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SUPREME COURT OF TEXAS
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Nos. 25-0674 and 25-0687

In the Supreme Court of Texas

IN RE GREG ABBOTT,
IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS,

Relator.

IN RE STATE OF TEXAS,

Relator.

On Petitions for Writs of Quo Warranto

BRIEF OF AMICUS CURIAE THOMAS R. PHILLIPS IN OPPOSITION TO PETITIONS FOR WRITS OF QUO WARRANTO

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IDENTITY AND INTEREST OF AMICUS CURIAE

Thomas R. Phillips has been a licensed Texas lawyer since 1974. He served as a Harris County district judge from 1981 to 1988 and as Chief Justice of the Supreme Court of Texas from 1988 to 2004. In the latter capacity, he authored a number of opinions for the Court interpreting various provisions of the Texas Constitution, such as *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454 (Tex. 1997) (separation of powers), *Texas Workers' Compensation Commission v. Garcia,* 893 S.W.2d 504 (Tex. 1995) (due course, equal protection, right to jury trial), *Trinity River Authority v. URS Consultants, Incorporated-Texas,* 889 S.W.2d 259 (Tex. 1994) (open courts, special law), and *Edgewood Independent School District v. Kirby*, 804 S.W.2d 491 (Tex. 1991) (efficient system of public education), as well as authoring separate opinions such as *Ex parte Tucci*, 859 S.W.2d 1, 16 (Tex. 1993) (Phillips, C.J., concurring) (free speech), and *Lucas v. U.S.*, 757 S.W.2d 687, 702 (Tex. 1988) (Phillips, C.J., dissenting) (open courts, due course of law, equal protection). He currently practices law in Austin, Texas.[1]

[1] No fee was paid or will be paid for preparing this brief.

INTRODUCTION

Intentional quorum-breaking in America dates from colonial times, and in Texas it predates statehood. This brief is submitted to supplement the history presented in other briefs. This brief does not address whether this case is moot in light of the quorum-breakers' return to the Capitol, whether this Court has jurisdiction to issue the requested writs of quo warranto, or what punishments might be levied by legislators against their bolting colleagues. Likewise, this brief does not discuss executive branch authority to request the judicial branch to issue writs removing officials in the executive branch. Rather, amicus addresses only whether the Texas Constitution permits any non-legislator to seek judicial ejection of a legislator who breaks quorum to prevent a law's passage. On that narrow question, amicus respectfully maintains that only other members of the same legislative branch may discipline a legislative quorum-breaker.

This Court interprets the Constitution's text "to give effect to the intent of the makers and adopters of the provision in question[,]" which may entail considering "the conditions and spirit of

the times, the prevailing sentiments of the people, the evils intended to be remedied, and the good to be accomplished." *Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009). The nineteenth century framers and adopters of Texas's Quorum and Punishments Clauses would not have understood Respondents' conduct in intentionally breaking quorum to be punishable by even the other body of the bicameral legislature, much less by an official of another governmental branch.

Because of the plain words of the Constitution, as informed and reinforced by this history, Relators are constitutionally precluded from obtaining the relief they seek here.

ARGUMENT

I. Despite multiple attempts to amend it downward, Texas has always required a two-thirds quorum of each legislative house to conduct business.

American state constitutions have imposed widely varying quorum thresholds on their legislative assemblies, ranging from less than a majority to a supermajority. Only eight states joined the

Union with a constitutional supermajority requirement for the conduct of general business,[2] and half of those—Arkansas, Illinois, Ohio, and Pennsylvania—subsequently abandoned it. But Indiana, Oregon, Tennessee, and Texas still retain the two-thirds requirement for a legislative quorum imposed in their original state constitutions. *See* Ind. Const. art. IV, § 11; Or. Const. art. IV, § 12; Tenn. Const. art. II, § 11; Tex. Const. art. III, § 10. At least in Texas's case, the decision to take and maintain this minority approach has been considered and deliberate.

A. Texas's earliest constitutions contained a two-thirds quorum requirement.

The Texas two-thirds threshold finds precedent in the 1827 Constitution of Coahuila and Texas, which provided:

> One more than the half of the entire number of deputies shall form a quorum for dictating measures and steps not possessing the character of law or decree. For discussing and voting upon projects of law or decree, and dictating orders of great importance, the concurrence of two-thirds of all the members shall be required.

[2] Some states have special supermajority quorum thresholds for certain types of actions, such as enacting tax bills. *See, e.g.*, N.Y. Const. art. III, § 23 (3/5ths quorum for tax bills); Wis. Const. art. VIII, § 8 (same). This brief does not address these selective quorum requirements.

Coahuila & Tex. Const. of 1827, tit. I, § V, art. 101, *reprinted in Laws and Decrees of the State of Coahuila and Texas* 327 (Houston, Telegraph Power Press 1839) (photo reprint in 1 *Proceedings of the Constituent Congress of Coahuila and Texas, 1824-1827*, at 241 (Manuel González Oropeza & Jesús F. de la Teja coordinators, 2016)).[3]

The current wording of Texas's Quorum Clause began to take shape in the *Plan and Powers of the Provisional Government of Texas* (also known as the "Organic Law"), adopted by the November 1835 "Consultation" after hostilities commenced with the centralist government of Mexico. The Organic Law required that "two-thirds of the members elect of the General Council shall form a quorum to do business[.]" Plan and Powers of the Provisional Government of Texas, art. III, *in Ordinances and Decrees of the Consultation, Provisional Government of Texas and the Convention Which Assembled at Washington March 1, 1836*, at 5, *reprinted in* 1 H.P.N.

[3] Available at https://archive.org/details/actas-1/page/327 (last visited Oct. 29, 2025).

Gammel, *The Laws of Texas 1822–1897*, at 909 (Austin, Gammel Book Co. 1898) [hereinafter Gammel, *Laws*].

