No. _____

In The
Supreme Court of the United States

COMMON CAUSE, *et al.*,

Petitioners,

v.

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

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do members of the House of Representatives who voted for two specific bills that passed the House but were blocked in the Senate because of the 60-vote requirement in the Senate cloture rule (Rule XXII), notwithstanding the support of a majority of senators, or the beneficiaries of those bills, have standing to challenge the constitutionality of the 60-vote requirement in a declaratory judgment action against the Vice President, as the President of the Senate, and employees of the Senate who are required as a part of their official duties to interpret, implement and enforce the Senate rules?

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

Petitioners:

Common Cause

Representative John Lewis

Representative Michael Michaud

Representative Henry (Hank) Johnson

Representative Keith Ellison

Erika Andiola

Ceslo Mireles

Caesar Vargas

Respondents:

Joseph R. Biden, Jr. in his official capacity as President of the Senate

Nancy Erickson in her official capacity as Secretary of the Senate

Elizabeth MacDonough in her official capacity as Parliamentarian of the Senate

Andrew B. Willison in his official capacity as the Sergeant at Arms of the Senate

CORPORATE DISCLOSURE STATEMENT

Ownership & Parent Companies

Common Cause is a non-profit corporation organized and existing under the laws of the District of Columbia. Common Cause has no parent, subsidiary or affiliated companies. No publicly-held company has an ownership interest in Common Cause.

General Nature and Purpose

Common Cause is a nonpartisan, non-profit advocacy organization founded in 1970 by John Gardner as a grass-roots citizens' lobby to assist citizens in making their voices heard in the political process and in holding their elected leaders accountable to the public interest. Common Cause's purposes and objectives include campaign finance reform and disclosure, electoral reform, and the repair and reform of the structures and the instruments of self-government to make government more democratic and accountable to the people. Common Cause remains the nation's largest organization committed to honest, open and accountable government, and greater citizen participation in democracy.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Common Cause, four members of the House of Representatives (Representatives John Lewis, Michael Michaud, Henry Johnson, and Keith Ellison), and three children of undocumented immigrants who were the intended beneficiaries of the DREAM Act (Erika Andiola, Ceslo Mireles and Caesar Vargas), respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1) is reported at 748 F.3d 1280. The memorandum opinion of the district court (App. 11) is reported at 909 F. Supp. 2d 9.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 2014. A timely petition for rehearing *en banc* was denied on June 5, 2014. App. 58. This Court has jurisdiction of this petition under 28 U.S.C. § 1254(1).

THE STANDING RULE OF THE SENATE INVOLVED

Rule XXII(2) of the Standing Rules of the United States Senate is reproduced in the appendix to this petition. App. 60.

STATEMENT OF THE CASE

I. The 60-Vote Senate

The United States Senate does not operate under the principle of majority rule. Since 1917, the Senate has operated under a supermajority-vote rule that prohibits the Senate from considering or voting on a bill without (a) unanimous consent or (b) the adoption of one or more motions for cloture of debate.

Under the current version of Rule XXII(2), a motion for cloture requires a supermajority vote of 60 senators – unless the issue involves an amendment to the Senate rules, in which case a two-thirds vote is required.

Because of the supermajority-vote requirement in Rule XXII, no bill of consequence can pass in the Senate without first obtaining the 60 votes required by Rule XXII(2) for cloture.[1]

[1] An opponent can prevent the Senate from considering a bill, or voting on a bill after a full debate, simply by objecting to a request for unanimous consent. An opponent does not have to explain the basis of his objection to the bill. The Senate cannot

(Continued on following page)

II. The 60-Vote Requirement Fundamentally Alters The Legislative Process

The 60-vote requirement in Rule XXII alters the legislative process in the Senate from that contemplated by the Constitution in three fundamental ways.[2]

A. The Quorum Clause

The 60-vote requirement in Rule XXII violates the Quorum Clause which specifies that "a Majority

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proceed in the face of an objection without a motion for cloture under Rule XXII(2). The effect of the 60-vote requirement in the rule is to relieve the opponents from any burden to explain, debate or defend the merits of their opposition and to place on the proponents the entire burden of securing the presence and votes of 60 senators required for cloture. Opponents do not have to debate a motion for cloture or even be present or vote against the motion, because absence of a senator (because of death, illness, or travel) or an abstention are the equivalent of a vote against cloture. RICHARD S. BETH & VALERIE HEITSHUSEN, CONG. RESEARCH SERV., RL30360, FILIBUSTERS AND CLOTURE IN THE SENATE (May 31, 2013); Senate Comm. on Rules and Admin. *Senate Cloture Rule*, S. Prt. 112–31 (Comm. Print 2011).

[2] *See generally*, Dan T. Coenen, *The Filibuster and the Framing: Why the Cloture Rule is Unconstitutional and What to Do About It*, 55 B.C. L. REV. 39 (2014); Dan T. Coenen, *The Originalist Case Against Congressional Supermajority Voting Rules*, 106 NW. U. L. REV. 1091 (2012); Josh Chafetz, *The Unconstitutionality of the Filibuster,* 43 CONN. L. REV. 1003 (2011); Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction,* 48 HARV. J. ON LEGIS. 467 (2011); Jeb Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73 (1996).

of each [house] shall constitute a Quorum to do Business. . . .” Art. I, § 5, cl. 1. The purpose of the Quorum Clause is to ensure that each house will have the power to “do business” when a simple majority of its members are present, so that the capacity of each house to debate and vote on bills would not “depend,” as it had under the Articles of Confederation, “upon the . . . assent or action of any single member or fraction of the majority present.” *United States v. Ballin*, 144 U.S. 1, 5–6 (1892).

The Senate is one-half of the legislative branch. Its primary business and reason for being is to debate and vote on legislation, and especially legislation that has already been passed by a simple majority vote of the House of Representatives.

The Senate is, however, prohibited by the 60-vote requirement in Rule XXII from proceeding with its legislative business when only a majority of its members are present, as contemplated by the Quorum Clause. The rule gives an individual senator the power to prevent the entire Senate from proceeding to debate or vote on a bill unless 60 senators are present and vote in favor of a cloture motion.

B. The Presentment Clause

The 60-vote requirement in the cloture rule also violates the Presentment Clause. Art. I, § 7, cl. 2, 3. The Presentment Clause “represents the Framers’ decision that the legislative power . . . be exercised [in each house] in accord with a *single,* finely wrought

. . . procedure" by vote of "*the prescribed majority* of the Members of both Houses." *INS v. Chadha*, 462 U.S. 919, 951 (1983) (emphasis added). The Framers of the Constitution rejected proposals that would have required more than a majority both for purposes of a quorum and for the passage of certain kinds of bills[3] prior to their being transmitted to the other house for its consideration or presented to the President. *The Federalist,* Nos. 22 (at 140–41), 58 (at 396–97), 75 (at 507–08) (Cooke ed. 1961).

As James Madison explained in No. 54 of *The Federalist*, "[u]nder the proposed Constitution, the federal acts will take effect . . . merely on the majority of votes in the Federal Legislature." at 371 (Cooke ed. 1961).

In No. 58, Madison responded directly to opponents of the new Constitution who objected that "more than a majority ought to have been required for a quorum, and in particular cases [*e.g.*, laws regulating commerce], if not all, more than a majority of a quorum for a decision." Madison began by conceding,

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[3] The Framers rejected a proposal by the Committee of Detail that would have created an exception to the procedure in the Presentment Clause for the enactment of legislation by a vote of a simple majority of each house, by prohibiting Congress from passing navigation acts and laws regulating commerce without a supermajority vote of two-thirds vote of both houses. 2 Max Farrand, *The Records of the Federal Convention of 1787*, 143, 184 (1937 Rev. ed.) (hereinafter cited as Farrand). This proposal resulted in a heated debate and was rejected by the Convention. Farrand at 449–53.

"that some advantages might have resulted from such a precaution cannot be denied. It might have been an additional shield to some particular [minority] interests, and another obstacle generally to hasty and partial measures." *The Federalist*, No. 58 at 396–97 (Cooke ed. 1961). But Madison responded that,

> [T]hese considerations are outweighed by the inconveniences in the opposite scale. In all cases where justice or the general good might require new laws to be passed, or active measures be pursued, the 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 it to screen themselves from equitable sacrifices to the general weal, or . . . extort unreasonable indulgences.

Id. at 397.

For 225 years, beginning with the first session of Congress that convened in March of 1789 immediately after ratification of the Constitution, the Senate has interpreted the Presentment Clause as both authorizing and requiring no more than a vote of a simple majority of its members to pass legislation prior to sending it to the House or to the President. The Senate has never contended that it could use the power granted by Article I, § 5, cl. 2 to "determine the Rules of its Proceedings" to alter the number of votes required for final passage of a bill from a majority to

a 60-vote supermajority. Such a rule would conflict with the Framers' prescription for the enactment of laws according to a "*single*, finely wrought and exhaustively considered . . . procedure," that applies equally to both houses of Congress and requires no more than a vote of "*the prescribed majority* of the members of both Houses." *Chadha*, 462 U.S. at 948, 951 (emphasis added). *See NLRB v. Noel Canning,* ___ U.S. ___, 134 S. Ct. 2550, 2559 (2014) ("[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions."). Rule XXII(2) has the same practical effect.

This Court has consistently interpreted the Presentment Clause as reflecting "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 . . . [unless] the organic act under which the body is assembled . . . prescribe[s] specific limitations."[4] *Ballin*, 144 U.S. at 6; *see also Chadha*, 462

[4] There are six exceptions to the principle of majority rule in the original Constitution. Article I, § 3, § 5, § 7 and § 9 contain two exceptions, one for the override of a presidential veto of a "bill" and another for the override of a veto of a "resolution" or other vote of both houses. Art. II, § 2; Art. V. Two additional exceptions were added by the Fourteenth and Twenty-Fifth Amendments. Amend. XIV, § 3; Amend. XXV, § 4. None of the six exceptions applies to the procedure for passage of bills before a presidential veto. They involve instead other powers of an unusual nature of one or both houses of Congress that the Framers thought too important to be decided by a vote of a simple majority. Farrand at 254; *see also*, *Powell v. McCormack*,

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U.S. at 948, 951; *Missouri Pac. Ry. Co. v. Kansas*, 248 U.S. 276 (1919).

The 60-vote requirement shifts the point at which legislative decisions are *actually* made in the Senate from the final vote on the merits, to the initial stage *before the Senate has the opportunity to debate the bill on its merits*. The rule makes a negative vote on a motion for cloture decisive in the vast majority of cases. Conversely, once 60 senators have voted in favor of one or more motions for cloture, at least a majority of senators are almost certain to vote for the bill when it reaches the point of a vote on final passage. The rule has created two different procedures for the passage of legislation – a 60-vote supermajority procedure in the Senate and a majority vote procedure in the House of Representatives, instead of the "*single*, finely wrought . . . procedure" contemplated by the Presentment Clause. *Chadha*, 462 U.S. at 951 (emphasis added).

C. The Great Compromise

Finally, the 60-vote requirement violates the Great Compromise by shifting the balance of legislative

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395 U.S. 486, 536 (1969). The Framers were fully aware of the common law rule of construction *expressio unius est exclusio alterius* (Farrand at 123; *Powell*, 395 U.S. at 533). They knew that by conditioning six actions on the part of one or both houses of Congress on more than a majority vote, they were "by implication t[ying] up the hands of the Legislature from supplying" other exceptions. Farrand at 123 (quoting John Dickenson).

power in the Senate from the majority of States to a minority of States. While the Great Compromise guaranteed each State equal representation in the Senate without regard to population, it also gave a majority of the States the power to pass legislation by majority vote over the opposition of senators elected from only a minority of States. Rule XXII(2) effectively deprives a majority of States of the power to pass legislation by majority vote of the senators elected from those States. It gives senators elected from a minority of States the power to veto legislation favored by and over the objections of the majority. By requiring 60 affirmative votes for cloture, Rule XXII gives 41 senators elected from 21 states with as little as 11% of the population, the power to veto legislation that has the support of as many as 59 senators elected from 29 states with 89% of the total population of the United States. *See The Federalist*, No. 22, at 140 (Cooke ed. 1961) ("To give the minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision) . . . tend[s] to subject the sense of the greater number to that of a lesser number. . . . [I]ts real operation is to embarrass the administration, destroy the energy of government. . . . [T]he majority, in order that something may be done, must conform to the views of the minority. . . . [T]he sense of the smaller number will over-rule that of the greater.").

III. The DREAM Act Plaintiffs

Petitioners, Erika Andiola, Ceslo Mireles, and Caesar Vargas were born in Mexico and were brought to the United States by their undocumented parents while the petitioners were still minors. They have lived in the United States most of their lives and have graduated with honors from college (and in one instance from law school). These petitioners would have benefited directly from the passage of the DREAM Act (H.R. 5281, S. 3992) which would have made them eligible for U.S. citizenship and protected them from deportation.[5]

The DREAM Act was passed by the House of Representatives during the 111th Congress. Although the DREAM Act had the support of 55 senators, the bill was never considered or formally voted on by the full Senate and subsequently died for the sole reason that it failed to receive the 60 votes required by Rule XXII for cloture. The 60-vote rule deprived these petitioners of the opportunity to apply for U.S. citizenship and left them subject to the continued risk of being deported because of their undocumented status. *See Chadha,* 462 U.S. at 936 (holding that an undocumented immigrant had standing to challenge a violation of the Presentment Clause that subjected him to deportation).

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[5] This Court has held that even indirect beneficiaries of legislation have standing to assert a violation of their procedural rights under the Presentment Clause. *Clinton v. City of New York*, 524 U.S. 417 (1998).

IV. The DISCLOSE Act Plaintiff

The DISCLOSE Act (H.R. 5175 and S. 3628) was also passed by large majorities in the House of Representatives during the 111th Congress but also died in the Senate, in spite of having the support of 59 senators, one vote short of the 60-vote threshold required for cloture, but more than enough votes to pass the Senate.

The DISCLOSE Act would have benefited both the petitioner, Common Cause, and its members by requiring corporations, unions, and certain 527 or 501(c) organizations to disclose the sources of their hundreds of millions of dollars in expenditures aimed at influencing the outcomes of presidential and congressional elections through negative TV political advertisements and other "electioneering communications" that are secret and hidden from the voters.

