ORAL ARGUMENT IS REQUESTED BUT HAS NOT BEEN SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CASE NO. 12-5412

COMMON CAUSE, et al.,

Appellants,

v.

JOSEPH R. BIDEN, et al.,

Appellees.

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

BRIEF OF APPELLANTS

Emmet J. Bondurant
Georgia Bar No. 066900
bondurant@bmelaw.com
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree Street
Atlanta, Georgia 30309
Telephone: (404) 881-4100
Facsimile: (404) 881-4111

Stephen Spaulding
Staff Counsel of Common Cause
D.C. Bar No. 1001633
sspaulding@commoncause.org
Common Cause
1133 19th Street, NW, Suite 900
Washington, D.C. 20036
Telephone: (202) 736-5781
Facsimile: (202) 355-7546

Attorneys for Appellants

Certificate as to Parties, Ruling Under Review and Related Cases

A. Parties, Intervenors and *Amici*

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]

Intervenors and *Amici*:

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

B. Ruling Under Review

The ruling under review is a final judgment by Judge Emmet G. Sullivan of the United States District Court for the District of Columbia entered on December 21, 2012, in docket 1:12-cv-00775 (D.D.C.) dismissing the plaintiffs' complaint under Fed. R. Civ. P. 12(b)(1) for lack of standing and under the political question doctrine. JA66-112. No official citation exists.

C. Related Cases

This matter has not previously been before this Court or any other court. Appellants' counsel are unaware of any related cases pending in this Court or any other court.

Corporate 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

[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.).

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.

Statement Regarding Oral Argument

Appellants respectfully request that they be granted oral argument.

This case involves a challenge by four members of the House of Representatives, three beneficiaries of the DREAM Act, and Common Cause, to the constitutionality of the Senate filibuster rule. Rule XXII has been called the "shame of the Senate" by senators on both sides of the aisle, and its constitutionality has been repeatedly questioned since the rule was first adopted in 1917. There is also a widespread belief that the Senate is broken and is incapable

of healing itself by majority vote through the normal political processes because of Senate rules which prohibit the Senate from amending its rules without a two-thirds vote.

Previous attempts to challenge the constitutionality of the Senate filibuster rule have all failed because they were brought by parties who were neither members of the House of Representatives whose votes were nullified in the Senate by the Senate filibuster rule, nor beneficiaries of bills that had majority support in the Senate and would have passed and become law but for the supermajority vote requirement in Rule XXII.

As is explained in greater detail in the brief, appellants believe that the ruling of the district court is in conflict with both Supreme Court and D.C. Circuit precedents and should be reversed.

Oral argument would assist the Court in ruling on these important issues.

Table of Contents

Table of Authorities[2]

CASES:

[2] Authorities upon which we chiefly rely are marked with asterisks.

Rules & Statutes:

Other:

Jurisdictional Statement

This is an appeal from a final judgment of the United States District Court for the District of Columbia entered on December 21, 2012, dismissing the plaintiffs' complaint under Fed. R. Civ. P. 12(b)(1) for lack of standing and under the political question doctrine. JA66-112.

The complaint sought entry of a judgment under 28 U.S.C. § 2201 declaring the supermajority vote portions of Rule XXII of the Standing Rules of the United States Senate unconstitutional and severing the offending portions of Rule XXII from the remainder. JA61-62.

The district court had subject matter jurisdiction under 28 U.S.C. § 1331.

A Notice of Appeal was filed on December 21, 2012. JA10 (Dkt. No. 26).

This Court has appellate jurisdiction under 28 U.S.C. § 1291.

Statement of the Issues

1. Do members of the House of Representatives have standing to challenge the unconstitutional nullification of votes they cast in the House as a consequence of the 60-vote requirement in Senate Rule XXII?

2. Do children of undocumented immigrants have standing to challenge the unconstitutionality of the 60-vote requirement in Senate Rule XXII which prevented the Senate from debating and passing the DREAM Act?

3. Does Common Cause have standing to challenge the unconstitutionality of the 60-vote requirement in Rule XXII on its own behalf and on behalf of its members who were deprived of the benefit of information concerning the identities of individuals and corporations who fund political ads, as a result of a filibuster of the DISCLOSE Act by a minority in the Senate under Rule XXII?

4. Do the federal courts have jurisdiction to rule on the unconstitutionality of Senate rules adopted under Article I, Section 5 that conflict with other provisions of the Constitution, or is the constitutionality of Senate rules, unlike the constitutionality of laws passed by Congress, beyond the purview of the courts under the political question doctrine?

5. Are the supermajority vote requirements in Senate Rule XXII unconstitutional, either alone, or in combination with Rule V(2)?

Statement of the Case and Course of Proceedings

Common Cause, Representatives John Lewis of Georgia, Michael Michaud of Maine, Hank Johnson of Georgia, Keith Ellison of Minnesota, and three children of undocumented immigrants, Erika Andiola, Celso Mireles, and Caesar Vargas, filed a complaint against Vice President Joseph Biden, as the presiding officer of the Senate, Nancy Erickson, the Secretary of the Senate, Elizabeth MacDonough, the Senate Parliamentarian, and Terrance Gainer, the Sergeant-at-

Arms of the Senate, alleging that the supermajority vote provisions of Rule XXII of the Standing Rules of the United States Senate that require 60 votes to close debate in the Senate on motions to proceed, bills, and nominees, and a two-thirds vote to close debate on a resolution to amend the Senate rules, are unconstitutional. The complaint requested entry of a judgment declaring the supermajority vote requirements in Rule XXII unconstitutional and severing the offending portions. JA61-62.

On July 20, 2012, the defendants filed a Motion to Dismiss under Fed. R. Civ. P. 12(b)(1). JA64.

On December 21, 2012, Judge Emmet G. Sullivan issued a Memorandum Opinion [JA66] and an Order [JA113] granting the Defendants' Motion to Dismiss for lack of standing and under the political question doctrine.

A Notice of Appeal was filed on December 21, 2012. JA10 (Dkt. No. 26).

Statement of Facts

Common Cause, four members of the House of Representatives, and three children of undocumented immigrants challenged the constitutionality of the Senate filibuster rule after a Senate minority used the 60-vote requirement in Rule XXII to prevent the majority from passing the DISCLOSE Act (H.R. 5175) and the DREAM Act (H.R. 5281) and sending them to the President who would have signed them into law. JA17.

The DISCLOSE Act would have required prompt public disclosure of the sources and amounts of heretofore secret contributions by corporations and individuals to Super PACs and other supposedly "independent" groups for campaign ads. JA25-26 The DREAM Act would have provided a path to U.S. citizenship and immunity from deportation for children of undocumented immigrants who were brought to the United States as minors by their parents.

The DISCLOSE Act and the DREAM Act were passed by large majorities of the House of Representatives and sent to the Senate where they had the support of absolute majorities of 59 and 55 senators respectively and of the President. JA17, 28. Both acts would have passed the Senate and been signed into law by the President, but for the 60 votes required by Rule XXII to overcome a minority filibuster. *Id*. Instead, both acts died in the Senate without any debate or a vote solely because they had only the support of an absolute majority, rather than the 60-vote supermajority required by Rule XXII to close debate. *Id*.

The DISCLOSE Act and the DREAM Act are two examples of hundreds of bills passed by the House of Representatives that would also have been passed by the Senate and become law, if the minority in the Senate had not used the Senate filibuster rule to prevent the majority from debating and passing those bills. JA46-49.

Representatives John Lewis, Michael Michaud, Hank Johnson and Keith Ellison (the House member plaintiffs) voted for the DREAM and DISCLOSE Acts. JA28. Their votes were unconstitutionally nullified in the Senate as a direct result of the 60-vote requirement in Rule XXII which prevented the DREAM and DISCLOSE Acts from becoming law. JA28-29.

Erika Andiola, Celso Mireles, and Caesar Vargas (the DREAM Act plaintiffs) are children of undocumented immigrants who graduated with honors from high school and college. JA22-25. They would have been direct beneficiaries of the DREAM Act which would have enabled them to apply for U.S. citizenship and exempted them from deportation. They were deprived of that opportunity when the 60-vote requirement in Rule XXII prevented majority passage of the DREAM Act. JA29-30.

Common Cause devoted substantial resources to creating public support for the DISCLOSE Act. That effort was largely wasted when the DISCLOSE Act was filibustered and died in the Senate despite the support of 59 senators and the President. Common Cause was also forced to expend additional resources to uncover and expose the sources of hundreds of millions in special interest money used by Super PACs and independent groups to influence the outcomes of the 2010 and 2012 elections. JA25-28. These expenditures would have been unnecessary if the 60-vote requirement of Rule XXII had not blocked passage of the DISCLOSE

Act. JA26. The filibuster of the DISCLOSE Act also deprived members of Common Cause of information to evaluate the motivations and interests of those secretly paying for campaign ads. JA27.

Filibusters (the "right" of a minority of a legislative body to prevent the majority from voting) were unheard of at the time of the adoption of the Constitution. Nor were filibusters part of the Framers' constitutional design. JA34-42. Under the established rules of parliamentary procedure that pre-dated the Constitution by over 180 years, the majority could cut off debate at any time by adopting a motion for the previous question, and the minority had no right to prevent the majority from voting. JA34-35. The rules of the Second Continental Congress (JA35) and the first rules adopted by both the Senate and the House of Representatives in April 1789 immediately after ratification of the Constitution incorporated the previous question motion from English parliamentary practice. JA41-42. The first filibuster in the Senate did not occur until fifty years later and is purely the result of an historical accident. JA43.

