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

REPLY 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

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 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.

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INTRODUCTION

The Senate[2] minimizes the significance of Rule XXII and diverts attention from its real operation and effect by arguing that it is only a procedural rule that merely determines when a bill can be debated on the Senate floor and "how long … debate should continue." Brief of Appellees ("Senate Br.") at 52.

Rule XXII is far more than a rule of procedure. It is a substantive rule that "dictates electoral outcomes" (*U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995)) by transforming the Senate from a majoritarian body into a "60-vote Senate." The rule shifts the point at which decisions are *actually* made from the final majority-vote stage of both the legislative and the confirmation processes to the preliminary cloture stage. No bill (with limited exceptions) can be debated

[2] For the sake of clarity the defendants will be collectively referred to as "the Senate" because the Senate has undertaken and is controlling the defense on their behalf through Senate Staff Counsel pursuant to S. Res. 485 (112th Cong.) and will be bound by the decision to the same extent as if the Senate had intervened as a party. "[T]he persons for whose benefit and at whose direction a cause of action is litigated cannot be said to be 'strangers to the cause.... [O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right ... is as much bound ... as he would be if he had been a party to the record.'" *Montana v. United States*, 440 U.S. 147, 154-55 (1979) (internal quotations omitted).

or passed and no nominee can be confirmed without 60 votes on cloture. Final passage by majority vote is merely a formality once 60 senators have voted for cloture. Because of Rule XXII, legislative outcomes in the Senate are determined by a minority veto and a super-majoritarian process specifically rejected by the Framers. *See The Federalist* Nos. 22, 58 and 75.

The Senate's core argument is that none of this matters because the Senate is not bound by the Framers' "prescription for legislative action" in the Presentment Clause – namely, the enactment of legislation by vote of the "prescribed majority of the Members of both Houses" and "presentment to the President." *INS v. Chadha*, 462 U.S. 919, 948, 954-55 (1983). According to the Senate, by delegating to each House power to "determine the rules of its proceedings" (Art. I, § 5, cl. 2), the Constitution grants the Senate plenary power to replace the Presentment Clause's "single, finely wrought and exhaustively considered procedure" for enactment of legislation (*INS v. Chadha*) with a 60-vote rule of its own making. Under this rule, the objection of a single senator suffices to prevent the Senate from debating or passing legislation or confirming nominees without securing 60 votes for cloture.

Despite the Supreme Court's ruling that the rule-making power is not unlimited, but is subject to "constitutional restraints" and may be exercised only "within these limitations" (*United States v. Ballin*, 144 U.S. 1, 5 (1892)), the

Senate contends any constitutional restraints on its rule-making power are unenforceable because (1) no one has standing to challenge the constitutionality of its exercise of its rule-making power, (2) judicial review is foreclosed by the political question doctrine, and (3) every conceivable defendant is immune from suit under the Speech or Debate Clause.

There is, however, nothing sacred about the arbitrary 60-vote requirement in Rule XXII. If the Senate is correct that its rule-making power has no constitutional limitations, nothing prevents the Senate from increasing the number of votes required on all legislation or on bills dealing with particular subjects (*e.g.*, raising taxes, protecting voting rights or regulating banks) from 60 to 75, 80 or even 100. The Senate could also require unanimous consent for cloture of debate on all Cabinet or judicial nominees.

Acceptance of the Senate's arguments would undermine both the constitutional system of checks and balances and the separation of powers. The Senate could, for example, intrude into the internal operations and diminish the legislative powers of the House of Representatives by adopting a rule providing that no bill passing the House by less than a two-thirds vote – or proposed by a black member of the House – would be scheduled for Senate debate without unanimous consent or a vote of three-fourths of the Senate.

Although these examples may seem far-fetched, a minority of senators has already demonstrated its willingness to use Rule XXII's supermajority vote requirement to "embarrass the administration" (*The Federalist,* Nos. 22, 75) by delaying or preventing confirmation of nominees to fill critical vacancies in executive branch agencies and the federal courts – sometimes for the sole purpose of ensuring the agency or court cannot fulfill its legal responsibilities.

A ruling in the Senate's favor would also lead to anomalous results. The Supreme Court has consistently held that the law-making powers of Congress under Article I, § 7 (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)), the rule-making powers delegated by Article I, § 4 to state legislatures to prescribe the times, places and manner of elections of Senators and Representatives (*U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995)), and the power delegated to each House by Article I, § 5, cl. 1 to judge the qualifications of its own members (*Powell v. McCormack*, 395 U.S. 486 (1969)) are all subject to constitutional restraints and judicial review. Under the district court and Senate's rationales, a ruling in the Senate's favor would mean that the Senate's *rule-making* power would not be limited by the Constitution and would be immune from judicial review. While the *law-making* powers of the Senate would remain subject to the checks and balances of both a bicameral Congress and a presidential veto, its *rule-making* power would become unbound. "It is inconceivable that guarantees

embedded in the Constitution … may thus be manipulated out of existence." *U.S. Term Limits*, 514 U.S. at 831 (internal quotations omitted).