The use of Rule XXII to prevent the majority in the Senate from passing the DISCLOSE Act has made it more difficult, if not impossible, for Common Cause to achieve one of its primary campaign reform objectives. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). It also deprived the members of Common Cause of access to heretofore secret information as to who is really paying for the hundreds of millions in negative political TV advertisements that pervade federal elections. This information would have enabled the members of Common Cause to make more informed political decisions. *See FEC v. Akins*, 524 U.S. 11, 21, 24–25 (1998) (information as to

the identities of contributors to AIPAC would have been valuable to members in making more informed decisions as voters).

The DREAM and the DISCLOSE Acts were but two examples of literally dozens of bills passed by the House of Representatives during the 111th Congress that were prevented from passing and subsequently died in the Senate because of the supermajority-vote requirement in Rule XXII despite having the support of a majority of senators.[6]

V. The House-Member Plaintiffs

Representatives John Lewis, Michael Michaud, Henry Johnson, and Keith Ellison are members of the House of Representatives. Each of the House-member plaintiffs voted in favor of the DREAM and the DISCLOSE Acts, both of which were passed by large majorities in the House and forwarded to the Senate for its consideration under the procedure set forth in the Presentment Clause. Their votes in favor of both were *unconstitutionally nullified* in the Senate when the two bills were denied a vote despite having the support of a majority of senators. *See Coleman v. Miller*, 307 U.S. 433 (1939); *Kennedy v. Sampson*, 511

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[6] Dylan Matthews, *17 Bills That Likely Would Have Passed the Senate If It Didn't Have the Filibuster*, WASH. POST, Dec. 5, 2012, http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/05/17-bills-that-likely-would-have-passed-the-senate-if-it-didnt-have-the-filibuster/.

F.2d 430 (D.C. Cir. 1974); *Kerr v. Hickenlooper*, 744 F.3d 1156 (10th Cir. 2014), reh'g den., ___ F.3d ___, 2014 WL 3586582 (10th Cir. July 22, 2014); *cf. Raines v. Byrd*, 521 U.S. 811, 823 (1997).

VI. The Proceedings In The District Court

Petitioners filed a declaratory judgment action to have the supermajority-vote requirement in Rule XXII(2) declared unconstitutional and severed from the remainder of Rule XXII,[7] allowing future motions for cloture to be decided by majority vote under the general rules of parliamentary procedure. *Ballin*, 144 U.S. at 6; *FTC v. Flotill Prods. Inc.,* 389 U.S. 179, 182–83 (1967).[8]

Jurisdiction of the district court was based on 28 U.S.C. § 1331.

"It has been long settled . . . that the rules of Congress . . . are judicially cognizable." *Yellin v. United States*, 374 U.S. 109, 114 (1963); *see also United*

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[7] *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012) (seeking similar remedy); *Chadha*, 462 U.S. at 931–32 (same).

[8] The petitioners did not seek to interfere with the right of senators under Rule XIX to unlimited and uninterrupted debate – to hold the floor indefinitely and "talk their heads off" (*i.e.*, "filibuster"). Nor did the complaint name the Senate or any of its members as defendants, or ask that they be enjoined or required to rewrite the Senate rules. It asked only that the 60-vote requirement be declared unconstitutional and severed from the remainder of the rule.

States v. Smith, 286 U.S. 6, 33 (1932) (When "the construction [of] . . . the [Senate's] rules affects persons other than members of the Senate, the question presented is of necessity a judicial one.").

Petitioners named as defendants the Secretary of the Senate, the Parliamentarian of the Senate and the Doorkeeper/Sergeant at Arms who are employees and agents of the Senate and are required to interpret, obey, implement and enforce the Senate Rules as a part of their official duties.

The complaint also named the Vice President, who is declared by Article I, § 3, cl. 4 of the Constitution, to be the President of the Senate. The Vice President, however, is not a member of the Senate and cannot speak or debate. The Vice President's *only* duty under the Constitution is to preside over the Senate.

> From John Adams in 1789 to Richard Nixon in the 1950s, presiding over the Senate was the chief function of vice presidents, who . . . rarely were invited to participate in cabinet meetings or other executive activities. In 1961, Vice President Lyndon B. Johnson changed the vice presidency by . . . directing his attention to executive functions, and by attending Senate sessions only at critical times when his vote, or ruling from the chair,

might be necessary. Vice Presidents since Johnson's time have followed his example.[9]

As the presiding officer of the Senate, the Vice President is required to interpret, apply, and enforce adherence to its Standing Rules and to rule on questions of order. *See Jefferson's Manual of Parliamentary Practice*, Sec. I – Importance of Adhering to Rules, H.R. Doc. 99-279 at 113 (99th Cong., 2d Sess. (1987)). Once a motion for cloture is made, the Vice President (or whoever is presiding at the time) is required by Rule XXII to state the motion, direct the Clerk to call the roll, and submit the question of cloture to the Senate in the following words: "Is it the sense of the Senate that debate shall be brought to a close?" (Rule XXII para. 2). The presiding officer then must announce the result of the vote and whether cloture has or has not been invoked, which is then recorded in the minutes.

The Secretary of the Senate is an employee of the Senate. She appoints the Chief Clerk and controls, directs, and supervises "the Chief Clerk's office."[10] When a motion for cloture is made, the Clerk, under

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[9] United States Senate, Officers and Staff: President Pro Tempore, Chapter 2: Constitutional Authority, https://www.senate.gov/artandhistory/history/common/briefing/President_Pro_Tempore.htm.

[10] *See* FLOYD M. RIDDICK AND ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. Doc. 101–28 at 1231 (1992) ("[T]he 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.").

the supervision of the Secretary, is required by Rule XXII, to "immediately report[ ] the [cloture] motion" and to "call the roll."[11] The Secretary[12] directs the Senate Bill Clerk to "provide Senate 'Roll Call Vote' results"[13] which "are compiled through the Senate Legislative Information System by the Senate Bill Clerk under the direction of the Secretary of the Senate."[14]

The Parliamentarian also plays an important role in the implementation and enforcement of the Standing Rules of the Senate. Her duties are to interpret the Senate rules and advise the Vice President or other presiding officer whether a particular Senate rule applies, and how it should be enforced through rulings on questions of parliamentary procedure and questions of order. She advises the Senate "how to implement applicable procedures" in particular

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[11] *See id*. at 282 ("Cloture Procedure").

[12] *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 [her] absence the Assistant Secretary, shall perform the duties of the Chair."); Senate Rule XIV ("All bills, amendments, 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.").

[13] *See* United States Senate Website's Compilation of Legislation & Records, http://www.senate.gov/pagelayout/legislative/a_three_sections_with_teasers/votes.htm.

[14] *Id*.

circumstances including those that arise under Rule XXII.[15]

The duty of the Sergeant at Arms is to "*enforce* [ ] *all rules of the Senate*, [including] its Standing Rules [and] Standing Orders."[16]

The Senate adopted a resolution directing the Senate Legal Counsel to represent the defendants. S. Res. 485 (112th Cong.)

VII. The Ruling Of The District Court

The district court dismissed the complaint for lack of standing under Fed. R. Civ. P. 12(b)(1) on two grounds: (1) that none of the plaintiffs had "a 'procedural' right, grounded in the text of the Constitution, that entitles them to the majority enactment of legislation" by the Senate (App. 13); and (2) that the plaintiffs had not shown that their injuries were redressable – *i.e.*, "that this court can do anything to remedy the alleged harm they have suffered" from the filibuster of legislation from which they would have benefited. *Id*.

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[15] VALERIE HEITSHUSEN, CONG. RESEARCH SERV., RS20544, THE OFFICE OF THE PARLIAMENTARIAN IN THE HOUSE AND SENATE (Feb. 3, 2012).

[16] United States Senate, Officers and Staff: Sergeant at Arms, Chapter 2: Offices and Functions Under the Jurisdiction of the Sergeant at Arms, http://www.senate.gov/artandhistory/history/common/briefing/sergeant_at_arms.htm (emphasis added).

The district court also dismissed the complaint on the alternative ground that the constitutionality of a Senate rule is a political question. App. 53.[17]

VIII. The Ruling Of The Court Of Appeals

The court of appeals did not rule on either of the grounds on which the district court dismissed the complaint. Instead, the court of appeals based its decision on an entirely different theory. The court ruled as a matter of law that petitioners' injuries were not caused by the petitioners but by the Senate, which was responsible for the supermajority-vote requirements in Rule XXII(2), and also by the individual senators who prevented the DREAM and the DISCLOSE Acts from passing by voting against cloture because the Senate was the primary cause of petitioners' injury. "In suing only non-Senators [petitioners were] 'Hoist with [their] own petard.'" App. 8.

> [I]t was the Senate that adopted the cloture rule in 1917 . . . ; it was the Senate that amended the rule thereafter . . . ; it was the Senate that failed to invoke cloture on the

[17] This Court has ruled on the merits of challenges to either the constitutionality of the internal rules of the House or Senate or the interpretation of those rules by the House or Senate, or their committees, in no fewer than five cases. *Ballin*, 144 U.S. at 1; *Missouri Pac. Ry. Co.*, 282 U.S. at 176; *Smith*, 286 U.S. at 6; *Christoffel v. United States*, 338 U.S. 84 (1949); *Yellin*, 374 U.S. at 109. In three of those cases, this Court rejected the interpretations by the Senate (*Smith*) or committees of the House (*Christoffel* and *Yellin*) of their own rules.

DREAM and DISCLOSE bills [and] [i]f "we assume for purposes of standing that [Common Cause] will ultimately receive the relief sought," . . . it will be the Senate that has to conduct its legislative business according to a court-ordered change in its rule.

Yet the complaint named neither the Senate nor a Senator. It is apparent why . . . . The Constitution's Speech or Debate Clause . . . confers immunity for any act that falls "within the sphere of legitimate legislative activity."

. . . .

What defeated the DREAM and DISCLOSE bills was legislative action, activity typically considered at the heart of the Speech or Debate Clause. . . . Yet, Common Cause . . . named as defendants only the Vice President . . . the Secretary of the Senate; the Parliamentarian . . . and the Sergeant-at-Arms. . . . In suing only non-Senators, Common Cause is "Hoist with [its] own petard."

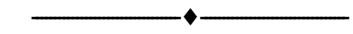
. . . .

Here, Common Cause does not identify anything the defendants did (or refrained from doing) to cause its alleged injuries. The Senate established the cloture rule and the Senators voting against cloture doomed the DREAM and DISCLOSE bills. It is hard to imagine how any of the defendants bore responsibility for the outcome.

. . . .

> [Petitioners'] alleged injur[ies were] caused not by any of the defendants, but by an "absent third party" – the Senate itself.

App. 5–10.



REASONS FOR GRANTING THE WRIT

The court of appeals has decided a question of exceptional importance that will have an impact far beyond this particular case. The ruling conflicts with a long line of decisions of this Court, and will make it impossible for the constitutionality of a Senate (or House) rule to be challenged, not only by these petitioners, but by any future plaintiff. The decision therefore warrants review, and the petition for a writ of *certiorari* should be granted.

I. The Ruling Will Make It Impossible Not Only For These Petitioners, But For Any Future Plaintiffs, To Challenge The Constitutionality Of A Senate Rule.

The court of appeals ruled as a matter of law that petitioners lack standing to challenge the constitutionality of the Senate cloture rule in a declaratory judgment action against the Vice President in his capacity as the President of the Senate or against Senate employees officially charged with interpreting, implementing, and enforcing the rules on behalf of

the Senate. According to the court, because these defendants are "non-Senators," they did not cause and were not legally "responsible for" petitioners' injuries; petitioners' injuries were caused instead "by an 'absent third party' – the Senate itself," (App. 10) when it "established the cloture rule and [by] the Senators [whose] vot[es] against cloture doomed the DREAM and DISCLOSE bills." App. 9.

The court said that it was "apparent why" the petitioners had not named the Senate nor any individual senators as defendants (App. 6), observing that they would be immune under "the Speech or Debate Clause." App. 7.

The District of Columbia is the only jurisdiction in which a suit challenging the constitutionality of a Senate rule (or a House rule) can be brought because it is the only court with jurisdiction and venue over the Vice President and Senate employees who interpret, implement, and enforce the rules on behalf of the Senate. They are the only conceivable defendants who are not immune under the Speech or Debate Clause.

The ruling of the court of appeals creates a dilemma that will make it impossible, not only for these petitioners, but for any future plaintiff who has been injured by an unconstitutional Senate rule or procedure, to challenge its validity, no matter how clearly the rule conflicts with the Constitution. If the plaintiff sues the Senate and its members, the case will be dismissed instantly under the Speech or

Debate Clause. If the plaintiff sues the Vice President or the Senate employees who are responsible for the implementation and enforcement of the unconstitutional rule, the case will be dismissed for lack of standing.

II. The Ruling Will Nullify This Court's Decisions In *Ballin, Smith* And *Yellin*.

The court of appeals' decision conflicts with and effectively nullifies the ruling of this Court in *United States v. Ballin,* 144 U.S. at 5. In *Ballin* this Court addressed the validity of a House rule for determining the presence of a quorum. While acknowledging that "the constitution empowers each house to determine the rules of its proceedings," the Court held that the rulemaking power of the Senate or the House is not absolute and that neither house "may . . . by its rules ignore constitutional restraints." The ruling of the court of appeals frees the Senate and the House of Representatives from any "constitutional restraints" on their rulemaking powers and procedures, and gives them *carte blanche* to adopt rules that are clearly incompatible with the Constitution.

The ruling of the court of appeals will also nullify this Court's ruling in *United States v. Smith*, 286 U.S. at 33, which held that when "the construction [by the Senate of its] . . . rules *affects persons other than members of the Senate*," – as it affected the petitioners in this case – "the question presented is . . . a

judicial one" and a matter of law for the courts (emphasis added).

Finally, the decision will also nullify the decision of this Court in *Yellin v. United States*, 374 U.S. at 114, in which this Court held that "[i]t has been long settled . . . that the rules of Congress . . . are judicially cognizable." The rules of Congress will not be "judicially cognizable" if a person who has been injured by an unconstitutional Senate rule or procedure does not have standing to bring a declaratory judgment action against the Vice President or the employees of the Senate charged with its implementation and enforcement.

Thus, at a fundamental level, the court of appeals' decision will make it impossible for the federal courts to perform their primary and essential function under the Constitution, as recognized in both *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) and in *Ballin* – namely, to prevent one or both houses of Congress from violating the doctrine of separation of powers by exceeding the limitations imposed by the Constitution on the exercise of their powers to pass laws or determine the rules of their proceedings.

