IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMON CAUSE, *et. al.*	)	
Plaintiffs	)	
	)	
v.	)	CIVIL ACTION
	)	FILE NO. 12-cv-0775(EGS)
JOSEPH R. BIDEN, *et. al.*	)	**ORAL HEARING REQUESTED**
	)	
Defendants.	)	

BRIEF OF PLAINTIFFS IN OPPOSITION TO MOTION TO DISMISS

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Introduction and Summary of Argument

This is an action for a declaratory judgment declaring the ***supermajority vote provisions*** in Rule XXII of the Standing Rules of the Senate unconstitutional and ***severing*** the illegal portions so as to allow the ***majority*** to adopt motions for cloture.

Contrary to defendants' assertions, the Court is not asked to "intrude into the Senate's legislative procedures – to rewrite the Senate's rules [] to oversee its floor proceedings," to regulate the length of debate, to limit the number of times a Senator may speak, or limit speech length.[1] Nor have the plaintiffs asked the Court "to rewrite the Senate's rules."[2] In fact, the complaint expressly disavows any such interest. *See* Compl., ¶ 76.

The sole question in this case is whether a Senate rule that empowers the minority ***to prevent the majority from speaking, debating, deliberating, and voting*** unless the majority can acquire 60 votes violates the Constitution and therefore exceeds the rule-making authority granted to the Senate by Article I, section 5, clause 2. Each of the plaintiffs has been concretely injured by Rule XXII's violations of the majority vote provisions of Article I governing the enactment of statutes. Plaintiffs ask this Court to do what courts have done since 1803—interpret the Constitution and decide whether a political branch has violated our most fundamental law.

The Constitution prescribes only *one* rule for determining when the Senate and the House can "do Business"—in the Quorum Clause[3]—and only *one* procedure for the passage of laws—in the Presentment Clause.[4] They each apply equally to the House and the Senate. The Quorum Clause specifies that only a simple majority need be present to enable the Senate or the House to

[1] Def. Br. at 1, 41-43.
[2] *Id*.
[3] Art. I, sec. 5, cl. 1.
[4] Art. I, sec. 7.

"do Business" and the Presentment Clause requires only the vote of a simple majority of a quorum of each House to "*pass*" a bill prior to its presentment to the President. If the President vetoes that bill, a two-thirds majority of a quorum of each House shall have the power to override that veto. As the Supreme Court held in *INS v. Chadha*, 462 U.S. 948, 948 (1983), the Presentment Clause's "prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' . . . ***single***, finely wrought and exhaustively considered ***procedure***" that requires only "the prescribed ***majority*** [vote] of the Members of both Houses of Congress." *Id*. at 948-51 (emphasis added).

There is no room in the Constitution for two rules for the passage of legislation—a majority vote rule for the House of Representatives and a 60 vote rule for the Senate. The Senate cannot preempt or short-circuit this "*single*, finely wrought … *procedure*" in Art. I, sec. 7 that requires only the "prescribed majority [vote] of both Houses"[5] for the passage of laws. It cannot substitute a rule of its own—one that allows a minority of senators to prevent majority-supported-bills from reaching the floor of the Senate unless the majority can obtain 60 votes on a motion for cloture—for the rule supplied by the U.S. Constitution.

This subversion of the Constitution's requirements has not only harmed the nation, it has violated the plaintiffs' individual rights. As the Supreme Court has noted, "'[t]he Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) (Roberts, C.J., quoting Alexander Hamilton in *The Federalist No. 84*). While Article I, section 7 does not create an individual right to have a bill *passed* by the Senate, it does create a procedural right to have the bill fairly considered by the majority in the Senate under the *procedures* specified in Art. I, section 7. Rule

[5] *Chadha*, 462 U.S. at 951.

XXII deprived the plaintiffs of that procedural right by allowing a minority in the Senate to prevent the majority from deciding whether bills, such as the DISCLOSE Act and the DREAM Act, should be debated or voted on by the full Senate.

Although the complaint alleges that both bills had the support of more than a majority of the Senate and would have passed and become law,[6] the plaintiffs need not show that both bills would have been enacted but for the filibuster to have standing. The plaintiffs were intended beneficiaries of the DREAM and DISCLOSE Acts, and therefore, were injured when the bills died in the Senate without the Senate majority having had an opportunity to debate or pass them, in violation of Article I, section 7's procedures for the passage of legislation—solely because the majority did not obtain the 60 votes needed under Rule XXII. Whether the bills would have passed *is irrelevant* to the question of whether Rule XXII inflicted a procedural injury on the plaintiffs, and as a result, illegally denied them an *opportunity* to obtain the concrete benefits of the DREAM and DISCLOSE Acts.[7] Such lost opportunity injuries are concrete, are not shared in common with the entire body politic, and are sufficient to underwrite Article III standing.[8]

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[6] *See* Compl., ¶ 9.D.(2).

[7] *City of Dania Beach v. F.A.A.*, 485 F.3d 1181, 1186 (D.C. Cir. 2007) ("A plaintiff asserting procedural injury never has to prove that if he had received the procedure the substantive result would have been altered.").

[8] *See e.g., CC Distribs., Inc. v. United States*, 883 F.2d 146, 150 (D.C. Cir. 1989) ("[A] plaintiff suffers a constitutionally cognizable injury by the loss of an opportunity to pursue a benefit … even though the plaintiff may not be able to show that it was certain to receive that benefit had it been accorded the lost opportunity."); *N.E. Fla. Chapter of Assoc. Gen. Contrs. of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (holding that the denial of an opportunity to compete for a contract was an injury-in-fact sufficient to establish standing and did not require a showing that the plaintiff would have been awarded the contract); *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160-62 (1981) (holding that California's loss of the opportunity to benefit from alternative pricing schemes that were not considered by the Secretary of Interior conferred standing even though "the relief California seeks – experimental use [of alternative bidding schemes] … will not ensure that the Secretary will try these systems."); *Yellin v. United States*, 374 U.S. 109, 121 (1963) (Yellin might not prevail … but he is at least entitled to have the Committee follow its own rules and give … in consideration."); *United States ex rel. Accardi v.*

The plaintiffs' injury consists of the denial of their right to the "procedures governing the enactment of statutes set forth in Article I," *Clinton v. City of New York*, 524 U.S. 417, 439 (1998), and the loss of the opportunity to benefit that this violation entailed. And whether the relief that the plaintiffs seek ever results in the passage of the DREAM and DISCLOSE Acts is beside the point; the plaintiffs' procedural injury will be redressed by restoring the Article I process to which the plaintiffs are due, *i.e.*, by invalidating the illegal supermajority voting requirements of Rule XXII. *See Defenders of Wildlife v. Lujan*, 504 U.S. 555, 573, n.7 (1992) ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."). Such a remedy will also remove Rule XXII as a barrier to the passage of the DREAM and DISCLOSE Acts.

"[N]one of the Constitution's commands explicitly sets out a remedy for a violation. Nevertheless, the principle that the courts will strike down a law when Congress has passed it in violation of such a command has been well settled for almost two centuries."[9] There can be no doubt that the same principle applies to a mere rule adopted by one House of Congress, and that this Court has the jurisdiction to decide whether the supermajority voting provisions in Rule XXII are unconstitutional.

This Court has jurisdiction to decide whether the supermajority vote requirements in Rule XXII conflict with other provisions of the Constitution. And it is not barred by the doctrine of separation of powers from doing so. The Supreme Court has held that while "the Constitution

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Shaughnessy, 347 U.S. 260, 268 (1954) (Of course, he may be unable to prove his allegation before the District Court; but he is entitled to *the opportunity* to try.").

[9] *United States v. Munoz-Flores*, 495 U.S. 385, 396-97 (1990) (*citing Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

empowers each house to determine its rules of proceedings,[10] [**i]t *may not by its rules ignore constitutional restraints or violate fundamental rights***." *United States v. Ballin*, 144 U.S. 1, 5 (1892) (emphasis added). The Court has also held that when "the construction to be given to the [Senate's] rules affects persons other than members of the Senate, the ***question presented is of necessity a judicial one*** … ***and is solely one of law***." *United States v. Smith*, 286 U.S. 6, 30, 33 (1932) (emphasis added); *Yellin v. United States*, 374 U.S. 109, 114 (1963) ("It has been long settled … that rules of Congress are judicially cognizable."); *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1171, 1173 (D.C. Cir. 1982) ("[I]f Congress should adopt internal procedures which 'ignore constitutional restraints or violate fundamental rights,' it is clear we must provide remedial action … Article I does not alter our judicial responsibility to say what rules Congress may not adopt because of constitutional infirmity.…").

The defendants' assertion that the Court is being asked "to rewrite the Senate's rules"[11] is flatly untrue. The complaint plainly states that the Court is *not* being asked to rewrite the rules of the Senate.[12] The plaintiffs ask the Court to do what courts have traditionally done when they have found that parts of a statute or rule are unconstitutional—they have *severed the unconstitutional provisions* as the Supreme Court did in the Affordable Health Care Act case of *Sebelius*, 132 S. Ct. at 2607-08, *Chadha*, 462 U.S. at 959, and in scores of other cases. After the Court severs the unconstitutional provisions, "the general rule of all parliamentary bodies . . . that, when a quorum is present, the act of a majority of the quorum [is] the act of the body," *Ballin*, 144 U.S. at 6, would apply to motions for cloture under Rule XXII. Compl., ¶ 78. The

[10] Art. I, sec. 5, cl. 2.
[11] Def. Br. at 1.
[12] Compl., ¶ 76.

Senate would then be free to amend its rules by, *inter alia*, crafting a new cloture rule by majority vote, instead of a two-thirds vote.

The 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; they must look to the federal courts for relief from the unconstitutional requirements of Rule XXII. *See Smith*, 286 U.S. at 30, 33 ("As the construction to be given to the rules **[when they] affect[] persons *other than members of the Senate***, the question presented is of necessity a judicial one . . . [and] is one of law.") (emphasis added); *Michel v. Anderson*, 14 F.3d 623, 627-28 (D.C. Cir. 1994); *Gregg v. Barrett*, 771 F.2d 539, 546 (D.C. Cir. 1985). The plaintiffs cannot force the Senate to reform its rules. Neither the House of Representatives nor the President of the United States has that power.

The Senate is also powerless to amend its own rules. Scores of senators, beginning with Henry Clay in 1841, have tried unsuccessfully to persuade the Senate to amend its rules to allow the majority to end debate and bring matters to a vote.[13] Rule V, which the Senate adopted in 1959, declares that the rules of the Senate continue from one Congress to the next and can only be amended as provided in the Rules. Rule XXII prohibits cloture on a motion to amend Senate rules unless two-thirds of the Senate agree to enact such a rule change. As a practical matter, this has made change impossible as individual Senators are incentivized to maintain the status quo.[14] If relief is to come, it must come from the federal courts.

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[13] *Senate Cloture Rule, Limitation of Debate in the Senate of the United States and Legislative History of Paragraph 2 of Rule XXII of the Standing Rules of the United States Senate (Cloture Rule)* S. Prt. 112-31 (112th Cong. 1st Sess.) (listing attempts to eliminate filibusters); Compl., ¶ 54.

[14] Compl., ¶ 55; Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 Stan. L. Rev. 181, 230-31 (1997) ("[I]t is the political process itself that makes judicial review essential. . . . The political party that is in the minority in the Senate always has a strong incentive to continue the

The federal courts have not hesitated to remedy constitutional violations when the political branches or the states have shown themselves unable or unwilling to do so.[15] The D.C. Circuit has emphasized that the lesson of these cases is that "for many years, our nation – with surprising consensus – has relied on the judiciary to remedy long-standing flaws in the political system."[16] The plaintiffs ask the Court to redress their procedural injuries, and in the process, restore the Founders' vision of a Senate governed by majority rule.

Statement of Facts

In 1917, President Woodrow Wilson pointed out that the Senate is "the only legislative body in the world which cannot act when its majority is ready for action." Under Senate rules, if one senator puts a "hold" on a bill or nomination or objects to a request from the majority leader for unanimous consent to schedule debate on a bill or nomination, the Senate cannot proceed with debate without the adoption of a motion to proceed. A motion to proceed is a debatable motion and cannot be voted on without the adoption of a separate motion—a motion for cloture of debate which requires 60 votes under Rule XXII. Compl., ¶ 15.

Rule XXII gives the minority in the Senate the power to prevent the majority from debating the substantive merits of a bill or from ending that debate so that the bill can be brought to a final vote. In addition, Rule XXII in combination with Rule V bars the Senate from amending its rules by majority vote as contemplated by Article I, section 5, clause 2 of the

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filibuster rule . . . The need for judicial review of the filibuster is thus similar to why the Court ultimately concluded that challenges to malapportioned state legislatures were justiciable.").

[15] *See e.g., Baker v. Carr*, 396 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Sebelius*, 132 S. Ct. at 2607-08; *Chadha*, 462 U.S. at 959; *Clinton*, 524 U.S. at 439.

[16] *Vander Jagt*, 699 F.2d at 1170.

Constitution. A motion for cloture of debate on a motion to amend the Senate rules requires a two-thirds (67) vote.

Although the Court, at this stage, "must assume [the plaintiffs] will prevail on the merits of their constitutional claims," *see LaRoque v. Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011), the defendants have made a number of unsupportable claims about the merits of the filibuster under the section entitled, "Statement of Facts."[17] A number of these so-called facts are inaccurate and camouflage the harm inflicted by Rule XXII.

First, Rule XXII is not a rule of debate or deliberation— it is a rule that allows the minority to prevent debate and deliberation.

Rule XXII has been called "the shame of the Senate" by senators on both sides of the aisle. *See e.g.*, Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 Utah L. Rev. 803 (2005) (quoting Senator Edward Kennedy). The constitutionality of Rule XXII has been questioned by many senators, including Paul Douglas[18] and Tom Harkin[19] on the left and Orrin Hatch and John Cornyn on the right.[20]

Rule XXII's 60 vote requirement:

(a) Does not protect the right of the majority to debate—it gives the minority the power to prevent the majority from debating the merits of a bill or a nomination on the floor of the Senate;

[17] *See also Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1105 (D.C. Cir. 2008) ("In reviewing the standing question, the court must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims.").
[18] *See* Remarks of Paul Douglas, The Previous Question in the Senate, 103 Cong. Rec. S. 669-88 (daily ed. May 9, 1957); 107 Cong. Rec. S 242-56 (daily ed. Jan. 5, 1961).
[19] 141 Cong. Rec. S 340 (daily ed. Jan. 5, 1995); Sen. Tom Harkin, Fixing the Filibuster, The Nation (July 19, 2010).
[20] Hatch, *supra*; John Cornyn (R. Tex.), *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 Harv. J.L. & Pub. Pol'y. 1818, 195 (2003-2004) ("The essence of our democratic system of government is simple: Majorities must be permitted to govern.").

(b) Does not promote mature deliberation—it allows the minority to prevent the majority from deliberating and debating the merits of a bill or the qualifications of a judicial nominee;

(c) Does not promote compromise—it promotes gridlock by giving the minority the power to veto bills and nominations supported by the administration and a majority of senators; and

(d) Does not promote accountability—it allows the minority to avoid accountability because it never has to explain the basis for a "hold" on a bill or nomination, never has to take a position on the merits during debate, and never has to go on the record as voting against a bill or nominee.

The 60 vote requirement in Rule XXII however:

(a) Gives the minority party in the Senate the power to "embarrass the administration, [and] … destroy the energy of government," *Federalist No. 22*, by blocking the President's agenda;

(b) Gives the minority the power to deprive the President of the ability to fill critical positions in the administration and the judiciary. Compl., ¶ 49; *see* Thomas E. Mann and Norman J. Ornstein, *It's Even Worse Than it Looks,* 91, 98 (2012) (describing filibuster being used to "block the confirmation of nominees – to embarrass the president and hobble his ability to run the executive branch.");

(c) Gives the minority the power to *nullify existing laws.* Compl., ¶ 6. Mann and Ornstein call this the "The New Nullification" in which the filibuster rule is used to "prevent the implementation of laws on the books by blocking nominations, even while acknowledging the competence and integrity of the nominees." Mann & Ornstein, *supra*, at 98; and

(d) *Encourages legislative hostage taking* –by allowing individual senators to "use nominations as hostages to extract concessions from the executive branch." Mann & Ornstein, *supra*, at *85*; Compl., ¶ 31.

