**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**

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| **MONTGOMERY BLAIR SIBLEY,**<br>**402 KING FARM BOULEVARD, SUITE 125-145**<br>**ROCKVILLE, MARYLAND 20850**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**THE HONORABLE MITCH MCCONNELL,**<br>**SOLELY IN HIS CAPACITY AS MAJORITY**<br>**LEADER OF THE SENATE**<br>**UNITED STATES SENATE,**<br>**317 RUSSELL SENATE OFFICE BUILDING**<br>**WASHINGTON, D.C. 20510-1702**<br><br>**AND**<br><br>**THE HONORABLE PAUL D. RYAN,**<br>**SOLELY IN HIS CAPACITY AS SPEAKER OF**<br>**THE HOUSE OF REPRESENTATIVES**<br>**UNITED STATES HOUSE OF REPRESENTATIVES,**<br>**1233 LONGWORTH HOUSE OFFICE BUILDING**<br>**WASHINGTON, D.C. 20515-3508**<br><br>**Defendants.** | | **Civil Action**<br>**No.15-0002442 B**<br>**Honorable Maurice A. Ross** |

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS OF DEFENDANT THE HONORABLE MITCH McCONNELL**

## Introduction and Summary

Defendant, the Honorable Mitch McConnell, Majority Leader of the United States Senate, through the undersigned counsel, files this Memorandum of Law in Support of his Motion To Dismiss.

On April 8, 2015, Plaintiff Montgomery Blair Sibley ("Sibley"), proceeding pro se, brought this action in the Superior Court for the District of Columbia. On May 13, 2015, in

conformity with 28 U.S.C. §§ 1441(a), and 1442(a), Defendant McConnell removed the action to the United States District Court for the District of Columbia. In a Memorandum Opinion and Order issued October 13, 2015, the District Court held that Sibley lacked standing, which deprived it of jurisdiction, and remanded the action to this Court.[1]

Sibley has now filed in this Court a First Amended Complaint ("Complaint"), which is essentially the same complaint that the United States District Court for the District of Columbia dismissed for lack of standing. Sibley alleges that, because the requisite number of states have purportedly applied for a Convention for proposing Amendments under Article V to the Constitution, the Court should declare that two-thirds of the states have called for a Convention to propose amendments, that Congress has not called for such a Convention, and the Court should issue a writ of mandamus to compel the Defendants, Senate Majority Leader Mitch McConnell and Speaker of the House of Representatives Paul D. Ryan, to call a Constitutional Convention. The Complaint sues Defendants only in their official capacities. Complaint at ¶¶ 4-5. It does, however, propose the future certification of the suit as a class action against all Members of Congress. Complaint at ¶ 12.

Three reasons warrant dismissal of this action. *First,* Sibley lacks Article III standing because he does not allege injury in fact. Furthermore, Sibley concedes that he lacks standing. Moreover, the Complaint does not allege that Sibley has suffered *any* injury much less the kind of injury Article III requires. Sibley also lacks standing because the failure to call a Constitutional Convention is not fairly traceable to the acts or omissions of the named defendants. In addition, Sibley lacks standing because the requested relief would not provide redress for his claimed

[1] We attach the Memorandum Opinion and Order as Exhibit A to this Memorandum of Law.

injury. Apart from the separation of powers principles that preclude a court from ordering a Member of Congress to vote to call a Constitutional Convention, such an order would not bring about a Convention absent affirmative action by both Houses of Congress.

*Second*, the Speech or Debate Clause of the Constitution, Art. I, sec. 6, cl. 1, bars Sibley's claims because they arise out of an alleged failure to take legislative action. The Speech or Debate Clause gives Members of Congress absolute immunity from suits for damages, injunctions, and declaratory judgments for all conduct arising out of all "matters which the Constitution places within the jurisdiction of either House." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975).

*Third*, the political question doctrine also mandates dismissal of this action against Senator McConnell. Under the Constitution, Congress's exercise of its Article V power is a matter committed solely to the House and Senate. Furthermore, because there are no judicially manageable standards for resolving this case, the political question doctrine bars this action.

## I. SIBLEY LACKS ARTICLE III STANDING.

The Court should dismiss the Complaint for lack of subject-matter jurisdiction because Sibley 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 he seeks to contest. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

To satisfy this burden, a plaintiff must establish the 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*, he must demonstrate the existence of "a causal connection between the injury and the conduct complained of -- the injury has to be fairly traceable to the challenged action of the defendant and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Id.* (internal punctuation omitted). *Third*, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (citation omitted); *accord Bennett v. Spear*, 520 U.S. 154, 167 (1997).

Where another branch of government is a party, standing is particularly important. "[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997).

