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 Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

In holding that it lacked jurisdiction, the court of appeals eschewed normal standing doctrine and departed from this Court's holding in *Powell v. McCormack*, 395 U.S. 486 (1969). The lower court instead created a new jurisdictional ruling that forecloses future suits challenging the constitutionality of a Senate or House rule. This ruling conflicts with this Court's long-settled pronouncement that the rules of Congress are judicially cognizable. Until this Court intervenes, plaintiffs will be unable to challenge the constitutionality of a Senate or House rule by naming congressional employees as defendants, as was done in *Powell*. The separation of powers cannot tolerate the insulation of Senate and House rules from judicial review. This Court's review is strongly warranted. Respondents' arguments against granting review are both unpersuasive and misapprehend the breadth and significance of the appellate court's decision.

I. The Court Of Appeals' Ruling Conflicts With *Powell* And This Court's Holding That The Causation Element Of Article III Standing Requires Only That Petitioners' Injuries Be "Fairly Traceable" To The Actions Of At Least One Of The Respondents.

Respondents argue that there is no conflict between *Powell* and the lower court's ruling that it lacks jurisdiction over petitioners' action. Opp. 12-13. That argument fails. Under *Powell*, respondents sufficiently "participated in the unconstitutional activity" of the

operation of the Senate cloture rule to establish jurisdiction. 395 U.S. at 504. The lower court's ruling that it lacks jurisdiction because the Senate was the sole cause of petitioners' injuries ignores the allegations in petitioners' complaint, misapprehends the participation of respondents in the administration of the Senate cloture rule, and conflicts with *Powell*.

A. *Powell* Controls Whether A Constitutional Challenge To A Congressional Rule May Be Asserted Against A Legislative Employee.

In *Powell*, Representative Adam Clayton Powell challenged the constitutionality of a House resolution denying him his seat in the House of Representatives. This Court acknowledged that the House was the real party in interest, being primarily responsible for the unconstitutional resolution excluding Powell from membership and declaring his seat vacant. *See id.* at 490-94. Although the Speech or Debate Clause, U.S. Const., art. I, § 6, cl. 1, barred Powell's suit against House members, this Court held that it had jurisdiction over Powell's declaratory-judgment action as asserted against those "legislative employees who participated in the unconstitutional activity [and] are responsible for their acts." *Powell*, 395 U.S. at 504. In his complaint, Powell had "alleged that the Clerk of the House threatened to refuse to perform the service for Powell to which a duly elected Congressman is entitled . . . and that the Doorkeeper threatened to deny Powell admission to the House chamber." *Id.* at

493. This Court held that the participation of the Clerk and the Doorkeeper in the unconstitutional House resolution, although attenuated, was sufficient to establish its jurisdiction over Powell's constitutional challenge. *Id.* at 506 ("[P]etitioners are entitled to maintain their action against House employees and to judicial review of the [House's] decision to exclude petitioner Powell.").

The *Powell* Court noted that allowing the suit against House officers was consistent with the Speech or Debate Clause and necessary to permit "judicial review of the propriety of the decision to exclude petitioner Powell." *Id.* at 508. Repeating its statement in *Kilbourn v. Thompson*, 103 U.S. 168 (1881), this Court explained the necessity of jurisdiction over constitutional challenges to the rules of Congress:

> Especially is it competent and proper for this court to consider whether its [the legislature's] proceedings are in conformity with the Constitution, because . . . it is the province and duty of the judicial department to determine . . . whether the powers of any branch of the government, and even those of the legislature in the enactment of the laws, have been exercised in conformity with the Constitution.

Powell, 395 U.S. at 506 (quoting *Kilbourn*, 103 U.S. at 199 (first alteration original)).

Respondents suggest that *Powell* is unavailing because respondents neither participated in debate nor voted on any bill – in short, because they were not

members of the Senate. Opp. 12-13. Respondents' argument is irrelevant: In *Powell*, neither the Clerk nor the Doorkeeper participated in debate about, or voted on, the unconstitutional House resolution; yet this Court allowed Powell to name them as defendants.