III. The Ruling Also Nullifies The Decisions Of This Court Allowing The Constitutionality Of Executive Orders Issued By The President, And Of Statutes, Resolutions And Rules Adopted By Congress, To Be Challenged By Suing Subordinate Officials.

The court of appeals' ruling cannot be reconciled with a long line of other decisions of this Court allowing injured plaintiffs to sue subordinate officials charged with the duty of implementing or enforcing an allegedly unconstitutional executive order issued by the President or a statute, resolution, or rule adopted by one or both Houses of Congress, without naming the President or the members of Congress as defendants. None of these cases was dismissed because of the failure to sue the President who issued the unconstitutional executive order, the members of Congress who voted for an unconstitutional resolution or statute, or the President who signed the statute into law – even though their actions, and not those of their subordinates, were the primary cause of the plaintiffs' injuries.

In *Marbury*, William Marbury sued Secretary of State James Madison for a writ of mandamus compelling Madison to deliver to Marbury the justice of the peace commission signed by President John Adams shortly before leaving office. Madison was merely carrying out an order from President Thomas Jefferson, who had defeated Adams for reelection. This Court held that Jefferson had no right to revoke Marbury's appointment, and that Madison's refusal to

deliver the commission was unauthorized (*ultra vires*) because Jefferson's order was illegal. 5 U.S. at 167–68. No one argued then, or since, that *Marbury v. Madison* was wrongly decided and should have been dismissed for want of standing without reaching the constitutional questions in the case.

Since *Marbury*, this Court has consistently allowed the constitutionality of an executive order or a statute to be challenged in suits against subordinate officials on the ground that their implementation or enforcement of an invalid order or statute was *ultra vires*, without requiring that suit be brought against the President who issued the order, or the members of Congress who voted for an unconstitutional statute, resolution or rule.

In *Youngstown Sheet & Tube v. Sawyer,* for example, the plaintiff was allowed to challenge the constitutionality of President Truman's order seizing its steel mill by suing the Secretary of Commerce. 343 U.S. 579 (1952). No one argued in that case or since that the case should have been dismissed for want of standing because Youngstown Sheet & Tube did not sue President Truman.

In *National Federation of Independent Business v. Sebelius*, 132 S. Ct. at 2566, the plaintiffs filed a pre-enforcement challenge to the Patient Protection and Affordable Care Act by filing an action for a declaratory judgment and an injunction against Kathleen Sebelius, the Secretary of Health and Human Services, the subordinate official charged with

interpreting and administering the Act, without naming as defendants the members of Congress who voted for the Act, or President Obama who signed it into law. No one argued that the case should have been dismissed for lack of standing because plaintiffs' alleged injuries were not caused by Secretary Sebelius, but by the members of Congress who voted for the Act and by the President who signed the Act into law. *See also Ex parte Young*, 209 U.S. 123 (1908) (holding that plaintiffs could challenge the constitutionality of a state statute by suing a subordinate state official, without suing the State).

This Court has never held that an individual who has been injured by a failure on the part of Congress to follow the procedures for the enactment of laws specified in Article I, § 7 does not have standing to sue subordinate officials, but must sue Congress or its members to challenge the violation of the plaintiff's procedural rights under the Constitution. *Clinton*, 524 U.S. at 417; *Chadha*, 462 U.S. at 419; *see also United States v. Munoz-Flores,* 495 U.S. 385 (1990) (alleging a violation of the Origination Clause).

These same principles have been applied in cases in which plaintiffs have challenged the constitutionality or the interpretation of a Senate rule (*Ballin*, 144 U.S. at 5; *Smith,* 286 U.S. at 33), and a House rule (*Missouri Pac. Ry. Co.*, 248 U.S. at 276), or resolutions adopted by only one House of Congress. *Powell*, 395 U.S. at 486 (refusing to seat an elected member); *Kilbourn v. Thompson*, 103 U.S. 168 (1881) (ordering an arrest for contempt).

If the ruling of the court of appeals is correct, all of these cases were wrongly decided and should have been dismissed for want of standing under Article III because of the failure of the plaintiffs to sue the President and the members of Congress who primarily caused the plaintiffs' injuries by voting to adopt the statute, resolution or rule, or by misinterpreting a Senate or House rule.

IV. The Ruling Conflicts With This Court's Decisions That The Causation Element Of Article III Standing Requires Only That Petitioners' Injuries Be "Fairly Traceable" To The Actions Of At Least One Of The Respondents.

A. This Court Has Rejected The Primary Causation Requirement Imposed By The Court Of Appeals.

The court of appeals ruled as a matter of law that petitioners did not have standing to sue the defendants, because as "non-Senators" their actions were not the *primary* cause of petitioners' injuries. According to the court, the defendants were not responsible because they did not adopt the supermajority-vote requirement in Rule XXII; nor did they vote against (or fail to vote for) the cloture motions that doomed the DREAM and DISCLOSE Acts. Under the court's reasoning, the petitioners would not have suffered any injury but for the Senate's adoption of Rule XXII and a minority of senators' votes against cloture.

This Court has never adopted a *primary cause* or "proximate cause" standard for the causation element of Article III standing. In fact, this Court rejected such a standard in *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* ___ U.S. ___, 134 S. Ct. 1377, 1391, n.6 (2014), stating: "Proximate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct."

Nor does Article III require that suit be brought against the person or entity that is *primarily* responsible for a plaintiff's injuries. *See Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, ___ n.12, 130 S. Ct. 3138, 3163 n.12 (2010). Article III requires only that there be "*a causal connection* between [the plaintiff's] injury and the conduct complained of . . . [that is] *fairly traceable* to the challenged action of the defendant and not . . . the result of the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (emphasis added, internal punctuation omitted).

B. The Petitioners' Injuries Are "Fairly Traceable" To The Duties And Actions Of The Respondents.

The causation element of Article III standing is satisfied as long as the petitioners' injuries are "fairly traceable" to the actions (or inactions) of at least one of the defendants who *participated* in the challenged

conduct as part of their official duties or as an agent of the responsible body. *See, e.g.*, *Powell*, 395 U.S. at 504 (holding that "legislative employees who *participated* in the unconstitutional activity are responsible for their acts.") (emphasis added).

In *Powell*, this Court exercised jurisdiction in a declaratory judgment action by Representative Adam Clayton Powell against three employees of the House of Representatives – the Clerk, the Doorkeeper, and the Sergeant at Arms. Powell challenged the constitutionality of a House resolution denying him his seat in the House. As a result of the resolution, the Clerk no longer had authority to continue providing Powell services as a member of the House; the Doorkeeper had no authority to admit Powell to the House chamber; and the Sergeant at Arms had no authority to pay Powell a salary as a member of the House.

Although this Court held that Powell was barred by the Speech or Debate Clause from suing John McCormack, the Speaker of the House, and other members of the House of Representatives who voted in favor of the resolution, the Court held that Powell could prosecute a declaratory judgment action solely against "legislative employees who *participated* in the unconstitutional activity [and] are responsible for their acts." *Id.* It ruled that the fact "[t]hat House employees are acting pursuant to express orders of the House does not bar judicial review of the constitutionality of the underlying legislative decision" to deny Powell his seat. *Id.* The Court specifically held that a federal "court may grant declaratory relief

[against employees of the House] even though it chooses not to issue an injunction or mandamus. . . ." *Id*. at 499.

In this case, the court of appeals ruled as a matter of law that the petitioners' injuries were not fairly traceable to the actions of any of the respondents. But the official duties of each of the respondents – the Secretary of the Senate, the Parliamentarian, and the Sergeant at Arms – in implementing or enforcing the Senate cloture rule involved far more affirmative actions as agents of the Senate than those at issue in *Powell*.

The official duties of the Secretary of the Senate, as alleged in the complaint, include recording the votes and keeping the official minutes and records of the Senate. The final vote against cloture, which the court of appeals cited as the action that "doomed" the DREAM and DISCLOSE bills (App. 9), was officially recorded by the Secretary of the Senate.

The Parliamentarian participates in the implementation and enforcement of the Senate cloture rule as the Senate's expert on issues of parliamentary procedure. The court of appeals held that the petitioners' injuries were not caused by the Parliamentarian because "the Parliamentarian's role is 'purely advisory.'" App. 9. This ruling conflicts with this Court's decisions finding standing even when the named defendant serves only an advisory function.

For example, in *Bennett v. Spear*, 520 U.S. 154, 169–71 (1997), this Court held that a plaintiff had

standing to sue the Fish and Wildlife Service for issuing an opinion on which the Bureau of Reclamation had relied to reallocate river water in a way that allegedly violated the Endangered Species Act. The Court rejected an argument by the Fish and Wildlife Service that the suit should be dismissed because its opinion was purely advisory and that the Bureau's decision, rather than its action, was the cause of the plaintiff's injury. The Court held that "while the Service's Biological Opinion theoretically serves an 'advisory function,' in reality it has a powerful coercive effect on the [Bureau] . . . [which] runs a substantial risk if its (inexpert) reasons [for disregarding the advice] turn out to be wrong," and that this was to satisfy the "fairly traceable" element Article III standing. *Id*. *See also Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (plurality opinion) (upholding standing in declaratory judgment action challenging congressional reapportionment against Secretary of Commerce, even though Secretary's report to the President after the decennial census was advisory and not binding).

In this case, as in *Bennett,* even though the Parliamentarian's role is advisory, the Senate "runs a substantial risk if its (inexpert) reasons" for disregarding the expert advice of the Parliamentarian turn out to be wrong. In numerous cases, this Court has rejected one house's interpretation of its own rules. *See Smith*, 286 U.S. at 33 (in which this Court rejected the Senate's interpretation of its rules). *See also Yellin*, 374 U.S. at 114 and *Christoffel*, 338 U.S.

at 84 (both rejecting interpretations of House rules by House committees). Thus, the court of appeals' ruling that petitioners did not have standing to sue the Senate Parliamentarian because her opinions are advisory is in direct conflict with the rulings in *Franklin v. Massachusetts* and *Bennett v. Spear*.

Finally, the Sergeant at Arms is expressly charged with the duty of enforcing the Senate rules, whenever enforcement is necessary. His participation is no less substantial here than that of the Sergeant at Arms against whom relief was granted in *Powell*.

V. Upholding The Petitioners' Standing Is Consistent With The Objectives Of Article III.

This Court's standing doctrine is designed to ensure that the parties' dispute presents a "case or controversy" under Article III. The court of appeals wrongly assumed that the purpose of the causation element of standing is, as in tort cases, to assign responsibility, assess blame, or award damages for a defendant's wrongful actions. That is not, however, the purpose of causation as an element of Article III standing in the context of a declaratory judgment action against a public official that seeks to challenge the constitutionality of a statute or Senate rule.

The causation element of Article III standing in the naming of *defendants* in such a declaratory judgment action primarily serves a two-fold purpose. First, it ensures that the validity of the statute or Senate rule in question will be defended in an

adversarial proceeding by a defendant who has a genuine stake in the controversy, and whose authority to act under the statute or Senate rule in question would be *ultra vires* if the statute or rule is declared unconstitutional. It ensures that the parties before the Court will provide the kind of sharp presentation of the issues on which the Court depends.

That purpose is fulfilled here. The Secretary of the Senate, the Parliamentarian, and the Sergeant at Arms are employees and agents of the Senate, and as such, have a direct interest in defending the constitutionality of the Senate cloture rule against attack on behalf of the Senate. *See Franklin*, 505 U.S. at 803 (holding Secretary of Commerce "has an interest in defending her policy determinations concerning the census" in a declaratory judgment action challenging congressional reapportionment of seats). The defendants in this case, including the Vice President, are being represented by the Senate Office of Legal Counsel at the direction of the Senate pursuant to Senate Resolution 486 (112th Cong.). *See Montana v. United States*, 440 U.S. 147 (1979).

Second, in order to prevent the issuance of advisory opinions, the standing requirements ensure that a judgment will redress the plaintiff's injuries and settle the controversy by determining whether the statute or Senate rule under which the defendants have been operating is *ultra vires*. That purpose is also served in this case. A judgment against the Vice President and the Senate employees declaring the supermajority-vote requirements in Rule XXII unconstitutional and severing them from the remainder

of Rule XXII will redress the injury to the procedural rights under the Constitution of the petitioners who stood to benefit from the DREAM and DISCLOSE acts and of the House members who voted for these bills, even though the Senate is not a formal party to the action. *See, e.g.*, *N.E. Fla. Assn. of Gen. Contrs. v. City of Jacksonville,* 508 U.S. 656, 664–65 (1993) (injury redressed by removal of unconstitutional obstacle); *Franklin*, 505 U.S. at 803 (plurality opinion) (Court assumes that absent executive and congressional officials who "would not be directly bound by such a determination" would abide by "declaratory relief against the Secretary alone" concerning the proper interpretation of the census statute and the constitutional provision on apportionment).

CONCLUSION

Petitioners respectfully urge that their petition for a writ of *certiorari* be granted, and that the judgment of the court of appeals dismissing the complaint be reversed.

Respectfully submitted,

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August 29, 2014

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 21, 2014 Decided April 15, 2014

No. 12-5412

COMMON CAUSE, ON ITS OWN BEHALF AND BEHALF OF ITS MEMBERS, ET AL.,
APPELLANTS

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES SENATE, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:12-cv-00775)

Emmet J. Bondurant II argued the cause for appellants. With him on the briefs was *Stephen Spaulding*.

Thomas E. Caballero, Assistant Senate Legal Counsel, Office of Senate Legal Counsel, argued the cause for appellees. With him on the brief were *Morgan J. Frankel*, Senate Legal Counsel, *Patricia Mack Bryan*, Deputy Senate Legal Counsel, and *Grant R. Vinik*, Assistant Senate Legal Counsel.

Before: HENDERSON, *Circuit Judge*, and WILLIAMS and RANDOLPH, *Senior Circuit Judges*.

Opinion for the Court filed by *Senior Circuit Judge* RANDOLPH.

RANDOLPH, *Senior Circuit Judge*: A bill that would have become the "DISCLOSE" Act and a bill that would have become the "DREAM" Act never became law. Both bills passed the House of Representatives during the 111th Congress and then stalled in the Senate. *See generally* H.R. 5281, 111th Cong. (2d Sess., 2010) (DREAM bill); H.R. 5175, 111th Cong. (2d Sess., 2010) (DISCLOSE bill). The Senate never put either to a vote. Both fell to a filibuster. According to the plaintiffs, the Senate rule governing filibusters is unconstitutional.

