UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVEN S. MICHEL, Plaintiff, v. ADDISON MITCHELL MCCONNELL, JR., CHARLES ERNEST GRASSLEY, and UNITED STATES SENATE, Defendants.	)	Case No. 16-1729-RC

DEFENDANTS' MOTION TO DISMISS

Defendants United States Senate and United States Senators Mitch McConnell and Charles Grassley, through undersigned counsel, hereby respectfully move this Court, pursuant to Rule 12 of the Federal Rules of Civil Procedure, to dismiss without leave to amend plaintiff's Emergency Petition for Declaratory Judgment and Writ of Mandamus. The grounds for this motion are: (i) plaintiff lacks Article III standing; (ii) the Speech or Debate Clause of the Constitution bars this suit; (iii) the petition seeks to present a nonjusticiable political question; and (iv) the statutes plaintiff's petition relies upon do not establish a cause of action here.

For these reasons, which are explained more fully in the accompanying Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for a Preliminary Injunction and in

Support of Defendants' Motion to Dismiss, plaintiff's petition should be dismissed without leave to amend.

Respectfully submitted,

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October 31, 2016

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FOR THE DISTRICT OF COLUMBIA

STEVEN S. MICHEL,	)	
Plaintiff,	)	
v.	)	Case No. 16-1729-RC
ADDISON MITCHELL MCCONNELL, JR., CHARLES ERNEST GRASSLEY, and UNITED STATES SENATE,	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AND IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES. iii

INTRODUCTION. 1

PLAINTIFF'S COMPLAINT. 3

ARGUMENT. 4

I. PLAINTIFF CANNOT MAKE AN EXCEPTIONALLY STRONG SHOWING OF A LIKELIHOOD OF SUCCESS ON THE MERITS AND THE COMPLAINT SHOULD BE DISMISSED. 5

A. Plaintiff Lacks Article III Standing. 5

1. Plaintiff's Complaint Presents a Generalized Grievance That is Not Concrete, Particularized, or Actual. 6

2. The Causation Requirement is Lacking. 12

3. Plaintiff's Claims Are Not Redressable by This Suit. 12

B. The Speech or Debate Clause Bars This Suit. 14

C. This Action Is Nonjusticiable Under the Political Question Doctrine. 17

1. The Constitution Commits to the Senate Alone the Manner in Which It Provides "Advice and Consent" Concerning Judicial Nominations and Determines the "Rules of Its Proceedings" for Doing So. 18

2. There Are No Judicially Discoverable Standards to Resolve This Case. 21

3. The Court's Consideration of Plaintiff's Claims Would Demonstrate a Lack of Respect for a Co-Equal Branch. 22

D. The Complaint Lacks a Cause of Action. 24

II. PLAINTIFF CANNOT MAKE AN EXCEPTIONALLY STRONG SHOWING THAT THE REMAINING FACTORS FAVOR INJUNCTIVE RELIEF. 25

A. Plaintiff Cannot Show Irreparable Injury. 25

B. An Injunction Would Substantially Harm the Senate.. 26

C. Granting the Requested Injunction Is Not in the Public Interest. 27

CONCLUSION. 28

TABLE OF AUTHORITIES

CASES

Adams v. Vance, 570 F.2d 950 (D.C. Cir. 1978). . . . . *passim*

Alaska Legislative Council v. Babbitt, 181 F.3d 1333 (D.C. Cir. 1999).. 9

Allen v. Wright, 468 U.S. 737 (1984).. 5

Anderson v. Carter, 802 F.3d 4 (D.C. Cir. 2015). 25

Awala v. U.S. Congress, 2005 WL 3447644 (D. Del. Dec. 15, 2005). 11

Baker v. Carr, 369 U.S. 186 (1962).. . . . . 18, 21

Brown v. Hansen, 973 F.2d 1118 (3d Cir. 1992) (per curiam).. 23

Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000). 9

Chenoweth v. Clinton, 181 F.3d 112 (D.C. Cir. 1999). 9

Cogswell v. U.S. Senate, 2009 WL 529243 (D. Colo. Mar. 2, 2009),
aff'd, 353 F. App'x 175 (10th Cir. 2009). . . . . *passim*

Coleman v. Miller, 307 U.S. 433 (1939). 9, 22

Common Cause v. Biden, 909 F. Supp. 2d 9 (D.D.C. 2012),
aff'd on other grounds, 748 F.3d 1280 (D.C. Cir. 2014). . . . . *passim*

Dastmalchian v. Dep't of Justice, 71 F. Supp. 3d 173 (D.D.C. 2014),
aff'd, 2015 WL 3372295 (D.C. Cir. May 4, 2015).. 15

Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999). 10

Doe v. McMillan, 412 U.S. 306 (1973). 14

Dorfmann v. Boozer, 414 F.2d 1168 (D.C. Cir. 1969). 26

Eastland v. U.S. Servicemen's Fund, 421 U.S. 491 (1975). 2, 14, 15

Emily's List v. Fed. Election Comm'n, 362 F. Supp. 2d 43 (D.D.C.),
aff'd, 170 F. App'x 719 (D.C. Cir. 2005). 26

**Ex parte Levitt*, 302 U.S. 633 (1937) (per curiam). 8

Fairchild v. Hughes, 258 U.S. 126 (1922).. 12

Goldwater v. Carter, 444 U.S. 996 (1979) (Rehnquist, J.) (plurality). 20

Gravel v. United States, 408 U.S. 606 (1972). 15

Hastings v. U.S. Senate, 1989 WL 122685 (D.C. Cir. Oct. 18, 1989) 5, 13

Hearst v. Black, 87 F.2d 68 (D.C. Cir. 1936). 13

Heckler v. Redbud Hosp. Dist., 473 U.S. 1308 (1985) (Rehnquist, J., in chambers). 27

Hoffman v. Jeffords, 2002 WL 1364311 (D.C. Cir. May 6, 2002),
aff'g, 175 F. Supp. 2d 49 (D.D.C. 2001). 10, 11

Hollingsworth v. Perry, 133 S. Ct. 2652 (2013). 6

In Re Cheney, 406 F.3d 723 (D.C. Cir. 2005). 3

**Judicial Watch, Inc. v. U.S. Senate*, 340 F. Supp. 2d 26 (D.D.C. 2004),
aff'd, 432 F.3d 359 (D.C. Cir. 2005). 11, 13, 23, 26

Katz v. Georgetown Univ., 246 F.3d 685 (D.C. Cir. 2001). 26

Kimberlin v. McConnell, No. 16-1211 (D. Md. June 3, 2016),
appeal docketed, No. 16-1657 (4th Cir. June 9, 2016). 11

Lance v. Coffman, 549 U.S. 437 (2007).. 10

Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014). 7

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). 6, 7, 8, 12

Marsh v. U.S. Congress, 1997 WL 215519 (6th Cir. Apr. 29, 1997). 17

Mazurek v. Armstrong, 520 U.S. 968 (1997) (per curiam). 4

**McClure v. Carter*, 513 F. Supp. 265 (D. Idaho),
aff'd mem. sub nom., *McClure v. Reagan*, 454 U.S. 1025 (1981). 8

Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991). 27

Mexichem Specialty Resins, Inc. v. E.P.A., 787 F.3d 544 (D.C. Cir. 2015). 26

N.L.R.B. v. New Vista Nursing and Rehabilitation, 719 F.3d 203 (3d Cir. 2013). 16

