IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' MOTION TO DISMISS

Defendants Vice President Joseph R. Biden, Secretary of the Senate Nancy Erickson, Senate Sergeant at Arms and Doorkeeper Terrance W. Gainer, and Senate Parliamentarian Elizabeth MacDonough, through undersigned counsel, hereby respectfully move this Court, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, to dismiss with prejudice plaintiffs' Complaint for a Declaratory Judgment. The grounds for this motion are: (a) plaintiffs lack standing under Article III of the Constitution, (b) the Speech or Debate Clause of the Constitution bars this lawsuit, and (c) plaintiffs' claims present a nonjusticiable political question.

For these reasons, which are explained more fully in the accompanying Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss, plaintiffs' complaint should be dismissed with prejudice.

Respectfully submitted,

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

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INTRODUCTION

From early in its history, the United States Senate has allowed for extended debate on measures before it. For just as long, Senators have been able to use debate to forestall Senate action on legislation. In 1917, the Senate adopted a cloture rule that provided a mechanism for Senators to close debate on a matter over objection. Throughout the almost one hundred years since then, the Senate has modified the cloture rule, particularly the number of votes required to invoke cloture, and that rule, along with the continued use of extended debate (or "filibusters") to delay proceedings, has remained the subject of vigorous discussion both inside the Senate and in the public. Such public debate over the functioning of an important government institution is an appropriate part of our democratic system.

In the past two decades, however, the Senate's cloture rule has also become the subject of lawsuits by persons and entities outside the Senate who are displeased with current proceedings in the body. These lawsuits ask the courts to intrude into the Senate's legislative procedures – to rewrite the Senate's rules and oversee its floor proceedings. Not surprisingly, the courts uniformly have declined on jurisdictional grounds to entertain these suits, finding that they do not present a case or controversy as required for federal court jurisdiction under Article III of the Constitution. *Judicial Watch, Inc. v. United States Senate*, 340 F. Supp. 2d 26 (D.D.C.), *aff'd*, 432 F.3d 359 (D.C. Cir. 2005); *Page v. Shelby*, 995 F. Supp. 23, 29 (D.D.C.), *aff'd*, 172 F.3d 920 (D.C. Cir. 1998) (table); *Page v. Dole*, No. 93-1546 (D.D.C. Aug. 18, 1994), *vacated as moot*, No. 94-5292, 1996 WL 310132 (D.C. Cir. May 13, 1996). Specifically, the courts in those cases held that the plaintiffs lacked standing because they could not establish that they were injured by the Senate cloture rule nor that a court could provide redress to their claimed injuries.

Plaintiffs' lawsuit here is the latest in this series of lawsuits challenging the Senate's cloture rule. Plaintiffs bring this action against four officials of the Senate – the Vice President (as President of the Senate), the Secretary of the Senate, the Senate Sergeant at Arms, and the

Parliamentarian, in their official capacities – challenging the constitutionality of the Senate's internal rules governing debate in the Chamber as applied to the consideration of two bills in the last Congress. Specifically, plaintiffs allege that a minority of Senators used the Senate's cloture rule, Rule XXII of the Standing Rules of the Senate [Attachment 1], which generally requires a vote of sixty Senators to force debate on a measure to a close, to prolong debate in order to block the Senate from voting on (1) the DREAM Act, H.R. 5281 and S. 3992, 111th Cong. (providing relief from removal to certain aliens who entered the United States as children), and (2) the DISCLOSE Act, H.R. 5175 and S. 3628, 111th Cong. (requiring, *inter alia*, disclosure of certain independent expenditures and campaign-related activity in elections), proposed legislation that plaintiffs claim would benefit them. Plaintiffs assert that the Senate's cloture rule violates the Constitution by effectively requiring a vote of more than a simple majority to pass legislation in the Senate. Plaintiffs request that the Court declare unconstitutional and sever the portion of the Senate's cloture rule requiring a vote of sixty Senators to cut off debate on a pending measure (and two-thirds of Senators present and voting to close debate on a motion to amend the rules), thereby establishing cloture in the Senate by majority vote. Compl. ¶¶ 77-78.

As in the previous cases challenging the cloture rule, this suit asks the Court to do what no court has ever done – inject the Judicial Branch into the Senate's internal deliberations and usurp the Senate's power to determine its own rules and procedures. The Court should reject this attempt to have the Judicial Branch rewrite the Senate's rules, and dismiss the complaint on the jurisdictional grounds that (1) plaintiffs lack Article III standing, (2) their claims are barred by legislative immunity, and (3) the complaint presents a non-justiciable political question.

First, as in the other challenges to the Senate's cloture rule, plaintiffs here lack standing because they cannot demonstrate that they have suffered a concrete and particularized injury-in-fact caused by the defendants and redressable by this suit. Second, the Speech or Debate Clause of the Constitution, Art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [Senators and

Representatives] shall not be questioned in any other Place."), bars this suit. Senate officials, like Senators, are absolutely immune from suit for actions taken regarding the consideration of legislation because such actions fall squarely within the sphere of legitimate legislative activity protected from questioning by the Speech or Debate Clause.

Third, plaintiffs' complaint presents a non-justiciable political question, as the Constitution commits to the Senate the authority to "determine the Rules of its Proceedings," Art. I, § 5, including how much time should be spent debating a matter and when to bring pending business to a vote. In addition, the appropriate amount of floor debate on any measure and the procedures for regulating that debate and putting a measure to a vote are matters for which the courts lack judicially manageable standards. Furthermore, to review this exercise of the Senate's authority would require this Court to supervise the Senate's internal deliberations, thereby showing a lack of the respect due a coequal branch.

In sum, under our system of separated powers, questions regarding the appropriate procedures for considering legislation and regulating debate thereon, including the proper scope of the cloture rule, should be resolved by the Senate – and not the courts.[1]

BACKGROUND

A. The Senate's History of Floor Debate and Adoption of the Cloture Rule

In the Senate, legislation, nominations, resolutions, and most other business before the body are subject to extended debate, including what are often called "filibusters," which are commonly understood as an attempt by one or more Senators to prevent or forestall the Senate from voting on a pending matter by continuing to debate it. Although it is often difficult to identify when extended debate becomes a filibuster, the use of prolonged debate to prevent final

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[1] Defendants do not address the merits of plaintiffs' constitutional claims in this motion, because the jurisdictional and justiciability doctrines discussed herein preclude the Court from considering the merits of those claims. *See Judicial Watch*, 340 F. Supp. 2d at 28 n.1 (holding in abeyance proceedings on plaintiff's motion for summary judgment pending adjudication of defendants' motion to dismiss on threshold grounds).

action on a matter has long been a part of Senate floor practice.[2] Throughout its history, the Senate has wrestled with the merits and shortcomings of allowing unlimited debate – including susceptibility to filibusters – and has repeatedly, over time, adopted and adjusted the procedures it deems fitting for regulating debate. Indeed, proposals to refine the rules further to address contemporary issues have been under active consideration by the Senate as recently as the current Congress. Because these rules have been the subject of alteration and adjustment throughout the Senate's history, we discuss in some detail the history of the Senate's rules for regulating debate.

1. Early History of Senate Debate

From 1789 to 1806, the Senate's procedures provided for a motion for the "previous question," which permitted a majority to determine whether matters on the Senate's calendar should be postponed or considered. *See* 1 Annals of Cong. at 21 (providing that "if the nays prevail, the main question shall not then be put"). This mechanism enabled the majority to postpone questions it wished to avoid deciding[3], and could be used to bring matters to a vote.[4] The Senate abandoned that rule in 1806. *See* 15 Annals of Cong. 201-03 (1806).

For more than one hundred years, from 1806 to 1917, there was no mechanism for closing debate over the objection of a Member who wished to speak. The Senate followed the

[2] Indeed, when the First Congress was deciding on a permanent location for the nation's capital, lengthy debate (among other procedural mechanisms) was used to create an impasse. *See* IX *Documentary History of the First Federal Congress of the United States of America: The Diary of William Maclay and Other Notes on Senate Debates* 156-57 (Kenneth R. Bowling and Helen E. Veit eds., 1988) (recounting report that opponents of proposal to locate capital on Susquehannah River planned "to talk away the time, so that we could not get the bill passed"); *see also* 1 Annals of Cong. 858 (J. Gales ed. 1789) (then-Representative James Madison argued that the "majority ought to govern, yet they have no authority to deprive the minority of . . . the right of free debate . . . to bring forward all the arguments which we think can, and ought to have an influence on the decision").

[3] *See The Previous Question: Its Standing as a Precedent for Cloture in the United States Senate*, S. Doc. No. 87-104, at 5-13 (1962) (reprinting academic dissertation arguing that motion for previous question in early Senate rules was used to postpone decisions); 1 George H. Haynes, *The Senate of the United States: Its History and Practice* 393-94 (1938).

[4] *See* 107 Cong. Rec. 241-56 (1961) (statement of Sen. Douglas) (contending that previous question motion permitted majority cloture because it forced a vote if passed).

practice that a question remains open until every Member who desires has spoken, as "possibly he may say something to give new light into the matter coming to the question so as to change the whole thing, [and] it is not known what a gentleman will say till he speaks." Luther S. Cushing, *Elements of the Law and Practice of Legislative Assemblies in the United States of Am.* § 1610, at 626 (photo. reprint 1971) (1856).

During this period before the adoption of a cloture rule, and especially in the first half of the nineteenth century before the term "filibuster" was employed[5], it is difficult to identify definitively instances when Senators employed lengthy debate in an attempt to prevent final action on pending matters (*i.e.*, a "filibuster"), as opposed to instances of genuine, though extended, debate on the merits of an issue.[6] One of the earliest known occurrences of what might be described today as a "filibuster" involved an attempt by a minority of Senators to block the Senate's consideration of a resolution to expunge from the Journal the Senate's 1834 vote to censure President Jackson. *See* Franklin L. Burdette, *Filibustering in the Senate* 19-20 (1940). The attempt failed as the Senate stayed in session late into the evening while the "[o]pponents talked and talked," until finally the resolution came to a vote and passed. *Id.* at 20.[7]

2. *Adoption of a Cloture Rule*

By the early twentieth century, the increased intensity, frequency, and success of what had

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[5] The term "filibuster," in the sense of dilatory use of prolonged debate, began appearing in Congress in the 1850s. *See, e.g.*, Congressional Globe, 32[d] Cong., 2[d] Sess. 194 (1853) (statement of Rep. Brown); *id.* at 424 (statement of Sen. Badger).

[6] Determining whether any particular instance of extended debate constitutes a filibuster is problematic because, by definition, what constitutes a filibuster depends on a judgment that the motivation of Senators participating in debate is to preclude action by the Senate on the matter.

[7] Another early use of extended debate to forestall Senate action was in March 1841, when Democratic Senators debated for seven days in an unsuccessful attempt to prevent the new-majority Whig Senators from dismissing the Senate's two official printers, who had been elected prior to the Senate switching party control. *See* 2 Robert C. Byrd, *The Senate 1789-1989: Addresses on the History of the United States Senate* 96 (Wendy Wolff ed. 1991); Burdette, *supr*a, at 21-22. Only a few months later, in June 1841, extended debate was employed, again unsuccessfully, to try to prevent passage of the Fiscal Bank Bill. *See id.* at 24; 2 Byrd, *supra*, at 97.

come to be termed "filibusters" heightened demands for reform of the Senate's rules for floor debate. *See* Burdette, *supra*, at 79-80, 83-115. Pressure to adopt a cloture rule – to allow the Senate to close debate over objection – came to a head in 1917, after a filibuster prevented Senate passage of a bill authorizing President Wilson to arm American merchant ships. *See id.* at 118-23; Thomas W. Ryley, *A Little Group of Willful Men* 147-48 (1975); 2 Byrd, *supra*, at 118.

