No. 14-253

IN THE

Supreme Court of the United States

COMMON CAUSE, *et al.*,

Petitioners,

—v.—

JOSEPH R. BIDEN, JR., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF PROFESSORS OF CONSTITUTIONAL LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a lawsuit alleging that a United States Senate Rule imposes an unconstitutional supermajority requirement for the passage of ordinary legislation is cognizable by the federal judiciary or whether, as the D.C. Circuit held, such a challenge must always fail for lack of a proper defendant.

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Amici curiae Eric Berger, Kathleen Burch, Erwin Chemerinsky, David S. Cohen, Charlotte Garden, Scott Douglas Gerber, Stephen E. Gottlieb, Nancy Leong, and Eric J. Segall are law professors and legal scholars with expertise in constitutional law and federal jurisdiction. *Amici* hold differing views on whether the cloture rule (Senate Rule XXII) as currently practiced in the United States Senate violates the Constitution. What *amici* agree upon, and the reason they have filed this brief,[1] is that the constitutionality of the cloture rule is an extremely important question that the federal judiciary can and should address on the merits.

In particular, *amici* agree that the D.C. Circuit's opinion below, which effectively holds that there can be no proper defendant, and therefore no justiciable challenge, with respect to *any* Congressional voting rule, improperly abrogates the federal judiciary's "duty . . . to determine in cases regularly brought before them, whether the powers of any branch of the government, *and even those of the legislature in the enactment of laws*, have been exercised in conformity to the Constitution."

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[1] This *amicus* brief is filed with the consent of the parties and letters confirming that consent are being filed herewith in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that neither the parties to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief. Brief biographies of the individual *amici* are included as an Appendix to this brief.

Kilbourn v. Thompson, 103 U.S. 168, 199 (1881) (emphasis added) (internal quotation marks omitted).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The petition for certiorari should be granted because it presents an important – indeed a foundational – question of federal law that should be decided by this Court.

Petitioners contend that the cloture rule violates a principle of majority rule enshrined in the Constitution. Rather than address petitioners' claims on the merits, the D.C. Circuit dismissed them based on a Catch-22. On the one hand, the Court reasoned that the case should be dismissed because petitioners' suit against the officers of the Senate – proper defendants in a challenge to a congressional rule under *Powell v. McCormack*, 395 U.S. 486 (1969) – did not name as defendants the Senators who created the rule. On the other hand, the Court observed that these Senators were immune from suit under the Speech and Debate Clause. Pet. A5-A9. Because the D.C. Circuit's opinion leaves no room for anyone to challenge a Congressional voting rule, the question presented is whether the constitutionality of a Congressional supermajority voting requirement can *ever* be decided by the federal judiciary. In *amici*'s view, the answer to that question is emphatically yes.

The development of the cloture rule is a relatively recent phenomenon, with its invocation dramatically increasing in the past decade. As a

result of its ever-increasing use, there is now a near-consensus among observers of American politics that a sixty-vote supermajority is necessary to pass most significant national legislation. What was once an abstract legal issue – whether the Constitution requires Congress to operate by majority rule – is now a compelling question about the Nation's ability to govern itself. (Point I).

The constitutional status of the cloture rule is a question that is within the competence, the province, and the duty of the federal judiciary to answer. It is not a political question. Although Congress has the power under Article I, section 5, clause 2 of the Constitution to determine the rules of its proceedings, this Court has long held that the judiciary may decide whether Congress has exercised this power in conformity with the law – just as Congress's other powers are subject to judicial review. Furthermore, the questions whether the cloture rule violates a constitutional principle of majority rule, or whether such a principle even exists, are questions that are susceptible to traditional legal analysis based on the text, structure, and history of the Constitution and the precedents and principles of law established by this Court. It is therefore the responsibility of the judiciary to decide them. (Point II).