Even though this rigorous quorum requirement hamstrung the General Council at crucial points in the Texas Revolution, *see* Ralph W. Steen, *General Council*, Handbook of Tex. Online, Tex. State Hist. Ass'n (Sep. 11, 2020);[4] John Henry Brown, *Life and Times of Henry Smith* 185-86, 249-51 (Dallas, A.D. Aldridge & Co. 1887),[5] the 1836 Constitution of the Republic of Texas retained the two-thirds quorum requirement:

> SEC. 13. Each House shall be the judge of the elections, qualifications and returns of its own members. Two thirds of each House shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may compel the attendance of absent members.

Repub. Tex. Const. of 1836, art. I, § 13, *reprinted in* 1 Gammel, *Laws*, *supra*, at 1070. And nine years later, the Constitution of 1845 adopted the Quorum Clause that remains in effect today.

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[4] Available at https://www.tshaonline.org/handbook/entries/general-council (last visited Oct. 29, 2025).

[5] Available at https://archive.org/details/lifeandtimeshen01browgoog/page/n192/mode/1up (last visited Oct. 29, 2025).

B. In 1845, framers rejected an attempt to lower the two-thirds quorum threshold.

In preparing a constitution for submission to the voters of Texas and Congress for American statehood, the framers seriously considered what quorum requirement was most appropriate. The Committee on the Legislative Department's initial draft contained a simple majority requirement: "a majority of each House shall constitute a quorum to do business[.]" *Journals of the Convention, Assembled at the City of Austin on the Fourth of July, 1845, for the Purpose of Framing a Constitution for the State of Texas* 56 (Austin, Miner & Cruger 1845) [hereinafter *1845 Journals*] (July 14, 1845);[6] *Debates of the Texas Convention* 55 (William F. Weeks rep., Houston, J.W. Cruger 1846) [hereinafter *1845 Debates*].[7] Then the Convention (sitting as the Committee of the Whole), on motion by Oliver Jones of Austin County, amended the draft "to insert 'two-thirds' after the words 'majority of,'[.]" *1845 Debates*, *supra*, at 162

[6] Available at https://tarlton.law.utexas.edu/constitutions/texas-1845-en/journals (last visited Oct. 29, 2025).

[7] Available at https://tarlton.law.utexas.edu/constitutions/texas-1845-en/debates (last visited Oct. 29, 2025).

(July 21, 1845). Two days later, the Convention (not sitting as the Committee of the Whole) accepted that amendment, so that the provision read "a majority of two-thirds of each House shall constitute a quorum to do business[.]" *Id.* at 212 (July 23, 1845); *1845 Journals*, *supra*, at 99. A majority of two-thirds, read literally, could be deemed equal to one-third, not the two-thirds required in earlier constitutions.

A few weeks later, the Convention (not sitting as the Committee of the Whole) amended the provision yet again by providing, on motion of Richard Bache of Galveston County, that "the words 'a majority of,' were stricken out, where they occurred before the words 'two-thirds.'" *1845 Journals*, *supra*, at 224 (Aug. 12, 1845); *see 1845 Debates*, *supra*, at 526. So the quorum and enforcement provisions of section 12,[8] as twice amended, read:

> two-thirds of each house shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and compel the attendance of absent members, in such manner, and under such penalties as each house may provide.

[8] The section was enumerated as "14th section" during the course of the amendments described here. Section 14 became section 12 because one of the draft sections that came prior was stricken and another was moved back in number. *See 1845 Journals*, *supra*, at 221, 222, 228-30, 345.

1845 Journals, *supra*, at 342-43; Tex. Const. of 1845, art. III, § 12.

Delegates may have been influenced on this issue by the discussion that had occurred a few weeks earlier, on July 19, 1845, regarding another supermajority threshold—the two-thirds requisite for overriding a governor's veto. There the anti-majoritarian nature of any two-thirds requirement was freely debated. James Mayfield of Fayette County acknowledged that an enhanced requirement for override was not strictly majoritarian, but he believed it a wise check on the power of a simple but misguided majority. *1845 Debates*, *supra*, at 141. More succinctly, John Hemphill of Washington County, the Republic's sitting chief justice, argued: "The very purpose of a Constitution is to take power from the majority in order to protect the minority[.]" *Id.* at 144. Isaac Van Zandt of Harrison County quoted a contemporary national statesman as saying "that there was no tyranny known to the civilized world greater than that of the unrestricted power [of] a simple majority." *Id.* at 142. As with the quorum requirement, the two-thirds threshold for a veto-override ultimately prevailed. *See* Tex. Const. of 1845, art. V, § 17.

C. In 1868-69, framers rejected an attempt to lower the two-thirds quorum threshold.

Neither the 1861 Secession Convention nor the 1866 Presidential Reconstruction Convention amended the Quorum Clause, and no available record exists that they even considered doing so.[9] But at the 1868-69 "Reconstruction Convention," even though the 1845 Constitution was used as "the basis of the [Legislative Department] report[,]" 1 *Journal of the Reconstruction Convention, which met at Austin, Texas, June 1, A.D., 1868*, at 560, 563 (Austin, Tracy, Siemering & Co. 1870) (1st Session, Jul. 29, 1868) [hereinafter *Reconstruction Convention Journal*],[10] F.W. Sumner of Grayson County unsuccessfully moved to insert "the words 'a majority' in place of 'two-thirds,'" *id.* at 858 (Aug. 23, 1868).

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[9] *See Journal of the Secession Convention of Texas 1861 (*Ernest William Winkler, ed., Austin Printing Company 1912); *Journal of the Texas State Convention, Assembled at Austin, Feb. 7, 1866* (Austin, Southern Intelligencer Office 1866).

[10] Available at https://tarlton.law.utexas.edu/constitutions/texas-1869/journals-reconstruction-convention-1868 (last visited Oct. 29, 2025).