A resolution to amend the Senate's rules to provide for cloture was introduced at the opening of a special session immediately following sine die adjournment of the 64th Congress. *See* Burdette, *supra*, at 127; 2 Byrd, *supra*, at 123. That resolution provided that whenever sixteen Senators moved to close debate on any pending measure, the presiding officer would, after a two-day hiatus, submit to the Senate, without debate, the question, "Is it the sense of the Senate that the debate shall be brought to a close?" If the question were determined in the affirmative by two-thirds of those voting, the measure would become the pending business to the exclusion of all other business until the Senate disposed of it. Debate would not be cut off immediately, but would be limited to one hour for each Member. The resolution also restricted amendments after cloture and prohibited dilatory motions and non-germane amendments.[8] On March 8, 1917, the Senate agreed to the cloture rule by a 76-3 vote. *See* 55 Cong. Rec. 45 (1917).[9] The cloture resolution reflected a compromise between those Members of the Senate who favored majority cloture, *see, e.g.*, *id.* at 33-34 (statement of Sen. Thomas); *id.* at 31 (statement of Sen. Stone), and those who opposed it, but were willing to accept some form of cloture, *see id.* at 36 (statement of Sen. Hardwick); *id.* at 27 (statement of Sen. Norris).

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[8] *See* 55 Cong. Rec. 19 (1917); Senate Comm. on Rules and Admin., *Senate Cloture Rule: Limitation of Debate in the Senate of the United States and Legislative History of Paragraph 2 of Rule XXII of the Standing Rules of the U.S. Senate (Cloture Rule)*, S. Prt. No. 112-31, at 185-86 (Comm. Print 2011) [hereinafter "Rules Committee, *Senate Cloture Rule*"] *available at* http://www.gpo.gov/fdsys/pkg/CPRT-112SPRT66046/pdf/CPRT-112SPRT66046.pdf.

[9] The new cloture rule applied only to "pending measures" and, therefore, did not apply to motions to amend the rules, procedural votes, or nominations. *See* Rules Committee, *Senate Cloture Rule* at 17.

3. *Changes in the Cloture Rule Since Its Adoption in 1917*[10]

The cloture rule, however, did not end the use of dilatory tactics. Although cloture was invoked four times between 1917 and 1927, *see* Rules Committee, *Senate Cloture Rule* at 115, the rule could be circumvented simply by filibustering a procedural motion. *See id.* at 20*; Amending Senate Rule Relating to Cloture: Hearings Before a Subcomm. of Senate Comm. on Rules and Administration*, 80th Cong., 1st Sess. 4 (1947) (statement of Sen. Knowland). In 1949, the Senate extended the cloture rule to apply to motions and other pending matters. *See* 95 Cong. Rec. 2724 (1949). But, as a compromise, the Senate increased the number of votes required to invoke cloture from two-thirds of those voting to two-thirds of total Senate membership, and also continued to exclude from cloture motions to proceed to resolutions to amend the Senate rules. *See id.* at 2509-10, 2724; Rules Committee, *Senate Cloture Rule* at 20-21, 191-92.

Even after the 1949 amendment, many Senators remained dissatisfied with the cloture rule, and the use of filibusters to block civil rights legislation in the 1950s only increased this discontent.[11] Because proposed changes to the rule were themselves subject to filibusters and not subject to cloture, Senators who favored closing debate by less than a two-thirds vote advanced the theory that a majority of the Senate had the authority to adopt its own rules at the commencement of each Congress. *See, e.g.*, 103 Cong. Rec. 13 (1957) (statement of Sen. Douglas). While this position was not accepted, *see infra* n.17, the Senate did modify the cloture rule again in 1959. The Senate reduced the number of votes required to invoke cloture from two-thirds of Senate membership back to the original requirement of two-thirds of Members present and voting. *See* 105 Cong. Rec. 8, 494 (1959); Rules Committee, *Senate Cloture Rule* at 24, 197. In

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[10] A full discussion of proposals to modify the cloture rule or otherwise constrain debate in the Senate from 1917 through 2008 is set forth in Rules Committee, *Senate Cloture Rule* at 17-41. Defendants focus here on the relevant changes to the cloture rule adopted by the Senate.

[11] *See Limitation on Debate in the Senate: Hearings Before the Senate Comm. on Rules and Admin.*, 82d Cong., 1st Sess. (1951); *Proposed Amendments to Rule XXII of the Standing Rules of the Senate*, 85th Cong., 2d Sess. (Comm. Print 1958).

addition, motions to proceed to resolutions to amend the Senate rules were made subject to cloture for the first time, *see id.*, and the resolution codified the Senate's existing understanding, from the First Congress onward, that the Senate's rules continue from one Congress to the next. *See* 105 Cong. Rec. 8, 494 (1959); Rules Committee, *Senate Cloture Rule* at 24-25, 196-97.

The cloture rule was not amended again until 1975, even though a motion to amend Rule XXII was made at the beginning of every Congress from 1961 to 1971, *see* Rules Committee, *Senate Cloture Rule* at 25-29; *see also, e.g.*, 103 Cong. Rec. 13 (1957); 107 Cong. Rec. 232 (1961). In 1975, Senators Mondale and Pearson sponsored a resolution to amend Rule XXII to authorize cloture by a three-fifths vote of Senators present and voting. *See* 121 Cong. Rec. 12 (1975). Senator Pearson subsequently moved to proceed to consideration of the resolution and moved that debate on the motion to proceed be closed upon vote of a majority. *See id.* at 3835. Through points of order, the Senate debated the constitutional basis for that motion, notwithstanding Rule XXII, but ultimately agreed to a compromise amendment to Rule XXII permitting cloture upon a vote of three-fifths of the Senate membership, and not merely of those present and voting. *See id.* at 5650-52. The compromise 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. *See id.*; Rules Committee, *Senate Cloture Rule* at 29-31, 208. The number of votes required to invoke cloture has not changed since that 1975 amendment.

From 1975 through the 1980s, debate on changes to Rule XXII focused largely on post-cloture procedures, and changes to the rule sought to refine the post-cloture process by limiting the number of amendments, *see* 125 Cong. Rec. 3194 (1979)[12], and capping the time the Senate devotes to a measure once cloture is invoked, *see id.* at 3037-38, 3194 (capping at one hundred

[12] In 1976, the Senate modified Rule XXII's requirement that amendments must be "presented and read" prior to the cloture vote in order to be considered after cloture is invoked, and provided instead that amendments only had to be submitted in writing to the Journal Clerk prior to the end of the cloture vote to be considered post-cloture. *See* Rules Committee, *Senate Cloture Rule* at 31, 209-10; 122 Cong. Rec. 9685-86 (1976).

hours the time for debate after cloture invoked, but guaranteeing each Senator ten minutes); 132 Cong. Rec. 3156-57 (1986) (lowering post-cloture debate cap to thirty hours). Throughout the 1990s and up to the present, the Senate has continued actively to review its cloture rule, but has not made any further changes to it. *See* Rules Committee, *Senate Cloture Rule* at 38-41.

In addition to adopting and refining the cloture rule, over the years the Senate has developed several mechanisms to ensure that necessary business can be conducted expeditiously. Much debate in the Senate, for example, is now governed by unanimous consent agreements.[13] Moreover, Congress has enacted a variety of statutes exempting various measures from the Senate's ordinary rules of debate. Many major pieces of legislation that the Senate considers, such as budget resolutions, reconciliation bills, and trade agreements, have been placed on a "fast track," which tightly constrains the opportunity for debate.[14]

4. Rule V and the Continuity of the Senate's Rules

As plaintiffs' complaint challenges Senate Rule V as well as Rule XXII, it is necessary to discuss briefly Rule V [Attachment 2], which provides that the Senate's rules continue from one Congress to the next, unless amended. From the First Congress onward, it has been the practice that the rules of the Senate remain in effect from Congress to Congress and need not be readopted at the beginning of each new Congress. In contrast, the House of Representatives adopts its rules anew at the beginning of each Congress. *See* 5 Asher Hinds, *Hinds' Precedents*

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[13] *See* Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, S. Doc. No. 101-28, at 1311 (Alan S. Frumin ed., rev. ed. 1992) [hereinafter "*Riddick's Senate Procedure*"]; *see also, e.g.*, 157 Cong. Rec. S7141 (daily ed. Nov. 3, 2011) (unanimous consent agreement setting time for debate and vote on resolutions disapproving rule of Federal Communications Commission); *id.* at S6890-91 (daily ed. Oct. 20, 2011) (unanimous consent agreement setting time for debate and vote on judicial nomination).

[14] *See, e.g.*, 2 U.S.C. § 641(e)(2) (limiting debate on budget reconciliation measures to twenty hours); 19 U.S.C. § 2191(g)(2) (same for trade agreement implementing laws when President has met certain consultation and notification requirements). For an example of another statutory limitation on debate, see the Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, § 2908(d)(2), 104 Stat. 1808, 1817 (limiting to two hours debate on resolution disapproving recommendations of base closing commission).

of the House of Representatives of the United States, § 6742, at 881 (1907). This difference is attributable to the fact that the Senate is considered a "continuing body,"[15] and Senate committees and officers, as well as Senate rules – though not bills and nominations – carry over from one Congress to the next. In fact, since adoption of the Senate rules at the beginning of the First Congress in 1789, "the Senate has readopted or made only seven general revisions of its rules," six times from 1806 to 1884 and once in 1979. *Riddick's Senate Procedure* at 1220.[16] As mentioned previously, this practice was formally codified in the Senate's rules in 1959 by S. Res. 5, 86th Cong. (1959), which stated: "The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules."[17]

5. Current Debate Over Filibusters and the Cloture Rule

With the increased number of cloture votes in recent years, debate in the Senate over the cloture rule and proposals to modify it has continued. In 2003, the Committee on Rules and Administration held a hearing on proposals to amend Rule XXII. *See* 149 Cong. Rec. D308-09 (2003). In 2004-2005, the Senate debated extensively the propriety of using Senate rules permitting extended debate to forestall confirmation votes on judicial nominations, and there was also discussion of using parliamentary mechanisms to close debate on judicial nominations by a

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[15] *McGrain v. Daugherty*, 273 U.S. 135, 181 (1927); *see also* 4 *The Encyclopedia of the United States Congress* 1791 (Donald C. Bacon, et al., eds., 1995) ("Because only a third of the Senate is newly elected every two years, it is considered a continuing body whose rules require no readoption from one Congress to the next.").

[16] Aside from those seven general revisions, discrete individual rules have been adopted or amended by the Senate at various points in its session in many Congresses. The Senate also has refined and modified its practices and procedures through the interpretation of its rules.