The D.C. Circuit's opinion amounts to an abrogation of this duty, not just with respect to petitioners' challenge to the cloture rule, but for any future challenge to any Congressional voting rule. The D.C. Circuit, correctly, did not find any jurisdictional deficiency in the petitioners' complaint

specific to their particular circumstances that could be remedied by a suit by a different set of plaintiffs. Instead, the D.C. Circuit concluded that, no matter who the plaintiffs, there is no proper defendant for a challenge to a Congressional voting rule. The court's holding, that Congressional employees cannot be named in an action for declaratory relief challenging a congressional rule, is contrary to this Court's holding in *Powell v. McCormack*, *supra*. More fundamentally, the D.C. Circuit's approach is inadequate to the gravity of the question presented by petitioners' claims. Whether the Constitution does or does not require majority rule, and, if so, whether the cloture rule as practiced by the Senate does or does not violate this requirement, are questions that require, and furthermore deserve, substantive answers from the judiciary. The D.C. Circuit's opinion, which threatens to deny the country such judicial answers for all time, cannot stand. (Point III).

ARGUMENT

I. The Cloture Rule Imposes a *De Facto* Supermajority Requirement on a Rapidly Increasing Proportion of Legislation

The cloture rule requires a three-fifths majority of all Senators – sixty votes – to end debate and bring a legislative measure to a final up-or-down vote. Sen. R. XXII; *see* Pet. A2. For much of its history, however, the cloture rule dwelt in the obscurity appropriate for what is ostensibly a fine point of parliamentary procedure. It is only in recent years that cloture has become a threshold

requirement for most Senate business, effectively imposing a sixty-vote supermajority requirement for most legislation to pass the Senate and become law. The constitutional status of the cloture rule is therefore an increasingly important question which deserves a substantive response from the federal judiciary.

A. The Routine Use of the Cloture Rule Is a Recent Phenomenon

Although the cloture requirement is often understood as a synonym for the filibuster, the Senate first adopted a cloture rule in 1917 as a mechanism to *limit* filibusters. The rule was passed days after President Woodrow Wilson published a newspaper column, following a filibuster of his proposal to arm merchant ships during World War I, lambasting "[a] little group of willful men, representing no opinion but their own, [who] have rendered the great Government of the United States helpless and contemptible." Richard A. Baker, *Twentieth-Century Senate Reform: Three Views from the Outside*, *in* The Contentious Senate: Partisanship, Ideology, and the Myth of Cool Judgment 147, 150 (Colton C. Campbell & Nicol C. Rae eds., 2001). Indeed, before the cloture rule, a single Senator or group of Senators could delay a vote for as long as they could muster the stamina to hold the floor, with no formal mechanism by which other Senators "could vote to bring a debate to an end, or even limit it." Richard S. Beth & Valerie Heitshusen, Cong. Research Serv., Filibusters and Cloture in the Senate 1 (2013).

For years after its passage, the cloture rule was understood as a tool allowing a supermajority of the Senate to overcome an actual filibuster on the Senate floor. In practice, it was hardly ever used; between 1917 and the passage of the Civil Rights Act of 1964, cloture was successfully invoked only six times, and cloture motions were rarely brought. Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 Stan. L. Rev. 181, 198-99 (1997); *see also* Figure 1, *infra*. Until the 1960s, therefore, filibusters remained an important, but extraordinary, way for a determined minority of the Senate to block controversial legislation by indefinitely prolonging debate, and the cloture rule was a seldom-used check on this practice.

In recent years, however, the character of the filibuster has changed dramatically, and it has changed as a direct result of the cloture rule. In the early 1970s, the Senate implemented a "two-track" system, which allowed less controversial Senate business to proceed on a separate track even while a filibuster was ongoing. Fisk & Chemerinsky, *supra*, at 201; *see* Richard S. Beth, Cong. Research Serv., What We Don't Know About Filibusters 18 (1995). Before long, the two-track system, which originally called for dividing the Senate's time between a filibustered measure and other business, evolved into a system where a measure that could not obtain the sixty votes needed for cloture would not be brought to the Senate floor at all. Fisk & Chemerinsky, *supra*, at 202-03.

