IN THE COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

CASE NO. 12-5412

COMMON CAUSE, et al.,

Petitioners,

v.

JOSEPH R. BIDEN, et al.,

Respondents.

On Appeal from the United States District Court for the District of Columbia

PETITION FOR REHEARING EN BANC

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Statement in Support of En Banc Rehearing

Appellants, Common Cause, four members of the House of Representatives, and three children of undocumented immigrants deprived of the opportunity to obtain U.S. citizenship as a result of the filibuster of the DREAM Act (hereafter collectively referred to as Common Cause), respectfully petition this Court for a rehearing en banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure.

I. The Ruling Conflicts with Controlling Decisions of the Supreme Court.

The ruling of the panel—that plaintiffs injured as a result of the supermajority vote requirement in the Senate filibuster rule do not have standing to challenge the constitutionality of the rule by suing "non-Senators," [Slip op. at 8], the Vice President, as President of the Senate, the Secretary of the Senate, Parliamentarian, and Sergeant-at-Arms, agents of the Senate who participate in the implementation and enforcement of the filibuster rule as part of their official duties, but must instead sue the Senate, as the body responsible for existence of the rule, and individual Senators invoking the rule to prevent the majority from voting on and passing the DISCLOSE and DREAM Acts [Slip op. at 5]—directly conflicts with three controlling decisions of the Supreme Court: *Powell v. McCormack*, 395 U.S. 486, 503-06 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967); and *Kilbourn v. Thompson* 103 U.S. 168, 196-200 (1881).

The ruling is also inconsistent with a long line of Supreme Court cases that

have held that an injured plaintiff is not required to sue the President who issued an unconstitutional executive order (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (plurality opinion)), the Congress or members of Congress who passed an unconstitutional statute, or the President who signed it into law, but may sue subordinate officials who participate in implementation or enforcement of the executive order or statute as a part of their official duties, *even though* the subordinate officials were not responsible for its adoption, had no power to repeal or suspend its enforcement, and were merely following orders. *See Ex parte Young*, 209 U.S. 123 (1908).

II. The Issue is of Exceptional Importance.

The Supreme Court has long held that the rule-making power of Congress is not absolute and is subject to the limitations imposed by other provisions of the Constitution. *United States v. Ballin*, 144 U.S. 1, 5 (1892) (While "[t]he Constitution empowers each house to determine its rules of proceedings, [i]t may not by its rules ignore constitutional restraints."). The ruling of the panel[1] will make it impossible, for these and any plaintiffs, to challenge the validity of a rule

[1] The panel left undecided another fully briefed issue of exceptional importance. The district court erred in holding that the House member plaintiffs could not establish standing on a vote nullification theory. JA 94-101. That court all-too-broadly applied *Raines v. Byrd*, 521 U.S. 811 (1997), to effectively overrule *Coleman v. Miller*, 307 U.S. 433, 439 (1939), and *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). That reaches too far. *Chenoweth v. Clinton*, 181 F.3d 112, 116-17 (D.C. Cir 1999); *Kerr v. Hickenlooper*, 744 F.3d 1156, 1171 (10th Cir. 2014). This Court should grant en banc review to correct this error.

of the House or Senate no matter how clearly it conflicts with the Constitution.

The Nature of Appellants' Claim

Common Cause filed a declaratory judgment action challenging the constitutionality of *supermajority vote requirements* in Rule XXII of the Standing Rules of the Senate, commonly known as the Senate filibuster rule.[2] JA 12-52. The rule gives a single Senator the power to prevent the Senate from considering, voting on, and passing a bill without a supermajority vote of 60 Senators.

The complaint alleged that the supermajority vote requirement of Rule XXII is in direct conflict with the fundamental democratic principle of majority rule embodied in the Quorum and the Presentment Clauses (as well as other provisions of the Constitution).[3] JA 40-44. The constitutionality of a Senate rule is not a political question. *Yellin v. United States,* 374 U.S. 109, 114 (1963) ("It has been long settled … that the rules of Congress … are judicially cognizable."). The

[2] Rule XXII is not a rule of *debate*; it is a rule of *voting*. It shifts the point at which decisions are *actually made* in the legislative process from the final majority-vote stage to the preliminary stage. JA 29-32; Reply brief of Appellants at 26.

[3] The Quorum Clause was intended to give each house "the capacity to transact business" based on "the mere presence of a majority" so that the capacity of the Senate to debate and pass legislation would not "depend upon the … assent or action of any single member or fraction of the majority." *Ballin* 144 U.S. at 5-6. Rule XXII does the exact opposite. The rule also conflicts with the Presentment Clause, which "provid[es] that no law could take effect without the concurrence of the *prescribed majority* of the Members of both Houses [and]…represents the Framers' decision that the legislative power … be exercised [in each House] in accord with a *single*, finely wrought …procedure." *INS v. Chadha,* 462 U.S. 919, 948, 951 (1983) (emphasis added). When the Framers intended exceptions to majority rule, they did so expressly in six places. JA 36-37.