**Nat'l Treasury Emp. Union v. Bush*, 715 F. Supp. 405 (D.D.C. 1989). 18, 22

Nat'l Treasury Emp. Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974). 22

Nixon v. United States, 506 U.S. 224 (1993). 18, 19, 21

**Page v. Shelby*, 995 F. Supp. 23 (D.D.C.),
aff'd, 172 F.3d 920 (D.C. Cir. 1998). 9, 10, 12, 25

**Patterson v. U.S. Senate*, 2014 WL 1349720 (N.D. Cal. Mar. 31, 2014),
aff'd, 2016 WL 4137638 (9th Cir. Aug. 4, 2016). 10, 12, 13, 26

Pauling v. Eastland, 288 F.2d 126 (D.C. Cir. 1960). 13

Powell v. McCormack, 395 U.S. 486 (1969). 9, 20

**Raines v. Byrd*, 521 U.S. 811 (1997). 6, 8, 9, 10

Raiser v. Daschle, 54 F. App'x 305 (10th Cir. 2002). 11, 23

Rangel v. Boehner, 20 F. Supp. 3d 148 (D.D.C. 2013),
aff'd, 785 F.3d 19 (D.C. Cir. 2015). 14, 17, 25

Rockefeller v. Bingaman, 234 F. App'x 852 (10th Cir. 2007). 17

Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974). 7

Schneider v. Kissinger, 412 F.3d 190 (D.C. Cir. 2005). 18

Schultz v. Sundberg, 759 F.2d 714 (9th Cir. 1985) (per curiam). 15

Shoshone Bannock Tribes v. Reno, 56 F.3d 1476 (D.C. Cir. 1995). 24

Sociedad Anonima Vina Santa Rita v. U.S. Dep't of the Treasury,
193 F. Supp. 2d 6 (D.D.C. 2001). 4

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998).. 6

Supreme Court of Virginia v. Consumers Union of United States, Inc.,
446 U.S. 719 (1980).. . . . . 14, 16

Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28 (2002). 24

Thomas v. Holder, 750 F.3d 899 (D.C. Cir. 2014). 24

**United States v. Ballin*, 144 U.S. 1 (1892). 19

United States v. Choi, 818 F. Supp. 2d. 79 (D.D.C. 2011). 24, 25

United States v. Peoples Temple of the Disciples of Christ,
515 F. Supp. 246 (D.D.C. 1981). 17

Univ. of Texas v. Camenisch, 451 U.S. 390 (1981).. 27

Warth v. Seldin, 422 U.S. 490 (1975). 7

Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.,
559 F.2d 841 (D.C. Cir. 1977).. 5

West v. Spellings, 480 F. Supp. 2d 213 (D.D.C. 2007),
recons. denied, 539 F. Supp. 2d 55 (D.D.C. 2008). 24

Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008).. 5

Wisconsin Gas Co. v. Fed. Regulatory Comm'n, 758 F.2d 669 (D.C. Cir. 1985).. 25

CONSTITUTION AND STATUTES

U.S. Const.:
art. I, § 2, cl. 2. 20
art. I, § 4, cl. 1. 20
art. I, § 4, cl. 2. 20
art. I, § 5, cl. 1. 20
art. I, § 5, cl. 4. 20
art. I, § 6, cl. 1. . . . . 2, 14
art. II, § 2, cl. 2. . . . . 15, 18

28 U.S.C. § 1361. 24

28 U.S.C. § 1651(a). 24

CONGRESSIONAL MATERIAL

Richard S. Beth and Betsy Palmer, Cong. Research Serv., RL33247, *Supreme Court Nominations: Senate Floor Procedure and Practice, 1789-2011* (2011), *available at* https://fas.org/sgp/crs/misc/RL33247.pdf. 16

Standing Rules of the Senate, Rule XXXI.6, *reprinted in* S. Doc. No. 113-18, at 43 (2013), http://www.gpo.gov/fdsys/pkg/CDOC-113sdoc18/pdf/CDOC-113sdoc18.pdf. 16

RULES

Fed. R. Civ. P. 2. 3

Fed. R. Civ. P. 3. 3

Fed. R. Civ. P. 81(b). 3

* Cases and authorities chiefly relied upon are denoted with an asterisk.

INTRODUCTION

The *pro se* plaintiff in this case advances the extraordinary claim that he has a judicially enforceable right to compel the Senate to vote on a pending legislative matter, here, a Supreme Court nomination. No court has ever ordered either House of Congress to vote on a matter before it. To the contrary, to our knowledge, every prior suit challenging alleged delays in voting on judicial nominations or legislation has been rejected. As one court concluded in summarily dismissing a similar claim arising out of the Senate's alleged delay in voting on two judicial nominations:

> [A] federal court is not the proper forum to press general complaints about the way in which government goes about its business. . . . The Constitution clearly allocates the power to appoint judges of the supreme court, and all other officers of the United States to the Executive Branch upon the advice and consent of the Senate; the Judicial Branch lacks the power to restructure the apparatus established by the Executive Branch and Legislative Branch. . . .

Cogswell v. U.S. Senate, 2009 WL 529243, at *10 (D. Colo. Mar. 2, 2009) (citations and quotations omitted), *aff'd*, 353 F. App'x 175 (10th Cir. 2009).

Accordingly, plaintiff's motion for a preliminary injunction should be denied because, as an initial matter, he cannot establish that he has any likelihood of success on his claims. As set forth below, this action, like the ones before it, is precluded by threshold doctrines grounded in the separation of powers and because the statutes plaintiff relies upon do not establish a cause of action here.

First, plaintiff cannot satisfy any of the three constitutional requirements for Article III standing. Plaintiff's allegation that the "effectiveness" of his and others' votes for New Mexico's United States Senators has been "diminished" because those Senators have not voted on a

pending judicial nomination amounts to a quintessential generalized grievance that does not establish injury in fact to bring this suit. Nor is there a causal link between the conduct he complains of (the Senate's consideration in 2016 of the nomination at issue), and his claim of injury (the alleged diminished "effectiveness" of votes he and others cast in 2012 and 2014 for New Mexico's Senators). Redressability is also absent because separation of powers principles preclude the issuance of any judicial order that would control the exercise of the Senate's constitutional authority to advise and consent with regard to judicial nominations.

Second, because plaintiff's claims arise out of the Senate's constitutional power to provide advice and consent, they are barred by the Speech or Debate Clause, U.S. Const. art. I, sec. 6, cl. 1, which affords the Senate and its Members an absolute immunity for all conduct arising out of "matters which the Constitution places within the jurisdiction of either House." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975) (quotations omitted). Since Article II of the Constitution expressly assigns to the Senate the power to advise and consent to judicial nominations, Speech or Debate immunity interposes an absolute bar to this complaint.