The District of Columbia Court of Appeals has "adopted the constitutional requirement of a case or controversy and the prudential prerequisites of standing applicable to federal courts under Article III." *Sibley v. Alexander*, No. 13-cv-1151 (D.C. App. Ct. Nov. 21, 2013). Thus, the Courts of the District of Columbia examine standing under the same analysis described above. *See Padou v. District of Columbia Alcoholic Beverage Control Board*, 70 A.3d 208, 211 (D.C. App. Ct. 2012) (in applying prudential prerequisites of standing, court will "look to federal standing jurisprudence"); *Grayson v. AT&T Corporation*, 15 A.3d 219, 224 & 235 n. 8 (D.C. App. Ct. 2011) (*en banc)*; *Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723, 729 (D.C. App. Ct.2011); *Hakki v. Zima Company*, 2006 WL 852126, at * 2 (Superior Ct. 2006).

This Court's task is simple because Sibley concedes that he lacks standing. In the proceedings before the District Court for the District of Columbia following removal, Sibley's motion for an order remanding the matter to this Court stated, that "this Court (the District Court for the District of Columbia ) does not have subject-matter jurisdiction as Sibley does not have Article III 'standing.'" ECF 7 at 4 (emphasis in original).

Given Sibley's concession that he lacks standing, this Court should dismiss the action for lack of Article III injury. But, as shown below, even if Sibley had not made that concession, this Court would reach that conclusion.

### A. Sibley Presents Only A Generalized Grievance That Does Not Show Injury In Fact.

Sibley's claim that Defendants have failed to call a Constitutional Convention is a generalized grievance about the acts or omissions of the federal government that does not establish injury in fact. "[A] plaintiff raising only a generally available grievance about government -- 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 this case, the District Court endorsed *Lujan*'s application in determining that Sibley lacked standing. Mem. Op. at 7. Thus, "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 Committee to Stop the War*, 418 U.S. 208, 220 (1974). *See Warth v. Seldin*, 422 U.S. 490, 499 (1975).

By contrast, a particularized injury affects a party in a personal and individual way. *Lujan*, 504 U.S. at 560 n.1. "[T]o entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he is sustaining, or is immediately in danger of sustaining, a direct injury as a 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, 634 (1937) (per curiam). The Supreme Court has rejected citizen suits based on generalized claims of unlawful governmental activity for lack of standing. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. at 220-21 (holding that an anti-war group lacked standing to invoke the Incompatibility Clause, art. II, § 6, cl. 2, to have members of Congress stricken from the Armed Forces Reserve List); *United States v. Richardson*, 418 U.S. 166, 179 (1974) (holding taxpayer lacked standing to obtain information about the expenditures of the Central Intelligence Agency under the Constitution's Accounts Clause, art. I, § 9, cl. 7); *Ex parte Levitt*, 302 U.S. at 633 (holding that a citizen lacked standing to challenge appointment of Hugo Black to the Supreme Court under the Constitution's Ineligibility Clause, art. I, § 6, cl. 2).

A citizen who requests that a Member of Congress call for a Constitutional Convention does not sustain a Constitutional injury-in-fact from the Member's failure to do so. An individual who only petitions his elected representative has not suffered constitutional injury from the government's failure to act as he requested. *Minnesota Bd. for Community Colleges v. Knight*, 465 U.S. 271, 285 (1984 ) ("Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." ); *We the People Foundation, Inc. v. United States*, 485 F.3d 140, 141 (D.C. Cir. 2007) (individuals lack a

"right to receive a government response to or official consideration of a petition for redress of grievances").

Thus, a citizen's disagreement with actions or inactions of Members of Congress does not provide injury in fact to establish standing to sue them. *DeGenes v. Murphy*, 289 Fed. Appx 558, 559 (3d Cir. 2008) (affirming dismissal of action that sought explanation from Member of Congress for failing to present legislation for lack of Article III injury; "[n]either the Constitution nor any federal statute requires a citizen's elected representative to respond in writing to his requests"); *Keener v. Congress*, 467 F.2d 952 (5th Cir. 1972) (dismissal of action to compel Congress to take legislative action for lack of standing); *Hoffman v. Jeffords*, 175 F. Supp. 2d 49 (D.D.C. 2001), *aff'd*, 2002 WL 1364311 *1 (D.C. Cir. May 6, 2002) (dismissal of complaint that Senator unlawfully switched parties after the election for lack of injury in fact).

### B. Sibley Lacks Standing Because Congress's Failure To Call a Constitutional Convention Is Not Traceable To the Two Named Defendants.