This is not what the Founders intended.

Second, members of legislative bodies had no minority "right of unlimited debate" at the time the Constitution was adopted.

At the time the Constitution was adopted, Senators had no "right" of "unlimited debate" and no "right" to prevent the majority from debating or voting by "filibustering." *Id*., ¶ 20. Filibusters in the English Parliament had been prohibited since 1604 when the Parliament

adopted the previous question motion as a part of its rules. The previous question motion allowed the majority to end debate and bring a matter to a vote at any time. *Id*., ¶¶ 20-22.

Filibusters were also prohibited by the rules of the Second Continental Congress which incorporated the previous question motion from English parliamentary practice as a part of its rules. *Id*., ¶ 24.

Third, the first rules of the Senate (April 1789) prohibited filibusters.

Proponents of Rule XXII contend that the right to filibuster and prevent the majority from voting was an inherent part of the Senate's fabric. This argument is a myth and a fabrication.

The first rules adopted by the Senate in April 1789 immediately after ratification of the Constitution included the previous question motion. *Id*., ¶¶ 36-37. As noted historian and Madison-biographer, Irving Brandt, has pointed out, "[f]rom 1789 to 1806, debate on a bill could be ended instantly by a majority of senators present through the adoption of an undebatable motion calling for the previous question."[21] No fewer than eleven members of the first Senate—almost half—had been delegates to the Constitutional Convention. *See Bowsher v. Synar*, 478 U.S. 714, 724 (1986) (listing names of the eleven senators).

The defendants also claim that the right of the minority to obstruct the proceedings in the Senate is what distinguishes the Senate from the House. In fact, the features that distinguish the Senate from the House are listed in the Constitution[22] and the "right of unlimited debate" or to filibuster is not among them. This list of distinguishing features in the Constitution is exclusive,

[21] Irving Brandt, *Absurdities and Conflicts in Senate Rules*, Wash. Post, Jan. 2, 1957 (reprinted in 103 Cong. Rec. 17 (1957)); *Jefferson's Manual* (Reprinted in H. Doc. 108-241, pp. 123, 125 (108th Cong., 2nd Sess. (2005)).

[22] Each state was assigned two senators chosen by the state legislature rather than by the people. Senators had six-year terms rather than two-year terms, were required to be 30 years of age, not 25, and were required to have been citizens for nine years, not seven. *Compare* Art I, sec. 2 with Art. I, sec. 3.

just as the list of cases within the original jurisdiction of the Supreme Court stated in Art. III, section 2, clause 2 is exclusive, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and the list of qualifications of members of the House of Representatives stated in Art. I, section 5 is exclusive, *see Powell v. McCormack*, 395 U.S. 486 (1969). The Senate has no right to add the filibuster or a 60 vote rule to this list.

Fourth, filibusters are an historical accident.

The first filibusters in the Senate did not occur until 1841, almost fifty years after the adoption of the Constitution. Compl., ¶ 39. Filibusters are the result of an historical accident; they did not come about by design, but as the unintended consequence of a decision by the Senate to accept the advice of Aaron Burr. In his farewell address as Jefferson's Vice President, Burr observed that the Senate rules had become too complicated and that the previous question motion could be eliminated since it had been invoked only once during Burr's four years as President of the Senate. The Senate apparently accepted Burr's advice and eliminated the previous question motion from its rules in 1806. *Id*., ¶ 38 (*citing* John Quincy Adams, Vol. 1, *Memoirs of John Quincy Adams* 365 (Charles Francis Adams ed. 1874); Sara A. Binder and Steven S. Smith, *Politics or Principle, Filibustering in the United States Senate* 38 (1997)). *See* Mann and Ornstein, *supra*, at 86 (describing the elimination of the previous question motion from the rules of the Senate as "an unintended quirk that changed history.").[23]

It was not until 1841—well after the elimination of the previous question motion from the Senate rules—that a handful of senators took advantage of the fact that there was nothing in the rules of the Senate to prevent senators from preventing a vote by filibustering the debate. Compl., ¶ 39. In 1841, Henry Clay promptly moved to amend the Senate rules to restore the

[23] *See* Ex. A attached hereto (letter dated December 2, 2010 from Binder *et al.* to the U.S. Senate at http://www.brookings.edu/research/opinions/2010/12/02-filibuster-mann-binder).

previous question motion as a part of its rules, but Clay's motion was filibustered. *Id*., ¶ 54. Numerous senators since Clay have attempted to restore majority rule to the Senate by amending the rules to allow the majority to impose limits on or end debate.[24] But all Senate reform efforts have failed, including attempts by Senators Harkin, Udall and Merkley to amend Rule XXII on the first day of the 112th Congress in January 2011.[25]

Fifth, Senate Rule XXII was adopted in 1917 to limit obstruction by filibusters, not to protect the right of Senators to filibuster.

It was not until 1917, that the Senate adopted a second rule for limiting debate. Compl., ¶ 40. The purpose of the rule—the predecessor of Rule XXII—was not to guarantee Senators the right to engage in unlimited debate (*i.e.*, to filibuster) but to provide a way to end debate, where none had existed since the elimination of the previous question motion from the Senate rules in 1806. *Id*., ¶ 44. Rule XXII, as adopted in 1917, was a compromise between senators who wanted majority rule and those who wanted to maintain the status quo and have no rule for ending debate. Rule XXII had little effect since it allowed the Senate to end debate by a two-thirds vote only on the final vote on "measures," but not on motions to proceed with debate on measures or nominations, which could still be filibustered.

Sixth, "talking filibusters" in the sense of "Mr. Smith Goes to Washington" are a thing of the past.

Although Rule XXII is commonly known as the "filibuster rule," the term "filibuster" has become an anachronism and is misleading as applied to the current practice in the Senate. The 1975 amendment to Rule XXII changed the number of votes required for cloture from two-thirds of "senators *present and voting*" to "three-fifths of the Senate" (*i.e.*, 60 votes). This apparent

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[24] *Id.*; *see Senate Cloture Rule, Limitation of Debate in the Senate of the United States and Legislative History of Paragraph 2 of Rule XXII of the Standing Rules of the United States Senate (Cloture Rule)* S. Prt. 112-31 (112th Cong. 1st Sess.).

[25] *See* 157 Cong. Rec. – S15-54 (Jan. 5, 2011); S85-95 (Jan. 25, 2011); S296-329 (Jan. 27, 2011).

"victory" for the reformers was actually a defeat. The rule change placed the burden of ending debate on the proponents while making obstruction easier by making it unnecessary for opponents of cloture to hold the floor of the Senate and "talk their heads off" in the mode of Jimmy Stewart in *Mr. Smith Goes to Washington*, Huey Long, or Strom Thurmond.[26]

Under the 1975 amendment, the absence or an abstention by a senator who sought to prevent a bill from reaching the floor is the same as a "no" vote against cloture under the 60 vote requirement. In other words, it is not necessary for opponents to hold the floor and engage in "extended debate" to block a bill or nomination from reaching the floor. The result is a "silent filibuster." A single senator can prevent any bill or nomination from reaching the floor of the Senate by putting a secret "hold" on the bill or nomination. A "hold" under Senate practice is nothing more than a signal to the majority leader that the senator intends to object in the event the majority leader disregards the "hold" and asks the Senate for unanimous consent to bring the bill or nomination to the floor of the Senate for debate and deliberation.[27]

If the majority leader chooses to ignore a "hold" and to ask the Senate for unanimous consent to schedule debate on a bill or nomination, the Senate cannot proceed with debate if an individual senator objects. The Senate must first adopt a "motion to proceed" which is a debatable motion. The objecting senators do not have to debate or to explain their opposition. The motion to proceed cannot be brought to a vote without the adoption of a motion for cloture which, under Rule XXII, requires 60 votes (unless, the issue involves a proposed amendment to the Senate rules, in which case a two-thirds vote (67) is required). Even if the motion for cloture

[26] The late Senator Strom Thurmond still holds the record for the longest filibuster: 27 hours against a civil rights bill. *See* Mann & Ornstein, *supra*, at 169.
[27] Compl., ¶ 15. Congressional Research Service, *How Measures Are Brought to the Senate Floor* 1, 4 (2003).

is adopted, the entire process can consume two weeks of valuable floor time of the Senate.[28] The minority can use this tactic to "run out the clock" and prevent the Senate from enacting vital bills. *See* Mann & Ornstein, *supra*, at 90-91 (citing three examples).

Seventh, obstruction has become the rule rather than an exception in the Senate.

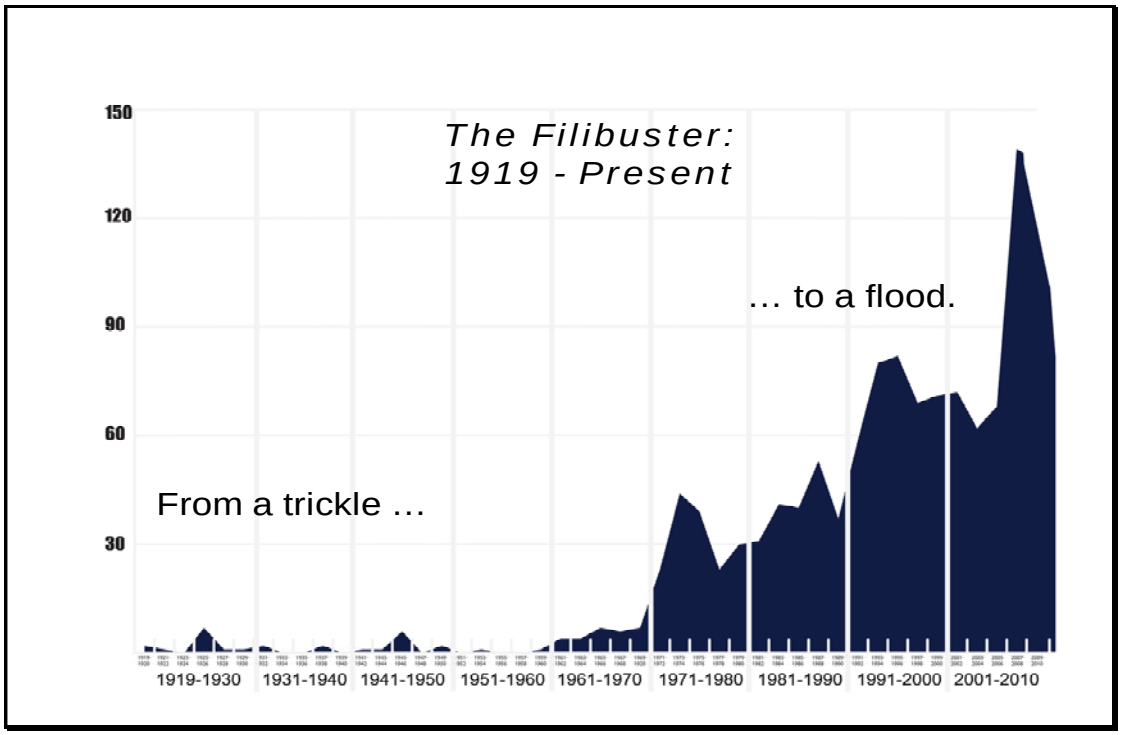
Filibusters were relatively rare from 1917 until 1970, and averaged only about one per year. Compl., ¶ 46. Rule XXII was primarily used by southern senators to block anti-lynching, fair employment, and voting rights legislation. *Id*., ¶ 34, n. 10. But the number of filibusters has grown exponentially as the Senate has become more polarized and partisan. As Mann and Ornstein have reported:

> [S]tarting in 2006, the number spiked dramatically and even more with the election of Barack Obama. In the 110th Congress, 2007-2008, and in the 111th Congress, the number of cloture motions … was on the order of two a week!

Mann & Ornstein, *supra*, at 88.

In 2009, there were a record 67 filibusters in the first half of the 111th Congress—*double the number of filibusters that occurred in the entire 20-year period between 1950 and 1969*. By April 2010, the number of filibusters had grown to a record 92, surpassing the entire number of cloture motions filed in the 109th Congress (2005-2006), and triple the number of filibusters in the entire 20-year period between 1950 and 1969. By the time the 111th Congress adjourned in December 2010, the number of filibusters had swelled to 137 for the entire two-year term of the 111th Congress. Compl., ¶ 50.

[28] Congressional Research Service, *Filibusters and Cloture in the Senate*, 18 (Feb. 18, 2011) ("[A] truly determined minority of Senators, even one too small to prevent cloture, usually can delay for as much as two weeks … [a] vote[ ] to pass a bill that most Senators support.").



Eighth, the Senate has become a zero sum game.

Senate minority leader Mitch McConnell has stated publicly that his objective is to make President Obama a one-term president[29] and has used Rule XXII to turn the Senate into the classic zero-sum game. As Mann and Ornstein have observed, Rule XXII provides "incentives for obstruction" as evidenced by "the Republicans' immense electoral success in 2010 after voting in unison against virtually every Obama initiative and priority." Mann & Ornstein, *supra*, at 102. Both sides of the aisle have used and abused Rule XXII. And the latest evidence merely reflects the most recent damage inflicted by Rule XXII.

[29] Compl., ¶ 4.

Argument

I. The Supermajority Vote Requirements in Rule XXII Conflict With the History, Structure and Language of the Constitution

Rule XXII conflicts with the history, structure, and text of the Constitution.[30]

First, the Framers experienced the negative effects of supermajority voting under the Articles of Confederation.

The Framers of the Constitution observed first-hand the paralysis caused by the Articles of Confederation's supermajority requirements. The government under the Articles could not act without the approval of delegates from of nine of thirteen states (1) whose presence was required for a quorum and (2) whose votes were required for the passage of legislation. The inability to get nine of thirteen states to agree rendered the government under the Articles weak and ineffectual. Joseph Story, *1 Commentaries on the Constitution of the United States*, § 836, p. 578 (1851 ed.) ("It was a defect of the Articles of Confederation … that no vote, except for adjournment, could be determined by the votes of a majority of states."). This gridlock under the Articles led directly to the convening of the Constitutional Convention.

"There could be but one of two rules adopted [by the Framers], either that the majority should govern or the minority should govern." Story, *supra* § 890, at 620. The Framers rejected demands that the new Constitution require more than a simple majority for purposes of a quorum and for the passage of legislation. Compl., ¶ 25. The Framers elected instead to base the Constitution on the democratic principle of majority rule with only six exceptions specified in

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

the Constitution. Compl., ¶¶ 1, 25-26. The Framers specified in the Quorum Clause[31] that no more than the presence of a "majority of each [house] shall constitute a Quorum to do Business." They also decided to require in the Presentment Clause[32] a vote of no more than a simple majority to "pass" a bill in the House and Senate prior to its presentment to the President, but to require a two-thirds vote of both Houses to "pass" a bill to override a presidential veto.

Second, the 60 vote requirement conflicts with the intent of the Framers.

James Madison and Alexander Hamilton explained why the Framers chose majority rule and rejected supermajority requirements (for purposes of a quorum and for purposes of voting) in three editions of *The Federalist Nos. 22, 58* and *75*.

Alexander Hamilton said in *The Federalist No. 22* that "***to give the minority a negative upon the majority*** (which is always the case where more than a majority vote is requisite to a decision) … ***subject[s] the sense of the greater number to that of the lesser number*** … ***but in its real operation [its effect] is to embarrass the administration, to destroy the energy of government*** *and to substitute the pleasure, caprice or artifices of [the minority] … to the deliberations and decisions of a respectable majority* … [t]he majority in order that something may be done, must conform to the views of the minority … the smaller number will overrule … the greater. Hence tedious delays—continual negotiation and intrigue." Compl., ¶ 32; *The Federalist No. 22*, at 140 (Cooke ed. 1961) (emphasis added).