The mechanics of a filibuster are these. Senators are entitled to debate any bill indefinitely unless the Senate passes a motion, known as a "cloture" motion, to end debate and proceed to a vote on the bill. *See* WALTER J. OLESZEK, CONG. RESEARCH SERV., CLOTURE: ITS EFFECT ON SENATE PROCEEDINGS (2008). The Senate typically operates by majority rule. But under Senate Rule XXII, invoking cloture requires a three-fifths majority of all Senators – sixty votes. *See* STANDING RULES OF THE SENATE, S. DOC. 113-18, R. XXII § 2, at 15-17 (2013). In other words, even when a majority of Senators support a bill, a minority of Senators can put off a vote indefinitely.

Historically, a Senator determined to prevent a vote on a measure he opposed would stand and speak for hours on end. Unless he yielded the floor, the Senate could not move forward. Modern filibusters

are less physically demanding. Due to a change in the Senate's legislative procedure, filibustering no longer requires that a Senator "actually stand before the chamber speaking." Tonja Jacobi & Jeff VanDam, *The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in the U.S. Senate*, 47 U.C. DAVIS L. REV. 261, 277-78 (2013). About forty years ago, the Senate began to conduct its legislative business on parallel "tracks." *See* Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1010 (2011). As a result, the defeat of a cloture motion allows the Senate to take up other business while the "filibuster" remains, in a technical sense, ongoing.[1] *Id.*

The DREAM and DISCLOSE bills foundered on this modern version of the filibuster. The Senate considered cloture motions on both bills. Although the motions garnered the votes of a majority of Senators, neither motion achieved the sixty votes necessary to cut off debate. *See* 156 CONG. REC. S10,665 (daily ed. Dec. 18, 2010) (defeating cloture, 41-55, on the House-passed DREAM bill); 156 CONG. REC. S7388 (daily ed. Sept. 23, 2010) (defeating cloture, 39-59, on the Senate version of the DISCLOSE bill after the House passed a similar bill). After the failed cloture votes, the Senate turned to other business.

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[1] Making filibusters easier has made them more frequent. Today the mere threat of a filibuster may be "enough to convince the majority leader to devote the Senate's time to other matters." RICHARD S. BETH & VALERIE HEITSHUSEN, CONG. RESEARCH SERV., FILIBUSTERS AND CLOTURE IN THE SENATE 23 (2013).

The plaintiffs in this case are House members who voted for the DREAM and DISCLOSE bills, individuals who would have benefitted from the DREAM Act, and an association, Common Cause, that supported passage of the DISCLOSE Act. We shall refer to the plaintiffs collectively as Common Cause. They brought suit in the district court in May 2012 against the Vice President and three Senate officers. Their complaint alleged that the effect of Rule XXII is to require sixty votes to get legislation through the Senate, that the rule prevents the passage of legislation that has the support of a majority of both houses of Congress, and that the rule therefore violates the Constitutional principle of majority rule. They asked the court to strike the sixty-vote requirement from Rule XXII and replace it with a majority-rule requirement.[2]

The district court dismissed the complaint for lack of jurisdiction. *Common Cause v. Biden*, 909 F. Supp. 2d 9, 17-27 (D.D.C. 2012). The court ruled that none of the plaintiffs – neither the Congressmen, the individuals, nor the association – had suffered a

[2] This is not the first constitutional challenge to the filibuster. No court has reached the merits of the dispute. *See, e.g.*, *Judicial Watch, Inc. v. U.S. Senate*, 432 F.3d 359 (D.C. Cir. 2005) (dismissing for lack of standing); *Patterson v. U.S. Senate*, No. 13-2311 (N.D. Cal. Mar. 31, 2014) (same); *Page v. Shelby*, 995 F. Supp. 23 (D.D.C. 1998) (same). But the filibuster remains a topic of scholarly debate. *See, e.g.*, Josh Chafetz & Michael J. Gerhardt, Debate, *Is the Filibuster Constitutional?*, 158 U. PA. L. REV. PENNUMBRA 245 (2010).

cognizable injury. *See id.* at 18-20 (procedural injury), 21-22 (substantive injury), 23-26 (vote nullification). It found that the plaintiffs could not satisfy the causation and redressability prongs of standing, because there was no guarantee the bills would have passed but for Rule XXII and because nothing the court could do would provide effective relief. *Id.* at 22-23. The court also determined that the suit presented a nonjusticiable political question. *Id.* at 27-31.

We agree with the district court that Common Cause lacks standing, but for a different reason. Our analysis focuses on whom Common Cause chose to sue – or, more to the point, *not* to sue.

The Senate has the power to "determine the Rules of its Proceedings." U.S. CONST. art. I, § 5. Accordingly, it was the Senate that adopted the cloture rule in 1917, *see* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 195 (1997); it was the Senate that amended the rule thereafter, *see id.* at 209-13; and it was the Senate that failed to invoke cloture on the DREAM and DISCLOSE bills. If "we assume for purposes of standing that [Common Cause] will ultimately receive the relief sought," *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 665 (D.C. Cir. 1996) (en banc), it will be the Senate that has to conduct its legislative business according to a court-ordered change in its rule.

Yet the complaint named neither the Senate nor a Senator.[3] It is apparent why. *See* Tr. of Oral Arg. at 11, *Common Cause v. Biden*, No. 12-5412 (D.C. Cir. Jan. 21, 2014). The Constitution's Speech or Debate Clause provides that "for any Speech or Debate in either House," Senators and Representatives "shall not be questioned in any other Place." U.S. CONST. art I, § 6. The Clause confers immunity for any act that falls "within the sphere of legitimate legislative activity." *Eastland v. U.S. Servicemen's Fund*, 421 U. S. 491, 503 (1975); *see also Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880) (the Clause covers all "things generally done in a session of the House [or Senate] by one of its members in relation to the

[3] Citing *Montana v. United States*, 440 U.S. 147 (1979), Common Cause argues that no matter who the defendants are, the Senate will be bound by the result of this lawsuit because it "has undertaken and is controlling the defense" on behalf of the Senate officers sued. Reply Br. of Appellants 1 n.2. We seriously doubt whether *Montana* – a case about collateral estoppel – supports Common Cause's position. But even if it did, the argument has at least two fatal flaws. First, it appears only in Common Cause's reply brief and is forfeit. *See Newspaper Ass'n of Am. v. Postal Regulatory Comm'n*, 734 F.3d 1208, 1212 (D.C. Cir. 2013) ("[W]e have repeatedly held that we do not consider arguments raised only in a reply brief."). Second, there is no reason to think Common Cause's *ipse dixit* – that the Senate is "controlling" the defense – is true. Senate Resolution 485, cited by Common Cause, simply authorizes Senate Counsel "to represent" the defendants in this lawsuit. S. Res. 485, 112th Cong. (2012). We doubt the Senate's involvement extended any further. Indeed we doubt Senate Counsel would have *allowed* it to. *Cf.* MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (barring interference with the client-lawyer relationship by a third party who pays for the representation).

business before it"). And it protects not only elected legislators but their aides, to whom legislative work is delegated. *See Gravel v. United States*, 408 U.S. 606, 616-18 (1972). That is, the Clause covers aides when their conduct "would be a protected legislative act if performed by the Member himself." *Id.* at 618.

When the Clause applies, it is an absolute bar to suit. *See Eastland*, 421 U.S. at 503. The right not to be "questioned in any other Place," U.S. CONST. art. I, § 6, means that lawmakers are protected "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

What defeated the DREAM and DISCLOSE bills was legislative action, activity typically considered at the heart of the Speech or Debate Clause. *See, e.g.*, *Doe v. McMillan*, 412 U.S. 306, 311-12 (1973). Yet Common Cause, in objecting to the Senate rule dealing with how Senators "Debate" legislation, named as defendants only the Vice President, in his capacity as President of the Senate, *see* U.S. CONST. art. I, § 3; the Secretary of the Senate; the Parliamentarian of the Senate; and the Sergeant-at-Arms of the Senate. Relying on the Supreme Court's Speech or Debate Clause decisions, the defendants mount an argument that the Clause protects them from suit, just as it does Senators and their aides.[4] Whether they are

[4] For instance, the Constitution designates the Vice President "President of the Senate." U.S. CONST. art. I, § 3. As such, he has "no Vote, unless [the Senate] be equally divided." *Id.*

(Continued on following page)

right is unnecessary for us to decide. In suing only non-Senators, Common Cause is "Hoist with [its] own petar." WILLIAM SHAKESPEARE, HAMLET, PRINCE OF DENMARK act 3, sc. 4.

To invoke the jurisdiction of the federal courts, a plaintiff must allege (1) a concrete injury (2) caused by the defendant (3) that a favorable judicial decision will redress. *See, e.g.*, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146-47 (2013). The causation element requires that a proper defendant be sued. *See* 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3531.5 (3d ed. 2013); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). That is, a plaintiff's claimed injury must have been caused by "acts of the defendant, not of some absent third party." *Fla. Audubon Society*, 94 F.3d at 663.

The defendants argue that the Senate, acting through its voting Members, caused the injuries

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When "the Vice President is fulfilling his duties under Article I to preside over the Senate and break ties," he might "be considered part of the legislative branch and fall within the ambit of the Speech or Debate Clause." Roy E. Brownell II, *Vice Presidential Secrecy: A Study in Comparative Constitutional Privilege and Historical Development*, 84 ST. JOHN'S L. REV. 423, 579 (2010) (footnote omitted); *see also* Memorandum from Robert G. Dixon Jr., Ass't Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, Re: Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office, at 36 (Sept. 24, 1973) ("With respect to his responsibility as tie breaker his immunity . . . should be analogized to that of Members of Congress under Article I, section 6. . . .").

alleged in the complaint. In response, Common Cause cites *Powell v. McCormack*, 395 U.S. 486 (1969), for the proposition that it may challenge the cloture rule by suing the Senate officers responsible for "implementing" it, even if it cannot sue the legislators who created it. Reply Br. of Appellants 15 (emphasis omitted). The analogy to *Powell* does not hold up. After the House of Representatives voted to exclude Adam Clayton Powell, Powell sued the Speaker of the House, five Members of the House, the Clerk of the House, the Sergeant at Arms, and the House Doorkeeper for "refus[ing] to pay Powell his salary" and "threaten[ing] to deny Powell admission to the House chamber." *Powell*, 395 U.S. at 493. The Court concluded that Powell could sue the House officers "for their acts" in implementing the House resolution. *Id.* at 505. The causal connection between the named officers and the specific injuries alleged was obvious.

Here, Common Cause does not identify anything the defendants did (or refrained from doing) to cause its alleged injuries. The Senate established the cloture rule and the Senators voting against cloture doomed the DREAM and DISCLOSE bills. It is hard to imagine how any of the defendants bore responsibility for that outcome. Consider, for instance, the defendant Senate Parliamentarian. If he enforced or executed Senate rules, then perhaps he could be held to account if the rule were unconstitutional. *See Powell*, 395 U.S. at 503-06. But the Parliamentarian's role is "purely advisory." Chafetz, *supra*, at 1036. Rulings on Senate procedure are the purview of the Senate's presiding officer. *Id.* at 1036-37. And Senate

Rule XX makes the rulings of the presiding officer appealable to the full chamber.[5] *See* STANDING RULES OF THE SENATE, *supra*, R. XX. Thus the Vice President is an improper defendant, too, even though he may preside over Senate proceedings. In any event, the Vice President did not preside over the cloture votes on the DREAM and DISCLOSE bills.

In short, Common Cause's alleged injury was caused not by any of the defendants, but by an "absent third party" – the Senate itself. *Fla. Audubon Society*, 94 F.3d at 663. We therefore lack jurisdiction to decide the case.

The judgment of the district court is

Affirmed.

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[5] That opportunity to appeal constituted the so-called "nuclear option" the Senate invoked to modify the cloture rule as applied to executive branch and lower federal court nominees. *See generally* Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES (Nov. 21, 2013). On November 21, 2013, the Senate considered, and defeated, a cloture motion on a nomination to a judgeship on this court. Senator Reid, the majority leader, then raised a point of order to the Chair, positing that a cloture vote for such nominations required only a majority. The Chair rejected the point of order under Rule XXII. Senator Reid then appealed the ruling to the full Senate, and, by a 52-48 vote, the Chair's ruling was overturned. Thus was set new Senate precedent interpreting Rule XXII in the context of executive branch and lower federal court nominations. *See* 159 CONG. REC. S8417-18 (daily ed. Nov. 21, 2013).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMON CAUSE, *et al.,*	) Civil Action No.
Plaintiffs,	) 12-775 (EGS)
v.	)
JOSEPH R. BIDEN, JR., *in his official capacity as President of the United States Senate, et al.,*	)
Defendants.	)

ORDER

(Filed Dec. 21, 2012)

For the reasons stated in the accompanying Memorandum Opinion filed this same day, it is hereby

ORDERED that Defendants' Motion to Dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure is **GRANTED**; and it is

FURTHER ORDERED that Plaintiffs' Complaint is **DISMISSED**.

SO ORDERED.

SIGNED: Emmet G. Sullivan
United States District Judge
December 21, 2012

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMON CAUSE, *et al.*, Plaintiffs, v. JOSEPH R. BIDEN, JR., *in his official capacity as President of the United States Senate, et al.*, Defendants.	Civil Action No. 12-775 (EGS)

MEMORANDUM OPINION

(Filed Dec. 21, 2012)

Plaintiffs in this action are a non-profit organization devoted to government accountability and election reform, four members of the United States House of Representatives, and three individuals who allege they would have benefited from the DREAM Act. They bring this suit against representatives of the United States Senate seeking a declaratory judgment that Rule XXII (the "Cloture Rule" or the "Filibuster Rule") – which requires a vote of sixty senators to proceed with or close debate on bills or presidential nominations and a two-thirds vote to proceed with or close debate on proposed amendments to the Senate Rules – is unconstitutional because it is "inconsistent with the principle of majority rule." In the alternative, Plaintiffs challenge Senate Rule V, which provides that the Senate's rules continue from one Congress to the next, unless amended. Pending before

the Court is Defendants' Motion to Dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Defendants make three arguments: (1) Plaintiffs lack standing to bring this suit; (2) the Speech or Debate Clause bars this suit; and (3) the Complaint presents a non-justiciable political question.