Sibley also lacks Article III standing because the challenged conduct -- Congressional inaction -- is not "fairly traceable" to the two named defendants. The D.C. Circuit has affirmed dismissals of complaints arising out of alleged congressional action or inaction where the named defendants could not provide the requested relief. For example, in *Common Cause v. Biden*, 748 F.3d 1280 (D.C. Cir. 2014), the court affirmed the dismissal of a constitutional challenge to the Senate cloture rule for lack of Article III standing because the complaint named only Senate officers as defendants. The Court explained that "the causation element requires that a proper defendant be sued," and noted that plaintiff's "injury was caused not by any of the defendants, but by an 'absent third party'—the Senate itself," which was immune from suit under the Speech or

Debate Clause. *Id.* at 1284-85.

Likewise, in *Kurtz v. Baker*, 829 F.2d 1133 (D.C. Cir. 1987), the D.C. Circuit rejected a challenge to the refusal of the House and Senate Chaplains to invite a religiously unaffiliated person to deliver secular remarks during the period reserved for legislative prayer. None of the plaintiff's claimed injuries was fairly traceable to the defendants - - congressional chaplains and the Treasury Secretary - - because they had "*no authority to compel either house* to accede to appearances of a guest chaplain." *Id.* at 1144 (emphasis added).

Here, the challenged conduct - - a failure to call a Constitutional Convention - - is not fairly traceable to the two named defendants either. Neither of them has the authority to call a Constitutional Convention, acting individually or together. Although Sibley proposes to seek "class certification" of all 533 remaining Members of Congress as defendants (Complaint at ¶ 12), only Senator McConnell and Speaker Ryan are named in the Complaint as defendants. Because they could not provide the relief Sibley seeks, dismissal is appropriate.

**C. This Court Cannot Provide Redress For Plaintiff's Claims.**

These facts also show that a favorable decision cannot redress Sibley's claims. *See Lujan*, 504 U.S. at 560. An order directing the named defendants to call a Constitutional Convention would not bring about a convention because it is plainly speculative whether a sufficient number of the other Members of each body would vote in agreement. Thus, "declaratory and injunctive relief against the *defendants actually named* would not prevent the claimed injury." *Newdow v. Roberts*, 603 F.3d 1002, 1011 (D.C. Cir. 2010) (emphasis added).

Finally, the Complaint is also not redressable because no court can issue the declaratory and injunctive relief he seeks without violating the principle of separation of powers. In the

mid-nineteenth century, the Supreme Court held that the courts lack authority under the Constitution to restrain the Senate:

> The Congress is the legislative department of the government; the President is the executive department. *Neither can be restrained in its action by the judicial department*; though the acts of both, *when performed*, are, in proper cases, subject to its cognizance.

*Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 500 (1866) (emphasis added).

The D.C. Circuit has also recognized the constraints against enjoining the Senate in the performance of its constitutional functions. *Hastings v. United States Senate*, 716 F. Supp. 38, 41 (1989), *aff'd*, *Hastings v. United States Senate*, Nos. 89-5188, 89-5191, 1989 WL 122685 at *1-2 (D.C. Cir. Oct. 18, 1989) ("[c]ourts in this District have regularly rejected other petitions seeking judicial supervision of Congressional proceedings"); *Pauling v. Eastland*, 288 F.2d 126, 130 (D.C. Cir. 1960) (dismissing for lack of jurisdiction judicial challenge to Senate subpoena); *Hearst v. Black*, 87 F.2d 68, 72 (D.C. Cir. 1936) (refusing to issue relief against a Senate committee concerning its retention, use, or disclosure of allegedly unlawfully obtained information).

## II. THE SPEECH OR DEBATE CLAUSE BARS THIS SUIT.

Under the Speech or Debate Clause of the Constitution, 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. That clause bars Sibley's claims. It must be read "broadly to effectuate its purposes," which include insuring "that the legislative function the Constitution allocates to Congress may be performed independently." *Eastland v. United States Servicemen's Fund*, 421 U.S. at 502. Where applicable, the Speech or Debate Clause provides absolute immunity from actions for all forms of relief, whether for injunction, damages, or declaration. That immunity

applies whenever a defendant invokes it in any suit that falls "within the 'sphere of legitimate legislative activity.'" Id. at 501. *See* S*upreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 732 & n. 10 (1980).

Thus, the Speech or Debate Clause bars a suit for virtually "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) (citation omitted). Furthermore, it applies not just to "the deliberative and communicative processes by which Members participate in the legislative process but also "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). "[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." *Eastland*, 421 U.S. at 503.