James Madison conceded in *The Federalist No. 58* that "some advantages might have resulted" if the Framers had required "more than a majority … for a quorum, and … for a decision … It might have been an additional shield to some particular interests and an[] obstacle … to hasty and partial measures." But Madison concluded that "***these considerations are***

[31] Article I, sec. 5, cl. 1.
[32] Article I, sec. 7, cl. 2.

outweighed by the inconveniences … justice or the general good might require new laws to be passed … **[*T]he fundamental principle of free government would be reversed. It would no longer be the majority that would rule; the power would be transferred to the minority*** … [A]n interested minority might take advantage of [a supermajority vote requirement] to screen themselves from equitable sacrifices … or to extort unreasonable indulgences."[33]

Hamilton defended the decision of the Framers to reject supermajority voting in favor of majority rule once again in *No. 75* of *The Federalist.* Hamilton described the negative consequences that would have resulted if the Framers had adopted supermajority voting requirements such as those in Rule XXII. He pointed out that "***all provisions which require more than the majority … have a direct tendency to embarrass the operations of the government and … to subject the sense of the majority to that of the minority***." Hamilton was also prescient in warning that "If two thirds of the whole number of members [were] … required, it would … amount in practice to a necessity of *unanimity*. And the history of every political establishment in which this principle has prevailed, is a history of *impotence, perplexity and disorder*."[34]

Third, the 60 vote requirement conflicts with the Quorum Clause.

Rule XXII is inconsistent with the Quorum Clause. Under Rule XXII, the majority of the Senate cannot "do Business" —it cannot debate, deliberate or vote—over the objection of a single senator without the presence of 60 senators to vote in favor of a motion for cloture. Story, *supra* § 835, at 578 ("To require such extraordinary quorum [*i.e.*, more than a majority] would in

[33] *Id*. (emphasis added); Compl., ¶ ¶30-31 (quoting *The Federalist No. 58*, at 397 (Cooke ed. 1961)) (emphasis added).
[34] Compl., ¶ 33 (quoting *The Federalist No. 75*, at 507-08 (Cooke ed. 1961) (emphasis added).

effect be to give the rule to the minority, instead of the majority, and thus would subvert the fundamental principle of republican government.").

Fourth, the 60 vote requirement short-circuits the "single, finely wrought procedure" in the Presentment Clause for the passage of laws by the "prescribed majority of … both Houses."

There is only one procedure for passing laws in the Constitution and this procedure was intended to be the same for the Senate and for the House of Representatives. That procedure is set forth in the Presentment Clause[35] and is the "***single***, finely wrought and exhaustively considered ***procedure***" for the passage of laws by "the prescribed ***majority*** of the Members of both Houses." *Chadha*, 462 U.S. at 948, 951; *United States v. Munoz-Flores*, 495 U.S. 385, 396 (1990) ("§ 7 gives effect to *all* of its clauses in determining what procedures the Legislative and Executive Branches must follow to enact a law."). The procedure for the passage of laws by majority vote is not optional; it is mandatory and equally binding on both the Senate and the House. Congress has no power to depart from those procedures even with the concurrence of the President. *See e.g., Chadha*, 462 U.S. at 950-52 (holding the one-house veto unconstitutional); *Clinton v. City of New York*, 524 U.S. 417 (1998) (holding the line-item veto unconstitutional). It follows that the Senate, as only one house of Congress, has no greater power and cannot do so.[36]

Fifth, the 60 vote requirement is invalid because it conflicts with the exclusive list of exceptions to majority rule in the Constitution.

The 60 vote rule is an unconstitutional attempt by the Senate to add to the exclusive list of exceptions to the principle of majority rule in the Constitution. Compl., ¶¶ 26, 27, 60(c). The Framers decided that there were a limited number of decisions that were of such gravity or

[35] Art. I, sec. 7, cl. 2.
[36] *See also* Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 Duke L.J. 73 (1996).

importance that they should not be decided by the vote of a bare majority. *See, e.g., Powell,* 395 U.S. at 536 ("Madison 'observed that the right of expulsion … was too important to be exercised by a bare majority of a quorum"). They carved out six[37] specific exceptions to the principle of majority rule in which a two-thirds vote of one or both Houses is required. Compl., ¶¶ 26, 27. The enumeration of these exceptions precludes the Senate from using its rule-making power to create additional exceptions of its own. *See, e.g., Sebelius,* 132 S. Ct. at 2577 ("The enumeration of powers is also a limitation of powers because '[t]he enumeration presupposes something not enumerated.' … The Constitution's express conferral of some powers makes clear that it does not grant others.").[38]

Sixth, the 60 vote requirement upsets the balance in the Great Compromise.

Rule XXII upsets the balance in the Great Compromise between the interests of citizens in the more populous states and those of citizens in less populous states. *Cf. Chadha,* 462 U.S. at 950-51. This balance and allocation of political power is a part of the fundamental structure of the Constitution. Compl., ¶ 65. Under the Great Compromise, states were guaranteed equal representation in the Senate.[39] And under the Presentment Clause, the majority of senators representing a majority of states had the power to pass legislation and confirm nominees; they could not be prevented from exerting their will by the minority in the Senate. *See The Federalist No. 62*, p. 417 (Cooke ed. 1961) ("No law or resolution can now be passed without the

[37] Two additional exceptions to the principle of majority rule were added by the Fourteenth and Twenty-fifth Amendments. Compl., ¶ 27.

[38] *See also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (qualifications for election to the House and Senate held to be exclusive and to preclude the states from enacting term limits); *Powell*, 395 U.S. 486 (qualifications for election to the House were held to be exclusive and to prohibit the House from refusing to seat a member for any other reason); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (holding the list of cases within the original jurisdiction of the Supreme Court in Art. III, sec. 2, cl. 2 to be exclusive and to preclude Congress from adding mandamus to that list.).

[39] Art. I, sec. 3.

concurrence, first, of a majority of the people, ***and then, a majority of the states***.") (emphasis added.

Rule XXII fundamentally alters that constitutional balance. It takes power away from the majority of states by giving a minority of senators (41) from a minority of states (21 of 50) with as little as 11% of the population the power to override the opinions of as many as 59 senators elected from 30 states that may represent as much as 89 % of the nation's population.

Seventh, Rule V in combination with Rule XXII prohibits the Senate from amending its rules by majority vote and is unconstitutional.

Rule V was adopted in 1959 to overrule a 1957 advisory opinion of then Vice President Richard Nixon that said the Senate could amend its rules on the first day of each new Congress, there being nothing in the Senate rules to the contrary. Rule V states that the "rules of the Senate shall continue from one Congress to the next Congress unless … changed as provided in these rules." Rule XXII prohibits cloture of debate on a motion to amend the Senate rules without a two-thirds vote.

The two rules in combination are unconstitutional because they have made it impossible as a practical matter for the Senate to amend the filibuster rule. Compl., ¶ 55. First, the two-thirds vote requirement violates Art. I, section 5, clause 2, by depriving the Senate of the power to amend its rules by majority vote. Second, the two-thirds vote requirement violates the firmly established principle that one generation of legislators cannot tie the hands of their successors.[40]

[40] *See e.g., United States v. Winstar Corp.*, 518 U.S. 839, 872-73 (1996); *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932) ("[T]he will of a particular Congress … does not impose itself upon those to follow in succeeding years."); *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 621 (1899); *Newton v. Commisioners*. 100 U.S. 548, 559 (1880) ("[T]here can be no … irrepealable law …. Every succeeding Legislature possesses the same … power … as its predecessors … of repeal and modification which the former had."); *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U.S. 416, 431 (1853) ("[N]o one Legislature can, by its own act, disarm their successors of any powers."); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810); I William

II. Plaintiffs' Constitutional Claims Are Justiciable.

The Supreme Court has ruled that the power delegated to each House by Article I, section 5, clause 2 of the Constitution "to determine the Rules of its Proceedings" is not unlimited. Nor is it immune from judicial review.[41] The Senate cannot evade the procedural requirements of the Constitution by claiming that Rule XXII only operates at the preliminary stages of the legislative process and does not affect the number of votes ultimately needed to pass legislation. A similar argument was made in the White Primary cases and was rejected for similar reasons.[42] Such an argument would render the Presentment Clause's rule-making procedures illusory and allow the Senate to evade constitutional constraints. The two landmark cases identifying such limits on the Senate's rulemaking authority are *United States v. Ballin*, 144 U.S. 1 (1892) and *United States v. Smith*, 286 U.S. 6 (1932).

First, in *Ballin*, the Supreme Court proclaimed that while "the constitution empowers each house to determine its rules of proceedings, ***[i]t may not by its rules ignore constitutional restraints or violate fundamental rights***." (emphasis added)." 144 U.S. at 5.

Second, in *Smith*, 286 U.S. 6, the Supreme Court applied *Ballin* and set aside an attempt by the Senate to reconsider and rescind its confirmation of an appointee to the Federal Power

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Blackstone, *Commentaries on the Common Law*, at 90 (St. George Tucker ed. 1803). *See also* Aaron-Andrew Bruhl, *Burying the 'Continuing Body' Theory of the Senate*, 95 Iowa L. Rev. 1401 (2010); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 Stan. L. Rev. 181, 295 (1997); John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation*, 91 Cal. L. Rev. 1773 (2003); John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 Harv. J.L. & Pub. Pol'y, 181, 204 (2003) ("Just as one Congress cannot enact a law that a subsequent Congress could not amend by a majority vote, one Senate cannot enact a rule that a subsequent Senate could not amend by majority vote.").

[41] *United States v. Ballin*, 144 U.S. 1, 5 (1892); *United States v. Smith*, 286 U.S. 6 (1932).

[42] *See, e.g.*, *Morse v. Republican Party of Virginia*, 517 U.S. 186, 235 (1996) (Breyer, J., concurring) ("They knew, too, that States had tried to maintain that status quo through the 'all-white' . . . by permitting white voters alone to select the 'all-white' Democratic Party nominees, who were then virtually assured of victory in the general election.").

Commission, under a Senate rule that reserved to the Senate the power to reconsider a confirmation vote within three days. The Senate argued that its power to interpret its own rules was immune from judicial review. This argument was unanimously rejected by the Supreme Court; it held that questions concerning the validity of the Senate's rules or procedures are justiciable. As Justice Brandeis explained: when "the construction to be given to ***the [Senate's] rules affects persons other than members of the Senate, the question presented is of necessity a judicial one***" and is "sole[ly] … ***one of law***."[43] The Court noted that while "the court must give great weight to the Senate's … construction of its own rules,… *we are not concluded by it*."[44]

The Supreme Court has followed *Ballin* and *Smith* in subsequent cases in which the Court rejected interpretations by congressional committees of their own rules. *See e.g., Yellin v. United States*, 374 U.S. 109, 114 (1963) ("It has long been settled … that rules of Congress are judicially cognizable"); *Christoffel v. United States*, 338 U.S. 84 (1949); *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1170, 1173 (D.C. Cir. 1982) ("Article I does not alter our judicial responsibility to say what rules Congress may not adopt because of constitutional infirmity.… [I]f Congress should adopt internal procedures which 'ignore constitutional restraints or violate fundamental rights,' it is clear we must provide remedial action").

The defendants, nevertheless, contend that the constitutionality of the supermajority vote provisions in Rule XXII is a non-justiciable political question. According to defendants, the validity of Rule XXII is "textually committed" by Article I, section 5, clause 2, to the Senate; this Court, in the defendants' view, lacks judicially manageable standards for resolving

[43] *Id*. at 30, 33.
[44] *Id.* at 33 (emphasis added).

plaintiffs' claims and adjudication would "intrude into the Senate's internal proceedings" and "express [a] lack of respect" for a coordinate branch.[45]

As explained below, defendants' arguments have been rejected in a long line of Supreme Court cases and are without merit.

A. The validity of a Senate rule is not the kind of political question that is beyond the jurisdiction of the federal courts.

"[T]he mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection 'is little more than a play upon words'…. The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."[46]

For example, in *Chadha*, 462 U.S. at 942-43, the Supreme Court rejected the idea that any issue involving "political overtones" is necessarily a "political question." In the context of the one-House, legislative veto, the Court stated that while "[i]t is correct that this controversy may … be termed 'political … the presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine. Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications." After all, the Court noted, "*Marbury v. Madison* … was also a 'political case.'" *Id*. Indeed, the Supreme Court has not hesitated to rule on cases with far greater political implications than this one. *See e.g.*, *Bush v. Gore*, 531 U.S. 98 (2000) (outcome of the 2000 Presidential election); *Wesberry v. Sanders,* 374 U.S. 1 (1964) (reapportionment of congressional districts); *Int'l. Fed. of Bus. v. Sebelius,* 132 S. Ct. 2566, 2607-08 (2012) (validity of the Affordable Healthcare Act); *Clinton v. City of New York*, 524

[45] Def. Br. at 40.
[46] *Baker v. Carr*, 369 U.S. 186, 209, 217 (1962).

U.S. 417, 439 (1998) (Line Item Veto Act); *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (power of Congress to regulate campaign expenditures by corporations and Super PACs); *Powell v. McCormack*, 395 U.S. 486 (1969) (whether the House could refuse to seat Rep. Powell).

B. The validity of a Senate rule is not "textually committed solely to the Senate by the Constitution" to the exclusion of the courts; nor are the rules of the Senate entitled to greater immunity from judicial review than federal statutes.

The defendants analogize Article I, section 5's delegation to each House of the power to determine the rules of its proceedings to the provision in Article I, section 3 that states that "the Senate shall have *sole* power to try all Impeachments." Defendants contend that the delegation of the power to make rules reflects a "textual commitment of the same quality as the commitment" to the Senate to try impeachments which was held to be non-justiciable in *Nixon v. United States*, 506 U.S. 224 (1993) (Judge Walter Nixon). This contention is flatly inaccurate.

The *Nixon* Court based its decision on the express language in the text of the Constitution that the Senate "shall have the *sole* power to try all impeachments"[47] and "the next two sentences [which] specifi[ed] the requirements to which the Senate proceedings shall conform."[48] The Court held that the debate at the Constitutional Convention reflected a conscious decision on the part of the Framers to *exclude* the Supreme Court from the impeachment process.[49] As the Court recognized, if the Justices ruled on impeachments, they would be the final judges of their own powers (*i.e.*, they could block judicial impeachments).

By contrast, there is no comparable language in the text of Article I, section 5 or in the debates at the Constitutional Convention. The power of each House to determine the rules of its proceedings in Article I, section 5 is more analogous to the power of each House to pass laws in

[47] Art. I, sec. 3, cl. 6.
[48] 506 U.S. at 229.
[49] 506 U.S. 233-34.

Article I, section 7 than it is to the power of the Senate to "try all impeachments." Although the Constitution grants the power to make laws to the *elected* political branches, the Supreme Court has consistently held since *Marbury v. Madison*[50] that the validity of those laws is not a political question, but a question of law to be decided by the courts. Moreover, unlike *Nixon*, judicial review of the Senate's rules ensures that the Senate is not the sole judge of its own powers.

It cannot be that statutes adopted by both Houses of Congress are subject to judicial review while a mere internal *rule* adopted by only one House of Congress, without the consent of the other House or the President, is exempt from judicial scrutiny. *Ballin*, *Smith*, and *Yellin* leave no room for doubt that rules and statutes are equally subject to judicial review.

The power of each House to make rules is more akin to the power granted to each House by Article I, section 5, clause 1 to judge the qualifications of its own members. In *Powell v. McCormack*, 395 U.S. 486, 518-22 (1969), the Court held that the delegation of power to each House to judge the qualifications of its own members did not reflect a "textual commitment" to the House, to determine in its sole discretion, whether Rep. Adam Clayton Powell could be seated. The House argued that the issue was a non-justiciable political question. The Court rejected this contention:

> ***Especially is it … 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 [courts] to determine … whether the powers … even … of the legislature … have been exercised in conformity to the Constitution; and if they have not to treat their acts as null and void.