[17] That provision was relocated, *see* 126 Cong. Rec. 6494 (1980), and is currently in Rule V. Notwithstanding this practice, at various times some Senators and Presidents of the Senate have argued that a majority of the Senate has authority under the Constitution to adopt rules at the beginning of each Congress. *See* Rules Committee, *Senate Cloture Rule* at 22-31; 103 Cong. Rec. 178 (1957) (Vice President Nixon's "advisory opinion" that majority's right to adopt new rules at beginning of a Congress could not be inhibited by two-thirds requirement for cloture on rule changes); 105 Cong. Rec. 8-9 (1959) (same); 115 Cong. Rec. 593, 994-95 (1969) (Vice President Humphrey announced that vote of 51-47 invoked cloture on motion to proceed to consider resolution to amend Senate's rules; Senate overturned ruling on appeal).

majority vote, but such action was not taken. Rules Committee, *Senate Cloture Rule* at 40-41.

In 2010, the Rules Committee held six days of hearings examining the filibuster and the Senate's cloture rule and received testimony from Senators, former Senate parliamentarians, and academics and congressional scholars regarding the history of filibusters, the application of the cloture rule, and proposed changes to Senate rules. *See Examining the Filibuster: Hearings Before the Senate Comm. on Rules and Admin.*, S. Hrg. 111-706 (2010), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111shrg62210/pdf/CHRG-111shrg62210.pdf. In addition, in that Congress and the current Congress, Senators have introduced various proposals to amend the Senate's cloture rule to limit the use of extended debate to prevent action on pending measures. *See, e.g.*, S. Res. 416, S. Res. 440, S. Res. 465, and S. Res. 662, 111th Cong. (introduced on Feb. 11, Mar. 4, Mar. 23, and Sept. 28, 2010, respectively); S. Res. 8, S. Res. 10, and S. Res. 21, 112th Cong. (introduced on Jan. 5, Jan. 5, and Jan. 25, 2011, respectively). Hence, Senate rules on debate and proposed reforms to those rules continue to be an important topic that is the subject of active consideration within the Senate.

B. Plaintiffs' Complaint

The eight plaintiffs who filed this suit fall into three groups: an organizational plaintiff (Common Cause), four United States Representatives, and three private individuals. 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." Compl. ¶ 9(A). Plaintiffs John Lewis, Michael Michaud, Hank Johnson, and Keith Ellison (the "Member plaintiffs"), are Members of the House of Representatives representing Georgia, Maine, Georgia, and Minnesota, respectively. *Id.* ¶ 9(B).

Finally, Plaintiffs Erika Andiola, Celso Mireles, and Caesar Vargas (the "DREAM Act plaintiffs"), allege that they 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). Plaintiff Andiola now serves "as a board member, volunteer, and founder of multiple organizations devoted to serving immigrant populations" and works as a "legal document preparation assistant with the Phoenix Immigration Center." *Id.* ¶ 9(C)(1)(a). Plaintiff Mireles "runs a computer repair business." *Id.* ¶ 9(C)(1)(b). Plaintiff Vargas earned his J.D. and is the Government Affairs Managing Director at DRM Capitol Group, LLC, which "serves as a voice for undocumented youth and is a lobbying arm of the DREAM movement." *Id.* ¶ 9(C)(1)(c).

Plaintiffs allege that the Senate cloture rule – Rule XXII – "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. Plaintiffs allege that "[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. And, plaintiffs note, even when cloture is invoked, Rule XXII permits further delay by allowing an "additional 30 hours of debate." *Id.* ¶ 15. Plaintiffs assert that the "filibuster has been used with increasing frequency" in recent years, *id.* ¶¶ 49-50, and "[a]ctual or threatened filibusters . . . 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" a minority "from obstructing

the business of the Senate by filibustering." *Id.* ¶ 19.

Each group of plaintiffs alleges that it has suffered injury by the cloture rule's preventing a majority in the Senate from closing debate and passing legislation – specifically, the DISCLOSE Act, a campaign finance reform bill, and the DREAM Act, an immigration reform bill. Common Cause alleges that a minority in the Senate used the rules permitting extended debate to prevent passage of the DISCLOSE Act in the last Congress, thereby wasting "the time, effort and resources" Common Cause had devoted to lobbying for passage of that Act, *id.* ¶ 9(D)(1)(c), and forcing it "to devote additional time and resources to support the enactment of a new DISCLOSE Act . . . by the 112th Congress." *Id.* Common Cause also alleges that it has been "forced to divert staff, time and resources that could have been used to support other election reforms to combatting the effects of secret expenditures by Super PACs and others in federal elections that would have been prohibited by the DISCLOSE Act," *id.*, and that it wasted resources in a "nationwide campaign to build public support" for efforts within the Senate to reform Senate Rule XXII. *Id.* ¶ 9(D)(1)(e).

The House Member plaintiffs allege that "a minority of senators" have used extended debate "to nullify [their] votes . . . in favor of numerous bills and resolutions that passed the House . . . and would have passed the Senate and become law but for Rule XXII." *Id.* ¶ 9(D)(2)(a). The Member plaintiffs also claim they are injured as candidates for reelection by the failure to invoke cloture and pass the DISCLOSE Act, because they have been deprived of information about "the identities of corporations and wealthy individuals – who have been secretly financing negative campaign ads by Super PACs and other phony grass roots organizations in the Representatives' campaigns for re-election to the House – which would have enabled [them] . . . to evaluate and respond more effectively to those attacks." *Id.* ¶ 9(D)(2)(b).

The DREAM Act plaintiffs generally allege that they "have been denied a path to United States citizenship" and are "now subject to the risk of deportation," *id.* ¶ 9(E)(1), because "[a] minority of the Senate" used Rule XXII to block passage of the DREAM Act in the last Congress.

Plaintiffs' complaint asserts that Rule XXII violates numerous constitutional provisions or principles, including: the Senate's rule-making power, Art. I, § 5, cl. 2 (Compl. ¶¶ 57-59); the Quorum Clause, Art. 1, § 5 (*Id.* ¶ 60(a)); the Presentment Clause, Art. I, § 7 (*Id.* ¶ 60(b)); "the exclusive list of exceptions" to majority rule (*Id.* ¶ 60(c)); the Vice President's power to vote when the Senate is "equally divided," Art. I, § 3, cl. 4 (*Id.* ¶ 60(d)); the Advice and Consent Clause, 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 for states in Congress (*Id.* ¶¶ 61-70); "the fundamental constitutional principle that prohibits one Congress (or one house of Congress) from binding its successors"; and "the power" of the Senate "to adopt or amend its rules by majority vote." (*Id.* ¶¶ 71-75).

For relief, plaintiffs ask this Court to declare unconstitutional the portion of Rule XXII requiring sixty votes to invoke cloture on most measures (and a two-thirds vote for cloture on amendments to Senate rules), to sever that language from the remainder of the rule, and to declare that "a vote of a simple majority of a quorum" is all that is required to invoke cloture. *Id.* ¶ 78. Alternatively, plaintiffs request that the Court declare that Rule V is unconstitutional and that debate on resolutions to amend Senate rules may be closed by a majority vote. *Id.*

ARGUMENT

In evaluating a motion to dismiss for lack of subject matter jurisdiction, the Court must "accept[] all of the factual allegations in [the] complaint as true," *Jerome Stevens Pharm., Inc. v. F.D.A.*, 402 F.3d 1249, 1250 (D.C. Cir. 2005) (internal quotation marks and citation omitted), but "is not required . . . to accept inferences unsupported by the facts alleged or legal conclusions that are cast as factual allegations." *Cartwright Intern. Van Lines, Inc. v. Doan*, 525 F. Supp. 2d 187, 193 (D.D.C. 2007) (quoting *Rann v. Chao*, 154 F. Supp. 2d 61, 64 (D.D.C. 2001)). In addition, the Court "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction." *Jerome Stevens Pharm.*, 402 F.3d at 1253.

As explained below, the Court lacks subject matter jurisdiction over plaintiffs' complaint because: (1) plaintiffs lack standing; (2) plaintiffs' claims are barred by the Speech or Debate Clause; and (3) plaintiffs' complaint presents a non-justiciable political question.[18]

I. PLAINTIFFS LACK STANDING TO BRING THIS SUIT

"Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982). "[T]he 'case or controversy' requirement," the Supreme Court has explained, "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Allen v. Wright*, 468 U.S. 737, 750 (1984). As the Court has emphasized, "'[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976)).

A necessary part of any case or controversy is that a party have standing to bring suit. *See Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 598 (2007); *Nat'l Ass'n of Home Builders v. E.P.A.*, 667 F.3d 6, 11 (D.C. Cir. 2011). Standing doctrine requires a litigant to "allege[ ] such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction," *Chamber of Commerce v. E.P.A.*, 642 F.3d 192, 200 (D.C. Cir. 2011) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)), thus ensuring "that the

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[18] The D.C. Circuit has considered motions to dismiss on Speech or Debate Clause and political question grounds as seeking dismissal for lack of subject matter jurisdiction under Rule 12(b)(1). *See Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1233 n.3 (D.C. Cir. 2009) ("We have consistently dismissed claims raising political questions for want of subject matter jurisdiction once we have found nonjusticiability."), *rev'd on other grounds*, 132 S. Ct. 1421 (2012); *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 7, 13 (D.C. Cir. 2006) (en banc) (reviewing denial of 12(b)(1) motion based on Speech or Debate Clause immunity, and noting that "Speech or Debate Clause operates as a jurisdictional bar"); *see also Porteous v. Baron*, 729 F. Supp. 2d 158, 162 n.3 (D.D.C. 2010). This Court has noted, however, that some authority suggests that such defenses are not jurisdictional. *See Judicial Watch*, 340 F. Supp. 2d at 30. Plaintiffs' complaint would be equally subject to dismissal on these bases under Rule 12(b)(6).

Judicial Branch does not perform functions assigned to the Legislative or Executive Branch and 'that the judiciary is the proper branch of government to hear the dispute.'" *Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1289 (D.C. Cir. 2007) (quoting *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (en banc)). Standing, thus, is not a mere pleading hurdle, but "a part of the basic charter promulgated by the Framers of the Constitution." *Valley Forge*, 454 U.S. at 476. Moreover, because "'the law of Art. III standing is built on a single basic idea – the idea of separation of powers,'" *Raines*, 521 U.S. at 820 (quoting *Allen*, 468 U.S. at 752), the standing inquiry is "especially rigorous" in cases where "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." *Id.* at 819-20.

"The 'party invoking federal jurisdiction bears the burden of establishing the[] elements [of standing].'" *Public Citizen, Inc.*, 489 F.3d at 1289 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). To meet this burden, a plaintiff must satisfy the three elements that form the "irreducible constitutional minimum of standing" under Article III: (1) that the plaintiff "ha[s] suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical;" (2) that the injury was caused by, or is "fairly . . . trace[able] to the challenged action of the defendant"; and (3) that 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 (internal quotation marks and citations omitted); *see also Center for Law and Educ. v. U.S. Dep't of Educ.*, 396 F.3d 1152, 1157 (D.C. Cir. 2005). If a plaintiff fails to satisfy any of the three elements of standing, the Court lacks jurisdiction and must dismiss the complaint. *See Valley Forge*, 454 U.S. at 475-76.