Summary of Argument

The district court erred in holding that the plaintiffs lack Article III standing and that their complaint presents a non-justiciable political question. The alternate ground for dismissal offered by the Senate, that the Speech or Debate Clause bars the claims, is similarly unavailing. This Court should reverse the district court and allow the plaintiffs' claims to proceed.

Rule XXII is far more than a rule of procedure. It determines legislative outcomes under a supermajority approach rejected by the Framers. The Senate defends the rule on the basis of an asserted plenary power that fails to acknowledge the constitutional restraints that bind the Senate. *United States v. Ballin*, 144 U.S. 1, 5 (1892). In the Senate's view, *no one* has standing to challenge the exercise of such power, *no court* can review such exercise, and *any defendant* is immune from suit under the Speech or Debate Clause. This unrestrained view cannot be squared with Supreme Court precedent. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137*; U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 831; *Powell v. McCormack*, 395 U.S. 486.

Moreover, both the Senate and the district court improperly contest the merits of the plaintiffs' constitutional claims by repeatedly arguing the absence of any procedural right under Article I. This is improper at the pleading stage.

LaRoque v. Holder, 650 F.3d 777, 785 (D.C. Cir. 2011); *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1105 (D.C. Cir. 2008). It also ignores the holdings of *INS v. Chadha*, 462 U.S. 919 (1983) and *Clinton v. City of New York*, 524 U.S. 417 (1998).

The district court incorrectly held that the House member plaintiffs lack standing. *Raines v. Byrd*, 521 U.S. 811 (1997), does not control here. *Raines* was not a vote nullification case. Nor did it overrule the more relevant precedents of *Coleman v. Miller*, 307 U.S. 433 (1939) and *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). That the votes of House members were counted in the House does not undermine the fact that those votes were later nullified by the unconstitutional procedure of Rule XXII.

The DREAM Act plaintiffs have suffered the same concrete, particularized harm deemed sufficient to confer standing in *INS v. Chadha*, the threat of deportation. That harm was inflicted by violation of the same procedural right acknowledged in *Chadha* and *Clinton v. City of New York – i.e.*, the right to have legislation enacted through the single, finely wrought procedure prescribed by Article I. The declaratory relief plaintiffs seek removes an unconstitutional obstacle (the supermajority requirement of Rule XXII), thus redressing the injury. *Northeastern Florida Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993); *FEC v. Akins*, 524 U.S. 11 (1998).

Common Cause has organizational standing. Defeat of the DISCLOSE Act, caused solely by the supermajority vote requirement, inflicted a direct, concrete, and particularized injury on Common Cause's core mission of transparency in campaign financing. This injury to core mission confers standing. *See Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977). Moreover, the loss of information the DISCLOSE Act would have provided Common Cause and its members is an "informational injury." *Akins*, 524 U.S. at 21.

The constitutionality of Rule XXII is not a political question. Judicial review of congressional rules is fully supported by Supreme Court precedent. *See Ballin*, 144 U.S. 1; *United States v. Smith*, 286 U.S. 6 (1932); *Christoffel v. United States*, 338 U.S. 84 (1949); and *Yellin v. United States*, 374 U.S. 109, 114 (1963). The Senate's argument regarding judicially manageable standards for review misstates the plaintiffs' core argument. Rule XXII is not a rule of debate; it is a rule of *voting*. The supermajority vote requirement is, and should be, subject to review.

Finally, the Speech or Debate Clause does not bar plaintiffs' claims. The named defendants have a role in enforcing the 60-vote requirement of Rule XXII, and are not immune from suit under the Speech or Debate Clause. This question has been decisively answered by the Supreme Court. *Powell v. McCormack*, 395

U.S. 486, 505-08 (1969); *Dombrowski v. Eastland*, 387 U.S. 82 (1967); *Kilbourn v. Thompson*, 103 U.S. 168 (1881).

ARGUMENT

The Senate cannot have it both ways. On the one hand, the Senate asserts that the merits of plaintiffs' constitutional claims are not at issue on this appeal. Senate Br. at 1, n.1. On the other, it argues that "[t]he concept of 'procedural injury' … has no application in the legislative context" (*id*. at 38) and defends the district court's erroneous conclusion that neither *Chadha* nor *Clinton* construed Article I to confer "an individual procedural right." *Id*. at 41.