Id. at 506 (emphasis added) (*quoting Kilbourn v. Thompson* , 103 U.S. 168, 199 (1881)); *see also Chadha*, 462 U.S. at 941 (the grant to Congress in Art. I, sec. 8 of plenary power over aliens

[50] 5 U.S. (1 Cranch) 137 (1803).

exists only so long as the exercise of the power does not offend some other provision of the Constitution and is not a political question that is immune from judicial review); *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964) (delegation to the states in Art. I, sec. 4 of the power to draw congressional district lines and the reservation to Congress of the power "to make or alter [those] regulations," did not make the question of the constitutionality of congressional districts under the one-person-one-vote rule a political question or preclude judicial review).

These cases recognize limits on enumerated powers granted to Congress by Article I of the Constitution, including the power to make procedural rules. *See e.g.*, *Sebelius,* 133 S. Ct. at 2566 (identifying limits under the Commerce Clause); *Marbury v. Madison*, 5 U.S. (1 Cranch) at 177 ("[T]he powers of the legislature are defined and limited; and those limits may not be mistaken, or forgotten, [because] the constitution is written."); *Chadha*, 462 U.S. at 941; *Buckley v. Valeo*, 424 U.S. 1, 132 (1976); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1994) (power of states to regulate time, place, and manner of election was "not a source of power to dictate electoral outcomes"). In short, just as this Court is empowered to review a statute passed by both Houses of Congress, this Court is authorized to review an internal Senate rule.

C. The defendants' claim that the Court is being asked to "rewrite" the rules of the Senate is a mischaracterization of plaintiffs' claims and is contradicted by the complaint's allegations, which must be accepted as true.

The defendants claim that the plaintiffs ask this "Court [to] rewrite the rule governing the length of debate in the Senate."[51] Based on this false premise, defendants argue that "plaintiffs

[51] Def. Br. at 41 n 35.

have not and cannot identify any constitutional provision that expressly regulates the time for debate or requires the Senate to vote … within a certain time period." Defendant's Br. at 41.[52]

The defendants have ignored the complaint's plain language, mischaracterized plaintiffs' claims, and mischaracterized the requested remedy. The complaint explicitly states that the plaintiffs are *no*t asking the Court to *rewrite* either Rule V or Rule XXII.[53] Nor are the plaintiffs asking this court to "prescribe when or in what order business is conducted"[54] in the Senate or to "rewrite" the rules of the Senate governing the length of speeches or debate. Defendants' claim that plaintiffs are asking the court to declare *all* of "Rule XXII unconstitutional [which] would leave the Senate with no mechanism to close debate"[55] is also flatly untrue.

Plaintiffs ask that the Court to declare only the *supermajority vote portions* of Rule XXII unconstitutional, and to *sever only the unconstitutional portions* of that Rule from the remainder of Rule XXII—just as the Supreme Court did in the Affordable Health Care Act case of *Sebelius*, 132 S. Ct. at 2607-08, *Chadha*, 462 U.S. at 959, and scores of other cases. Compl., ¶ 77. "Unless it is 'evident'" that the Senate would have chosen no cloture rule over a rule that would allow cloture by majority vote, the Court "must leave the rest of [Rule XXII] intact. *Sebelius*, 132 S. Ct. at 2607.

As stated in the complaint, a declaratory judgment in the plaintiffs' favor would not leave the Senate without a cloture rule, but with a rule that allows the Senate to adopt a cloture motion and to amend its own rules by *majority vote*.

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[52] Contrary to defendants' assertion, the plaintiffs have identified in the complaint a long list of provisions in the Constitution that are violated by the supermajority provisions in Rule XXII. Compl., ¶¶ 58, 59(a)-(f), 60(a)-(f), 62, 74, and 75.
[53] Compl., ¶¶ 76-78.
[54] Def. Br. at 42.
[55] Def. Br. at 34.

> Once a declaratory judgment has been entered declaring *the italicized portions* of Rule XXII [that contain the supermajority vote requirements] … invalid, *the "general rule of all parliamentary bodies … that, when a quorum is present, the act of a majority of the quorum [shall be] the act of the [Senate]"*[56] *… will apply to all future motions for cloture under Rule XXII,* and the democratic principle of majority rule will be restored [to the Senate].

Id., ¶ 78 (emphasis added).[57] The defendants ignore the complaint's explicit language.

D. The Constitution provides judicially manageable standards for determining whether the supermajority voting requirements in Rule XXII are unconstitutional.

The defendants argue that the courts lack "judicially manageable standards" to adjudicate the appropriate length of debate in the Senate.[58] This is yet another straw man. Plaintiffs do not ask the Court to determine "the appropriate length of debate."[59] The plaintiffs ask only that the Court determine whether the supermajority vote requirements in Rule XXII are unconstitutional. And "[i]t is emphatically the province and duty of the [courts] to say what the law is" by interpreting the Constitution. *Marbury*, 5 U.S. (1 Cranch) at 177.

Plaintiffs seek a declaratory judgment, the exact same relief that the Court granted in *Powell*. 395 U.S. at 549 (authorizing declaratory judgment against House employees for unconstitutionally refusing to seat Rep. Powell). Just as in *Powell*, the plaintiffs seek a declaration "determin[ing] that the [Senate] was without power" to condition Senate action on the vote of a supermajority rather than a simple majority. *Id*. Such a declaration "requires an interpretation of the Constitution—a determination for which clearly there are 'judicially' []

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[56] *Ballin*, 144 U.S. at 6.
[57] *See also F.T.C. v. Flotill Products, Inc.*, 389 U.S. 179, 183-84 (1967) ("[T]he almost universally accepted common-law rule is the precise converse-that is, in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body. Where the enabling statute is silent on the question, the body is justified in adhering to that common-law rule.").
[58] Def. Br. at 43.
[59] *Id*.

manageable standards." *Id*. Indeed, the defendants advance no argument as to why Rule XXII is any less justiciable than the one-House veto in *Chadha*. 462 U.S. at 942 ("Article I provides the 'judicially discoverable and manageable standards . . . for resolving the question[s] presented in this case . . . [T]he constitutionality of [the line-item veto statute] is for this Court to resolve."). Nor has it explained why ruling on Rule XXII would be any less appropriate than the Court's treatment of a Senate rule in *Smith.* 286 U.S. at 33. As the Court noted in *Smith*, the question of the validity of Senate rule is "necessarily a judicial one" and involves "sole[ly] [a] question … of law" for the courts.

E. Judicial review of the validity of the Senate rules does not reflect any lack of respect for the Senate; it respects the Constitution.

Whenever the constitutionality of the executive and legislative branches' conduct is challenged, the political branches argue that courts should not "intrude" into the operations of a coordinate branch of government; to do so would be disrespectful. Those same arguments were made and rejected in *Chadha*, *Nixon*, *Powell*, and *Smith*.

The Constitution is the supreme law of the land.[60] The federal courts show no disrespect for other branches of government when they perform their constitutionally assigned duties to review and rule upon the constitutionality of acts of the President (as in the *Steel Seizure* case, the *Nixon Tapes* case, and the *Line Item Veto* cases), or the joint acts of Congress and the President (as in *Marbury*), or of only one House of the legislative branch (as in *Powell* and *Chadha*). Such determinations fall within the traditional role accorded courts to interpret the law and do not involve a "lack of the respect due [a] coordinate [branch] of government." *Powell*, 395 U.S. at 548 (*quoting Baker*, 369 U.S. at 217). And, as Chief Justice Roberts recently reminded, "[d]eference in matters of policy cannot . . . become abdication in matters of law . . .

[60] Art. VI, sec. 2.

[R]espect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed." *Sebelius*, 132 S. Ct. at 2579.

III. Each of the Plaintiffs Has Standing to Challenge the Injury Inflicted by Rule XXII's Supermajority Voting Requirements.

Erika Andiola, Celso Mireles and Caesar Vargas ("the DREAM Act plaintiffs"), Representatives John Lewis, Michael Michaud, Hank Johnson, and Keith Ellison ("The House plaintiffs"), and Common Cause each independently satisfy the Article III requirements for standing. The Court need only find that ***one plaintiff has standing*** before deciding the merits.[61]

A. Plaintiffs Seek to Enforce Procedural Rights, Which Have Different Standing Requirements Than Substantive Rights Claims.

The Supreme Court has recognized that "***procedural rights are special***." *Lujan*, 504 U.S. at 573 n.7. "[***T]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy***." (emphasis added). *Id*. In fact, "the Supreme Court has made clear that neither the causation requirement nor the redressability requirement for constitutional standing should hinder enforcement of procedural rights." *Idaho By & Through Idaho Pub. Utils. Comm'n v. I.C.C.*, 35 F.3d 585, 591 (D.C. Cir. 1994).

[61] *See, e.g., Crawford v. Marion County Election Bd.*, 553 U.S. 181, 189 (2008) ("We also agree with the unanimous view of those judges that the Democrats have standing to challenge the validity of SEA 483 and that there is no need to decide whether the other petitioners also have standing."); *Bowsher*, 478 U.S. at 721 (holding that where one union member "will sustain injury… this is sufficient to confer standing---[and] we therefore need not consider the standing issue as to the Union or Members of Congress."); *Bldg. & Constr. Trades Dep't., AFL-CIO v. Allbaugh*, 172 F. Supp. 2d 67, 74 (D.D.C. 2001) ("A court need not determine the standing of a party when the standing of others has been established.") (Sullivan, J.); *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) ("Because we find California has standing, we do not consider the standing of the other plaintiffs."); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977) ("Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit.").

In *Lujan*, the Supreme Court explained the framework for establishing Article III standing for procedural injuries. The Court noted that individuals can "enforce procedural rights," provided that "the procedures in question are designed to protect some threatened *concrete interest* of his that is the ultimate basis of his standing." 504 U.S. at 573 n.8 (emphasis added). And the procedures in question here—the procedures governing the enactment of statutes set forth in the text of Article I—are a Bill of Rights, *Sebelius*,132 S. Ct. at 2578, designed to protect the *concrete interests* of the plaintiffs.

The Supreme Court has held that individuals are entitled to the protection of Article I's procedures governing the enactment of statutes. Thus, in *INS v. Chadha*, the Supreme Court held that a deportable alien had standing to challenge an attempt by one House of Congress to repeal an administrative regulation in violation of Article I's procedures governing the enactment of statutes. 462 U.S. at 954. The Court explained that "[t]he prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, *procedure*." *Chadha*, 462 U.S. at 954 (emphasis added). In *Clinton v. New York*, 524 U.S. at 440, the Supreme Court followed *Chadha* and reaffirmed the individual right of private parties to "[t]he *procedures* governing the enactment of statutes set forth in the text of Article I." *See also United States v. Munoz-Flores*, 495 U.S. 385, 396 (1990) (noting that the Court must "give effect . . . to *all* of [§7's] clauses in determining what procedures the Legislative and Executive Branches must follow to enact a law.") (emphasis added).

Article I is a Bill of Rights that protects individuals who have been injured by the failure of one or both Houses of Congress to comply with the procedures for enacting laws. *Cf. Sebelius*, 132 S. Ct. at 2578 ("'[T]he Constitution is itself, in every rational sense, and to every

useful purpose, A BILL OF RIGHTS.'") (Roberts, C.J., quoting Alexander Hamilton in *The Federalist No. 84*)). Such structural constitutional limits are designed to "protect the individual." *Bond v. United States.*, 131 S. Ct. 2355, 2365 (2011) ("The recognition of an ***injured person's standing*** to object to a violation of a constitutional principle that allocates power within government is illustrated. . . by cases in which individuals sustain discrete, justiciable injury from actions that transgress separation-of-powers limitations. . . . ***The structural principles secured by the separation of powers protect the individual as well***.") (emphasis added).

When plaintiffs suffer a *procedural injury*, they are entitled to a *procedural remedy*. They need not prove that they would have received a substantive benefit had the procedure been followed. As the *Lujan* Court noted:

> The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though *he cannot establish with any certainty* that the statement will cause the license to be withheld or altered, and even though the dam *will not be completed for many years*.

504 U.S. at 573 n. 7 (emphasis added). Indeed, "***[a] plaintiff asserting procedural injury never has to prove that if he had received the procedure the substantive result would have been altered***." *City of Dania Beach v. F.A.A.*, 485 F.3d 1181, 1186 (D.C. Cir. 2007) (emphasis added); *Sugar Cane Growers Co-op. of Florida v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002). A litigant need not show that the substantive outcome will be any different once the procedural defect, here the Senate's procedures, has been restored. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) ("Of course, he may be unable to prove his allegation before the District Court; but he is entitled to *the opportunity* to try."); *Yellin*, 374 U.S. at 121 ("*Yellin might not prevail* . . . But he is at least entitled to have the Committee follow its

rules and give him consideration according to the standards it has adopted in Rule IV."); *McGarry v. Sec'y of Treasury*, 853 F.2d 981, 985 (D.C. Cir. 1988) ("It is a well-established rule that a party suing to vindicate such rights need not make a showing that the agency would have acted differently."); *cf. Baker*, 369 U.S. at 208 ("It would not be necessary to decide whether appellants' allegations of impairment of their votes by the 1901 apportionment will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it . . . They are asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes, not merely a claim of the right possessed by every citizen to require that the government be administered according to law."); *N.E. Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("***It follows from our definition of 'injury in fact' that petitioner has sufficiently alleged both that the city's ordinance is the 'cause' of its injury and that a judicial decree directing the city to discontinue its program would 'redress' the injury.***"); *Comm. for Full Employment v. Blumenthal*, 606 F.2d 1062, 1065 (D.C. Cir. 1979) ("Complainants are injured if this procedural right is denied them, regardless of whether their complaint is ultimately found meritorious."); *Spirit of Sage Council v. Kempthorne*, 511 F. Supp. 2d 31, 40-41 (D.D.C. 2007) ("[T]he fact that an agency may still in its discretion choose not to revoke a permit if the Court strikes down the PRR *does not defeat the redressability* prong of standing.") (Sullivan, J.) (emphasis added for all italics and bold).

Therefore, this Court may redress the plaintiff's Article I procedural injury by providing the procedural remedy that they have requested: the elimination of the supermajority voting provisions of Rule XXII.

B. This Case Is Distinguishable From Prior Challenges to Rule XXII.

The defendants contend that because the plaintiffs did not have standing in *Judicial Watch, Inc. v. United States Senate*, 340 F. Supp. 2d 26, 32, 36 (D.D.C. 2004), *aff'd*, 432 F.3d 359 (D.C. Cir. 2005) (allegation of substantive injury: "delayed justice"); *Page v. Shelby*, 995 F. Supp. 23 (D.D.C.), *aff'd*, 172 F.3d 920 (1998) (*pro se*); and *Page v. Dole*, No. 93-1546 (D.D.C. Aug. 18, 1994) (*pro se*), the DREAM Act plaintiffs, the House plaintiffs, and Common Cause do not have standing in this case. This argument overstates the significance of *Judicial Watch* and the *pro se Page* cases, which ultimately, *support* the plaintiffs' standing in this case, which is far stronger than that of the plaintiffs in *Judicial Watch* or *Page*.

1. *Judicial Watch* Supports the Proposition that the Plaintiffs Need Not Prevail on the Merits to Show Injury.

Judicial Watch alleged that the slow pace of judicial confirmations caused a *substantive*—not a procedural—injury to Judicial Watch as an organization by "delay[ing] justice" and "harm[ing] the proper functioning of the judiciary." 340 F. Supp. 2d at 32, 36. The district court ruled that Judicial Watch failed to "establish a *legally protected interest*" because it could not show a legally recognized injury under 28 U.S.C. § 44, the First Amendment, and the Fifth Amendment. *Id*. at 36.

On appeal, the D.C. Circuit did not accept the district court's "legally protected interest" analysis. Instead, the D.C. Circuit "assume[d] *arguendo* that Judicial Watch ha[d] *met the injury-in-fact requirement*," 432 F.3d at 360 (emphasis added), but held that "Judicial Watch ha[d] failed to substantiate either essential link between Rule XXII and delayed vacancy filling, and between delayed vacancy filling and delayed adjudication" on cases where Judicial Watch was a party. In other words, Judicial Watch could not show causation. *Id*. at 362.

