IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMON CAUSE, *et al.*, Plaintiffs, v. VICE PRESIDENT JOSEPH R. BIDEN, *et al.*, Defendants.	)	No. 12-cv-00775 (EGS)

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs bring this suit challenging the constitutionality of the Senate's cloture rule, which requires 60 votes to close debate over the objection of any Senator. Defendants moved to dismiss plaintiffs' complaint on three threshold grounds rooted in the separation of powers: (a) plaintiffs lack Article III standing, (b) their claims are barred by the Speech or Debate Clause, and (c) plaintiffs' complaint presents a non-justiciable political question. As in the prior suits challenging the cloture rule in this Court, threshold grounds prevent this Court from entertaining the merits of plaintiffs' claims and require dismissal of this suit.

Plaintiffs' opposition provides no arguments that rebut these threshold barriers to this suit. Indeed, plaintiffs' opposition begins with a lengthy presentation on the merits of their constitutional claims – a matter not at issue in this motion, since the Court lacks jurisdiction to consider the merits. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)).[1]

The arguments plaintiffs do put forward on the threshold bases for dismissal lack merit and should be rejected. In their opposition, plaintiffs recharacterize their allegations of harm as "procedural injuries." Regardless of what they call their injuries, they are insufficient to establish standing. Indeed, simply comparing plaintiffs' allegations of injury to the redress they seek

[1] Plaintiffs incorrectly state that defendants "*do not dispute* the merits" of their claims. Brief of Plaintiffs in Opposition to Motion to Dismiss ["Pls.' Opp."] at 38. While defendants' motion to dismiss does not *address* the merits of plaintiffs' claims, that is because the Court lacks jurisdiction to reach the merits – not because defendants concede the merits of those claims.

In addition, plaintiffs' statement that in "the section entitled, 'Statement of Facts'" defendants have asserted a number of "so-called facts [that] are inaccurate," *id.* at 8, is perplexing. Defendants' memorandum included no "Statement of Facts," but provided historical background on the history of the cloture rule. While plaintiffs appear to take issue with interpretations of that history, nowhere do they point to any "facts" that defendants have stated inaccurately, much less any inaccuracies relevant to this motion to dismiss for lack of jurisdiction.

demonstrates that exercising judicial power over their claims exceeds "the proper – and properly limited – role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

Plaintiffs allege injuries from the failure in the last Congress of two pieces of legislation, the DISCLOSE and the DREAM Acts, that were assertedly blocked by the Senate rule requiring 60 votes to cut off debate. But for the cloture rule, plaintiffs claim, they would have received concrete benefits from those laws: namely, information needed for their campaigns and the pursuit of their organization's mission (DISCLOSE Act), and relief from the threat of deportation (DREAM Act). To redress those injuries, however, plaintiffs do not seek a declaration that those bills have in fact become law and should be enforced to their benefit. Plaintiffs presumably understand that the Court cannot by decree usurp Congress' legislative power and enact laws that never, in fact, passed the Senate or were presented to the President. *See INS v. Chadha,* 462 U.S. 919 (1983) (bicameralism and presentation requirements for lawmaking under Art. I, § 7).

Plaintiffs also do not ask the Court to order the Senate to vote on final passage of these bills – votes that were allegedly prevented by the 60-vote threshold for cloture. Nor could they, as the bills died at the end of the last Congress. In addition, even if the Senate voted on and passed a similar bill in this Congress, it must still be passed by the House and signed by the President to become law – far too speculative redress to support standing. More fundamentally, this Court – as plaintiffs surely recognize – cannot order the Senate to vote on, or even take up for consideration, any particular bill. Such "relief. . .would be utterly foreign to our system of divided powers," *Hastings v. U.S. Senate, Impeachment Trial Comm.*, 716 F. Supp. 38, 41 (D.D.C.), *aff'd*, 887 F.2d 332 (D.C. Cir. 1989) (table), as reflected by the lack of "any case in which the judiciary has issued injunctive or declaratory relief intercepting ongoing proceedings of the legislative branch." *Hastings v. U.S. Senate*, 1989 WL 122685, at *1-2 (D.C. Cir. Oct. 18, 1989).

Instead, plaintiffs seek declaratory relief "invalidating the supermajority voting portions of Rule XXII." Pls.' Opp. at 61. But unaccompanied by an order to reconsider the failed bills

under a court-modified cloture rule, a declaration will provide no redress to plaintiffs' asserted injuries: it will not give them campaign finance information they lack, nor provide relief from the risk of deportation. Vindication of those interests would still be wholly dependent on independent action through the political process. Such lawsuits, where "it can be only a matter of speculation whether the claimed violation has caused concrete injury to the particular complainant," improperly "call on the courts to resolve abstract questions . . . assert[ing] an arguable conflict with some limitation of the Constitution." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 223 (1974). The responsibility to grapple with such issues rests, as it has for two centuries, with the Senate, not the courts. For the reasons described herein, which are grounded in the separation of powers, the Court should dismiss plaintiffs' complaint for lack of jurisdiction.

ARGUMENT

I. Plaintiffs Fail To Establish Article III Standing

Plaintiffs assert standing in three groups: Common Cause, four House Members, and three non-citizen individuals (the "DREAM Act" plaintiffs). As explained in defendants' opening memorandum, none of these plaintiffs has standing under Article III because each has failed to demonstrate an injury-in-fact fairly traceable to the defendants and likely to be redressed by a favorable judgment. Indeed, plaintiffs fail to establish any of the prerequisites for standing, presenting only "generalized grievances" about the Senate's cloture rule – which are "pervasively shared and most appropriately addressed in the representative branches." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 475 (1982).

A. Plaintiffs Cannot Overcome Their Lack of Standing by Calling Their Alleged Injuries "Procedural Injuries"

Plaintiffs' opposition tries to sidestep the problems inherent in their speculative and conjectural allegations of injury by claiming that, notwithstanding the allegations in their Complaint, *see* Compl. ¶ 9, they do not assert an injury from the Senate's failure to *pass* the

DREAM and DISCLOSE Acts, but rather allege harm to their "procedural right to Article I processes" by application of the cloture rule in the *consideration* of those acts. Pls.' Opp. at 2-6. Plaintiffs claim that their "procedural right" was infringed when the cloture rule blocked passage of the DREAM and DISCLOSE Acts and "illegally denied [plaintiffs] the *opportunity* to obtain the concrete benefits of [those acts]." *Id.* at 3.