Third, this action is nonjusticiable under the political question doctrine. The timing and processes by which the Senate provides advice and consent with regard to judicial nominations are constitutionally committed to the Senate alone; there is a lack of judicially manageable standards for resolving this case; and, granting the relief plaintiff seeks would deeply disrespect the constitutional role of a coordinate branch of government.

Fourth, the statutes plaintiff relies upon do not establish a cause of action here.

In addition to plaintiff's lack of a likelihood of success on his claims, plaintiff would not suffer any irreparable injury if the Court denies the injunction he requests, and the entry of an injunction would substantially injure other interested parties, namely the Senate, and cause great harm to the public interest.

Accordingly, plaintiff's motion for a preliminary injunction should be denied. In addition, because this suit is subject to dismissal for the several grounds identified above and explained below, the complaint should be dismissed without leave to amend.

PLAINTIFF'S COMPLAINT

Steven Michel brings this petition for writ of mandamus "on his own behalf and on behalf of all citizens of New Mexico" seeking a judicial order compelling the Senate to vote this year on the nomination of Judge Merrick Garland to the United States Supreme Court. Emergency Pet. for Declaratory J. and Writ of Mandamus at 7, 33 (Aug. 25, 2016), ECF No. 1 [hereinafter "Compl."]. The "respondents" are the United States Senate, Senate Majority Leader Mitch McConnell, and Senate Judiciary Committee Chairman Charles Grassley.[1]

Plaintiff alleges that the Senate has a "non-discretionary constitutional duty to determine within a reasonable time whether to provide advice and consent" to Supreme Court nominations. *Id*. at 4. He further alleges that because the Senate has not voted on the nomination at issue, he

[1] Since Rule 81(b) of the Federal Rules of Civil Procedure "long ago abolished the writ of mandamus in the district courts . . . it is not technically accurate to speak of . . . actions as [a] petition[] for a writ of mandamus." *In Re Cheney*, 406 F.3d 723, 728-29 (D.C. Cir. 2005). Rather, "[r]elief previously available" under mandamus "may be obtained by appropriate *action* or motion under these rules." Fed. R. Civ. P. 81(b) (emphasis added). "There is one form of action–the civil action," Fed. R. Civ. P. 2, which "is commenced by filing a complaint." Fed. R. Civ. P. 3. We thus construe Mr. Michel's "petition" as a complaint and the "petitioner" and "respondents" as the plaintiff and defendants, respectively.

and the citizens of New Mexico like him "have had the effectiveness of their vote for United States senators diminished because those senators have been deprived of their ability to vote" on the nomination. *Id.* at 7.

Plaintiff seeks a declaratory judgment that "the Senate, as a body, has a constitutional duty" to vote on pending Supreme Court nominations "within a reasonable time" from such nominations being made. *Id*. at 33. Plaintiff also seeks a writ of mandamus instructing the Senate Majority Leader, the Senate Judiciary Committee Chairman, and the Senate "promptly" to vote on the pending nomination. *Id.*

On October 19, 2016, plaintiff moved for a preliminary injunction, requesting preliminary relief not sought in the complaint. *See* Mot. for Prelim. Injunct. at 26, ECF No. 12 (requesting a preliminary injunction directing: (i) Senator McConnell "to schedule a vote of the full Senate" before the 114th Congress adjourns; (ii) Senator Grassley "to hold any necessary Judiciary Committee hearings prior to the vote of the full Senate"; and (iii) the Senate to vote on the nomination).

ARGUMENT

A preliminary injunction is "an extraordinary remedy," *Sociedad Anonima Vina Santa Rita v. U.S. Dep't of the Treasury*, 193 F. Supp. 2d 6, 13 (D.D.C. 2001), that "should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (citations omitted).

A plaintiff seeking "a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the

balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

Here, plaintiff must make an "exceptionally strong showing on the relevant factors" because the preliminary injunction he seeks would directly intrude into the constitutional functions of a coordinate branch of government. *Adams v. Vance*, 570 F.2d 950, 955-56 (D.C. Cir. 1978) ("[W]hen requested immediate injunctive relief deeply intrudes into the core concerns of [another] branch, a court is 'quite wrong in routinely applying . . . the traditional standards governing more orthodox stays.'" (citation omitted); *Hastings v. U.S. Senate*, 1989 WL 122685, at *1 (D.C. Cir. Oct. 18, 1989) (recognizing same in dismissing challenges to Senate impeachment trials).

As explained below, because plaintiff's moving papers do not make an "exceptionally strong showing" on any of the four factors, his motion for a preliminary injunction should be denied. And because plaintiff's complaint is foreclosed for the numerous reasons set forth in Part I, *infra*, it should be dismissed without leave to amend.

I. PLAINTIFF CANNOT MAKE AN EXCEPTIONALLY STRONG SHOWING OF A LIKELIHOOD OF SUCCESS ON THE MERITS AND THE COMPLAINT SHOULD BE DISMISSED

A. Plaintiff Lacks Article III Standing.

Plaintiff cannot make an "exceptionally strong showing" of a likelihood of success warranting a preliminary injunction, *Adams,* 570 F.2d at 955-56, and his complaint should be dismissed, because he cannot establish Article III standing to sue. "Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'" *Allen v. Wright*,

468 U.S. 737, 750 (1984). To meet this threshold jurisdictional requirement, a plaintiff must have "standing" to challenge the action sought to be adjudicated. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). A party seeking to invoke a federal court's jurisdiction bears the burden of establishing his standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

To satisfy this burden, plaintiff must establish the familiar elements of standing. *First*, he must show an "injury in fact," consisting of "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (citations and internal quotation marks omitted). *Second*, plaintiff must demonstrate the existence of "a causal connection between the injury and the conduct complained of. . . ."' *Id.* (internal punctuation omitted). *Finally*, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (citation omitted).

The Supreme Court has emphasized that "[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) (citation omitted). That is because the standing doctrine "'serves to prevent the judicial process from being used to usurp the powers of the political branches.'" *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (citation omitted).

1. Plaintiff's Complaint Presents a Generalized Grievance That is Not Concrete, Particularized, or Actual.

Plaintiff's complaint presents a quintessential generalized grievance that does not confer subject matter jurisdiction upon this Court. The Supreme Court has:

> consistently held that a plaintiff . . . claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large [] does not state an Article III case or controversy.

Lujan, 504 U.S. at 573-74.

In accordance with this bedrock principle, "standing to sue may not be predicated upon an interest of the kind . . . which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974); *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[W]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction."); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.3 (2014) (clarifying that generalized grievances are precluded for constitutional, not merely "prudential," reasons) (citations and quotations omitted).

Plaintiff's allegation that the "effectiveness" of all votes cast by New Mexico citizens for their United States Senators has been "diminished" because the Senate has not voted on a pending judicial nomination presents precisely the kind of undifferentiated, widely-shared, and abstract injury that does not constitute "injury in fact." Compl. at 7. In 1937, the Supreme Court summarily dismissed, for lack of such injury, a constitutional challenge to the appointment of Justice Hugo Black, stating:

> The motion papers disclose no interest upon the part of the petitioner *other than that of a citizen and a member of the bar of this Court. That is insufficient.* It is an established principle that to entitle a private individual to invoke the judicial power to determine the

> validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.