In a separate concurring opinion, Judge Williams criticized the district court's "injury" analysis and warned that "the use of the phrase 'legally protected' to require showing of a substantive right would thwart a major function of standing doctrine—to avoid premature judicial involvement in resolution of issues on the merits." *Id*. at 364. He further noted that the phase "legally protected interest" is not a "requirement that the interest be one affirmatively protected by some positive law, either common law, statutory or constitutional." *Id*. at 363.

Judge Williams's view is consistent with Supreme Court and D.C. Circuit authority, which requires litigants to show no more than *injury-in-fact*. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152-53 (1970) ("The first question is whether the plaintiff alleges that the challenged action has caused him *injury in fact*, economic or otherwise."). This is because "[t]he 'legal interest' test goes to the merits. The question of standing is different." *Id*.; *Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997) ("[I]n *Lujan* the Court characterized the 'legally protected interest' element of an injury in fact simply as a 'cognizable interest' and, *without addressing whether the claimants had a statutory right to use or observe an animal species*, concluded that the desire to do so 'undeniably' was a cognizable interest.") (emphasis added); *cf. Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 239 F.R.D. 9, 17 (D.D.C. 2006) ("A court should ask not whether a 'legal right' was invaded, the Court observed, but rather whether the plaintiff has suffered an '*injury in fact*.'") (emphasis added). This principle is consistent with recent proclamations by the D.C. Circuit that "in assessing [p]laintiffs' standing, [the Court] must assume they *will prevail on the merits* of their constitutional claims." *LaRoque v. Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011) (emphasis added). In short, *Judicial Watch* supports the plaintiffs' argument that they need not show—at

this stage—that it will prevail on the legal merits to satisfy the injury-in-fact requirement for standing.

2. The *Pro Se* Plaintiff in the *Page* Cases Failed to Show That Rule XXII Blocked Any Specific Legislation Or Caused Him Any Specific Injuries.

The two *Page* cases were *pro se* suits brought by Douglas R. Page, a *pro se* lawyer, who was apparently upset that his two Senators were "denied equal suffrage in the Senate" and that the filibuster "dilute[d] his voting power." *Page*, 995 F. Supp. 23 at 26, 27. Page's only allegation of injury was speculation that Rule XXII would be used "to prevent the passage of unspecified legislation favored by Page." *Id*. at 27. But Page could not show injury. *Id*. at 27. ("This Court cannot find that a litigant has standing *based solely on his speculation* that, no matter which party's senatorial candidates he votes for, Senators of the other political party will invoke Rule XXII to prevent the passage of *unspecified legislation* favored by Mr. Page.") (emphasis added). Page failed to "provide examples of the types of legislation he favors and d[id] not indicate how he personally has been or will be injured if that legislation fails to become law." *Id. at 28.* Unlike *Page*, the plaintiffs in this suit have identified *specific legislation*—of which they would have been the direct beneficiaries—that was unconstitutionally denied consideration by the Senate by Rule XXII. Moreover, they have alleged and explained how their concrete interests were impacted by the specific use of Rule XXII on two specific bills, the DREAM Act and the DISCLOSE Act. *See, e.g.*, Compl. ¶ ¶ 9A-9E.

Importantly, the *Page* court did not hold that the failure of the Senate to consider a bill in violation of constitutional procedural requirements could never be a cognizable injury to the intended beneficiaries of the bill. But the district court did incorrectly conflate the merits of Page's constitutional argument with the question of whether he had standing. *See Page*, 995 F.

Supp. at 28. That is, the district court noted that "Mr. Page's claims of injury are insufficient because the votes of 51 Senators are still all that is necessary to enact any particular legislation." *Id*. (citing *Skaggs v. Carle*, 110 F.3d 831 (D.C. Cir. 1997)).

First, this conflation of the merits with standing is impermissible, and therefore, the district court's reasoning in *Page* was incorrect. *See also Coker v. Bowen*, 715 F. Supp. 383, 386 (D.D.C. 1989) *aff'd sub nom. Coker v. Sullivan*, 902 F.2d 84 (D.C. Cir. 1990) ("The standing inquiry should not be a mask for a court's view of the merits of the case."). And unlike *Page*, in this case, the defendants *do not dispute* the merits, *i.e.*, they make no effort to defend the proposition that Rule XXII is constitutional. Even if the defendants had challenged the merits, "in assessing [p]laintiffs' standing, [the Court] *must assume* the[] [plaintiffs] will prevail on the merits of their constitutional claims." *LaRoque*, 650 F.3d at 785.

Moreover, *Page* is not controlling because the "injury" allegations here (assuming that one can properly refer to the merits as part of the injury analysis, which is improper) are far more specific, individualized, and concrete. As noted in Section I *supra* and the complaint, Rules V, VIII, and XXII in combination violate several provisions of Article I of the U.S. Constitution, including the Quorum Clause,[62] the Presentment Clause,[63] the power of the Vice President to break ties,[64] the scope of the Senate's powers to make procedural rules,[65] Article II's Advice and Consent clause,[66] the equal representation of states in the Senate,[67] principles embodied in the Great Compromise,[68] and the separation of powers. Compl., ¶¶ 57-70. Page did not raise these

[62] Art. I, sec. 5.
[63] Art. I, sec. 7.
[64] Art I., sec. 3, cl. 4.
[65] Art I., sec. 5, cl. 2.
[66] Art II, sec. 2, cl. 2.
[67] Art I., sec. 3 combined with Article V.
[68] Compl., ¶¶ 61-70.

merits arguments: he only alleged a dilution of his vote. *Page*, 995 F. Supp. at 28 n.3 ("Mr. Page refers to his alleged injury as dilution of his vote, the vote dilution cases he cites are not applicable in this situation."). Nor did he allege that the combination of these constitutional violations caused his injury. Therefore, *Page*'s discussion of injury does not bind this Court. Even if 51 Senators still technically have the power to vote on the final passage of legislation that comes up for a majority vote, ***the entire purpose and effect of Rule XXII's supermajority voting requirement is unconstitutional; it allows a minority of Senators to prevent a bill from reaching the floor of the Senate, no matter what the majority desires***. *See* Section I *supra* (explaining how Rule XXII violates Article I's single, finely wrought and exhaustively considered procedure for the enactment of legislation).

The district court's reasoning in *Page* ignores the practical impact of Rule XXII. The power of the majority to enact legislation by 51 votes is nullified if the minority in the Senate can use Rule XXII to ensure that the majority never gets an opportunity to vote on a bill that the minority opposes. To argue that Rule XXII only deals with cloture, which is a mere preliminary matter of procedure, and not the actual vote on whether a bill passes is reminiscent of the White Primary Cases, where some argued that black voters were not harmed by their exclusion from the primary elections because they could participate in the final stage of the general election. *See Nixon v. Herndon*, 273 U.S. 536, 540 (1927) (Holmes, J.); *Nixon v. Condon*, 286 U.S. 73 (1932) (Cardozo, J.); *Morse v. Republican Party of Virginia*, 517 U.S. 186, 235 (1996) (Breyer, J., concurring) ("They knew, too, that States had tried to maintain that status quo through the 'all-white' . . . by permitting white voters alone to select the 'all-white' Democratic Party nominees, who were then virtually assured of victory in the general election."). If a Senator successfully invokes Rule XXII to prevent a bill from reaching the Senate floor, he has been "assured of

victory" without having to bother with an actual floor vote. *Id*. As the Supreme Court has said, "Constitutional rights would be of little value if they could be . . . indirectly denied. The Constitution nullifies sophisticated as well as simple-minded modes of infringing on constitutional protections." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 830 (1994).[69]

3. *Page* Mistakenly Relied on *Skaggs v. Carle*, Which Supports the Plaintiffs' Claim for Standing.

Page mistakenly relied on *Skaggs v. Carle*, 110 F.3d 831, 834 (1997), for the proposition that Page could not show an injury because 51 Senators retained the right to pass legislation. 995 F. Supp. at 28. But *Skaggs supports* the plaintiffs' case for standing here.

In *Skaggs v. Carle*, the D.C. Circuit rejected a challenge by members of the House of Representatives to the constitutionality of House Rule XXI(5)(c), which required a three-fifths supermajority vote to pass bills raising federal income taxes. The plaintiffs argued that the rule diluted their votes by requiring more than a majority for the enactment of certain statutes. In a 2-1 decision, the court held that the House members' standing was dependent on whether "Rule XXI(5)(c) *in fact* renders the votes of 218 Members inadequate to pass legislation carrying an income tax increase. If the votes of a simple majority are still sufficient, ***in practice***, to pass such legislation, then Rule XXI(5)(c) has not caused the vote dilution that would establish their injury for the purpose of standing under Article III." 110 F.3d at 834-35 (emphasis added).

The court focused on the practical realities of the rule—not formal distinctions. After reviewing evidence showing that the majority had, in fact, been able to *suspend that rule* and exert its will when it desired, the court noted that "[b]oth the House Rules and their role in the 104th Congress strongly suggest that Rule XXI(5)(c) does not prevent 218 Members set upon

[69] *Id*. at 829 ("[T]hat which cannot be done [directly] by express statutory prohibition cannot be done by indirection.").

passing an income tax increase from working their legislative will." *Id*. at 835 ("[T]he House Rules allow any Member to introduce a resolution to amend or to repeal Rule XXI(5)(c), and any such resolution could be adopted by the vote of a simple majority.").

The court found "telling . . . that on at least four occasions during the 104th Congress, the House had voted to waive the requirement of Rule XXI(5)(c) in order to allow a simple majority to enact legislation that increased income tax rates." *Id*. Thus, the court ultimately concluded that plaintiffs failed to allege more than a conjectural or hypothetical injury because the record showed that "when a simple majority wanted to vote for legislation increasing income tax rates, the House voted to waive the Rule." *Id*.

In contrast to the House, Senate rules do not allow for the rules to be suspended without an amendment to the Senate rules. And Rule XXII cannot be amended unless 67 Senators support a motion for cloture. In other words, the reason why the *Skaggs* plaintiffs could not show injury—the House rule in question was, in practice, subject to the will of the majority—is precisely why the plaintiffs can show injury and standing in this case, namely, Rule XXII, as a factual matter, consistently thwarts the will of the majority of the Senate. *See* Compl., ¶¶ 47-54. Therefore, *Skaggs* cannot support the reasoning of the district court in *Page*; it supports the plaintiffs.

In short, *Judicial Watch* and the *pro se Page* cases do not support the defendants' contention that the plaintiffs lack standing, especially given the very different facts and injuries alleged here. *See United States ex rel. Chapman v. Fed. Power Comm'n*, 345 U.S. 153, 156 (1953) (noting that standing is a "complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the *specific circumstances of individual situations*.") (Frankfurter, J.) (emphasis added).

C. Each of the Plaintiffs Satisfies the Article III Requirements for Standing.

The DREAM Act plaintiffs, The House plaintiffs, and Common Cause each independently satisfy the Article III requirements for standing.

The DREAM Act plaintiffs. The three DREAM Act plaintiffs were brought to the U.S. by their parents when they were minors. Since arriving in the U.S., each has excelled at school, contributed to society, and lived an exemplary life. The DREAM Act plaintiffs' right to the procedures governing the enactment of statutes set forth in the text of Article I were violated when Rule XXII was used to prevent the majority of the Senate from debating and voting on the DREAM Act, H.R. 5281 and S. 3992, during the 111th Congress. The DREAM Act passed the House, had majority support in the Senate, and would have been enacted into law, but for the use of Rule XXII. That illegal action impaired the DREAM Act plaintiffs' *individual* and *concrete interests* in ways that distinguish them from other members of the public whose only general interest is that the Senate follow the law; the DREAM Act plaintiffs were *intended* and *direct* beneficiaries of the DREAM Act.

Indeed, Rule XXII deprived them of the opportunity to benefit from the DREAM Act. They face deportation; they have lost a path to U.S. citizenship. They do not ask this Court to guarantee them the passage of the DREAM Act. Rather, they ask this Court to remedy the violation of their right to consideration of the DREAM Act by the Senate according to the procedures governing the enactment of statutes set forth in the text of Article I—a violation which impacted them in a *specific* and *concrete* way—by declaring the supermajority voting provisions of Rule XXII unconstitutional.

The House plaintiffs. The House plaintiffs have suffered two distinct injuries in their official and personal capacities. First, Rule XXII has nullified the votes that they personally cast

in favor of the DREAM Act, the DISCLOSE Act, and numerous other bills. The DREAM and DISCLOSE Acts would have been enacted into law, but for the defendants' use of Rule XXII. The defendants' violations of the procedures governing the enactment of statutes set forth in the text of Article I *nullified* the House plaintiffs' votes. That is, when the defendants short-circuited the legislative process by blocking a Senate vote on the DREAM and DISCLOSE Acts, despite the fact that a majority voted for cloture, it illegally rendered the House votes nugatory. That vote-nullification-injury is not an injury shared with every other member of the public. Nor is it one shared with every member of Congress. It is a personal and distinct injury, shared only by those who personally cast votes in favor of the bills that were illegally blocked in violation of the procedures governing the enactment of statutes set forth in the text of Article I.

Moreover, the defendants injured the House plaintiffs by illegally blocking the passage of the DISCLOSE Act, H.R. 5281 and S. 3992, during the 111th Congress. Despite the fact that the DISCLOSE Act had passed the House, and that 59 Senators voted in favor of cloture, the defendants' prevented the DISCLOSE Act from coming up for a vote in violation of the procedures governing the enactment of statutes set forth in the text of Article I. This procedural violation impacted the separate and concrete interests of the House plaintiffs in accessing critical information regarding the identity of those financing negative ads in each of their campaigns, which directly and concretely injured the House plaintiffs.

Common Cause. Common Cause is a non-profit, grass roots "citizens lobby." Its mission is to promote the adoption of campaign finance, disclosure, and election reform legislation. The use of Rule XXII to illegally block the DISCLOSE Act during the 111th Congress—in violation of the procedures governing the enactment of statutes—injured Common Cause as an organization because Common Cause diverted staff, time, and resources to

combatting the effects of secret expenditures by Super PACs that would have been prohibited by the DISCLOSE Act. Common Cause must now independently investigate each individual Super PAC to learn what the DISCLOSE Act would have automatically *required.*

1. The DREAM Act Plaintiffs Have Standing.

Rule XXII thwarted Article I's procedures for enacting statutes and impacted the DREAM Act plaintiffs' concrete interests, namely, the interest in (a) avoiding deportation, *i.e.*, physical restraint and removal from the United States and (b) obtaining a path to citizenship. Compl., ¶ 9.E.(1). The DREAM Act plaintiffs have a specific and concrete interest in the Senate's compliance with Article I. Surely the DREAM Act plaintiffs' interest in avoiding forced, physical removal from the U.S. constitutes as much of an injury as an "increase in pay,"[70] an environmentalist's interest in the "[a]esthetic and environmental well-being" of a park,[71] or an "emotional attachment to [a] particular elephant."[72]

Ignoring the procedural nature of the DREAM Act plaintiffs' injury, the defendants focus their argument on *substantive* outcomes. That is, the defendants argue that it is "purely speculative" that "the DREAM Act would have passed Congress, without amendment to the bill that passed the House, and been signed into law by the President." Def.'s Br. at 29. Setting

[70] *Boehner v. Anderson*, 30 F.3d 156, 160 (D.C. Cir. 1994) ("We do not think it the office of a court to insist that getting additional monetary compensation is a good when the recipient, a congressman, says that in his political position it is a bad.") (increase in pay is an "injury").
[71] *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).
[72] *ASPCA v. Ringling Bros. & Barnum & Bailey Circus*, 246 F.R.D. 39, 42 (D.D.C. 2007) ("In other words, Rider's standing in this case is based on his emotional attachment to particular elephants-six of which are still at issue in this case.") (Sullivan, J.).

aside the fact that the complaint's factual allegations must be "accepted as true" at the motion to dismiss stage,[73] this argument is foreclosed by the law of this Circuit.

