

No. 24-10386

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**In the United States Court of Appeals  
for the Fifth Circuit**

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STATE OF TEXAS,  
*Plaintiff-Appellee,*

v.

PAMELA BONDI, U.S. ATTORNEY GENERAL, IN HER 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.*

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On Appeal from the United States District Court  
for the Northern District of Texas, Lubbock Division  
Case No. 5:23-cv-034-H

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***EN BANC BRIEF OF AMICI CURIAE FORMER NATIONAL SECURITY  
OFFICIALS IN SUPPORT OF DEFENDANTS-APPELLANTS***

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE  
DISCLOSURE STATEMENT**

The undersigned counsel of record certifies that, in addition to the named parties, their counsel, and prior *amici*, the following listed persons and entities as described in the fourth sentence of Fifth Circuit 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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## TABLE OF CONTENTS

	<b>Page</b>
CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT .....	i
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES .....	iv
INTEREST OF <i>AMICI CURIAE</i> .....	ix
INTRODUCTION .....	1
ARGUMENT .....	2
I.    LONGSTANDING PRACTICE CONFIRMS THAT THE CONSTITUTION DOES NOT REQUIRE PHYSICAL ASSEMBLY FOR CONGRESS TO ACT .....	2
A.    Congress Has Long Conducted Business Without Physically Assembling a Majority .....	3
B.    The Physical-Presence Rule Conflicts With Long Legislative Practice and Has No Limiting Principle .....	7
II.   NATIONAL SECURITY THREATS COULD PREVENT CONGRESS FROM GATHERING IN PERSON.....	9
III.  A PHYSICAL-PRESENCE REQUIREMENT WOULD DISABLE CONGRESS AT PRECISELY THE MOMENTS WHEN ITS ACTION IS MOST CRITICAL .....	17
CONCLUSION.....	20
CERTIFICATE OF SERVICE .....	21
CERTIFICATE OF COMPLIANCE.....	22

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>NLRB v. Noel Canning</i> , 573 U.S. 513 (2014).....	3, 5
<i>Terminiello v. City of Chicago</i> , 337 U.S. 1 (1949).....	19
<b>Constitutional Provisions</b>	
U.S. Const. amend. XX, § 2.....	5
U.S. Const. Article I, § 5, cl. 1.....	2, 17
U.S. Const. Article I, § 5, cl. 2.....	2, 3, 17
U.S. Const. Article I, § 5, cl. 3.....	2
U.S. Const. Article I, § 5, cl. 4.....	5
<b>Statutes</b>	
Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb <i>et seq.</i> .....	4
<b>Legislative Materials</b>	
71 Cong. Rec. 3228 (1929).....	5
96 Cong. Rec. 16,980 (1950).....	5
107 Cong. Rec. 5515 (1961).....	4
156 Cong. Rec. S7137 (daily ed. Sept. 15, 2010).....	4
157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011).....	6
157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011).....	5
157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011).....	6
158 Cong. Rec. H6285-86 (daily ed. Sept. 28, 2012).....	6

*Continuity of Congress: An Examination of the Existing Quorum Requirement and the Mass Incapacitation of Members: Hearing Before the Comm. on Rules*, 108 Cong. 2 (Apr. 29, 2004).....17

H.R. Con. Res. 232, 96th Cong., 93 Stat. 1438 (Dec. 21, 1979).....5

**Other Authorities**

Thomas Adamson & Jeffrey Schaeffer, *Arsonists attack French high-speed rail system hours before opening ceremonies of the Paris Olympics*, AP News (July 26, 2024), <https://perma.cc/4QQK-VXRJ>.....10

Simon A. Andrew *et al.*, *Ebola crisis response in the USA: Communication management and SOPs*, 31 Int’l J. of Disaster Risk Reduction 243 (2018), <https://perma.cc/54UC-UBZC> .....13

Harriet Baskas, *What to know about travel safety as the Israel-Hamas war continues*, NBC News (Oct. 24, 2023), <https://perma.cc/7LYY-KLQQ>.....10

Br. for Legal Historians & Legislation Professors as *Amici Curiae* Supporting Defendants-Appellants, *Texas v. Bondi*, 149 F.4th 529 (No. 24-10386).....4

Br. for Senate Republican Leader Mitch McConnell as *Amicus Curiae* Supporting Defendants-Appellants, *Texas v. Bondi*, 149 F.4th 529 (No. 24-10386).....4, 7

Jack Brook & Lisa Baumann, *United Airlines grounds flights nationwide*, AP (Aug. 7, 2025), <https://bit.ly/4ahBrHY>.....12

Ctr. for Counterproliferation Rsch., *Anthrax In America: A Chronology and Analysis of the Fall 2001 Attacks* 1 (2002), <https://bit.ly/3WyMUfA> .....15

Cong. Rsch. Serv., 96-452, *Voting and Quorum Procedures in the Senate* 1 (2020), <https://www.congress.gov/crs-product/96-452> .....4

Cong. Rsch. Serv., RL33939, *The Rise of Senate Unanimous Consent Agreements* 1 (2008), <https://www.congress.gov/crs-product/RL33939> .....3

Rebecca Falconer, *Hundreds of United flights across U.S. delayed after “technology issue,”* Axios (Aug. 6, 2025), <https://bit.ly/4kxRm9N> .....12