Supreme Court held over eighty years ago that when "the construction [of] … the [Senate] rules affects persons other than members of the Senate,"—as is true in this case—"the question presented is of necessity a judicial one" and presents a question of law for the courts. *United States v. Smith*, 286 U.S. 6, 29, 33 (1932).

The complaint named the Vice President, in his official capacity as President of the Senate, as a defendant. JA 30. As President of the Senate, his only *constitutional duty* is to preside over the Senate and enforce its rules.

In addition to the Vice President, the complaint also named three employees of the Senate as defendants. As plainly stated in the complaint, each plays an important role in the implementation and enforcement of the Standing Rules of the Senate. The Secretary of the Senate appoints the Clerk and is primarily responsible for calling the roll and recording the votes on motions for cloture and other Senate business in the official minutes. JA 30. The official duties of the Parliamentarian are to advise the presiding officer on issues of parliamentary procedure, including questions of order that arise under the Senate filibuster rule. JA 30. The Sergeant-at-Arms is specifically charged with the duty to *enforce* the Standing Rules of the Senate, including the filibuster rule. JA 30.

The complaint did *not* ask for relief directly against the Senate or that the

Senate be required to rewrite its rules. JA 49.[4] It simply asked for entry of a declaratory judgment that the *supermajority voter requirements* in Rule XXII are unconstitutional and that they be severed from the remainder of the rule. JA 49-51.[5] Such a judgment would relieve the defendants from any obligation to apply offending portions of the rule. Future cloture motions under Rule XXII would be decided by a vote of a simple majority of Senators present, in conformity with "the general rule of all parliamentary bodies." *Ballin*, 144 U.S. at 6.

The Ruling of the Panel

The panel affirmed the dismissal of the complaint on the sole ground that Common Cause should have sued the Senate and the individual Senators who filibustered the DREAM and DISCLOSE Acts rather than the Vice President and Senate employees who were responsible for the administration and enforcement of the Senate rules:

> [I]t was the Senate that adopted the cloture rule in 1917; … it was the Senate that amended the rule thereafter; … it was the Senate that

[4] *Franklin*, 505 U.S. at 803 (plurality opinion) ("[T]he injury alleged is likely to be redressed by declaratory relief against [the defendants] … even though [they] cannot [themselves] change" Senate rules, because the court may "assume it is substantially likely that the [Senate]…would abide by an authoritative interpretation" of the Constitution); *Powell*, 395 U.S. at 517, 549 n.86 ("[I]t is an inadmissible suggestion that action might be taken [by the House] in disregard of a judicial determination."); *Nixon v. Sirica*, 487 F.2d 700, 711-12 (D.C. Cir. 1973) ("[C]ourts in this country always assume that their orders will be obeyed, especially when addressed to responsible government officials.")

[5] See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

> failed to invoke cloture on the DREAM and DISCLOSE bills [and] "[i]f we 'assume for purposes of standing that [Common Cause] will ultimately receive the relief sought,' it will be the Senate that has to conduct its legislative business according to a court-ordered change in its rule."
>
> ….
>
> What defeated the DREAM and DISCLOSE bills was legislative action, activity typically considered at the heart of the Speech of Debate Clause …. Yet, Common Cause … named as defendants only the Vice President … the Secretary of the Senate; the Parliamentarian … and the Sergeant-at-Arms …. In suing only non-Senators, Common Cause is "Hoist with [its] own petar."
>
> ….
>
> Here, Common Cause does not identify anything the defendants did (or refrained from doing) to cause its alleged injuries. The Senate established the cloture rule and the Senators voting against cloture doomed the DREAM and DISCLOSE bills. It is hard to imagine how any of the defendants bore responsibility for the outcome.

Slip op. at 4-5, 7, 8.

Reasons for Granting the Petition

The ruling of the panel creates a dilemma that would make it impossible, not only for these plaintiffs but for any future plaintiffs, to challenge the constitutionality of a Senate rule, no matter how clearly the rule may conflict with the Constitution. No one could, for example, challenge a rule that prohibited black or female Senators from voting. An aggrieved plaintiff could not sue the Vice President or employees of the Senate required to implement and enforce the discriminatory rule without being impaled by the panel's unjustifiably narrow reading of the causation element of standing. If the plaintiff were to follow the advice of the panel and name the Senate or individual Senators as defendants, the

complaint would be instantly dismissed under the Speech or Debate Clause.