D. In 1875, framers rejected an attempt to lower the two-thirds quorum threshold.

During the Constitutional Convention of 1875, another attempt to reduce the quorum requirement also failed. The Committee on the Legislative Department recommended the same language from the prior constitutions, unchanged since 1845. *See Journal of the Constitutional Convention of the State of Texas, Begun and Held at The City of Austin, September 6th, 1875*, at 155 (Galveston, "News" Office 1875) (Sep. 20, 1875).[11] H.S. Russell of Harrison County moved to "strik[e] out the words 'two-thirds' and insert[] 'a majority,'" but his motion failed. *Id.* at 209 (Sep. 27, 1875).[12]

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[11] Available at https://tarlton.law.utexas.edu/constitutions/texas-1876-en/journals (last visited Oct. 29, 2025).

[12] Regarding a more recent attempt to change the Constitution, Amicus found no indication that the 1974 Texas Constitutional Convention (from which no proposal ultimately issued) contemplated any change to the constitutional two-thirds quorum. *See* 1 *Records of Proceedings, Texas Constitutional Convention, Official Journals* 67, 99, 123, 210, 237, 241, 253, 657, 661, 870, 919 (1974), *available at* https://lrl.texas.gov/scanned/SIRSI/C3050.2%20P941%20v.1.pdf (various proposals for article regarding legislature, all with two-thirds quorum requirement); 2 *id.* at 1382, 1387, 1616, 1648, 1786, 1836, 1935, *available at* https://lrl.texas.gov/scanned/SIRSI/C3050.2%20P941%20v.2.pdf (same). The 1974 Convention delegates did, however, see fit to approve an amendment to the Convention's internal rules that changed the quorum requirement for the Convention from a simple majority to a two-thirds threshold. 1 *id.* at 11, 29;

II. Texas framers chose to retain the supermajority quorum even though they well knew of the obstacles caused by past quorum-breaks.

Obstructing legislative proceedings by quorum-breaking is not a recent innovation. One expert on legislative institutions has explained that:

> During the colonial era, quorum rules became set and two precedents about their use were established. First, under certain circumstances lawmakers could and would exploit the rule to their advantage. Second, those who did not break quorum might seek retribution against those who were seen as abusing the rules.

Peverill Squire, *Quorum Exploitation in the American Legislative Experience*, 27 Stud. in Am. Pol. Dev. 142, 145 (2013) [hereinafter Squire, *Quorum Exploitation*].[13] Both precedents remain in effect today.

After the colonial era, quorum-breaking continued at both the federal level and in state legislatures. Professor Squire lists 23 "notable bolting quorums" in America between 1787 and 1872, and

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1 *Records of Proceedings, Texas Constitutional Convention, Official Proceedings* [Transcript] 11, 32 (1974), *available at* https://lrl.texas.gov/scanned/SIRSI/C3050.2%20J826%20v.1.pdf.

[13] Available at https://doi.org/10.1017/S0898588X13000084 (last visited Oct. 29, 2025).

another 36 that occurred between 1872 and 2013. *Id.* at 154-55. Even that long list is incomplete. For example, Squire's list doesn't include any of the "bolting" quorum-break attempts that occurred in Texas prior to 1870.[14]

A. Quorum-breaking in Colonial America

Colonial assemblies had a range of different quorum requirements, with less-than-majority thresholds in jurisdictions such as Maryland, Massachusetts, and Virginia, and a two-thirds requirement in Pennsylvania after 1683. Squire, *Quorum Exploitation*, *supra*, at 144. Pennsylvania's high threshold contributed to a quorum-break as early as 1689. *Id.* at 145.

Even jurisdictions with a bare majority quorum requirement—such as North Carolina—or a less-than-majority threshold—such as South Carolina—experienced quorum obstructionism.

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[14] A "bolting" quorum-break is one in which breakers physically absent themselves. A "disappearing" quorum-break is one in which legislators are physically present but refuse to vote when called. Until the late nineteenth century, disappearing quorum-breaks were very common, *see, e.g.*, Squire, *Quorum Exploitation*, *supra*, at 148-53, but—over time—states and Congress revised or reinterpreted their parliamentary rules to eliminate that type of quorum-break, *id.* at 150. For example, the rules of the Texas House currently provide: "Any member who is present and fails or refuses to record on a roll call after being requested to do so by the speaker shall be recorded as present by the speaker and shall be counted for the purpose of making a quorum." Tex. H.R. Rule 5, § 4, Tex. H.R. 4, 89th Leg., R.S., 2025 H.J. of Tex. 42, 93 (2025).

See, e.g., 4 *The Colonial Records of North Carolina* 1152-53 (William Saunders ed., 1886) (colonial governor complaining about legislators breaking quorum "if they did not like [a] bill").[15] South Carolina's governor complained bitterly about "a party made to go out of town purposely to break the House, and thus prevent the success of what they could not otherwise oppose." Abstract of Letter from Gov. James Glen to Duke of Bedford (Oct. 10, 1748), *in* 2 *Collections of the South-Carolina Historical Society* 303, 305 (Charleston, South-Carolina Historical Society 1858).[16]

B. Early State Quorum-breaks

Following Independence, state legislatures regularly experienced quorum-breaks, just as their colonial counterparts had. In 1787, 19 anti-Federalist members of the Pennsylvania General Assembly physically absented themselves from the legislative session in an attempt to obstruct resolutions regarding the time and place for a state convention to consider ratification of the proposed

[15] Available at https://archive.org/details/colonialrecordso04nort/page/1152/ (last visited Oct. 29, 2025).

[16] Available at https://archive.org/details/collectionsofsou02sout_0/page/305/mode/1up (last visited Oct. 29, 2025).

federal Constitution. The sergeant-at-arms and assistant clerk benefitted from the "assistance of a mob" in returning two absent members to the chambers, thereby permitting the resolutions to pass and the convention to be called. 2 *The Documentary History of the Ratification of the Constitution* 55 (Merrill Jensen ed., 1976).[17]

In 1841, Tennessee saw the so-called "immortal thirteen" block a two-thirds quorum in the joint session to fill the state's two U.S. senate positions. *See, e.g.*, Squire, *Quorum Exploitation*, *supra*, at 159. That quorum-break "not only deprived the state of representation in the U.S. Senate for almost two years, but continued to thwart the Whig program for the remainder of that legislature." 1 *The Papers of Andrew Johnson* 35 (LeRoy P. Graf & Ralph W. Haskins eds., 1967).[18]

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[17] Available at https://search.library.wisc.edu/digital/ATR2WPX6L3UFLH8I (last visited Oct. 29, 2025). The 1790 Pennsylvania Constitution replaced the two-thirds quorum with a simple majority requirement. *See* Pa. Const. of 1790, art. I, § 12.