The complaint alleged that by replacing majority rule in the Senate with a *de facto* 60-vote rule (JA18), Rule XXII conflicts with the history, text of the Constitution (*Id.*; JA41-42, 51-58) and the intentions of the Framers as reflected by the statements of James Madison and Alexander Hamilton in *The Federalist Nos.*

22, *59*, and *75* (JA38-41). The rule also exceeds the authority delegated to the Senate by the Constitution to determine the rules of its proceeding. JA50-51.

The complaint also alleged that by prohibiting the Senate from amending its rules without a two-thirds vote, Rule XXII(2) in combination with Rule V(2) unconstitutionally deprives the Senate of the power granted by Article I, § 5, cl. 2 to amend its rules by majority vote and it also violates the principle forbidding one generation of senators from binding the hands of their successors. JA20, 33-34, 49-50, 58-59.

The complaint sought the entry of a declaratory judgment (1) that the supermajority vote portions of Rule XXII are unconstitutional, (2) severing the offending portions from the remainder of Rule XXII, and once those portions have been severed, (3) declaring that the general rule of all parliamentary bodies (that the act of a majority is the act of the body), would then apply. This would allow the Senate to decide by majority vote whether to close debate on bills, presidential nominations and amendments to the Senate rules. JA60-61.

The Ruling of the District Court

The district court dismissed the complaint for two independent reasons: (1) standing – "the Court cannot find that any of the Plaintiffs have standing to sue" (JA67); and (2) separation of powers. JA68. The court said that "[w]hile the House Members have presented a unique posture, the Court is not persuaded that

their alleged injury – vote nullification – falls into a narrow exception enunciated by the Supreme Court in *Raines v. Byrd*." JA67.

The court also ruled that the DREAM Act plaintiffs, Common Cause and its members did not have standing for two reasons: (1) they had not shown that their injuries were redressable – "that this Court can do anything to remedy the alleged harm they have suffered" from the filibuster of legislation from which they would have benefited (JA67), and (2) that the court "was … [not] persuaded that the Plaintiffs possess a 'procedural' right, grounded in the text of the Constitution, that entitles them to the majority enactment of legislation." JA67-68.

The court dismissed the complaint on the alternative ground that the constitutionality of a Senate rule is a political question. "Article I reserves to each House the power to determine the rules of its proceedings. And absent a rule's violation of an *express* constraint in the Constitution or an individual's fundamental rights, the internal proceedings of the Legislative Branch are beyond the jurisdiction of this Court." JA68 (emphasis added).

The linchpin of the district court's rulings on standing, the political question doctrine, and the merits of plaintiffs' constitutional claims was the court's mistaken view that unlike a statute, a court has no jurisdiction to declare a Senate rule unconstitutional merely because it may "conflict" with other provisions in the Constitution. According to the district court, a Senate rule is not unconstitutional,

nor is it subject to judicial review, unless the plaintiffs identify a separate constitutional provision that "*expressly* limits" the Senate's rule-making power. JA105 (emphasis added). The district court also ruled that in the absence of such an explicit limitation on the Senate's rule-making power, there is no judicially manageable "standard within the Constitution by which the Court could judge whether … the Cloture Rule is constitutionally valid." JA109.

Standard of Review

The district court's dismissal of the complaint under Fed. R. Civ. P. 12(b)(1) for lack of standing and justiciability under the political question doctrine is subject to *de novo* review. *LaRoque v. Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011):

> We review *de novo* the district court's dismissal for lack of standing.… At this stage of the litigation, we "must accept as true all material allegations of the complaint," drawing all reasonable inferences from those allegations in plaintiffs' favor … and "presum[ing] that general allegations [of standing] embrace those specific facts that are necessary to support the claim" *Lujan*…. And in assessing plaintiffs' standing we must assume they will prevail on the merits of their constitutional claims.

Summary of Argument

In ruling on the motion to dismiss, the district court was required at the pleading stage to accept as true the *factual* allegations of the complaint that the DISCLOSE Act and DREAM Act were supported by an absolute majority in the Senate and would have *passed and become law* but for the 60-vote requirement in Rule XXII. *Lujan*, 504 U.S. at 561; *LaRoque*, 650 F.3d at 785. The district court violated this rule. JA89-90. The district court also violated the rule that requires a court when ruling on standing to presume that plaintiffs "will prevail on the merits of their constitutional claims" (*LaRoque*, 650 F.3d at 785) and to refrain from ruling on the merits of plaintiffs' constitutional claims. *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1105 (D.C. Cir. 2008). The district court did the opposite when it ruled that the plaintiffs have no procedural rights under the Constitution to enactment of legislation by a simple majority vote. JA67-68, 88, 92. These procedural errors infected all of its rulings and require that its dismissal of the complaint be reversed.

I. John Lewis and the other members of the House have standing to prevent the unconstitutional nullification of their votes by a minority in the Senate.

Under controlling Supreme Court and D.C. Circuit precedents, legislators have an interest in preserving the effectiveness of their votes and have standing to

challenge the unconstitutionality of a procedure that results in the nullification of their votes in favor of a specific piece of legislation. *Coleman v. Miller*, 307 U.S. 433, 439 (1939) (state senators' standing to challenge unconstitutional nullification of their votes against ratifying Child Labor Amendment); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974) (Senator's standing to challenge unconstitutional nullification of his legislative vote by untimely pocket veto); *Moore v. U.S. House of Representatives*, 733 F.2d 946, 951-52 (D.C. Cir. 1984); *see also League of Educ. Voters v. State*, 295 P.3d 743 (Wash. 2013).[3]

The district court "acknowledge[s] that this case appears to present a unique question on vote nullification after *Raines*." JA98. *Raines v. Byrd*, 521 U.S. 811 (1997) was not a vote nullification case and did not purport to overrule *Coleman v. Miller* or *Kennedy v. Sampson*. *See Chenoweth v. Clinton*, 181 F.3d 112, 116-17 (D.C. Cir. 1999) ("*Raines* notwithstanding, *Moore* and *Kennedy* may remain good law"). To the contrary, the Court in *Raines* reaffirmed its holding in *Coleman* that "legislators whose votes … would have been sufficient to … enact a specific legislative Act have standing to sue *if that legislative action … does not go into effect on the ground that their votes have been completely nullified*" by a procedural violation of the Constitution. 521 U.S. at 823-24 (emphasis added).

---

[3] Catherine Fisk and Erwin Chemerinsky, *The Filibuster*, 49 Stan. L.Rev. 181, at 231-239 (1997) (hereinafter "*The Filibuster* at ___").

The Court rejected Senator Byrd's standing under *Coleman* because, unlike the House member plaintiffs here, he mounted a *facial* challenge to the Line-Item Veto Act the day after it passed and *before* it had been applied by the President. He did not and could not allege that his vote on *any specific appropriation bill* had been nullified by the Act.

II. Common Cause and the DREAM Act plaintiffs also have standing.

Common Cause has standing to sue on its own behalf and on behalf of its members. It suffered and continues to suffer concrete, particularized injury to its core mission of campaign reform when Rule XXII blocked passage of the DISCLOSE Act. The resources it devoted to promote its passage were wasted, and its efforts to identify and expose the sources of anonymous expenditures in the 2010 and 2012 elections would have been unnecessary if Rule XXII had not prevented passage of the DISCLOSE Act. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Havens Realty Co. v. Coleman*, 455 U.S. 363, 379 (1982).

Common Cause also has standing to sue on behalf of its members who were deprived of information about the identities of contributors to Super PACs and other "independent" groups that would have been relevant to them as voters. *FEC v. Akins*, 524 U.S. 11, 21 (1998) (informational injury sufficient for voter standing

to challenge FEC ruling); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

The DREAM Act plaintiffs also have standing. Unlike the public at large, these plaintiffs were direct beneficiaries of the DREAM Act and were unconstitutionally deprived of the opportunity to apply for U.S. citizenship as a direct result of Rule XXII's 60-vote requirement. The Supreme Court has held that beneficiaries of legislation suffer a concrete, particularized injury and have standing to sue when action on the part of Congress or the President that is alleged to violate the Presentment Clause deprives them of the opportunity to benefit from that legislation. *INS v. Chadha*, 462 U.S. 919 (1983) (holding that illegal alien had standing to challenge one-house veto of Attorney General's discretionary decision to suspend his deportation); *Clinton v. City of New York*, 524 U.S. 417 (1998) (*indirect, but intended beneficiaries* of line-items in appropriations bills had standing to challenge validity of the Line-Item Veto Act under the Presentment Clause, despite absence of any legally enforceable right).

Contrary to the ruling of the district court (JA67-68, 80-81, 92), Common Cause and the DREAM Act plaintiffs, like the plaintiffs in *Chadha* and *Clinton*, have a "non-statutory cause of action … to seek declaratory and injunctive relief" when congressional action is "alleged [] [to] venture beyond the bounds of Congress's enumerated powers." *LaRoque*, 650 F.3d at 792; *see also Bond v.*

United States, 564 U.S.__, 131 S. Ct. 2355, 2365 (2011) (individuals have "standing to object to a violation of a constitutional principle [because] … [t]he structural principles secured by separation of powers protect the individual as well.").

The requirements of the Presentment Clause are mandatory (*Chadha*, 462 U.S. at 980-81) and apply as fully to the procedure for *passing* legislation while it is pending in Congress and *prior to its presentment to the President*, as to the procedure for amending or repealing legislation after it has been signed by the President. The injury to beneficiaries which gives rise to their standing is the same – *denial of the opportunity to benefit from passage of the statute as a result of a procedural violation of the Constitution* – whether the procedural violation of the Constitution occurred *during* the legislative process and *prevents* a statute from passing or results in its invalidation after it has passed.