*The Federalist* No. 23 .....19

*The Federalist* No. 59 .....19

*Flying Again: Washington's Reagan National to Reopen,* NPR News (Oct. 2, 2001), <https://bit.ly/3ZUdLoc>.....10

Brian Fung, *We finally know what caused the global tech outage - and how much it cost,* CNN (July 24, 2024), <https://bit.ly/4r43QbQ>.....12

Andrew Glass, *U.S. Capitol likely terrorist target: Sept. 11, 2001,* Politico (Sept. 11, 2016), <https://bit.ly/4aEEQC1> .....15

Gabriel Higgins, *Airports that have been affected by drones,* Int'l Airport R. (Nov. 7, 2025), <https://bit.ly/4cmluTp> .....10

Leslie Josephs, *Winter Storm Fern cancels thousands of flights as snow slams East Coast,* CNBC (Jan. 23, 2026), <https://bit.ly/3ZyNfRh>.....16

Paul Kane, *Congress in grip of confusion, fear over coronavirus unsure whether to stay or go,* Wash. Post (Mar. 10, 2020).....15

Sara Machi *et al.*, *FAA system outage disrupts thousands of flights across U.S.,* CNBC (Jan. 11, 2023), <https://bit.ly/3M4XxWd> .....12

Sara Machi *et al.*, *United flight to L.A. diverted to Chicago due to bomb threat,* CBS News (Feb. 21, 2024), <https://bit.ly/4rra4lQ>.....10

Nat'l Sec. Agency, *Pro-Russia Hactivists Conduct Opportunistic Attacks Against U.S. and Global Critical Infrastructure* (Dec. 9, 2025), <https://bit.ly/4rHXGxI> .....9

*No-Fly Zone: Ebola Quarantine Rules Keep Researchers Away,* NBC News (Nov. 4, 2014), <https://www.nbcnews.com/storyline/ebola-virus-outbreak/no-fly-zone-ebola-quarantine-rules-keep-researchers-away-n241051> .....13

Steve Perlstein & Sari Horwitz, *High Court Closes in Anthrax Scare*,  
 Wash. Post (Oct. 26, 2001).....16

Pam Pylas & Jamey Keaten, *Cyberattack disrupts systems at several  
 major European airports, delaying travel*, PBS News,  
<https://bit.ly/4tpYCsC> (Sept. 20, 2025).....12

Joseph Olmo, NBC Wash.,  
<https://www.instagram.com/reel/DT6XaT6EdQj>.....16

Kevin Poireault, *US: Maryland Confirms Cyber Incident Affecting  
 State Transportation Systems*, Infosecurity (Aug. 26, 2025),  
<https://bit.ly/4qBHsp7>.....10

*Preserving Our Institutions: The First Report of the Continuity of  
 Government Commission*, The Continuity of Gov’t Comm’n (May  
 2003), <https://bit.ly/4tp25rf>.....18

2 *Records of the Federal Convention of 1787* 253 (Max Farrand ed.,  
 1911) .....8

Floyd M. Riddick & Alan S. Frumin, *Riddick’s Senate Procedure:  
 Senate Precedents and Statistics* 1038 (1992).....4

Lydia Saad, *Historically Low Faith in U.S. Institutions Continues*,  
 Gallup (July 6, 2023), <https://bit.ly/4kspd3V> .....18

Marc Santora, *First Patient Quarantined Under Strict New Policy  
 Tests Negative for Ebola*, N.Y. Times (Oct. 24, 2014) .....13

David Schaper, *It Was Shoes On, No Boarding Pass Or ID. But  
 Airport Security Forever Changed On 9/11*, NPR News (Sept. 10,  
 2021), <https://bit.ly/4kumF5p> .....10

Charnetta L. Smith, *et al.*, *Addressing Needs of Contacts of Ebola  
 Patients During an Investigation of an Ebola Cluster in the United  
 States - Dallas, Texas, 2014*, U.S. Ctrs. for Disease Control and  
 Prevention (Feb. 13, 2015), <https://bit.ly/4c2zG3Z>.....13

2 Joseph Story, *Commentaries on the Constitution of the United States*  
 § 835 (1833).....3

Sam Sweeney *et al.*, *Software maintenance mistake at center of major FAA computer meltdown: Official*, ABC News (Jan. 11, 2023), <https://bit.ly/4al0qu1> .....11

U.S. Ctrs. for Disease Control and Prevention, *Ebola Disease Basics* (Apr. 23, 2024), <https://perma.cc/27F3-NEB9> .....13

U.S. Gov’t Accountability Off., GAO-21-86, *Aviation Cybersecurity: FAA Should Fully Implement Key Practices to Strengthen Its Oversight of Avionics Risks 5* (Oct. 9, 2020), <https://perma.cc/A757-SQG2> .....11

U.S. Gen. Acct. Off., Report to the Chairman, Comm. on Finance, U.S. Senate, *Capitol Hill Anthrax Incident EPA’s Cleanup Was Successful; Opportunities Exist to Enhance Contract Oversight 1* (June 2003), <https://bit.ly/3LVWDYe> .....15

U.S. Senate, *The First Unanimous Consent Agreement*, <https://perma.cc/WT8Z-N3LZ>;.....3

Jeff VanDam, Note, *The Kill Switch: The New Battle over Presidential Recess Appointments*, 107 Nw. U. L. Rev. 361 (2012) .....5