Respondents simply miss the centrality of *Powell* to this case. *Powell* informs whether a plaintiff has standing to challenge the constitutionality of a congressional rule. To establish the causation prong of Article III standing, a plaintiff need only show "*a causal connection* between [the plaintiff's] injury and the conduct complained of . . . [that is] *fairly traceable* to the challenged action of the defendant." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (emphasis added). In the light of *Powell*, a plaintiff asserting a constitutional challenge to a congressional rule against a congressional employee satisfies the causation requirement of Article III standing where that employee's participation in the unconstitutional activity is at least commensurate with the Clerk and Doorkeeper's participation in the unconstitutional House resolution.

B. As In *Powell*, Petitioners' Injuries Are Fairly Traceable To Respondents Who Are Alleged To Have Administered And Enforced The Senate Cloture Rule.

The court of appeals erred in holding that petitioners failed to establish the causation prong of standing because respondents' participation in the

administration of the Senate cloture rule exceeds the participation of the Clerk and the Doorkeeper in the unconstitutional House resolution in *Powell*. Respondents maintain, however, that the Senate is the sole cause of petitioners' injuries and contend that petitioners have not identified any action that can be fairly traced to respondents. Opp. 12-13. Both contentions are incorrect.

The Senate does not administer or enforce its rules of procedure without the participation of respondent Senate employees. The Senate relies on "non-Senators" – the Secretary to implement the rules, the Parliamentarian to interpret the rules, and the Sergeant-at-Arms to enforce the rules on behalf of the Senate.

Moreover, in their complaint, petitioners alleged that the official duties of Nancy Erikson, in her official capacity as Secretary of the Senate, include recording the votes and keeping the official minutes and records of the Senate. R. 1, Compl. ¶ 10. The Secretary recorded the final votes against cloture, which the lower court cited as the actions that "doomed the DREAM and DISCLOSE bills." App. 9.

In its opinion, however, the appellate court completely ignored petitioners' allegations of the Secretary's participatory duties in the administration of the Senate cloture rule. As a result, the lower court's analysis of the causal connection between petitioners' alleged injuries from Senate Rule XXII and

respondents' participation in the operation of that rule is not only incomplete; it is wrong.

The Secretary oversees and "control[s] . . . the clerical force in the Secretary's office, including the Chief Clerk." *See* RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOC. 101-28 at 1231 ("[T]he appointment, removal, and *control* of the clerical force in the Secretary's office, including the Chief Clerk, [is] vested in the Secretary of the Senate.") (emphasis added). When a motion for cloture is made, the Clerk is required by Rule XXII, under the supervision of the Secretary, to "immediately report[ ] the [cloture] motion" and to "call the roll." *See id.* at 282. Because she oversees the clerical force of the Senate, *see id.* at 282, 1230-31, and because she is charged with recording the votes against cloture, the Secretary "participated" in the cloture procedure and is "responsible" for the execution of the cloture rule. *See Powell*, 395 U.S. at 504.

Petitioners also alleged that the official duties of the Sergeant-at-Arms include the enforcement of all rules of the Senate, including Rule V and Rule XXII, whenever enforcement is necessary. Here, the duty to enforce the Senate rules is no less participation than the Doorkeeper's alleged threat to enforce the House resolution in *Powell*.

Properly considered under *Powell*, respondents' role in the administration and enforcement of Rule XXII satisfies the causation requirement of Article III standing. If, in *Powell*, the participation of the Clerk

and Sergeant-at-Arms in the unconstitutional House resolution – which amounted to no more than alleged threats to enforce it – was sufficient to establish jurisdiction over Powell's constitutional challenge to the resolution, then, *a fortiori*, the participation of respondents in the administration of the Senate rules satisfies the causation prong of petitioners' standing to bring this suit. In comparison to the House employees in *Powell*, respondents not only "*participated*" in the enforcement of the challenged legislative action; they were *integral* to its administration. *See id.* at 505 (emphasis added).

Therefore, the appellate court's ruling that it lacks jurisdiction because the Senate was the sole cause of petitioners' injury conflicts with *Powell*'s ruling that jurisdiction was predicated on the minimal participation of the House employees – a degree of involvement that is far exceeded by respondents' role in the operation of the Senate cloture rule.