The Court acknowledges at the outset that the Filibuster Rule is an important and controversial issue. As Plaintiffs allege, in recent years, even the mere threat of a filibuster is powerful enough to completely forestall legislative action. However, this Court finds itself powerless to address this issue for two independent reasons. First, the Court cannot find that any of the Plaintiffs have standing to sue. Standing is the bedrock requirement of an Article III court's jurisdiction to resolve only those cases that present live controversies. While the House Members have presented a unique posture, the Court is not persuaded that their alleged injury – vote nullification – falls into a narrow exception enunciated by the Supreme Court in *Raines v. Byrd.* And none of the other Plaintiffs have demonstrated that this Court can do anything to remedy the alleged harm they have suffered: the inability to take advantage of the opportunity to benefit from proposed legislation that was never debated, let alone enacted. The Court is even less persuaded that the Plaintiffs possess a "procedural" right, grounded in the text of the Constitution, that entitles them to the majority enactment of legislation. Second, and no less important, the Court is firmly convinced that to intrude into this area would

offend the separation of powers on which the Constitution rests. Nowhere does the Constitution contain express requirements regarding the proper length of, or method for, the Senate to debate proposed legislation. Article I reserves to each House the power to determine the rules of its proceedings. And absent a rule's violation of an express constraint in the Constitution or an individual's fundamental rights, the internal proceedings of the Legislative Branch are beyond the jurisdiction of this Court.

Accordingly, upon consideration of Defendants' Motion to Dismiss, the response and reply thereto, the supplemental briefs filed by the parties, the arguments made at the hearing held on December 10, 2012, the relevant law, the entire record in this case, and for the reasons stated below, the Court will **GRANT** Defendants' Motion to Dismiss.

I. BACKGROUND

A. History of the Cloture Rule

The Complaint sets forth the following background regarding the history of the Cloture Rule. At the time the Constitution was adopted, there was no recognized "right" on the part of members of legislative or other parliamentary bodies to engage in unlimited debate over the objections of the majority (*i.e.,* to "filibuster"). Compl. ¶ 20. Under the established rules of parliamentary procedure that prevailed both in England and in the Continental Congress prior to the adoption of the Constitution, the majority had the

power to end a debate and bring a measure to an immediate vote at any time over the objection of the minority by adopting a "motion for the previous question." *Id.* ¶ 21. The Articles of Confederation were an exception, however; under the Articles of Confederation, voting was by state, and the "United States in Congress" was unable to take action without a supermajority vote of nine of the thirteen states. *Id.* ¶ 24. Because the Framers of the Constitution had observed first-hand the paralysis caused by the supermajority voting requirement in the Articles of Confederation, the Framers refused to require more than a majority, either as a condition of a quorum or for the passage of legislation under the proposed new constitution. *Id.* ¶ 25. Only six exceptions to the principle of majority rule were expressly enumerated in the Constitution.[1]

The first rules adopted by the Senate in 1789 adopted the previous question motion. *Id.* ¶ 37. In

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[1] (1) Impeachments, U.S. Const. art. 1, § 3, cl. 6; (2) expelling members, U.S. Const. art. 1, § 5, cl. 2; (3) overriding a Presidential veto of a bill, U.S. Const. art. 1, § 7, cl. 2; (4) overriding a Presidential veto of an Order, Resolution or Vote, U.S. Const. art. 1, § 7, cl. 3; (5) ratification of treaties by the Senate, U.S. Const. art. 2, § 2, cl. 2; and (6) amendments to the Constitution, U.S. Const. art. V. In addition, two exceptions were subsequently added by amendment: (1) removal of the disability to hold public office of any person who engaged in insurrection or rebellion against the United States, U.S. Const. amend. XIV, § 3; and (2) a determination that the President is unable to discharge the powers and duties of his office, U.S. Const. amend. XXV, § 4. *See* Compl. ¶¶ 26-27.

1806, however, the previous question motion was eliminated from the rules of the Senate, apparently at the urging of Vice President Aaron Burr, who, in his farewell address before the Senate in 1805, suggested that the previous question motion was unnecessary because it had been invoked only once during the four years that he had presided over the Senate. *Id.* ¶ 38. From 1806 until 1917, the Senate had no rule that allowed the majority to limit debate or terminate a filibuster. Despite the absence of a rule for limiting debate, filibusters were relatively rare during this period and occurred at an average rate of one every three years between 1840 and 1917. *Id.* ¶ 40. In 1917, however, after a small minority of senators filibustered a bill authorizing President Wilson to arm American merchant ships, leading to public outrage, the Senate adopted the predecessor to the current Cloture Rule. *Id.* ¶¶ 41-43. The 1917 rule required a two-thirds vote of the Senate to end debate. *Id.* ¶ 45. Filibusters remained relatively rare from 1917 to 1970.

The Cloture Rule was not amended again until 1975, when the Senate agreed to a compromise amendment to Rule XXII. The amendment changed the number of votes required for cloture from two-thirds of senators present and voting to three-fifths of the Senate, not merely those present and voting (*i.e.,* sixty votes). In addition, the amendment provided that cloture on motions to amend the Senate's rules would continue to require a vote of two-thirds of senators present and voting. The number of votes

required to invoke cloture has not changed since 1975. *See* Defs.' Mem. of P. & A. in Supp. of Mot. to Dismiss ("Defs.' Mem.") at 8. Rule XXII of the Standing Rules of the Senate provides in pertinent part as follows:

> [A]t any time a motion signed by sixteen Senators, to bring to a close the debate upon any measure . . . is presented to the Senate, the Presiding Officer, or clerk at the direction of the Presiding Officer, shall at once state the motion to the Senate, and . . . he shall lay the motion before the Senate and direct that the clerk call the roll, and upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by a yea-and-nay vote the question:
>
> "Is the sense of the Senate that the debate shall be brought to a close?" And if that question shall be decided in the affirmative by three-fifths of the Senators duly chosen and sworn – except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting – then said measure . . . shall be the unfinished business to the exclusion of the all other business until disposed of.

Standing Rules of the Senate Rule XXII § 2; *see also* Compl. ¶ 16. Rule V states that the "rules of the Senate shall continue from one Congress to the next

Congress unless they are changed as provided in these rules." Standing Rules of the Senate Rule V § 2.

The number of actual or threatened filibusters has increased dramatically since 1970, and now dominates the business of the Senate. Compl. ¶ 47. In 2009, there were a record sixty-seven filibusters in the first half of the 111th Congress – double the number of filibusters that occurred in the entire twenty-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. *Id.* ¶ 50. During the 111th Congress, over four hundred bills that had been passed by the House of Representatives – many with broad bipartisan support – died in the Senate without ever having been debated or voted on because of the inability to obtain the sixty votes required by Rule XXII. *Id.* ¶ 52.

B. Allegations in the Complaint

The Complaint is brought by three groups of Plaintiffs. Plaintiff Common Cause is a non-profit corporation formed "to serve as a grass roots 'citizens lobby' to promote the adoption of campaign finance, disclosure and other election reform legislation by Congress and by state and local governments." *Id.* ¶ 9(A). Plaintiffs John Lewis, Michael Michaud, Henry ("Hank") Johnson, and Keith Ellison (the "House Member Plaintiffs"), are members of the House of Representatives representing Georgia, Maine, Georgia, and

Minnesota, respectively. *Id.* 19(B). Finally, Plaintiffs Erika Andiola, Celso Mireles, and Caesar Vargas (the "DREAM Act Plaintiffs"), are three U.S. residents who were born in Mexico, brought to the United States by their families when they were children, and subsequently graduated from college and obtained employment. *Id.* ¶ 9(C). Each group of Plaintiffs alleges that it has suffered injury due to the Cloture Rule preventing a majority in the Senate from closing debate on and passing legislation that would have benefited the Plaintiffs – specifically, the DISCLOSE Act, a campaign finance reform bill, and the DREAM Act, an immigration reform bill. *See id.* ¶¶ 9(D)-(E).

Plaintiffs allege that the Cloture Rule "replaces majority rule with rule by the minority by requiring the affirmative votes of 60 senators on a motion for cloture before the Senate is allowed to even debate or vote on" measures before it. *Id.* ¶ 2. According to Plaintiffs, "[b]oth political parties have used Rule XXII when they were in the minority in the Senate to prevent legislation and appointments proposed by the opposing party from being debated or voted on by the Senate." *Id.* ¶ 4. Plaintiffs further assert that Rule XXII has primarily been used "not to protect the right of the minority to debate the merits of a bill or the fitness of a presidential nominee on the floor of the Senate . . . , but to *suppress and prevent the majority from debating* the merits of bills or presidential appointments opposed by the minority." *Id.* ¶ 7 (emphasis in original). "Actual or threatened filibusters (or objections to the commencement of debate which are

the functional equivalent of a filibuster) have become so common that it is now virtually impossible as a practical matter for the majority in the Senate to pass a significant piece of legislation or to confirm many presidential nominees without the 60 votes required to invoke cloture under Rule XXII." *Id.* ¶ 18. Plaintiffs allege that because invoking cloture is "time consuming and cumbersome," the mere threat of a filibuster is sufficient to forestall consideration of a measure. *Id.* ¶ 15. Furthermore, because Senate Rule V provides that Senate rules continue from one Congress to the next, and because invoking cloture to close debate on any resolution to amend Senate rules requires the affirmative vote of two-thirds of Senators present and voting, Plaintiffs assert that "the combination of Rule V and Rule XXII has made it virtually impossible for the majority in the Senate to amend the rules of the Senate to prevent the minority in the Senate from obstructing the business of the Senate by filibustering." *Id.* ¶ 19.

The Complaint asserts that the Filibuster Rule is invalid because it conflicts with the following constitutional provisions and/or principles: the Senate's Rulemaking Power, U.S. Const. art. I, § 5, cl. 2, Compl. ¶¶ 57-59; the Quorum Clause, U.S. Const. art. 1, § 5, *id.* ¶ 60(a); the Presentment Clause, U.S. Const. art. I, § 7, *id.* ¶ 60(b); "the exclusive list of exceptions" to majority rule, *id.* ¶ 60(c); the power of the Vice President to vote when the Senate is "equally divided," U.S. Const. art. I, § 3, cl. 4, *id.* ¶ 60(d); the Advice and Consent Clause, U.S. Const. art. II, § 2, cl.

2, *id.* ¶ 60(e); the "equal representation of each state in the Senate," *id.* ¶ 60(f); "the finely wrought and exhaustively considered balance of the Great Compromise" regarding representation of states in Congress, *id.* ¶¶ 62-70 (internal quotation marks and citation omitted); the power of the Senate "to adopt or amend its rules by majority vote," *id.* ¶ 74; and "the fundamental constitutional principle that prohibits one Congress (or one house of Congress) from binding its successors," *id.* ¶ 75. Plaintiffs seek the entry of a declaratory judgment, pursuant to 28 U.S.C. § 2201, declaring the supermajority vote portions of Rule XXII unconstitutional. Plaintiffs request that the Court sever the unconstitutional portions of that Rule and declare that a vote of a simple majority is all that is required to invoke cloture. Secondarily, and in the alternative, Plaintiffs seek the entry of a judgment declaring Rule V unconstitutional to the extent that it prohibits the Senate from amending its rules by majority vote.

C. Procedural Background

On May 14, 2012, Plaintiffs filed their Complaint against Vice President Joseph R. Biden, Jr., in his official capacity as President of the Senate, Nancy Erickson, in her official capacity as Secretary of the Senate, Elizabeth MacDonough, in her official capacity as Parliamentarian of the Senate, and Terrance Gainer, in his official capacity as Sergeant-at-Arms of the Senate. Defendants filed a Motion to Dismiss on July 20, 2012, and the Court heard argument on the

motion on December 10, 2012. The motion is ripe for determination by the Court.

II. STANDARD OF REVIEW

Federal district courts are courts of limited jurisdiction, *Kokkonen v. Guardian Life Ins. Co.,* 511 U.S. 375, 377 (1994), and a Rule 12(b)(1) motion for dismissal presents a threshold challenge to a court's jurisdiction, *Haase v. Sessions,* 835 F.2d 902, 906 (D.C. Cir. 1987). On a motion to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of establishing that the Court has jurisdiction. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992). In evaluating such a motion, the Court must "accept[ ] all of the factual allegations in [the] complaint as true," *Jerome Stevens Pharms., Inc. v. FDA,* 402 F.3d 1249, 1250 (D.C. Cir. 2005) (citation omitted), but the Court "is not required . . . to accept inferences unsupported by the facts alleged or legal conclusions that are cast as factual allegations," *Cartwright Int'l Van Lines, Inc. v. Doan,* 525 F. Supp. 2d 187, 193 (D.D.C. 2007) (citation omitted). In addition, the Court may consider materials outside the pleadings where necessary to resolve disputed jurisdictional facts. *Herbert v. Nat'l Acad. of Scis.,* 974 F.2d 192, 197 (D.C. Cir. 1992).[2]

[2] The Court follows the weight of authority in the D.C. Circuit in construing the political question doctrine as a threshold challenge to the Court's jurisdiction pursuant to Rule

(Continued on following page)

III. ANALYSIS

The Court first addresses Plaintiffs' standing to sue.[3] The Court finds that Plaintiffs' attempt to invoke procedural standing fails because Plaintiffs have failed to identify a procedural right that protects their concrete, particularized interests. In addition, each group of plaintiffs has failed to demonstrate Article III standing because they have not demonstrated an injury-in-fact that is caused by the Cloture Rule and that would be redressable by any action of this Court. Finally, the Court finds that this case presents a non-justiciable political question and that dismissal is appropriate on that basis as well.

12(b)(1). *See, e.g., Lin v. United States,* 561 F.3d 502, 504 (D.C. Cir. 2009) (affirming dismissal of complaint for lack of subject matter jurisdiction based on the political question doctrine); *Schneider v. Kissinger,* 412 F.3d 190, 193 (D.C. Cir. 2005) ("The principle that the courts lack jurisdiction over political decisions that are by their nature committed to the political branches to the exclusion of the judiciary is as old as the fundamental principle of judicial review." (internal quotation marks and citation omitted)). Even were the Court to treat political question doctrine as a Rule 12(b)(6) ground, rather than a Rule 12(b)(1) challenge to the Court's jurisdiction, the Court would nonetheless conclude that it lacks authority to decide this case.

[3] Although the Court may dismiss the Complaint on any jurisdictional threshold ground, *see Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 585 (1999), the D.C. Circuit has counseled that standing should be addressed before political question doctrine, *see Reuss v. Balles,* 584 F.2d 461, 465 n.14 (D.C. Cir. 1978). Indeed, the Supreme Court has stated that standing is "the most important of the jurisdictional doctrines." *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 231 (1990) (citation omitted).