The ruling of the panel simply cannot be reconciled with the decisions of the Supreme Court in *Powell v. McCormack* and *Kilbourn v. Thompson*, or with a long line of Supreme Court cases where plaintiffs alleged injury from an unconstitutional executive order or other action of the President (*Youngstown Sheet & Tube Co.*, 343 U.S. 579; *Franklin*, 505 U.S. 788 (plurality opinion)), an unconstitutional statute passed by Congress and signed into law by the President (*See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)), an unconstitutional resolution adopted by one house of Congress (*Powell*, 395 U.S. 486 (refusing to seat duly elected member); *Smith*, 286 U.S. 6 (reconsidering confirmation vote); *Kilbourn*, 103 U.S. 168 (ordering arrest for contempt)), allegedly unconstitutional rules adopted by the House (*Ballin*, 144 U.S. 1 (rejecting a challenge to a rule requiring members present but abstaining from voting be counted for purposes of a quorum))[6], or by the Senate (*Missouri Pac. Ry. Co. v. Kansas*, 248 U.S. 276 (1919) (rejecting a challenge to a Senate rule that required a vote of only two-thirds of a quorum of the Senate, rather than the full Senate, to override presidential veto)).

In neither case in which the Court has entertained challenges to the constitutionality of Senate rules were the Senate or any of its members named as defendants or plaintiffs. *Smith*, 286 U.S. at 33 (rejecting the Senate's interpretation

[6] See also *Yellin v. United States*, 374 U.S. 109 (1963); *Christoffel v. United States*, 338 U.S. 84 (1949) (rejecting interpretations of House rules).

of one of its own rules which expressly allowed the Senate to reconsider a confirmation vote within three executive calendar days); *Missouri Pac. Ry.*, 248 U.S. at 276. In none of these cases were the President, Congress, or the members of Congress held to be necessary parties even though their actions were the *primary* cause of the plaintiff's injuries.

I. The Appellants Were Not Required to Sue the Senate to Satisfy the Causation Element of Article III Standing.

Article III does not require that the action of a named defendant be the *primary* cause of injuries complained of by a plaintiff as long as there be "*a* causal connection between the injury and the conduct complained of—the injury has to be 'fairly … trace[able]' to the challenged action of the defendant." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (emphasis added); *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 705 (D.C. Cir. 1988) ("[M]ere indirectness of causation is no barrier to standing and thus, *an injury worked on one party by another through a third party intermediary may suffice.*") (emphasis added); 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3531.5 (3d ed. 2013) ("The required 'causal link' was found in the prospect of remedial benefit, nothing more.") (citing *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 80-81 (1978)). This requirement is satisfied so long as *at least one* of the named defendants participated or assisted in the implementation or enforcement of the allegedly unconstitutional rule which injured at least one of the plaintiffs.

Powell, 395 U.S. at 504, 550.

In *Powell*, the Clerk, the Sergeant-at-Arms, and the Doorkeeper of the House had no *responsibility* for the decision of the House to refuse to seat Rep. Adam Clayton Powell. Their only involvement was that they each were required, as a part of their official duties, to participate in the implementation and enforcement of the unconstitutional decision of the House. Powell's complaint *alleged* that the Clerk threatened to withhold services to which Powell was entitled as a member of the House, the Sergeant-at-Arms threatened to withhold payment of Powell's salary, and the Doorkeeper threatened to deny Powell admission to the House chamber. *Id.* at 500-01. As employees of the House, they had no discretion to do otherwise, but were required to obey the resolution of the House.

Although the Court held that the House members who voted to deny Powell his seat were immune from suit under the Speech or Debate Clause, their "[l]egislative immunity does not … bar … judicial review of legislative acts" alleged to violate the Constitution. "That question was settled by implication … [in] Marbury v. Madison … and expressly in *Kilbourn v. Thompson*." *Id.* at 503.

The panel failed to recognize that an unconstitutional Senate rule, like an unconstitutional statute, is void (*Marbury v. Madison*, 5 U.S. (1 Cranch) at 177), and any attempt to implement or enforce an unconstitutional rule or resolution (*Powell* and *Kilbourn*) is outside the "sphere of *legitimate* legislative activity"

(*Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975) (emphasis added)). An unconstitutional Senate rule or statute "is a nullity. It confers no authority…affords no protection [and] [w]hoever seeks to enforce unconstitutional statutes [or rules] … or to obtain immunity through them, fails …." *Hopkins v. Clemson Agric. Coll.*, 221 U.S. 636, 644 (1911).

The Court held in *Powell* that, "although an action against a Congressman may be barred by the Speech or Debate Clause, *legislative employees who participated in the unconstitutional activity are responsible for their acts*" and the fact "[t]hat House employees are acting pursuant to express orders of the House does not bar judicial review of the constitutionality of the underlying legislative decision." *Powell*, 395 U.S. at 504 (emphasis added). The Court specifically held that "[a] court may grant declaratory relief even though it chooses not to issue an injunction or mandamus," against employees of a coordinate branch. *Id.* at 499. "[A]lthough [Powell's] action should be dismissed against … Congressmen, *it may be sustained against their agents." Id.* at 550 (emphasis added).