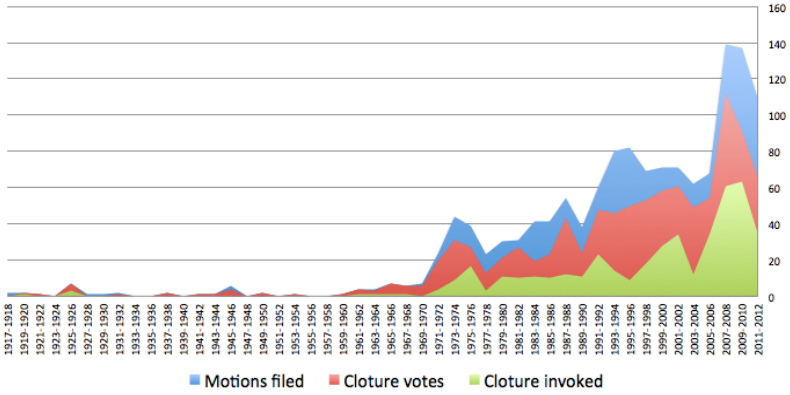
Under the Senate's current system, a "credible threat that forty-one senators will refuse to vote for

cloture on a bill is enough to keep that bill off the floor." *Id.* at 203. Rather than an extraordinary means to combat filibusters by intransigent minorities, the cloture rule has become a mechanism by which a minority may block legislation routinely and with minimum effort.

B. The Senate's Use of the Cloture Rule Is Rapidly Expanding

As the D.C. Circuit observed, the modern use of the cloture rule has made filibusters "less physically demanding," and "[m]aking filibusters easier has made them more frequent." Pet. A3 & n.1. This is an understatement. "[W]hat was once an extraordinary procedure has now become thoroughly routine." *See* Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 Conn. L. Rev. 1003, 1008-09 (2011). Since the 1960s, the number of annual cloture votes has increased exponentially, directly reflecting the increasing role of cloture as a routine prerequisite for the passage of legislation. After the long period of near-dormancy from 1917 through 1964, there were 23 cloture motions filed in the 95th Congress (1977-78), 54 in the 100th Congress (1987-88), 69 in the 105th Congress (1997-98), and 139 in the 110th Congress (2007-08). To date, in the 113th Congress, there have been 196 cloture motions – almost *one hundred times* the pre-1970 average for a single Congress. *See* U.S. Senate, *Senate Action on Cloture Motions*, http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm.

Figure 1: Cloture Motions, Cloture Votes, and Successful Invocations of Cloture, 1919-2012[2]



C. The Modern Cloture Rule Effectively Imposes a Supermajority Requirement on Most Legislation

Importantly, filibusters have become routine not in spite of the cloture rule, but because of it. In empowering sixty Senators to force a final vote on a measure by voting for cloture, the cloture rule also empowers forty-one Senators to delay a final vote indefinitely simply by *refusing* to vote for cloture, without expending the effort or political capital to mount an actual filibuster. In its current form, the cloture rule has replaced the traditional filibuster,

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[2] Ezra Klein, *The History of the Filibuster, in One Graph*, Wash. Post (May 15, 2012, 5:11 PM), http://www.washingtonpost.com/blogs/wonkblog/post/the-history-of-the-filibuster-in-one-graph/2012/05/15/gIQAVHf0RU_blog.html, (image available at http://www.newenglandprogress.com/wp-content/uploads/2013/11/killing-filibuster-washingtonpost.jpg).

which required an arduous and conspicuous effort by the filibustering Senators to extend debate indefinitely, with a supermajority requirement for the passage of ordinary legislation.

While there is, as discussed below, much controversy about the constitutionality of the cloture rule, there is no real dispute that the modern cloture rule, for all *practical* purposes, imposes a supermajority requirement for the passage of legislation in most cases. *See* Dan T. Coenen, *The Filibuster and the Framing: Why the Cloture Rule Is Unconstitutional and What To Do About It*, 55 B.C. L. Rev 39, 64-70 (2014) (collecting statements from law professors, political scientists, journalists, and Senators themselves that "sixty votes have become a de facto requirement to pass any legislation") (internal quotation marks omitted).