The plaintiffs need not show with certainty that the DREAM Act would have passed; they need only show that they were denied a procedural protection connected to the substantive result. *See, e.g., Sugar Cane Growers Co-op.*, 289 F.3d at 94-95 ("**A plaintiff who alleges a deprivation of a procedural protection to which he is entitled *never has to prove* that if he had received the procedure the substantive result would have been altered. *All that is necessary is to show that the procedural step was connected to the substantive result*.**") (emphasis added). Even if Rule XXII was not the definitive reason that the DREAM Act failed, the use of that illegal procedure was certainly "a procedural step connected to the substantive result," *i.e.*, the DREAM Act's failure in the 111th Congress. It is substantially probable, based on the allegations in the complaint, that the DREAM Act would have passed but for Rule XXII's supermajority voting requirements.[74] Therefore, the DREAM Act plaintiffs have adequately alleged a procedural injury; they seek to enforce a procedural requirement that protects a separate concrete interest of theirs.[75]

[73] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim."); *id*. ("The plausibility standard is *not akin to a probability requirement*.") (emphasis added).

[74] Moreover, there is no dispute that, but for Rule XXII's supermajority voting requirements, the DREAM and DISCLOSE Acts would have come to the Senate floor for a vote. The defendants' only dispute the factual allegation that a sufficient number of Senators who voted for cloture would have also voted to pass the bill. But there is no dispute that Rule XXII's illegal supermajority voting requirements deprived the Plaintiffs of Article I's procedural protections, namely, full consideration by the Senate. This allegation, alone, is sufficient to demonstrate a violation of Article I processes.

[75] *See Lujan* , 504 U.S. at 572 (noting that procedural standing exists where plaintiff seeks "to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs.").

Moreover, the plaintiffs do not seek to enforce Article I procedural requirements based solely on abstract interest in ensuring that the Senate follows the law.[76] Far from a generalized grievance, they seek to enforce Article I's procedural requirements because they have been personally deprived of an opportunity to avoid *forced removal* from the U.S and a path to U.S. citizenship. The sheer fact that the group of potential DREAM Act beneficiaries is large does not transform this case into a generalized grievance. "So long as the plaintiffs [have] a concrete and particularized injury, it does not matter that legions of other persons have the same injury." *Pye v. United States*, 269 F.3d 459, 469 (4th Cir. 2001); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998) ("Thus the fact that a political forum may be more readily available where an injury is widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes.").

Indeed, the DREAM Act plaintiffs were the *intended*, *direc*t beneficiaries of the DREAM Act. They do not allege that might have benefitted from a bill intended to abstractly promote the general welfare. They do not allege an injury shared by the body politic.[77] "[W]e deal here simply with the pleadings in which the appellees alleged a specific and perceptible harm that distinguished them from other citizens."[78]

The defendants contend that the DREAM Act plaintiffs cannot prove that they were certain to benefit from the DREAM Act because "it remains speculative whether the Secretary

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[76] *See Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 620 (2007) ("[A] plaintiff lacks a concrete and particularized injury when his only complaint is the *generalized grievance* that the law is being violated.").

[77] *See Chadha v. Immigration & Naturalization Serv.*, 634 F.2d 408, 418 (9th Cir. 1980) *aff'd sub nom. I.N.S. v. Chadha*, 462 U.S. 919 (1983) ("While it may be true that Chadha asserts a claim common to all citizens interested in separation of powers, it is true only in a trivial sense. He also has the added motive, crucial to a sharp presentation of the issues, of being injured by the operation of the statute he challenges.") (involving risk of deportation) (Kennedy, J.).

[78] *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 (1973).

would have granted their application." Def.'s Br. at 29. The Supreme Court rejected similar arguments in *Yellin* and *Accardi*.[79] Moreover, the complaint alleges that the plaintiffs meet the DREAM Act's statutory criteria. *See* Compl., ¶ 9.E.1 (noting that "[e]ach DREAM Act plaintiff has been denied a path to United States citizenship, and is now subject to the risk of deportation as a *direct result* of the 60 vote requirement in Rule XXII") (emphasis added). *See Id.*, ¶¶ 9.E.(1) (alleging that the plaintiffs would obtain the benefits of the DREAM Act); *Id.*, ¶¶ 9.C.1(a)-(c) (providing specific factual allegations that each plaintiff meets the statutory requirements, *i.e.*, that each plaintiff is the child of an undocumented immigrant, brought to the U.S. while a minor, has been present in the U.S. for greater than 5 years, and has an outstanding record of success); *see also* S. 3992, § 4(a)(1)(A) (providing relief for an alien who "has been physically present in the United States . . . for not less than 5 years . . . and was younger than 16 years of age on the date the alien initially entered the United States").

The DREAM Act plaintiffs need not prove that they would have definitively benefitted from the DREAM Act to show an Article III injury. They need merely show that they were deprived of an *opportunity* to benefit. A "***plaintiff suffers a constitutionally cognizable injury by the loss of an opportunity to pursue a benefit . . . even though the plaintiff may not be able to show that it was certain to receive that benefit had it been accorded the lost opportunity***."[80]

The defendants also argue that the DREAM Act plaintiffs cannot show harm due the "Senate['s] failure[] to vote on and pass legislation" because "such a harm does not constitute an

[79] *Yellin*, 374 U.S. at 121 ("*Yellin might not prevail* . . . But he is at least entitled to have the Committee follow its rules and give him consideration according to the standards it has adopted in Rule IV."); *Accardi*, 347 U.S. at 268 ("Of course, he may be unable to prove his allegation before the District Court; but he is entitled to *the opportunity* to try.").
[80] *CC Distribs., Inc. v. United States*, 883 F.2d 146, 150 (D.C. Cir. 1989.

injury-in-fact for standing purposes."[81] They support this proposition by citing to *dicta* contained in a footnote from a district court's order in *Hoffman v. Jeffords*, 175 F. Supp. 2d 49, 56 n.3 (D.D.C. 2001) ("[I]t is doubtful that anyone has a right to certain legislation being enacted by Congress."). Even if this *dictum* is correct, it is irrelevant. The plaintiffs do not allege a substantive "right" to the DREAM Act; they allege a procedural right to Article I processes; and they allege injury arising out the Senate's use of unconstitutional procedures to block a bill that would have benefitted plaintiffs. "One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law." *Homer v. Richmond*, 292 F.2d 719, 722 (D.C. Cir. 1961).

Moreover, the defendants' argument, which is unsupported by any binding authority, incorrectly assumes that a litigant can only assert an Article III injury when a statute or some positive law expressly says: "the litigant has been injured." As noted above, this contention is wrong as a matter of law and inappropriately conflates the injury-in-fact requirement with the merits.[82] Furthermore, the DREAM Act plaintiffs need only show an injury-in-fact, because, as noted above, Article I bestows individual rights. *See* Section III. A. Here, the opportunity to benefit from DREAM Act legislation is sufficiently concrete to underwrite Article III standing.

[81] Def.'s Br. at 29.

[82] *Claybrook*, 111 F.3d at 907; *Judicial Watch*, 432 F.3d at 363 ("[T]he *Lujan* Court itself found an interest 'cognizable' for standing purposes (the desire to observe an animal species, even if purely for aesthetic purposes) with no discussion of any support in any positive law.") (Williams, J., concurring); *Lujan*, 504 U.S. 555, at 580 (Kennedy, J., concurring) ("[W]e must be sensitive to the articulation of new rights that do not have clear analogs in our common law tradition. Modern litigation has progressed far from the paradigm of Marbury suing Madison to get his commission.").

2. The House Plaintiffs Have Standing to Challenge the Nullification of Their Votes.

The House plaintiffs, who have brought this claim in their official and personal capacities, have suffered a cognizable injury-in-fact: they *personally* voted for bills, specifically, the DREAM Act and the DISCLOSE Act, and those votes have been *nullified* by Rule XXII. Compl., ¶¶ 9.B.1-4; *id.*, ¶¶ 9.D.2(a)-(c). Under controlling Supreme Court precedent, the House plaintiffs have been injured as they have a "plain, direct and adequate interest in maintaining the *effectiveness* of their votes." *Coleman v. Miller*, 307 U.S. 433, 438 (1939) (emphasis added); *Kennedy v. Sampson*, 511 F.2d 430, 435 (D.C. Cir. 1974).[83]

The defendants contend that *Raines v. Byrd*, 521 U.S. 811 (1997), stripped the House plaintiffs of their right to judicial redress where their votes have been nullified by illegal action. But *Raines* did not so hold.

The plaintiffs in *Raines* brought a challenge to the Line Item Veto Act raising "a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally." *Id*. at 821; *id*. ("Unlike the injury claimed by Congressman Adam Clayton Powell, the injury claimed by the Members of Congress here is not claimed in any private capacity but solely because they are Members of Congress. . . . If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. 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.").

[83] *Michel v. Anderson*, 817 F. Supp. 126, 137 (D.D.C. 1993) *aff*'d, 14 F.3d 623 (D.C. Cir. 1994) ("The alleged harm falls squarely within the zone of interests protected by Article I of the Constitution. Members of the House are . . . are each given a vote as the tool with which to craft legislation."); *Vander Jagt*, 699 F.2d at 1168 (recognizing that legislator "vote nullification" is a cognizable injury).

But, unlike the plaintiffs in *Raines*, the House plaintiffs have brought this claim in their official *and* personal capacities; they allege that they *personally* cast votes in favor of the DREAM and DISCLOSE Acts, and the Senate deployed an illegal procedure, Rule XXII, which prevented those bills from being enacted and rendered the House plaintiffs' votes null and void. In other words, the House plaintiffs do not raise a claim shared by every member of Congress; only those who voted for the DREAM and DISCLOSE Acts have had their votes nullified by the use of Rule XXII as alleged here.

The House plaintiffs have also been personally injured in that their injury does not "run with the seat." *Raines*, 521 U.S. at 821. If Representative Lewis stepped down, his successor could not bring the same vote nullification claim. It was Representative Lewis who cast votes in favor of those bills, and therefore, he has standing—not his successor. Therefore, the Representatives allege that they "have been deprived of something to which they personally are entitled." *Id*. at 821. The House plaintiffs personally cast specific, identifiable votes in favor of bills that were illegally blocked by the Senate.[84] In this sense, the House plaintiffs' injury is more analogous to the injury claimed by Representative Adam Clayton Powell in *Powell v. McCormack*, 395 U.S. 486 (1969), in that the House plaintiffs allege that the Senate's actions have *personally* nullified votes they have taken, whereas the alleged injury in *Raines* impacted every legislator equally, no matter how they personally conducted themselves or what votes they

[84] *See, e.g., United States House of Representatives v. United States Dep't. of Commerce*, 11 F. Supp. 2d 76, 89 (D.D.C. 1998) (allegation that use of statistical sampling in violation of the Census Act deprived the House Members of information to which they were "personally entitled" within the meaning of *Raines*) (Lamberth, J.); *Id*. ("The House of Representatives alleges an injury based upon claims that it will not receive information to which it is entitled by law and which it needs to perform a mandatory constitutional function, and that an improperly conducted census will cause it to become unlawfully composed. . . this case falls within the narrow area left by the Court. The House is, as per the precise language used by the Supreme Court, 'claim [ing] that [it is being] deprived of something to which [it] personally [is] entitled.'").

cast. *Raines*, 521 U.S. at 821 ("Unlike the injury claimed by Congressman Adam Clayton Powell, the injury claimed by the Members of Congress here is not claimed in any private capacity but *solely because* they are Members of Congress.") (emphasis added). The House plaintiffs have been injured because of what they did, not "solely because they are Members of Congress." *Id*. Indeed, there is world of difference between a legislator vote nullification claim, as the plaintiffs allege here, and a diminution of legislator influence claim.

Furthermore, the House plaintiffs lack a remedy that was available to the *Raines*-plaintiffs. That is, the *Raines*-plaintiffs could have simply repealed the Lite Item Veto Act by majority vote. *See Raines*, 521 U.S. at 824 ("***[A] majority of Senators and Congressmen can vote to repeal the Act***, or to exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act; again, the Act has no effect on this process."). By contrast, the House is powerless to repeal Rule XXII, which is a creature of the Senate. But even if the House could persuade a majority of Senators to repeal Rule XXII, this would still be insufficient as Rules V, VIII, and XXII foreclose the ability of a majority to change the Senate's Standing Rules.

The *Raines* Court was also careful not to foreclose legislators from ever bringing suit. Therefore, it analyzed its decision in *Coleman v. Miller*, 307 U.S. 433, 438 (1939) and noted:

> It is obvious, then, that our holding in ***Coleman*** stands (at most, *see* n.8, *infra*) for the proposition that ***legislators whose votes would have been sufficient to*** defeat (or ***enact***) ***a specific legislative Act have standing to sue if that legislative action*** goes into effect (or ***does not go into effect), on the ground that their votes have been completely nullified***.

521 U.S. at 823 (emphasis added). Because the *Raines*-plaintiffs raised only a generalized grievance about Line Item Veto Act's impact on legislative power, the Court found that they lacked standing. But the Court further noted that:

> It should be equally obvious that appellees' claim does not fall within our holding in *Coleman*, as thus understood. ***They have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated. In the vote on the Act, their votes were given full effect. They simply lost that vote***.

Id. at 824 (emphasis added). Here, the Representatives allege that they voted for two specific bills, that there were sufficient votes to pass each bill, and that each bill should have been enacted, but was nonetheless deemed defeated because of the Senate's illegal application of Rule XXII. In short, the House votes were gives *no effect* towards the passage of the final bill; it is as if they were never cast at all.[85]

The defendants contend that the House plaintiffs have no standing under *Coleman* because they do not represent a "bloc" of sufficient votes; that is, they argue that a numerical increase in the number of Plaintiffs (hundreds of other representatives) would create standing. *Raines* does not support this narrow view; it says nothing about the raw number of plaintiffs needed to bring suit.

The D.C. Circuit has also rejected this view of *Coleman* in *Kennedy v. Sampson*, 511 F.2d 430, 435 (D.C. 1974). In *Kennedy*, Senator Ted Kennedy brought suit challenging President Nixon's "pocket veto" of the Family Practice of Medicine Act ("FPMA"), which had passed the House and Senate. *Id*. at 433. Senator Kennedy alleged that the impermissible pocket veto nullified his vote for the bill. The D.C. Circuit rejected the defendants' overly narrow reading of *Coleman*. *See id*. at 435 ("In light of the purpose of the standing requirement, however, we think the better reasoned view of both *Coleman* and the present case is that an

[85] Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 Stan. L. Rev. 181, 237 (1997) ("If a House passed a bill that has presidential support, for example, that bill would almost certainly become law if adopted by the Senate. If the bill was stifled by a filibuster but not supported by a majority of the Senate, a House member who voted for the bill could plausibly claim that the filibuster effectively nullified his or her vote.").

individual legislator has standing to protect the effectiveness of his vote with or without the concurrence of other members of the majority.").[86]

The D.C. Circuit also rejected a similar voting bloc theory in *Skaggs v. Carle*, 110 F.3d 831, 834 (1997). In *Skaggs*, House members challenged an internal House rule requiring a three-fifths vote for certain appropriations measures. *See* Section III.B.3 *supra*. The D.C. Circuit rejected a similar voting bloc theory advanced by the defendants. It noted that, "***We do not agree . . . that, in order to establish that they have been injured by the Rule, the appellants would have to show that 218 Members have voted or would vote (but for the Rule) in favor of a bill carrying an income tax increase . . . [V]ote dilution is itself a cognizable injury regardless whether it has yet affected a legislative outcome***." (emphasis added).