Simply calling their alleged injury "procedural" does not solve the defects in plaintiffs' standing. First and foremost, the concept of "procedural injury" – developed in administrative (mostly environmental) cases and in equal protection challenges where a person was denied government consideration due to impermissible criteria – has no application in the legislative context. Plaintiffs cite no case suggesting that a person has a "procedural right" to any particular form of congressional consideration or debate on a bill. The fact that plaintiffs point to the Constitution's Quorum and Presentment Clauses – which shed no textual light on debate in the Senate – demonstrates the weakness of their attempt to reshape their flawed allegations of "concrete injury" into "procedural injuries" of the type arising in the administrative context. Moreover, whereas in a "procedural injury" case, the courts may vacate the agency action and remand to the agency to reconsider the matter under the proper procedures, *see, e.g.*, *City of Dania Beach, Fla. v. FAA*, 485 F.3d 1181, 1186 (D.C. Cir. 2007), such procedural relief is not possible in the congressional context because the Court cannot order Congress "on remand" to reconsider legislation, as that would violate the Senate's power to control the business before it, nor can it deem enacted a bill that one House never passed.

Invocation of a "procedural injury" – even if it had any applicability to the legislative context – does not relieve plaintiffs of the burden of satisfying each requirement for standing. A "procedural injury" plaintiff must still demonstrate injury-in-fact. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient to create

Article III standing."). Because "a 'procedural injury' arises where the claimant asserts a substantive injury from the denial of the statutorily required procedure," *Humane Soc'y of U.S. v. Babbitt*, 46 F.3d 93, 99 (D.C. Cir. 1995), plaintiffs "must show *both* (1) that their procedural right has been violated, *and* (2) that the violation of that right has resulted in an invasion of their concrete and particularized interest." *Center for Law and Educ. v. U.S. Dep't of Educ.*, 396 F.3d 1152, 1159 (D.C. Cir. 2005); *United Transp. Union v. ICC*, 891 F.2d 908, 918 (D.C. Cir. 1989) ("[B]efore we find standing in procedural injury cases, we must ensure that there is some connection between the alleged procedural injury and a substantive injury that would otherwise confer Article III standing. . . . Without such a nexus, the procedural injury doctrine could swallow Article III standing requirements.").

In addition, a plaintiff asserting a procedural injury must demonstrate that the injury is fairly traceable to the defendants. *See City of Dania Beach*, 485 F.3d at 1187. "[A] prospective plaintiff must demonstrate that the defendant caused the particularized injury, and not just the alleged procedural violation." *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) (en banc). And, while courts may "relax" the redressability prong in procedural injury cases, a plaintiff still must show that it is possible to grant redress for the procedural injury. *Center for Law & Educ.*, 396 F.3d at 1157 ("Where plaintiffs allege injury resulting from violation of a *procedural* right afforded to them by statute and designed to protect their threatened concrete interest, the courts relax – while not wholly eliminating – the issues of imminence and redressability . . . ."). In sum, no matter how plaintiffs characterize their injury, they cannot meet their burden to establish Article III standing.

B. *None of the Plaintiffs Has Alleged a Cognizable Injury-in-Fact*

1. Common Cause Lacks an Injury-in-Fact

Defendants' opening memorandum demonstrated that Common Cause lacks associational standing on behalf of its members and organizational standing on its own behalf. Mem. of Pts. and

Auths. in Supp. of Defendants' Mot. to Dismiss ["Defs.' Mem."] at 18-23. Plaintiffs' opposition fails to support Common Cause's claim of associational standing, as it points to no member of Common Cause who would have standing in his or her own right. Accordingly, the Court should find that Common Cause lacks associational standing. *See Hopkins v. Women's Div., Gen. Bd. of Global Ministries*, 238 F. Supp. 2d 174, 178 (D.D.C. 2002) ("It is well understood in this Circuit that when a plaintiff files an opposition to a motion to dismiss addressing only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.") (citing *FDIC v. Bender*, 127 F.3d 58, 67–68 (D.C. Cir. 1997)).

Regarding organizational standing, plaintiffs argue that "[a] number of courts have held that an organization has standing where it devoted resources to counteracting an unlawful act," Pls.' Opp. at 56 (citing *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 28-29 (D.C. Cir. 1990)), purportedly such as the resources Common Cause has devoted to monitoring Super PAC expenditures. But unlike in *Spann* or *Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982), the activity that Common Cause is allegedly devoting resources to combat – undisclosed expenditures by Super PACs – is *not* alleged to be unlawful. *See Spann*, 899 F.2d at 27 ("*Havens* makes clear, however, that an organization establishes Article III injury if it alleges that purportedly *illegal* action increases the resources the group must devote to programs independent of its suit challenging the action.") (emphasis added). As Common Cause concedes, it "diverted staff, time and resources to combatting the effects of secret expenditures by Super PACs *that would have been prohibited by the DISCLOSE Act*." Pls.' Opp. at 55 (emphasis added). What this makes clear is that their alleged expenditures are not the result of an effort to combat illegal activity, but rather, voluntary budget choices made by Common Cause to further its policy goals. The D.C. Circuit has explained that any "harm" from such a voluntary shifting of resources from one program to another does not, by itself, demonstrate an injury for standing purposes. *See Fair*

Employment Council v. BMC Marketing Corp., 28 F.3d 1268, 1276-77 (D.C. Cir. 1994).[2] Finally, Common Cause does not explain how the Senate's rules on debate "directly conflict with the organization's mission," as required to demonstrate an injury-in-fact for organizational standing. *See Nat'l Treasury Emps. Union*, 101 F.3d at 1430 (citing *Warth*, 422 U.S. at 499).

2. The House Member Plaintiffs Lack an Injury-in-Fact

The four House Member plaintiffs assert standing in both their official capacity, from the alleged nullification of their votes on the DREAM and DISCLOSE Acts, and their personal capacity, from the failure to receive information about the financing of negative advertisements against them in their reelection campaigns. Neither alleged injury confers standing.