Rebecca Whitehair, *U.S. Under Anthrax Attack; Bioterror Source Unknown*, Arms Control Ass’n (Nov. 2001), <https://bit.ly/4duGgxv> .....16

Holly Yan *et al.*, *3,000 US flights are canceled as a global computer outage wreaks havoc on businesses, 911 systems and government agencies*, CNN (July 19, 2024), <https://bit.ly/3ZQ8xd9>.....12

Kun Zhai *et al.*, *The impact of major public health emergencies on Trust in Government: From SARS to COVID-19*, Front Psychol. (Nov. 16, 2022), <https://bit.ly/3NX0Xej>.....18

## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici* are former high-ranking national security officials with extensive experience in the legislative and executive branches of government, as well as the military. *Amici* understand the myriad national security threats our Nation faces—and the need for all sectors of the government to work together in response to those threats. They submit this brief to address a question of great institutional consequence: Whether the Constitution disables Congress from acting unless a majority of its Members can physically gather in a single location (and in the view of Texas, on Capitol Hill *alone*). In the view of *amici*, such a construction would undermine the Nation’s security, impair Congress’s ability to perform its core constitutional functions during national emergencies, and conflict with longstanding historical practice confirming that the Constitution vests Congress with authority to set rules for its proceedings to ensure it remains able to conduct the Nation’s business even during times of crisis.

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<sup>1</sup> No party’s counsel authored this brief in whole or in part, no party or party’s counsel contributed money intended to fund this brief, and no person other than *amici*, their members, and their counsel contributed money to fund this brief. All parties consent to the filing of this brief.

<sup>2</sup> *Amici* all have had significant and lengthy careers; for the sake of brevity, they are identified by a subset of the positions they have held.

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## INTRODUCTION

*Amici* know from experience that the United States will continue to face serious threats to its safety and stability. Those threats may be foreign or domestic. They may arise from hostile actors, natural disasters, public-health emergencies, or technological failures. Whatever their source, national emergencies have repeatedly disrupted ordinary travel, communications, and physical assembly—sometimes without warning. When that happens, the federal government must still be able to perform its essential constitutional functions.

Congress's ability to act in such moments is indispensable. That has never depended on the physical presence of a majority of Members in a single location. From the Founding to the present, Congress has conducted its business pursuant to rules of its own making, including through long-established practices such as unanimous consent and *pro forma* sessions—procedures that permit legislative action even when relatively few Members are physically assembled. Those practices are not recent innovations. They are among the ways Congress has long exercised the authority the Constitution vests in each House to determine the rules of its proceedings and to ensure continuity of government.

A judicially imposed rule requiring the physical assembly of a quorum as a constitutional precondition to action would upend that settled understanding. It would paralyze Congress precisely when its participation is most critical—when

appropriations must be made, authorities granted, or other action is necessary in response to a national crisis. That disabling limitation, created by the district court, rejected by the panel majority, and urged again here, finds no support in the Constitution’s text, structure, or historical practice. The Court should decline to adopt a construction that would so constrain Congress’s ability to function as a coequal branch of government.

## ARGUMENT

### I. LONGSTANDING PRACTICE CONFIRMS THAT THE CONSTITUTION DOES NOT REQUIRE PHYSICAL ASSEMBLY FOR CONGRESS TO ACT

The Constitution vests Congress with great discretion in conducting its proceedings. Each House is granted authority to “be the Judge of the ... Qualifications of its own Members,” U.S. Const. art. I, § 5, cl. 1, to decide how to record and report its proceedings (including votes), *id.* cl. 3, and, most important here, to “determine the Rules of its Proceedings,” *id.* cl. 2. While the Quorum Clause requires that “a Majority of each [House] shall constitute a Quorum to do Business,” *id.* cl. 1, it does not specify *how* presence must be established. To the contrary, it expressly leaves to each House discretion to compel attendance “in such Manner” as it provides. And by empowering each House to “determine the Rules of its Proceedings,” the Constitution has necessarily been understood to include the authority to define how a quorum is determined. Thus, both Congress and the courts

have long understood the Constitution to vest each House with broad authority to conduct its proceedings.

That discretion was by design. After the Revolution and the tumultuous early years of the Republic, the Founders understood that the Nation’s legislature needed the flexibility to govern itself so that it was always able to “transact the business of the nation,” 2 Joseph Story, *Commentaries on the Constitution of the United States* § 835 (1833), in any manner of circumstances it might confront, *NLRB v. Noel Canning*, 573 U.S. 513, 534 (2014).

**A. Congress Has Long Conducted Business Without Physically Assembling a Majority**

Since the Founding, Congress has exercised its discretion to “determine the Rules of its Proceedings,” U.S. Const. art. I, § 5, cl. 2, in ways that do not require the physical assembly of a majority in a single location. Two longstanding practices illustrate the point.

**Unanimous Consent.** First, since the First Congress,<sup>3</sup> Congress has relied on unanimous consent to “conduct[] much of its business,” *Noel Canning*, 573 U.S. at 553. Under that procedure, the presiding officer assumes a quorum is present unless a Member objects. No roll call is taken. No physical headcount is conducted. *See*

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<sup>3</sup> U.S. Senate, *The First Unanimous Consent Agreement*, <https://perma.cc/WT8Z-N3LZ>; Cong. Rsch. Serv., RL33939, *The Rise of Senate Unanimous Consent Agreements* 1 (2008), <https://www.congress.gov/crs-product/RL33939>.