[18] Available at https://archive.org/details/papersofandrewjo0001john/page/35/mode/1up (last visited Oct. 29, 2025).

In Oregon, a quorum-break delayed a Senate election in 1860. *Oregon*, The Civilian and Gazette (Galveston), Oct. 16, 1860, at 1;[19] Squire, *Quorum Exploitation*, *supra*, at 154 (six senators fled; one "was arrested but escaped custody"). Indeed, that state's two-thirds quorum requirement has resulted in such frequent obstructions that voters recently amended their Constitution to attempt to reduce the occurrence of quorum-breaks (without going so far as to abandon the two-thirds threshold) by providing that ten unexcused absences "shall be deemed disorderly behavior and shall disqualify the member from holding office as a Senator or Representative for the term following[.]" Or. Const. art. IV, § 15 (amendment adopted Nov. 8, 2022). Of course, nothing like Oregon's express constitutional amendment has been adopted in Texas. *See* Jack L. Landau, *On Legislative Quorum Requirements and Efforts to Enforce Them: Oregon's Ballot Measure 113*, 60 Willamette L. Rev. 1 (Fall 2023).

In Indiana, breaks were attempted almost every annual session in the tumultuous years prior to the Civil War. *See* Squire,

[19] Available at https://texashistory.unt.edu/ark:/67531/metapth177470/m1/1/ (last visited Oct. 29, 2025).

Quorum Exploitation, supra, at 146, 154-55, 159-60. Levity was at times the only sane response. During an 1861 quorum-break, the following exchange occurred in the Indiana Senate:

> The PRESIDENT. I would ask if the Doorkeeper found the absentees?
>
> The Assistant Doorkeeper. (From the Doorkeeper's chair at the door.) I saw them pretty nearly all in a batch, and the answer was "Tell them to go to hell."
>
> Mr. WHITE. I move that we don't do that.
>
> The motion was agreed to.

4 *Brevier Legislative Reports* 346 (Ariel & W.H. Drapier reps., Indianapolis 1861).

Contrary to Relator's claim that "[h]istorical practice furnishes no support for willful and indefinite flight from the State[,]" Relator's Reply Br. on the Merits in Case No. 25-0674, at 26, fleeing a jurisdiction to break quorum has a long and storied history. For example, in 1872, Louisiana State Senators successfully broke quorum by first bolting to the U.S. Custom House in New Orleans and then cruising up and down the Mississippi River on the U.S. revenue cutter ship *Wilderness*. *The Legislature, Disgraceful Outrages, Review of the Week*, The Semi-Weekly

Louisianian (New Orleans), Jan. 7, 1872, at 2.[20] After the *Wilderness* was ordered to dock by the U.S. Treasury Secretary, the quorum-breaking Senators "fled to Mississippi, and set up their tents at Bay St. Louis[.]" *The Custom-House Which Mr. Casey "Has Taken Out of Politics"*, 343 The Nation 49, 54 (Jan. 25, 1872);[21] *see also, e.g.*, Squire, *Quorum Exploitation*, *supra*, at 155, 163 (among other instances, Ohio senators "fled to Michigan, Kentucky, Tennessee and, allegedly, Canada" in 1886; Montana senators "fled to Portland, Oregon" in 1890; Florida senators "fled to Georgia" in 1891; Tennessee representatives "fled to Hopkinsville, Kentucky" in 1909 and to Alabama in 1911, 1913, and 1920; W. Virginia senators "fled to Cincinnati, Ohio" in 1911; Rhode Island senators "fled to Rutland, Massachusetts" in 1924).[22]

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[20] Available at https://www.loc.gov/resource/sn83016631/1872-01-07/ed-1/?sp=2&st=image (last visited Oct. 29, 2025).

[21] Available at https://archive.org/details/sim_nation_1872-01-25_14_343/page/54/mode/1up (last visited Oct. 29, 2025).

[22] Relator's claim that all of the 1979 "Killer Bees" remained a short drive from the Capitol is inaccurate. *Contra* Relator's Br. on the Merits in Case No. 25-0674, at 64. "Nine of the 12 hid out in a garage apartment in Tarrytown, another [Chet Brooks] drove to Oklahoma[.]" Stuart Eskenazi, *In 1979, the buzz was about Killer Bees*, Austin American-Statesman, Page B1 (June 10, 1994).

C. Early Texas Quorum-breaks

Unsurprisingly, given Texas's two-thirds quorum requirement, quorum-breaking and attempted quorum-breaking occurred multiple times in the nineteenth century. For example, in 1842, western congressmen of the Republic of Texas broke quorum to prevent the capital from leaving Austin to a location nearer the nation's population centers. President Sam Houston justified the move to Houston not merely because of the town's catchy name, but also because Mexican troops had briefly seized San Antonio and were thought to be targeting Austin. Sam W. Haynes, *Mexican Invasions of 1842*, Handbook of Tex. Online, Tex. State Hist. Ass'n (July 4, 2018).[23]

Months later, when Houston called for the next Congress to meet at Washington on the Brazos instead of Austin, congressmen from Austin, Bastrop, Bexar, Fayette, Goliad, Matagorda, San Patricio, and Victoria Counties joined the Travis County congressman in fleeing the new capitol (where they had all been on the prior

[23] Available at https://www.tshaonline.org/handbook/entries/mexican-invasions-of-1842 (last visited Oct. 29, 2025).

day) to break quorum. H.J. of Repub. Tex., 7th Cong., R.S. 36-37 (1842).[24] Eventually, enough congressmen from other parts of Texas appeared to make the quorum, and the breakers returned. *Id.* at 37-40; *see also Congress*, The Morning Star (Houston), Dec. 13, 1842, at 2 ("nine members [. . .] left the town and returned home evidently with the intention of breaking the quorum");[25] E.R. Lindley comp., *Biographical Directory of the Texan Conventions and Congresses, 1832-1845*, at 62 (1942) (noting the Bastrop County congressman's "hop[e] that the absence of himself and eight others would destroy a quorum and force acquiescence to their demands").[26]

Three of the quorum-breakers, John Caldwell, William L. Cazneau, and William L. Hunter, were members of the 1845 Constitutional Convention, as were a non-bolting representative (Nicholas H. Darnell) and a non-bolting senator (Oliver Jones) from

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[24] Available at https://lrl.texas.gov/scanned/CongressJournals/07/7thHouseRegular.pdf (last visited Oct. 29, 2025).