As defendants' opening memorandum demonstrated, standing in the Member plaintiffs' official capacity is squarely foreclosed by the Supreme Court's decision in *Raines v. Byrd*, 521 U.S. 811 (1997). *Raines* held that Members of Congress lacked the required personal injury to sue based on institutional injuries affecting the "meaning and effectiveness of their vote" – except in two situations: (1) when they have been individually deprived of something they are personally entitled to, such as their salary, as in *Powell v. McCormack*, 395 U.S. 486 (1969), *see Raines*, 521 U.S. at 821, 829, or (2) in the rare circumstance when Members' votes would have been sufficient to defeat or enact a bill which has gone into effect or not been given effect and "their votes have been completely nullified." *Id.* at 823.

The Member plaintiffs argue that their injuries fit both exceptions. First, they assert that

[2] In addition, as noted in defendants' opening memorandum, Defs.' Mem. at 20-21, Common Cause provides no detail as to what funds were diverted, how much, when, and from which activities, and thus fails to establish with particularity a "concrete and demonstrable injury to the organization's activities – with [a] consequent drain on the organization's resources." *Common Cause v. Federal Election Comm'n*, 108 F.3d 413, 417 (D.C. Cir. 1997) (quotation marks and citation omitted). The one activity on which Common Cause does specifically allege that it expended resources – lobbying for passage of the DISCLOSE Act – this Circuit has found not to constitute an injury-in-fact for standing purposes. *See Center for Law and Educ.*, 396 F.3d at 1161 (D.C. Circuit "has not found standing when the only 'injury' arises from the effect [of the challenged action] on the organization['s] lobbying activities"); *see also Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996).

because they "*personally* cast votes in favor of the DREAM and DISCLOSE Acts" that were nullified by the Senate's failure to invoke cloture on those bills, they "do not raise a claim shared by every member of Congress" but "only those who voted for the DREAM and DISCLOSE Acts[.]" Pls.' Opp. at 50. In this way, the Member plaintiffs assert, they have been "deprived of something to which they personally are entitled," *id.*, namely their individual votes on the DISCLOSE and DREAM Acts, which they analogize to the loss of salary in *Powell v. McCormack*.

Plaintiffs' analogy fails. In *Powell*, Representative Powell was denied payment of his salary when he was improperly excluded from his House seat. That salary was a *personal* entitlement to him – for his personal benefit, not as part of his legislative power. In contrast, the Member plaintiffs' votes are powers they exercise in their official capacity as House Members. They are not a personal entitlement any more than were the votes of the *Raines* plaintiffs – or of any Member of Congress. *See Nevada Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2350 (2011) ("a legislator's vote . . . is not personal to the legislator but belongs to the people; the legislator has no personal right to it."); *Raines*, 521 U.S. at 821 ("The claimed injury thus runs (in a sense) with the Member's seat, a seat which the Member holds (it may quite arguably be said) as trustee for his constituents, not as a prerogative of personal power."). Plaintiffs' alleged injury is not a deprivation of a personal entitlement as in *Powell*, and thus does not escape *Raines*.

The Member plaintiffs also assert that their injuries constitute vote nullification under *Coleman v. Miller*, 307 U.S. 433 (1939), as recognized by *Raines*, because they "voted for two specific bills, [] there were sufficient votes to pass each bill, and [] each bill should have been enacted, but was nonetheless deemed defeated because of the Senate's illegal application of Rule XXII." Pls.' Opp. at 52. But this argument misconceives the vote nullification injury of *Coleman*. As the D.C. Circuit explained, the Supreme Court "used nullify to mean treating a vote that did not pass as if it had, or vice versa." *Campbell v. Clinton*, 203 F.3d 19, 22 (D.C. Cir. 2000). These four House Members voted in favor of the DREAM and DISCLOSE Acts, both of which passed the

House. No official in the Senate treated the legislation as if it did not pass the House. Rather, the Senate simply failed to pass the legislation itself. No vote "nullification" occurred. Indeed, the Member plaintiffs' expansive understanding of *Coleman* vote nullification would grant standing to all Members of the House who voted for any bill that passed the House but failed to pass the Senate – whether because debate was not brought to a close, the bill failed to receive committee consideration, it was never brought to the Senate floor, or for any other reason – a prospect that demonstrates well the error of their interpretation of that "narrow exception."[3]

The House Member plaintiffs also lack standing in their personal capacities as candidates for reelection. The Member plaintiffs allege injury from the Senate's failure to pass the DISCLOSE Act because that Act would have required disclosure of "the identities of corporations and wealthy individuals – who have been secretly financing negative campaign ads by Super PACs and other phony grass roots organizations in the [Member plaintiffs'] campaigns for re-election," thereby "enabl[ing] the [Member plaintiffs] and their supporters to evaluate and respond more effectively to those attacks." Compl. ¶ 9(D)(2)(b). As defendants' opening memorandum pointed out, Defs.' Memo. at 23, 27-28, such an "informational injury" can be the basis for standing *only* where the complaining party "fails to obtain information *which must be publicly disclosed pursuant to a statute*." *Federal Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998) (emphasis added); *accord Am. Society for the Prevention of Cruelty to Animals v. Feld Entertainment*, 659 F.3d 13, 22 (D.C. Cir. 2011); *Common Cause*, 108 F.3d at 418. Here, the Member plaintiffs cannot identify any statute, regulation, or other legal provision requiring

[3] Plaintiffs continue to rely on D.C. Circuit cases regarding standing for Members of Congress that pre-date the Supreme Court's decision in *Raines*. *See, e.g.*, Pls.' Opp. at 40 (citing *Skaggs v. Carle*, 110 F.3d 831 (D.C. Cir. 1997)); *id.* at 49 n.83 (citing *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994), and *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1983)); *id.* at 52 (citing *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974)). As defendants' opening memorandum explained, Defs.' Mem. at 27 n.24, this Circuit has recognized that *Raines* markedly restricted standing for Members of Congress. *See Chenoweth v. Clinton*, 181 F.3d 112, 115 (D. C. Cir. 1999) ("[T]he portions of our legislative standing cases upon which the current plaintiffs rely are untenable in the light of *Raines*").

disclosure of the information they seek – indeed, that is why they support the DISCLOSE Act. Accordingly, they have not alleged an informational injury for standing purposes.[4]

Plaintiffs' assertion that defendants' argument "improperly conflates the injury-in-fact question with the merits," Pls.' Opp. at 54, is wholly refuted by the cases. Both the Supreme Court and D.C. Circuit have been clear that a legal right to the information at issue is essential to a party's *standing* to raise an informational injury – not simply to its success on the merits of such a claim. *See Akins*, 524 U.S. at 21; *Feld Entertainment*, 659 F.3d at 22-24 (requiring a plaintiff to "suffer an injury in fact" by "failing to obtain information which must be publicly disclosed"); *Common Cause*, 108 F.3d at 418 ("standing" limited to situations where information plaintiff deprived of is "required by Congress to be disclosed"); *see also Ass'n of Am. Physicians and Surgeons, Inc. v. FDA*, 539 F. Supp. 2d 4, 15 (D.D.C. 2008) ("Informational standing arises only in very specific statutory contexts where a statutory provision has explicitly created a right to information.") (citation and internal quotation marks omitted).