Floyd M. Riddick & Alan S. Frumin, *Riddick's Senate Procedure: Senate Precedents and Statistics* 1038 (1992) (“[T]he Senate operates on the absolute assumption that a quorum is always present until a point of no quorum is made.”). And it is openly acknowledged that unanimous consent is often used when far fewer than a majority of Senators are physically present. *See* Cong. Rsch. Serv., 96-452, *Voting and Quorum Procedures in the Senate* 1 (2020) (“It is unusual for as many as 51 Senators to be present on the floor at the same time unless a roll call vote is in progress.”), <https://www.congress.gov/crs-product/96-452>.

This practice is not incidental. It is the mechanism by which Congress passes much if not most legislation (including the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq.*), confirms executive and judicial nominations (including many Supreme Court Justices), considers treaties, adopts resolutions, and takes legally consequential procedural actions. *See, e.g.*, Br. for Senate Republican Leader Mitch McConnell as *Amicus Curiae* Supporting Defendants-Appellants, *Texas v. Bondi*, 149 F.4th 529 (No. 24-10386), at 20–21; Br. for Legal Historians & Legislation Professors as *Amici Curiae* Supporting Defendants-Appellants, *Texas v. Bondi*, 149 F.4th 529 (No. 24-10386), at 20–21; 156 Cong. Rec. S7137–38 (daily ed. Sept. 15, 2010) (Sen. Coburn); 107 Cong. Rec. 5515 (1961) (Treaty of Friendship with Belgium).

***Pro Forma Sessions.*** Second, for almost a century,<sup>4</sup> Congress has relied on *pro forma* sessions to satisfy important constitutional obligations and to conduct substantive business. Such sessions typically involve only a Member or two and a few staffers in an otherwise empty chamber, and typically last a minute or two at most. See Jeff VanDam, Note, *The Kill Switch: The New Battle Over Presidential Recess Appointments*, 107 Nw. U. L. Rev. 361, 379–80 (2012) (noting a typical session, which lasted 85 seconds and had two Senators present). They are expressly designed to avoid assembling a quorum while preserving Congress’s institutional capacity to act.

Congress has long used *pro forma* sessions to comply with the Adjournments Clause, which provides that “[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days.” U.S. Const. art. I, § 5, cl. 4. For nearly a half-century,<sup>5</sup> Congress has also used *pro forma* sessions to satisfy the Twentieth Amendment’s requirement that Congress “assemble” annually and that “such meeting shall begin ... on the 3d day of January, unless they shall by law appoint a different day.” U.S. Const. amend. XX, § 2. The sessions are denominated “*pro forma*” precisely because a majority of that House does not need

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<sup>4</sup> See 71 Cong. Rec. 3228–29 (1929) (Rep. Tilson); see also 96 Cong. Rec. 16,980 (1950); Resp. Br. App. B, *NLRB v. Noel Canning*, 573 U.S. 513 (2014) (collecting examples), <https://perma.cc/8XX3-F7GB>.

<sup>5</sup> See, e.g., H.R. Con. Res. 232, 96th Cong., 93 Stat. 1438 (Dec. 21, 1979) (*pro forma* sessions for both houses); 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011).

to assemble. Their purpose is to avoid assembling a quorum while preserving Congress's capacity to act as needed.

Congress has also repeatedly used *pro forma* sessions to conduct substantive business. During a *pro forma* session in August 2011, for example, the Senate passed the Airport and Airway Extension Act, a measure necessary to prevent disruptions to aviation funding and safety programs. 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011). During a September 2012 *pro forma* session, the House passed three bills. 158 Cong. Rec. H6285–86 (daily ed. Sept. 28, 2012). And on December 23, 2011, during a *pro forma* session, the Senate agreed to temporarily extend the payroll tax cut. *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). The President signed all five bills into law.

These practices reflect Congress's settled understanding that it may define, through its own rules, what it means to assemble and remain in session. If such sessions have long been accepted to satisfy other constitutional requirements—one located in the same section of Article I as the Quorum Clause, and another expressly addressing Congress's obligation to "assemble" and "meet[]"—there is no principled basis for concluding that they are insufficient for purposes of the Quorum Clause. The existence, longevity, and acceptance of these practices foreclose the contention that the Quorum Clause silently imposes a rigid physical-presence requirement. Taken together, unanimous consent and *pro forma* sessions reflect a

settled understanding: presence for constitutional purposes is a determination governed by congressional rules, not a rigid requirement of physical co-location.

**B. The Physical-Presence Rule Conflicts With Long Legislative Practice and Has No Limiting Principle**

The rule urged by Texas—and embraced by the dissent—cannot be reconciled with two centuries of practice. The dissent offers no limiting principle that would preserve settled practices like uniform consent and *pro forma* sessions while imposing a new physical-presence rule elsewhere. Nor could it. A constitutional requirement that a majority be physically assembled would call into question Congress’s most common procedures, undermine its ability to remain in session, and cast doubt on enacted legislation from the Religious Freedom Restoration Act to the Copyright Term Extension Act to the COVID-19 Origins Declassification Bill.<sup>6</sup> Adopting such a rule would be extraordinarily disruptive.