Ex parte Levitt, 302 U.S. 633, 636 (1937) (per curiam) (emphasis added).

Ex parte Levitt was the basis for the Supreme Court's subsequent rejection of a suit brought by a United States Senator, both in his personal and official capacities, challenging the appointment of a D.C. Circuit judge. *See McClure v. Carter*, 513 F. Supp. 265, 270 (D. Idaho) (three-judge court) ("As a private individual . . . Senator McClure does not have a sufficient personal interest in the validity of [the] Judge['s] appointment to have standing in federal court"), *aff'd mem. sub nom.*, *McClure v. Reagan*, 454 U.S. 1025 (1981).

Plaintiff's claim that the Senate, by not voting on the nomination, has "diminished" the "effectiveness" of votes cast for his Senators in 2012 and 2014 is no more particularized or concrete than the widely-shared, abstract injuries alleged in *Ex Parte Levitt* and *McClure.* Plaintiff's claimed injury is not "particularized" because it does not "affect [him] in a *personal and individual way*." *Lujan,* 504 U.S. at 560 n.1 (emphasis added). Rather, it is an alleged injury shared by the citizens not only of New Mexico, but of all fifty States, who, like plaintiff, believe that the "effectiveness" of their votes for their Senators has been diminished by the Senate's consideration of this nomination.

Furthermore, necessary to plaintiff's claim that the Senate has diminished the "effectiveness" of votes for his Senators is a concomitant injury to those Senators in not voting on the nomination at issue. But the Supreme Court in *Raines v. Byrd* rejected the claim that individual Members of Congress suffer cognizable injury from executive or legislative actions

that allegedly diminish the "effectiveness" of their votes. *Raines*, 521 U.S. at 825-26. *Raines* held that the six Member-of-Congress plaintiffs there lacked standing to challenge the Line Item Veto Act, reasoning that the Members' alleged injury was neither concrete nor personal to them because their claim amounted to "a loss of political power" that was "wholly abstract" and "widely dispersed" among all Members of Congress. *Id.* at 821, 829.[2]

Shortly following *Raines*, the D.C. Circuit affirmed by summary order the dismissal of a private individual's suit – very much like this one – alleging that Senate voting rules unconstitutionally "*diminishe[d] [plaintiff's] voting power* to obtain legislation he desire[d]" because a minority of Senators could prevent a final vote on that legislation. *Page v. Shelby*, 995 F. Supp. 23, 28 (D.D.C.) (emphasis added), *aff'd*, 172 F.3d 920 (D.C. Cir. 1998). The district court found that

> Based on the [Supreme] Court's *Raines* reasoning, it might well be that Mr. Page's Senators would themselves lack standing to challenge the cloture rule in federal court because any injury arguably resulting from that rule is common to all Senators, amounts to a loss of political power, and is essentially an abstract dilution of institutional legislative power. *Any injury to Mr. Page is even more attenuated than the injury to his Senators and, therefore, certainly insufficient to support standing.*

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[2] *Raines* identified two possible exceptions to its general rule against Member standing, neither of which is at issue here: 1) a Member suing because he was "singled out for specially unfavorable treatment," 521 U.S. at 821 (*citing Powell v. McCormack*, 395 U.S. 486 (1969)); or 2) a sufficient number of Members, "suing as a bloc," establishing that their "votes would have been sufficient to defeat (or enact) a specific legislative Act" and "that legislative action goes into effect (or does not go into effect)," *id.* at 822-23 (*citing Coleman v. Miller,* 307 U.S. 433 (1939)). Since *Raines*, the D.C. Circuit has rejected every suit by individual Members predicated on legislative standing. *See Alaska Legislative Council v. Babbitt*, 181 F.3d 1333, 1338 (D.C. Cir. 1999) ("[T]here is not the slightest suggestion here that these particular legislators had the votes to enact a particular measure, that they cast those votes or that the federal statute or the federal defendants did something to nullify those votes."); *Chenoweth v. Clinton*, 181 F.3d 112, 115 (D.C. Cir. 1999) (stating that Members' alleged "dilution of their authority as legislators" was "identical to the injury the Court in *Raines* deprecated as 'widely dispersed' and 'abstract'"); *Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000).

Id. at 28 (emphasis added) (recognizing that plaintiff "cannot show that he will suffer any *personal* harm" should the legislation he supported "not come to a vote") (emphasis in original).

Plaintiff's claims thus do not establish cognizable injury because they are predicated upon both a claimed loss of political power by his Senators that the Supreme Court rejected in *Raines* as well as a derivative claim of diminished voting power by him as a private individual that the D.C. Circuit rejected in *Page*. *See also Hoffman v. Jeffords,* 2002 WL 1364311, at *1 (D.C. Cir. May 6, 2002) (affirming for lack of injury in fact dismissal of plaintiffs' claim that Senator's actions diminished likelihood of enactment of legislation favored by them)*, aff'g*, 175 F. Supp. 2d 49, 55-57 (D.D.C. 2001) ("Plaintiffs do not . . . demonstrate how they will be personally affected by the lack of legislation relating to these issues.").[3]

Other circuit courts have had equally little difficulty rejecting, for lack of injury in fact, claims indistinguishable from this one. In *Patterson v. U.S. Senate,* 2016 WL 4137638, at *1 (9th Cir. Aug. 4, 2016), for example, the Ninth Circuit summarily affirmed for lack of injury in fact the dismissal of a complaint alleging that Senate voting rules violated plaintiff's Seventeenth Amendment rights because the rules allegedly "*dilute[d] [plaintiff's] voting power* as a resident of California" by allowing a minority of Senators to preclude consideration of matters favored by a majority. *Patterson v. U.S. Senate*, 2014 WL 1349720, at *2, *4-7 (N.D. Cal. Mar. 31, 2014)

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[3] Plaintiff's reliance on *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999) (challenging the method of conducting the census for apportionment), Compl. at 7-8 & Mot. for Prelim. Injunct. at 9, is unavailing. Neither apportionment nor redistricting, which directly impact the relative weight of the votes of individuals from different districts, is at issue in this case. Even if this case did implicate the vote-dilution interests in such cases, plaintiff's failure to allege a concrete, particularized injury to him would still be fatal. *See Lance v. Coffman*, 549 U.S. 437, 441 (2007) (rejecting as generalized grievance four voters' complaint that state Constitution deprived their state legislature of its authority to draw congressional districts).

(dismissing complaint as generalized grievance, stating plaintiff had not shown that his asserted injury, which was "derivative of his Senators' alleged vote dilution injury," survived *Raines*); *Cogswell*, 353 F. App'x at 175-76 (affirming dismissal of generalized grievance alleging unconstitutional Senate delay in filling two district court vacancies); *Raiser v. Daschle*, 54 F. App'x 305, 306-07 (10th Cir. 2002) (affirming dismissal of challenge to Senate's rule referring judicial nominations to Judiciary Committee, holding that pendency of plaintiff's other cases and "claims of alleged delay because of vacancies in the courts do not establish an injury").