3. DREAM Act Plaintiffs

The DREAM Act plaintiffs, three non-U.S. citizens, allege that they are "now subject to deportation as a direct result of the 60 vote requirement in Rule XXII." Compl. ¶ 9(E). Yet, as

[4] Plaintiffs claim that the D.C. Circuit has recognized in one case "that an informational injury can underwrite standing even where the statute in question does not provide a right to the information." Pls.' Opp. at 55 (citing *Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler*, 789 F.2d 931, 937 (D.C. Cir. 1986)). In *Heckler*, the Secretary of Health and Human Services (HHS) promulgated government-wide regulations under the Age Discrimination Act, 42 U.S.C. § 6101 *et seq.*, to serve as a template for regulations to be adopted by each agency to implement the Act. *Heckler*, 789 F.2d at 935. The Act required each agency's regulations to conform with the government-wide regulations. 42 U.S.C. § 6103(a)(4). HHS's government-wide regulations required agencies to collect from government program recipients information related to age discrimination practices and compliance with legal requirements. *Heckler*, 789 F.2d at 935. However, when HHS issued its own agency-specific regulations, those regulations made such information collection voluntary and otherwise weakened the requirements established in the government-wide regulations. *Id.* The *Heckler* plaintiffs had standing to challenge HHS's agency-specific regulations for not conforming to the requirements of the government-wide regulations. *Id.* at 937-40. The government-wide regulations provided a "legal requirement" for HHS to collect and make available the information at issue. Here, in contrast, the plaintiffs point to no regulation or other legal provision requiring disclosure of the information they allege being deprived of.

defendants' opening memorandum explained, Defs.' Mem. at 33, plaintiffs are not "subject to deportation" *because of* the Senate's failure to pass the DREAM Act. Rather, they are subject to deportation because of their immigration status under existing law – a status that existed prior to the DREAM Act's consideration by the Senate.[5] Hence, plaintiffs cannot show that the Senate's failure to close debate on the DREAM Act invaded a concrete or particularized interest of theirs, as the failure to invoke cloture is not what made them subject to deportation.

Essentially plaintiffs claim as an injury the Senate's failure to remove their preexisting risk of deportation by passing legislation to help them. But plaintiffs fail to provide any authority whatsoever that holds that Congress' failure to pass legislation that would benefit a person constitutes an injury-in-fact for standing purposes. Indeed, finding standing on such a ground would bleed the standing doctrine of all meaning, allowing anyone who could benefit from any piece of legislation standing to sue a House of Congress whenever that legislation fails to pass under the rules of that House. Such a basis for standing would apply to an almost limitless class of persons across all the legislation that Congress considers each session.[6]

C. Plaintiffs' Alleged Injuries Are Not Fairly Traceable to the Defendants

Nor can plaintiffs show that their alleged injuries are "fairly traceable" to the four named Senate defendants or to their failure to cause the Senate to close debate on the DREAM and

[5] In contrast, the plaintiff in *Chadha*, 462 U.S. 919, was made deportable *by* the House's action overturning the Attorney General's suspension of his deportation. Even there, the plaintiff sued the Executive agency that was going to deport him, not the House of Congress that voted to overturn the suspension.

[6] Plaintiffs note that their "interest in avoiding forced, physical removal from the U.S. constitutes as much of an injury as an 'increase in pay,' an environmentalist's interest in the '[a]esthetic and environmental well-being' of a park, or an 'emotional attachment to [a] particular elephant'" – injuries that courts have found supported a party's standing. Pls.' Opp. at 44. But that mixes two separate issues. Defendants do not argue that plaintiffs' interest in avoiding deportation is not an interest that could support standing. Rather, defendants submit that that interest has not been harmed in a cognizable way by the Senate's failure to pass the DREAM Act. By analogy, while a taxpayer may have a tangible interest in paying lower taxes, the Senate's failure to pass legislation lowering the tax rate does not cause an injury-in-fact to that taxpayer sufficient to establish Article III standing to sue the Senate, let alone the defendants here.

DISCLOSE Acts. Having made no allegations in the Complaint regarding these Senate officials beyond naming them as defendants, plaintiffs now argue that defendants caused their injuries because each "enforces and effectuates" Rule XXII. Pls.' Opp. at 57. Yet, none of the defendants "enforces" or "effectuates" the Senate's cloture rule, nor did any defendant have a role in the Senate's failure to close debate under Rule XXII on the DREAM and DISCLOSE Acts.

Plaintiffs assert that the Vice President has such a role because he can preside over the Senate and rule on points of order. *See id.* at 58. Yet, the Vice President was *not* presiding over the Senate during the cloture votes on the DREAM and DISCLOSE Acts, and no points of order were made to be ruled upon. Moreover, even while presiding and ruling on points of order, the Vice President "has no rulemaking power over the Senate," Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, S. Doc. No. 101-28, at 1026 (Alan S. Frumin ed., rev. ed. 1992), and all rulings interpreting and applying Senate rules are subject to appeal and determination by the Senate. *Id.* at 146 ("Decisions of the Chair are subject to appeal and by a majority vote the Senate may reverse or overrule any decision by the Chair.").

Plaintiffs' suggestion that the Secretary "enforces" Rule XXII by overseeing the Clerk who calls the roll and records votes, Pls.' Opp. at 59, is equally meritless. The Secretary does not control the legislative effect of cloture votes. She only records the votes as actually cast by Senators. In recording the votes of Senators and reporting the tally to the presiding officer, the Secretary does not enforce the cloture rule. It is the Senate, not the Secretary, that determines the meaning and effect of any vote tally on a cloture motion. The Secretary's vote tallying cannot be considered "enforcing" the cloture rule insofar as enjoining her from performing that activity would not change the outcome of a cloture vote, as the presiding officer or some other Member could count the votes and announce the outcome.