Texas’s position underscores the extremity of the rule it advocates. It has suggested that even real-time participation by secure videoconference would fail to satisfy the Quorum Clause. At oral argument, Texas went further still, suggesting that Congress must physically assemble in the U.S. Capitol.<sup>7</sup> That would have been

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<sup>6</sup> The dissent seeks to distinguish the unanimous consent procedure by saying it is permitted because Congress must first “muster[] an actual quorum at the beginning of each session.” 149 F. 4th at 553. But that provides no basis for distinction. Congress established an actual quorum before using the proxy mechanism challenged here. And Congress has long used *pro forma* sessions to satisfy the Assembly Clause’s requirement of initial assembly on January 3 with only a member or two present in an empty chamber. *See supra* at 5–6.

<sup>7</sup> *See* Oral Argument at 19:55, *Texas v. Bondi*, 149 F.4th 529 (No. 24-10386).

both impracticable and unacceptable to early Congresses, which met in temporary quarters before a permanent structure was built and returned to temporary quarters after the British burned the Capitol during the War of 1812.

Nothing in the Constitution supports the assertion of such a requirement. Article I speaks of “Houses,” not buildings. It does not require Congress to meet in a particular structure, city, or room. Nor does it condition legislative power on access to a specific physical location—or on physical attendance of a majority. As the next section explains, the consequences of that theory are grave. It would disable Congress not only during pandemics or biological emergencies, but also during travel shutdowns caused by cyber incidents or infrastructure failures that prevent physical assembly.

The Constitution does not require Congress to accept that risk. It vests each House with authority to determine the rules of its proceedings precisely because it grants each the ability to best determine how it will function in each session of Congress. A rule that categorically excludes remote participation would substitute judicial rigidity for constitutional design. It finds no support in the text, structure, or history of Article I.

\* \* \* \* \*

The Quorum Clause was adopted to prevent a minority from conducting business against the will of the majority. See 2 *Records of the Federal Convention*

of 1787 253 (Max Farrand ed., 1911) (statement of Oliver Ellsworth). It was not intended to impose a rigid physical-presence requirement or to serve as a technical trap for undoing legislation enacted with overwhelming support of both Houses.

## **II. NATIONAL SECURITY THREATS COULD PREVENT CONGRESS FROM GATHERING IN PERSON**

*Amici* know from experience that this country faces a wide range of national security threats at any given time. Some are posed by malicious actors—foreign adversaries, terrorist organizations, criminal enterprises, or homegrown extremists. Others may be less nefarious but no less disruptive, including public health emergencies, technological failures, and severe natural disasters. Threats of sufficient gravity, whatever their source, can pose serious national security risks when they impede or prevent Congress from physically convening to respond to an immediate crisis.

Attacks on the Nation’s transportation infrastructure could prevent Members of Congress from assembling in person. A physical or cyber attack on airports, railways, or major roadways could paralyze travel nationwide and make return to Washington impossible. This is not a hypothetical concern: the National Security Agency warned in December 2025 that pro-Russia “hactivists” have engaged in opportunistic attacks on critical U.S. infrastructure.<sup>8</sup> A cyber incident caused

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<sup>8</sup> Nat’l Sec. Agency, *Pro-Russia Hactivists Conduct Opportunistic Attacks Against U.S. and Global Critical Infrastructure* (Dec. 9, 2025), <https://bit.ly/4rHXGxI>.

disruptions in Maryland transit systems in August 2025.<sup>9</sup> Drone attacks, including “systemic operation[s]” by “professional actor[s]” have forced recent airport closures both at home and abroad.<sup>10</sup> Although security at American airports has improved substantially since September 11, 2001, it is not infallible. Explosives, arson, and hijackings remain active threats. If an attack were to occur, the resulting response may require the closure of U.S. airspace for extended periods.<sup>11</sup> After September 11, for example, the FAA Command Center was forced to shut down all commercial air traffic for three days.<sup>12</sup> The capital’s closest airport, Ronald Reagan-Washington National Airport, remained closed for *three weeks*.<sup>13</sup>

Disruptions need not involve physical attacks. Much of the Nation’s transportation system depends on complex digital infrastructure and cybersecurity systems. Take air travel. Airplanes have avionics systems—which include “engine

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<sup>9</sup> Kevin Poireault, *US: Maryland Confirms Cyber Incident Affecting State Transportation Systems*, Infosecurity (Aug. 26, 2025), <https://bit.ly/4qBHsp7>.

<sup>10</sup> Gabriel Higgins, *Airports that have been affected by drones*, Int’l Airport R. (Nov. 7, 2025), <https://bit.ly/4cmluTp> (quoting Danish defense minister, referencing airports across the European Union).

<sup>11</sup> See Sara Machi *et al.*, *United flight to L.A. diverted to Chicago due to bomb threat*, CBS News (Feb. 21, 2024), <https://bit.ly/4rra4lQ>; see also Harriet Baskas, *What to know about travel safety as the Israel-Hamas war continues*, NBC News (Oct. 24, 2023), <https://perma.cc/7LYY-KLQQ> (quoting TSA spokesman that the TSA is operating at a “heightened level of security as a result of world events and the current threat environment”); Thomas Adamson & Jeffrey Schaeffer, *Arsonists attack French high-speed rail system hours before opening ceremonies of the Paris Olympics*, AP News (July 26, 2024), <https://perma.cc/4QQK-VXRJ>.

<sup>12</sup> David Schaper, *It Was Shoes On, No Boarding Pass Or ID. But Airport Security Forever Changed On 9/11*, NPR News (Sept. 10, 2021), <https://bit.ly/Fha4kumF5p>.