Moreover, the defendants improperly rely on *Chenoweth v. Clinton* as requiring a "bloc" of plaintiffs whose votes were necessary before a litigant may bring suit to fall under the *Coleman* exception. 181 F.3d 112 (1999). But *Chenoweth* was careful to emphasize that even under a "narrow interpretation [of *Coleman*], one could argue that the plaintiff in *Kennedy* had standing. The pocket veto challenged in that case had made ineffective a bill that both Houses of the Congress had approved. Because it was the President's veto—not a lack of legislative support—that prevented the bill from becoming law (either directly or by the Congress voting to override the President's veto), those in the majority could plausibly describe the President's

[86] Judges Fahy and Bazelon concurred and noted that even if one read *Coleman* differently, and even though Senator Kennedy's vote did not control the outcome of the FPMA, "his interest *is substantial*. As a United States Senator he represents a sovereign State whose people have a deep interest in the Act and look to their Senators to protect that interest; and he, as Senator, it seems to me, *has a legal right not only to seek judicial protection of those interests*, believed by him to be threatened by an invalid veto, but also, in the circumstances, to protect his own interest as a national legislator in the bill for which he voted. These interests I think do not depend for their protection upon affirmative approval by the Senate itself of efforts to obtain judicial relief." *Id*. at 446 (emphasis added).

action as a complete nullification of their votes." *Id*. at 116-117.[87] And, as pointed out in Justice Tatel's concurring opinion, *Chenoweth*'s discussion of *Raines* was *dicta*. *See* 181 F.3d at 118 ("Because *United Presbyterian* still squarely controls, it is unnecessary to reach the difficult issue of the precise extent to which *Raines* limits *Kennedy* and *Moore*, an issue not briefed in this case beyond the conclusory assertions cited by the court.") (Tatel, J., concurring).

In short, Rule XXII prevented the DREAM and DISCLOSE Acts from becoming law—not a lack of legislative or presidential support. Therefore, the application of Rule XXII resulted in a "complete nullification of their votes," within the meaning of *Kennedy*, and the House plaintiffs have standing to challenge to Rule XXII.

3. The House Plaintiffs Have Standing to Challenge Their Injury Under the DISCLOSE Act.

The defendants do not dispute that each of the House plaintiffs has been impacted in his individual capacity by the filibuster of the DISCLOSE Act. The defendants argue, however, that because no statute gives the House plaintiffs a right to the information that would have been revealed by the DISCLOSE Act, they have not suffered an "informational injury" for Article III purposes. But as noted above, this argument improperly conflates the injury-in-fact question with the merits.[88]

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[87] *Chenoweth* is also inapplicable. In that case, four members of the House sued to enjoin the President's implementation of the American Heritage Rivers Initiative via Executive Order on the ground that he did so without congressional consent. *Id*. at 113, 116. They alleged that the President's actions "dilute[ed] their authority as Members of the Congress." *Id*. at 117. But, unlike the Representatives in this action, the plaintiffs did not allege that their vote was nullified by the President's action. *Id*. ("In this case, however, the Representatives do not allege that the necessary majorities in the Congress voted to block the AHRI.").

[88] *Claybrook*, 111 F.3d at 907; *Judicial Watch*, 432 F.3d at 363 ("[T]he *Lujan* Court itself found an interest 'cognizable' for standing purposes (the desire to observe an animal species, even if purely for aesthetic purposes) with no discussion of any support in any positive law.") (Williams, J., concurring).

Moreover, the right to know the identity of donors attacking a political candidate is just as concrete as an environmentalist's emotional attachment to an elephant.[89]

The D.C. Circuit has also recognized that informational injury can underwrite standing even where the statute in question does not provide a right to the information. In *Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler*, 789 F.2d 931, 937 (D.C. Cir. 1986), the D.C. Circuit, found informational injury[90] even when the statute at issue, the Age Discrimination Act, 42 U.S.C. § 6101, *et seq*., provided no right to information. The D.C. Circuit relied on Supreme Court authority, which provides that an injury need not be large; it need merely be an "identifiable trifle." *See id*. (citing *United States v. SCRAP*, 412 U.S. at 689 n.14). Therefore, the House plaintiffs have adequately alleged an informational injury in their personal capacities.

4. Common Cause Has Suffered Injury.

The use of Rule XXII to illegally block the DISCLOSE Act during the 111th Congress—in violation of the procedures governing the enactment of statutes—injured Common Cause as an organization because, *inter alia*, Common Cause diverted staff, time and resources to combatting the effects of secret expenditures by Super PACs that would have been prohibited by the DISCLOSE Act. Compl., ¶ 9.A. And the DISCLOSE Act's defeat undoubtedly set back Common Cause's mission of encouraging transparency in elections. It forced Common Cause to expend resources counteracting the negative effects of undisclosed financing that would have been prohibited by the DISCLOSE Act. Compl., ¶ 9. In other words, Common Cause must now

[89] *ASPCA*, 246 F.R.D. at 42 ("In other words, Rider's standing in this case is based on his emotional attachment to particular elephants-six of which are still at issue in this case.") (Sullivan, J.).

[90] *Id*. ("The government-wide regulations HHS published afford interested individuals and organizations a *generous flow of information* regarding services available to the elderly. AASC asserts that two of the challenged dispositions in the HHS-specific regulations—the elimination of the self-evaluation requirement and the reduction of compliance reports—significantly *restrict that flow*.") (emphasis added).

independently investigate each individual Super PAC to learn what the DISCLOSE Act would have automatically *required*.

In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982), a plaintiff-organization alleged that the defendants engaged in "racial steering practices"—*i.e.*, discriminatory efforts to discourage blacks from living in particular homes—and that such practices "had frustrated the organization's counseling and referral services, with a consequent drain on resources." *Id*. at 369. The Supreme Court concluded that:

> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low-and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interest

Id. at 379.

Likewise, Common Cause's ability to pursue its mission was "perceptibly impaired" because it has had to "divert staff, time and resources . . . to combatting the effects of secret expenditures by Super PACs and others in federal elections that would have been prohibited by the DISCLOSE Act." Compl., ¶ 9.D.1.(c). A number of courts have held that an organization has standing where it devoted resources to counteracting an unlawful act. *See, e.g., Spann v. Colonial Village, Inc.*, 899 F.2d 24, 28-29 (D.C. Cir. 1990) ("The organizations instead allege concrete drains on their time and resources. Expenditures to reach out to potential home buyers or renters who are steered away from housing opportunities by discriminatory advertising, or to monitor and to counteract on an ongoing basis public impressions created by defendants' use of print media, are sufficiently tangible to satisfy Article III's injury-in-fact requirement.").[91]

[91] In *Spann*, the court held that an organization's efforts to "monitor and to counteract on an ongoing basis public impressions created by defendants' use of print media [we]re sufficiently

And the D.C. Circuit has noted that the lesson of *Havens Realty* is that "an organization establishes Article III injury if it alleges that purportedly illegal action increase[d] the resources the group must devote to programs independent of its suit challenging the action." *Spann*, 899 F.2d at 27. Here, illegal action—the use of Rule XXII to block the DISCLOSE Act in violation of Article I—forced Common Cause to expend its resources combatting the effects of Super PACs and other campaign contributions in violation of the DISCLOSE Act. Therefore, Common Cause has standing to challenge the illegal filibuster of the DISCLOSE Act.

D. Plaintiffs Satisfy Article III's Causation Requirements.

The plaintiffs have been injured by Rule XXII, and, therefore, this suit names the constitutional officers responsible for enforcing that Rule. There is no dispute that each of the defendants, the Vice President and three other Senate employees, enforces and effectuates Rule XXII. The Supreme Court has held that "legislative employees who participate[] in the unconstitutional activity *are responsible* for their acts." *Powell*, 395 U.S. at 504. In *Powell*, Rep. Adam Clayton Powell challenged a House resolution, which declared that "he was not permitted to take his seat," despite the fact that he was duly elected as a representative. *Id*. at 489. Powell challenged this action by, *inter alia*, filing suit against the Speaker of the House and a number of *House employees*, including the Clerk of the House, the Sergeant at Arms, and the Doorkeeper. Despite the fact that the Speaker of the House and other representatives were protected by the Speech and Debate Clause, the Supreme Court held that "legislative employees who participate in . . . unconstitutional activity are *responsible*," even if elected officials made

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tangible to satisfy Article III's injury-in-fact requirement." *Id.* at 29; *see also ACORN v. Fowler*, 178 F.3d 350, 361 (5th Cir. 1999) ("ACORN has presented evidence that it has expended resources registering voters in low registration areas who would have already been registered if the appellees had complied with the [applicable law]"); *Smith v. Pacific Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004).

the actual decision that caused the plaintiff's injury. *Id*. at 504. In other words, even though individual Senators invoked Rule XXII in a way that concretely injured the plaintiffs, Senate employees who enforce the rule are proper parties to this suit for standing purposes.

Joseph Biden is the Presiding Officer of the Senate.[92] Rule XXII, by its very terms, *requires* action by the Presiding Officer of the Senate, including that he, or an officer at his direction, states the motion for cloture to the Senate, directs the clerk to call the roll, and submits to the Senate the question of cloture: "Is it the sense of the Senate that the debate shall be brought to a close?"[93] Whether he or the President *Pro Tempore* exercising the Presiding Officer's authority was present when the DREAM and DISCLOSE Acts were the subject of cloture motions is irrelevant. The President of the Senate has the inherent authority to preside over the Senate[94] and to enforce Rule XXII, and therefore, is a proper defendant.

Furthermore, the President of the Senate's official duties include enforcing Senate rules and ruling on points of order. *See* Rule XX ("Questions or Order"). Neither the President of the Senate nor the Senate has jurisdiction to decide points of order that turn on a question of constitutional law, because the separation of powers requires that questions of law be decided by the courts under *Marbury*, 5 U.S. (1 Cranch) at 137. A declaratory judgment that the supermajority vote requirement in Rule XXII is unconstitutional will guide the future conduct of the President of the Senate, just as the declaratory judgment in *Powell* provided needed guidance and direction to employees of the House that the House had no power to refuse to seat Rep. Powell. In short, the President of the Senate is a proper defendant to this suit.

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[92] U.S. Const. art. I, § 3, cl. 4 ("The Vice President of the United States shall be President of the Senate.").
[93] *See* Rule XXII, ¶ 2.
[94] Story, *supra* § 739, at 516-17 ("If, indeed, the vice president had not this power *virtue officii*, there was nothing to prevent the senate from confiding it to any other officer chosen by itself.").

Moreover, Nancy Erickson, acting in her capacity as Secretary of the Senate, controls "the Chief Clerk's office."[95] The Secretary improperly directed the Senate Bill Clerk to record the failed cloture votes on bills, such as the DREAM and DISCLOSE Acts, even though cloture was properly "invoked" (*i.e.*, a majority supported the motion). Her official duties, among others,[96] include directing the Senate Bill Clerk to "provide Senate 'Roll Call Vote' results."[97] Such "[r]oll call vote results are compiled through the Senate Legislative Information System by the Senate Bill Clerk *under the direction of the Secretary of the Senate*."[98] Moreover, Rule XXII requires the Secretary of State's subordinate, the Clerk, to "immediately report[] the [cloture] motion."[99] *See* Rule XXII (noting that the "the clerk" is "direct[ed to] . . . call the roll" on motions for cloture). In other words, the declaratory relief that the plaintiffs seek will forbid the Secretary of the Senate's office from recording cloture motions that garner more than 50 votes as having failed. *See Powell*, 395 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."). Here, the Secretary and her subordinates called the roll and unconstitutionally recorded the votes of 55 Senators as sufficient to defeat a motion for cloture. This enforcement of Rule XXII caused plaintiffs' injuries and will be redressed by invalidating Rule XXII.

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[95] *See* Riddick's Senate Procedure: Precedents and Practices, at 1231 (1992) ("Offices Under the Secretary: . . . [I]n 1892 . . . the appointment, removal, and control of the clerical force in the Secretary's office, including the Chief Clerk, was vested in the Secretary of the Senate.").
[96] *See* Senate Rule I ("In the absence of the Vice President, and pending the election of a President pro tempore, the Acting President pro tempore or the Secretary of the Senate, or in his absence the Assistant Secretary, shall perform the duties of the Chair."); Rule XIV ("All bills, amendment, and joint resolutions shall be examined under the supervision of the Secretary of the Senate before they go out of the possession of the Senate.").
[97] *See* U.S. Senate Website's Compilation of Legislation & Records, at http://www.senate.gov/pagelayout/legislative/a_three_sections_with_teasers/votes.htm.
[98] *Id*. (Emphasis added).
[99] *See* Riddick's Senate Procedures: Precedents and Practices, at 282 ("Cloture Procedure").

Likewise, Terrence Gainer, the Sergeant at Arms of the U.S. Senate, is "an executive officer of Senate" tasked with "*enforc[ing] all rules of the Senate*, [including] its Standing Rules [and] Standing Orders."[100] And Elizabeth MacDonough, the Parliamentarian of the United States Senate, advises Senators on all of the Standing Rules of the Senate, including interpretations of "how to implement applicable procedures" in particular circumstances.[101]

That the defendants did not enact Rule XXII does not minimize their role in the plaintiffs' injuries. Indeed, the House employees in *Powell* did not make the decision not to seat Rep. Powell; Powell was directly injured by a "House resolution." 395 U.S. at 489. Nonetheless, the Supreme Court allowed the plaintiffs to hold House employees responsible for the decisions of the elected Members of the House. *See e.g.*, *See Powell*, 395 U.S. at 504; *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 705 (D.C. Cir. 1988) ("The Supreme Court's decisions on this point show that mere indirectness of causation is no barrier to standing, and thus, an injury worked on one party by another through a third party intermediary may suffice."). Contrary to the defendants' arguments, the plaintiffs need not show that each of the defendants is independently capable of reforming the Senate rules, limiting debate, or anything of the like. They need merely show that they enforce Rule XXII.

A declaration severing Rule XXII's supermajority voting requirements will invalidate the unconstitutional provisions of the rule in question, rules that the President of the Senate, the Sergeant-at-Arms, the Secretary of the Senate, and the Parliamentarian enforce.

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[100] Officers and Staff: Sergeant at Arms, *Chapter 2: Offices and Functions Under the Jurisdiction of the Sergeant at Arms*, at http://www.senate.gov/artandhistory/history/common/briefing/sergeant_at_arms.htm.

[101] Valerie Heitshusen, Cong. Research Serv., RS20544, *The Office of the Parliamentarian in the House and Senate* (Feb. 3, 2012).

E. The Plaintiffs' Injuries Are Redressable.

The plaintiffs have alleged a procedural injury; therefore, a procedural remedy will redress that violation. Indeed, the remedy that the plaintiffs seek for a violation of their individual right to Article I procedures—a declaration invalidating the supermajority voting portions of Rule XXII that violate Article I—will redress that injury by removing a procedural barrier to the passage of the DREAM and DISCLOSE Acts and restoring the majority-rule process in the Senate to which they are entitled by Article I. *See Lujan*, 504 U.S. at 573 n. 7 ("[T]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."); *Idaho By & Through Idaho Pub. Utilities Comm'n*, 35 F.3d at 591 ("[T]he Supreme Court has made clear that neither the causation requirement nor the redressability requirement for constitutional standing should hinder enforcement of procedural rights"); *City of Jacksonville*, 508 U.S. at 666 ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing."). Even if the requested remedy "will not ensure that the [Senate] will" pass the DREAM and DISCLOSE Acts,[102] the requested remedy will remove a procedural barrier[103] to the passage of such legislation, *i.e.*, Rule XXII's supermajority voting language. As noted above, "[a] plaintiff asserting procedural injury never has to prove

[102] *Cf. Watt*, 454 U.S. at 160-62 (holding that declaratory and injunctive relief would redress California's loss of the opportunity to benefit from alternative pricing schemes that were not considered by the Secretary of Interior for the purposes of standing, even though, on the merits, "the relief California seeks – experimental use [of alternative bidding schemes] … will not ensure that the Secretary will try these systems.").

[103] *Cf. City of Jacksonville*, 508 U.S. at 666 ("The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.").

that if he had received the procedure the substantive result would have been altered."[104] So long as the proper procedure is restored, litigants need not show that the substantive outcome will be any different or that they will obtain a substantive benefit.[105]

Although it is not the plaintiffs' burden to show that the requested remedy will result in passage of the DREAM and DISCLOSE Acts, it is likely that severing the 60-vote-requirement from Rule XXII will allow the passage of both bills. Since the 111th Congress, multiple DREAM Act bills have been reintroduced. *See, e.g.*, Andorra Bruno, Cong. Research Serv., RL33863, *Unauthorized Alien Students: Issues and 'DREAM Act' Legislation* (June 19, 2012) at 2 ("Multiple bills have been reintroduced in recent Congresses to provide relief to unauthorized alien students."); *see also* S. 952, H.R. 1842, and H.R. 3823 (DREAM Act bills which have been introduced in the 112th Congress). Likewise, the DISCLOSE Act has been reintroduced. *See* DISCLOSE Act (H.R. 4010, S. 2219) (112th Congress).[106]

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[104] *City of Dania Beach*, 485 F.3d at 1186; *Sugar Cane Growers Co-op.*, 289 F.3d at 94-95.