The district court erred when it required plaintiffs to *prove* either "that the DREAM and DISCLOSE Acts would have *passed* the Senate but for the Cloture Rule" or that the plaintiffs "*necessarily would have benefitted* from those Acts." JA90-91 (emphasis added). *At the pleading stage*, the district court was required to accept as true the complaint's factual allegations that both acts had the support of an absolute majority and would have passed the Senate but for Rule XXII. *Lujan*, 504 U.S. at 561. Moreover, a plaintiff who alleges violation of a procedural right

under the Constitution never has to prove that he was *certain* to receive the benefit of the legislation but for the procedural violation. *Lujan*, 504 U.S. at 573, n.7 (a "person who has … a procedural right to protect his concrete interests can assert that right *without meeting all the normal standards for redressability and immediacy*") (emphasis added); *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("When the government erects a barrier that makes it more difficult for … a group to obtain a benefit … a member of the … group seeking to challenge the barrier *need not allege [or, prove] that he would have obtained the benefit but for the barrier*") (emphasis added); *City of Dania Beach v. FAA*, 485 F.3d 1181, 1186 (D.C. Cir. 2007); *CC Distribs., Inc. v. United States*, 883 F.2d 146, 150 (D.C. Cir. 1989).

The district court also erred in holding that the plaintiffs' injuries cannot be redressed. JA91-92. As in *City of Jacksonville*, the injury will be redressed by *removal of the unconstitutional barrier* to passage of the DISCLOSE and DREAM Acts upon entry of a judgment declaring the 60-vote requirement in Rule XXII unconstitutional. The unconstitutional portions would be severed from the remainder of Rule XXII. *Nat'l Fed'n. of Indep. Bus. v. Sebelius*, __ U.S. ___, 132 S. Ct. 2566, 2607 (2012). Cloture could then be invoked by vote of a simple majority. *FTC v. Flotill Prods. Inc.*, 389 U.S. 179, 183-84 (1967); *United States* v. *Ballin*, 144 U.S. 1, 6 (1892).

III. The constitutionality of the 60-vote requirement in Rule XXII is not a political question.

"It has been long settled … that ***the rules of Congress … are judicially cognizable.***" *Yellin v. United States*, 374 U.S. 109, 114 (1963) (emphasis added). The ruling of the district court is inconsistent with four cases in which the Supreme Court exercised jurisdiction over and ruled on the merits of challenges to either the constitutionality or the validity of interpretations of rules of both the House and the Senate. *See Ballin*, 144 U.S. at 5 (while "[t]he constitution empowers each house to determine its rules of proceedings ***[i]t may not by its rules ignore constitutional restraints*** or violate fundamental rights") (emphasis added); *United States v. Smith*, 286 U.S. 6, 30, 33 (1932) ("***As the construction … [of] the rules [of the Senate] affects persons other than members of the Senate, the question presented is of necessity a judicial one" and was solely a question of law for the courts)*** (emphasis added).

These cases make it clear that a challenge to the constitutionality of a Senate rule is not a "political question" textually committed by the Constitution to the Senate. The delegation of authority to each house to "determine the rules of its proceedings" in Art. I, § 5, cl. 2 was a routine procedural measure and was adopted by the Framers without debate. 2 Max Farrand, ed., *Records of the Federal Convention of 1787* at 140. There is nothing in the record of the Federal

Convention indicating that the Framers intended to delegate to either house the authority to depart from the principle of majority rule or that the rule-making power be interpreted more broadly than the delegation to the state legislatures of the power to prescribe the "times, places and manner of elections of Senators and Representatives." *See Cook v. Gralike*, 531 U.S. 510, 523 (2001) ("*U.S. Term Limits* [made clear that] 'the Framers understood the Elections Clause as ***a grant of authority to issue procedural regulations, not as a source of power to dictate electoral outcomes … or to evade important constitutional restraints.***" (emphasis added)).

There is no support for the district court's ruling that the plaintiffs must not only allege (JA51-55) that a Senate rule "conflicts" with the Constitution, the plaintiffs must also show that the rule violates a provision in the Constitution that expressly limits the rule-making power. JA105, 109. That ruling is inconsistent with a long line of Supreme Court cases, beginning with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803), that have held that actions of one house (*see e.g., Powell v. McCormack*, 395 U.S. 486 (1969)*; Chadha*, 462 U.S. 919) or both houses of Congress (*Marbury*) are unconstitutional when they conflict with or were "repugnant" to *implied*, as well as express limitations in the Constitution. *See also Printz v. United States*, 521 U.S. 898 (1998) (Brady Bill violated implied

limitations in Constitution on power of federal government to require states to implement federal law.).

Finally the district court was also wrong in holding that there are no judicially manageable standards for determining the constitutionality of a Senate rule, as opposed to a statute. JA108. The issue is purely one of law and the Constitution itself provides all the judicially manageable standards that are required. *Powell*, 395 U.S. at 549; *Chadha*, 462 U.S. at 942.

IV. The 60-vote requirement in Rule XXII is unconstitutional.

In ruling on the motion to dismiss, the district was required to presume that the plaintiffs will prevail on the merits of their claims that the 60-vote requirement of Rule XXII is unconstitutional. *LaRoque*, 650 F.3d 777; *Muir*, 529 F.3d 1100. Because the court violated that rule, plaintiffs are compelled to address the merits, and outline in summary form at the end of this brief why Rule XXII is inconsistent with the history, intent of the Framers, and text of the Constitution. JA14-16; 34-40.

Argument

Introduction

The district court committed numerous procedural errors that pervade its opinion and require reversal of its dismissal of the complaint on standing and political question grounds.

Although the district court gave lip service to its obligation to accept the plaintiffs' allegations as true (JA79), it did the exact opposite. It did *not* accept as true the factual allegations of the complaint that the DISCLOSE and DREAM Acts had the support of 59 and 55 senators respectively and would have passed but for Rule XXII. JA86-93. The court did *not* draw all reasonable inferences from the factual allegations of the complaint in plaintiffs' favor (*contra Lujan*); it did *not* presume that plaintiffs' general allegations of standing embraced those specific facts necessary to support the claims (*contra Lujan*); it did *not* assume that plaintiffs are entitled to prevail on the merits of their constitutional claims (*contra LaRoque*); and most erroneously, it did not refrain from deciding the merits of plaintiffs' constitutional claims (*contra Muir; LaRoque*). The trial court ruled instead that it was not "persuaded that the Plaintiffs possess a 'procedural' right, grounded in the text of the Constitution, that entitles them to the majority enactment of legislation" (JA68), that "Plaintiffs have failed to demonstrate that they have a 'procedural right' to enactment of legislation by a simple majority [or

that] … any such right was designed to protect their particularized interest" (JA80-81), and that "Plaintiffs identify no authority for the proposition that an individual has a 'procedural right' to any particular form of congressional consideration or debate on a bill." *See also*, JA82. The court repeated these errors in ruling on defendants' motion to dismiss under the political question doctrine. JA108-09. These errors are sufficient to require reversal.

I. John Lewis and the other House plaintiffs have standing to challenge the unconstitutional nullification of their votes in favor of the DISCLOSE and the DREAM Acts.

The House plaintiffs were injured when the 60-vote requirement of Rule XXII resulted in the unconstitutional nullification of the effectiveness of their votes for the DISCLOSE and DREAM Acts. Both the Supreme Court and this Circuit have held that legislators have standing to challenge procedural violations of the Constitution that are alleged to have resulted in the unconstitutional nullification of their votes. *Coleman v. Miller*, 307 U.S. 433; *Kennedy v. Sampson*, 511 F.2d 430; *Moore v. U.S. House of Representatives*, 733 F.2d 946; *see also League of Educ. Voters v. State*, 295 P.3d 748 (holding that twelve members of the Washington legislature had standing to challenge the constitutionality of a supermajority vote requirement "when a bill they voted for failed to pass despite receiving a simple majority.").

In *Coleman*, the Court held that members of the Kansas Senate had standing to challenge the unconstitutional nullification of their votes against ratification of the Child Labor Amendment. The legislators alleged that the Lieutenant Governor's tie-breaking vote in favor of ratification violated Article V of the U.S. Constitution and was invalid. The State argued that the legislators lacked standing because they "lack an adequate interest to invoke our jurisdiction." 307 U.S. at 438. The Supreme Court upheld the senators' standing because their "votes against ratification have been overridden and virtually held for naught, although if they are right in their contentions, their votes would have been sufficient to defeat ratification." *Id.* The Court explained that "these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes" which was sufficient to give them standing. *Id.*

In *Kennedy v. Sampson*, this Court followed *Coleman* in holding that Senator Edward Kennedy had standing to challenge the nullification of his vote by an untimely pocket veto of a bill for which he had voted. The defendants argued that Senator Kennedy did not have standing because the procedures in the Presentment Clause protected "only the interests of the Congress or one of its Houses as a body" (511 F.2d at 434) and that "an individual member of Congress does not [have standing] even if he voted for the bill in controversy." *Id.* at 435.

This Court not only rejected the defendants' standing argument; it also ruled in Senator Kennedy's favor on the merits.

> [T]he prerequisite to standing is that a party be 'among the injured' … not that he be the *most* grievously or *most* directly injured…. [Senator Kennedy] has alleged that conduct by officials of the executive branch [an untimely pocket veto] amounted to an illegal nullification not only of Congress's exercise of its [legislative] power, but also of appellee's exercise of his power [as a member of the Senate]. In the language of the *Coleman* opinion, ***appellee's objective in his lawsuit is to vindicate the effectiveness of his [individual] vote. No more essential interest could be asserted by a legislator***. We are satisfied … that the purposes of the standing doctrine are fully served in this litigation.

511 F.2d at 435-36 (emphasis added).

In *Moore v. U.S. House of Representatives*, this Court held that dissenting members of the House of Representatives who had voted against the Tax Equalization and Fiscal Responsibility Act (TEFRA) had standing to challenge its constitutionality on the ground that it originated in the Senate in violation of the Origination Clause.