<sup>13</sup> *Flying Again: Washington’s Reagan National to Reopen*, NPR News (Oct. 2, 2001), <https://bit.ly/3ZUDLoc>.

controls, flight control systems, navigation, communications, flight recorders, lighting systems that provide interior and exterior illumination, fuel systems, weather radar, performance monitors, and systems that carry out hundreds of other mission and flight management tasks.”<sup>14</sup> The connectivity of “airplane networks and systems and various other systems via the Internet increasingly presents more opportunities for cyberattacks.”<sup>15</sup> For example, “critical data used by cockpit systems could be altered, someone with authorized access could intentionally or unintentionally misuse flight data, commercial components within avionics systems could contain vulnerabilities that enable cyberattacks, and malevolent hackers could seek to disrupt flight operations with various types of attacks on navigational data.”<sup>16</sup> Failures—whether malicious or inadvertent—can halt travel on a national scale.

Recent experience bears that out. In January 2023, an FAA pilot alert system failed after an engineer inadvertently replaced one file with another,<sup>17</sup> prompting a nationwide ground stop, delaying thousands of flights and disrupting air travel for days.<sup>18</sup> In July 2024, a faulty software update by a cybersecurity vendor triggered

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<sup>14</sup> U.S. Gov’t Accountability Off., GAO-21-86, *Aviation Cybersecurity: FAA Should Fully Implement Key Practices to Strengthen Its Oversight of Avionics Risks* 5 (Oct. 9, 2020), <https://perma.cc/A757-SQG2>.

<sup>15</sup> *Id.* at 19.

<sup>16</sup> *Id.*

<sup>17</sup> Sam Sweeney *et al.*, *Software maintenance mistake at center of major FAA computer meltdown: Official*, ABC News (Jan. 11, 2023), <https://bit.ly/4al0qu1>.

<sup>18</sup> Sara Machi *et al.*, *FAA system outage disrupts thousands of flights across U.S.*, CNBC (Jan. 11, 2023), <https://bit.ly/3M4XxWd>.

widespread outages that grounded thousands of flights in the United States and thousands more worldwide.<sup>19</sup> Other system failures affecting airline operations—including flight-planning, weight-and-balance calculations, and boarding systems—have disrupted travel at major hubs, affecting hundreds or thousands of flights at a time. In August 2025, the FAA issued ground stops for United Airlines flights at major airports across the United States after the carrier reported a “technology issue” linked to an upgrade of its booking system software. The incident caused widespread delays and temporarily halted departures nationwide.<sup>20</sup> In September 2025, a cyber attack ground to a halt electronic check-in and boarding procedures in London, Brussels, and Berlin.<sup>21</sup> Technological outages affecting basic flight information like weight and balance and flight times affected over a thousand flights for the world’s largest carrier this past summer, affecting United Airlines flights at some of the country’s busiest airports in Chicago, Denver, and Houston.<sup>22</sup> Although some of those incidents were inadvertent, they demonstrate how easily air travel can be

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<sup>19</sup> Holly Yan *et al.*, *3,000 US flights are canceled as a global computer outage wreaks havoc on businesses, 911 systems and government agencies*, CNN (July 19, 2024), <https://bit.ly/3ZQ8xd9>; Brian Fung, *We finally know what caused the global tech outage - and how much it cost*, CNN (July 24, 2024), <https://bit.ly/4r43QbQ>.

<sup>20</sup> Rebecca Falconer, *Hundreds of United flights across U.S. delayed after “technology issue,”* Axios (Aug. 6, 2025), <https://bit.ly/4kxRm9N>.

<sup>21</sup> Pam Pylas & Jamey Keaten, *Cyberattack disrupts systems at several major European airports, delaying travel*, PBS News (Sept. 20, 2025), <https://bit.ly/4tpYCsC>.

<sup>22</sup> Jack Brook & Lisa Baumann, *United Airlines grounds flights nationwide*, AP (Aug. 7, 2025), <https://bit.ly/4ahBrHY>.

halted nationwide, preventing Members of Congress from returning to Washington when urgent legislative action may be required.

Public-health emergencies present similar risks. Exposure to dangerous pathogens or other biohazards also could prevent Members from traveling to and convening in person at the Capitol. The Ebola outbreak of 2014–2016 provides a concrete example.<sup>23</sup> Ebola is a rare but deadly virus, with a mortality rate as high as 80 to 90 percent.<sup>24</sup> During that outbreak, many U.S. states issued strict protocols to ensure that individuals who were potentially exposed did not spread the virus.<sup>25</sup> After the first domestic Ebola case, certain individuals were ordered to remain at home and avoid long-distance travel for extended periods.<sup>26</sup> Just from that one case, scores of health care workers were placed under movement restrictions that required them to remain at home and avoid commercial long distance travel.<sup>27</sup> An outbreak involving Members of Congress—or a biological attack involving a pathogen with

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<sup>23</sup> Simon A. Andrew *et al.*, *Ebola crisis response in the USA: Communication management and SOPs*, 31 Int’l J. of Disaster Risk Reduction 243 (2018), <https://perma.cc/54UC-UBZC>.

<sup>24</sup> U.S. Ctrs. for Disease Control and Prevention, *Ebola Disease Basics* (Apr. 23, 2024), <https://perma.cc/27F3-NEB9>.