A. Standing

Article III of the Constitution restricts the jurisdiction of the federal courts to adjudicating actual "cases" and "controversies." U.S. Const. art. III, § 2; *see also Allen v. Wright,* 468 U.S. 737, 750 (1984). This requirement has given rise to "several doctrines . . . 'founded in concern about the proper – and properly limited – role of the courts in a democratic society.'" *Allen,* 468 U.S. at 750 (quoting *Warth v. Seldin,* 422 U.S. 490, 498 (1975)); *see also Valley Forge Christian Coll. v. Ams. United for Separation of Church and State,* 454 U.S. 464, 471 (1982). One aspect of this "case-or-controversy" requirement is that plaintiffs must have standing to sue, an inquiry that focuses on whether the litigant is entitled to have the court decide the merits of the dispute. *Allen,* 468 U.S. at 750-51 (quoting *Warth,* 422 U.S. at 498).

To establish the "irreducible constitutional minimum" of Article III standing, a plaintiff must show that: (1) he has suffered an "injury in fact" which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) there is a causal connection between the alleged injury and the conduct complained of that is fairly traceable to the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan,* 504 U.S. at 560-61 (citations omitted). The standing inquiry is "especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal

Government was unconstitutional." *Raines v. Byrd,* 521 U.S. 811, 819-20 (1997). If the Court finds that one of the Plaintiffs has standing, it need not consider the standing of the other Plaintiffs. *See Tozzi v. Dep't of Health and Human Servs.,* 271 F.3d 301, 310 (D.C. Cir. 2001). In assessing Plaintiffs' standing, the Court assumes that Plaintiffs will prevail on the merits of their constitutional claims. *See Muir v. Navy Fed. Credit Union,* 529 F.3d 1100, 1105 (D.C. Cir. 2008).

1. Procedural Standing

Plaintiffs argue that they have procedural standing, a more relaxed version of the standing doctrine. *See* Pls.' Opp'n to Mot. to Dismiss ("Pls.' Opp'n") at 31-33. "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." *Lujan,* 504 U.S. at 573 n.7. As the D.C. Circuit has recognized, "where plaintiffs allege injury resulting from violation of a procedural right afforded to them by statute and designed to protect their threatened concrete interest, the courts relax – while not wholly eliminating – the issues of imminence and redressability, but not the issues of injury in fact or causation." *Center for Law and Educ. v. Dep't of Educ.,* 396 F.3d 1152, 1157 (D.C. Cir. 2005). Thus, the D.C. Circuit has held that plaintiffs have procedural standing only if, *inter alia,* (1) the government violated their procedural rights designed to protect their threatened, concrete interest, and (2) the violation resulted in injury to their

concrete, particularized interest. *Id.* However, the procedural standing doctrine "does not – and cannot – eliminate any of the 'irreducible' elements of standing[.]" *Fla. Audubon Soc'y v. Bentsen,* 94 F.3d 658, 664 (D.C. Cir. 1996). For the reasons discussed below, the Court concludes that Plaintiffs have failed to demonstrate that they have a "procedural right" to enactment of legislation by a simple majority. Moreover, Plaintiffs have failed to show that any such right was designed to protect their particularized interest.

In *Lujan,* the Supreme Court offered two examples of procedures designed to protect a party's concrete interest: (1) the requirement for a hearing prior to a denial of a license application is designed to protect the applicant, and (2) the requirement that a federal agency prepare an environmental impact statement before conducting a major federal action such as constructing a dam is designed to protect neighbors of the proposed dam. *See* 504 U.S. at 572. Thus, for example, the D.C. Circuit has found procedural standing where a plaintiff alleged that the FAA authorized certain runway use at a local airport without performing an environmental assessment. The court stated "[t]he procedural requirements of NEPA were designed to protect persons . . . who might be injured by hasty federal actions taken without regard for possible environmental consequences. . . . And [plaintiff] has adequately demonstrated that the FAA's failure to follow the NEPA procedures poses a 'distinct risk' to his 'particularized interests' – given

the location of his home, he is uniquely susceptible to injury resulting from increased use of the secondary runways." *City of Dania Beach v. FAA,* 485 F.3d 1181, 1186 (D.C. Cir. 2007) (citation omitted).

Here, Plaintiffs argue that they are asserting procedural rights based upon "the procedures governing the enactment of statutes set forth in the text of Article I." Pls.' Opp'n at 32 (relying on *INS v. Chadha,* 462 U.S. 919 (1983) and *Clinton v. New York,* 524 U.S. 417 (1998)). According to Plaintiffs, the Presentment Clause, Article I, section 7, is the "only [ ] procedure [prescribed by the Constitution] for the passage of laws." *Id.* at 1.[4] Plaintiffs further allege that although the Presentment Clause 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. *See id.* at 2.

However, Plaintiffs identify no authority for the proposition that an individual has a "procedural right" to any particular form of congressional consideration or debate on a bill. The Supreme Court cases on which Plaintiffs purport to rely do not address

[4] The Presentment Clause, Article I, section 7 states, in relevant part: "Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States." Plaintiffs also rely on the Quorum Clause, Article I, section 5, clause 1, which states: "a Majority of each [House] shall constitute a Quorum to do Business."

procedural standing and thus are not instructive on this issue. For example, in *Chadha,* the Supreme Court held that a provision of the Immigration and Nationality Act that authorized the House of Representatives alone, by resolution, to invalidate an immigration decision of the Executive Branch (the "one-House veto") was unconstitutional because it violated the Presentment Clause. *See* 462 U.S. at 952-58. Similarly, in *Clinton,* the Supreme Court ruled unconstitutional the Line Item Veto Act, which gave the President the power to cancel certain types of statutory spending and tax provisions after they had been signed into law. *See* 524 U.S. at 448-49. Plaintiffs rely on the Court's analysis of the merits in both cases. The Court recognized that the Presentment Clause's requirement that legislative action be passed by both Houses and then presented to the President "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 951; *see also Clinton,* 524 U.S. at 440. Nowhere in either case, however, did the Court analyze whether or not the Constitution, and more specifically Article I, confers an individual procedural right sufficient for standing.

More importantly, however, Plaintiffs' attempt to invoke procedural standing fails because they are unable to demonstrate that any alleged procedural right to majority consideration of proposed legislation is designed to protect Plaintiffs' particularized, concrete

interests. As the D.C. Circuit has recognized, not all procedural-rights violations are sufficient for standing; a plaintiff must show that "the procedures in question are *designed* to protect some threatened concrete interest of *his* that is the ultimate basis of his standing." *Center for Law and Educ.,* 396 F.3d at 1157 (citing *Lujan,* 504 U.S. at 573 n.8). "[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient to create Article III standing." *Summers v. Earth Island Inst.,* 555 U.S. 488, 496 (2009).

Plaintiffs assert that "structural constitutional limits are designed to 'protect the individual.'" Pls.' Opp'n at 33 (quoting *Bond v. United States,* 131 S. Ct. 2355, 2365 (2011)). *Bond,* however, does not involve procedural standing and is distinct from the instant case. In *Bond,* the plaintiff, who had been convicted of a federal crime, challenged the statute under which she was convicted as a violation of the Tenth Amendment. The Court stated that "it [was] clear" Ms. Bond had Article III standing because she was injured by the statute when she was convicted of a federal crime; and indeed, the Court's invalidation of the statute would redress that harm. *See* 131 S. Ct. at 2361-62. The issue in *Bond* was whether the individual plaintiff, rather than a State, was the proper party to bring a Tenth Amendment challenge, a question of prudential standing, not procedural standing. *See id.* at 2360, 2363-64. The Supreme Court stated:

> An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. . . . 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.

Id. at 2364-65 (emphasis added). Bond stands for the proposition that where a plaintiff has already suffered an Article III injury-in-fact due to a statute, that individual can challenge the statute's validity under the Constitution. *See id.* at 2365 ("[I]ndividuals, too, are protected by the operations of separation of powers and checks and balances; and they are not disabled from relying on those principles in otherwise justiciable cases and controversies." (emphasis added)). It does not stand for the proposition that the Constitutional principle of separation of powers confers an individual right that is sufficient to meet the more relaxed requirements of procedural standing.[5]

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[5] The case is also factually distinct because the Court could redress Ms. Bond's injury, whereas here, this Court cannot redress Plaintiffs' deprivation of the opportunity to benefit from legislation that was never enacted, as will be discussed in more detail *infra* Part III.A.2.a.

Beyond their inability to point to a precise procedural right conferred by Article I, Plaintiffs do not point to a concrete interest, particular to these Plaintiffs, that Article I of the Constitution was designed to protect. The Court therefore concludes that Plaintiffs have not demonstrated procedural standing.

2. Article III Standing

As noted above, to demonstrate Article III standing, a plaintiff must establish a concrete and particularized injury, which is fairly traceable to the alleged illegal action, and likely to be redressed by a favorable decision. *Lujan,* 504 U.S. at 560-61. Plaintiffs assert that all three groups of Plaintiffs have Article III standing. Because the DREAM Act Plaintiffs and Common Cause present common issues of law with respect to the standing inquiry, the Court analyzes standing as to these two groups together, and considers the standing of the House Member Plaintiffs separately below.

a. DREAM Act Plaintiffs and Common Cause

Both the DREAM Act Plaintiffs and Common Cause allege that the Cloture Rule injured them by depriving them of the "opportunity to benefit" from the DREAM and DISCLOSE Acts. *See* Pls.' Opp'n at 46-48, 55-57 (citing, *e.g., N.E. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville,* 508 U.S. 656 (1993); *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.")).[6] Plaintiffs emphasize that they are not alleging a "substantive right" to either bill, but rather that their injury arises out of "the Senate's use of unconstitutional procedures to block a

[6] Common Cause asserts that it has organizational standing. For an organization to have standing in its own right, it must meet the same requirements of individual standing: injury-in-fact, causation, and redressability. *See Havens Realty Corp. v. Coleman,* 455 U.S. 363, 378-79 (1982); *Nat'l Treasury Emps. Union v. United States,* 101 F.3d 1423, 1427 (D.C. Cir. 1996). In the Complaint, Common Cause also alleged associational standing. *See* Compl. ¶ 9(D)(1). An association may have standing to sue on behalf of its members if "(1) at least one of its members would have standing to sue in his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit." *Sierra Club v. EPA,* 292 F.3d 895, 898 (D.C. Cir. 2002). In their Motion to Dismiss, Defendants argued that Common Cause did not meet the requirements of associational standing because it had not specifically identified any of its members who suffered the requisite harm. *See* Defs.' Mem. at 22-23. Plaintiffs did not respond to this argument in their Opposition. The Court therefore finds that Plaintiffs have conceded that they do not have associational standing. *See Hopkins v. Women's Div., Gen. Bd. of Global Ministries,* 284 F. Supp. 2d 15, 25 (D.D.C. 2003), *aff'd,* 98 F. App'x 8 (D.C. Cir. 2004) ("It is well understood in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded." (citation omitted)).

bill that would have benefited plaintiffs." Pls.' Opp'n at 48; *see also id.* at 43-44 ("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.").

The Court is not persuaded that Plaintiffs' alleged injury is akin to a deprivation of a contracting opportunity, as recognized by *City of Jacksonville* and its progeny. In those cases, although the plaintiff did not have to show that it would have obtained the particular benefit at issue, it still had to show that its injury was "certainly impending." *See, e.g., Adarand Constrs., Inc. v. Pena,* 515 U.S. 200, 211-12 (1995). Neither the DREAM Act nor the DISCLOSE Act was ever debated by the Senate, let alone enacted into law. And Plaintiffs' assertion that the bills are likely to be re-introduced does not demonstrate that the bills will ever be enacted by the House and the Senate and signed by the President. As a result, there is no existing or certainly impending opportunity from which Plaintiffs could benefit, but for the Cloture Rule. Any injury is therefore hypothetical, rather than concrete.[7] As Defendants argue, to recognize

[7] *Cf. Clinton,* 524 U.S. at 432 ("[Plaintiffs] suffered an immediate injury when the President canceled the limited tax benefit that Congress had enacted to facilitate the acquisition of

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such an injury as sufficient for Article III standing would potentially permit standing for any individual who would have benefited from any piece of legislation that passed one House of Congress but not the other.[8]

Even were the Court persuaded that this was sufficient to demonstrate an injury-in-fact, however,

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processing plants. . . . Congress enacted § 968 for the specific purpose of providing a benefit to a defined category of potential purchasers of a defined category of assets. The members of that statutorily defined class received the equivalent of a statutory 'bargaining chip' to use in carrying out the congressional plan to facilitate their purchase of such assets. . . . [Plaintiffs] had concrete plans to utilize the benefits of § 968 . . . By depriving them of their statutory bargaining chip, the cancellation inflicted a sufficient likelihood of economic injury to establish standing under our precedents.").

[8] Common Cause also has not demonstrated a sufficient injury to its organizational mission. An organization seeking to establish *Havens* standing must show a "direct conflict between the defendant's conduct and the organization's mission." *Nat'l Treasury Emps. Union,* 101 F.3d at 1430; *see also ASPCA v. Feld Entm't, Inc.,* 659 F.3d 13, 25 (D.C. Cir. 2011). According to Plaintiffs, the DISCLOSE Act's defeat "undoubtedly set back Common Cause's mission of encouraging transparency in elections. . . . Common Cause must now independently investigate each individual Super PAC to learn what the DISCLOSE Act would have automatically required." Pls.' Opp'n at 55-56. However, Common Cause has shown no direct conflict between the allegedly illegal conduct – use of the Cloture Rule – and the organization's mission – encouraging transparency in elections. Rather, the use of the Cloture Rule is but an intermediate step that prevented a benefit to the organization's activities. Plaintiffs cite no authority that supports such an attenuated injury as sufficient for purposes of organizational standing.

neither the DREAM Act Plaintiffs nor Common Cause can show causation or redressability for similar reasons. As another Judge on this Court stated with respect to an earlier challenge to the Cloture Rule:

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

Page v. Shelby, 995 F. Supp. 23, 29 (D.D.C. 1998), *aff'd without op.,* 172 F.3d 920 (D.C. Cir. 1998). Not only have Plaintiffs failed to demonstrate that the DREAM and DISCLOSE Acts would have *passed* but for the Cloture Rule,[9] but they also have not

[9] Plaintiffs allege that at this stage, the Court must accept as true Plaintiffs' claim that the DREAM and DISCLOSE Acts *would have passed* the Senate but for the Cloture Rule. *See* Compl. ¶ 9(D)(1)(b) ("The DISCLOSE Act . . . had the support of 59 senators and the President. . . ."); *id.* ¶ 9(D)(2)(a)-(b); *id.* ¶ 9(E)(1) ("[T]he DREAM Act had the support of a clear majority of 55 senators and the support of the President."). However, this was the number of votes in favor of cloture, not in favor of the ultimate passage of the bills. *See* Compl. at 6 n.3 ("Both bills . . . were supported by . . . a majority of senators (as evidenced by the fact that both bills received 59 and 55 votes, respectively, in the Senate on motions for cloture)[.]"). A vote in favor of cloture

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persuaded the Court that they necessarily would have benefitted from those Acts. For example, although Plaintiffs allege that each of the DREAM Act Plaintiffs met the requirements of the DREAM Act considered by the previous Congress, *see* Compl. ¶ 9(C)(1), Defendants argue that the ultimate determination would have been at the discretion of the Secretary of Homeland Security, *see* Defs.' Mem. at 29 (citing H.R. 5281, 111th Cong. § 6(a)(1) (2010) ("Secretary of Homeland Security *may* cancel removal of an alien . . . ")). The connection between the Senate's debate over proposed legislation, or lack thereof, and Plaintiffs' inability to benefit from the opportunities that legislation would have offered is simply too tenuous to support standing.