In the three previous challenges to the Senate's cloture rule, the courts dismissed each of the complaints for lack of Article III standing. *See Judicial Watch*, 432 F.3d at 361-62; *Page*, 995 F. Supp. at 29; *Page v. Dole*, No. 93-1546, at 11-18. Plaintiffs' complaint here fails for the

same reason as those previous challenges – all plaintiffs lack standing to bring suit. Each group of plaintiffs alleges a different injury, none of which constitutes injury-in-fact cognizable under Article III. Common Cause lacks standing under this Circuit's well-established doctrines for finding organizational, associational, and informational injury standing. The House Members lack standing under the Supreme Court's ruling in *Raines v. Byrd*. Finally, the individual DREAM Act plaintiffs cannot demonstrate the concrete, as opposed to merely speculative and contingent, injury required to establish injury-in-fact.

More fundamentally, though, these alleged harms all suffer from the same fatal flaw, namely, they rely on an underlying, unprovable proposition: that a bill that fails to advance because of a filibuster would otherwise – but for the cloture rule – have been enacted into law. Only by making that assumption could a party claim that it suffered an injury from the loss of a benefit accorded by proposed legislation that never became law. But federal courts cannot credit such inherently speculative projections about the possible outcome of the legislative process as a basis for finding Article III injury. As the District Court cogently articulated in *Page*:

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

995 F. Supp. at 29. Accordingly, as a matter of law, a party cannot predicate standing on a claim that Congress' failure to enact a bill caused the party injury by depriving it of the benefit of that proposed legislation.

Similarly, regardless of the nature of the plaintiffs' alleged injuries, none of them is redressable by this Court for two fundamental reasons. First, the relief plaintiffs seek – a judicial rewrite of the Senate's cloture rule – is beyond the authority of courts as it would intrude directly into the Senate's internal legislative procedures and interfere with the Senate's constitutional

rulemaking power. Second, even if the Court could rewrite the cloture rule to plaintiffs' liking, that relief would not redress the plaintiffs' alleged injuries: neither the DISCLOSE Act, the DREAM Act, nor any other legislation would be enacted into law by the Court's judgment.

A. Plaintiffs' Allegations Do Not Establish an Injury-in-Fact

Plaintiffs fail to allege any harms that constitute cognizable injuries-in-fact for standing. While plaintiffs specify their alleged injuries among three groups – (1) Common Cause, (2) the four House Member plaintiffs, and (3) the three individual DREAM Act plaintiffs– none of these groups establishes an injury-in-fact sufficient to confer standing to bring their claims.

1. Common Cause Fails to Allege an Injury-in-Fact.

Plaintiff Common Cause claims standing based on two sets of injuries: injury to itself (organizational standing) and injury to its members (associational standing). Compl. ¶ 9D(1)(a). Neither set of injuries suffices for Article III standing.

a. Injury to Itself – Organizational Standing[19]

To satisfy the injury-in-fact requirement for standing, an organization "must demonstrate that it has suffered 'concrete and demonstrable injury to [its] activities.'" *NTEU*, 101 F.3d at 1427 (alteration in original). "A mere 'setback to the organization's abstract social interests' is inadequate[.]" *Id.* (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)); *see also Equal Rights Center v. Post Properties, Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011). In demonstrating injury-in-fact, "the presence of a direct conflict between the defendant's conduct and the organization's *mission* is necessary – though not alone sufficient – to establish standing." *NTEU*, 101 F.3d at 1430.

Common Cause alleges that it suffered a "direct and immediate injury" as an organization

[19] An organization suing on its own behalf, like any plaintiff, must establish the three prerequisites of Article III standing, that is, a concrete and particularized injury that is fairly traceable to the alleged illegal action, and likely to be redressed by a favorable decision. *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996) ["*NTEU*"]; *see also Common Cause v. Federal Election Comm'n*, 108 F.3d 413, 417 (D.C. Cir. 1997) (per curiam).

because "the time, effort and resources" it devoted to "the passage of the DISCLOSE Act were wasted," as that bill failed to pass the Senate. Further, Common Cause alleges it "has been forced to devote additional time and resources to support the enactment of a new DISCLOSE Act . . . by the 112th Congress, expenditures that would have been unnecessary, but for the successful filibuster of the DISCLOSE Act" in the previous Congress.[20] Compl. ¶ 9(D)(1)(c). Common Cause also claims that it has been "forced to divert staff, time and resources that could have been used to support other election reforms to combatting the effects of secret expenditures by Super PACs and others in federal elections that would have been prohibited by the DISCLOSE Act." *Id.* Finally, Common Cause claims an injury from the time and resources it devoted to a nationwide campaign to build public support for efforts within the Senate to reform Rule XXII. *Id.* ¶ 9D(1)(e).

None of these allegations constitutes a concrete injury-in-fact. First, all these injuries relate to Common Cause's expenditures unsuccessfully lobbying Congress to pass legislation it favors. Yet, the D.C. Circuit "has not found standing when the only 'injury' arises from the effect [of the challenged action] on the organization's lobbying activities." *Center for Law and Educ.*, 396 F.3d at 1161. In *Center for Law and Education*, the court of appeals rejected the plaintiff organizations' claims of standing based on allegations that "Federal rules force them to change their lobbying strategies" to "a more costly form of lobbying." *Id.* at 1162. Likewise, in *NTEU*, the D.C. Circuit found that an organization challenging the Line Item Veto Act could not establish standing based on allegations that it would have to expend more resources on lobbying because of the line-item veto power the new law granted the President. 101 F.3d at 1430. This Circuit similarly rejected an organization's standing based on alleged increased lobbying expenses in *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428 (D.C. Cir. 1995), where

[20] Several modified versions of the DISCLOSE Act that failed to pass the Senate in the last Congress have been introduced in the current Congress, *see, e.g.,* S. 2219 and S. 3369, 112th Cong. (2012). A motion was made to proceed to consideration of one of those bills, S. 3369, but the Senate voted twice against invoking cloture to close debate on that motion. *See* 158 Cong. Rec. S5008 (daily ed. Jul. 16, 2012) ; *id.* at S5072 (daily ed. Jul. 17, 2012).

the organization challenged a new tax law provision that frustrated its objectives and asserted that it had to expend substantial funds on lobbying to repeal the law. *Id.* at 1431, 1434; *see also Nat'l Ass'n of Home Builders*, 667 F.3d at 12 (allegations that organization "spent considerable staff time and monetary resources" in submitting comments to government agencies, testifying before the Senate, and participating in court cases to overturn government action were insufficient for organizational standing). Accordingly, in this Circuit, "it is settled that a plaintiff cannot show injury simply by pointing to an expenditure of resources such as increased . . . lobbying expenses." *LPA, Inc. v. Chao*, 211 F. Supp. 2d 160, 165 (D.D.C. 2002).[21]

Indeed, Common Cause's allegation that the resources it expended on lobbying were "wasted," Compl. ¶ 9(D)(1)(c), indicates that the organization is complaining not so much that it had to spend money lobbying Congress, but that its legislative efforts promoted by that lobbying were frustrated by the Senate's failure to pass the DISCLOSE Act. "Frustration of an organization's objectives," however, "is the type of abstract concern that does not impart standing." *Center for Law and Educ.*, 396 F.3d at 1161 (quoting *NTEU*, 101 F.3d at 1429); *see also Nat'l Taxpayers Union*, 68 F.3d at 1433 ("The allegation that Section 13208 has 'frustrated' NTU's objectives is the type of abstract concern that does not impart standing.").

Similarly unavailing is Common Cause's allegation that it had "to divert . . . resources that could have been used to support other election reforms to combatting the effects of secret expenditures by Super PACs and others in federal elections that would have been prohibited by the DISCLOSE Act." Compl. ¶ 9(D)(1)(c). First, that conclusory allegation provides no detail

[21] The D.C. Circuit's recent decision in *Am. Society for the Prevention of Cruelty to Animals v. Feld Entertainment*, 659 F.3d 13 (D.C. Cir. 2011), is not to the contrary. In that case, the court stated that "whether injury to an organization's advocacy supports *Havens* [*Realty Corp. v. Coleman*, 455 U.S. 363 (1982)] standing remains an open question." *Id.* at 27. However, the court in that case was not addressing standing based on lobbying expenses as in *Center for Law and Education*, *NTEU*, or *National Taxpayers Union*, but rather the distinct question of whether the challenged conduct (in that case, the use of bullhooks and chains on circus elephants) undermined the organization's public education efforts (regarding cruelty to elephants from such implements), requiring it to augment those efforts.

as to what funds were diverted, how much, when, and from which activities, and thus, fails to establish with particularity a "concrete and demonstrable injury to the organization's activities – with [a] consequent drain on the organization's resources." *Common Cause*, 108 F.3d at 417 (quoting *NTEU*, 68 F.3d at 1433 (alteration in original)). Moreover, simply alleging that the organization moved funds from one lobbying effort to another issue advocacy area does not make out an injury. As the D.C. Circuit explained, any harm from such voluntary shifting of resources results from the organization's own "budgetary choices" and, by itself, does not demonstrate an injury for standing purposes. *Fair Employment Council v. BMC Marketing Corp.*, 28 F.3d 1268, 1276-77 (D.C. Cir. 1994) ("The [Supreme] Court [in *Havens*]. . . did not base standing on the diversion of resources from one program to another, but rather on the alleged injury that the defendants' actions themselves had inflicted upon the organization's programs.").

Common Cause's final alleged injury is that it expended resources in a "nationwide campaign to build public support for" three proposed Senate resolutions to amend Senate rules to "reduce or mitigate the power of the minority to obstruct the business of the Senate." Compl. ¶ 9 (D)(1)(e) (citing S. Res. 8, S. Res. 10, and S. Res. 21, 112th Cong.). Common Cause claims that the "time and resources" spent on this "campaign" "were wasted," when Senate rules were "used to prevent debate and voting" on these three resolutions. *Id.* These allegations fail to establish injury-in-fact. First, expenditures to build public pressure on Senators to support pending proposals to change the cloture rule are merely a form of grassroots lobbying, and, as discussed above, increased lobbying expenses do not constitute an injury-in-fact for standing purposes. Further, contrary to Common Cause's allegations, the Senate *did* debate and vote on these resolutions, rejecting each of them. And, while the Senate agreed that adoption of the resolutions would require an affirmative vote of two-thirds of Senators voting, *see* 157 Cong. Rec. S265 (daily ed. Jan. 26, 2011), none of the three resolutions received the vote of even a majority of Senators. *See id.* at S327 (daily ed. Jan. 27, 2011) (rejecting S. Res. 8 by vote of 12-84); *id.* at

S328 (rejecting S. Res. 10 by vote of 44-51); *id.* (rejecting S. Res. 21 by vote of 46-49).

Indeed, this alleged injury suffers from the same fatal flaw that all of Common Cause's claims present – the organization cannot show that it challenges matters that are in "direct conflict" with its mission. As the court in *NTEU* explained, "in those cases where governmental action is challenged," as here, "if the government's conduct does not directly conflict with the organization's mission, the alleged injury to the organizations likely will be one that is shared by a large class of citizens and thus insufficient to establish injury in fact." 101 F.3d at 1430 (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). Just as in *NTEU*, where the organization's mission (to improve the conditions of workers in the union) was not in direct conflict with the Line Item Veto Act, so here, the mission of Common Cause in promoting campaign finance and other election reform legislation is not in direct conflict with Senate rules governing debate.