The Senate's bald assertions that the district court did not rule on the merits or rule "that plaintiffs lack a cause of action under Article I" (*id*. at 37) are flatly contradicted by the opinion. The district court ruled that the plaintiffs did not have standing because "plaintiffs cannot demonstrate that they have a procedural right to majority consideration of legislation." JA92. It also ruled that the complaint's allegations that Rule XXII "conflicts" with numerous provisions of the Constitution were insufficient because "Plaintiffs cannot identify any constitutional provision that expressly limits the authority committed to the Senate by Article I, section 5, clause 2." JA105.

The district court's conclusion was based on the following *interpretation of the constitutional provisions at issue:*

> Plaintiffs allege that the Quorum Clause … the Presentment Clause … and … provisions expressly providing for 'supermajority votes' on certain matters provide explicit textual limits on the Senate's rule-making power…. *Plaintiffs have not demonstrated that [these] or any other constitutional provision explicitly requires that a simple majority is all that is required to close debate and enact legislation.* As is … clear in the Complaint, Plaintiffs' argument is that the Cloture Rule 'conflicts' with these constitutional provisions … but Plaintiffs do not assert – nor can they – that any of these provisions *expressly limits* the Senate's power to determine the rules of its proceedings." JA105 (emphasis added).

Not only are the district court's rulings substantively wrong, they are also procedurally improper under this Court's controlling decisions in *LaRoque v. Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011), and *Muir v. Navy Federal Credit Union*, 529 F.3d 1100, 1105 (D.C. Cir. 2008). Under these decisions, which the Senate ignores, a court must refrain from deciding the merits in ruling on a motion to dismiss for want of standing (*Muir*), and must also assume that the plaintiffs "will prevail on the merits of their constitutional claims" in ruling on standing. *LaRoque*, 650 F.3d at 785. These errors are alone sufficient for reversal.

I. *Raines v. Byrd* did not overrule *Coleman v. Miller* or *Kennedy v. Sampson.*

The Senate argues that *Raines v. Byrd*, 521 U.S. 811 (1997), overruled the decisions in *Coleman v. Miller*, 307 U.S. 433 (1939), and *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). Senate Br. at 24-28.

Raines was not a vote nullification case. Nor did it purport to overrule *Coleman v. Miller* or *Kennedy v. Sampson.*

Although the Senate spends five pages discussing *Raines*, the Senate conspicuously fails to quote the Supreme Court's own description of the significance of its holding in *Coleman*. The Court said:

> It is obvious … that our holding in *Coleman* stands for the proposition 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.*

521 U.S. at 823 (emphasis added).

The Senate also neglects to mention *why* the Supreme Court held that Senator Byrd and the other plaintiffs did not have standing to sue under *Coleman*: "They have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and the bill was nevertheless deemed defeated." *Id.* at 824.

Unlike Senator Byrd, the House member plaintiffs alleged that they voted for two specific bills which passed the House, had the support of an absolute majority of the Senate and of the President, and would have been enacted into law, but were defeated when Rule XXII was used by a minority of senators to nullify the House members' votes. *See Page v. Shelby*, 995 F. Supp. 23, 28 (D.D.C. 1998), *aff'd.*, 172 F.3d 920 (D.C. Cir. 1998) (noting that *Skaggs v. Carle*, 110 F.3d 831 (D.C. Cir. 1998)), "implies that a House or Senate rule requiring a supermajority vote for passage of legislation, if strictly enforced, might result in sufficient constitutional injury to support standing by some plaintiff.").

The Senate also relies on *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir 1999), but again omits the most significant part where this Court discusses the impact of *Raines* on *Kennedy v. Sampson*. After quoting the *Raines* Court's description of its holding in *Coleman*, this Court said:

> Even under this narrow interpretation, one could argue that the plaintiff in *Kennedy* had standing. The pocket veto challenged in that case had made ineffective a bill that both houses of Congress had approved. Because it was the President's veto – not a lack of legislative support that prevented the bill from becoming law … those in the majority could plausibly describe the President's action as a complete nullification of their votes.

Id. at 116-17.[3]

As *Chenoweth* acknowledges, *Kennedy* was not overruled by *Raines* and remains binding on this Court (unless overruled *en banc*).

Finally, the Senate asserts that the House member plaintiffs' votes in favor of the DISCLOSE and the DREAM Acts were not "nullified" because they were counted *in the House.* Senate Br. at 26 ("No official in the Senate treated the legislation as if it did not pass the House."). In *Coleman,* the Kansas legislators were held to have standing, even though their votes against ratification of the Child Labor Amendment were counted in the Kansas Senate, only to be later nullified by the Lt. Governor's tie-breaking vote. This Court also held that Senator Kennedy had standing even though his vote was also counted in the Senate only to be nullified by President Nixon's untimely pocket veto. The fact that a vote was

[3] Unlike the House member plaintiffs, Rep. Chenoweth did not allege that she had been injured by the unconstitutional nullification of a vote cast as a member of Congress for or against a specific bill. She complained that President Clinton bypassed Congress without authority by issuing an executive order of which she disapproved. This Court held that she had no standing under *Coleman* because she had not cast a vote that had been unconstitutionally nullified and that her complaint that the executive order was *ultra vires* was only a generalized grievance insufficient to give her standing.

