dangerous to the distant parts" of the country. 2 Farrand at 253. But the Framers did not "reduce" these assumptions about physical presence to the Constitution's "printed page," *Chiafalo*, 591 U.S. at 592, allowing future Congresses to depart from

the legislative practice "then prevalent" as technology allows, *Noel Canning*, 573 U.S. at 550.

The District Court made much ado about the fact that the Framers opted to solve quorum-busting by authorizing Congress to compel attendance instead of permitting proxy voting, even though both Alexander Hamilton and Benjamin Franklin had mentioned proxy voting in their drafts of the Constitution and the Articles of Confederation. ROA.1379-80. But there is no evidence that Hamilton's or Franklin's draft was rejected because any Framer thought proxy voting should be unconstitutional. And an equally strong inference cuts the other way: the Framers knew that proxy voting was a possibility yet they did not preclude the practice. Indeed, the District Court neglected to mention that Franklin's proposed draft expressly *barred* the legislature from counting proxy votes towards a quorum. Franklin, *Proposed Articles of Confederation*, on or before 21 July 1775, https://perma.cc/J2N4-LPW4 (a quorum would be "One half of the Members return'd *exclusive of Proxies*") (emphasis added). That suggests that at least one Framer believed such a choice was within a legislature's authority if the Constitution did not instruct otherwise.

Fourth, the District Court was wrong to conclude that the subsequent historical practice supports a physical presence requirement. The District Court's principal evidence on this score was that the First, Fifth, and Eighth Congresses

waited to legislate until a majority was present. ROA.1381-83. Again, that simply reflected the practical reality of the time.

The District Court's other evidence of historical practice was even further afield. The court collected stray remarks from individual representatives over the last several hundred years insisting that "[t]he Chair cannot count any members that he cannot see." ROA.1383-84 (cleaned up). But these statements merely confirmed then-current House and Senate rules that required physical presence; they did not speak to the *constitutionality* of quorum-by-proxy. And as the Supreme Court made clear, "[i]t is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time." *Ballin*, 144 U.S. at 5. "[O]riginalism does not require" a "use it or lose it" approach to constitutional interpretation. *Rahimi*, 144 S. Ct. at 1925 (Barrett, J., concurring).

* * *

No doubt, Congress has had good reasons to prefer in-person legislative business even after new technology made remote participation more feasible. Face-to-face proceedings foster deliberation, discussion, and compromise—which might well be why the House discontinued proxy voting after the pandemic ended. But the question in this case is not whether the Quorum Clause affirmatively permits quorum-by-proxy, but whether the Clause prohibits it. Nothing about the original meaning of the Quorum Clause's text, the Framers' debates, or centuries of historical

practice requires physical presence. And it is no answer that previous Congresses—or the District Court—believed that physical presence was "better" or "more just." *Ballin*, 144 U.S. at 5. As much today as in 1789, debates over legislative procedure belong in Congress—not in court.

CONCLUSION

For the foregoing reasons, the District Court's judgment should be reversed.

Respectfully submitted,

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August 16, 2024

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/s/ Jessica L. Ellsworth
Jessica L. Ellsworth

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I hereby certify that the foregoing was filed with the Clerk using the appellate CM/ECF system on August 16, 2024. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Jessica L. Ellsworth
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August 19, 2024

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No. 24-10386 State of Texas v. Garland
USDC No. 5:23-CV-34

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We filed your brief. However, you must make the following corrections within the next 14 days.

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Case No. 24-10386

State of Texas,

Plaintiff - Appellee

v.

Merrick Garland, U.S. Attorney General, in his official capacity as United States Attorney General; Charlotte A. Burrows, in her official capacity as Chair of the U.S Equal Employment Opportunity Commission; Jocelyn Samuels, in her official capacity as Vice Chair of the U.S Equal Employment Opportunity Commission; Keith Solderling, in his official capacity as Commissioner of the U.S Equal Employment Opportunity Commission; Andrea R. Lucas, in her official capacity as Commissioner of the U.S Equal Employment Opportunity Commission; Christopher W. Lage, in his official capacity as General Counsel of the Equal Employment Opportunity Commission; Equal Employment Opportunity Commission; United States Department of Justice,

Defendants - Appellants