> It is important to note that *the injury claimed here is to the members' rights to participate and vote on legislation in a manner defined by the*

> *Constitution.* ***Deprivation of a constitutionally mandated process for enacting law may inflict a more specific injury on a member of Congress than would be presented by a generalized complaint*** that a legislator's effectiveness is diminished by allegedly illegal activities taking place outside the legislative forum.

733 F.2d at 951 (emphasis added). This Court also held that "the fact that the House as a body may have been injured by the allegedly unconstitutional origination of TEFRA in the Senate does not negate an injury in fact to the individual members [of the House who voted against TEFRA]." *Id.* at 952. The Court concluded that the *D.C. Circuit has consistently* "***held that unconstitutional deprivations of a legislator's constitutional duties or rights, such as the nullification of a legislator's vote by illegal Executive action may give rise to standing if the injuries are specific and discernible***." *Id.*[4] (emphasis added).

---

[4] The complaint in *Moore* was dismissed under this Circuit's unique remedial discretion doctrine, which applies when a congressional plaintiff's dispute is primarily with other members of the *same house* and the plaintiff could obtain substantial relief by a majority vote. 733 F.2d at 955-56. The remedial discretion doctrine does not apply to the claims of appellants, who have no political remedy. *See Michel v. Anderson*, 14 F.3d 623, 628 (D.C. Cir. 1994) (holding that the D.C. Circuit's remedial discretion doctrine applies only to members of a legislative body

The district court did not cite *Kennedy* or *Moore*. It simply ruled that it was "not persuaded that the House Members' alleged injury constitutes vote nullification for two … reasons: (1) this case is factually distinguishable from the 'narrow' exception recognized by the Supreme Court [in *Raines v. Byrd*], and (2) it arises in the federal context, which raises fatal separation-of-powers concerns." JA93-94. It is apparent from the trial court's later statement that it was "not aware of any case in this Circuit where a court has recognized legislative standing after *Raine*s" (JA98), that the district court thought *Raines* had effectively overruled the vote nullification theory of legislator standing in *Coleman v. Miller*.

Raines was not, however, a vote nullification case. Nor did it purport to overrule *Coleman*, *Kennedy*, or *Moore*. *See Chenoweth v. Clinton*, 181 F.3d 116 ("*Raines* notwithstanding, *Moore* and *Kennedy* may remain good law."). The fact that this case "arises in the federal context" does not, as the district court held, "raise[] fatal separation of powers concerns." JA94. *Kennedy* and *Moore* also arose in the federal context, yet members of Congress in both cases were held by this Court to have standing.

---

who have an internal political remedy by majority vote, and does not apply to plaintiffs who are not members of the legislative body whose rules are being challenged).

Raines was a *pre-enforcement facial challenge* by Senator Robert Byrd to the constitutionality of the Line-Item Veto Act. Senator Byrd did not and could not allege that his vote in favor of any specific appropriation bill had been unconstitutionally nullified because he sued before President Clinton even applied the Line-Item Veto Act. Senator Byrd asserted a different claim – that the mere existence of "the Act causes a type of institutional injury (the diminution of legislative power)." 521 U.S. at 821. The Court held that Senator Byrd did not have standing because he had not alleged a personalized injury to himself, but only a generalized injury – one "which necessarily damages all Members of Congress and both Houses of Congress equally." *Id.*

The Court's ruling in *Raines supports* the standing of the House-member plaintiffs in this case to sue on a vote nullification theory. The Court said that:

> [i]t is obvious … that ***our holding in Coleman stands … for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect) on the ground that their votes have been completely nullified***. *Id.* at 823 (emphasis added).

The Court ruled that "[i]t should be equally obvious that appellees' claim does not fall within our holding in *Coleman*.… They have not alleged that they

voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated." *Id*. at 823-24.

This case fits precisely within the Supreme Court's reaffirmation of *Coleman*'s recognition of legislative standing to challenge a legislative process that results in the unconstitutional nullification of their votes. The House-member plaintiffs were part of a House majority that passed the DREAM and DISCLOSE Acts; "there were sufficient votes to pass the bill" in the Senate (JA17, 28, 97); yet the Acts did not go into effect because of the unconstitutional supermajority vote requirement of Rule XXII.

The *Raines* Court emphasized that the Line-Item Veto Act had no effect on the right of Senator Byrd and other members of Congress *by majority vote* to (a) reinstate a line item after it had been vetoed by the President, (b) exempt a future appropriation from being vetoed under the Act, or (c) repeal the Act in its entirety. The Court emphasized that "*a majority* of Senators and Congressmen can pass or reject appropriations bills…. In addition, *a majority* of Senators and Congressmen can vote to repeal the Act [in its entirety], or exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act." 521 U.S. at 824 (emphasis added). That is not true of Rule XXII. A majority of "Senators and Congressmen" cannot overcome Rule XXII or even proceed with debate by majority vote.

Finally, the *Raines* Court also emphasized that its ruling denying standing to members of Congress in that case would not "deprive[] Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach)" by majority vote. 521 U.S. at 829. In contrast, the denial of standing to John Lewis and the other House-member plaintiffs in this case would leave them without any remedy to prevent a minority of senators from using Rule XXII to nullify their votes. *See also Chenoweth v. Clinton*, 181 F.3d 112 (distinguishing *Coleman*, *Kennedy*, and *Moore* on the ground that they were vote nullification cases); *Campbell v. Clinton*, 203 F.3d 19, 22-23 (D.C. Cir. 2000) (also distinguishing *Coleman* on the ground that it was a vote nullification case in which the Kansas legislators had no political remedy).

II. The DREAM Act plaintiffs and Common Cause have standing to challenge the 60-vote requirement in Rule XXII.

A. The DREAM Act plaintiffs suffered a concrete, particularized injury when Rule XXII's 60-vote requirement deprived them of the opportunity to benefit from that legislation.

The district court was required to accept as true the complaint's allegations that the DREAM Act plaintiffs were the direct and intended beneficiaries of a bill that passed the House, was supported by 55 senators and the President, and would have passed and become law but for the 60-vote requirement in Rule XXII (JA29-

30). They were injured-in-fact when Rule XXII unconstitutionally deprived them of the *opportunity to benefit* from the Act's offer of a path to citizenship and remained at risk of deportation. This injury is unique to plaintiffs and other beneficiaries of the DREAM Act, and is not shared by the public at large.[5]

[5] The plaintiffs' status as intended beneficiaries of the DREAM Act and loss of the opportunity to benefit from that specific legislation because of Rule XXII (JA22, 28, 29-30), distinguish this case from *Page v. Shelby*, 995 F. Supp. 23 (D.D.C.), *aff'd without opinion*, 172 F.3d 920 (D.C. Cir. 1998). Page, an individual voter, challenged the constitutionality of Rule XXII, alleging that its use diluted his vote. The court dismissed because Page had failed to allege any concrete, particularized injury in fact. "This Court cannot find that a litigant has standing based solely on his speculation that, no matter which party's senatorial candidates he votes for, Senators of the other political party will invoke Rule XXII to prevent the passage of *unspecified legislation* favored by Mr. Page.... *[H]e does not provide examples of the types of legislation he favors and does not indicate how he personally has been or will be injured if that legislation fails to become law*." *Id.* at 27-28 (emphasis added).

B. *Chadha* and *Clinton* support the plaintiffs' standing to mount an Article I challenge.

Under *INS v. Chadha*, 462 U.S. 919 (1983), and *Clinton v. City of New York*, 524 U.S. 417 (1998), even indirect beneficiaries of legislation suffer a concrete, particularized harm when deprived of the opportunity to benefit from its passage, and have standing to challenge, as a violation of Article I, the constitutionality of the procedure that led to that deprivation. The district court clearly erred when it dismissed *Chadha* and *Clinton* as "not instructive" on the question of standing. JA82-83.

In both cases the Supreme Court *expressly rejected* attacks on the plaintiffs' standing. The Attorney General made a *discretionary* decision to suspend Chadha's deportation after he overstayed his student visa, but Chadha was deprived of the benefit of that decision when the House exercised a one-house legislative veto of the suspension.

The Supreme Court rejected the government's attack on Chadha's standing to challenge the veto as a violation of Article I. It concluded that Chadha's loss of the opportunity to benefit from the suspension order, and the resulting threat of deportation, were sufficient injuries to support his standing, even though Chadha had *no enforceable legal right* under the Immigration and Nationality Act to avoid

deportation (*i.e.*, had no "legally protected interest" under the statute). 462 U.S. at 936.

Like Chadha, the DREAM Act plaintiffs have suffered loss of the opportunity to benefit from that Act's offer of a path to citizenship and elimination of the threat of deportation through a legislative process they contend violates Article I. This injury-in-fact is precisely the kind held sufficient to confer standing in *Chadha*.

Similarly, in *Clinton v. City of New York*, the Supreme Court expressly rejected an attack on the standing of *indirect* beneficiaries of statutes to mount an Article I challenge to a presidential veto that deprived them of the opportunity to benefit from those statutes. Acting under the Line Item Veto Act, President Clinton vetoed parts of the Balanced Budget Act of 1997 and the Taxpayer Relief Act of 1997. As a result, the president cancelled a provision that would have forgiven the State of New York for a contingent liability to reimburse Medicare for health care overpayments. The State had passed on two overpayments to the City and intended to seek reimbursement from the plaintiff City of New York. The president also cancelled a tax incentive that was intended to encourage the owners of potato processing plants to sell their plants to agricultural cooperatives such as the Snake River Co-op.