In short, whatever the merits of petitioners' constitutional challenge to the cloture rule, their contention that the rule raises fundamental questions about the status of majority rule in the Senate is simply true. Pet. A13. Furthermore, the cloture rule's character as a *de facto* supermajority requirement is a recent and rapidly intensifying phenomenon of undeniable – indeed foundational – importance to our constitutional system of government. This Court should confirm that it is within the power, and therefore is the duty, of the judiciary to address the important questions raised by petitioners' lawsuit.

II. Whether the Cloture Rule Imposes an Unconstitutional Supermajority Requirement Is an Appropriate Question for Judicial Review

In rejecting petitioners' challenge, the D.C. Circuit held that the Senate officers named by petitioners were not proper defendants because the Senators themselves – who are protected from suit by the Speech and Debate clause – are the only persons that caused petitioners' alleged injuries. Pet. A5-A9. The court thus held, in effect, that the federal judiciary lacks the power to hear any challenge to the constitutionality of a Senate voting rule. Notably, however, the D.C. Circuit failed to address the relevant doctrine for determining whether an issue can ever be appropriate for judicial resolution: the political question doctrine.

Petitioners' challenge to the cloture rule does not raise a political question because there is no "'textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Zivotofsky v. Clinton*, 566 U.S. ___, 132 S. Ct. 1421, 1427 (2012) (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993) and *Baker v. Carr*, 369 U.S. 186, 217 (1962)). On the contrary, the question raised by petitioners – whether the cloture rule is "in conformity with the Constitution," *Kilbourn*, 103 U.S. at 199 (internal quotation marks omitted) – is not, and under this Court's longstanding precedent cannot be, a political question committed solely to Congress. Therefore, answering it is the "province and duty of the judicial department." *Id.* (internal quotation marks

omitted); *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

A. The Constitutionality of the Cloture Rule Is Not Committed to the Sole Discretion of Congress

Although the D.C. Circuit did not address the political question doctrine, the district court concluded that petitioners' claims were barred by the doctrine because their claims were "textually committed" to the Senate, could not be resolved by "judicially discoverable and manageable standards," and would require an intrusion into the Senate's internal rules that would "express[] a lack of respect due a coordinate branch." Pet. A46-A56. The court's analysis "misunderstands the issue presented" in exactly the same way that the lower court did in *Zivotofsky*, this Court's most recent political question case. 132 S. Ct. at 1427.

Petitioners here, like the petitioner in *Zivotofsky*, are not asking the judiciary to decide an issue that is committed to a political branch – there, the "foreign policy decision" whether Jerusalem should be recognized as the capital of Israel, *id*., here, whether the cloture rule is wise. Petitioners are asking the judiciary to fulfill its duty under *Marbury* to determine whether the cloture rule is consistent with the Constitution.

The district court wisely did not conclude that that the cloture rule is insulated from judicial review merely because it is a Senate Rule. As this Court has long held, while "[t]he Constitution empowers each house to determine its rules of proceedings[,]

[i]t may not by its rules ignore constitutional restraints or violate fundamental rights." *United States v. Ballin*, 144 U.S. 1, 5 (1892); *see also Yellin v. United States*, 374 U.S. 109, 114 (1963) ("It has been long settled, of course, that rules of Congress and its committees are judicially cognizable.") (citing *Ballin* and *United States v. Smith*, 286 U.S. 6 (1932)). Indeed, this Court long ago explained that the judiciary's "province and duty" to say what the law is, *Marbury*, 1 Cranch at 177, applies squarely to the "proceedings" of the "legislature in the enactment of laws."

> "[I]t [is] competent and proper for this court to consider whether [the legislature's] proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, *and even those of the legislature in the enactment of laws*, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void."

Kilbourn, 103 U. S. at 199 (emphasis added) (quoting *Burnham v. Morrissey*, 80 Mass. (14 Gray) 226 (1859) with the comment "[i]n this statement of the law, and in the principles there laid down, we fully concur").