Accordingly, Common Cause's alleged harms do not qualify as concrete and particular injuries-in-fact necessary to support organizational standing.

b. Injury to Its Members – Associational Standing

In order to assert associational standing on behalf of its members, an organization must demonstrate that "(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." *Chamber of Commerce*, 642 F.3d at 200; *accord Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 342-43 (1977); *Nat'l Ass'n of Home Builders*, 667 F.3d at 12.

In asserting associational standing, the complaint alleges:

> The members of Common Cause have been deprived during the 2010 elections and will be deprived during the 2012 elections of relevant information concerning the identities of the corporations and wealthy individuals who are secretly spending millions to finance negative campaign ads by Super PACs and other front organizations to support or defeat both candidates in the presidential and congressional primary and general election campaigns.

Compl. ¶ 9(D)(1)(d). This allegation fails to satisfy the first prong of associational standing, as "it is not enough to aver that unidentified members have been injured . . . the petitioner must specifically 'identify members who have suffered the requisite harm.'" *Chamber of Commerce*, 642 F.3d at 199 (quoting *Summers*, 555 U.S. at 499). Yet, the complaint nowhere identifies a specific member of Common Cause who is deprived of this information, what that information would be, or how the member is injured by failing to have such information. *See Am. Chemistry Council v. Dep't of Transportation*, 468 F.3d 810, 820 (D.C. Cir. 2006) ("[T]he identity of the party suffering an injury in fact must be firmly established" for associational standing.).

Even if Common Clause identified specific members of its organization seeking the relevant information, it would still fail to demonstrate an injury-in-fact to its members. The harm Common Cause alleges on behalf of its members is a quintessential "informational injury" – that is, a claim that its members have been deprived of information they desire. It is well established that such an "informational injury" can be the basis for standing *only* where the complaining party "fails to obtain information *which must be publicly disclosed pursuant to a statute*." *Federal Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998) (emphasis added); *accord Feld Entertainment*, 659 F.3d at 22; *Ass'n of Am. Physicians v. Food and Drug Admin.*, 539 F. Supp. 2d 4, 15 (D.D.C. 2008) ("Informational standing arises only in very specific statutory contexts where a statutory provision has explicitly created a right to information.") (citation and internal quotation marks omitted); *Common Cause*, 108 F.3d at 418 (standing based on a claim of informational injury is "expressly limited . . . to those cases where the information denied is . . . required by Congress to be disclosed."). In this case, Common Cause identifies no statute that requires the disclosure of the information that its members have been deprived of. Indeed, the gravamen of Common Cause's complaint is that the Senate's debate rules have prevented Congress from enacting such a law. The lack of a statute requiring disclosure is fatal to Common Cause's claim of associational standing based on an informational injury to its members.

2. The House Member Plaintiffs' Allegations Do Not Demonstrate an Injury-in-Fact.

The House Member plaintiffs assert standing based on an injury in their official capacity as Representatives and in their capacity as candidates for election. Compl. ¶ 9(D)(2). Neither injury is sufficient for Article III standing.

A. Standing of the House Member Plaintiffs in Their Official Capacity Is Precluded by *Raines v. Byrd*.

The House Member plaintiffs allege that they have been injured in their official capacity as Representatives by the Senate's failure to close debate and vote on legislation passed by the House and sent to the Senate in the last Congress. By preventing final votes on such legislation, the Member plaintiffs claim, the Senate has "nullif[ied] votes that [they] cast as members of the House of Representatives in favor of numerous bills and resolutions that passed the House," including the DISCLOSE Act and the DREAM Act in the 111th Congress. Compl. ¶ 9(D)(2)(a).

Standing based on this claim of injury is foreclosed by the Supreme Court's decision in *Raines v. Byrd*, 521 U.S. 811. In *Raines*, Senators and Representatives who had voted against the Line Item Veto Act brought suit challenging the Act's constitutionality. They claimed standing "in their official capacities" because, they asserted, the Act "alter[ed] the legal and practical effect of all votes they may cast on bills" subject to the line item veto, "divest[ed] [them] of their constitutional role in the repeal of legislation," and "alter[ed] 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 Member plaintiffs lacked "concrete injury" because their asserted harm was "based on a loss of political power," and not the loss of "any private right." *Id.* at 821. The Court noted that a harm to Members in their official capacity was not a personal injury to them, but rather a harm that "runs (in a sense) with the Member's seat, a seat which the Member holds . . . as trustee for his constituents, not as a prerogative of personal power." *Id.* Accordingly, the Court concluded that Members asserting

an institutional injury from the diminution of the "'meaning' and 'effectiveness' of their vote," *id.* at 825, as the Member plaintiffs here claim, lack standing because such an injury is "wholly abstract and widely dispersed," and "contrary to historical experience." *Id.* at 829.

The Supreme Court in *Raines* noted just two situations where Member standing may still be possible. First, where, as in *Powell v. McCormack*, 395 U.S. 486 (1969), legislators allege that "they have been deprived of something to which they *personally* are entitled" and have been "singled out for specially unfavorable treatment as opposed to other Members of their respective bodies," thus suffering "an injury to themselves as individuals." *Raines*, 521 U.S. at 821, 829 (explaining that in *Powell*, House Member had standing to challenge his exclusion from the House and consequent loss of salary). This exception does not apply here, as the challenged Senate rules have not "singled out" these House Members "for specially unfavorable treatment as opposed to other Members" of the House, nor deprived them of anything to which they are "personally entitled." *See id.* 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.").

The second possible exception *Raines* recognized is where the Members' injury falls within the "narrow rule announced in *Coleman v. Miller*, 307 U.S. 433 (1939)." *Chenoweth v. Clinton*, 181 F.3d 112, 116 (D. C. Cir. 1999). In *Coleman*, twenty of Kansas' forty state senators voted against ratifying a proposed Child Labor Amendment to the Federal Constitution, and such an evenly divided vote would have meant the amendment was not ratified by the state. *Raines*, 521 U.S. at 822 (citing *Coleman*, 307 U.S. at 436-37). However, the Lieutenant Governor, who presided in the Kansas Senate, cast a vote to break the tie in favor of ratification, and the amendment was deemed ratified after the Kansas House passed the same resolution. *Coleman*, 307 U.S. at 436. Twenty-one state senators and three state representatives then sued to have appropriate state officials recognize that the legislature had not ratified the amendment because

of the deadlocked vote in the state Senate. *Raines*, 521 U.S. at 822; *Coleman*, 307 U.S. at 436. The Supreme Court held that the state senators had standing based on the nullification of their votes against ratification. As the *Raines* court explained, however, *Coleman*'s holding does not support standing for legislators generally, but rather "stands (at most[]) 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." *Raines*, 521 U.S. at 823.[22]

Although the Member plaintiffs try to fit their claim within the *Coleman* exception by alleging that the Senate's failure to close debate "nullif[ies]" their votes as House Members, Compl. ¶ 9(D)(2)(a), their injury falls well outside the narrow scope of *Coleman*. As *Raines* pointed out, *Coleman* involved a majority of the state Senate – a "bloc" sufficient to enact or defeat the proposed constitutional amendment. *Raines*, 521 U.S. at 822-23. Here, in contrast, only four Members of the House – and no Senators – are named as plaintiffs. Thus, unlike in *Coleman*, the Member plaintiffs do not represent a "bloc" of "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act." *Id.* at 823.

Furthermore, the allegations do not establish that these four Members suffered vote nullification of the type involved in *Coleman*. As the D.C. Circuit has explained, the Supreme Court "used nullify to mean treating a vote that did not pass as if it had, or vice versa." *Campbell v. Clinton*, 203 F.3d 19, 22 (D.C. Cir. 2000). These four House Members voted in favor of the legislation at issue (the DREAM Act and the DISCLOSE Act), and that legislation passed the House. No official in the Senate, or elsewhere, has treated the legislation as if it did not pass the

[22] The Supreme Court noted, though without deciding the issue, that the *Coleman* exception may not even apply to cases brought by federal legislators because "the separation-of-powers concerns present in such a suit were not present in Coleman," which involved state legislators who brought suit in state court. *Raines*, 521 U.S. at 824 n.8.

House. Rather, the Senate simply failed to pass the legislation.[23] The votes of these House Members were given full effect in the House – and by the Senate: no vote "nullification" occurred.[24]

In essence, the Member plaintiffs' allegations amount to nothing more than a claim that the Senate's cloture rule enabled a minority of Senators to delay Senate action on pending legislation, thereby diminishing the power of the "votes that [they] cast as members of the House of Representatives in favor of numerous bills and resolutions." Compl. ¶ 9(D)(2)(a). This allegation is equivalent to the *Raines* plaintiffs' unavailing assertion that the Line Item Veto Act "alters the legal and practical effect of all votes they may cast on bills containing such separately vetoable items." *Raines*, 521 U.S. at 816. And just as that claim failed to provide standing to the plaintiffs in *Raines*, it is insufficient to establish standing by the Member plaintiffs here.[25]

B. Member Plaintiffs' Alleged Informational Injury as Candidates for Reelection Is Insufficient for Article III Standing.

The Member plaintiffs also assert standing as candidates in the upcoming congressional elections. They allege that the Senate's failure to close debate and pass the DISCLOSE Act

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[23] Indeed, under the logic of the Member plaintiffs' nullification theory, the votes of House Members in favor of a bill are "nullified" any time a bill is passed by the House and fails in the Senate – whether because debate was not brought to a close or for any other reason.

[24] Although prior to the Supreme Court's decision in *Raines*, the D.C. Circuit had found standing for Members of Congress in their official capacities in certain cases where the Members asserted a dilution of their voting power in the House, *see, e.g.*, *Michel v. Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994); *Moore v. U.S. House of Representatives*, 733 F.2d 946, 950-53 (D.C. Cir. 1984); *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1168-70 (D.C. Cir. 1983), after *Raines*, this Circuit has recognized that the Supreme Court's decision in *Raines* markedly restricted standing for Members of Congress to the very limited instances contemplated in that case. *See Chenoweth*, 181 F.3d at 115 (explaining that "the portions of our legislative standing cases upon which the current plaintiffs rely are untenable in the light of *Raines*").

[25] One of the Member plaintiffs also asserts an injury on behalf of a constituent who was a veteran who allegedly died waiting for admission to a health facility while a veterans' health care bill was subject to a filibuster threat in the Senate delaying its passage. Compl. ¶ 9(D)(2)(c). However, a Member cannot assert standing on behalf of a constituent. *See Kucinich v. Defense Finance and Accounting Serv.*, 183 F. Supp. 2d 1005, 1010 (N.D. Ohio 2002) (congressman lacked standing to sue on his constituents' behalf, finding that "[i]t would . . . be unwise and perhaps dangerous for this Court to carve out a new exception to *Raines* for legislators suing in their representational capacity").

injured them because that Act would have required disclosure of "the identities of corporations and wealthy individuals - who have been secretly financing negative campaign ads by Super PACs and other phony grass roots organizations in the [Member plaintiffs'] campaigns for re-election," and this information "would have enabled the [Member plaintiffs] and their supporters to evaluate and respond more effectively to those attacks." Compl. ¶ 9(D)(2)(b). This alleged injury is the same one that Common Cause alleges on behalf of its members – an informational injury. But, as discussed previously, such an injury suffices for standing purposes only when a plaintiff can point to a particular statute creating a right to the information, *see Akins*, 524 U.S. at 21; *Feld Entertainment*, 659 F.3d at 22; *Common Cause*, 108 F.3d at 418; *Ass'n of Am. Physicians*, 539 F. Supp. 2d at 15, and the Member plaintiffs have not identified any such statute.