As the Court explained in *Gravel v. United States*, immunity under the Speech or Debate Clause was "unavailable to [the House employees in *Powell* and in *Kilbourn*] because they were engaged in illegal conduct that was [unconstitutional and] not entitled to Speech or Debate Clause protection" even though the employees were "merely carrying out directions that were protected by

the Speech or Debate Clause." 408 U.S. 606, 620-21 (1972). While the Speech or Debate Clause protected the members of Congress from liability for passing an "illegal legislative act," it did not preclude the Court in *Kilbourn* and *Powell* from "afford[ing] relief against House aides seeking to implement the invalid resolutions." *Id.* at 620.[7] The same is true here.

Although the Senate was responsible for the adoption of Rule XXII, it does not follow that the action of the Senate was the *sole* cause of appellants' injuries. As was true in *Powell*, appellants' injuries were *also caused* by the acts or omissions of the Vice President, the Secretary, the Sergeant-at-Arms and the Parliamentarian, each of whom was required to accept, implement, and enforce the Senate filibuster rule, unless and until the rule is repealed by a two-thirds vote of the Senate, or is declared unconstitutional by the federal courts.

The relevant question is not whether the Senate was "an absent party," [Slip op. at 7], but whether the Senate was an *unrelated* "third party" having no connection to the defendants. In this case, as in *Powell* and *Kilbourn*, there was a

[7] The Court has explicitly held that "[l]egislative privilege [where elected members are sued] deserves greater respect than where an official acting on behalf of the legislature is sued …." *Tenney v. Brandhove*, 341 U.S. 367, 376-78 (1951); *Dombrowski*, 387 U.S. at 84-85 (per curiam) (deeming employee protection "less absolute"). While the members of Congress are absolutely immune for legislative acts, regardless of whether those acts are valid, their agents and employees are immune only if their actions are *both* legislative *and lawful*. *Gravel*, 408 U.S. at 619 ("The Speech or Debate Clause could not be construed to immunize [] illegal [conduct] even though directed by an immune legislative act.").

"formal legal relationship" between the Senate and each of the defendants. *Nat'l Parks Conservation Ass'n v. Manson*, 414 F.3d 1, 6 (D.C. Cir. 2005). Each defendant was functioning as an agent of the Senate and was required as a part of their official duties to implement and enforce the Senate rules and decisions made by the Senate under those rules (assuming the rule is constitutional). The actions of the Senate in this case were not those of a "truly independent actor who could destroy the causation required for standing." *Id.*

Moreover, where the violation of a "mandatory legal regime," such as that imposed by the Constitution, is alleged, "[t]he proper comparison for determining causation is … between what the [defendants] did and what the plaintiffs allege the [defendants] should have done under the [Constitution]." *Animal Legal Def. Fund Inc. v. Glickman*, 154 F.3d 426, 441 (D.C. Cir. 1998) (en banc). If, as Common Cause has alleged, the supermajority vote requirement in Rule XXII is unconstitutional, the Vice President (and other presiding officers) should have declared it so in ruling on questions of order, the Parliamentarian should have advised that the rule was unconstitutional, the Secretary should have declared cloture on the DREAM and DISCLOSE Acts to have been properly invoked by majority vote, and the Sergeant-at-Arms should have enforced that decision.

II. Appellants' Injuries Were "Fairly Traceable" to the Acts or Omissions of the Vice President and Senate Employees.

In ruling on a motion to dismiss for want of standing, the panel was required

to presume that appellants are entitled to prevail on the merits of their constitutional claims that the supermajority vote requirements in Rule XXII are unconstitutional (*LaRoque v. Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011)), accept the "general factual allegations of injury resulting from defendant's conduct… [and] 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan*, 504 U.S. at 561. The allegations of the complaint were more than sufficient to satisfy the causation prong of Article III standing.

The Vice President is declared to be the President of the Senate by Art. I, § 3, cl. 4 of the Constitution. His *only* duty is to preside over the Senate and to interpret, apply, and enforce adherence to its Standing Rules. *See Jefferson's Manual of Parliamentary Practice*, Sec. I - Importance of Adhering to Rules, House Doc. 99-279 p. 113 (99th Cong. 2nd Sess. (1987)).

It is the duty of the Vice President to enforce the Senate rules by ruling on questions of order.[8] If a motion for cloture is made, the Vice President (or whoever is presiding at the time) is required by Rule XXII to state the motion, direct the

[8] Under Senate precedents, questions of order that turn on a question of constitutional law (such as one contending that the supermajority vote requirements in Rule XXII are unconstitutional) are not ruled on by the presiding officer but are referred to the full Senate and decided by majority vote. Since only the federal courts have jurisdiction to "say what the law is," by deciding an issue of constitutional law (*Marbury v. Madison*, 5 U.S. (1 Cranch) at 177), these precedents violate separation of powers and should not be given effect.