The district court, relying on *Nixon v. United States*, 506 U.S. 224 (1993), concluded that the constitutionality of the cloture rule was a political question because "Plaintiffs cannot identify any constitutional provision that *expressly* limits the authority committed to the Senate by Article I, section 5, clause 2." Pet. A50 (emphasis added). Of course, Plaintiffs did point to provisions of the Constitution that they contended did expressly limit the Senate's power to enact the cloture rule. *See* Pet. at 3-9 (arguing that the cloture rule violates a principle of majority rule required, *e.g.*, by the Quorum Clause, U.S. Const. art. I, § 5, cl. 1, and the Presentment Clause, U.S. Const. art. I, § 7, cl. 2, 3).

But even if the district court's analysis were correct, its assumption that constitutional claims implicating the powers of the political branches are non-justiciable unless they involve *express* constitutional limitations is untenable. Implied limitations on congressional power are regularly enforced by this Court. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2566, 2577 (2012) ("If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.").

In *Nixon*, this Court did not hold that a challenge to Congress's powers was non-justiciable unless Congress had violated an express requirement of the Constitution. Rather, the issue in *Nixon* was whether the Senate's "sole Power to try all Impeachments," U.S. Const. art. I, § 3, cl. 6,

contains, *in itself*, the additional requirement "that the proceedings must be in the nature of a judicial trial." *Nixon*, 506 U.S. at 229. The Court held that it was beyond the power of this Court to impose such a limitation on the Senate's "sole" power. *See id.* at 230-31 ("The commonsense meaning of the word 'sole' is that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted.").

Here, in contrast, this Court has already determined that the scope of Article I, section 5, clause 2, is "judicially cognizable." *Yellin*, 374 U.S. at 114; *see also Powell*, 395 U.S. at 519-49 (challenge to scope of Congress's power under Article I, section 5, clause 1 to "be the Judge of the . . . Qualifications of its own Members" not a political question). Furthermore, petitioners do not contend that the cloture rule is contrary to the Senate's power to establish its own rules, but rather that its *de facto* supermajority requirement is inconsistent with *other* provisions of the Constitution, which petitioners contend create a principle of majority rule for ordinary legislation in Congress. *See* Pet. at 3-9. There is no basis to conclude that the question whether this principle exists in the Constitution is committed to the sole discretion of Congress.

To be sure, the judiciary may disagree with petitioners' constitutional analysis. Moreover, the courts may decide, in the course of addressing petitioners' challenge, that the Senate's practices deserve deference. *See, e.g.*, *Dep't of Commerce v. Montana*, 503 U.S. 442, 459 (1992) ("[rlespect for a coordinate branch of Government . . . relate[s] to the

merits of the controversy rather than to our power to resolve it"). But whatever the courts decide, it is their duty to determine whether the law is what petitioners say it is. *See Zivotofsky*, 132 S. Ct. at 1427 ("In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'") (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)).

B. The Constitutionality of the Cloture Rule Is a Legal Question That the Courts Are Capable of Resolving

The district court also concluded that petitioners' claims were non-justiciable because "no judicially manageable standards exist" to assess the merits of petitioners' challenge. Pet. A53-A54. This is incorrect. The constitutionality of the cloture rule is certainly a controversial question, but it is one that permits "detailed legal arguments" of the sort the judiciary is not only competent, but uniquely situated, to address. *Zivotofsky*, 132 S. Ct. at 1428 (judicially manageable issue presented where "both sides offer detailed legal arguments regarding whether [the relevant statute] is constitutional in light of powers committed to the Executive, and whether Congress's own powers with respect to passports must be weighed in analyzing this question").