The D.C. Circuit recently held that a Member of Congress had standing in his capacity as a candidate for office to challenge an FEC rule on campaign finance reporting because that rule allegedly denied him information that a statute, the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, required be disclosed. *Shays v. Federal Election Comm'n*, 528 F.3d 914, 923 (D.C. Cir. 2008). Unlike in *Shays*, where the plaintiff's "injury in fact [was] the denial of information he believes the law entitles him to," *id.*, the Member plaintiffs here claim an injury on precisely the opposite ground – that the law does *not* entitle them to this information and Congress should change that. Such an allegation fails on its face to establish an informational injury-in-fact that can support standing for these Members as candidates.

3. The DREAM Act Plaintiffs Do Not Allege a Cognizable Injury-in-Fact.

Each of the three DREAM Act plaintiffs alleges the same injury – that because the Senate failed to pass the DREAM Act, he or she "has been denied a path to United States citizenship, and is now subject to the risk of deportation as a direct result of the 60 vote requirement." Compl. ¶ 9(E)(1). Yet, failure of the Senate to close debate and pass the DREAM Act, and thereby provide a potential path to citizenship, does not constitute an injury-in-fact for standing purposes.

First, assertion of any alleged harm from the possibility that the DREAM Act would have passed Congress, without amendment to the bill that passed the House, and been signed into law by the President is purely speculative. Neither plaintiffs nor this Court can predict what the law's final provisions would have been and whether they would have provided relief to these plaintiffs.

Second, even assuming that the same provisions of the DREAM Act that passed the House had passed the Senate and become law, that legislation required persons to meet several criteria to be eligible to seek cancellation of removal and request conditional nonimmigrant status, *see* H.R. 5281, 111th Cong. § 6(a)(1) (2010) (engrossed House amendment), and the complaint's allegations do not establish that these plaintiffs would have satisfied all the necessary conditions. And, under the provisions of that legislation, whether to grant an eligible individual conditional nonimmigrant status was left to the discretion of the Secretary for Homeland Security, *see id.* ("Secretary of Homeland Security *may* cancel removal of an alien. . .") (emphasis added), and, therefore, even had the law passed and these plaintiffs qualified to seek conditional immigrant status, it remains speculative whether the Secretary would have granted their application.

Moreover, stated simply, the DREAM Act plaintiffs' allegation of harm is that the Senate failed to vote on and pass legislation that they believe would benefit them. But such a harm does not constitute an injury-in-fact for standing purposes because it invades no cognizable interest of plaintiffs. *See Hoffman v. Jeffords*, 175 F. Supp. 2d 49, 56 n.3 (D.D.C. 2001) ("[I]t is doubtful that anyone has a right to certain legislation being enacted by Congress."), *aff'd*, 2002 WL 1364311 (D.C. Cir. May 6, 2002). Under plaintiffs' reasoning, any person who could benefit from legislation has standing to challenge internal Senate (or House) rules whenever the legislation fails to pass through operation of such rules.[26] Such an alleged injury presents "a clear

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[26] For instance, on plaintiffs' reasoning, when the Senate failed to invoke cloture on legislation to extend for a year the $250 additional annual benefit for social security and supplemental security income recipients originally provided for in the American Recovery and Reinvestment Act of 2009, *see* 156 Cong. S8627-28 (daily ed. Dec. 8, 2010) (failing to invoke continue...

example of one of those 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches . . . ," not the federal courts. *Common Cause of Pa. v. Pennsylvania*, 558 F.3d 249, 267 (3[d] Cir. 2009) (quoting *Valley Forge*, 454 U.S. at 474-75).

B. Plaintiffs' Alleged Injuries Are Not Fairly Traceable to the Defendants, Nor Likely To Be Redressed by a Favorable Decision

Plaintiffs' allegations also fail to demonstrate standing, because, as in the previous challenges to the cloture rule, *see Judicial Watch*, 432 F.3d at 361-62; *Page*, 995 F. Supp. at 29, they cannot show that their alleged injuries were caused by the Senate's cloture rule nor that their injuries would be redressed by a favorable judgment.

As an initial matter, none of the defendants exercises authority to regulate debate on the floor of the Senate or to rewrite the Senate's cloture rule and thus none could have caused plaintiffs' alleged injuries. The Secretary of the Senate keeps the Journal and other official records of the Senate, oversees the disbursement of payrolls, affirms the accuracy of bill text by signing all measures that pass the Senate, notifies the President of the confirmation of nominations, and attends to other duties such as the acquisition of stationery and the maintenance of the Senate Library. The Sergeant at Arms and Doorkeeper serves as the protocol and chief law enforcement officer and the principal administrative manager for most support services in the Senate. The Parliamentarian advises the Senate's presiding officer on the interpretation of Senate rules and procedures and the conduct of legislative business. *See* Rule XX.1; *Riddick's Senate Procedure* at 989 ("The Chair rules on points of order, not the Parliamentarian; the Parliamentarian merely advises the Chair.").

None of these Senate officers is permitted to participate in debate, *see* Senate Rule XIX;

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[26]...continue
cloture by vote of 53-45 on motion to proceed to S. 3985), each of the over 50 million persons who would have received a benefit payment (*see* http://www.socialsecurity.gov/newsletter/archives/2009/feb2009.html), would have had standing to challenge the cloture rule.

Riddick's Senate Procedure at 717 ("Debate is the prerogative of Senators on the floor."); to vote on any bill, nomination, or motion, *see* Rule XII; to close debate, *see* Rules XIX (Senator shall not be interrupted in debate except by his or her consent), XXII (cloture motion must be signed by sixteen *Senators*); or to adopt or amend Senate rules. Similarly, none of these officers has authority to compel the Senate to vote on any measure. Accordingly, any injury purportedly caused by the Senate's failure to close debate and vote on a pending measure cannot be caused by, or fairly traced to, any of these Senate officers. And, for the same reason, a judgment against these Senate officers cannot redress the plaintiffs' injuries as they have no power to change the Senate's rules, or to close debate or require the Senate to vote on any particular measure.

Nor are the alleged injuries fairly traceable to the Vice President. The Senate and not the Vice President adopted the rules and procedures governing debate in the Senate; indeed, the Vice President "has no rulemaking power over the Senate." *Riddick's Senate Procedure* at 1026. Further, even when the Vice President is presiding over the Senate,[27] it is the Senate that ultimately decides its procedures and rules, as all rulings of the presiding officer interpreting and applying Senate rules are subject to appeal and determination by the Senate. *Id.* at 146 ("Decisions of the Chair are subject to appeal and by a majority vote the Senate may reverse or overrule any decision by the Chair."). In addition, the Vice President is not permitted to participate in debate, *id. at* 717, 1391, "nor does he have a right to engage in conversation with Senators on the floor." *Id.* at 766. Therefore, he has not been, and cannot be, part of any attempt to block a measure from a vote in the Senate by unlimited debate. Accordingly, the injuries plaintiffs allege cannot be fairly traced to any actions by the Vice President. Nor, for the same reasons, can those injuries be redressed by the Vice President, as he is unable to force the Senate to vote on any measure or to amend its rules.

[27] In fact, the Vice President was not presiding over the Senate during the cloture votes on either the DREAM Act or the DISCLOSE Act.

Even if plaintiffs could name a defendant who had the authority to amend the Senate's rules and invoke cloture on pending measures, their allegations would nonetheless fail to demonstrate that their injuries were fairly traceable to the Senate's cloture rule and the failure to invoke cloture on the DREAM Act or the DISCLOSE Act. As the previous cloture rule cases demonstrate, it is inherently speculative to link any particular legislative outcome to the Senate's internal debate procedures as they represent but one part of the legislative process. For proposed legislation to become law, it must pass the House and Senate in the exact same form and must then be signed by the President (or, if vetoed, must receive a two-thirds override vote of both Houses). The connection between Senate debates and the failure of the Congress to enact, and the President to sign, a bill into law is simply too tenuous to support standing to challenge the Senate's cloture rule. As this Court explained in *Page*:

> 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. . . . Moreover, the failure to close debate on an individual cloture vote does not necessarily prevent the legislation in question, or parts of that legislation, from being enacted. The attempt to close debate may succeed on a subsequent cloture vote or a part of the bill may be incorporated into other legislation that is ultimately enacted.

995 F. Supp. at 29.

Plaintiffs, who seek standing based on failed legislation, are not asserting that a particular piece of legislation in fact became law and that Executive Branch officials are not enforcing or administering that law, *see Clinton v. City of New York*, 524 U.S. 417 (1998) (plaintiffs challenging cancellation of appropriations by President after signing law), or that a particular statute was enacted unconstitutionally – and so is not the law, *see Field v. Clark*, 143 U.S. 649 (1892) (plaintiff challenging tariff law for not having been validly enacted). Rather, plaintiffs assert that the failure of the Senate to close debate on the DISCLOSE Act and the DREAM Act

caused their injury by depriving them of a law that could benefit them.

But this asserted connection between their injury and the cloture rule turns the causation prong of the standing test on its head. Plaintiffs seek to make Congress' failure to pass a law to *relieve* their purported injuries into the *cause* of their injuries. Hence, Common Cause claims its members are injured because they lack information "concerning the identities of the corporations and wealthy individuals who are secretly spending millions to finance negative campaign ads by Super PACs and other front organizations." Compl. ¶ 9(D)(1)(d). Similarly, the Member plaintiffs allege injury from the lack of disclosure of "the identities of corporations and wealthy individuals – who have been secretly financing negative campaign ads . . . in the Representatives' campaigns for re-election." *Id.* ¶ 9(D)(2)(b). But plaintiffs' lack of such information is not caused by the Senate's debate rules or even the Senate's not passing the DISCLOSE Act. Rather, it is caused by the organizations and individuals choosing not to disclose the information. Congress' failure to pass the DISCLOSE Act simply deprived Common Cause and the Member plaintiffs of the benefit of a law that could help them – it did not *cause* their injuries.

The same holds for the DREAM Act plaintiffs' alleged injury – being "subject to the risk of deportation" and lacking a path to citizenship due to their immigration status. *Id.* ¶ 9(E)(1). That injury was not caused by the Senate's debate rules or its consideration of the DREAM Act; rather, their injury pre-dates consideration of that Act and results from their immigration status under existing law. The Senate's failure to invoke cloture on the DREAM Act, at most, was part of Congress' considering but not enacting legislative relief favorable to these plaintiffs.

Put simply, plaintiffs cannot manufacture a causal connection to the cloture rule and the Senate's failure to invoke cloture on any particular legislation merely by asserting that Congress' failure to provide legislative relief for plaintiffs' existing injuries is the cause of those injuries. Accordingly, plaintiffs cannot demonstrate that their alleged injuries are fairly traceable to the Senate's cloture rule or its failure to invoke cloture on specific matters.