[105] *See Accardi*, 347 U.S. at 268 ("Of course, he may be unable to prove his allegation before the District Court; but he is entitled to *the opportunity* to try."); *Yellin*, 374 U.S. at 121 ("*Yellin might not prevail* . . . But he is at least entitled to have the Committee follow its rules and give him consideration according to the standards it has adopted in Rule IV."); *McGarry*, 853 F.2d 981, 985 ("It is a well-established rule that a party suing to vindicate such rights need not make a showing that the agency would have acted differently."); *cf. Baker*, 369 U.S. at 208 ("It would not be necessary to decide whether appellants' allegations of impairment of their votes by the 1901 apportionment will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it . . . They are asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes, not merely a claim of the right possessed by every citizen to require that the government be administered according to law."); *Blumenthal*, 606 F.2d at 1065 Complainants are injured if this procedural right is denied them, regardless of whether their complaint is ultimately found meritorious."); *Spirit of Sage Council*, 511 F. Supp. 2d at 40-41 (D.D.C. 2007) ("[T]he fact that an agency may still in its discretion choose not to revoke a permit if the Court strikes down the PRR *does not defeat the redressability* prong of standing.") (Sullivan, J.).

[106] The defendants contend that standing cannot be predicated on a prediction of what Congress will do. Def.'s Br. at 35-36 (citing *Havana Club Holding S.A. v. Galleon S.A.*, 203 F.3d 116 (2d Cir. 2000). But *Havana Club* has *nothing* to do with Article III standing; the words "Article III" do not appear in the entire opinion. *Havana Club* addressed whether a plaintiff had standing, as

Furthermore, the House Plaintiffs face a *certain prospect* of having their votes nullified by future filibusters of bills that otherwise would have become law. *See* Compl., ¶¶ 47-53 ("The Flood in the Number of Filibusters"). Eliminating the supermajority voting provision of Rule XXII is certain to relieve the House plaintiffs' future injuries from vote-nullification in the Senate.

The defendants argue that the remedy that the plaintiffs seek, maintaining Rule XXII but simply striking the supermajority voting language, constitutes an impermissible "rewrite" of a Senate rule.[107] The defendants rely on *Pro Se Page* and *Judicial Watch*, both of which are inapplicable. Douglas R. Page and Judicial Watch sought *very different remedies* from the one sought here: they explicitly requested *injunctions* and *rewrites* of the Senate rules.[108]

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in a *private right of action*, under Section 43(a) of the Lanham Act. *Id*. at 132-33. There, the plaintiff's injury involved future lost sales in Cuba. But, because of the Cuban embargo, the plaintiff could not show commercial injury within the meaning of Section 43(a). In response, the plaintiff argued that Congress had made some effort to lift the embargo. The *Havana* court noted that the plaintiff could not predicate standing, *i.e.*, a finding of commercial injury, based merely on recent congressional efforts to lift the embargo, given the existence of a comprehensive, statutory embargo against Cuba. Here, the plaintiffs' injury is not predicated on what Congress might do, but on what the Senate *did*, *i.e.*, it violated Article I procedures, and in the process, inflicted a procedural injury on the plaintiffs that impaired their concrete interests. Moreover, the procedural injury alleged here will be fully redressed by the procedural remedy that the plaintiffs have requested.

[107] Def.'s Br. at 34.

[108] *See Judicial Watch*, 432 F.3d at 361 ("But Judicial Watch's complaint *asked for an injunction* to stop defendants from 'continuing to prevent votes' on the nominations of Miguel Estrada and Priscilla Owen (a request mooted by Miguel Estrada's withdrawal and Judge Owen's confirmation" including "any and all other relief the Court deems just and proper"); *id*. (ruling only on causation, *not redressability*); *Page*, 995 F. Supp. at 26 (explicitly asking for a rewrite of Rule XXII and seeking insertion of the following language: "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 ...."; and seeking injunction ordering "the Senate to henceforth close debate by a simple majority of a quorum," and another injunction ordering "defendants Rubin and Withrow [to] suspend the pay of those Senators participating in violation of the Court's Orders").

In contrast to *Page* and *Judicial Watch*, the complaint disavows any request that the Court rewrite Senate rules. Compl., ¶ 76. Plaintiffs ask the Court to declare the supermajority voting provisions of Rule XXII unconstitutional and *sever the unconstitutional provisions*. *See, e.g.*, *Sebelius*, 132 S. Ct. at 2607-08; *Chadha*, 462 at 959. Once the Court severs the illegal parts of Rule XXII, "the general rule of all parliamentary bodies … that when a quorum is present, the act of a majority of the quorum [is] the act of the body"[109] would govern motions for cloture under Rule XXII. Compl., ¶ 78.[110] A ruling in the plaintiffs' favor would not tie the Senate's hands. The Senate would be free to amend its rules by, *inter alia*, crafting a new cloture rule by majority vote, instead of a two-thirds vote. Therefore, the defendants' claim that plaintiffs' remedy would leave the Senate with no mechanism to close debate is flatly untrue.

The defendants contend that the Rulemaking Clause, U.S. Const. Article I, section 5, clause 2, precludes this Court from redressing plaintiffs' injury. Relatedly, the defendants suggest—without citing a single case—that "this Court has no power" to strike down unconstitutional provisions of a Senate rule that offend Article I.[111] But these are merits arguments. And incorrect ones at that. The Rulemaking Clause provides only a *limited* grant of power to the Senate. *Marbury*, 1 Cranch at 176 ("The powers of the legislature are defined and limited"). And the Senate cannot use its procedural rulemaking authority to rewrite the Article I process for passing legislation. *Cf. Chadha*, 462 U.S. at 959. It is, after all, "the province and

[109] *Ballin*, 144 U.S. at 6.
[110] *F.T.C. v. Flotill Products, Inc.*, 389 U.S. 179, 183-84 (1967) ("[T]he almost universally accepted common-law rule is the precise converse-that is, in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body. Where the enabling statute is silent on the question, the body is justified in adhering to that common-law rule.").
[111] Def.'s Br. at 35.

duty" of this Court to review the constitutionality of Congressional actions. *Marbury*, 1 Cranch at 177.

The defendants also argue that a ruling in plaintiffs' favor would require that Rule XXII be stricken in its *entirety*. The Supreme Court has held that "[u]nless it is *evident* that" Congress wanted the entire Act to fall (rather allow severance), "we must leave the rest of the Act intact." *Sebelius*, 132 S. Ct. 2607-08. There is no basis for the defendants' assertion that the Senate would prefer no cloture rule to one that allowed the majority to invoke cloture.[112] It is far from "evident" that the Senate would prefer no cloture rule to a rule that allowed the majority to invoke cloture. *See also Chadha*, 462 U.S. at 959 (finding legislative veto provision severable). But even if the defendants are correct, a ruling in plaintiffs' favor would leave the Senate free to repeal Rule XXII by a vote of a simple majority.

F. The Plaintiffs' Procedural Injuries Are Redressable Even if the DREAM and DISCLOSE Acts Never Pass.

The nature of procedural injuries is such that litigants are often extremely likely to lose the substantive benefits, even if proper process is restored. Yet, a procedural injury is considered redressed by simply restoring the *process* that is due. For example, in *Yellin v. United States*, 374 U.S. 109, Edward Yellin challenged a contempt finding by the House Committee on Un-American Activities for his refusal to answer the Committee's questions. He alleged that the Committee's findings were made in violation of Committee Rules. That is, the Committee rules provided a mechanism for Yellin to give his testimony privately, as opposed to in a public setting, where his testimony may "unjustly injure his reputation." *Id*. 117. And Yellin requested

[112] The only case that the defendants' cite with respect to severability is *Basardh v. Gates*, 545 F.3d 1068, 1070 (D.C. Cir. 2008), a case involving the Detainee Treatment Act. Suffice it to say, nothing in *Basardh* suggests that this Court lacks the power to strike down offending provisions of an internal Senate rule, which presumably, should be entitled to less weight than a statute that has passed both Houses of Congress and been signed by the President.

the use of that mechanism. But the Committee refused to act on Yellin's request and held him in contempt for refusing to answer questions. *Id*. at 120. The Supreme Court reversed because the Committee failed to adhere to its rules: the Committee failed to exercise its discretion by considering Yellin's request. *Id*. at 121. Although the Court was well aware that upon a re-hearing by the Committee "Yellin might not prevail," it emphasized that "he is at least entitled to have the Committee *follow its rules* and give him consideration according to the standards it has adopted in [its Rules]." *Id*. (emphasis added).

Likewise, the plaintiffs "might not prevail" in their quest to pass the DREAM and DISCLOSE Acts. *Id*. It may be that invalidating the supermajority voting provisions of Rule XXII will not result in the passage of either bill. But such uncertainty does not deprive the plaintiffs of their right to have bills, of which they are the intended beneficiaries, given "consideration according to the standards adopted [by Article I of the Constitution]." *Id*.

The *Yellin* Court relied on *United States v. ex rel. Accardi v. Shaugnessy*, 347 U.S. 260 (1954). Accardi, an immigrant facing deportation, applied to the Board of Immigration Appeals ("BIA") for a suspension of his deportation order. Although federal regulations entitled Accardi to a hearing, the Attorney General published a list of "unsavory characters." Accardi alleged that the BIA did not exercise its discretion by considering Accardi's application; rather it summarily denied his request for a suspension based on the published list. The Supreme Court reversed, remanded the case to the BIA so that Accardi could obtain a hearing, and noted that, "[o]f course, [Accardi] may be unable to prove his allegation before the District Court; but he is *entitled to the opportunity to try*. ***If successful, he may still fail to convince the Board or the Attorney General, in the exercise of their discretion, that he is entitled to suspension, but at***

least he will have been afforded that due process required by the regulations in such proceedings." 347 U.S. at 268.

Therefore, the remedy that plaintiffs seek might not result in passage of the DREAM and DISCLOSE Acts. The plaintiffs may well lose out in the political process. But, if they do, they will at least lose playing under a process required by Article I of the U.S. Constitution.

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

The Speech or Debate Clause in Article I, sec. 6 provides in pertinent part that:

> The *Senators* and *Representatives* shall … be privileged from Arrest … and for any Speech or Debate *in either House*, they shall not be questioned in any other place."

The Speech or Debate Clause in Article I, section 6 does not bar plaintiffs' claims. Nor does it immunize defendants for a suit challenging the constitutionality of a Senate rule.

A. The Speech or Debate clause does not apply to the Vice President.

The Speech or Debate clause does not apply to the Vice President because (1) the Vice President is not a "Senator"; (2) the office of Vice President is created separately from that of senators by the Constitution;[113] (3) the Vice President's duty to preside over the Senate is derived directly from the Constitution and not by delegation from the Senate; (4) the Vice President can neither speak or debate on the floor of the Senate; and (5) his membership in the Senate is prohibited by Article I, section 6, clause 2 which provides that "no Person holding any Office

[113] *See* Memorandum from Nicholas Katzenbach, Assistant Attorney General, Office of Legal Counsel, to the Vice President, at 3 (April 18, 1961) ("Despite his position as President of the Senate, [the Vice President] is certainly not one of its members. Nor can he be convincingly described as a third member of the Legislative Branch alongside the two Houses of Congress."); Story, *supra* § 735, at 515 (explaining why the Vice President was selected to preside over the Senate and noting "[t]here is no novelty in the appointment of a person to preside, as speaker, who is not a constituent member of the body, over which he is to preside.").

under the United States, shall be a Member of either House during his Continuance in Office…" as Vice President.

B. The Parliamentarian, the Secretary of the Senate and the Sergeant at Arms are proper defendants and not immune from suit.

In *Powell*, 395 U.S. at 505-08 (1969), Representative Adam Clayton Powell brought suit challenging the House of Representatives' refusal to seat him. Powell named as defendants John McCormack, the Speaker of the House, five members of the House as class representatives of the entire House, the Clerk, the Sergeant-at-Arms, and the Doorkeeper of the House. The defendants "assert[ed] that the Speech or Debate Clause … is an absolute bar" to Powell's action against not only the House members, but against the Clerk, the Sergeant-at-Arms, and the Doorkeeper of the House, and any House employees. *Id*. at 501.

The Supreme Court framed the issue as follows: "whether those respondents who are merely employees of the House may plead the bar of the [Speech and Debate] clause." *Id.* at 502. The Court held that they could not:

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

> ***against House employees and to judicial review of the propriety of the decision to exclude [him.]***.

395 U.S. at 504-06 (emphasis added). In addition to *Kilbourn*, the Court cited its decision in *Dombrowski v. Eastland*, 387 U.S. 82 (1967) in which it had "affirmed the grant of summary judgment as to . . . Senator [Eastland], *but reversed as to subcommittee counsel*" an action seeking $500,000 in damages. *Powell*, 395 U.S. at 504 n. 23.

Indeed, the Speech or Debate clause does not immunize Senate employees from suits challenging unconstitutional conduct any more than the Eleventh Amendment or the doctrine of sovereign immunity immunizes state officials from suits to enjoin them from implementing unconstitutional state statutes—even if the state employees had no role in adopting them. *See Ex parte Young*, 209 U.S. 123 (1908).

The defendants' cases are not to the contrary. As defendants acknowledge, those cases involved actions of employees of the House or Senate that were "'within the sphere of *legitimate legislative activity*.'"[114] In contrast, *Powell, Dombrowski* and *Kilbourn*, all involved "legislative employees who participated in *unconstitutional activity*." *Powell*, 395 U.S. at 504. The employees in all these cases were held to be "responsible for their acts" and were not immune from suit under the Speech or Debate clause. *Powell*, 395 U.S. at 504 (emphasis added).

The assertion in defendants' brief that "the Supreme Court has allowed cases to proceed against congressional officers only when the officers were acting outside the legitimate legislative sphere, *i.e.* taking non-legislative actions"[115] is incorrect. *Powell, Dombrowski* and *Kilbourn* all involved actions taken by "legislative employees who participated in unconstitutional activity," *Powell*, 395 U.S. at 501, at the direction of the House (*Powell* and

[114] Def. Br. at 38 (quoting *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975)).
[115] Def. Br. at 39 n. 35.

Kilbourn) or at the direction of a Senate committee (*Dombrowski*) and that were therefore "within the legislative sphere," *id*. In each instance, the Court held that the Congressional employees actions were not immune under the Speech or Debate Clause because their directives from their superiors were unconstitutional – *i.e.*, were not "*legitimate*."

Since the Court is required to accept, for purposes of ruling on the motion to dismiss, as true plaintiffs' allegations that Rule XXII is unconstitutional,[116] it follows that defendants' roles in the implementation of Rule XXII are not "legitimate" because the rule itself, like the directions from the House not to seat Adam Clayton Powell or to arrest Kilbourn, is unconstitutional. Therefore, the defendants' motion to dismiss based on the Speech or Debate Clause must be denied.

V. Conclusion

The defendants have not, and cannot at this stage of the proceedings, contest the merits of plaintiffs' claim that Rule XXII's supermajority voting requirements are unconstitutional. Rather, the defendants argue that the constitutionality of Rule XXII is not justiciable, that it is a political question, and that no one has standing to raise such a challenge. In other words, the defendants contend that the Senate is above the law. But the Senate is not above the law; its rules are subject to constitutional restraints. *Ballin*, 144 U.S. at 5. And its rules are justiciable because Rule XXII "affects persons other than members of the Senate." *Smith*, 286 U.S. at 33. The defendants' motion to dismiss should therefore be denied.

This 27th day of August, 2012.

[116] *LaRoque*, 650 F.3d at 785.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this date electronically filed the within and foregoing **BRIEF OF PLAINTIFFS IN OPPOSITION TO MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

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