"counted" does not mean the legislator casting that vote lacks standing if the vote is unconstitutionally nullified.[4]

II. The DREAM Act Plaintiffs Have Standing.

The Senate completely ignores the fact that the DREAM Act plaintiffs have suffered the same concrete, particularized injury-in-fact deemed sufficient to confer standing in *INS v. Chadha* – namely, the threat of deportation. A "person whose liberty [is] at risk" (*Bond v. United States*, 131 S. Ct. 2355, 2365 (2011)) suffers a real, concrete harm that distinguishes this person from members of the public who have only a generalized interest in constitutional governance.

The Senate focuses instead on the procedural violation that was the mechanism by which this concrete harm was inflicted, arguing that the DREAM Act plaintiffs do not have standing because "the concept of 'procedural injury' …

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[4] The Senate argues that the two bills did not become law because the "Senate simply failed to pass the legislation" (Senate Br. at 26) without, however, mentioning *why* they failed to pass. The cause was not a lack of majority support in the Senate. They failed to pass because Rule XXII allowed a minority to prevent the majority from debating and passing both acts. In the words of *Chenoweth*, 181 F.3d at 117, it is "not a lack of legislative support that prevented the bill[s] from becoming law" since a majority of senators and the President favored passage; it is a minority's use of an unconstitutional procedure.

has no application in the legislative context (Senate Br. at 38) and that neither "*INS v. Chadha* nor *Clinton v. City of New York* … addressed 'procedural standing.'" *Id*. at 40. The Senate also says that "plaintiffs fail to identify either a precise procedural right conferred by Article I or a concrete interest, particular to plaintiffs, that Article I was designed to protect." *Id*. at 19.

The Senate is substantively and procedurally wrong. First, in both *Chadha* and *Clinton*, the Supreme Court upheld the standing of indirect beneficiaries to challenge legislative procedures that deviated from "the single, finely wrought … procedure" (*Chadha*, 462 U.S. at 951) for enactment and repeal of legislation by "the prescribed majority of both Houses" (*id*. at 948), even though the plaintiffs in both cases had no legally enforceable rights under the legislative acts in question. The DREAM Act plaintiffs' claims exactly parallel the Senate's own description of claims deemed sufficient in *Chadha*: "Plaintiffs … cite[] particularized, substantive injuries (in *Chadha*, impending deportation …), and they claim[] a constitutional defect in the government's actions that led to their injuries…." Senate Br. at 40.

Moreover, whether the Presentment Clause was intended to protect the rights of beneficiaries of acts pending in Congress to have legislation considered by "the prescribed majority of both Houses" is a merits issue. In ruling on the DREAM Act plaintiffs' standing, the trial court was required to assume that the plaintiffs

would prevail on the merits of their constitutional claims. *LaRoque v. Holder*, 650 F.3d at 785.

The Senate says that even if plaintiffs' procedural rights under the Constitution were violated by Rule XXII, their injuries are not "fairly traceable to the defendants" because the Vice President and the Secretary, Clerk, Parliamentarian and Sergeant-At-Arms were merely following orders in implementing Rule XXII. Senate Br. at 19, 41-42, 45. The "fairly traceable" element of standing does not require that the defendants be morally culpable, be members of the legislative body, or have had any role in making the unconstitutional legislative decision. *Powell v. McCormack*, 395 U.S. 486 (1969) (refusal to seat House member); *Kilbourn v. Thompson*, 103 U.S. 168 (1881) (ordering Sergeant-at-Arms to arrest someone for contempt of Congress). It requires only that plaintiffs' injury be "fairly traceable" to the actions of one or more named defendants in *implementing* the unconstitutional action or rule.

The Senate contends that even if Rule XXII is unconstitutional, plaintiffs lack standing because their injuries are "inherently speculative" and "'there is no guarantee that, but for the cloture rule, the legislation … would have passed.'" Senate Br. at 43. This case was decided at "the pleading stage, [where] general factual allegations of injury … may suffice [because] on a motion to dismiss [a court is required] 'to presume that general allegations embrace those specific facts

that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The court was required to "accept as true all of the factual allegations of the complaint" (*Erickson v. Pardus*, 551 U.S. 89, 94 (2007)) and "construe the complaint 'liberally' grant[ing] [plaintiff] the benefit of all inferences that can be derived from the facts alleged." *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002); *Accord, NB ex rel. Peacock v. District of Columbia*, 682 F.3d 77, 82 (D.C. Cir. 2012).