Plaintiffs proffer no specific ways the Sergeant at Arms enforces the cloture rule or regulates floor debate, *see* Pls.' Opp. at 60, because he has no role in those matters. *See* Defs.'

Mem. at 30. And the suggestion that by *advising* the Chair and the Senate on parliamentary questions the Parliamentarian "enforces" Rule XXII, *see* Pls.' Opp. at 60, is simply wrong as the Parliamentarian has no control over rulings of the presiding officer.

In addition to failing to demonstrate causation at the hands of these defendants, plaintiffs are also unable to demonstrate that their alleged injuries were caused by any actions of the Senate at all. Plaintiffs' allegations of injury stem from the assertion that they suffered harm when the Senate failed to invoke cloture and pass the DREAM and DISCLOSE Acts. *See* Compl. ¶ 9(D); *see also* Pls.' Opp. at 3 (plaintiffs injured when Rule XXII "denied them an *opportunity* to obtain the concrete benefits of the DREAM and DISCLOSE Acts") (emphasis in original). But, as defendants' opening memorandum explained, Defs.' Mem. at 32-33, this asserted connection between their injury and the cloture rule gets the causation prong backwards by attempting to make Congress' failure to pass a law to *relieve* their threatened injuries, the *cause* of their injuries. Not surprisingly, plaintiffs can cite no authority for the proposition that Congress causes injury-in-fact to a person when it fails to pass legislation beneficial to that person.

Further, for the Senate to be the cause of plaintiffs' injuries would require the Court to assume as a matter of law that these statutes would have been enacted but for the cloture rule. Yet, as noted in defendants' opening memorandum, *see* Defs.' Mem. at 35, 36 n.29, Senators may vote for cloture to end debate and then vote against the underlying legislation. As the previous cloture rule challenges demonstrate, it is inherently speculative to link any particular legislative outcome to the Senate's internal debate procedures as they represent but one part of the legislative process. As this Court explained in *Page v. Shelby*:

> There is no guarantee that, but for the cloture rule, the legislation favored by [plaintiff] would have passed the Senate; that similar legislation would have been enacted by the House of Representatives; and that the President would have signed into law the version passed by the Senate. There are too many independent actors and events in the span between a cloture vote and the failure to pass legislation to characterize the connection as direct.

995 F. Supp. 23, 29 (D.D.C.), *aff'd*, 172 F.3d 920 (D.C. Cir. 1998) (table).[7]

In short, plaintiffs cannot demonstrate that their alleged injuries are traceable to any actions by defendants.

D. Plaintiffs' Injuries Are Not Redressable in This Suit

Plaintiffs also fail the third prong of standing because a favorable decision in this case cannot redress their alleged injuries. As defendants' opening memorandum explained, *see* Defs.' Mem. at 34-37, any relief that could redress plaintiffs' injuries would require the Court to interfere in the Senate's floor proceedings, raising grave separation of powers concerns. *See Judicial Watch, Inc. v. United States Senate*, 432 F.3d 359, 361 (D.C. Cir. 2005); *Page*, 995 F. Supp. at 29.

Plaintiffs maintain that the Court can avoid such concerns by granting a declaratory judgment holding the 60-vote requirement in Rule XXII unconstitutional and severing that clause from the rule – thereby, in plaintiffs' reasoning, establishing cloture by majority vote. *See* Pls.' Opp. at 64; Compl. ¶¶ 77-78. But merely seeking declaratory relief does not alleviate the interference in the Senate's proceedings. Indeed, plaintiffs' requested declaratory judgment – deleting part of a Senate rule to change its debate procedures – would be an unprecedented and improper intrusion on the Senate's constitutional power to "determine the Rules of its Proceedings," U.S. Const. art. I, § 5, cl. 2, contrary to any understanding of the judiciary's role in our system of separated powers. Plaintiffs point to no authority even suggesting that courts can intrude into the Senate's rulemaking power by striking one clause in a Senate rule. Indeed, both this Court and this Circuit have expressed strong reservations over the "judicial interference" that such action would entail. *Judicial Watch*, 432 F.3d at 361; *Page*, 995 F. Supp. at 29 (("[I]t would be inappropriate for this Court to rewrite the Senate rules as [Plaintiff] Page suggests.").

[7] The Supreme Court in *Powell* was unwilling to assume that the House would have voted to *expel* Rep. Powell because it voted 307 to 116 to *exclude* him – a two-thirds margin that would have been sufficient to expel him (expulsion requires a two-thirds vote; exclusion requires only a majority). 395 U.S. at 507-12. This Court similarly cannot assume that a majority vote in support of cloture on a bill necessarily means that the Senate would have enacted the bill.

Plaintiffs claim that the previous challenges to Rule XXII are inapposite because those cases "sought *very different remedies* from the one sought here[.]" Pls.' Opp. at 63. But, contrary to plaintiffs' assertion, the plaintiff in *Page* sought essentially the same remedy:

> To redress these alleged constitutional wrongs, Mr. Page suggests that the Court rewrite Senate Rule XXII by substituting "And if that question shall be decided in the affirmative by a simple majority of a quorum Senators [sic] plus the vote of the Vice President, if the votes be equally divided ..." for the current phrase "And if that question shall be decided in the affirmative by three-fifths of the Senators duly chosen and sworn . . . ."

995 F. Supp. at 26 (citing complaint). Similarly, in *Judicial Watch*, the court understood the relief sought as "encompassing a request for judicial substitution of a simple majority rule for cloture on judicial nominations," amounting to a request for a "judicial rewrite" of the cloture rule. 432 F.3d at 361. Both courts described such judicial rewriting of a Senate rule as "inappropriate," *Page*, 995 F. Supp. at 29, "interference," *Judicial Watch*, 432 F.3d at 361, with the Senate's internal proceedings.