The Supreme Court expressly rejected challenges to standing, *even though the plaintiffs were only indirect, rather than direct, beneficiaries of the cancelled provisions.*[6] The Court concluded that "the parties have alleged a 'personal stake' in having an actual injury redressed, rather than an 'institutional injury' that is 'abstract and widely dispersed.'" 524 U.S. at 430. According to the Court, revival of the City's *contingent* liability and elimination of the cooperative's statutory *bargaining chip* vis-à-vis other *potential* purchasers of potato processors "inflicted a sufficient likelihood of economic injury to establish standing under our precedents." *Id.* at 432-33. In this case, the DREAM Act plaintiffs' loss of a path to citizenship is far less "hypothetical" (JA88-89) than was the potential economic injury to the Snake River Cooperative in *Clinton*. The plaintiff cooperative was merely "searching for other processing facilities for *possible future purchase* if the President's cancellation is reversed." 524 U.S. at 432 (emphasis added).

C. Individuals have a non-statutory cause of action to enforce constitutionally prescribed procedures.

The district court dismissed *Chadha* and *Clinton* with this observation: "Nowhere in either case, however, did the Court analyze whether or not the

---

[6] *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977) (plaintiff's "injury may be indirect" as long "as the complaint … indicate[s] that the injury is … fairly traceable to defendants' acts or omissions").

Constitution, and more specifically Article I, confers an individual procedural right sufficient for standing." JA83. It is obvious, however, from the Supreme Court's finding of standing and its holding that the challenged conduct in both cases violated Article I that *the Court recognized that individuals do have the right to enforce the constitutional restraints on the legislative process imposed by Article I*. *See Chadha*, 462 U.S. at 935-36.

The district court's ruling that individuals do not have enforceable procedural rights under the Constitution also cannot be squared with *Bond v. United States*, 564 U.S. ___, ___, 131 S. Ct. 2355, 2365 (2011). In *Bond* the plaintiff had been convicted under a federal criminal statute of using a chemical to injure her husband's paramour. She challenged her conviction on the ground that the statute exceeded Congress's powers under the 10th Amendment. The Court affirmed her standing as an individual to enforce the "structural constitutional limit" established by that amendment upon Congress's power to affect the states' interests.

The district court distinguished *Bond* and improperly limited the Court's holding to cases in which the plaintiff has been injured "due to a statute." JA84-85. According to the district court, *Bond* "does not stand for the proposition that the Constitutional principle of separation of powers confers an individual right that is sufficient to meet the more relaxed requirements of procedural standing." JA85.

While denial of a *statutory* benefit is *sufficient* to confer standing, a host of Supreme Court cases undermine the district court's view that a plaintiff who has no preexisting statutory right can never have standing to enforce the structural limits imposed by the Constitution. Indeed, in *Bond* itself the Supreme Court relied on its decision in *Chadha* that a plaintiff with no enforceable legal right to suspension of deportation had standing to enforce the procedural requirements of Article I. *Bond*, 131 S. Ct. at 2365 (In *Chadha* "[a] cardinal principle of separation of powers was vindicated at the insistence of an individual, indeed one who was not a citizen of the United States but who still was *a person whose liberty was at risk*.") (emphasis added).

Likewise, the plaintiffs in *FEC v. Akins*, 524 U.S. 11 (1998), *Clinton v. City of New York*, 524 U.S. 417 (1998), *Watt v. Energy Action Educational Foundation*, 454 U.S. 151 (1981), and *Bryant v. Yellen*, 447 U.S. 352 (1980) were all held to have standing even though they had no enforceable legal rights under a statute. *See also Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, ___ U.S. ___, 130 S. Ct. 3138, 3151, n.2 (2010) (private party standing to Appointments Clause).

The district court failed even to cite *LaRoque v. Holder*, 650 F.3d 777 (D.C. Cir. 2011), in which this Circuit expressly rejected the district court's narrow interpretation of *Bond*. In *LaRoque*, the plaintiff alleged his intention to run for municipal office as a nonpartisan. He challenged the constitutionality of the

Attorney General's refusal to preclear under the Voting Rights Act a state referendum-approved change from partisan to nonpartisan elections. Even though the plaintiff had no right to run as a nonpartisan and no guarantee of winning, this Court upheld his standing to challenge the Voting Rights Act as exceeding Congress' power under the 14th and 15th Amendments. The Court rejected the district court's reasoning that because partisan elections are constitutionally permissible, the plaintiff had no "legally protected interest." The plaintiff's loss of "the benefits he claims would flow from the [blocked] nonpartisan system" [namely, cheaper election costs and an improved chance of victory] was sufficient injury to provide standing. *Id*. at 786.

This Circuit expressly rejected as "foreclosed by *Bond*" (*id.* at 791) the argument that the plaintiff in *LaRoque* was improperly trying to assert the separation of powers interests of third parties – specifically, the rights of the city and state against federal interference with state control over municipal elections. Again citing *Bond* (*id.* at 793), this Court affirmed that private individuals have "nonstatutory causes of action … to seek declaratory and injunctive relief" when the challenged action "allegedly venture[s] beyond … Congress's enumerated powers." *Id.* at 792.[7]

[7] The district court's conclusion that plaintiffs have no "individual right" to enforce the limitations imposed by Article I (JA80-82, 92) is yet another example

The DREAM Act plaintiffs suffered injury in fact because loss of the opportunity to seek citizenship under that statute puts their "liberty … at stake." *Bond*, 131 S. Ct. at 2364. The district court improperly refused to recognize their

---

of its improper resolution of a merits question when ruling on a motion to dismiss for lack of standing. *See Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152-53 (1970) ("[T]he first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise.… The 'legal interest' test goes to the merits. The question of standing is different."); *Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997) ("[I]n *Lujan* the Court characterized the 'legally protected interest' element of an injury in fact simply as a 'cognizable interest' and, *without addressing whether the claimants had a statutory right* to use or observe an animal species, concluded that the desire to do so 'undeniably' was a cognizable interest.") (emphasis added). *See also Judicial Watch, Inc. v. United States Senate*, 432 F.3d 359, 364 (D.C. Cir. 2005) (Williams, J. concurring) ("use of the phrase 'legally protected' to require showing of a substantive right thwarts a major function of standing doctrine – to avoid premature judicial involvement in resolution of issues on the merits"); *id*. at 363 ("legally protected interest" is not a "requirement that the interest be one affirmatively protected by some positive law, either common law, statutory or constitutional").

right to enforce the separation of powers restraints imposed by Article I on the legislative process that caused their injury. *See also Noel Canning v. NLRB*, 705 F.3d 490, 510 (D.C. Cir. 2013) ("The Constitution's separation of powers features … do not simply protect one branch from another.... These structural provisions serve to protect the *people*, for it is ultimately the people's rights that suffer when one branch encroaches on another.").[8]

D. Common Cause and its members have sustained injuries-in-fact that are concrete and particularized.

Common Cause has both organizational and associational standing to challenge the 60-vote requirement in Rule XXII.

1. Common Cause sustained an organizational injury.

The use of Rule XXII to prevent passage of the DISCLOSE Act injured Common Cause as an organization in at least three ways. First, it prevented Common Cause from achieving one of its major objectives: campaign finance reform. Second, Common Cause devoted significant staff and resources to drafting the DISCLOSE Act and building public support for its passage. These resources

[8] If the district court was correct that plaintiffs' injuries were caused by "existing immigration law" rather than Rule XXII (JA98), *Chadha* would not have had standing since his risk of deportation was also the result of his having overstayed his visa in violation of existing immigration law.

were largely wasted when a minority in the Senate used Rule XXII to prevent its passage. Third, Common Cause was forced to devote substantial resources to uncover, identify, and expose the identities of the corporations, unions, and wealthy individuals who spent millions to influence the outcome of the 2008, 2010, and 2012 elections.

These injuries to Common Cause are as specific and central to its core mission as the injury held sufficient for organizational standing in *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 261-63 (1977) (non-profit devoted to making low-cost housing available suffers injury to its core mission from refusal to rezone property under contract). Similarly, in *Havens Realty v. Coleman*, 455 U.S. at 379, the injury to the non-profit's equal housing opportunity efforts, including the drain on its resources for providing housing counseling and referral services, was sufficient to give it standing to challenge the defendant's steering practices.

2. Common Cause also has associational standing to sue for the injury to its members from use of Rule XXII to prevent passage of the DISCLOSE Act.

Common Cause also has associational standing to sue on behalf of its members because: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's

purpose; and (c) neither the claim asserted nor the relief requested requires the participation in the lawsuit of … individual members." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. at 343.

Most of the members of Common Cause are voters who would have benefited from the enactment of the DISCLOSE Act. The DISCLOSE Act would have made available to voters otherwise-secret information concerning the identities of the corporations and wealthy individuals that spend more than $10,000 to broadcast campaign ads either directly or through "independent" groups. The members of Common Cause were injured in fact when they were deprived of the benefit of this information as a direct result of the use of Rule XXII to prevent the Senate from passing the DISCLOSE Act, despite the fact that the Act was supported by 59 senators and the President. This informational injury is precisely the type of injury held sufficient to support standing in *FEC v. Akins*, 524 U.S. 11, 21 (1998); *see also Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (informational inquiry to member of House of Representatives).

In *Akins* the Supreme Court held that voters who were denied information about AIPAC's donors and AIPAC's campaign-related political contributions were injured in fact and had standing to challenge the validity of the FEC's ruling despite the fact that the FEC had *discretion* to withhold the information anyway. The consequent uncertainty that the Court's favorable ruling would assure the

voters access to the information, was not a barrier to the voters' standing. 524 U.S. at 25. "[P]rudential standing is satisfied when the injury asserted by a plaintiff arguably [falls]," as it does in this case, "within the zone of interests to be protected or regulated by the statute … in question," which in this case is the DISCLOSE Act. *Id.* at 20.