As they explain, petitioners contend that the cloture rule runs afoul of a principle of majority rule established by, or implicit in, the Quorum Clause, the Presentment Clause, and the Great Compromise. Pet. 3-9. Determining whether the structure of the

Constitution creates limitations on Congressional power is a task that the federal judiciary has long considered itself competent to perform. *See, e.g., Marbury*, 1 Cranch at 174 (Constitution's express enumeration of cases over which the Supreme Court has original jurisdiction implicitly prohibits Congress from enlarging the Court's jurisdiction); *Gibbons v. Ogden*, 9 Wheat. 1, 195 (1824) (Congress's enumerated powers under Article I, section 9 are limited because "[t]he enumeration presupposes something not enumerated"); *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964) (Article I, section 2, of the Constitution requires that "one man's vote in a congressional election is to be worth as much as another's"); *New York v. United States*, 505 U.S. 144, 175 (1992) ("[F]ederal action [that] would 'commandeer' state governments into the service of federal regulatory purposes [is] . . . inconsistent with the Constitution's division of authority between federal and state governments.").

The scholarly debate regarding the constitutionality of the cloture rule – a debate on which *amici* have views on all sides – further demonstrates that it is a question susceptible to traditional legal analysis. *See, e.g.*, Coenen, *supra*, at 43-47 (reviewing the scholarly literature). The debate has centered around two central questions: first, whether the Constitution permits Congress to enact a supermajority requirement for the passage of ordinary legislation; and second, whether the cloture rule's formal character as a regulation of Senate debate makes it really a rule about debating rather than a rule that abrogates the alleged constitutional principle of majority rule. *See id.*

Both of these questions have been the subject of scholarly dispute. Many legal scholars agree with petitioners that the cloture rule as practiced creates a *de facto* supermajority requirement that is inconsistent with the structure and history of the Constitution. *See generally id.*; Dan T. Coenen, *The Originalist Case Against Congressional Supermajority Voting Rules*, 106 Nw. U. L. Rev. 1091 (2012); Chafetz, *supra*; *see also* Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 Duke L.J. 73 (1996).

Others defend the constitutionality of the cloture rule on the ground that it does not actually impose a supermajority requirement, *e.g.*, Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 Const. Comment. 445, 456-57 (2004), or that even an express supermajority requirement would be consistent with the Constitution, *e.g.*, John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 Yale L.J. 483 (1995).

Still other scholars take more nuanced positions that do not fit neatly into either camp. *See, e.g.*, Fisk & Chemerinsky, *supra*, at 239-52 (arguing that the cloture rule is not unconstitutional in virtue of requiring 60 votes to advance debate, but that the procedures for changing the rule are in violation of the principle that one legislature cannot bind future legislatures).

What few, if any, participants in the debate over the constitutionality of the filibuster have argued is that the question is a pure policy judgment that cannot be answered through traditional legal

methods such as constitutional text, structure, history, and principles. Whether the Constitution contains an implicit principle of majority rule and, if so, whether the cloture rule violates this principle, are hotly disputed questions – but they are questions of constitutional interpretation that the courts are experienced in addressing. It is the duty of the judiciary to address them on their merits.

III. The D.C. Circuit's Decision Improperly Insulates the Cloture Rule from Any Judicial Challenge

The D.C. Circuit refused to reach the merits of petitioners' challenge, not because of any procedural impropriety particular to petitioners' circumstances, but because, in the court's view, the petitioners named improper defendants and therefore could not satisfy the causation element of Article III standing. Pet. A5-A9. But as the court readily acknowledged, there were no *other* defendants that petitioners could have named: the parties the court considered to be the real parties in interest, the Senators themselves, are protected by the Speech and Debate Clause, U.S. Const. art. I, § 6, cl. 1. The D.C. Circuit's reasoning is directly contrary to *Powell v. McCormack*, *supra*, which held based on indistinguishable reasoning that congressional employees were proper defendants in a declaratory judgment action in which Congress members themselves are protected by the Speech and Debate Clause.

More fundamentally, the D.C. Circuit's approach represents an unfortunate refusal by the judiciary not only to decide an important question of constitutional interpretation, but even to provide a

substantial reason why the question should not be answered. Because the D.C. Circuit (correctly) failed to identify any true jurisdictional defects in petitioners' lawsuit, and (correctly) declined to deem their claims political questions, it should have addressed their constitutional challenge on the merits.