II. The Court Of Appeals' Ruling Forecloses Suits Challenging The Constitutionality Of A House Or Senate Rule And Therefore Conflicts With This Court's Declaration That The Rules Of Congress Are Judicially Cognizable.

Contrary to respondents' argument, the court of appeals did not simply apply settled standing doctrine. Rather, the lower court eschewed that doctrine and the guidance provided by *Powell*, creating instead a new jurisdictional rule. According to the appellate

court, petitioners lack standing to challenge the constitutionality of Rule XXII because any injury that petitioners may have suffered by the 60-vote requirement in the rule was not the result of respondents' implementation and enforcement of the rule, but is solely the result of "legislative action" on the part of "the Senate [which] established the cloture rule and the Senators voting against cloture." App. 7, 9. As respondents acknowledge, the appellate court concluded that "the enactment and amendment of the Senate rules . . . are all legislative actions by Members of the Senate and not the defendant Senate officers . . . [and therefore petitioners'] 'alleged injury was caused not by any of the defendants, but by an absent third party – the Senate itself.'" Opp. 12 (quoting App. 10).

In short, the court of appeals ruled that no proper defendant exists in suits that challenge the constitutionality of a Senate (or House) rule. The lower court's holding creates a dilemma for any future plaintiff seeking relief from an injury caused by an unconstitutional Senate or House rule. On the one hand, as the appellate court acknowledged, the plaintiff could not seek relief against the Senate or its members because of the immunity provided by the Speech or Debate Clause. App. 6-7. On the other hand, according to the appellate court's holding, the plaintiff would fail to establish the causation requirement of Article III standing to seek relief against legislative employees responsible for the administration or enforcement of an unconstitutional Senate

rule because "the Senate itself" causes the rule that causes the injury. App. 10.

Respondents misunderstand the conflict between the lower court's ruling and this Court's long-settled pronouncement that the rules of Congress "are judicially cognizable." *Yellin v. United States*, 374 U.S. 109, 114 (1963) (citing *Christoffel v. United States*, 338 U.S. 84 (1949); *United States v. Smith*, 286 U.S. 6 (1932); *United States v. Ballin*, 144 U.S. 1 (1892)). The power the Rulemaking Clause, U.S. Const., art. I, § 5, cl. 2, grants to the Senate is limited. *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2574 (2014) (finding that the limits on the Senate's rule-making power require "'a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained' and [that] the rule does not 'ignore constitutional restraints or violate fundamental rights'" (quoting *Ballin*, 144 U.S. at 5)). In light of those limits, this Court has been careful to craft jurisdictional rules that permit review of constitutional challenges to House and Senate rules. *See Powell*, 395 U.S. at 506 (quoting *Kilbourn*, 103 U.S. at 199); *Yellin*, 374 U.S. at 114 (citing *Christoffel*, 338 U.S. 84; *Smith*, 286 U.S. 6; *Ballin*, 144 U.S. 1).

Owing to the jurisdiction-stripping dilemma created by the lower court's holding, a plaintiff's constitutional challenge to a Senate or House rule is no longer judicially cognizable. Indeed, respondents do not identify any way that a plaintiff could challenge a Senate or House rule under the appellate court's

decision. If this ruling is allowed to stand, it will be impossible not only for petitioners but also for any other plaintiff to challenge the constitutionality of any rule adopted by the Senate or the House, no matter how obvious the conflict between the rule and the Constitution. This is not, and never has been, the law.

In *Ballin*, the plaintiff's injury was caused by an amendment to the rules of the House that changed the definition of a quorum, without which a statute that imposed an excise tax on Ballin's goods would not have passed the House. 144 U.S. at 4-5. Ballin was allowed to challenge the constitutionality of the amendment as a violation of the Quorum Clause, U.S. Const., art. I, § 5, cl. 1, without naming the Speaker or other members of the House as defendants. Although this Court ultimately rejected Ballin's claim on the merits, it asserted jurisdiction over Ballin's challenge and held that the rule-making powers of the House are subject to constitutional restraints. *Id.* at 5.