[25] Available at https://texashistory.unt.edu/ark:/67531/metapth1497850/m1/2/ (last visited Oct. 29, 2025).

[26] Available at https://texashistory.unt.edu/ark:/67531/metapth1507991/ (last visited Oct. 29, 2025).

the same congress. *See Biographical Directory of the Texan Conventions and Congresses 1832-1845*, *supra*, at 35-36, 41-42. These framers knew first-hand about the merits and drawbacks of a supermajority quorum requirement; and Jones, as discussed above, *supra* p. 7, took an active role in determining the constitutional language.

Another well-publicized quorum-break occurred in 1852, when certain House "members took exceptions to a decision of the Speaker, and broke a quorum," Letter from Jon W. Dancy to Wm. F. Smith (Jan. 25, 1852), *reprinted in* The Texas Monument, Vol. II, No. 27, Jan. 28, 1852, at 2;[27] *see also* H.J. of Tex., 4th Leg., R.S. 613-17 (1852). Four years later, another quorum-break occurred that was reminiscent of Abraham Lincoln's 1840 "gymnastic performance" in jumping out of a Springfield window. *See Illinois State Register*, Dec. 12, 1840, *quoted in* Paul Simon, *Lincoln's Preparation for Greatness* 229 (Illini Books ed. 1971);[28] Brief of

[27] Available at https://texashistory.unt.edu/ark:/67531/metapth1291289/m1/2/ (last visited Oct. 29, 2025).

[28] Available at https://archive.org/details/lincolnspreparat0000simo/page/229/mode/1up (last visited Oct. 29, 2025).

Amici Curiae Joe Moody & Mary E. González at 6 (Aug. 8, 2025). After a call of the Texas House to engross a bill quieting land titles, H.J. of Tex., 6th Leg., Adj. S. 503 (Aug. 25, 1856), members were locked in the chamber pursuant to House rules ("the bar of the Hall shall then be closed"), *see* Tex. H.R. Rules § 56, 6th Leg., R.S., *reprinted in Rules of the House and Joint Rules of Both Houses of the Sixth Legislature of Texas* 9 (1855).[29] Thereupon, a vote revealed that the House was two members short of a quorum. The sergeant-at-arms was "dispatched after Mr. [John] Dancy, who made his escape through the window." H.J. of Tex., 6th Leg., Adj. S. 505 (Aug. 25, 1856). No other absent member being apprehended, the House then adjourned for the night, and a quorum was reached the following morning. *Id.*

In 1859, during a joint session to select a successor to the late United States Senator J. Pinckney Henderson, Unionist legislators unsuccessfully attempted to break quorum to prevent the election of fire-breathing State Senator Louis T. Wigfall of Harrison County.

[29] Available at https://lrl.texas.gov/scanned/rules/06-0/House_Rule_Text_1855.pdf (last visited Oct. 29, 2025).

Francis R. Lubbock, *Six Decades in Texas* 256-57 (C.W. Raines ed. 1900).[30] Amicus cannot find in any of these occasions an instance where anyone contended that the quorum-breakers had automatically vacated their seats by their behavior.[31]

III. Texas framers also chose to retain the supermajority quorum even though they knew the federal framers had debated and rejected it.

Framers of the U.S. Constitution specifically considered the proper quorum threshold for each house of Congress. *See* 2 *The Records of the Federal Convention of 1787*, at 251-54 (Max Farrand ed., 1911) [hereinafter Farrand]. According to James Madison's

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[30] Available at https://archive.org/details/sixdecadesintexa00lubb/page/256/mode/1up (last visited Oct. 29, 2025).

[31] Texas has experienced several other quorum-breaks and attempted quorum-breaks not mentioned in other briefs filed with this Court. *See, e.g.*, H.J. of Tex., 15th Leg., R.S. 725-42 (1876) (quorum-break precipitated by legislation to give relief to Texas Pacific Railroad); S.J. of Tex., 41st Leg., 2d C.S. 589, 592 (June 29, 1929) (quorum-break precipitated by gasoline tax legislation, H.B. 6); *Senator Cunningham Opposes Plan To Issue State Bonds For Highways*, Abilene Morning Reporter-News, Aug. 25, 1929, at 11, *available at* https://texashistory.unt.edu/ark:/67531/metapth1715856/m1/13/ (Senator writing about his colleague that left "the senate chamber and help[ed] to break a quorum"); H.J. of Tex., 51st Leg., R.S. 1792 (1949) (failed quorum-breaker's statement that "we, the minority, chose to try to break a quorum"); *see also* 2 *Reconstruction Convention Journal* at 325-26, 521, 523 (2d Session, Jan. 20, 1869, and Feb. 5, 1869) (describing reasons for expelling delegate by vote of Convention, noting delegate threatened the sergeant-at-arms with cane while saying "'damn you, I will kill you if you undertake to stop me'" and withdrew from the hall "contumaciously to prevent, by his absence, a vote").

notes, Nathaniel Gorham of Massachusetts "contended that less than a Majority (in each House) should be made of Quorum, otherwise great delay might happen in business, and great inconvenience from the future increase of numbers." *Id.* at 251. John Mercer of Maryland agreed, suggesting that a majority quorum requirement would "put it in the power of a few by seceding at a critical moment to introduce convulsions, and endanger the Government." *Id.* Mercer argued:

> Examples of secession have already happened in some of the States. He was for leaving it to the Legislature to fix the Quorum, as in Great Britain, where the requisite number is small & no inconveniency has been experienced.