The complaint alleged *as fact* that both the DREAM Act and the DISCLOSE Act (1) had the support of the President, and (2) the support of an absolute majority of the full Senate (not a mere majority of a quorum), (3) that 55 senators voted to end the filibuster of the DREAM Act, and (4) 59 senators voted to break the filibuster of the DISCLOSE Act. JA17. The inference – that both acts would have been passed by the Senate and signed into law by the President but for Rule XXII's 60-vote requirement – was fully supported by the facts alleged and cannot be dismissed as unreasonable.

Finally, the Senate contends that plaintiffs' injuries cannot be redressed because the DREAM and DISCLOSE Acts expired at the end of the 111th Congress. Senate Br. at 20. What the Senate is really arguing is that the issue has become moot. Plaintiffs' claims are not moot because they are capable of repetition as long as Rule XXII continues to exist, and would evade review if every

case challenging the rule's constitutionality had to be dismissed as moot at the end of each two-year term of Congress. *See LaRouche v. Fowler*, 152 F.3d 974, 978 (D.C. Cir. 1998) ("Challenges to rules governing elections are the archetypal cases for application of this exception" to the mootness doctrine.); *Stewart v. Taylor*, 104 F.3d 965, 969 (7th Cir. 1997) ("[E]lections are routinely too short in duration to be fully litigated and there is a reasonable expectation that the same party would be subjected to the same action again.") *CBS, Inc. v. FCC*, 629 F.2d 1, 28 (D.C. Cir. 1980), *aff'd*. 453 U.S. 367 (1981) ("In the context of elections, where fragile rights are at stake, courts must be careful to avoid dismissing litigation as moot.").

The Senate contends that a ruling in plaintiffs' favor would not redress plaintiffs' injuries because the "Vice President 'has no rule making power over the Senate'" and that any parliamentary ruling by the Vice President based on a declaratory judgment that Rule XXII is unconstitutional would be "subject to appeal and determination by the Senate." The Sergeants-at-Arms in *Powell* and *Dombrowski* also had no role in the decisions of the House that were challenged in those cases. Senate Br. at 42. In *Powell*, the Supreme Court also rejected the "'inadmissible suggestion' that [the House of Representatives might] disregard … a judicial determination" that the House had violated the Constitution by refusing to seat Representative Powell. 395 U.S. at 549, n.86. The Court need not reach that issue here because the Senate has assumed the defense of the Vice President

and will be bound by any judgment declaring Rule XXII unconstitutional. *See Montana v. United States*, 440 U.S. 147 (1979) (quoted in footnote 2).

The Senate is also wrong when it asserts that a court could not redress plaintiffs' injuries without ordering the Senate to vote on the DISCLOSE and the DREAM Acts or declaring the two acts to have been passed by the Senate. Senate Br. at 45. The Supreme Court did not redress the white contractors' injuries in *Northeastern Florida Chapter of Associated General Contractors v. City of Jacksonville*, 508 U.S. 656 (1993), by awarding them contracts on which they had been denied the right to bid, but by removing the unconstitutional obstacle to their right to bid on future contracts. Likewise, the Court in *FEC v. Akins*, 524 U.S. 11 (1998), did not redress plaintiff's injuries by ordering the FEC to require AIPAC to disclose its donor list. It affirmed the plaintiffs' standing and granted relief, *even though the Court recognized that this relief might not get the plaintiffs what they wanted*, since the FEC still had discretion to exempt AIPAC from disclosure.

As in *Northeastern Florida Chapter* and *Akins*, the injury to plaintiffs' procedural rights under the Constitution can be redressed by declaring the supermajority vote provisions in Rule XXII unconstitutional and severing them from the remainder of the rule. This would remove those provisions as an unconstitutional barrier to the future right of the Senate to enact the DISCLOSE or the DREAM Act, or any other legislation, by majority vote as required by the

Presentment Clause. *See also Shays v. Fed. Election Comm'n*, 414 F.3d 76, 91 (D.C. Cir. 2005) ("[P]arties claim[ing] standing based on violations of a procedural right [can do so] without meeting all the normal standards for redressability…" (internal quotation omitted)).

The Senate has also stated the rule on severability exactly backwards. To sever the unconstitutional supermajority vote requirements from Rule XXII, the court would *not* "have to find that the Senate *would have enacted* the balance of the Cloture Rule." Senate Br. at 46 (emphasis added). The court must sever the unconstitutional portions "*unless it is evident*" that the Senate *would not have enacted* the rules and "must leave the rest [of Rule XXII] intact." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012) (emphasis added).