The district courts have concluded similarly. *See, e.g.*, *Common Cause v. Biden*, 909 F. Supp. 2d 9, 23 (D.D.C. 2012) (dismissing as generalized grievance challenge by nonprofit organization, Members of House of Representatives, and others to Senate voting rules governing legislation), *aff'd on other grounds*, 748 F.3d 1280 (D.C. Cir. 2014); *Judicial Watch, Inc. v. U.S. Senate*, 340 F. Supp. 2d 26, 29 (D.D.C. 2004) (nonprofit organization challenging Senate voting rules governing judicial nominations), *aff'd on other grounds*, 432 F.3d 359 (D.C. Cir. 2005); *Kimberlin v. McConnell*, No. 16-1211 (D. Md. June 3, 2016) (challenge to Senate consideration of Garland nomination), *appeal docketed*, No. 16-1657 (4th Cir. June 9, 2016).[4]

In sum, because "the right, possessed by every citizen, to require that the Government be administered according to law . . . does not entitle a private citizen to institute [suit] in the federal

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[4] While plaintiff alleges that the Senate's consideration of the nomination at issue has "adversely and impermissibly impact[ed] all three branches of the federal government," Compl. at 16, plaintiff does not, and cannot, rely upon such allegations of abstract, third-party effects in an effort to establish his standing. *See, e.g.*, *Judicial Watch, Inc.*, 340 F. Supp. 2d at 32 (alleged "harm to the proper functioning of the judiciary" insufficient); *Hoffman v. Jeffords*, 175 F. Supp. 2d 49, 57 (D.D.C. 2001) (alleged "destr[uction of] the foundation of good government" and "diminished . . . confidence [in] electorate" insufficient); *Awala v. U.S. Congress*, 2005 WL 3447644, at *2 (D. Del. Dec. 15, 2005) (alleged harm to judiciary insufficient).

courts," *Fairchild v. Hughes*, 258 U.S. 126, 129-30 (1922), plaintiff's allegations are insufficient to establish injury in fact.

2. <u>The Causation Requirement is Lacking</u>.

Plaintiff lacks standing for the additional reason that he cannot establish the Article III causation requirement.

Simply put, the causation requirement is lacking because there is no "causal link" between the Senate's consideration of a judicial confirmation in 2016 and the "effectiveness" of the votes cast for plaintiff's Senators in 2012 and 2014. Those votes were "effective" when they were counted in those elections. Upon election, New Mexico's Senators, like all other Senators, became subject to the Senate's rules and procedures governing how and when the Senate and its committees consider the thousands of bills, judicial and executive nominations, treaties, and other legislative matters coming before the Senate in each Member's six-year term of office. The Senate's consideration of any one of those legislative matters does not "cause" citizens' prior votes for each Senator to be any more – or less -- "effective."

Accordingly, plaintiff's "claimed injury is too speculative and remote to satisfy Article III's causation requirement." *Patterson*, 2014 WL 1349720, at *7; *Page*, 995 F. Supp. at 29 (same).

3. <u>Plaintiff's Claims Are Not Redressable by This Suit</u>.

Plaintiff's complaint is also not "likely" to be "'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560-61 (citation omitted).

Plaintiff's complaint is not redressable because the relief plaintiff seeks cannot be ordered consistent with our system of separated powers. A judicial order, whether in the nature of a

declaration or an injunction, purporting to instruct the Senate on the timing of its consideration of a pending legislative matter would amount to a "judgment respecting the validity of contemplated Congressional action [that] would violate the doctrine of the separation of powers and would be an illegal impingement by the judicial branch upon the duties of the legislative branch." *Pauling v. Eastland*, 288 F.2d 126, 130 (D.C. Cir. 1960) (stating that a declaratory judgment was no less precluded than an injunction).

"[T]he universal rule, so far as we know it, is that the legislative discretion in discharge of its constitutional functions, *whether rightfully or wrongfully exercised*, is not a subject for judicial interference." *Hearst v. Black*, 87 F.2d 68, 71-72 (D.C. Cir. 1936) (emphasis added). The courts have never retreated from that rule. *See Hastings*, 1989 WL 122685, at *1-2 ("[W]e have not found any case in which the judiciary has issued injunctive or declaratory relief intercepting ongoing proceedings of the legislative branch").

Indeed, courts have recognized the constitutionally impermissible nature of the relief sought in dismissing challenges like this one. *See Judicial Watch*, 432 F.3d at 361 (noting that relief requested "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"); *Patterson*, 2014 WL 1349720, at *7 (stating that "[p]laintiff has not cited any authority demonstrating that this Court has the authority to order the Senate to rewrite its rules");

Cogswell, 2009 WL 529243, at *10 (stating "the Judicial Branch lacks the power" to redress plaintiff's injury).[5]

B. The Speech or Debate Clause Bars This Suit.

Plaintiff cannot make an "exceptionally strong showing" of a likelihood of success warranting a preliminary injunction, *Adams,* 570 F.2d at 955-56, and his complaint should be dismissed, because this suit is also precluded by the Speech or Debate Clause of the Constitution. The Speech or Debate Clause provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1.

The Supreme Court has "[w]ithout exception" read the Clause "broadly to effectuate its purposes," which are "to insure that the legislative function the Constitution allocates to Congress may be performed independently." *Eastland*, 421 U.S. at 501-02. Where it applies, the Clause affords an absolute immunity from all forms of relief, whether for injunction, damages, or declaratory judgment, and regardless of claims of unconstitutionality.[6]

Legislative activity protected by the Clause encompasses "anything 'generally done in a session of the House by one of its members in relation to the business before it.'" *Doe v.*

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[5] Because Article III standing, Speech or Debate immunity, and the political question doctrine are all jurisdictional defenses, this Court, in considering defendants' dismissal motion, may address them in any order, prior to the remaining dismissal ground below. *See Rangel v. Boehner*, 785 F.3d 19, 22 (D.C. Cir. 2015).

[6] *See Supreme Court of Virginia v. Consumers Union of United States, Inc.,* 446 U.S. 719, 732 & n.10 (1980) (establishing that common-law legislative immunity, like Speech or Debate immunity, "is equally applicable to . . . actions seeking declaratory or injunctive relief"); *Eastland*, 421 U.S. at 496, 503, 512 (directing dismissal of complaint seeking injunctive and declaratory relief); *Rangel*, 785 F.3d at 24 (recognizing that courts have "rejected time and again" claims that Speech or Debate immunity does not apply where conduct is allegedly unlawful or motivated by an improper purpose).

McMillan, 412 U.S. 306, 311 (1973). The Clause accordingly precludes inquiry into "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 *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) (emphasis added).

When Speech or Debate immunity is raised in defense to a suit, the only question is whether the claims presented "fall within the 'sphere of legitimate legislative activity.'" *Eastland*, 421 U.S. at 501 (citation omitted). "[O]nce it is determined that Members are acting within the 'legitimate legislative sphere,' the Speech or Debate Clause is an absolute bar to interference." *Id.* at 503; *see also id*. at 501, 507, 509-10 & n.16 (Speech or Debate protections are absolute); *Gravel*, 408 U.S. at 623 n.14 (same).