Plaintiffs also argue that judicial severing of the 60-vote requirement from Rule XXII is proper because "[t]here is no basis for the defendants' assertion that the Senate would prefer no cloture rule to one that allowed the majority to invoke cloture." Pls.' Opp. at 65. Even assuming that a court could sever part of a Senate rule in the same way as a federal statute, the Court would have to find that the Senate would have enacted the balance of the cloture rule without the 60-vote requirement if it had known that it could not constitutionally include such a requirement. *See Basardh v. Gates*, 545 F.3d 1068, 1070 (D.C. Cir. 2008) (per curiam) ("Severability . . . turns on legislative intent. Courts must ask: 'Would Congress still have passed the valid sections had it known about the constitutional invalidity of the other portions of the statute?'") (quoting *United States v. Booker*, 543 U.S. 220, 246 (2005) and citation omitted). Given the extensive legislative deliberations and compromises over the past century that led to the current cloture rule, *see* Defs.' Mem. at 5-11, there is ample basis to conclude that the Senate would *not* have enacted a cloture

rule without the heightened vote threshold, as it has not adopted such a rule in two hundred years. Indeed, at the beginning of this Congress, the Senate, by an overwhelming vote, rejected a resolution to amend Rule XXII to provide for invoking cloture by a declining threshold number of votes on each successive cloture attempt, ultimately down to a bare majority. 157 Cong. Rec. S327 (daily ed. Jan. 27, 2011) (rejecting S. Res. 8, 112th Cong., by vote of 12-84).

Finally, plaintiffs assert that they meet the redressability prong of standing because they assert a "procedural injury," for which they need not show that the DREAM and DISCLOSE Acts will pass if their claims succeed, but only that "the proper process [will be] restored," Pls.' Opp. at 65, by removing "a procedural barrier to the passage of the DREAM and DISCLOSE Acts." *Id.* at 61. Yet, while the redressability requirement may be "relaxed" for procedural injuries, it is not "wholly eliminat[ed]," *see Center for Law & Educ.*, 396 F.3d at 1157, and a plaintiff still must show that it is possible to relieve the procedural deprivation connected to the substantive injury. Simply declaring Rule XXII unconstitutional and striking the 60-vote requirement will not redress plaintiffs' procedural deprivation. Rather, to provide "redress," the Court would have to provide plaintiffs with another "opportunity" for Senate consideration of the failed bills, without the 60-vote cloture rule in effect. To do so, however, would require a court to order the Senate to bring those bills back to the Senate floor and consider them without application of the cloture rule's 60-vote requirement. But those bills *lapsed* at the end of the last Congress and cannot be brought before the Senate. Moreover, no court has the authority to dictate to the Senate what legislation to bring before the Chamber. It is up to the Senate – and the Senate alone – to decide the business it will consider, including whether or not to bring a bill to the floor for debate. It would be an unprecedented usurpation of the Senate's authority for a court to order that a particular bill be made the pending business before the Chamber.

And, whether the Senate would voluntarily take up either bill after the cloture rule was held unconstitutional is entirely too speculative to make any such declaratory relief "likely" to

redress plaintiffs' injuries. Again, the House-passed DREAM and DISCLOSE Acts lapsed at the end of the last Congress and, thus, cannot be considered by the Senate. The House has not passed any similar legislation in the current Congress that awaits consideration by the Senate. Accordingly, even if the Senate did proceed to consider legislation similar to the DREAM and DISCLOSE Acts, and even if the Senate did close debate and pass such legislation, the legislation would require House passage and presidential signature before plaintiffs' alleged injuries could be redressed – a scenario inherently too speculative to support Article III standing.

Plaintiffs' citation to *Yellin v. United States*, 374 U.S. 109 (1963), and *Accardi v. Shaughnessy*, 347 U.S. 260 (1954), provides no support for the redressability of their injuries. *Yellin* involved a criminal defendant who was convicted of contempt of Congress for refusing to answer questions while testifying at a House subcommittee hearing. The Supreme Court reversed the conviction because the subcommittee had failed to follow its own rules and consider Yellin's request to testify in executive session. Neither redressability nor standing was in question in this criminal case, where wholly effective redress for the defendant was simply to reverse his criminal conviction.

In *Accardi*, the plaintiff challenged his deportation based on the failure of the Board of Immigration Appeals (BIA) to exercise discretion as required by regulation in considering his appeal of the deportation order. 347 U.S. at 266. The Supreme Court held that, if Accardi could show that the BIA failed to exercise discretion as required, he should be granted a new hearing. *Id.* at 267-68. Unlike *Accardi*, where the Court could grant redress by ordering the BIA to reconsider Accardi's appeal under proper procedures, the Court here lacks authority to order any new "consideration" by the Senate of the DREAM or DISCLOSE Acts or of any current, similar legislative proposals. Nor can the Court "reverse" the cloture votes on those bills or deem the bills passed by the Senate. In sum, no redress for plaintiffs' alleged injury (whether termed "substantive" or "procedural") can be provided by a favorable judgment in this case.

II. The Speech or Debate Clause Bars Plaintiffs' Suit

The Speech or Debate Clause of the Constitution protects Members of Congress and their aides from lawsuits challenging actions "within the sphere of legitimate legislative activity," *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 (1975), which includes all activities that are an "integral part of the deliberative and communicative processes . . . with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel v. United States*, 408 U.S. 606, 625 (1972). As demonstrated in defendants' opening memorandum, because plaintiffs' suit directly implicates core legislative activity, it is barred by the Speech or Debate Clause. *See Eastland*, 421 U.S. at 503 ("[O]nce it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference.").

Plaintiffs claim that the Vice President is not covered by the Speech or Debate Clause, Pls.' Opp. at 67, and that the other Senate defendants are not protected by the Clause here because their "roles in the implementation of Rule XXII" were outside the "sphere of legitimate legislative activity" since that rule is unconstitutional. *Id.* at 68-70. Neither argument has merit.

The activities of the Vice President, in his role as President of the Senate, fall squarely within the scope of the Speech or Debate Clause. Presiding over legislative debate and voting on legislation when the Senate is equally divided, as the Constitution authorizes the Vice President to do, are unquestionably part of the "deliberative and communicative processes . . . with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625; *cf. also Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 632 (1st Cir. 1995) ("A rule that colors the very conditions under which legislators engage in formal debate is indubitably part and parcel of the legislative process, and the acts of House officials (whether or not elected members) in enforcing it are therefore fully protected against judicial interference by the doctrine

of legislative immunity."). Plaintiffs nevertheless argue that the Vice President is not covered by the Clause because: he is not a Senator and his office is created in a separate article of the Constitution; his legislative duties are "derived directly from the Constitution and not by delegation from the Senate"; he can "neither speak or debate on the floor of the Senate"; and the Incompatibility Clause prohibits Senators from "holding any Office under the United States." Pls.' Opp. at 67. None of these points has anything to do with Speech or Debate Clause immunity.