<sup>25</sup> Marc Santora, *First Patient Quarantined Under Strict New Policy Tests Negative for Ebola*, N.Y. Times (Oct. 24, 2014), <https://www.nytimes.com/2014/10/25/nyregion/new-york-ebola-case-craig-spencer.html>; *No-Fly Zone: Ebola Quarantine Rules Keep Researchers Away*, NBC News (Nov. 4, 2014), <https://www.nbcnews.com/storyline/ebola-virus-outbreak/no-fly-zone-ebola-quarantine-rules-keep-researchers-away-n241051>.

<sup>26</sup> Charnetta L. Smith *et al.*, *Addressing Needs of Contacts of Ebola Patients During an Investigation of an Ebola Cluster in the United States — Dallas, Texas, 2014*, U.S. Ctrs. for Disease Control and Prevention (Feb. 13, 2015), <https://bit.ly/4c2zG3Z>.

<sup>27</sup> *Id.*

a long incubation or quarantine period—could wreak havoc on the ability of Members of Congress to gather in person.

Threats that prevent travel to Washington are not the only concern. Under the rule urged by Texas (and embraced by the panel dissent), circumstances that prevent Members already present in the Washington area from gathering in a single physical location also would bring Congress to a halt. Nationwide threats unfolding over the course of days or weeks could prevent or significantly delay Congress's ability to convene in person. But even brief disruptions could be disastrous. If Congress needed to act within hours—to raise or suspend the debt ceiling, enact or extend appropriations, or respond to an imminent national security threat—an inability to convene physically could trigger severe economic, diplomatic, or security consequences. The ability to convene virtually in a secure teleconference could prove a crucial tool in the event that Congress is prevented from gathering in person at a crucial moment. But under the rationale of Texas—and the panel dissent—such action would be impossible.

These are not hypothetical concerns. Evidence indicates that United Flight 93, hijacked on September 11, was intended to strike the Capitol Building, which was scheduled to host a joint session of Congress that day.<sup>28</sup> And terrorists have used

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<sup>28</sup> Andrew Glass, *U.S. Capitol likely terrorist target: Sept. 11, 2001*, Politico (Sept. 11, 2016), <https://bit.ly/4aEEQC1>.

biological weapons to disrupt Congress before. A month after the September 11 attacks, a series of anthrax attacks forced the evacuation and closure of congressional office buildings.<sup>29</sup> An anthrax-laden letter opened in the office of Senate Majority Leader Tom Daschle contaminated facilities throughout Capitol Hill.<sup>30</sup> Three more anthrax-laden letters were found during the ensuing search.<sup>31</sup> Dozens of congressional employees tested positive for exposure.<sup>32</sup> “Several workers at the postal facility that processed the letter fell ill with pulmonary anthrax [and] Congressional office buildings were evacuated.”<sup>33</sup> The Hart Senate Office Building, which houses the personal legislative offices and staffs of half of all senators, was closed, as were several others on Capitol Hill.<sup>34</sup> The building was shuttered for more than three months at a cleanup cost of \$27 million.<sup>35</sup> The House of Representatives was forced to adjourn for five days as a result of the attack.<sup>36</sup> The disruption extended elsewhere in the government. Anthrax spores were found at mail-handling facilities

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<sup>29</sup> Ctr. for Counterproliferation Rsch., *Anthrax In America: A Chronology and Analysis of the Fall 2001 Attacks* 1 (2002), <https://bit.ly/3WyMUfA>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> U.S. Gen. Acct. Off., Report to the Chairman, Comm. on Finance, U.S. Senate, *Capitol Hill Anthrax Incident EPA’s Cleanup Was Successful; Opportunities Exist to Enhance Contract Oversight* 1 (June 2003), <https://bit.ly/3LVWDYe>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Paul Kane, *Congress in grip of confusion, fear over coronavirus unsure whether to stay or go*, Wash. Post (Mar. 10, 2020), <https://bit.ly/4fwqjc9>.

<sup>36</sup> Rebecca Whitehair, *U.S. Under Anthrax Attack; Bioterror Source Unknown*, Arms Control Ass’n (Nov. 2001), <https://bit.ly/4duGgxv>.

for the Central Intelligence Agency and Supreme Court, causing the Justices to evacuate the building and hear argument in another courthouse. The Department of State's mail-pouch system was also shut down.<sup>37</sup>

Severe weather likewise can halt travel on a regional or national scale, with consequences indistinguishable from those caused by an attack or system failure. In January 2026, for example, Winter Storm Fern shut down air travel throughout the Washington metropolitan area. On the storm's peak day, approximately 99% of scheduled flights at Ronald Reagan Washington National Airport were canceled, along with substantial majorities of flights at Washington Dulles International Airport and Baltimore/Washington International Thurgood Marshall Airport.<sup>38</sup> With air travel into the Nation's capital region nearly suspended, Members of Congress located outside the Washington area would have faced extraordinary—and likely insurmountable—obstacles to returning in time to participate in urgent legislative proceedings. A sufficiently severe storm coinciding with a critical fiscal or national-security deadline could therefore prevent a majority of Congress from physically assembling, even absent any malicious act.

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<sup>37</sup> Steve Perlstein & Sari Horwitz, *High Court Closes in Anthrax Scare*, Wash. Post, October 26, 2001, <https://bit.ly/4tkf1yp>.