III. Common Cause has Organizational Standing.

Electoral transparency has been part of the core mission of Common Cause since its founding. Defeat of the DISCLOSE Act – despite having the support of 59 senators and of the President – was solely attributable to the unconstitutional 60-vote requirement in Rule XXII and constituted a direct, concrete and particularized injury to that core mission. As a result, Common Cause has been forced to expend additional resources to investigate, uncover and expose the sources of funds spent in the 2010 and 2012 elections.

The Senate attempts to minimize the magnitude of this injury by describing it as a "mere 'setback to the organization's abstract social interests'" of the type held insufficient to confer standing in *Sierra Club v. Morton*, 405 U.S. 727 (1972). Senate Br. at 29-30.

The Supreme Court rejected a similar assertion in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). There the Court held that "such concrete and demonstrable injury to the organization's activities – with the consequent injury drain on its resources – constitutes far more than simply a setback to the organization's abstract social interests" of the kind alleged in *Sierra Club*, and constitutes an injury-in-fact sufficient to give a non-profit corporation a personal stake in the controversy and Article III standing. *Id.* *See also Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 261 (1977) (upholding nonprofit's standing to challenge local zoning ordinance that interfered with core mission of affordable housing).

Common Cause also alleged injury to both itself and its members from deprivation of the information regarding the sources and amounts of expenditures that the DISCLOSE Act would have required.

The Senate wrongly asserts that *FEC v. Akins*, 524 U.S. 11, 21 (1998), supports a plaintiff's standing to redress informational injury *only* where the information "must be publicly disclosed pursuant to a statute." Senate Br. at 35.

The Senate is correct that the *Akins* plaintiffs "*asserted* that the information they sought [*i.e.*, disclosure of the identity of AIPAC's donors and the amount of its contributions to candidates] was required by law to be disclosed." *Id.* But the Supreme Court upheld their standing *even though* the statute did not *require* disclosure but instead gave the FEC "*discretion* not to require AIPAC to disclose the information." *Id.* (emphasis added)

IV. The Constitutionality of the 60-Vote Requirement in Rule XXII is not a Political Question.

The Senate argues that the constitutionality of the 60-vote requirement in Rule XXII is a non-justiciable political question. The Senate makes no effort, however, to reconcile that position with the rulings of the Supreme Court in *Ballin v. United States*, 144 U.S. 1 (1892); *United States v. Smith*, 286 U.S. 6 (1932); *Christoffel v. United States*, 338 U.S. 84 (1949); and *Yellin v. United States*, 374 U.S. 109, 114 (1963).

In *Yellin*, the Supreme Court said that "it has been long settled … that rules of Congress … are judicially cognizable," 374 U.S. at 114, and in *Ballin*, 144 U.S. at 5, the Court exercised jurisdiction to rule on the merits of a challenge to the constitutionality of a House rule.

The plaintiff in *Ballin* challenged the validity of an excise tax on the ground that a quorum was not present when the House passed the tax. Plaintiff contended

that the Quorum Clause required that only those House members who were present and voted on the tax should have been counted in determining a quorum. A House rule provided, however, that all members present during the vote should be counted for purposes of determining a quorum, even though they abstained. Ballin contended this rule conflicted with the Quorum Clause and was, therefore, unconstitutional. The Supreme Court rejected Ballin's claims on the merits.

The district court distinguished *Ballin* on the sole ground that "the Court did not review the [constitutional] validity" of the House rule. JA107. The Senate implicitly concedes the error in the district court's attempt to distinguish *Ballin* by failing to defend that reading. As the Supreme Court's opinion expressly states, there was no dispute that "the action [of the House] was in direct compliance with [its] rule. The [only] question, therefore, is as to the *validity* of this rule" under the Constitution. *Ballin*, 144 U.S. at 5 (emphasis added).

The Court held that since there was "no … limitation … in the Federal Constitution" requiring a supermajority vote for the passage of legislation, "the general rule of all parliamentary bodies … that, when a quorum is present *the act of a majority is the act of the body*" applied and the excise tax was valid. *Id.* at 6

(emphasis added). The Court also held that the Quorum Clause requires only that a majority of the House members be *present* at the time a vote is taken.[5]

Ballin cannot be distinguished and requires that the district court's decision be reversed insofar as it held that the constitutionality of a Senate rule is a non-justiciable political question.