Clerk to call the roll, and submit the question of cloture to the Senate in the following words: "Is it the sense of the Senate that debate shall be brought to a close" (Rule XXII para. 2), and then to announce the result of the vote and whether cloture has or has not been invoked, which is then recorded in the minutes.

The Secretary of the Senate is a Senate employee who appoints the Chief Clerk and controls, directs, and supervises "the Chief Clerk's office."[9] When a motion for cloture is made, the Clerk is required by Rule XXII, under the supervision of the Secretary, to "immediately report[] the [cloture] motion" and to "call the roll."[10] The Secretary[11] directs the Senate Bill Clerk to "provide Senate 'Roll Call Vote' results"[12] which "are compiled through the Senate Legislative Information System by the Senate Bill Clerk under the direction of the Secretary of the Senate."[13]

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[9] *See* FLOYD M. RIDDICK AND ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. Doc. 101-28 at 1231 (1992) ("[T]he appointment, removal, and control of the clerical force in the Secretary's office, including the Chief Clerk, was vested in the Secretary of the Senate.").

[10] *See id.* at 282 ("Cloture Procedure").

[11] *See* Senate Rule I ("In the absence of the Vice President, and pending the election of a President pro tempore, the Acting President pro tempore or the Secretary of the Senate, or in [her] absence the Assistant Secretary, shall perform the duties of the Chair."); Rule XIV ("All bills, amendments, and joint resolutions shall be examined under the supervision of the Secretary of the Senate before they go out of the possession of the Senate.").

[12] *See* United States Senate Website's Compilation of Legislation & Records, http://www.senate.gov/pagelayout/legislative/a_three_sections_with_teasers/votes.htm.

[13] *Id.*

The Parliamentarian also plays an important role in the implementation and enforcement of the Standing Rules of the Senate. Her duties are to interpret the Senate rules and to advise the Vice President or other presiding officer whether a particular Senate rule applies, and how it should be enforced through rulings on questions of parliamentary procedure and questions of order. She advises the Senate "how to implement applicable procedures" in particular circumstances including those that arise under Rule XXII.[14]

The duty of the Sergeant-at-Arms is the same as that of the Sergeant-at-Arms who was held to be a proper defendant in *Powell*—to "*enforce* [] *all rules of the Senate*, [including] its Standing Rules [and] Standing Orders."[15] This responsibility was spelled out in the initial complaint (JA 30) and satisfies even the panel's constricted reading of causation. Slip op. at 8 ("If [the Senate employee] enforced or executed Senate rules, then perhaps he could be held to account if the rule were unconstitutional.").

Conclusion

For the foregoing reasons, appellants respectfully urge that this Petition for a Rehearing En Banc be granted.

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[14] VALERIE HEITSHUSEN, CONG. RESEARCH SERV., RS20544, THE OFFICE OF THE PARLIAMENTARIAN IN THE HOUSE AND SENATE (Feb. 3, 2012).

[15] United States Senate, Officers and Staff: Sergeant at Arms, Chapter 2: Offices and Functions Under the Jurisdiction of the Sergeant at Arms, http://www.senate.gov/artandhistory/history/common/briefing/sergeant_at_arms.htm (emphasis added).

Respectfully submitted, this 27th day of May, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date electronically filed the within and foregoing **PETITION FOR REHEARING EN BANC** with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

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This 27th day of May, 2014

/s/ Emmet J. Bondurant
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ADDENDUM

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 21, 2014 Decided April 15, 2014

No. 12-5412

COMMON CAUSE, ON ITS OWN BEHALF AND BEHALF OF ITS MEMBERS, ET AL.,
APPELLANTS

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES SENATE, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:12-cv-00775)

Emmet J. Bondurant II argued the cause for appellants. With him on the briefs was *Stephen Spaulding*.

Thomas E. Caballero, Assistant Senate Legal Counsel, Office of Senate Legal Counsel, argued the cause for appellees. With him on the brief were *Morgan J. Frankel*, Senate Legal Counsel, *Patricia Mack Bryan*, Deputy Senate Legal Counsel, and *Grant R. Vinik*, Assistant Senate Legal Counsel.

Before: HENDERSON, *Circuit Judge*, and WILLIAMS and RANDOLPH, *Senior Circuit Judges*.

Opinion for the Court filed by *Senior Circuit Judge* RANDOLPH.

RANDOLPH, *Senior Circuit Judge*: A bill that would have become the "DISCLOSE" Act and a bill that would have become the "DREAM" Act never became law. Both bills passed the House of Representatives during the 111th Congress and then stalled in the Senate. *See generally* H.R. 5281, 111th Cong. (2d Sess., 2010) (DREAM bill); H.R. 5175, 111th Cong. (2d Sess., 2010) (DISCLOSE bill). The Senate never put either to a vote. Both fell to a filibuster. According to the plaintiffs, the Senate rule governing filibusters is unconstitutional.