<sup>38</sup> See, e.g., Leslie Josephs, *Winter Storm Fern cancels thousands of flights as snow slams East Coast*, CNBC (Jan. 23, 2026), <https://bit.ly/3ZyNfRh> (reporting 99% at Reagan Washington National); Joseph Olmo, NBC Wash., <https://www.instagram.com/reel/DT6XaT6EdQj> (reporting 96% cancellations at Reagan Washington National, 59% at Dulles, and 66% at Baltimore/Washington Marshall).

A well-timed physical, biological, or cyber attack—or even a natural disaster—could prevent Congress from convening physically in time to meet a critical deadline. Even brief delays could paralyze the federal government, precipitate financial instability, or undermine the Nation’s ability to respond to an evolving threat.

### **III. A PHYSICAL-PRESENCE REQUIREMENT WOULD DISABLE CONGRESS AT PRECISELY THE MOMENTS WHEN ITS ACTION IS MOST CRITICAL**

National emergencies demand swift and coordinated action by the political branches. Congress’s role in those moments is indispensable.<sup>39</sup> It alone may appropriate funds, authorize or limit military action, adjust statutory authorities, and provide democratic accountability for executive action. To ensure such action is possible, the Constitution has authorized Congress to establish the rules and procedures for determining whether a quorum is present, and it has done so, consistent with the Rulemaking and Quorum Clauses, U.S. Const. art. I, § 5, cls. 1 & 2, for more than two hundred years. A rule that disables Congress from acting unless a majority of its Members can physically assemble would undermine that constitutional design.

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<sup>39</sup> *Continuity of Congress: An Examination of the Existing Quorum Requirement and the Mass Incapacitation of Members: Hearing Before the Comm. on Rules*, 108 Cong. 2 (Apr. 29, 2004) (Purpose of the Hearing) (“One of the most important duties of the Congress is to assure continuing representation and Congressional operations for the American people during times of crisis.”).

Continuity is especially important because in every crisis there is an inevitable second crisis of confidence that follows: whether or not the government can respond and protect citizens in time of peril. Public confidence in the government remains at or near its all-time low,<sup>40</sup> and that trust generally declines further during disasters.<sup>41</sup> Impediments to Congress's assembly only intensify the question of credibility, and amplify the second crisis of confidence.<sup>42</sup>

Recent experience underscores how easily physical assembly can be disrupted. Air travel has been halted nationwide by technical failures, cybersecurity incidents, and system outages. Public-health emergencies have imposed quarantine and movement restrictions. Targeted attacks have forced the evacuation and closure of congressional buildings themselves. These events often unfold quickly, with little warning. All can interfere with Congress's ability to convene in person.

Under the rule urged by Texas and reflected in the dissent, Congress would be powerless in those moments—even if Members were able to assemble virtually with their colleagues and communicate instantaneously through secure means. That result would not merely delay legislative action. It would shift power away from the Legislative Branch entirely, leaving the Executive to act without timely

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<sup>40</sup> Lydia Saad, *Historically Low Faith in U.S. Institutions Continues*, Gallup (July 6, 2023), <https://bit.ly/4kspd3V>.

<sup>41</sup> Kun Zhai *et al.*, *The impact of major public health emergencies on Trust in Government: From SARS to COVID-19*, *Front Psychol.* (Nov. 16, 2022), <https://bit.ly/3NX0Xej>.

<sup>42</sup> *Preserving Our Institutions: The First Report of the Continuity of Government Commission*, The Continuity of Gov't Comm'n, at 3 (May 2003), <https://bit.ly/4tp25rf>.

authorizations, appropriations, or oversight. The Constitution does not contemplate, much less require, that outcome.

The district court effectively acknowledged the stakes. It noted in a footnote that it is “not an unforeseen problem” that its interpretation of the Quorum Clause may “paralyze the legislative branch” in a time of crisis. *Texas v. Garland*, 719 F. Supp. 3d 521, 578 n.19 (N.D. Tex. 2024). But a constitutional interpretation that admits paralysis as a foreseeable consequence should be approached with caution, not embraced. The Constitution was designed to preserve a functioning government in times of peril, not to disable a coequal branch when it is most needed. The Framers recognized that the “circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed” on the processes through which Congress can act in times of emergency. *The Federalist* No. 23 (Alexander Hamilton).

As Justice Robert Jackson put it, the Constitution is not “a suicide pact,” but a document built on “practical wisdom.” *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). It was written with the understanding that “[e]very government ought to contain in itself the means of its own preservation.” *The Federalist* No. 59 (Alexander Hamilton). Article I reflects that practical wisdom by vesting each House with authority to determine the rules of its proceedings,

including rules that permit continuity when ordinary modes of assembly are disrupted.

### CONCLUSION

The Court should reject Texas's efforts to impose a physical-presence requirement that would disable Congress at precisely the moments when its action is most critical. The Court should reverse the decision below.

Dated: February 20, 2026

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**CERTIFICATE OF SERVICE**

I, John P. Elwood, counsel for *amici*, certify that on February 20, 2026, a copy of the foregoing brief was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

*/s/ John P. Elwood*

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## CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts exempted by Fed. R. App. P. 32(f), it contains 5,132 words.

This filing also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fifth Circuit Rule 32.1 and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman font, with 12-point font for footnotes.

*/s/ John P. Elwood*

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