Id.

On the other extreme, George Mason of Virginia supported a supermajority quorum, *id.* at 251-52, even praising the obstructionism that other delegates feared:

> He [Mason] admitted that inconveniences might spring from the secession of a small number: But he had also known good produced by an apprehension of it. He had known a paper emission prevented by that cause in Virginia. He thought the Constitution as now moulded was founded on sound principles, and was disposed to put into it

> extensive powers. At the same time he wished to guard agst abuses as much as possible.

Id. at 252. Similarly, Elbridge Gerry of Massachusetts proposed that the House (but not the Senate) have at least a majority quorum, with the members themselves empowered to raise the quorum to 50 of the House's 65 members (76.9%). *See id.* at 253.

The delegates landed on a simple majority threshold. Rufus King of Massachusetts admitted that while "there might be some danger of giving an advantage to the Central States[,]" he felt "the public inconveniency on the other side was more to be dreaded." *Id.* at 252. Gouverneur Morris of Pennsylvania wanted a majority or even lower quorum requirement because:

> the Secession of a small number ought not to be suffered to break a quorum. Such events in the States may have been of little consequence. In the national Councils, they may be fatal.

Id.

The framers were well aware of the colonial precedents. During the Ratification process, Publius wrote in *The Federalist Papers*:

> It has been said that more than a majority ought to have been required for a quorum; and in particular cases, if not in all, more than a majority of a quorum for a decision. That some advantages might have resulted from such a precaution, cannot be denied. It might have been an additional shield to some particular interests, and another obstacle generally to hasty and partial measures. But these considerations are outweighed by the inconveniences in the opposite scale. [. . .] It would be no longer the majority that would rule: the power would be transferred to the minority. [. . .] [I]t would facilitate and foster the baneful practice of secessions; a practice which has shown itself even in States where a majority only is required; a practice subversive of all the principles of order and regular government[.]

The Federalist No. 58, at 377 (James Madison or Alexander Hamilton) (Robert Scigliano ed., 2001).

Texas's framers had detailed knowledge of the federal constitution and the ratification debates. *See, e.g.*, *1845 Debates*, *supra*, at 238-39 (calling attention to *The Federalist Papers*, Jefferson's *Notes on the State of Virginia*, and Judge Story's *Commentaries*); *Debates in the Texas Constitutional Convention of 1875*, at 43, 86, 135, 167, 295 (Seth Shepard McKay ed., 1930)

(mentions of the U.S. Constitution);[32] John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 Tex. Tech L. Rev. 1089, 1091-92 (1995) (noting 1845 Convention delegates' references to 20 state constitutions and the U.S. Constitution).

Despite the well-known concerns about "the baneful practice of secessions", *Federalist No. 58*, the examples in the colonies and other states, and Texas's own multiple quorum-break experiences, Texas's constitutional framers consistently chose two-thirds, not a simple majority, for the requisite quorum in both legislative houses. Texas's framers were clear-eyed in desiring the "additional shield to some particular interests" and the added "obstacle generally to hasty and partial measures" that the author of Federalist No. 58 rejected due to the weight of "inconveniences in the opposite scale." Given the actual experience of some and the extensive knowledge of many others about the reasons for and against a supermajority quorum, it would blinker reality to think that Texas's framers or ratifiers approved a two-thirds quorum requirement without

[32] Available at https://archive.org/details/debatesintexasco0000seth (last visited Oct. 29, 2025).

understanding that "an interested minority might take advantage of it[.]" *Federalist No. 58*, *supra*, at 377.

IV. The authority to discipline quorum-breakers rests exclusively with members of the affected legislative house.

As noted, since the colonial era, it has been recognized that "those who did not break quorum might seek retribution against those who were seen as abusing the rules." Squire, *Quorum Exploitation*, *supra*, at 145. The Texas Constitution sustains that precedent by article III, section 10's enforcement provision and by section 11's Punishments Clause.

Regarding section 10, this Court recently held that it "gives the present members of each chamber a remedy against the absent members when a quorum is lacking." *In re Abbott*, 628 S.W.3d 288, 292 (Tex. 2021). After all, the provision states that absent members' attendance may be compelled "under such penalties as each house may provide." Tex. Const. art. III, § 10. Article III, section 11, in turn, expressly addresses expulsion:

> Each house may determine the rules of its own proceedings, punish members for disorderly conduct, and, with the consent of two-thirds, expel

> a member, but not a second time for the same offense.

Id. at § 11. These constitutional provisions provide the exclusive remedies for disciplining quorum-breakers. *See Neeley v. W. Orange-Cove Consol. Ind. Sch. Dist.*, 176 S.W.3d 746, 777-78 (Tex. 2005) (assuming that "'a textually demonstrable constitutional commitment of the issue[s] to a coordinate political department'" serves to define the separation of powers under the Texas Constitution, quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). And they contemplate that an expelled member may ask his or her constituents to return them to office; and, if this is done, the legislative body may not remove them for the same offense—that is, the electors in each legislative district have the ultimate say on whether their own representative's conduct should or should not be tolerated. These provisions are consistent with the approach to quorum-breaks in other jurisdictions.

A. Colonial and Early State Examples

In response to the 1689 quorum-break (mentioned above, *supra* Part II.A), the non-breaking members of Pennsylvania's Assembly passed resolutions condemning the "abominable

Treachery and Practice of the said absent Members, in wilfully neglecting to appear[,]" and resolved that the quorum-breakers "ought not to receive any Salary for their Service this Assembly; and are not worthy to be chose again, or be intrusted as Delegates[.]" 1 *Votes and Proceedings of the House of Representatives of the Province of Pennsylvania* 55 (Philadelphia, B. Franklin & D. Hall 1752).[33] Amicus has found no suggestion that any punishment from outside the Pennsylvania Assembly was contemplated.