The Senate is also wrong that "[j]udicial review of the constitutionality of Senate rules simply was not at issue" in *United States v. Smith*, 286 U.S. 6 (1932). Senate Br. at 50. The Senate apparently has not read its own Supreme Court brief in the *Smith* case in which it stated that:

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[5] *See also Missouri Pac. Ry. Co. v. Kansas*, 248 U.S. 276 (1919), in which the Court rejected on the merits a similar challenge to the constitutionality under the Presentment Clause of a Senate vote to override a presidential veto on the ground that only two-thirds of senators present had voted to override, rather than two-thirds of the entire Senate. The Court relied in part on the fact that proposals that would have "required a two-thirds (instead of a majority) vote of a quorum … to pass a law concerning specified subjects" (*id*. at 283) had been rejected by the Framers at the Federal Convention (2 Max Farrand, *The Records of the Federal Convention of 1787*, p. 183; 400, 449-53 (1911) and at the first session of Congress. *See* Senate Journal, p. 75 (Sept. 8, 1789)).

> The sole question presented upon this appeal is one of law, namely [did] the Senate [have] the power to reconsider … its vote advising and consenting to [Smith's appointment]. Appellant Br. at 3 ("Question Presented").

In the same brief, the Senate argued (correctly and persuasively) that its rule-making power "has its limitations" and that the tests for determining the validity of a Senate rule "are identical with the tests applied … for the determination of the constitutionality of the exercise of any power vested in Congress or in either House." Appellant Br. at 72-73.

Smith challenged *both the constitutionality and the interpretation* of the Senate rule under which the Senate purported to reserve power to reconsider his confirmation within three executive calendar days. Appellant Br. at 49. Brief of Appellee (*Smith*) pp. 13-14 ("Neither House may 'by its rules ignore constitutional restraints' (quoting *Ballin*)…. The 'consent' contemplated by the Constitution is obviously an unconditional consent; no Senate rule can have the effect of annexing to it a clause of defeasance."). *See also* Brief of the Department of Justice as *amicus curiae* at 7 (describing Senate's defense of its rule as "wholly untenable. The consent required by the Constitution is an unconditional consent to an unconditional appointment.")

The Supreme Court did not order the *Smith* case dismissed on political question grounds. It did not find judicial review to be an unwarranted intrusion into the internal rule-making powers of the Senate to violate the separation of powers or to reflect disrespect for a coordinate branch. Nor did the Court rule that it lacked judicially manageable standards to decide *Smith*. The Court instead decided the case on the merits by rejecting the Senate's interpretation of its own rules. This ruling made it unnecessary for the Court to decide whether the rule or the Senate's interpretation of the rule was also unconstitutional under the Appointments Clause.

Justice Brandeis held that whether the Senate's interpretation of its own rule was valid was purely a question of law (*id*. at 29) and that when "the [Senate's] construction [of] … the rules affects persons other than members of the Senate, ***the question presented is of necessity a judicial one***…." *Smith*, 286 U.S. at 32 (emphasis added).

The Supreme Court has also exercised jurisdiction to sustain challenges to the validity of interpretations by Committees of the House of Representatives as to internal House rules. *Christoffel v. United States*, 338 U.S. 84 (1949); *Yellin v. United States*, 374 U.S. 109 (1963). If, as these cases demonstrate, the Supreme Court did not deem it a disrespectful intrusion into a coordinate branch's internal affairs to reject its interpretation of its own rules, then it is difficult to explain why

a court's exercise of its quintessential judicial function – interpreting the Constitution – would be an intrusion barred by the separation of powers. As *Marbury v. Madison* holds, it is solely a judicial function of the courts, not of the Congress under the doctrine of separation of powers, to decide what the law *is* by interpreting the Constitution.

Finally, the Senate attempts to bolster its separation-of-powers/judicially manageable standards argument by deliberately misrepresenting the complaint's allegations and the relief plaintiffs seek. This case is not, as the Senate claims, about "how to conduct floor debate … [or] how long such debate should continue" (Senate Br. at 52) or "what debate procedures the Senate may adopt." Senate Br. at 53. Rule XXII is not a rule of debate; it is a rule of *voting*. It fundamentally changes the number of votes required to pass a bill or confirm a judicial or executive branch nominee from a simple majority of senators present, to an absolute 60% majority of the entire Senate. It shifts the point at which decisions are made from the final to the preliminary stage of the legislative process. It allows one senator to prevent the majority *from debating* and *from voting* without first obtaining 60 votes for cloture. It replaces majority rule in the Senate with a de facto 60-vote rule. It is the constitutionality of that supermajority vote requirement in Rule XXII that is being challenged by the plaintiffs. And there are more than

enough manageable standards in the Constitution to enable a court to rule on that issue.

V. The Speech or Debate Clause Does not Bar Plaintiffs' Claims or Immunize Defendants from Suit.

The Senate argues that even if its 60-vote rule is unconstitutional, plaintiffs' claims are barred by the Speech or Debate Clause (Art. I, § 6). Even the district court was not prepared to go that far.