A. There Are No Jurisdictional Defects Specific to Petitioners' Circumstances

Petitioners are not the first plaintiffs to bring a judicial challenge to the cloture rule. But in the previous challenges, the plaintiffs were found to lack standing for reasons that were particular to their claims and that would not necessarily apply to all challenges to the cloture rule. *See Page v. Shelby*, 995 F. Supp. 23, 27 (D.D.C. 1998) (standing cannot be "based solely on [plaintiff's] speculation that, no matter which party's senatorial candidates he votes for, Senators of the other political party will invoke Rule XXII to prevent the passage of unspecified legislation favored by [plaintiff]"), *aff'd mem.* 172 F.3d 920 (D.C. Cir. 1998); *Patterson v. U.S. Senate*, No. 13-2311, slip op. at 8, 11 (N.D. Cal. Mar. 31, 2014) (plaintiff failed to establish injury-in-fact by not "identif[ying] any particular legislation he supports and how he was personally injured because the legislation did not become law" and "fail[ing] to connect his generalized claim of vote dilution injury to any particular use of the Cloture Rule"); *Judicial Watch, Inc. v. U.S. Senate*, 340 F. Supp. 2d 26, 32-36 (D.D.C. 2004) (plaintiff public interest organization did not suffer injury-in-fact resulting from alleged delay in confirmation of judicial nominees), *aff'd on*

other grounds, 432 F.3d 359, 361-62 (D.C. Cir. 2005) (no evidence that confirmation delay was attributable to the cloture rule, and no evidence that confirmation delay had a material effect on case disposition time).

Petitioners' claims suffer from no such deficiencies. Rather than relying on unspecified future legislation or generalized arguments about obstruction or delay, petitioners have identified two particular bills (the DISCLOSE Act and the DREAM Act) that passed the House and that indisputably had the support of a clear majority of Senators and the President, yet failed to become law. As the complaint alleged, but for the cloture rule's supermajority requirement, these bills would have become law. Petitioners, as House members who voted in favor of these bills and individuals who would have directly benefitted from them, have suffered concrete injuries in the form of the nullification of particular votes and the denial of specific benefits.

In short, unlike previous cases challenging the cloture rule, petitioners' claim cannot be dismissed for reasons specific to their individual circumstances. In holding that petitioners lacked standing because of the defendants they chose to sue, the D.C. Circuit created an artificial barrier to all future challenges to all Senate Rules that is both contrary to this Court's precedent and inadequate to the magnitude of the questions presented.

B. The D.C. Circuit's Reasoning Is Contrary to *Powell*

According to the D.C. Circuit, the petitioners could not satisfy the causation prong of standing because it was the Senators, and not the defendants named by petitioners (the Vice President, the Secretary of the Senate, the Senate Parliamentarian and the Sergeant at Arms), who caused petitioners' alleged injuries. Pet. A5-A8. The D.C. Circuit distinguished this Court's seemingly controlling decision in *Powell v. McCormack*, *supra*, which had allowed a declaratory judgment action against congressional employees to go forward, on the ground that in *Powell* "[t]he causal connection between the named officers and the specific injuries alleged was obvious" whereas here petitioners did not "identify anything the defendants did (or refrained from doing) to cause [their] alleged injuries." Pet. A9. The D.C. Circuit's distinction of *Powell* is impossible to square with the holding or the reasoning of that case.

In *Powell*, this Court held that the Sergeant-at-Arms, the Clerk, and the Doorkeeper of the House of Representatives were proper defendants, not because of any "affirmative act" that they performed in barring Representative Powell from the House – there was no allegation of an actual confrontation – but simply because they "participated in the unconstitutional activity" of the House by executing its decision to exclude Powell from Congress. 395 U.S. at 504-05. Here, the defendants similarly participated in the decision to execute the cloture rule. *See* Pet. 30-32. For example, the Secretary of the Senate officially recorded the challenged cloture

votes, and failed to record a merits vote on the DISCLOSE Act or the DREAM Act, in direct contradiction to petitioners' allegation that the former votes were unconstitutional and that the latter votes should have occurred. Pet. 30. While these acts and omissions by the Secretary were purely ministerial, carried out at the orders of the Senate, the precise holding of *Powell* is that such ministerial acts are sufficient to create standing. *See Powell*, 389 U.S. at 504 ("That House employees are acting pursuant to express orders of the House does not bar judicial review of the constitutionality of the underlying legislative decision.").