Because the Constitution expressly assigns to the Senate the power to provide "Advice and Consent," art. II, § 2, cl. 2, a pending judicial nomination is plainly a "matter[] which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625. Speech or Debate immunity, therefore, interposes an absolute bar to plaintiff's suit challenging the Senate's consideration of this nomination. *See id.* at 617 (Speech or Debate immunity "equally cover[s]" "voting" as it does actual speech or debate); *Schultz v. Sundberg*, 759 F.2d 714, 717 (9th Cir. 1985) (per curiam) (legislative immunity barred suit against state Senate president for compelling legislator to attend session to consider confirmation of gubernatorial nominees); *Dastmalchian v. Dep't of Justice*, 71 F. Supp. 3d 173, 178 (D.D.C. 2014) (Speech or Debate immunity barred suit against Senate Judiciary Committee arising out of judicial confirmation), *aff'd,* 2015 WL 3372295 (D.C. Cir. May 4, 2015).

Plaintiff erroneously contends that Speech or Debate immunity protects neither "the Senate" (as opposed to its individual Members) nor what he characterizes as the "refusal to act" at issue here. Compl. at 29-30 & Mot. for Prelim. Injunct. at 21-22. Plaintiff incorrectly assumes that a final vote on the floor of the Senate is the only legislative act by which the Senate may withhold its consent to a judicial nomination. To the contrary, over two-thirds of the 36 Supreme Court nominations not confirmed by the Senate failed for reasons *other than* the outcome of a final vote on the Senate floor. *See* Richard S. Beth and Betsy Palmer, Cong. Research Serv., RL33247, *Supreme Court Nominations: Senate Floor Procedure and Practice, 1789-2011* (2011), *available at* https://fas.org/sgp/crs/misc/RL33247.pdf (detailing 25 Supreme Court nominations that failed prior to receiving a final vote). "After all, the Senate's decision not to act on a nomination effectively is a rejection of that nomination, as evidenced by the Senate's routine return to the president of nominations [that] have not been acted upon." *N.L.R.B. v. New Vista Nursing and Rehabilitation*, 719 F.3d 203, 234-35 (3d Cir. 2013); *see also* Standing Rules of the Senate, Rule XXXI.6, *reprinted in* S. Doc. No. 113-18, at 43 (2013), http://www.gpo.gov/fdsys/pkg/CDOC-113sdoc18/pdf/CDOC-113sdoc18.pdf ("[A]ll nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President. . . .").

All methods, therefore, of withholding the consent necessary to confirm a nominee are legislative acts, whether characterized as a "refusal to act" or whether performed by "the Senate" (as opposed to its individual Members). *See Supreme Court of Virginia*, 446 U.S. at 733-34 (holding "Supreme Court of Virginia" enjoyed common law legislative immunity, modeled after Speech or Debate immunity, for its "issuance of, *or failure to amend*, the challenged rules" and

recognizing preclusion of a similar suit against the "*Virginia Legislature* . . . its committees, or members" for an alleged "*refus[al] to amend*" such rules) (emphasis added); *Common Cause*, 748 F.3d at 1283-84 (recognizing that Speech or Debate immunity precluded plaintiffs from naming "the Senate" as a defendant in complaint challenging nonpassage of legislation allegedly favored by a majority of Senators); *Rangel v. Boehner*, 20 F. Supp. 3d 148, 179 (D.D.C. 2013) (holding Members adjudicating disciplinary matter immune under Speech or Debate Clause based on their "fail[ure] to disclose" allegedly improper communications they received, stating "just as defendants are immune from suits based on speech within the legislative sphere, so are they protected for any failure to speak within the same sphere"), *aff'd*, 785 F.3d 19 (D.C. Cir. 2015); *Rockefeller v. Bingaman*, 234 F. App'x 852, 855 (10th Cir. 2007) (holding that Speech or Debate immunity bars suit challenging the "decision of individual Congressmen *not to take legislative action* in response to [plaintiff's] prompts") (emphasis added); *Marsh v. U.S. Congress*, 1997 WL 215519, at *1 (6th Cir. Apr. 29, 1997) (affirming district court's dismissal on Speech or Debate grounds of complaint against Congress for "neglecting to pass legislation" favored by plaintiff).

In sum, where, as here, the conduct complained of is legislative in nature, "judicial inquiry is at an end." *United States v. Peoples Temple of the Disciples of Christ*, 515 F. Supp. 246, 249 (D.D.C. 1981). "Such is the nature of absolute immunity, which is – in a word – absolute." *Rangel*, 785 F.3d at 24.

C. This Action Is Nonjusticiable Under the Political Question Doctrine.

Third, plaintiff cannot make an "exceptionally strong showing" of a likelihood of success warranting a preliminary injunction, *Adams,* 570 F.2d at 955-56, and his complaint should be

dismissed, because, beyond the barriers of lack of standing and legislative immunity, the complaint is also nonjusticiable under the political question doctrine. A complaint is nonjusticiable where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department," a "lack of judicially discoverable and manageable standards for resolving it," or where resolution of the claims would express "a lack of the respect due [a] coordinate branch[]." *Baker v. Carr*, 369 U.S. 186, 217 (1962). While the presence of any one factor renders an action nonjusticiable, *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005), here, each of the three factors does so.

1. The Constitution Commits to the Senate Alone the Manner in Which It Provides "Advice and Consent" Concerning Judicial Nominations and Determines the "Rules of Its Proceedings" for Doing So.

The complaint seeks to present a nonjusticiable political question because the Senate's determinations regarding how and when it provides "Advice and Consent," and the "Rules of its Proceedings" for doing so, are committed by the Constitution to the Senate exclusively, and are beyond review in this case.

Article II, Section 2, Clause 2, of the Constitution commits to the Senate the exclusive responsibility to provide "Advice and Consent" with respect to the appointment by the President of "Officers of the United States." The Appointments Clause, which speaks only of the President and the Senate, "makes no reference to *any* role of the judiciary." *Nat'l Treasury Emp. Union v. Bush*, 715 F. Supp. 405, 407 (D.D.C. 1989) (emphasis added) (holding nonjusticiable claim that President had nondiscretionary duty to nominate officer to fill agency vacancy). Senate confirmation was designed to be the only check on the appointment of judges for the same reasons that "impeachment was designed to be the only check," *Nixon v. United States*, 506 U.S.

224, 235 (1993), on their tenure. *See id.* (holding nonjusticiable challenge to process by which Senate conducted impeachment trial of federal judge). The interposition of the Judiciary in either process would "place final reviewing authority with respect to impeachments" and appointments "in the hands of the same body that the impeachment process," and the appointment process, are "meant to regulate." *Id*.

The Appointments Clause is not the only provision of the Constitution that insulates from judicial review the manner in which Members of the Senate provide "Advice and Consent." The Supreme Court has long recognized that Article I, Section 5 provides each House with broad discretion to determine its "Rules of Proceedings." A House of Congress

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

United States v. Ballin, 144 U.S. 1, 5 (1892) (emphasis added) (concluding that because "[t]he Constitution has prescribed no method" for determining the presence of a quorum, it fell within the competency of each House to do so).