As in colonial Pennsylvania, the remedies for willful absence in colonial Virginia do not appear to have included automatic vacation of a legislator's seat. Even though the quorum threshold was set below a majority, there were often not enough members present to transact business in the seventeenth- and eighteenth-century House of Burgesses because "members were too ready to place their private business before the affairs of the country." S. M. Pargellis, *The Procedure of the Virginia House of Burgesses*, 7 William and

[33] Available at https://archive.org/details/bim_eighteenth-century_votes-and-proceedings-of_1752_1/page/n94/ (last visited Oct. 29, 2025).

Mary College Quarterly Historical Magazine 73, 81 (1927).[34] But this did not lead to automatic vacation of seats. Instead, as a punishment for this dereliction of duty and an attempt to remedy the harm of no quorum, "[f]ines were imposed for unauthorized absence," sometimes as onerous as "a thousand pounds of tobacco[.]" *Id.* Absent members were taken into custody, and legislative pay was withheld for "days [members] had been absent on 'private occasions.'" *Id.* at 81-82.

Following the 1841 Tennessee quorum-break (discussed above, *supra* Part II.B), members of the Whigs, who would have had the votes to elect U.S. Senators had not the Democrats (Andrew Johnson included) used the two-thirds quorum rule to prevent it, contended that the quorum-breaking Democrats "desert[ed] the path of duty[.]" *Tennessee without Senators*, New York Tribune, Jan. 3, 1842, at 2;[35] *see* Kenneth McKellar, *Tennessee Senators as*

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[34] Available at https://www.jstor.org/stable/1921042 (last visited Oct. 29, 2025).

[35] Available at https://www.loc.gov/resource/sn83030212/1842-01-03/ed-1/?sp=2&st=image (last visited Oct. 29, 2025).

Seen by One of their Successors 202-03, 234 (1942).[36] Understandably, the Whigs were incensed, but no one claimed that the recalcitrant Democrats had automatically vacated their seats. Instead, the Whigs appealed to the ballot box as the mechanism for correcting the perceived injustice, thereby "let[ting] the people decide, which of the two parties are responsible for all this disorganizing and revolutionary conduct, and whether the majority shall be controlled by the minority." *Tennessee without Senators, supra.* And the people did respond, with Whig challenger James C. Jones defeating Democratic Governor James K. Polk in 1841 and defeating Polk by an even larger majority in 1843. 2 *Guide to U.S. Elections* 1649 (CQ Press 6th ed. 2010). The Tennessee Legislature thereupon elected two Whig Senators, who both took office on October 17, 1843. *Id.* at 1427.[37]

In 1864, an effort to expel two members of the Louisiana House "for their conduct in scaling the railing and breaking a

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[36] Available at https://archive.org/details/tennesseesenator0000kenn/ (last visited Oct. 29, 2025).

[37] Polk was relegated to seeking federal office, but he lost his home state of Tennessee despite winning election to the Presidency in 1844. Svend Petersen, *A Statistical History of the American Presidential Elections* 27 (Greenwood rev. ed. 1981).

quorum, and using insulting language towards the speaker" failed for lack of the required two-thirds majority constitutionally required for expulsion. *Journal of the House of Representatives of the State of Louisiana* 223 (New Orleans, W.R. Fish 1864).[38] Again, as with other examples, a notable feature of this nineteenth century occurrence is that legislators voted on whether to expel their colleagues for breaking quorum; vacation of the quorum-breakers' seats was not automatic.

The principle that remedies available for addressing quorum-breakers' conduct are available only to the legislative body itself is long-standing. As noted by an early American authority on parliamentary procedure, action within the legislative assembly is "[t]he only thing that can be done, in such an emergency" as a lack of quorum. Luther Stearns Cushing, *Lex Parliamentaria Americana* §§ 361, 442, at 147, 180-181 (Bos., Little, Brown & Co., 2d ed. 1866).[39]

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[38] Available at https://www.google.com/books/edition/Official_Journal_of_the_Proceedings_of_H/72VBAQAAMAAJ (last visited Oct. 29, 2025).

[39] Available at https://archive.org/details/lexparliamentari00cush/page/147/mode/1up (last visited Oct. 29, 2025).

B. Early Texas Examples

In Texas, as noted above, the ability of "a smaller number" (less than a quorum) to "compel the attendance of absent members" was provided for in the 1836 Constitution of the Republic of Texas and every Texas Constitution since. *Supra*, Part I. Compelling the attendance of absent members is very common in Texas legislative history, occurring whenever a house issues a "call of the house." For example, on the first afternoon of the 1876 quorum-break (mentioned above, *supra*, Part II.C, n. 31), the majority that remained behind felt disposed to strike a conciliatory note to their quorum-breaking colleagues:

> WHEREAS, There are a number of members of this House who have, as we believe, purposely absented themselves from the present sitting of the House, knowing that thereby no quorum would be here present; and,
>
> [. . .]
>
> WHEREAS, The power is accorded to us under the Constitution to compel the attendance of these absent members, but we are desirous, if possible, to avoid a resort to any compulsory measures, but would rather that all dissensions be amicably healed, and perfect harmony restored; therefore,
>
> RESOLVED, [. . .] we do most earnesly [sic] appeal to those members of this House who purposely absent themselves from this hall during our sitting to return to their seats and their duties, and aid us

> in the consummation of that legislation necessary to carry on the State government.

H.J. of Tex., 15th Leg., R.S. 734-45 (1876). When sweet reason failed, the majority ordered the absentees arrested. *Id.* at 736-37. For some time thereafter, sessions proceeded with some members "present under arrest[.]" *Id.* at 739-40, 742.