The injury-in-fact to the members of Common Cause is the same as "[t]he 'injury in fact' that [was] … suffered [by the voters in *Akins*] [and] consists of their inability to obtain information – lists of AIPAC donors … and campaign-related contributions and expenditures." *Id.* at 21. To paraphrase *Akins*, "the injury of which [Common Cause] complain[s]" on behalf of its members is "their failure to obtain relevant information [and] is [an] injury of a kind that [the DISCLOSE Act]" would have addressed. *Id.* at 20. Like *Akins*, "[t]here is no reason to doubt [Common Cause's] claim that the information would help [voters] (and others to whom they would communicate it) to evaluate candidates for public office," an injury which the Court held "seems concrete and particular." *Id.* at 21.

The Court also rejected the FEC's claim that the voters were asserting only a generalized grievance about the proper administration of the law that was shared by the public at large. 524 U.S. at 24-25 ("the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific").

E. The district court imposed an improperly high standard for redressability and immediacy.

1. Proof of certainty of benefit is not required.

The district court applied the wrong legal standard in ruling that plaintiffs could not satisfy the causation and redressability prongs of the standing test. JA79. It ignored the more relaxed standards for causation in cases alleging a procedural rights violation, and ruled that plaintiffs were required to prove with *certainty* that the DREAM and DISCLOSE Acts "would have passed" and that they "*necessarily would have benefited*" from that legislation but for the cloture rule. JA90-91 (emphasis added).

A person seeking to protect a procedural right – such as the right to have the fate of legislation decided by the "prescribed majority" of the Senate as set forth in the Presentment Clause (*Chadha*, 462 U.S. at 948) – need not prove that he was *certain* to receive the benefit of the legislation but for the procedural violation. The Supreme Court held in *Lujan* that "'procedural rights' are special: The person who has been accorded a procedural right to protect his *concrete* interests can assert that right without meeting all the normal standards for redressability and immediacy." 504 U.S. at 573, n.7; *see also CC Distribs.*, 883 F.2d at 150 ("[A] plaintiff suffers a constitutionally cognizable injury by the loss of an opportunity to pursue a benefit … *even though the plaintiff may not be able to show that it was*

certain to receive that benefit had it been accorded the lost opportunity.") (emphasis added).

A plaintiff asserting a procedural injury "*never has to prove* that if he had received the procedure the *substantive result would have been altered.*" *City of Dania Beach*, 485 F.3d at 1186 (emphasis added); *City of Jacksonville*, 508 U.S. at 666 ("When the government erects a barrier that makes it more difficult for ... a group to obtain a benefit … a member of the group seeking to challenge the barrier *need not allege [i.e., prove] that he would have obtained the benefit but for the barrier.*"); *id.* at 666 (white contractors' lost opportunity to compete for contracts confers standing to challenge minority set-aside program without proof of "ultimate inability to obtain the benefit" an actual award of contract). "[T]he Supreme Court has made clear that neither the causation requirement nor the redressability requirement for constitutional standing should hinder enforcement of procedural rights." *Idaho By & Through Idaho Pub. Utils. Comm'n v. I.C.C.*, 35 F.3d 585, 591 (D.C. Cir. 1994).

The district court also violated its legal duty to assume the truth of the factual allegations of the complaint that "the DISCLOSE Act and the DREAM Act … *would have been passed by the Senate and been enacted into law, but for*…

Rule XXII."[9] JA28. It concluded that plaintiffs' injury was "hypothetical" because there was no "demonstrat[ion] that the bills will ever be enacted." JA88. It reasoned that the plaintiffs "[cannot] show causation or redressability" because there "'is *no guarantee* that, but for the cloture rule, the legislation … would have

---

[9] The specific factual allegations in this case – that the DREAM and DISCLOSE Acts would have passed and been enacted but for Rule XXII (JA28), that the DREAM Act plaintiffs met the requirements of that Act (JA22-25), and that they were denied a path to citizenship and are subject to the risk of deportation as a direct result of the use of Rule XXII (JA29-30) – distinguish this case from *Judicial Watch, Inc. v. United States Senate*, 432 F.3d 359 (D.C. Cir. 2005). In that case the plaintiffs challenged Rule XXII, alleging that its use to block judicial nominations harmed Judicial Watch as a frequent litigant in the federal courts by delaying case disposition times. This Circuit assumed injury in fact but held causation lacking because of the *absence of two key allegations.* "[W]e find that its causation allegations fail to show two links needed to support an inference that the three-fifths cloture rule caused slower case processing than would have prevailed under a majority cloture rule." *Id.* at 361. More specifically, the plaintiff's allegations did not establish a link between use of Rule XXII and delayed confirmation, nor did "plaintiff's allegations … show that such a slowing [in the confirmation process] has materially increased case disposition time." *Id.*

passed.'" *Id.;* JA89-90; JA90 ("Plaintiffs failed to demonstrate that the DREAM and DISCLOSE Acts *would have passed* but for the Cloture Rule") (emphasis added).

The district court distinguished the Supreme Court's ruling in *City of Jacksonville* on the ground that it was "not persuaded that Plaintiffs' alleged injury is akin to a deprivation of a contracting opportunity." JA88. This factual distinction ignores the Court's affirmation of standing in *Clinton* where the plaintiff's injury was loss of a buying opportunity as a result of a veto of a tax incentive granted to third persons. There was no proof that the plaintiff Snake River cooperative would have been able to purchase a processing plant if the tax incentive had not been vetoed.

There the Supreme Court specifically *rejected* the government's argument that Snake River did not have standing because "there can be an Article III injury only if Snake River *would have actually obtained a facility* on favorable terms." *Clinton*, 524 U.S. 432-33, n.22. Citing *City of Jacksonville,* it reasoned that "denial of a benefit … can itself create an Article III injury, irrespective of the end result." *Id.* at 433, n.22.

Justice Scalia's illustration in *Lujan* is also instructive. "[U]nder our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an

environmental impact statement, *even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years"* – if at all. 504 U.S. at 573, n.7. Similarly, it is the denial of the *opportunity to benefit* that gives rise to plaintiffs' standing. The plaintiffs in this case do not have to prove with certainty that they would have benefited to have standing to assert a procedural violation of the Constitution.

2. The existence of agency discretion does not undermine Article III causation.

Again improperly ignoring plaintiffs' allegation that each DREAM Act plaintiff met the requirements of the Act (JA22-25), the district court ruled that the connection between plaintiffs' inability to benefit from the DREAM Act and the use of Rule XXII to block that legislation was "too tenuous" because (as defendants argued) "the ultimate determination would have been at the discretion of the Secretary of Homeland Security." JA91. As discussed above, the Supreme Court's recognition of voter standing in *FEC v. Akins*, 524 U.S. 11 (1998), directly undercuts this conclusion. The "fact [of agency discretion to deny disclosure for other reasons] does not destroy Article III 'causation.... [The voters'] 'injury in fact' is 'fairly traceable' to the FEC's decision not to issue its complaint, *even*

though the FEC might reach the same result exercising its discretionary powers lawfully." *Id.* at 25 (emphasis added); *Watt*, 454 U.S. at 160-62.

F. The plaintiffs' claims can be redressed by removing the unconstitutional barrier.

Finally, the injuries to the DREAM Act plaintiffs and Common Cause *are redressable* by the relief plaintiffs seek. The entry of a declaratory judgment that the supermajority voting requirements in Rule XXII are unconstitutional would remove the barrier created by the 60-vote requirement to passage of the DISCLOSE and DREAM Acts. Under *City of Jacksonville*, 508 U.S. at 656, plaintiffs need not prove that removal of a barrier (such as unconstitutional preferences in contracting opportunities or unconstitutional supermajority voting requirements) would guarantee an altered outcome for the plaintiff. *See also Vill. of Arlington Heights*, 429 U.S. at 261 ("If MHDC secures the injunctive relief it seeks, that barrier will be removed [although] an injunction would not … guarantee that Lincoln Green will be built. MHDC would still have to secure financing, qualify for federal subsidies and carry through with construction."); *Watt*, 454 U.S. at 160-62.

"Unless it is evident" that the Senate would have chosen no cloture rule to a rule that allowed cloture by majority vote, the court "must leave the rest of [Rule XXII] intact." *Nat'l Fed'n. of Indep. Business v. Sebelius*, ___ U.S. ___, 132 S. Ct.

2566, 2607 (2012); *see also Chadha*, 462 U.S. at 960 (severing the one-House veto); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, ___ U.S. ___, 130 S. Ct. 3138, 3161 (2010) ("when confronting a constitutional flaw,… we try to limit the solution to the problem severing any problematic portions, while leaving the remainder intact.") (internal quotations omitted). The general rule of all parliamentary bodies would then apply and allow cloture to be invoked by a simple majority vote. *Ballin*, 144 U.S. at 6; *FTC v. Flotill Prods., Inc.*, 389 U.S. 179, 183-84 (1967).

III. The Constitutionality of a Senate Rule is Not a Political Question.[10]

The district court dismissed the complaint on the alternate ground that whether Rule XXII violates the Presentment Clause, Quorum Clause or other constitutional provisions is a political question that a federal court should decline to resolve. According to the court, the grant of rule-making power under Article I, § 5, cl. 2 constitutes a textual commitment of the issue to the Senate that precludes judicial resolution in the absence of a separate constitutional provision that *expressly limits* the rule-making power. JA104-05. It is not enough, the court said, to show the existence of a "conflict" between a Senate rule and another constitutional provision; the other provision must provide an "explicit constitutional restraint[] upon the Senate's Cloture Rule." JA108. The court also

10 *The Filibuster* at 226-231.

concluded that it lacked judicially manageable standards to resolve the dispute (JA109) and that adjudication would be a disrespectful intrusion into the internal affairs of a coordinate branch. JA110.

The court is wrong on each point.