The Senate does *not* explicitly argue that the Vice President is protected from suit by the Speech or Debate Clause. That is understandable since that clause applies only to "Senators and Representatives." Art. I, § 6, cl. 2. The office of Vice President is created separately (Art. I, § 3, cl. 3) from that of senators (Art. I, § 3, cl. 1) by the Constitution. His powers as its presiding officer are derived directly from the Constitution, not by delegation from the Senate. And the Senate concedes that the Vice President cannot speak or debate on the floor of the Senate. Br. p. 42.

The Senate does argue that Senate employees – the Clerk, Parliamentarian, Secretary and Sergeant-at-Arms – should be immune from suit under the Speech or Debate Clause because they merely follow orders in enforcing Rule XXII on behalf of senators. This argument is foreclosed by *Powell v. McCormack*, 395 U.S. 486, 505-08 (1969) (holding that the Sergeant-at-Arms of the House was not

immune from suit under the Speech or Debate Clause), *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (holding that counsel to Senator Eastland's committee was not immune from suit); and *Kilbourn v. Thompson*, 103 U.S. 168 (1881) (holding that the Sergeant-at-Arms of the House was not immune). In these cases the Sergeants-at-Arms and staff counsel were merely "following orders" in implementing the decisions being challenged. But in each case, the Supreme Court held that the Speech or Debate Clause did not immunize them.

The *Powell* case outlines the proper framework for analyzing a claim of immunity under the Speech or Debate Clause. In *Powell*, Representative Adam Clayton Powell challenged the refusal of the House of Representatives to seat him after his reelection. Powell named as defendants the Speaker of the House, five House members as class representatives of the entire House, the Clerk, the Sergeant-at-Arms, and the House Doorkeeper. The defendants "assert[ed] that the Speech or Debate Clause … is an absolute bar" to Powell's action against all the defendants. 395 U.S. at 501.

The Supreme Court rejected this defense.

> Legislative immunity does not … bar all judicial review of legislative acts … ***[A]lthough an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their***

> ***acts.… That House employees are acting pursuant to the express orders of the House does not bar judicial review of the constitutionality of the underlying legislative action***. *Kilbourn* [*v. Thompson*, 103 U.S. 168 (1881)] decisively settles this question, since the Sergeant at Arms was held liable for false imprisonment even though he did nothing more than execute the House Resolution that Kilbourn be arrested and imprisoned…. ***The purpose of the protection afforded legislators [by the Speech or Debate Clause] is not to forestall judicial review of legislative action but to ensure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions***. A legislator is no more or no less hindered or distracted by legislation against a legislative employee calling into question the employee's affirmative action than he would be by a lawsuit questioning the employee's failure to act.… ***[T]hough this action may be dismissed against the Congressmen, [Powell is] entitled to maintain [this] action against House employees and to judicial review of the propriety of the decision to exclude [him.]***.
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> 395 U.S. at 503-06 (emphasis added).

Likewise in *Dombrowski v. Eastland*, 387 U.S. 82 (1967), the Court "affirmed the grant of summary judgment as to … Senator [Eastland], *but reversed as to subcommittee counsel*" in a damages action. *Powell*, 395 U.S. at 504, n.23.

All of the cases on which the Senate relies such as *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), are distinguishable. They stand only for the proposition that the Speech or Debate "Clause provides immunity from suit for all actions '*within the sphere of legitimate legislative activity.*'" Senate Br. at 56 (quoting *Eastland*) (emphasis added). Actions that violate the Constitution are not "within the sphere of *legitimate* legislative activity" – they are *ultra vires*. As the Supreme Court held in *Powell*, *Dombrowski* and *Kilbourn*, "legislative employees who participated in the *unconstitutional activity*" are not immune from suit under the Speech or Debate Clause and are "responsible for their acts." *Powell*, 395 U.S. at 504 (emphasis added).

Just as a state has no power to authorize or direct its employees to violate the Constitution (*Ex parte Young*, 209 U.S. 123 (1908)), the Senate likewise has no power to authorize its employees to violate the Constitution. Action taken by state or Senate employees in violation of the Constitution are *ultra vires*, even if taken "under orders" or at official direction, and are not immune from suit under the Eleventh Amendment (*Ex parte Young*) or the Speech or Debate Clause. *Powell*, 395 U.S. at 506.

Conclusion

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

Respectfully submitted, this 1st day of August, 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

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Emmet J. Bondurant
Emmet J. Bondurant

CERTIFICATE OF SERVICE

I hereby certify that I have this date electronically filed the within and foregoing **REPLY 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 1st day of August, 2013.

/s/ Emmet J. Bondurant
Emmet J. Bondurant