The mechanics of a filibuster are these. Senators are entitled to debate any bill indefinitely unless the Senate passes a motion, known as a "cloture" motion, to end debate and proceed to a vote on the bill. *See* WALTER J. OLESZEK, CONG. RESEARCH SERV., CLOTURE: ITS EFFECT ON SENATE PROCEEDINGS (2008). The Senate typically operates by majority rule. But under Senate Rule XXII, invoking cloture requires a three-fifths majority of all Senators—sixty votes. *See* STANDING RULES OF THE SENATE, S. DOC. 113-18, R. XXII § 2, at 15-17 (2013). In other words, even when a majority of Senators support a bill, a minority of Senators can put off a vote indefinitely.

Historically, a Senator determined to prevent a vote on a measure he opposed would stand and speak for hours on end. Unless he yielded the floor, the Senate could not move forward. Modern filibusters are less physically demanding. Due to a change in the Senate's legislative procedure, filibustering no longer requires that a Senator "actually stand before the chamber speaking." Tonja Jacobi & Jeff VanDam, *The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in the U.S. Senate*, 47 U.C. DAVIS L. REV. 261, 277-78 (2013). About forty years ago, the Senate began to conduct its legislative

business on parallel "tracks." *See* Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1010 (2011). As a result, the defeat of a cloture motion allows the Senate to take up other business while the "filibuster" remains, in a technical sense, ongoing.[1] *Id.*

The DREAM and DISCLOSE bills foundered on this modern version of the filibuster. The Senate considered cloture motions on both bills. Although the motions garnered the votes of a majority of Senators, neither motion achieved the sixty votes necessary to cut off debate. *See* 156 CONG. REC. S10,665 (daily ed. Dec. 18, 2010) (defeating cloture, 41-55, on the House-passed DREAM bill); 156 CONG. REC. S7388 (daily ed. Sept. 23, 2010) (defeating cloture, 39-59, on the Senate version of the DISCLOSE bill after the House passed a similar bill). After the failed cloture votes, the Senate turned to other business.

The plaintiffs in this case are House members who voted for the DREAM and DISCLOSE bills, individuals who would have benefitted from the DREAM Act, and an association, Common Cause, that supported passage of the DISCLOSE Act. We shall refer to the plaintiffs collectively as Common Cause. They brought suit in the district court in May 2012 against the Vice President and three Senate officers. Their complaint alleged that the effect of Rule XXII is to require sixty votes to get legislation through the Senate, that the rule prevents the passage of legislation that has the support of a majority of both houses of Congress, and that the rule therefore violates the Constitutional principle of majority rule. They asked the court to strike the

[1] Making filibusters easier has made them more frequent. Today the mere threat of a filibuster may be "enough to convince the majority leader to devote the Senate's time to other matters." RICHARD S. BETH & VALERIE HEITSHUSEN, CONG. RESEARCH SERV., FILIBUSTERS AND CLOTURE IN THE SENATE 23 (2013).

sixty-vote requirement from Rule XXII and replace it with a majority-rule requirement.[2]

The district court dismissed the complaint for lack of jurisdiction. *Common Cause v. Biden*, 909 F. Supp. 2d 9, 17-27 (D.D.C. 2012). The court ruled that none of the plaintiffs—neither the Congressmen, the individuals, nor the association—had suffered a cognizable injury. *See id.* at 18-20 (procedural injury), 21-22 (substantive injury), 23-26 (vote nullification). It found that the plaintiffs could not satisfy the causation and redressability prongs of standing, because there was no guarantee the bills would have passed but for Rule XXII and because nothing the court could do would provide effective relief. *Id.* at 22-23. The court also determined that the suit presented a nonjusticiable political question. *Id.* at 27-31.

We agree with the district court that Common Cause lacks standing, but for a different reason. Our analysis focuses on whom Common Cause chose to sue—or, more to the point, *not* to sue.

The Senate has the power to "determine the Rules of its Proceedings." U.S. CONST. art. I, § 5. Accordingly, it was the Senate that adopted the cloture rule in 1917, *see* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 195 (1997); it was the Senate that amended the rule thereafter,

[2] This is not the first constitutional challenge to the filibuster. No court has reached the merits of the dispute. *See, e.g.*, *Judicial Watch, Inc. v. U.S. Senate*, 432 F.3d 359 (D.C. Cir. 2005) (dismissing for lack of standing); *Patterson v. U.S. Senate*, No. 13-2311 (N.D. Cal. Mar. 31, 2014) (same); *Page v. Shelby*, 995 F. Supp. 23 (D.D.C. 1998) (same). But the filibuster remains a topic of scholarly debate. *See, e.g.*, Josh Chafetz & Michael J. Gerhardt, Debate, *Is the Filibuster Constitutional?*, 158 U. PA. L. REV. PENNUMBRA 245 (2010).

see id. at 209-13; and it was the Senate that failed to invoke cloture on the DREAM and DISCLOSE bills. If "we assume for purposes of standing that [Common Cause] will ultimately receive the relief sought," *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 665 (D.C. Cir. 1996) (en banc), it will be the Senate that has to conduct its legislative business according to a court-ordered change in its rule.