In addition to providing that attendance may be compelled, Texas's constitutions have always permitted the expulsion of legislators upon a vote of their colleagues. *See* Repub. Tex. Const. of 1836, art. I, § 14, *reprinted in* 1 Gammel, *Laws*, *supra*, at 1070-71; Tex. Const. of 1845, art. III, § 13; Tex. Const. of 1861, art. III, § 13; Tex. Const. of 1866, art. III, § 12; Tex. Const. of 1869, art. III, § 16; Tex. Const., art. III, § 11. Such expulsion was the remedy seen fit for use in Texas in response to the quorum-breaking (and violent resisting of arrest) that occurred in the Texas Senate in 1870. S.J. of Tex., 12th Leg., 1st C.S. 282-84 (June 29, 1870); *see* Respondents' Consolidated Br. on the Merits at 43.

C. The Texas provisions for compelling attendance and expelling members are similar to those in the U.S. Constitution.

The tools of compelling attendance and expelling members by vote of the legislative body also appear in the U.S. Constitution. U.S. Const. art. I, § 5, cls. 1, 2. In framing those provisions, multiple delegates expressly related these remedies to the quorum requirement. In other words, to guard against the mischief that could result from a minority's quorum-breaking, the federal and Texas framers adopted the same solutions.

Oliver Ellsworth of Connecticut argued that "[i]t would be a pleasing ground of confidence to the people that no law or burden could be imposed on them, by a few men[,]" and "[t]he inconveniency of secessions may be guarded agst by giving to each House an authority to require the attendance of absent members." 2 Farrand, *supra*, at 253. The Report of the Committee of detail, delivered to the Convention on August 6, 1787, did not provide for the power to compel attendance. In its Article VI, Section 3, it stated only:

> In each House a majority of the members shall constitute a quorum to do business; but a smaller number may adjourn from day to day.

Id. at 180. With the agreement of all the states except Pennsylvania, whose delegation was divided on the question, the Convention added language to the Quorum Clause enshrining the power of less-than-a-quorum "to compel the attendance of absent members in such manner & under such penalties as each House may provide." *Id.* at 246, 253-54.

Regarding punishment of members, the Report of the Committee of detail (in its Article VI, Section 6) stated:

> Each House may determine the rules of its proceedings; may punish its members for disorderly behaviour; and may expel a member.

Id. at 180. But Madison "observed that the right of expulsion (Art. VI. Sect. 6.) was too important to be exercised by a bare majority of a quorum: and in emergencies of faction might be dangerously abused." *Id.* at 254. Gouverneur Morris argued against Madison, stating:

> This power [to expel] may be safely trusted to a majority. To require more may produce abuses on the side of the minority. A few men from factious motives may keep in a member who ought to be expelled.

Id. Madison's position won the support of the vast majority of the delegates and, by the same vote as the power to compel attendance was added, the power to expel a member was modified to require "the concurrence of two thirds[.]" *Id.* at 246, 254. This language on Congress's quorum requirement and punishment powers, with minor changes to its grammar and being reorganized into Article I, Section 5, clauses 1 and 2, was adopted into the final version of the U.S. Constitution. *See* id. at 653; U.S. Const. art. I, § 5, cls. 1, 2.

Notably absent from the records of the federal Convention is any indication that any framer believed that quorum-breakers vacated their offices by the action of intentional "secession" from the legislature. Instead, the discussion of the quorum clause, the power of each house to compel attendance, and the power to expel a member all suggest that the exclusive remedy against quorum-breaking is express in the text of the Constitution.

Both Madison and Morris—though disagreeing on the percentage of legislators that should be needed to exercise the power—placed the power of expulsion in each house of the legislature itself.

Despite the large number of high-profile "bolting" and "disappearing" quorum-breaks in the American experience, Relators have not identified in briefing to this Court a single example in which a state legislator or a member of Congress was removed by executive or judicial action as a result of intentional quorum-breaking. Neither has counsel for Amicus, in preparing this brief, found such an outcome in Texas or another jurisdiction.[40] And only Oregon—through its recently adopted constitutional provision, *see supra* Part II.B—appears to contemplate that quorum-breaking might

[40] The closest case cited by one of the Relators is *Errichietti v. Merlino*, 457 A.2d 476 (N.J. Super. Ct. Law Div. 1982), in which a New Jersey lower court rejected a constitutional challenge to a statute that provided that a legislator's office "shall be deemed vacant" if the legislator is "absent unremittingly for ten days[.]" *Id.* at 480; *see* Relator's Opening Br. on the Merits for the State of Texas, at 39. Such prescription has been law in New Jersey since 1839, preceding the 1947 New Jersey Constitution that expressly provides for statutes in force at the time of the Constitution to "remain in full force[.]" *Errichietti*, 457 A.2d at 488-89. A legislator sued to recover his Senate seat and pay after the Senate President ordered that his annual salary and other emoluments be withheld because the seat was automatically vacated pursuant to the statute. *Id.* at 479. But New Jersey's statute distinguishes the case from other jurisdictions like Texas. And, even if the court there was not wrong in rejecting the constitutional challenge, the court explained that the "right [of removing a legislator from office] is universally controlled by constitutional and legislative provisions, and in the absence of constitutional prohibition rests with the Legislature." *Id.* at 479. The New Jersey Legislature's enactment of a statute that expressly dictates automatic vacation of a legislator's seat ("shall be deemed vacant") was an exercise of the power of removal that rests with the Legislature. *See id.* at 484. In Texas, no similar statute exists.

preclude a legislator from holding his seat again, even if expelled by a vote of his legislative colleagues.

CONCLUSION

This Court correctly observed that our Constitution contains a "careful balance between the right of a legislative minority to resist legislation and the prerogative of the majority to conduct business." *In re Abbott*, 628 S.W.3d at 292. "The two-thirds quorum rule protects against legislative action taken by a smaller fraction of the body. But in the very same sentence, article III, section 10 also protects against efforts by quorum-breakers to shut down legislative business." *Id.* at 297. Consistent with the nineteenth century understanding of the Quorum Clause and the Punishments Clause, the Court should leave punishment—including possible expulsion—of quorum-breakers to the Legislature. Amicus curiae respectfully requests that the petitions for writs of quo warranto be denied.

Respectfully submitted this 30th day of October 2025,

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