Finally, even if the Court could declare unconstitutional and sever the sixty vote requirement from

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is not necessarily a guarantee of ultimate support for a bill. *See, e.g.,* Defs.' Mem. at 36 n.29 (providing examples of instances in which senators voted for cloture and then did not vote on the bills' passage and vice versa). Although the Court accepts as true Plaintiffs' factual allegations about the number of Senators who supported cloture, the allegation that the bills would have passed the Senate is the type of conclusory allegation that the Court need not accept, even at the motion-to-dismiss stage. *Cartwright Int'l Van Lines,* 525 F. Supp. 2d at 193 ("In evaluating a motion to dismiss for lack of subject-matter jurisdiction, the court must accept the complaint's well-pled factual allegations as true and construe all reasonable inferences in the plaintiff's favor. The court is not required, however, to accept inferences unsupported by the facts alleged or legal conclusions that are cast as factual allegations." (internal quotation marks and citation omitted)).

the Cloture Rule, that relief would not redress Plaintiffs' alleged injuries because it would not provide them with the opportunity to benefit from the DREAM Act or the DISCLOSE Act.[10] Plaintiffs argue that because they have articulated a procedural right, removing a procedural barrier will redress that violation. *See* Pls.' Opp'n at 61-62. However, as discussed *supra* Part III.A.1., Plaintiffs cannot demonstrate that they have a procedural right to majority consideration of legislation, and their attempt to recast the relief they seek as the ability to have debate on bills is nothing more than a generalized grievance. Plaintiffs further contend that it is likely that severing the sixty vote requirement from the Cloture Rule will allow the passage of both bills: "Since the 111th Congress, multiple DREAM Act bills have been reintroduced. . . . Likewise, the DISCLOSE Act has been reintroduced." Pls.' Opp'n at 62 (citations omitted). The Court is not in a position, however, to determine or predict what action the Senate would take in a final vote on either proposed bill, much less what action would be taken by the House of Representatives and the President. Fundamentally, Plaintiffs' inability to demonstrate all three of the requisite

[10] Nor would declaring Rule V unconstitutional redress Plaintiffs' injuries. Not only would this remedy not provide any guarantee with respect to the DREAM and DISCLOSE Acts, which died in the last Congress, but it also would not necessarily ensure that the Senate would change Rule XXII to provide for majority cloture. This relief is therefore even more speculative than a declaratory judgment with respect to Rule XXII.

Article III standing elements is based upon the same fatal flaw: they cannot show that the invalidation of the Cloture Rule has any connection to, or will have any connection to, their ability to benefit from a particular piece of legislation. The Court concludes, therefore, that it is merely speculative that Plaintiffs' alleged injury would be redressed by a favorable decision.[11]

b. House Member Plaintiffs

Plaintiffs assert that the House Members have been injured because the Cloture Rule nullified votes they personally cast in favor of the DREAM Act and the DISCLOSE Act. *See* Pls.' Opp'n at 49.[12]

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[11] Plaintiffs also assert that the Cloture Rule impacted the DREAM Act Plaintiffs' concrete interests in avoiding deportation and obtaining a path to citizenship. *See* Pls.' Opp'n at 44. Although the Court does not seek to diminish the seriousness of that injury, it cannot find such an allegation sufficient for standing here because Plaintiffs cannot show that the Cloture Rule was the cause of that harm. That is, the DREAM Act Plaintiffs are not being denied a path to citizenship *because of* the Cloture Rule; rather, their injury pre-dates the Senate's consideration of that Act and is the result of existing immigration law. Nor can the DREAM Act Plaintiffs demonstrate that this Court's invalidation of the Cloture Rule's supermajority requirement would redress that harm – no prospective action by this Court can revive the DREAM Act, and it is speculative whether the House, Senate and President will agree to enact the same legislation in the future.

[12] The House Member Plaintiffs additionally claim they have suffered an informational injury because the failure of the DISCLOSE Act to pass prevented the House Members from

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Defendants contend that standing based on this claim of injury is precluded by the Supreme Court's ruling in *Raines,* 521 U.S. 811. *See* Defs.' Mem. at 24. The Court is not persuaded that the House Members' alleged injury constitutes vote nullification for two independent reasons: (1) this case is factually distinguishable from the "narrow" exception recognized by the Supreme Court, and (2) it arises in the federal context, which raises fatal separation-of-powers concerns.

In *Raines,* four Senators and two Representatives who had voted against the Line Item Veto Act brought suit challenging the Act's constitutionality. The Act gave the President authority to "cancel" certain spending and tax benefit measures after they had been enacted into law. *See* 521 U.S. at 814-15.

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being able to access critical information about the identities of parties financing negative ads in those House Members' campaigns. *See* Pls.' Opp'n at 54-55. However, an informational injury suffices for standing purposes only when the complaining party "fails to obtain information which must be publicly disclosed pursuant to a statute." *FEC v. Akins,* 524 U.S. 11, 21 (1998); *see also Shays v. FEC,* 528 F.3d 914, 923 (D.C. Cir. 2008) (holding that a Member of Congress had standing in his capacity as a candidate for office to challenge an FEC rule that allegedly denied him information that a statute, the Bipartisan Campaign Reform Act of 2002, required be disclosed). Here, by contrast, the House Member Plaintiffs do not identify a statute that entitles them to information about the identities of donors to Super PACs. Instead, they challenge the fact that the particular statute that would have provided that entitlement was never enacted. Therefore, Plaintiffs do not assert a sufficient informational injury for purposes of standing.

The plaintiffs claimed that the Act injured them in their official capacities by "(a) alter[ing] the legal and practical effect of all votes they may cast on bills" subject to the line item veto, "(b) divest[ing] [them] of their constitutional role in the repeal of legislation," and "(c) alter[ing] the constitutional balance of powers between the Legislative and Executive Branches." *Id.* at 816. The Supreme Court rejected these bases for standing, finding that the plaintiffs lacked "concrete injury" because their asserted harm was "a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally. . . . [plaintiffs'] claim of standing is based on a loss of political power, not loss of any private right, which would make the injury more concrete." *Id.* at 821. Accordingly, the Court concluded that because the Congress members' alleged injury was "wholly abstract and widely dispersed," and not personal to them as individuals, they did not allege a sufficient injury in fact to establish Article III standing. *Id.* at 829-30. The Court recognized two explicit exceptions, however: (1) when the Members have been individually deprived of something they are personally entitled to, as in *Powell v. McCormack,* 395 U.S. 486 (1969), *see Raines,* 521 U.S. at 821-22, or (2) when the Members' votes would have been sufficient to defeat (or enact) a bill which has gone into effect (or not been given effect) and "their votes have been completely nullified," as in *Coleman v. Miller,* 307 U.S. 433 (1939), *see Raines,* 521 U.S. at 823.

Plaintiffs first argue that their injury is like that in *Powell* because the House Member Plaintiffs "personally cast votes in favor of the DREAM and DISCLOSE Acts" which the Senate's Filibuster Rule then nullified, and therefore they "do not raise a claim shared by every member of Congress, only those who voted for the DREAM and DISCLOSE Acts[.]" Pls.' Opp'n at 50. Plaintiffs thus assert that they "have been deprived of something to which they personally are entitled." *Id.* (citation omitted). The Court is not persuaded by this argument. In *Powell,* Representative Powell was denied payment of his salary – a personal entitlement – when he was excluded from his House seat. *See* 395 U.S. at 493. In contrast, the House Member Plaintiffs' votes are powers they exercise in their official capacities as House Members. Just like in *Raines,* those votes are not a personal entitlement. *See 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.").

Plaintiffs next analogize their injury to that in *Coleman*. There, twenty of Kansas' forty state senators voted not to ratify the proposed Child Labor Amendment to the Federal Constitution. The vote deadlocked, such that the amendment ordinarily would not have been ratified; however, the Lieutenant Governor, the presiding officer of the State Senate, cast a deciding vote in favor of the amendment, and it was deemed ratified. The twenty state senators

who had voted against the amendment filed suit seeking a writ of mandamus to compel state officials to recognize that the legislature had not, in fact, ratified the amendment. *See* 307 U.S. at 436-37. The Supreme Court held that the senators had standing because their "votes against ratification have been overridden and virtually held for naught although . . . their votes would have been sufficient to defeat ratification. . . . [T]hese senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id.* at 438.

As the Supreme Court recognized in *Raines,* "our holding in *Coleman* stands . . . 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. The Court in *Raines* distinguished the congressmen's injury there, stating "[t]hey 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." *Id.* at 824. Here, by contrast, Plaintiffs argue that the House Member Plaintiffs "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." Pls.' Opp'n at 52.

The Court acknowledges that this case appears to present a unique question on vote nullification

after *Raines.* None of the D.C. Circuit's post-*Raines* opinions have addressed the scenario where members of one House of Congress sued the other. *See, e.g., Campbell v. Clinton,* 203 F.3d 19, 22-23 (D.C. Cir. 2000) (holding that thirty-one congressmen did not have standing based on a vote nullification theory to challenge the President's use of force in Yugoslavia without seeking congressional approval); *Chenoweth v. Clinton,* 181 F.3d 112, 115 (D.C. Cir. 1999) (finding that four congressmen did not have standing to challenge the President's use of executive order to enact a new environmental program, and stating "[i]f, as the Court held in *Raines,* a statute that allegedly 'divests [congressmen] of their constitutional role' in the legislative process does not give standing to sue, then neither does an Executive Order that allegedly deprives congressmen of their 'right [ ] to participate and vote on legislation in a manner defined by the Constitution'" (citation omitted)). Indeed, the Court is not aware of any case in this Circuit where a court has recognized legislative standing after *Raines.* The Court is not persuaded that Plaintiffs' alleged nullification injury is sufficient to confer standing in this case either.

The D.C. Circuit has interpreted the *Coleman* exception to mean "treating a vote that did not pass as if it had, or vice versa." *Campbell,* 203 F.3d at 22. As Defendants argue, the House Member Plaintiffs' votes in favor of the DREAM and DISCLOSE Acts were never treated as if they did not pass. Rather, the bills were treated as if they passed the House, but the

Senate then failed to debate or pass them itself. *See* Defs.' Reply Mem. of P. & A. in Supp. of Mot. to Dismiss at 8-9. By contrast, in *Coleman,* state officials endorsed a defeated ratification, treating it as if it had been approved. A closer example of vote nullification, then, is the theoretical scenario presented in *Raines,* where appropriations bills could have passed both the House and Senate, been signed by the President, but then were subject to line-by-line "cancellation" by the President, effectively deleting what was voted on – and passed – by the House and Senate. The Court found that this potential scenario did not "nullify [plaintiffs'] votes in the future in the same way that the votes of the *Coleman* legislators had been nullified." *Raines,* 521 U.S. at 824.

> In the future, a majority of Senators and Congressmen can pass or reject appropriations bills; the [Line Item Veto] Act has no effect on this process. In addition, 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. *Coleman* thus provides little meaningful precedent for [plaintiffs'] argument.

Id. Here too, Plaintiffs have failed to demonstrate that their votes to pass the DREAM and DISCLOSE Acts were nullified in the same manner as in *Coleman.* Furthermore, the D.C. Circuit has emphasized that the *Coleman* exception is a "narrow rule." *Chenoweth,* 181 F.3d at 116; *see also Campbell,* 203 F.3d at 24 &

n.6. Interpreting the exception in the way Plaintiffs urge, however, would transform it from a narrow exception into a broader one, potentially allowing members of either House of Congress to sue the other for failure to pass a bill the other House supported. Therefore, the Court is not persuaded that the House Members' alleged injury here presents "complete nullification" of the kind recognized by the Supreme Court in *Coleman.*[13]

Finally, the Court has considered whether separation-of-powers concerns counsel against finding legislative standing here. In *Raines,* the Supreme Court noted without deciding that *Coleman* might also be distinguishable from "a similar suit brought by federal legislators, since the separation-of-powers concerns present in such a suit were not present in *Coleman.*" 521 U.S. at 824 n.8; *see also Harrington v. Bush,* 553 F.2d 190, 205 n.67 (D.C. Cir. 1977) ("The major distinguishing factor between *Coleman* and the present case lies in the fact that the plaintiffs in *Coleman* were state legislators. A separation of powers issue arises as soon as the *Coleman* holding is extended to United States legislators. If a federal court decides a case brought by a United States

[13] The Court is also not persuaded that the lack of a legislative remedy transforms the injury here into the narrow vote nullification exception. While the House Member Plaintiffs themselves do not have a remedy, the Senate does have a remedy of its own – amendment of its rules. Because the other considerations weigh against finding legislative standing here, the Court declines to find this factor dispositive.

legislator, it risks interfering with the proper affairs of a coequal branch."). The law of Article III standing "is built on a single basic idea – the idea of separation of powers." *Allen,* 468 U.S. at 752. Here, and as discussed in more detail *infra,* separation-of-powers concerns persuade the Court that this suit is not justiciable.