Plaintiffs equally fail to demonstrate redressability for their alleged injuries. First and foremost, the Court lacks the power to order the Senate to close debate and vote on any piece of legislation. *See Newdow v. United States Congress*, 328 F.3d 466, 484 (9th Cir. 2003) ("[I]n light of the Speech and Debate Clause of the Constitution, Art. I, § 6, cl. 1, the federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation."), *rev'd on other grounds*, 542 U.S. 1 (2004); *cf. Hastings v. United States Senate, Impeachment Trial Comm.*, 716 F. Supp. 38, 41 (D.D.C.) (rejecting impeached judge's request to enjoin Senate's impeachment proceedings and stating that "[t]he relief sought by plaintiff . . . would be utterly foreign to our system of divided powers"), *aff'd*, 887 F.2d 332 (D.C. Cir. 1989) (table). Further, a declaratory judgment that Rule XXII is unconstitutional would leave the Senate with no mechanism to close debate over the objection of a Senator, *see Page*, 995 F. Supp. at 29 ("[W]ere Rule XXII declared unconstitutional, the Senate could return to its former practice of allowing unlimited debate unless there existed unanimous consent to close debate."), thus making it even less likely that debate could be closed and plaintiffs' alleged injury from Senate filibusters remedied.

Plaintiffs try to circumvent this obstacle by asking the Court to declare unconstitutional the clause in Rule XXII requiring sixty votes to invoke cloture, and to sever that language from the rule – thereby, in plaintiffs' reasoning, establishing cloture by majority vote. Compl. ¶¶ 77-78. But the Constitution grants the Senate (and not the courts) the sole power to "determine the Rules of its Proceedings," U.S. Const. art. I, § 5, cl. 2, and it would contravene any understanding of the role of the judiciary in our system of separated powers to suggest that a court could edit the Senate's rules, clause by clause, to alter their meaning and application. *See Judicial Watch*, 432 F.3d at 361 ("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." (emphasis in original)); *Page*, 995 F.

Supp. at 29 ("[I]t would be inappropriate for this Court to rewrite the Senate rules as Mr. Page suggests."). This Court has no authority to sit as a line-editor of the Senate's rules.

Further, plaintiffs' request that the Court sever the sixty-vote requirement but leave the rest of Rule XXII intact, "just as courts have severed unconstitutional portions of statutes," Compl. ¶ 77, would require finding that the Senate would have adopted Rule XXII even if it could not have established a sixty-vote requirement for invoking cloture. *See Basardh v. Gates*, 545 F.3d 1068, 1070 (D.C. Cir. 2009) (per curiam) ("Severability . . . turns on legislative intent. Courts must ask: 'Would Congress still have passed the valid sections had it known about the constitutional invalidity of the other portions of the statute?'") (quoting *United States v. Booker*, 543 U.S. 220, 246 (2005) and citation omitted). Rule XXII's extensive history and the delicate compromises regarding the vote thresholds for closing debate in the current rule refute any suggestion that the Senate would have adopted the current cloture rule without the sixty-vote requirement. In the last two hundred years, through various formulations of its rules on debate, the Senate has never adopted a rule providing for majority cloture. This Court has no power to impose such a rule.

Even if the Court could rewrite the Senate's rules to provide for majority cloture, redressability would remain speculative as the passage of the DREAM Act or DISCLOSE Act would still be contingent on a favorable final vote of the Senate after closing debate – not to mention their passing the House again in identical form in the remaining months of this Congress and being signed into law by the President.[28] Although plaintiffs allege that the DREAM Act and DISCLOSE Act "had the support of a majority of senators," Compl. ¶ 9(D)(2)(a), neither plaintiffs nor the Court is in any position to determine or predict what action the Senate would take in a final vote on any particular legislation – much less what action would be taken by the

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[28] The bills that the Senate failed to pass in the previous Congress lapsed at the end of that Congress. Because the legislative process begins anew each Congress, the legislation would need to pass both the House and the Senate in this Congress (and then be sent to the President). While modified versions of the DISCLOSE Act have been introduced in the current Congress, they are not identical to the version from the last Congress, and none has passed the Senate or the House.

House of Representatives and the President.[29] Party control of the House of Representatives has switched since the DREAM Act and DISCLOSE Act passed that Chamber in the previous Congress, and, thus, even if the Senate were to pass those bills in the current Congress, it is entirely speculative that they would again pass the House.[30] To "confer[] standing to [plaintiff] based on its own prediction of Congress's actions, . . . would expand [the court's] authority well beyond any zone of twilight that might exist between legislative and judicial authority[.]" *Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116, 132 (2d Cir. 2000).

Put simply, even granting plaintiffs' requested relief would not redress their injuries. They seek enactment of the DREAM Act and the DISCLOSE Act. A declaratory judgment lowering the vote threshold for invoking cloture under Rule XXII would not result in the passage of these bills, as it is wholly speculative what action the Senate – and the House and the President – would take regarding the legislation.[31]

Plaintiffs' alternative request for relief declaring unconstitutional Senate Rule V, which provides that Senate rules continue from one Congress to the next, and declaring that a majority

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[29] Plaintiffs argue that Senate passage is not speculative because a majority of Senators voted for cloture on this legislation in the last Congress. *See* Compl. ¶¶ 5(a) n.3, 9(D)(2)(b). However, a vote for cloture is a vote to close debate, and not necessarily a guarantee of ultimate support for a bill. *See, e.g.*, 154 Cong. Rec. 19115-16, 19393 (2008) (roll call votes 200 and 201) (on S. 3001, the National Defense Authorization Act for FY 2009, Sen. Byrd and Sen. Sanders voted for cloture, but against final passage of the bill, while 26 Senators who voted against cloture subsequently voted for passage); 153 Cong. Rec. 28708, 28719 (2007) (roll call votes 398 and 400) (on S. 294, a bill reauthorizing Amtrak, nine Senators voted for cloture but then against final passage of bill; one Senator voted against cloture and for final passage).

[30] In fact, the versions of the DISCLOSE Act currently pending in the Senate are not identical to the DISCLOSE Act that failed in the previous Congress.

[31] Indicative of the speculative nature of linking future government action to an effect on plaintiffs' alleged injury is the recent announcement by the Secretary of Homeland Security of the adoption of a policy under which individuals who came to the United States as children and who meet criteria substantially similar to the provisions of the DREAM Act can apply for administrative relief from removal from the United States for a period of two years, subject to renewal, and will be eligible to apply for work authorization. *See* Statement of Secretary Janet Napolitano, Jun. 15, 2012, http://www.dhs.gov/ynews/releases/20120612-napolitano-announces-deferred-action-process-for-young-people.shtm. A court is in no position to speculate how this recent administrative action might affect the path of future legislation in this area.

vote is sufficient to change the rules, Compl. ¶ 78(II), similarly fails the redressability prong.[32] Declaring Rule V unconstitutional would not remedy the plaintiffs' injuries as it would not enact the DREAM Act and DISCLOSE Act that failed in the last Congress – or any version pending in this Congress – nor would it grant any specific statutory relief to plaintiffs. Even if Rule V were rescinded, as plaintiffs seek, it is nothing more than unadorned speculation to assume that the Senate would then change Rule XXII to provide for majority cloture, and outright guesswork as to what effect such a change might have on whether the Senate and House would then pass the DISCLOSE Act and the DREAM Act in the identical form as last Congress. Such a remedy cannot be considered "likely" to redress plaintiffs' alleged injuries.

In sum, plaintiffs' injuries are not fairly traceable to the defendants, nor can they be redressed by a favorable judgment in this action, and therefore, plaintiffs lack standing.

II. THE SPEECH OR DEBATE CLAUSE BARS THIS SUIT

The Court should also dismiss the complaint because plaintiffs' claims are barred by the Speech or Debate Clause of the Constitution. That 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, cl. 1. "The purpose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975). To further this goal of legislative independence, the Clause protects from judicial inquiry activities that are an "integral part of the deliberative and communicative processes . . . with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel v. United States*, 408 U.S. 606, 625 (1972).

Because of its importance to the Legislative Branch's constitutional functions, the

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[32] It should be noted that a majority vote of a quorum of Senators *is* sufficient to amend Senate rules; it is invoking cloture to close debate on resolutions to amend the Senate rules that requires a two-thirds vote. *See* Rule XXII.

Supreme Court has consistently "read the Speech or Debate Clause broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501. The Court has held that the Clause provides immunity from suit for all actions "within the sphere of legitimate legislative activity," *id.* at 501, which encompasses "anything 'generally done in a session of the House by one of its members in relation to the business before it.'" *Doe v. McMillan*, 412 U.S. 306, 311 (1973) (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881)). The Clause's immunity covers all civil actions, "whether for an injunction or damages," *Eastland*, 421 U.S. at 503, or seeking a declaratory judgment. *See Supreme Court of Virginia v. Consumers Union of the U.S.*, 446 U.S. 719, 732 & n.10 (1980) (establishing that common-law legislative immunity, like that of the Speech or Debate Clause, "is equally applicable to . . . actions seeking declaratory or injunctive relief"); *see also Eastland*, 421 U.S. at 496, 512 (directing district court to dismiss complaint seeking injunctive and declaratory relief as barred by Speech or Debate Clause). And, Speech or Debate Clause immunity serves not merely as "a defense on the merits[,] but also protects a legislator from the burden of defending himself." *Powell*, 395 U.S. at 502-03.

Plaintiffs' suit challenging Senate rules for consideration of and debate on legislation questions matters that fall squarely within the coverage of the Speech or Debate Clause and, thus, is barred. Plaintiffs assert that a minority of Senators have used Rule XXII to prevent a vote on the DREAM Act and the DISCLOSE Act legislation. Compl. ¶ 9(D). This claim directly implicates the "speech or debate" of Senators, as it literally challenges the rules by which Senators debate a matter. By challenging the length of time and the procedures by which the Senate chooses to debate a measure, plaintiffs also effectively question the timing by which the Senate schedules votes on pending legislation, which similarly is protected by the Speech or Debate Clause. *See Gravel*, 408 U.S. at 617 (Speech or Debate immunity "equally cover[s]" "the act of voting" as it does actual speech or debate). In sum, the procedures the Senate uses to determine how to conduct debate, including when debate should be brought to a close, are unquestionably

"part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation[.] " *Id.* at 625. Thus, the Speech or Debate Clause bars plaintiffs' claims.