First, the fact that the office of Vice President is created in Article II (as opposed to Article I) is irrelevant to whether his legislative activities are protected by the Speech or Debate Clause. The Vice President's legislative role as President of the Senate is expressly provided for in Article I, section 3, clause 4, and there is no basis to conclude that when acting in that capacity he is any less protected by the Clause than any other Senate officer. Indeed, while presiding over the Senate, the Vice President's activities are vital to Senators' "speech" and "debate" as they can do neither without obtaining recognition from the presiding officer. *See* Senate Rule XIX.

Second, the fact the Vice President's legislative responsibilities are established in the Constitution actually underscores his legislative role. The Senate President pro tempore's authority is also established in the Constitution, and not by Senate delegation, U.S. Const. art. I, § 3, yet no one would assert that he is excluded from the coverage of the Speech or Debate Clause when performing duties within the legislative sphere. Indeed, all Senators' legislative responsibilities are derived from the Constitution. Further, plaintiffs' argument would deny the Vice President Speech or Debate immunity when he votes to break a tie in the Senate – a quintessentially legislative act. Further, while the Vice President does not participate in debate, neither do other Senate officers or aides, and yet the Supreme Court has expressly held that the Speech or Debate Clause covers their legislative activities. *See Gravel*, 408 U.S. at 618 (Speech or Debate Clause "applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself"); *Eastland*, 421

U.S. at 507.[8]

Plaintiffs' other point – that Speech or Debate Clause immunity does not apply to the Senate defendants because they are acting pursuant to an unconstitutional Senate rule, Pls.' Opp. at 69 – is equally unavailing as it is based on a misguided understanding of the immunity provided by the Speech or Debate Clause. As the Supreme Court has explained, application of the Speech or Debate Clause depends not on the lawfulness or constitutionality of the activity challenged, but on whether that activity is *legislative*. "Congressmen and their aides are immune from liability for their actions within the legislative sphere . . . , even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes.'" *Eastland*, 421 U.S. at 510 (quoting *Doe v. McMillan*, 412 U.S. 306, 312-13 (1973)) (internal citation and quotation marks omitted)). In *Eastland*, the Court specifically rejected the argument that issuance of a congressional subpoena was not protected by the Speech or Debate Clause because the plaintiffs had alleged that it violated their First Amendment rights. *Id.* at 509-10; *accord Minpeco, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 860 (D.C. Cir. 1988) (in determining whether Speech or Debate Clause applies, question "is whether the action at issue, whether legal or not, was undertaken within the 'legislative sphere'"); *Newdow v. U.S. Congress*, 328 F.3d 466, 484 (9th Cir. 2003), *rev'd on other grounds*, 542 U.S. 1 (2004) (rejecting argument that Speech or Debate Clause does not protect unconstitutional action, as "the court looks solely to whether or not the acts fall within the legitimate legislative sphere; if they do, Congress is protected by the absolute prohibition of the Clause"). Plaintiffs' argument that, because they allege that carrying out Rule XXII violates Article I, defendants are not protected by the Speech or Debate Clause must be rejected. That

[8] Further, the Supreme Court "ha[s] recognized that officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions." *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) (citing *Supreme Court of Va. v. Consumers Union of U.S.*, 446 U.S. 719, 731-34 (1980)). Also, because the Vice President is made President of the Senate by the Constitution itself, his role is not implicated by the Incompatibility Clause.

Clause bars plaintiffs' suit irrespective of the merits of their constitutional claims.

III. PLAINTIFFS' COMPLAINT PRESENTS A NON-JUSTICIABLE POLITICAL QUESTION

Plaintiffs' opposition disregards the fact that their claims are of the same nature as those in *Nixon v. United States*, 506 U.S. 224 (1993). This Court should conclude, like the Supreme Court in *Nixon*, that plaintiffs' challenge to the cloture rule presents a non-justiciable political question. In *Nixon*, Judge Walter Nixon, who was convicted by the Senate on impeachment charges and removed from office, filed suit challenging his Senate conviction on the grounds that the Senate's rules governing impeachment trials were unconstitutional because they permitted the Senate to appoint a committee to receive all evidence and take all testimony in his impeachment trial. Judge Nixon argued that the constitutional grant to the Senate of the power to "try" impeachments, U.S. Const. art. I, § 3, cl. 6, required the full Senate, not merely a committee, to hold evidentiary proceedings. *Nixon*, 506 U.S. at 228. The Supreme Court held that Judge Nixon's claim was non-justiciable because the power to try impeachments is textually committed to the Senate and there were no judicially manageable standards for resolving his challenge. *Id.* at 229-34.

Plaintiffs' challenge here similarly raises a political question. As with the power to "try" impeachments, the Constitution commits to the Senate the power to "determine the Rules of its Proceedings," Art. I, § 5, cl. 2 – including whether and in what manner to close debate. Just as *Nixon* found that the language of the Impeachment Trial Clause offered no judicially manageable standards to review the Senate's impeachment procedures, so here, neither the Rulemaking Clause nor any other textual constitutional provision provides a judicially manageable standard to review the Senate's debate procedures and the mechanism for closing debate. Further, resolution of plaintiffs' claims would require the Court to intrude deeply into the Senate's internal proceedings and deliberations, thereby expressing a lack of respect due a coequal branch.

Plaintiffs' arguments that their claims are not barred by the political question doctrine are

refuted by *Nixon*. First, plaintiffs assert that the power to determine the rules governing debate is not "textually committed" to the Senate but rather is "akin to the power granted to each House by Article I, section 5, clause 1 to judge the qualifications of its own members," which the Supreme Court reviewed in *Powell v. McCormack*. Pls.' Opp. at 26. But as the Supreme Court explained in *Nixon*, the "conclusion in *Powell* was based on the fixed meaning of '[q]ualifications' set forth in Art. I, § 2," which contains three explicit criteria for House membership (age, residency, and citizenship), *Nixon*, 506 U.S. at 237, that provides an express textual limit on the House's power to judge its Members' qualifications. The existence of that "separate provision specifying the only qualifications which might be imposed for House membership" made justiciable the House's exclusion of Representative Powell on a ground other than those three express qualifications. *Id.* (while "[t]he decision as to whether a Member satisfied the[] [age, residency and citizenship] qualifications *was* placed with the House, . . . the decision as to what these qualifications consisted of was not"). Here, like *Nixon* and in contrast to *Powell*, the Constitution sets forth no specific textual requirements on the Senate's rules of debate.