B. Political Question Doctrine

Like standing, the political question doctrine stems from the case-or-controversy requirement of Article III. The courts lack jurisdiction over "political questions that are by their nature 'committed to the political branches to the exclusion of the judiciary.'" *Schneider,* 412 F.3d at 193 (citation omitted); *see also Marbury v. Madison,* 5 U.S. 137, 170 (1803). A court may not, however, refuse to adjudicate a dispute merely because a decision "may have significant political overtones." *Japan Whaling Ass'n v. Am. Cetacean Soc'y,* 478 U.S. 221, 230 (1986); *see also Chadha,* 462 U.S. at 943 ("Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications[.]"). "The nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr,* 369 U.S. 186, 210 (1962). In *Baker,* the Supreme Court identified six circumstances in which an issue might present a non-justiciable political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially

> discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. The presence of any one factor indicates that the case presents a non-justiciable political question. *See Schneider,* 412 F.3d at 194. Defendants argue that three of the six Baker factors apply in this case: (1) Plaintiffs' claims involve a matter textually committed by the Constitution to the Senate; (2) there is a lack of judicially discoverable and manageable standards for resolving Plaintiffs' claims; and (3) resolution of Plaintiffs' claims would require the Court to intrude into the Senate's internal proceedings, thereby expressing a lack of respect due a coordinate branch. The Court addresses each in turn.

1. Textual Constitutional Commitment of Rulemaking Power to the Senate

The Supreme Court has long recognized that the power committed in Article I, section 5 provides each House with broad discretion to determine the rules of its proceedings. *See United States v. Ballin,* 144

U.S. 1, 5 (1892). The parties dispute the applicability of two Supreme Court precedents here: *Powell v. McCormack,* 395 U.S. 486, and *Nixon v. United States,* 506 U.S. 224 (1993).

Plaintiffs assert that this case is more like *Powell,* in which the Supreme Court found justiciable a challenge to the House's power to judge the qualifications of its Members. There, the Court held that Representative Powell's challenge to his exclusion from the House was justiciable because the Court determined that the House's power to "be the Judge of the . . . Qualifications of its own Members," U.S. Const. art. I, § 5, cl. 1, was expressly limited by Article I, section 2, clause 2, which sets forth the three textual criteria for membership (age, residency, and citizenship). *See Powell,* 395 U.S. at 547-50. Defendants assert, by contrast, that this case is more like *Nixon.* There, a federal judge was convicted by the Senate on impeachment charges and removed from office. The judge filed suit challenging his conviction and alleging that Senate Rule XI (governing impeachment trials) was unconstitutional because it permitted the Senate to appoint a committee to receive evidence and take testimony in the impeachment trial. Judge Nixon argued that the constitutional grant to the Senate of the power to "try" impeachments, U.S. Const. art. I, § 3, cl. 6, required the full Senate, not merely a committee, to hold evidentiary proceedings. *See* 506 U.S. at 228. The Supreme Court held that the case was non-justiciable because the power to try

impeachments was textually committed to the Senate. *See id.* at 229-34. The Court stated:

> Our conclusion in *Powell* was based on the fixed meaning of "qualifications" set forth in Art. I, § 2. The claim by the House that its power to "be the Judge of the Elections, Returns and Qualifications of its own Members" was a textual commitment of unreviewable authority was defeated by the existence of this separate provision specifying the only qualifications which may be imposed for House membership. The decision as to whether a member satisfied these qualifications was placed with the House, but the decision as to what these qualifications consisted of was not. In the case before us, there is no separate provision of the Constitution which could be defeated by allowing the Senate final authority to determine the meaning of the word "try" in the Impeachment Trial Clause.

Id. at 237; *see also Michel v. Anderson,* 14 F.3d 623, 626-27 (D.C. Cir. 1994) (concluding that Article I, section 2's requirement that the House of Representatives "be composed of Members chosen every second Year by the People of the several States" provided an express textual limit on the rulemaking power and thus rendered justiciable a challenge to the House's rule permitting non-member delegates to vote in the Committee of the Whole). Therefore, in order to present a justiciable challenge to congressional procedural rules, Plaintiffs must identify a separate

provision of the Constitution that limits the rulemaking power. The Court finds that this case is more like *Nixon* because Plaintiffs cannot identify any constitutional provision that expressly limits the authority committed to the Senate by Article I, section 5, clause 2.

Plaintiffs allege that the Quorum Clause, U.S. Const. art. I, § 5, cl. 1, the Presentment Clause, U.S. Const. art. I, § 7, cl. 2, and the existence of other constitutional provisions expressly providing for "supermajority votes" on certain matters provide explicit textual limits on the Senate's rulemaking power. This is simply not the case. None of these provisions contains any language that expressly limits the Senate's power to determine its rules, including when and how debate is brought to a close. More fundamentally, Plaintiffs have not demonstrated that the Presentment Clause, the Quorum Clause, or any other constitutional provision explicitly requires that a simple majority is all that is required to close debate and enact legislation. As is made clear in the Complaint, Plaintiffs' argument is that the Cloture Rule "conflicts" with these constitutional provisions, *see* Compl. ¶ 60, but Plaintiffs do not assert – nor can they – that any of these provisions expressly limits the Senate's power to determine the rules of its proceedings.[14]

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[14] Plaintiffs attempt to compare the Senate's rulemaking power to the congressional power to make laws, arguing that "[i]t cannot be that statutes adopted by both Houses of Congress are subject to judicial review while a mere internal rule adopted

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Plaintiffs contend that the Senate's rulemaking authority has been limited by *United States v. Smith,* 286 U.S. 6 (1932) and *Ballin,* 144 U.S. at 5, which stated 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." *See* Pls.' Opp'n at 22 (quoting *Ballin,* 144 U.S. at 5). According to Plaintiffs, the Supreme Court has followed *Ballin* and *Smith* in subsequent cases in which the Court "rejected interpretations by congressional committees of their own rules." *Id.* at 23 (citing *Chadha,* 462 U.S. at 941; *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)). As Defendants assert, however, these cases are all either distinguishable or contradict Plaintiffs' arguments. Indeed, in none of these cases did courts reject Congress's own rules as unconstitutional.[15] Rather, the courts either

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by only one House of Congress, without the consent of the other House or the President, is exempt from judicial scrutiny." *See* Pls.' Opp'n at 25-26. As the Supreme Court recognized in *Nixon,* it has long been recognized that judicial review was available and appropriate as a check on the Legislature's power with respect to statutes. *See* 506 U.S. at 233 (citing THE FEDERALIST, NO. 78, at 524 (J. Cooke ed. 1961)). This argument has no bearing on the Senate's power to determine the rules of its own proceedings.

[15] In *Ballin,* the plaintiff claimed that the House's passage of a statute was invalid for lack of a quorum and, in that regard,

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rejected Congress's actions for being in violation of its own rules,[16] or, as in *Chadha,* the Court rejected a

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that the House rule for determining a quorum was unconstitutional. *See* 144 U.S. at 4-5. The Court stated:

> The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations *all matters of method are open to the determination of the house,* and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just. . . . The power to make rules . . . is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.

Id. at 5 (emphasis added). The Court found that, as to the question of determining a quorum, there was "no constitutional method prescribed, [ ] no constitutional inhibition of any of [the possible methods of determining a quorum], and no violation of fundamental rights" by the House's rule. *Id.* at 6. Accordingly, the Court did not review the rule's validity. *See id.* ("The Constitution has prescribed no method of making this determination, and it is therefore within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact.").

[16] *See Yellin,* 374 U.S. at 121-24 (holding that House committee violated its own rules by failing to consider the plaintiff's request to be interrogated in a private, executive session, rather than in public); *Christoffel,* 338 U.S. at 88-89 ("Congressional practice in the transaction of ordinary legislative business is of course none of our concern. . . . The question is neither what rules Congress may establish for its own governance, nor whether presumptions of continuity may protect the validity of its legislative conduct. The question is rather what [rules] the

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statutory provision for violating the explicit text of the Constitution.[17] As noted above, Plaintiffs identify no explicit constitutional restraints upon the Senate's Cloture Rule, nor do they point to fundamental rights which have been violated. It is precisely for this reason that the Court finds that this challenge presents a political question.

2. Lack of Judicially Discoverable and Manageable Standards

The Court is also persuaded that this case presents a political question because no judicially manageable standards exist against which to review the Senate's rules governing debate.

Plaintiffs argue that they merely seek a declaratory judgment, the exact same relief that the Court granted in *Powell.* "Just as in *Powell,* the plaintiffs

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House has established and whether they have been followed."); *Smith,* 286 U.S. at 33 ("The question primarily at issue relates to the construction of the applicable rules, not to their constitutionality.").

[17] *See* 462 U.S. at 942. Moreover, in *Vander Jagt,* fourteen Republican Members of the House sued the Democratic House leadership and the Democratic Caucus, alleging that the Democrats had systematically discriminated against them by providing them with fewer seats on House committees and subcommittees than they were proportionally owed, thereby diluting their influence. *See* 699 F.2d at 1167. The D.C. Circuit affirmed the district court's dismissal of the case, stating that it was exercising its "remedial discretion" to withhold relief "given [its] respect for a coequal branch of government." *Id.* at 1176.

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. Such a declaration 'requires an interpretation of the Constitution – a determination for which clearly there are judicially [ ]manageable standards.'" Pls.' Opp'n at 29-30 (quoting *Powell,* 395 U.S. at 549). But *Powell* involved the interpretation of two seemingly contradictory constitutional provisions: Article I, section 5, clause 1, which set forth the House's power to "be the Judge of the . . . Qualifications of its own Members," and Article I, section 2, clause 2, which provided three explicit criteria for membership (age, residency, and citizenship). The Court reviewed the legislative history of Article I, section 5 and determined that the House's power to "judge" the qualifications of its own members was limited to the qualifications expressly set forth in the Constitution. *See* 395 U.S. at 521-48; *see also id.* at 522 ("Our examination of the relevant historical materials leads us to the conclusion that . . . the Constitution leaves the House without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution."). Here, Plaintiffs point to no standard within the Constitution by which the Court could judge whether or not the Cloture Rule is constitutionally valid.[18]

[18] Plaintiffs additionally argue that Defendants "advance no argument as to why Rule XXII is any less justiciable than the

(Continued on following page)

3. Intrusion into the Senate's Internal Proceedings

Finally, the Court finds that reaching the merits of this case would require an invasion into internal Senate processes at the heart of the Senate's constitutional prerogatives as a House of Congress, and would thus express a lack of respect for the Senate as a coordinate branch of government.

Plaintiffs argue that judicial review of the Cloture Rule would not reflect lack of respect for the Senate; instead, it reflects respect for the Constitution. Pls.' Opp'n at 30. According to Plaintiffs, 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 . . . , or the joint acts of Congress and the President . . . , or of

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one-House veto in *Chadha*. . . . 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*." Pls.' Opp'n at 30 (citing *Chadha,* 462 U.S. at 942; *Smith,* 286 U.S. at 33). But *Chadha* and *Smith* are also distinguishable. As noted above, *Chadha* involved a challenge to the constitutionality of a statute, not an internal Senate rule. Moreover, the dispute in *Chadha* was whether the one-House veto conflicted with the Presentment Clause, which provided a clear judicially manageable standard for the Court to use in reviewing the one-House veto. In *Smith,* as noted above, the issue was "the construction of the applicable rules, not [ ] their constitutionality." 286 U.S. at 33. The Court did not say anything about judicially manageable standards which it would use to review the constitutionality of an internal congressional rule.

only one House of the legislative branch. . . . 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.'" *Id.* (citations omitted). Plaintiffs provide no authority, however, for the proposition that the Court's review of an internal rule of Congress, rather than a legislative act, would reflect respect for the Constitution and not a lack of respect for the Senate, particularly where, as here, Plaintiffs have identified no constitutional restraint on the Senate's power to make rules regulating debate. In *Judicial Watch, Inc. v. United States Senate,* although the D.C. Circuit did not explicitly reach the political question doctrine, the court noted:

> While [plaintiff] may have asked for such a judicial rewrite [to require a simple majority rule for cloture on judicial nominations], our providing one would obviously raise the most acute problems, given the Senate's independence in determining the rules of its proceedings and the novelty of judicial interference with such rules.

432 F.3d 359, 361 (D.C. Cir. 2005). This Court agrees.

Accordingly, the Court finds that, absent a clear constitutional restraint, under the separation of powers recognized by Article III, it is for the Senate, and not this Court, to determine the rules governing debate.

IV. CONCLUSION

For the foregoing reasons, the Court concludes that Plaintiffs lack standing. The Court further concludes that this case presents a non-justiciable political question.[19] Accordingly, the Court will **GRANT** Defendants' Motion to Dismiss and will **DISMISS** the Complaint. A separate Order accompanies this Memorandum Opinion.

SIGNED: Emmet G. Sullivan
United States District Judge
December 21, 2012

[19] In view of the resolution of the motion on standing and political question grounds, the Court does not reach Defendants' argument that the Speech or Debate Clause bars this suit.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5412 **September Term, 2013**

1:12-cv-00775-EGS

Filed On: June 5, 2014

Common Cause, on its own behalf
and behalf of its members, et al.,

Appellants

v.

Joseph R. Biden, Jr., in his official capacity
as President of the United States Senate, et al.,

Appellees

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges; Williams and Randolph, Senior Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

The Senate Rules at Issue

Rule XXII of the Standing Rules of the United States Senate provides in pertinent part as follows:

> 22.2 Notwithstanding the provisions of rule II or rule IV or any other rule of the Senate, at any time a motion signed by sixteen Senators, to bring to a close the debate upon any measure, motion, other matter pending before the Senate, or the unfinished business, is presented to the Senate, the Presiding Officer, or clerk at the direction of the Presiding Officer, shall at once state the motion to the Senate, and one hour after the Senate meets on the following calendar day but one, he shall lay the motion before the Senate and direct that the clerk call the roll, and upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by a yea-and-nay vote the question:
>
> "Is it the sense of the Senate that the debate shall be brought to a close?" ***And if that question shall be decided in the affirmative by three-fifths of the Senators duly chosen and sworn – except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting*** – then said measure, motion, or other matter pending before the Senate, or the unfinished business, shall be the unfinished business to the exclusion of all other business until disposed of.

> Thereafter no Senator shall be entitled to speak in all more than one hour on the measure, motion, or other matter pending before the Senate. . . .
>
> . . . .
>
> After no more than thirty hours of consideration of the measure, motion, or other matter on which cloture has been invoked, the Senate shall proceed, without any further debate on any question, to vote on the final disposition thereof. . . .

STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, R. XXII § 2, at 15-16 (2013) (emphasis added).

Rule V(2) of the Senate rules provides:

> 2. The rules of the Senate ***shall continue*** from one Congress to the next Congress ***unless they are changed as provided in these rules.***

STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, R. XXII § 2, at 4 (2013) (emphasis added).