Accordingly, to present a justiciable challenge to internal congressional processes, a plaintiff must point to a "separate provision of the Constitution" that contains an "identifiable textual limit" upon the Senate's consideration of legislative business before it. *Nixon*, 506 U.S. at 237-38 (concluding that word "try" in Impeachment Trial Clause was not sufficiently "defined and fixed" by the Constitution to render justiciable challenge to Senate's rules of impeachment trial proceedings) (citation omitted); *Common Cause*, 909 F. Supp. 2d at 28 ("[I]n order to

present a justiciable challenge to congressional procedural rules, Plaintiffs must identify a separate provision of the Constitution that limits the rulemaking power.").

Although several constitutional provisions prescribe time requirements for the Senate, *see, e.g.*, U.S. Const. art. I, § 4, cl. 1 (time, place, and manner for congressional elections); art. I, § 4, cl. 2 (date for Congress to assemble); art. I, § 5, cl. 4 (length of time for adjournment without consent of other House), no constitutional provision expressly regulates the amount of time the Senate may consider a nomination or the means by which it may provide, or withhold, its consent. The lack of constitutional guidance governing the Senate's procedures for considering nominations thus distinguishes this action from those cases in which the courts have found challenges to congressional rules or practices to be justiciable.

For example, in *Powell v. McCormack*, 395 U.S. 486 (1969), the Supreme Court relied on the express qualifications for membership in the House of Representatives provided by Article I, Section 2, Clause 2 (age, residency, and citizenship) in reviewing the House's exercise of its Article I, Section 5, Clause 1 power to judge the qualifications of its Members. The Court held that, while the Constitution committed to the House the power to judge those three qualifications of its Members, the House could not interpose additional qualifications beyond those expressly set forth in the Constitution. *See id.* at 547-50. Thus, the House's exclusion of Representative-elect Powell for reasons other than age, residency, and citizenship did not present a political question. *See id.* at 547-48.

Unlike the qualifications for House membership, however, the constitutional provision relied upon here -- the Senate's advice and consent power -- does not expressly limit the Senate's authority when to provide, or withhold, that consent. *See id.*; *Goldwater v. Carter*, 444 U.S. 996,

1003 (1979) (Rehnquist, J.) (plurality) (challenge to President's termination of treaty nonjusticiable, reasoning that "while the Constitution is express" as to Senate participation in "ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty"); *Cogswell*, 2009 WL 529243, at *10-11 (challenge to timing of Senate consideration of judicial nominations nonjusticiable, stating that "[t]he Constitution, in its plain text, bestows no such power onto the Judiciary to regulate the timing in which the Executive or Legislature exercises their Constitutional duties" with regard to judicial nominations); *Common Cause*, 909 F. Supp. 2d at 13 (challenge to Senate rules governing voting on legislation nonjusticiable, stating "[n]owhere does the Constitution contain express requirements regarding the proper length of, or method for, the Senate to debate proposed legislation").

Accordingly, because "nowhere does the Constitution contemplate the participation by the third, non-political branch, that is the Judiciary, in the appointment of judges," *Cogswell,* 2009 WL 529243, at *10-11, the Senate has unreviewable authority to determine how and when it provides advice and consent with regard to this judicial nomination.

2. There Are No Judicially Discoverable Standards to Resolve This Case.

A second reason the complaint presents a nonjusticiable political question is that there are no judicially discoverable standards for resolving this case. *Baker*, 369 U.S. at 217. From what standards would this Court derive plaintiff's proferred rule that, after a "reasonable" amount of time, a court may instruct the Senate to vote on a pending nomination?

There are simply no principles from which this Court could derive guidance to order the relief plaintiff seeks placing the "Advice and Consent" power of the Senate in the hands of the courts. *See Nixon*, 506 U.S. at 229-30 (holding that grant of constitutional power to Senate to

"try all Impeachments" did not provide any measure by which a court could judge the Senate's exercise of that power); *Coleman v. Miller*, 307 U.S. 433, 451-53 (1939) (holding nonjusticiable claim that constitutional amendment was not ratified by Kansas within a "reasonable" amount of time from being proposed by Congress, asking "[w]here are to be found the criteria for such a judicial determination? None are to be found in Constitution or statute"); *Cogswell,* 2009 WL 529243, at *10-11 ("[N]othing in Article III indicates the Court should presume it has 'judicially discoverable and manageable standards' to control the timeliness of actions explicitly delegated by the Constitution to the Executive and Legislative Branches."); *Common Cause*, 909 F. Supp. 2d at 30-31 ("Plaintiffs point to no standard within the Constitution by which the Court could judge" challenge to Senate rules governing consideration of legislative matters before it); *Bush*, 715 F. Supp. at 407 (holding nonjusticiable claim that President Bush had duty to appoint agency officials within a specified period of time because it was "beyond the scope of judicial expertise" to "ask[] the Court to determine how much time should reasonably be permitted [for the President] to evaluate and select a nominee for" the agency).[7]

3. The Court's Consideration of Plaintiff's Claims Would Demonstrate a Lack of Respect for a Co-Equal Branch.

Finally, for a court to engage in the review plaintiff seeks would express an extraordinary lack of respect for the Senate as a coordinate branch of government. That is because "reaching

[7] Plaintiff's citation to *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974), *see* Compl. at 25 & Mot. for Prelim. Inj. at 17, is inapposite. As the court in *NTEU v. Bush* recognized, *NTEU v. Nixon*, which held that the President had an express, statutory, nondiscretionary duty to make federal pay adjustments by a specific date mandated by law, did not call into question the President's appointment power. *See NTEU v. Bush*, 715 F. Supp. at 408. Furthermore, the *NTEU v. Nixon* court recognized that its authority to issue declaratory relief in that case was predicated upon the existence of mandamus jurisdiction there, *NTEU v. Nixon,* 492 F.2d at 616, which is not present here. *See* Part I(D).

the merits of this case would require an invasion into internal Senate processes at the heart of the Senate's constitutional prerogatives as a House of Congress." *Common Cause*, 909 F. Supp. 2d at 31. Furthermore, a determination of this claim would also "call into question the application of every Senate or House standing-rule that interferes with or delays the enactment of legislation, the adoption of treaties, or the confirmation of executive [and judicial] officers." *Judicial Watch, Inc.*, 340 F. Supp. 2d at 38; *see also Raiser,* 54 F. App'x at 306-07 (challenge to Senate's rule referring nominations to committee). That "would amount to an unprecedented exercise of the judicial power, directed at the core functions of the United States Congress." *Judicial Watch, Inc.*, 340 F. Supp. 2d at 38.

Under our system of separated powers, the Senate, and not this Court, is the appropriate institution to address the timing and processes of the Senate's consideration of judicial nominations. *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.'") (challenge to legislature's voting rules) (citation omitted); *Cogswell*, 2009 WL 529243, at *10 (stating that "by granting Plaintiff's request, the Court would engage in the utmost expression of a 'lack of the respect due coordinate branches of government,'" as "Article III . . . preclud[es] the sort of judicial oversight of the political branches in which [Plaintiff] invite[s] [the Court] to engage") (citation omitted). Thus, plaintiff's complaint is nonjusticiable.