More importantly, this Court's holding in *Powell* did not turn on analysis of the defendants' precise actions in implementing the unconstitutional instructions of the House. Rather, the Court explained that the Speech and Debate Clause is not intended to "forestall judicial review of legislative action" but simply to protect Congress from the burden of litigation. *Id.* at 505. "Freedom of legislative activity and the purposes of the Speech or Debate Clause are fully protected if legislators are relieved of the burden of defending themselves." *Id.* The D.C. Circuit's decision is incompatible with this reasoning and does not follow a controlling decision of this Court.

C. The D.C. Circuit's Reasoning Is Inadequate to the Gravity of the Question Presented

In addition to being contrary to *Powell*, the D.C. Circuit's decision amounts to an unfortunate refusal not only to address the merits of petitioners'

claims, but to *ever* decide the foundational question whether the Constitution requires majority rule – or, for that matter, to even provide a substantial reason why the judiciary cannot answer the question.

Although the D.C. Circuit's formal holding was that petitioners lacked standing, under the court's reasoning the cloture rule – indeed, any voting rule of either House – can *never* be challenged by future plaintiffs. Immediately after concluding that the defendants named by petitioners were improper because the Senators were the real parties in interest, the D.C. Circuit noted that petitioners were correct not to name the Senators as defendants because the Speech and Debate would bar such a suit. Pet. A6. The petitioners were therefore "Hoist with [their] own petar" and their action could not proceed. Pet. A8 (quoting William Shakespeare, Hamlet).[3]

In fact, petitioners have been "hoist" only by the D.C. Circuit's reasoning and not by anything they did. Indeed, more appropriate literary references would have been Catch-22 by Joseph Heller or The Trial by Franz Kafka, as the D.C. Circuit's reasoning places parties aggrieved by Congress's rule-making in the absurd, damned-if-

3 While modern readers may perceive "petar" to be a misspelling of "petard", the D.C. Circuit correctly quotes from the original Shakespeare. A "petard" is a small explosive device, but the word is suggestively derived from the French *péter* ("to break wind"). XI Oxford English Dictionary 627 (2d ed.1989). Shakespeare presumably knew the difference and was apparently making an off-color pun about the expected fate of Rosencrantz and Guildenstern.

you-do, damned-if-you-don't position described in those works.

The D.C. Circuit's reasoning is wholly inadequate to gravity of the question presented – whether the Constitution generally requires the United States Congress to be governed by majority rule. If, as the D.C. Circuit effectively held, the judiciary lacks the power to decide that the Constitution contains such a requirement, that conclusion in itself is a matter of critical importance. Notably, by holding that any suit challenging the cloture rule will fail to meet the threshold requirement of standing, the D.C. Circuit ensured that even an *express* supermajority requirement imposed by congressional rule would be free from judicial challenge (even a facially unconstitutional rule, such as one requiring a supermajority based on race). In effect, the D.C. Circuit held that the courts can never resolve the constitutionality of any House or Senate Rule that abridges the core principle of legislative majoritarianism.

But if that is true, a clear and thoughtful explanation why is needed. The matter is too central to the architecture of our republican system to rest on shadowy assertions that no one except legislators themselves can consider the constitutionality of supermajority voting rules created by those very legislators. *See Marbury*, 1 Cranch at 177-78 (judicial review of congressional actions is necessary lest that branch be accorded "a practical and real omnipotence," thus producing conditions under which the written limits of the Constitution "may, at any time, be passed by those intended to be

restrained"). In short, this case presents a question of the highest importance to our system of separated powers, however question might be resolved.

CONCLUSION

The petition for certiorari should be granted.

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Respectfully submitted,

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APPENDIX

Identification of *Amici Curiae*

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