Yet the complaint named neither the Senate nor a Senator.[3] It is apparent why. *See* Tr. of Oral Arg. at 11, *Common Cause v. Biden*, No. 12-5412 (D.C. Cir. Jan. 21, 2014). The Constitution's Speech or Debate Clause provides that "for any Speech or Debate in either House," Senators and Representatives "shall not be questioned in any other Place." U.S. CONST. art I, § 6. The Clause confers immunity for any act that falls "within the sphere of legitimate legislative activity." *Eastland v. U.S. Servicemen's*

[3] Citing *Montana v. United States*, 440 U.S. 147 (1979), Common Cause argues that no matter who the defendants are, the Senate will be bound by the result of this lawsuit because it "has undertaken and is controlling the defense" on behalf of the Senate officers sued. Reply Br. of Appellants 1 n.2. We seriously doubt whether *Montana*—a case about collateral estoppel—supports Common Cause's position. But even if it did, the argument has at least two fatal flaws. First, it appears only in Common Cause's reply brief and is forfeit. *See Newspaper Ass'n of Am. v. Postal Regulatory Comm'n*, 734 F.3d 1208, 1212 (D.C. Cir. 2013) ("[W]e have repeatedly held that we do not consider arguments raised only in a reply brief."). Second, there is no reason to think Common Cause's *ipse dixit*—that the Senate is "controlling" the defense—is true. Senate Resolution 485, cited by Common Cause, simply authorizes Senate Counsel "to represent" the defendants in this lawsuit. S. Res. 485, 112th Cong. (2012). We doubt the Senate's involvement extended any further. Indeed we doubt Senate Counsel would have *allowed* it to. *Cf.* MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (barring interference with the client-lawyer relationship by a third party who pays for the representation).

Fund, 421 U.S. 491, 503 (1975); *see also Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880) (the Clause covers all "things generally done in a session of the House [or Senate] by one of its members in relation to the business before it"). And it protects not only elected legislators but their aides, to whom legislative work is delegated. *See Gravel v. United States*, 408 U.S. 606, 616-18 (1972). That is, the Clause covers aides when their conduct "would be a protected legislative act if performed by the Member himself." *Id.* at 618.

When the Clause applies, it is an absolute bar to suit. *See Eastland*, 421 U.S. at 503. The right not to be "questioned in any other Place," U.S. CONST. art. I, § 6, means that lawmakers are protected "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

What defeated the DREAM and DISCLOSE bills was legislative action, activity typically considered at the heart of the Speech or Debate Clause. *See, e.g.*, *Doe v. McMillan*, 412 U.S. 306, 311-12 (1973). Yet Common Cause, in objecting to the Senate rule dealing with how Senators "Debate" legislation, named as defendants only the Vice President, in his capacity as President of the Senate, *see* U.S. CONST. art. I, § 3; the Secretary of the Senate; the Parliamentarian of the Senate; and the Sergeant-at-Arms of the Senate. Relying on the Supreme Court's Speech or Debate Clause decisions, the defendants mount an argument that the Clause protects them from suit, just as it does Senators and their aides.[4] Whether they are right is

[4] For instance, the Constitution designates the Vice President "President of the Senate." U.S. CONST. art. I, § 3. As such, he has "no Vote, unless [the Senate] be equally divided." *Id.* When "the Vice President is fulfilling his duties under Article I to preside over the Senate and break ties," he might "be considered part of the legislative

unnecessary for us to decide. In suing only non-Senators, Common Cause is "Hoist with [its] own petar." WILLIAM SHAKESPEARE, HAMLET, PRINCE OF DENMARK act 3, sc. 4.

To invoke the jurisdiction of the federal courts, a plaintiff must allege (1) a concrete injury (2) caused by the defendant (3) that a favorable judicial decision will redress. *See, e.g.*, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146-47 (2013). The causation element requires that a proper defendant be sued. *See* 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3531.5 (3d ed. 2013); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). That is, a plaintiff's claimed injury must have been caused by "acts of the defendant, not of some absent third party." *Fla. Audubon Society*, 94 F.3d at 663.