In *Smith*, an appointee to the Federal Power Commission challenged the constitutionality of the Senate's interpretation of a hundred-year-old Senate rule that reserved to the Senate the power to reconsider a confirmation vote within three executive calendar days. Both the Senate rule and the Senate's vote to reconsider and disapprove Smith's nominations were unquestionably "legislative actions" of the Senate and its members. Neither the Senate nor any of its members who voted to reconsider Smith's confirmation were parties to the *quo warranto* action

challenging Smith's right to hold office; nevertheless, in a unanimous opinion by Justice Brandeis, this Court held that the issues were justiciable. The Smith Court held that when "the [Senate's] construction [of its] . . . rules affects persons other than members of the Senate, *the question is necessarily a judicial one*." 286 U.S. at 33 (emphasis added). This Court held that the questions presented were purely legal issues and ultimately rejected the Senate's interpretation of its own rule.

Respondents suggest that the lower court's decision does not conflict with *Yellin*, *Smith*, or *Ballin* because those cases did not present issues of Article III standing. Opp. 9-10. Respondents' argument is anachronistic and misses the point. In each of those cases, the challengers' injuries were as much the result of "legislative action" on the part of members of the Senate or House, as are the injuries to petitioners from the 60-vote requirement of the Senate cloture rule; yet, this Court asserted jurisdiction. Moreover, those cases made clear – as did *Powell* and *Kilbourn* – that because the Rulemaking Clause grants only a limited power to the legislature, the rules of Congress are and must remain judicially cognizable.

III. The Separation Of Powers Cannot Tolerate The Appellate Court's Decision Insulating The Rules Of Congress From Judicial Review.

Respondents would have this Court believe that this petition is simply another filing in a series of recent suits alleging the unconstitutionality of the Senate cloture rule and may be safely ignored by this Court. Opp. 2. They are wrong, for two reasons.

First, in previous challenges to the Senate cloture rule, the plaintiffs were neither Members of the House of Representatives nor the intended beneficiaries of specific statutes and had little more than an abstract interest in a legal issue. *See, e.g.*, *Judicial Watch, Inc. v. United States Senate*, 340 F. Supp. 2d (D.D.C. 2004), *aff'd*, 432 F.3d 359 (D.C. Cir. 2005); *Page v. Shelby*, 995 F. Supp. 23 (D.D.C. 1998), *aff'd*, 172 F.3d 920 (D.C. Cir. 1998) (table). Here, by contrast, petitioners assert concrete vote-nullification injuries, as recognized by this Court in *Coleman v. Miller*, 307 U.S. 433 (1939), and concrete injuries to their opportunity to benefit, as recognized in *N.E. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993).

Second, unlike in previous challenges, the court of appeals has now reached a decision foreclosing jurisdiction over constitutional challenges to Senate rules, especially challenges to Senate voting rules where the injury owes to the Senate's inaction. The separation of powers cannot tolerate the appellate

court's ruling. Assume *arguendo* that the Senate passed an invidious rule requiring 60 votes for the passage of any legislation sponsored by either an African American or a Muslim Congressman. If a plaintiff – whether a Congressman or an intended beneficiary of the House legislation – challenged that invidious voting rule, the appellate court's decision would stand as precedent, subjecting the suit to its jurisdiction-stripping dilemma. Suits against the Senate officers responsible for administering and enforcing the rule would be barred because "the Senate itself" is the cause of the alleged injury. App. 10. And suits against the Senate would be barred by the Speech or Debate Clause. App. 6-7.

The separation of powers simply cannot tolerate a jurisdictional rule that forecloses the federal courts' power to consider a constitutional challenge to such an invidious rule. Because of the limits on the Rule-making Clause's grant of power to the legislature, this Court has long guarded jurisdiction over the rules of Congress. *See Powell*, 395 U.S. at 506 (quoting *Kilbourn*, 103 U.S. at 199). In the light of that long-held vigilance, this Court should grant review.

CONCLUSION

In the end, the fundamental flaw of the decision below needs to be addressed. The court of appeals has barred future plaintiffs from bringing constitutional challenges to House and Senate rules, despite this

Court's long-standing pronouncements that the rules of Congress are judicially cognizable and the powers granted to the House and Senate by the Rulemaking Clause are limited. For the reasons stated above and previously, this Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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