Apparently attempting to circumvent the bar of Speech or Debate immunity, plaintiffs have sued four Senate officers instead of the Senate or Senators. Merely naming congressional officers instead of Members, however, does not overcome the Speech or Debate Clause bar. The Supreme Court has made clear that the Clause broadly applies not only to actions against Members of Congress but also to suits against congressional officers and employees, in order to protect Congress' constitutionally prescribed functions. *See id.* at 618 (holding that Speech or Debate Clause protection "applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself"); *Eastland*, 421 U.S. at 507 (Speech or Debate Clause protects congressional staff as well as Members); *see also Porteous v. Baron*, 729 F. Supp. 2d 158, 164 (D.D.C. 2010) ("[T]he Supreme Court . . . has extended [the Clause's] protections beyond Members of Congress to their aides as well."); *Hastings*, 716 F. Supp. at 42 (rejecting plaintiff's attempt "to obviate the clear requirements" of Speech or Debate Clause by suing individual congressional officers, and finding that actions by those officials were "internal functions" performed on behalf of Senate and thus "fully protected by Speech and Debate Clause"). Hence, if legislative conduct would be immune if performed by a Member of Congress, then the conduct is also immune when performed by legislative officers or staff. *See Gravel*, 408 U.S. at 618-22.[33]

Plaintiffs have not alleged any actions by the Vice President, the Secretary, the Sergeant at Arms, or the Parliamentarian that fall outside the scope of legitimate legislative activity taken

[33] The Supreme Court has allowed cases to proceed against congressional officers only when the officers were acting outside the legitimate legislative sphere, i.e. taking non-legislative actions. *See, e.g.*, *Doe v. McMillan*, 412 U.S. at 315 ("legislative functionaries carrying out . . . nonlegislative directives"); *Powell*, 395 U.S. at 503-06; *Dombrowski v. Eastland*, 387 U.S. 82, 84 (1967) (per curiam); *Kilbourn*, 103 U.S. at 199-200, 203-04.

on behalf of Senators; indeed, other than naming them as defendants, plaintiffs make no allegations at all regarding these officers. To whatever extent these officers assist the Senate in carrying out debate under its rules, such activity would fall within the legislative sphere and be protected by the Speech or Debate Clause. Accordingly, the Speech or Debate Clause bars plaintiffs' claims.[34]

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

Plaintiffs' challenge to the cloture rule is also subject to dismissal because it presents a non-justiciable political question. Claims that raise political questions are not judicially cognizable and must be dismissed. *See Nixon v. United States*, 506 U.S. 224, 230-35 (1993).

The Supreme Court in *Baker v. Carr*, 369 U.S. 186, 217 (1962), identified six factors, the existence of any of which indicates a political question. *See United States v. Rostenkowski*, 59 F.3d 1291, 1304 (D.C. Cir. 1995). Plaintiffs' challenge directly implicates three of those factors: (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' claim would require the Court to intrude into the Senate's internal proceedings, thereby expressing a lack of respect due a coordinate branch.[35]

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[34] Additionally, this suit is foreclosed by sovereign immunity. *See McLean v. United States*, 566 F.3d 391, 401 (4th Cir. 2009) (holding that "sovereign immunity extends to the United States Congress when it is sued as a branch of the government"); *Keener v. Congress of the United States*, 467 F.2d 952, 953 (5th Cir. 1972) (per curiam) (Congress "is protected from suit by sovereign immunity"). As the complaint makes clear, the Senate defendants are sued in their official capacities, *see* Compl. ¶¶ 10, and it is well established that "an official-capacity suit is, in all respects other than name, to be treated as a suit against the [government] entity," *Kentucky v. Graham*, 473 U.S. 159, 166 (1985), that is barred by sovereign immunity. *See Partovi v. Matuszewski*, 647 F. Supp. 2d 13, 17 (D.D.C. 2009) (explaining that sovereign immunity applies to suits against federal officials in their official capacities, because such suits "generally represent only another way of pleading an action against [the] entity of which an officer is an agent, such that an official capacity suit is, in all respects other than name, to be treated as a suit against the entity") (internal quotation marks and citation omitted), *aff'd*, 2010 WL 3521597 (D.C. Cir. Sept. 2, 2010); *Travelers Ins. Co. v. SCM Corp.*, 600 F. Supp. 493, 497 (D.D.C. 1984).

[35] The Supreme Court earlier this year addressed the political question doctrine in a case involving a statute requiring the Secretary of State, upon request, to record Israel on passports

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A. The Constitution Expressly Commits to the Senate the Power to Determine the Rules of Its Proceedings

Article I, section 5, clause 2 of the Constitution commits to the Senate the power to "determine the Rules of its Proceedings." That textual commitment is of the same quality as the commitment of the power to try impeachments, which the Supreme Court found constitutes a non-justiciable political question in *Nixon*, 506 U.S. 224. Indeed, the Supreme Court has long recognized that the power committed in Article I, section 5 provides each House with broad discretion to determine what rules to adopt for its proceedings. *See United States v. Ballin*, 144 U.S. 1, 5 (1892). In order to present a justiciable challenge to congressional procedural rules, a plaintiff must identify a separate provision of the Constitution that limits the authority committed to the Senate. *See Nixon*, 506 U.S. at 237-38.

Plaintiffs have not and cannot identify any constitutional provision that expressly regulates the time for debate or requires the Senate to vote on any measure within a certain time period. Although various constitutional provisions prescribe time requirements for the Senate on other matters, *see, e.g.*, U.S. Const. art. I, § 4, cl. 2; amend. XX, § 2 (Congress must meet at least once annually, at noon on January 3d); art. I, § 5, cl. 4 (neither House may adjourn for more than three days without consent of other House), none addresses the length of time that the Senate should permit its Members to debate business before the Chamber. And while the Constitution

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[35]...continue
and related documents as the place of birth for U.S. citizens born in Jerusalem. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427-28 (2012). In that case, as part of its analysis of two of the political question factors from *Baker v. Carr*, the Court found relevant what adjudicative task was required to resolve the plaintiff's claim. *Id.* at 1427. Because the plaintiff in that case asserted a particular statutory right (to have Israel listed on his passport), the Court reasoned that all the Judiciary was being asked to do was "decide if [plaintiff's] interpretation of the statute is correct, and whether the statute is constitutional." *Id.* As the Supreme Court considered such a task "a familiar judicial exercise," *id.*, it held that the claim did not present a non-justiciable political question. *Id.* Here, unlike in that case, plaintiffs do not assert a right under a statute that the Court must merely determine is or is not constitutional. Rather, what plaintiffs seek here – to have the Court rewrite the rule governing the length of debate in the Senate – is decidedly *not* a familiar, or proper, exercise of the judicial function.

does provide that "a Majority of each [House] shall constitute a Quorum to do Business," U.S. Const. art. I, § 5, cl. 1, this provision simply means that "when a majority are present the house is in a position to do business," *Ballin*, 144 U.S. at 5; it does not prescribe when or in what order business is conducted. None of the constitutional provisions plaintiffs cite, Compl. ¶ 60, provides "an identifiable textual limit on the authority which is committed to the Senate" to determine whether and at what time to close debate on a measure. *Nixon*, 506 U.S. at 238; *cf. Skaggs v. Carle*, 110 F.3d 831, 846 (D.C. Cir. 1997) (Edwards, J., dissenting) ("Requiring a supermajority to pass a bill into law can be distinguished from procedural rules – like the Senate cloture rule – that require a supermajority to bring an issue to a vote. Although such supermajority requirements may hinder or help a bill to become law, these procedural rules do not explicitly conflict with the presentment clause. . . ."). The Constitution is simply silent about the length of time that the Senate should permit Members to debate legislation before the Chamber – or how it should close debate and vote on such business.

The lack of definitive constitutional guidance limiting the Senate's authority to set the rules for legislative debate distinguishes this action from those cases where courts have found challenges to congressional rules or practices justiciable. For example, in *Powell v. McCormack*, the Supreme Court found justiciable former Representative Powell's challenge to his exclusion from the House because the Court determined that the House's power to judge the qualifications of its Members, U.S. Const. art. I, § 5, cl. 1, was expressly limited to the three textual criteria set forth in the Constitution, art. I, § 2, cl. 2 (age, residency, and citizenship). *See* 395 U.S. at 547-50. Similarly, in *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994), 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 that rendered justiciable a congressman's challenge to a House rule permitting non-Member delegates (*i.e.*, those not chosen by the people of a State) to vote in the House's Committee of the Whole. *Id.* at

626-27. In contrast, the lack of any express textual limit on the time to be spent considering legislation demonstrates that the Constitution commits to the Senate under its rulemaking authority the power to determine when and how to close debate.

B. The Courts Lack Judicially Manageable Standards for Deciding How Much Debate Should Be Allowed Prior to a Vote on a Measure

Plaintiffs' claim also presents a political question because no judicially manageable standards exist against which to review either the Senate's cloture rule or the appropriate length of debate on legislation and other matters. Plaintiffs appear to suggest that the "democratic principle of majority rule," Compl. ¶ 2, could serve as a standard against which to evaluate the length of Senate debate and to fix the proper number of votes required to invoke cloture. However, that requirement provides no more guidance for a court to judge the Senate's cloture rule and the length of appropriate debate in the Senate than did the provision granting the Senate power to "try all Impeachments" provide any measure by which to judge the Senate's impeachment proceedings. *See Nixon*, 506 U.S. at 229-30.

If the Constitution required, as plaintiffs appear to believe, that a majority is entitled to vote on a measure whenever it chooses, it is difficult to discern at what point a Senate rule on the length of debate would transgress that requirement. Would a rule providing a fixed amount of time for each Member to debate deprive a majority of its right to end debate sooner? Does plaintiffs' majority-vote principle entitle a majority completely to deprive other Members of any opportunity to debate if the majority wishes to vote forthwith? And if a majority of Senators wish immediately to vote on introduced legislation, would the Senate's normal legislative procedures, such as referral to committee and multiple readings of a bill – all of which can delay or even prevent a final vote from occurring – be acceptable? As these questions demonstrate, there simply are no legal standards for resolving a dispute over the proper time period for debate in the Senate or over the sixty-vote requirement for closing debate in the Senate's cloture rule.

C. Consideration of Plaintiffs' Suit Would Intrude Into the Senate's Internal Procedures and Demonstrate a Lack of Respect for a Co-Equal Branch

For a court to engage in the review plaintiffs seek would require an invasive inquiry into internal Senate processes at the heart of the Senate's constitutional prerogatives as a House of Congress – including scheduling of legislative business, establishing and interpreting the rules for its proceedings, allowing debate within the body, determining how long such debate may continue, and deciding how and when to schedule votes. Judicial intrusion into these matters would express a lack of respect for the Senate as a coordinate branch of government. *See Brown v. Hansen*, 973 F.2d 1118, 1122 (3d Cir. 1992) (per curiam) ("Absent a clear command from some external source of law, we cannot interfere with the internal workings of the Virgin Islands Legislature 'without expressing lack of the respect due coordinate branches of government.'") (quoting *Baker*, 369 U.S. at 217).

Indeed, plaintiffs' request that the Court issue a declaratory judgment striking one clause of the cloture rule is nothing less than a request that the Court edit the Senate's rules on when and how to close debate and vote on pending matters. Such an encroachment on the Senate's procedures would be at least as "disastrously intrusive" as telling the House of Representatives how to allocate seats on its committees, which the D.C. Circuit has declined to do. *See Vander Jagt*, 699 F.2d at 1176. For a court to usurp the Senate's power and alter its rules regulating floor debate would express an unprecedented lack of respect for a coequal branch. *Cf. Hastings*, 716 F. Supp. at 41 ("Courts in this District have regularly rejected other petitions seeking judicial supervision of Congressional proceedings.").

As explained earlier, the Senate has debated issues like those raised by plaintiffs throughout its history. Ever since the adoption of the cloture rule in 1917, the Senate has repeatedly adjusted the number of Members whose concurrence is necessary to end debate, the matters subject to cloture, and the procedures used following cloture. Debate over the cloture

rule and the regulation of floor debate continues in the current Congress. Plaintiffs are free, as is any other organization or individual, to participate in that debate by engaging in public discourse and expressing their views. However, under the separation of powers, it is for the Senate, and not this Court, to set the procedures for regulating debate in the Chamber, including whether to make further changes to the cloture rule.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss for lack of subject matter jurisdiction should be granted, and plaintiffs' complaint should be dismissed with prejudice.

Respectfully submitted,

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