A. Congressional rules that conflict with constitutional provisions are subject to judicial review.

"*It has been long settled … that rules of Congress … are judicially cognizable*." *Yellin*, 374 U.S. at 114 (emphasis added). A provision of the Constitution that "conflicts" with a Senate rule *is one that "expressly limits"* the Senate's rule-making power. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (holding that the court has power to declare void congressional action that "conflicts" with, is "repugnant to" or "violates" a provision of the Constitution). The Senate can no more adopt a rule that conflicts with provisions of the Constitution than it can pass a statute that conflicts with other provisions of the Constitution. *Ballin*, 144 U.S. at 5 (While "the constitution empowers each house to determine its rules of proceeding, *[i]t may not by its rules ignore constitutional restraints or violate fundamental rights*") (emphasis added). There is nothing in *Ballin* or other cases to suggest that the conflicting "constitutional restraints" must explicitly say, "and this limits the rule-making power." Yet that is essentially what the district court required.

In both *Ballin* and *United States v. Smith*, 286 U.S. 6 (1932), the Supreme Court exercised jurisdiction to decide whether a congressional rule conflicted with other constitutional provisions. In neither case did the Court decline to exercise jurisdiction on political question grounds.

In *Ballin*, the plaintiffs challenged under the Quorum Clause Rule 5 of the House of Representatives that provided that "the names of members … who do not vote shall be … counted … in determining the presence of a quorum to do business." 144 U.S. at 5. The House relied on this rule by passing an excise tax. The plaintiff challenged the tax, contending that members who abstained from voting should not have been included in the quorum count because the House rule was unconstitutional under the Quorum Clause.

The district court purported to distinguish *Ballin*, saying that "the Court did not review the rule's validity." JA107. That assertion is refuted by the opinion in *Ballin* in which the Court said that [t]he [only] question" before the Court "*is as to the validity of this rule.*" *Id.* at 5 (emphasis added). The Court upheld the constitutionality of the House rule under the Quorum Clause on the merits (*id*. at 5-6) – something the Court could not have done if the constitutionality of a House or Senate rule was a non-justiciable political question.

In *Smith*, 286 U.S. 6, the issue was whether a Senate rule permitting reconsideration of a confirmation vote within three executive calendar days

violated the Appointments Clause. After the Senate confirmed the appointment of George Smith to the Federal Power Commission before the Christmas recess, President Hoover signed Smith's commission and swore him into office. When the Senate reconvened in January, the three executive calendar days specified in the Senate rule for reconsideration of a confirmation vote had not expired, and the Senate reversed its prior vote. After the President refused to recognize the Senate's right to reconsider, the Senate brought a *quo warranto* action. Smith challenged both the constitutionality and interpretation of the Senate rule.

The Senate in *Smith* conceded in its brief before the Supreme Court that "[t]here can be no doubt that the power vested in the Senate to determine the rules of its proceedings, like all other powers, has its limitations, [that] not every exercise will be sanctioned," and that "the tests adopted by this Court to determine when a rule is not binding … *are identical with the tests applied by this Court for determination of the constitutionality of the exercise of any power vested in Congress or in either House.*" Brief of Appellant (Senate), pp. 72-73 (emphasis added).[11]

---

[11] The Senate's concession is directly contrary to the ruling of the district court that the power of a court to review the constitutionality of a statute "has no bearing" on a court's power to consider restraints "on the Senate's power to determine the rules of its own proceedings." JA106.

The Supreme Court did not rule that it was foreclosed from deciding the case on the merits by the political question doctrine or the textual grant of rulemaking power in Article I, section 5. The Court did not find it necessary to rule on the constitutionality of the Senate rule under the Appointments Clause. The Court held instead that the validity of the Senate's interpretation of its own rule was purely a question of law (*id.* at 29) and that when "***the construction [of] … the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one*** … *[and though]* the Court must give great *weight to the Senate's* **…** *construction … we are not bound by it*. *Id.* at 32 (emphasis added).[12]

[12] The district court tried to distinguish *Smith* and other cases on the ground that "in none of these cases did courts reject Congress's own rules as unconstitutional." The jurisdiction of a court to rule on the challenge to the constitutionality of a Senate rule does not depend on *how* it rules. JA106-07. The Court decided each of these cases on the merits and refused to abstain from the exercise of jurisdiction on the theory that congressional rules are immune from judicial review. As this Circuit has recognized, "*[I]f Congress should adopt internal procedures which 'ignore constitutional restraints or violate fundamental rights' it is clear that we must provide remedial action…. Article I does not alter our judicial responsibility to say what rules Congress may not adopt because of constitutional infirmity*." *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1170, 1173 (D.C.

Powell v. McCormack, 395 U.S. 486 (1969) also undermines the district court's conclusion that this case presents a non-justiciable political question. In *Powell*, the Supreme Court exercised jurisdiction over a dispute that was far more sensitive and represented a far greater intrusion into the internal affairs of a coordinate branch than does this case – namely, the refusal of the House to seat a member who a House Committee found guilty of fraud. The House contended that the issue was a political question textually committed by the Constitution to the House which had the sole power under Article I, § 5, cl. 1 to "be the Judge of the … Qualifications of its own Members." The Supreme Court rejected the House's arguments. It held that the issue was not a political question and that "a determination of … Powell's right to sit would require no more than an interpretation of the Constitution … within the traditional role accorded courts to interpret the law and does not involve a 'lack of respect due [a] coordinate [branch] of government." 395 U.S. at 548.

Cir. 1983) (emphasis added). *See also Metzenbaum v. FERC*, 675 F.2d 1282, 1287 (D.C. Cir. 1982) ("[J]udicial intervention may be appropriate where rights of persons other than members of Congress are jeopardized by Congressional failure to follow its own procedures … and [j]udicial intervention is appropriate when the failure of Congress to adhere to its own rules implicates constitutional rights.").

The district court said that unlike *Powell*, "Plaintiffs point to no standard within the Constitution by which the Court could judge whether or not the Cloture Rule is constitutionally valid." JA109. But that is not true. Plaintiffs cited numerous provisions of the constitution that are violated by Rule XXII. JA51-58.[13]

The district court ignored *Ballin*, *Smith*, *Yellin* and *Powell* and relied instead on *Nixon v. United States*, 506 U.S. 224 (1993) to justify its political question ruling. JA104-05. *Nixon*, however, is not on point.

In *Nixon*, the Court held non-justiciable Judge Walter Nixon's challenge to the Senate's procedures for trying his impeachment. The Court relied on three factors, none of which is present in this case. First, the Court pointed to the comprehensive language in Art. I, § 2, cl. 5 regarding the scope of the Senate's power: "the Senate *shall* have the *sole power* to try all impeachments." According to the Court, this language reflected a "textual commitment" of all questions of procedure in the trial of impeachments solely to the judgment of the Senate. 506

[13] The district court acknowledged that "*the Presentment Clause* [on which plaintiffs rely here] … *provided a clear judicially manageable standard for the Court to use*" in reviewing the constitutionality of the one-House veto in *Chadha*. JA110 (emphasis added). The text and legislative history of that clause, no less than that of the provisions at issue in *Powell*, are sufficient to permit the court to review the current challenge to Rule XXII.

U.S. at 230-31. Second, the Court noted that the next three sentences in the Impeachment Clause also dealt with matters of procedure: (i) Senators shall "be on oath"; (ii) the Chief Justice shall preside when the President is tried; and (iii) no person shall be convicted without a two-thirds vote of Senators present. The Court ruled that these three procedural requirements reflected the Framers' intent to leave other procedures in impeachment trials to the Senate's discretion. Third, the Court pointed to the Records of the Federal Convention which showed the Framers' conscious decision to exclude judges (other than the Chief Justice) from a role in the trial of impeachment cases, because judges themselves might be impeached and would have a conflict-of-interest if allowed to rule on procedural matters. 506 U.S. at 244. None of the factors that drove the decision in *Nixon* apply to this case.

B. The Presentment Clause and other constitutional provisions supply judicially manageable standards.

The district court ruled there were no judicially manageable standards for resolving the plaintiffs' claims. JA108. As noted above, the district court elsewhere contradicted not only this conclusion, as well as its earlier conclusion that "the Presentment Clause … [does not] provide explicit textual limits" (JA105) when it acknowledged that "the Presentment Clause *provided a clear judicially manageable standard*" for reviewing the constitutionality of the one-House veto in *Chadha*. JA110 (emphasis added). That provision, which the Supreme Court

construed to require a simple majority of both Houses for passage of legislation (462 U.S. at 942), provides a manageable standard in this case no less than in *Chadha*. The plaintiffs contend that current Senate rules violate a structural, historical, and textual requirement that majority rule governs legislative procedures. There is nothing in the plaintiffs' complaint that asks the court to do anything different than it does in any case challenging decisions of the elected branches.

C. The exercise of jurisdiction is not a disrespectful intrusion into the Senate's affairs.

The exercise of jurisdiction in this case is not an inappropriate intrusion into the internal affairs of a coordinate branch, but would preserve the separation of powers. As noted above, reviewing the House's decision to refuse to seat a member in *Powell* arguably reflects a far greater intrusion into Congress's internal affairs. Similarly, the Supreme Court did not hesitate to exercise jurisdiction to review and reject interpretations by the House and the Senate of their own internal rules (*United States v. Ballin,* 144 U.S. 1 (1982) (House rule for determining quorum); *United States v. Smith,* 286 U.S. 6 (1932) (Senate rule on reconsidering confirmation votes)) or to hold the House accountable for violation of its own rules. *See Christoffel v. United States*, 338 U.S. 84 (1949); *Yellin*, 374 U.S. 109.

The court concedes that the validity of a *statute* alleged to conflict with a constitutional provision is *not* a political question. There is no legal basis for the distinction between the validity of a statute and a Senate rule. A rule adopted by only one house of Congress, without the consent of the other house or of the President, cannot be entitled to *greater* deference than a statute passed by both houses and approved by the President. The exercise of judicial review is particularly warranted here since a single chamber's internal rules are not subject to the usual checks and balances of bicameralism and presentment. In this case, it is entirely consistent with the preservation of separation of powers for a court to review the contention by members of one chamber that a rule of the other chamber is being used to unconstitutionally nullify their votes and to upset the "single, finely wrought … procedure" for the enactment of laws by "the prescribed majority of the Members of both Houses." *Chadha*, 462 U.S. at 948, 951.