The defendants argue that the Senate, acting through its voting Members, caused the injuries alleged in the complaint. In response, Common Cause cites *Powell v. McCormack*, 395 U.S. 486 (1969), for the proposition that it may challenge the cloture rule by suing the Senate officers responsible for "implementing" it, even if it cannot sue the legislators who created it. Reply Br. of Appellants 15 (emphasis omitted). The analogy to *Powell* does not hold up. After the House of Representatives voted to

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branch and fall within the ambit of the Speech or Debate Clause." Roy E. Brownell II, *Vice Presidential Secrecy: A Study in Comparative Constitutional Privilege and Historical Development*, 84 ST. JOHN'S L. REV. 423, 579 (2010) (footnote omitted); *see also* Memorandum from Robert G. Dixon Jr., Ass't Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, Re: Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office, at 36 (Sept. 24, 1973) ("With respect to his responsibility as tie breaker his immunity . . . should be analogized to that of Members of Congress under Article I, section 6 . . .").

exclude Adam Clayton Powell, Powell sued the Speaker of the House, five Members of the House, the Clerk of the House, the Sergeant at Arms, and the House Doorkeeper for "refus[ing] to pay Powell his salary" and "threaten[ing] to deny Powell admission to the House chamber." *Powell*, 395 U.S. at 493. The Court concluded that Powell could sue the House officers "for their acts" in implementing the House resolution. *Id.* at 505. The causal connection between the named officers and the specific injuries alleged was obvious.

Here, Common Cause does not identify anything the defendants did (or refrained from doing) to cause its alleged injuries. The Senate established the cloture rule and the Senators voting against cloture doomed the DREAM and DISCLOSE bills. It is hard to imagine how any of the defendants bore responsibility for that outcome. Consider, for instance, the defendant Senate Parliamentarian. If he enforced or executed Senate rules, then perhaps he could be held to account if the rule were unconstitutional. *See Powell*, 395 U.S. at 503-06. But the Parliamentarian's role is "purely advisory." Chafetz, *supra*, at 1036. Rulings on Senate procedure are the purview of the Senate's presiding officer. *Id.* at 1036-37. And Senate Rule XX makes the rulings of the presiding officer appealable to the full chamber.[5] *See* STANDING RULES OF THE SENATE, *supra*, R. XX.

[5] That opportunity to appeal constituted the so-called "nuclear option" the Senate invoked to modify the cloture rule as applied to executive branch and lower federal court nominees. *See generally* Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES (Nov. 21, 2013). On November 21, 2013, the Senate considered, and defeated, a cloture motion on a nomination to a judgeship on this court. Senator Reid, the majority leader, then raised a point of order to the Chair, positing that a cloture vote for such nominations required only a majority. The Chair rejected the point of order under Rule XXII. Senator Reid then appealed the ruling to the full Senate, and, by a 52-48 vote, the Chair's ruling was

Thus the Vice President is an improper defendant, too, even though he may preside over Senate proceedings. In any event, the Vice President did not preside over the cloture votes on the DREAM and DISCLOSE bills.

In short, Common Cause's alleged injury was caused not by any of the defendants, but by an "absent third party"—the Senate itself. *Fla. Audubon Society*, 94 F.3d at 663. We therefore lack jurisdiction to decide the case.

The judgment of the district court is

Affirmed.

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overturned. Thus was set new Senate precedent interpreting Rule XXII in the context of executive branch and lower federal court nominations. *See* 159 CONG. REC. S8417-18 (daily ed. Nov. 21, 2013).

CERTIFICATE OF PARTIES AND AMICI CURIAE

The following is a list of all parties, intervenors and *amici* who appeared in the district court:

Plaintiffs:

COMMON CAUSE, Plaintiff/Appellant

REPRESENTATIVE JOHN LEWIS, Plaintiff/Appellant

REPRESENTATIVE MICHAEL MICHAUD, Plaintiff/Appellant

REPRESENTATIVE HENRY ("HANK") JOHNSON, Plaintiff/Appellant

REPRESENTATIVE KEITH ELLISON, Plaintiff/Appellant

ERIKA ANDIOLA, Plaintiff/Appellant

CELSO MIRELES, Plaintiff/Appellant

CAESAR VARGAS, Plaintiff/Appellant

Defendants:

JOSEPH R. BIDEN, Defendant/Appellee

NANCY ERICKSON, Defendant/Appellee

ELIZABETH MACDONOUGH, Defendant/Appellee

TERRANCE W. GAINER, Defendant/Appellee

THE UNITED STATES SENATE[1]

[1] The Senate undertook the defense of this action by adopting a resolution directing its Senate Legal Counsel to represent the defendants. S. Res. 485 (112th Cong.).

Intervenors and *Amici*:

No intervenors or *amici* appeared in the district court.

DISCLOSURE STATEMENT

Ownership & Parent Companies

Common Cause is a non-profit corporation organized and existing under the laws of the District of Columbia. Common Cause has no parent, subsidiary or affiliated companies. No publicly-held company has an ownership interest in Common Cause.

General Nature and Purpose

Common Cause is a nonpartisan, nonprofit advocacy organization founded in 1970 by John Gardner as a grass-roots citizens' lobby to assist citizens in making their voices heard in the political process and in holding their elected leaders accountable to the public interest. Common Cause's purposes and objectives include campaign finance reform and disclosure, electoral reform, and the repair and reform of the structures and the instruments of self-government to make government more democratic and accountable to the people. Common Cause remains the nation's largest organization committed to honest, open and accountable government, and greater citizen participation in democracy.