Plaintiffs suggest that the Quorum Clause, U.S. Const. art. I, § 5, cl. 1, the Presentment Clause, U.S. Const. art. I, § 7, cl. 2, and constitutional provisions expressly providing for "supermajority votes" on certain matters,[9] Pls.' Opp. at 18-20, limit the Senate's rulemaking power over debate. But none of those provisions sets forth any textual limit on the rules governing debate in the Senate Chamber, including when and how debate is brought to a close. Plaintiffs' attempt to infer from these provisions a textual constraint on how the Senate manages debate is as unpersuasive as Judge Nixon's attempt to infer from the word "try" in the Impeachment Trial Clause a limit on the manner in which the Senate receives evidence in

[9] *E.g.*, U.S. Const. art. I, § 7, cl. 2 (two-thirds vote to override veto); *id.* art. II, § 2, cl. 2 (two-thirds vote to ratify treaty); *id.* art. V (two-thirds vote to propose constitutional amendments).

impeachment trials. *See Nixon*, 506 U.S. at 230.[10]

Plaintiffs also argue that courts have judicially manageable standards to decide their claims because they seek only a declaratory judgment against Rule XXII. *See* Pls.' Opp. at 29. Yet, Judge Nixon similarly sought declaratory relief, *Nixon*, 506 U.S. at 228, and that did not preclude the Court from holding his claim non-justiciable. The issue is not the specific relief a party seeks, but whether the claim it presents lacks a manageable standard for resolving the issue.

Plaintiffs take issue with defendants' assertion that courts lack manageable standards for determining the proper amount of Senate debate on a given measure, by asserting that they are not asking the Court to adjudicate "the appropriate length of debate." Pls.' Opp. at 29. But the claim they present to the Court requires just that. The Senate has established rules governing the time for debate, namely, that debate continues until no Member wishes to speak on a measure, or until the time agreed to by unanimous consent of all Senators expires, or until 60 Senators vote to adopt a cloture motion to end debate. Considering the merits of plaintiffs' claim would require the Court to adjudicate whether the Senate's determination as to how long debate should continue, and when to bring it to a close, is unconstitutional. Moreover, the fact that plaintiffs' proposed constitutional standard – the "fundamental principle of majority rule," Compl. ¶ 59 – would call into question numerous longstanding Senate rules and procedures through which a minority of Senators may forestall or prevent the passage of proposed legislation (*e.g.*, the referral of matters to committees and the Majority Leader's right of first recognition and ability to control the Senate's floor schedule) is strong evidence that such a standard is not "judicially manageable."

Finally, plaintiffs' suggestion that the Supreme Court's decisions in *United States v. Ballin*, 144 U.S. 1 (1892), *United States v. Smith*, 286 U.S. 6 (1932), and *INS v. Chadha*, 462 U.S. 919, refute the argument that their claims are non-justiciable is not supported by those cases. In *Ballin*,

[10] Nor does the general "principle of majority rule," *see* Compl. ¶¶ 1, 2, 59(a), 78, provide a specific textual limit on the Senate's power to make rules governing debate.

the plaintiff argued that the House's passage of a statute was invalid for lack of a quorum and that the House rule for determining a quorum was unconstitutional. 144 U.S. at 4-5. The Court explained that the Constitution "empowers each House to determine its rules of proceedings," and while those rules may not "ignore constitutional restraints or violate fundamental rights," "within the limitations suggested" the power of each House to make its rules is "absolute and beyond the challenge of any other body." *Id.* at 5. The Court found that there was "no constitutional method prescribed" for determining a quorum, "no constitutional inhibition of any of [the possible methods of determining a quorum]," and "no violation of fundamental rights" by the House's rule. *Id.* at 6. Accordingly, the rule was not subject to challenge in the courts. Plaintiffs here have likewise not identified any express constitutional restraint violated by the cloture rule, nor can they allege a violation of fundamental rights. Consequently, the Senate's decision as to the mechanism for closing debate is "beyond the challenge of any other body." *Id.* at 5.

Plaintiffs' citation to *United States v. Smith* is similarly unavailing. Plaintiffs maintain that *Smith* stands for the proposition that Senate rules are justiciable when they "affect[] persons other than members of the Senate." Pls.' Opp. at 23 (quoting *Smith*, 286 U.S. at 30). Yet, the Senate impeachment rule in *Nixon* surely affected Judge Nixon directly and concretely, but that did not prevent the Court from finding Judge Nixon's claim non-justiciable. Plaintiffs also cite *Smith* to support their assertion that "[t]he political question doctrine is not a bar to plaintiffs' claims because the plaintiffs are not members of the Senate and do not have a political remedy." *Id.* at 6. Again, the same was true of Judge Nixon, yet the Supreme Court held his claims non-justiciable.

The Supreme Court's decision in *Chadha* is also distinguishable as the Court there found that the legislative veto violated an express textual limit on Congress' legislative power. The Court in *Chadha* found that a challenge to the constitutionality of a law that allowed a single House of Congress to overturn the action of an Executive official was justiciable because the Constitution contains an express textual provision, the Presentment Clause, that sets forth

specific procedural requirements for exercise of Congress' law-making power. 462 U.S. at 952-57. The Court determined that a House resolution overturning the Attorney General's decision to cancel deportation proceedings was effectively law-making, and irreconcilable with the "single, finely wrought and exhaustively considered, procedure," *id.* at 951, of bicameral passage and presentment to the President that the Constitution establishes for the exercise of legislative power. *Id.* In contrast, plaintiffs here have identified no clear, textual requirement limiting Senate rules governing debate. And, thus, unlike the unlawful exercise of the law-making power in *Chadha*, the power to make rules governing debate is committed by the Constitution to each House.

CONCLUSION

For the foregoing reasons, and for those stated in defendants' opening memorandum, the Court should dismiss plaintiffs' complaint with prejudice for lack of jurisdiction.

Respectfully submitted,

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