D. The Complaint Lacks a Cause of Action.

Finally, plaintiff cannot make an "exceptionally strong showing" of a likelihood of success warranting a preliminary injunction, *Adams,* 570 F.2d at 955-56, and his complaint should be dismissed, because the statutes the complaint relies upon – the federal mandamus statute, 28 U.S.C. § 1361, and the All Writs Act, 28 U.S.C. § 1651(a), *see* Compl. at 26 – do not supply a cause of action here.

The mandamus statute, by its terms, is not applicable to the Legislative Branch, *see United States v. Choi*, 818 F. Supp. 2d. 79, 84 (D.D.C. 2011) (collecting cases), and plaintiff, in any event, cannot satisfy its stringent requirements. *See Thomas v. Holder*, 750 F.3d 899, 903 (D.C. Cir. 2014) (recognizing that mandamus "is a drastic remedy," which may be invoked only in the "extraordinary circumstances" where "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available"); *Shoshone Bannock Tribes v. Reno,* 56 F.3d 1476, 1480 (D.C. Cir. 1995) (stating that the alleged duty must be "*ministerial* and the obligation to act *peremptory and clearly defined.* The law must not only authorize the demanded action, *but require it*; *the duty must be clear and undisputable.*") (emphasis added, citation omitted).

Nor can the All Writs Act supply the cause of action not afforded by the mandamus statute because the Act "does not . . . provide federal courts with an independent grant of jurisdiction," *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 33 (2002), and thus does not supply a cause of action. *West v. Spellings*, 480 F. Supp. 2d 213, 218 (D.D.C. 2007), *recons. denied*, 539 F. Supp. 2d 55, 58 (D.D.C. 2008). Moreover, the circumstances for its sparing and extraordinary use are not present here since this Court lacks "appellate jurisdiction" over internal

Senate practices. *See Choi*, 818 F. Supp. 2d at 84, 87 (explaining that "[k]ey to a court's issuance of a writ of mandamus [under the All Writs Act] is that it be acting in support of its appellate jurisdiction," and requires a showing, *inter alia*, that "the lower court has a clear duty to act"). The statutes relied upon by plaintiff thus cannot establish a cause of action here.[8]

II. PLAINTIFF CANNOT MAKE AN EXCEPTIONALLY STRONG SHOWING THAT THE REMAINING FACTORS FAVOR INJUNCTIVE RELIEF

A. Plaintiff Cannot Show Irreparable Injury.

Plaintiff cannot make an "exceptionally strong showing" of irreparable injury warranting a preliminary injunction. *Adams,* 570 F.2d at 955-56. It is a "well known and indisputable principle[]" that vague or speculative injury cannot constitute "irreparable harm" sufficient to justify injunctive relief. *Wisconsin Gas Co. v. Fed. Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985).

Plaintiff cannot demonstrate irreparable injury because, as explained in Part I(A), assuming *arguendo* that the Senate's consideration of a legislative matter has any bearing at all on the "effectiveness" of prior votes cast for its Members, any such injury amounts to nothing more than an abstract and diffuse dilution of voting power. *See Page,* 995 F. Supp. at 27-28 (concluding that claim by private individual that Senate voting rules "diminishe[d] [plaintiff's] voting power" was not an "actual injury" "personal" to him but was "vague and conjectural");

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[8] Defendants do not address the underlying merits of plaintiff's claims because a determination on the merits is precluded by the jurisdictional doctrines set forth herein. *See Anderson v. Carter*, 802 F.3d 4, 8 (D.C. Cir. 2015) ("The Supreme Court has taught . . . that when a federal court has no jurisdiction over a case, it cannot determine . . . the merits of that action."); *Rangel*, 20 F. Supp. 3d at 183 n.24 (acknowledging same, merits precluded by lack of Article III standing, the political question doctrine and legislative immunity).

Patterson, 2014 WL 1349720, at *5-6 (concluding that plaintiff's alleged "dilution of . . . voting power" was an injury that was "abstract and hypothetical, rather than concrete and real"). That, however, is the antithesis of irreparable injury – a personal injury that is "certain and great," "actual and not theoretical," and " of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Mexichem Specialty Resins, Inc. v. E.P.A.,* 787 F.3d 544, 555 (D.C. Cir. 2015) (recognizing the "high standard for irreparable injury") (citation omitted); *Emily's List v. Fed. Election Comm'n*, 362 F. Supp. 2d 43, 58 (D.D.C.) (finding no irreparable injury from challenged regulation that had no impact on plaintiff's speech or practices), *aff'd*, 170 F. App'x 719 (D.C. Cir. 2005).

Plaintiff, therefore, cannot establish irreparable injury warranting injunctive relief.

B. An Injunction Would Substantially Harm the Senate.

Preliminary injunctive relief should not be granted where it would substantially injure other interested parties. *Katz v. Georgetown Univ.*, 246 F.3d 685, 687 (D.C. Cir. 2001). "[E]ven where denial of a preliminary injunction will harm the plaintiff," absent an "overwhelming case in the plaintiff's favor," an "injunction should not be issued where it would work a great and potentially irreparable harm to the party enjoined, unless an overwhelming case in the plaintiff's favor is present on the merits and equities of the controversy." *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969).

An injunction that effectively instructs the Senate to vote on a matter would cause the Senate substantial harm. *First*, any such injunction would intrude directly into a core constitutional power of the Senate to advise and consent to judicial nominations. *E.g., Common Cause,* 909 F. Supp. 2d at 31; *Judicial Watch*, 340 F. Supp. 2d at 38. Judicial control of the

timing of Senate action on a matter before it would injure the Senate by making it subservient to a coordinate branch, in derogation of our system of separated powers. *See Adams,* 570 F.2d at 953-54, 956 (reversing injunction that "deeply intrude[d] into the core concerns of the executive branch" and "did not merely preserve the status quo pending further proceedings, but commanded an unprecedented action irreversibly altering" executive determinations).

Second, the interim relief that plaintiff seeks is essentially the ultimate relief sought in this case: an order directing the Senate to vote on a judicial nomination. But a preliminary injunction, standing on its own, should not constitute an adjudication of the merits of a case. *See, e.g., Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("[I]t is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits."); *Heckler v. Redbud Hosp. Dist.*, 473 U.S. 1308, 1313-14 (1985) (Rehnquist, J., in chambers) (staying preliminary injunction, stating that the district court's "requirement that the Secretary promulgate new nationwide regulations cannot possibly be justified as necessary to preserve the status quo").

C. Granting the Requested Injunction Is Not in the Public Interest.

Nor can plaintiff make an "exceptionally strong showing" that a preliminary injunction is in the public interest. *Adams,* 570 F.2d at 955-56. Rather, a preliminary injunction would be strongly contrary to the public interest, as it would undermine the separation of powers that guard against incursions on our representative government. Because "[t]he ultimate purpose of th[e] separation of powers is to protect the liberty and security of the governed," *Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 272 (1991), the

public interest is served by the Senate exercising its constitutional authority to determine the timing and manner in which it fulfills its role to provide advice and consent.

CONCLUSION

For the foregoing reasons, plaintiff's motion for a preliminary injunction should be denied and the complaint dismissed without leave to amend.

Respectfully submitted,

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