IV. Rule XXII Conflicts with the History, Intent of the Framers, and the Text of the Constitution.

In ruling on standing and the political question doctrine, this Court, like the district court, is required to presume that the plaintiffs are entitled to prevail on the merits of their claims that the 60-vote requirement in Rule XXII is unconstitutional. *LaRoque*, 650 F.3d 777; *Muir*, 529 F.3d 1100. The plaintiffs' constitutional claims are set forth in detail in ¶¶ 57-75 of the complaint. JA50-59.

Because the district court disregarded this rule and rejected plaintiffs' claims on the merits, plaintiffs are compelled to address the merits of their claims in this appeal, but will do so only in summary form.

Rule XXII's supermajority vote requirement is inconsistent with the rules of parliamentary practice that preceded the adoption of the Constitution (JA34-35), the intent of the Framers as reflected in *The Federalist Papers* (JA38-41), the text of the Quorum and the Presentment Clauses (JA36), the exclusive list of exceptions to the principle of majority rule in the Constitution which specify when a supermajority vote is required (JA36-38), the provision of Article I, § 3, cl. 4 that gives the Vice President the power to cast the tie-breaking majority vote when the Senate is "equally divided" (JA43, 50-60), and the first rules adopted by the Senate and the House immediately after ratification.[14] JA41-42.

---

[14] Dan T. Coenen, *The Originalist Case Against Congressional and Supermajority Voting Rules*, 106 Nw. U. L. Rev. 1091 (2012); Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 Conn. L. Rev. 1003 (2011); Aaron-Andrew Bruhl, *The Senate: Out of Order?*, 43 Conn. L. Rev. 1041 (2011); Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 Harv. J. on Legis. 467 (2011); Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 Duke L.J. 73 (1996); Comment, *An Open Letter to Congressman Gingrich*, 104 Yale L.J. 1539 (1994).

The purpose of the Quorum Clause was to give each house "the capacity to transact business" based on the "mere presence of a majority" so that its capacity 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 (emphasis added). The 60-vote requirement in Rule XXII violates the Quorum Clause by making the Senate's capacity to debate or vote on bills such as the DISCLOSE and DREAM Acts "depend upon the … assent of [a] member or fraction" of the Senate; it gives a single senator the power to prevent debate or passage of these and many other bills unless 60 senators are present and vote for cloture.

The purpose of the Presentment Clause was, as Madison explained, to allow "federal acts [to] take effect … merely on the *majority votes* of the Federal Legislature." *The Federalist No. 54* at 371 (Cooke ed. 1961) (emphasis added).

In *Chadha*, and again in *Clinton v. City of New York*, the Supreme Court held that compliance with the Presentment Clause is mandatory and Congress has no power to alter its procedures by statute. The Court held in *Chadha* that "[b]y providing that no law could take effect without the concurrence of ***the prescribed majority*** of the Members of both Houses … the prescription for legislative action in [the Presentment Clause] … *represents the Framer's decision that the legislative power … be exercised in accord with* ***a single****, finely wrought …* ***procedure***." 462 U.S. at 948, 951 (emphasis added). The Court also said that "the

fact that a given law or procedure is … convenient and useful … will not save it if it is contrary to the Constitution" (*id.* at 944) and the fact that "this controversy may … be termed as 'political'" or involves "constitutional issues with significant political overtones does not automatically invoke the political question doctrine." *Id.* at 942-43.

The *de facto* 60-vote requirement in Rule XXII conflicts with the requirements of the Presentment Clause that the legislative power be exercised by the "*prescribed majority* of the Members of both Houses … in accord with a single … procedure." *Id.* at 948, 951 (emphasis added).

The Federalist papers leave no room for doubt that the Framers did not intend to allow either house to depart from the democratic principle of majority rule. Hamilton said in *The Federalist No. 22* that:

> ***To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision) … subject[s] the sense of the greater number to that of the lesser*** …
>
> [I]ts real operation is to embarrass the administration, to destroy the energy of government…. ***If a … minority can control the opinion of the majority … the majority in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will over-rule that of the greater….***

The Federalist No. 22, pp. 140-41 (emphasis added); *see also No. 78.*

In *No. 58*, Madison responded to the criticism that the Framers should have required "more than a majority … for a quorum, and in particular cases…, more than a majority of a quorum for a decision" to pass legislation before sending it to the president. Madison conceded that

> some advantages might have resulted from such a precaution…. It might have been an additional shield … and another obstacle … to hasty measures. ***But these considerations are outweighed***…. In all cases where the justice or the general good … require new laws to be passed … ***the fundamental principle of free government would be reversed. It would no longer be the majority that would rule; the power would be transferred to the minority***…. [A]n interested minority might take advantage … to screen themselves from equitable sacrifices to the general weal, or … to extort unreasonable indulgences."

The Federalist, No. 58, pp. 396-97 (emphasis added).

The Framers created only six exceptions to the principle of majority rule in the Constitution. "These carefully defined exceptions from presentment and bicameralism underscore the difference between the legislative functions of Congress" – which are governed by the principle of majority rule – "and other

unilateral but important one-House acts" – "exceptions [that] are narrow, explicit and separately justified." *Chadha*, 482 U.S. at 956. This list of exceptions, like the list of cases within the original jurisdiction of the Supreme Court (*Marbury*, 5 U.S. (1 Cranch) at 174) or the list of qualifications of members of the House of Representatives (*Powell*, 395 U.S. at 558), is exclusive and cannot be expanded by a Senate rule.

Rule XXII also alters the constitutional balance achieved in the Great Compromise, which gives a majority of the states (26) the power to pass bills and confirm presidential nominees with the support of 51 of their 52 senators. *See The Federalist No. 62*, p. 417 ("No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then, *a majority of the states*." (emphasis added). Rule XXII violates this compromise by requiring the vote of 60 senators from 30 states to overcome a filibuster by senators from as few as 21 states (representing as little as 11% of the U.S. population).

Finally, there is no evidence that the Framers intended to give either house of Congress the power to depart from the principle of majority rule by granting them the authority in Article I, § 5, cl. 2 to "determine the rules of its proceedings." *See Ballin*, 144 U.S. at 5 (Congress "may not by its rules ignore constitutional restraints or violate fundamental rights."). This rule-making power like the power granted by the Elections Clause to state legislatures to prescribe the "times, places

and manner of elections of Senators and Representatives" is not a plenary grant of power, but is bounded and constrained by the Constitution. The Framers understood this latter delegation to be "a grant of authority to issue ***procedural regulations***, and ***not as a source of power to dictate electoral outcomes … or to evade important constitutional restraints.***" *U.S. Term Limits v. Thornton*, 514 U.S. 779, 833-34 (1995) (emphasis added); *Cook v. Gralike*, 531 U.S. at 523. There is nothing in the records of the Federal Convention to suggest that the Framers had a different understanding of the rulemaking clause that was adopted without debate.

Conclusion

For the foregoing reasons, appellants respectfully request reversal of the district court's dismissal of the complaint.

Respectfully submitted, this 18th day of June, 2013.

/s/ *Emmet J. Bondurant*

Emmet J. Bondurant
Georgia Bar No. 066900
bondurant@bmelaw.com

Bondurant Mixson & Elmore LLP
3900 One Atlantic Center
1201 W. Peachtree Street
Atlanta, Georgia 30309
Telephone: (404) 881-4100
Facsimile: (404) 881-4111

/s/ *Stephen Spaulding*

Stephen Spaulding
Staff Counsel of Common Cause
D.C. Bar No. 1001633
SSpaulding@CommonCause.org

Common Cause
1133 19th Street, NW
Suite 900
Washington, DC 20036
Telephone: 202-736-5781
Facsimile: 202-659-3716

Attorneys for Appellants

Certificate of Compliance
[required by Fed. R. App. P. 32(a)(7)]

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,988 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.

/s/ Emmet J. Bondurant
Emmet J. Bondurant

ADDENDUM

The Senate Rules at Issue

Rule XXII of the Standing Rules of the United States Senate provides in pertinent part as follows:

> 22.2 …[A]t any time a motion signed by sixteen Senators, to bring to a close the debate upon any measure … is presented to the Senate, the Presiding Officer…, shall at once state the motion to the Senate…, shall lay the motion before the Senate and direct that the clerk call the roll, and upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by a yea-and-nay vote the question:
>
> "Is it the sense of the Senate that the debate shall be brought to a close?" ***And if that question shall be decided in the affirmative*** by ***three-fifths of the Senators duly chosen and sworn – except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting*** – then said measure … shall be the unfinished business to the exclusion of all other business until disposed of.

JA32-33.

Rule V(2) of the Senate rules provides:

> 2. The rules of the Senate ***shall continue*** from one Congress to the next Congress ***unless they are changed as provided in these rules.*** (emphasis added).

JA34.

CERTIFICATE OF SERVICE

I hereby certify that I have this date electronically filed the within and foregoing **BRIEF OF APPELLANTS** 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:

Morgan J. Frankel (morgan_frankel@legal.senate.gov)
Grant R. Vinik (grant_vinik@legal.senate.gov)
Patricia M. Bryan (pat_bryan@legal.senate.gov)
Thomas E. Caballero (thomas_caballero@legal.senate.gov)
Office of Senate Legal Counsel
United States Senate
642 Hart Senate Office Building
Washington, DC 20510-7250

This 18th day of June, 2013.

/s/ Emmet J. Bondurant
Emmet J. Bondurant