Because Article V of the Constitution expressly assigns to the Houses of Congress the legislative power to "call a Convention for proposing Amendments," U.S. Const. Art. V, the exercise of that power is a "matter [] which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625. Therefore, the absolute immunity afforded by the Speech or Debate Clause erects an absolute bar to any suit seeking Congressional action to call a Constitutional Convention. *See Walker v. Members of Congress*, Case No. 04-1977, *1-2 (W.D. Wash. Oct. 8, 2004), *aff'd*, 180 F. Appx 770, 771 (9th Cir. 2006) (show cause order) (in case seeking order compelling Congress to call a Constitutional Convention, court lacked jurisdiction and complaint barred by Speech or Debate immunity); *Shade v. Congress*, 942 F. Supp. 2d 43, 48 (D.D.C. 2013), *aff'd*, 2013 WL 5975978 (D.C. Cir. Oct. 15, 2013) (dismissing action against legislative defendants for alleged failure to appropriate funds sought by plaintiffs); *Magee v.*

*Hatch*, 26 F. Supp. 2d 153, 154-56 (D.D.C. 1998) (dismissing as frivolous complaint against Senator because the Speech or Debate Clause bars a suit against a Member of Congress based on his or her legislative vote); *Dorsey v. District of Columbia*, 917 A.2d 639, 642-43 (D.C. Ct. App. 2007) (Speech or Debate immunity encompasses action challenging "voting by members"); *Cochran v. Couzens*, 42 F.2d 783, 784 (D.C. App. 1930) (affirming Speech or Debate Clause dismissal against Senator in slander action).

## III. THE ACTION IS NONJUSTICABLE BECAUSE IT PRESENTS A POLITICAL QUESTION.

In addition to these threshold barriers, the Complaint also presents a non-justiciable political question. The political question doctrine mandates dismissal of this action because a Congressional determination to exercise power under Article V of the Constitution is committed exclusively to the House and Senate. Furthermore, there are no judicially manageable standards for resolving this case. *See Baker v. Carr*, 369 U.S. 186, 217 (1962) (listing six factors, the existence of any of which indicates a political question). The political question doctrine applies in the Courts of this jurisdiction just as does any other facet of Article III. *See Banks v. Ferrell*, 411 A.2d 54, 55-56 & n. 8 (D.C. Ct. App. 1979).

The Constitution assigns to the Congress the exclusive power to "call a Convention for proposing Amendments." U.S. Const., Art. V. That commitment to the legislative branch does not differ materially from the power to try impeachments, *see Nixon v. United States*, 506 U.S. 224 (1993), or from the power to "Judge" the Elections, Qualifications, and Returns of its Members, *see Morgan v. United States*, 801 F.2d 445 (D.C. Cir. 1986).

In *Nixon*, the Supreme Court found that a challenge to how the Senate conducted an impeachment trial is committed to the Senate and was nonjusticiable. It reasoned that the word "try" in the Impeachment Trial Clause did not provide an identifiable textual limit on the Senate's authority to try impeachments. *Nixon v. United States*, 506 U.S. at 237. The Constitution also contains no identifiable textual limits that constrain Congress's power to apply the factors governing whether to call a Constitutional Convention.

Thus, any question involving the form and timing of a petition for a Constitutional Convention, any question about the intrinsic nature of such a proceeding, and all similar questions are matters entrusted exclusively to the legislative branch. For example, whether an amendment proposed by Congress loses its vitality after thirteen years elapsed presents a nonjusticiable question. *See Coleman v. Miller*, 307 U.S. 433, 451 (1939). In *Baker v. Carr*, the Supreme Court reaffirmed its *Coleman* holding: "the question[] of how long a proposed amendment to the Federal Constitution remained open to ratification . . . [is] committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp." 369 U.S. at 214.

This case resembles *Coleman* and *Baker* in key respects. Several constitutional provisions prescribe time requirements for actions by the House and Senate, *see, e.g.*, U.S. Const. art. I, § 4, cl. 2; art. I, § 5, cl. 4; amend. XX, § 2, and Article V itself contains several precise restrictions, including a time restriction, s*ee* Art. V (barring an amendment concerning the slave trade or direct taxes, prior to 1808). The Constitution, however, provides no "identifiable textual limit," *Nixon*, 506 U.S. at 237, defining how much time may elapse between the first and last applications of the requisite number of states for Congress to "call" a Constitutional Convention. Absent such an explicit limit, there is no manageable standard to govern judicial review. Furthermore, given that

Article V prescribes other aspects of the amendment process, the absence of other limits strongly suggests "that the Framers did not intend to impose additional limitations" on congressional consideration of the lapse of time between state applications. *Nixon*, 506 U.S. at 230 (inclusion of three requirements in the Constitution upon Senate's authority to try impeachments suggests absence of other limitations).

Thus, the questions about the Constitutional amendment process posed here are committed exclusively to Congress, and there are no judicially manageable standards to answer them. Therefore, the Complaint presents a nonjusticiable political question. *See Keener v. Congress*, 467 F.2d 952 (5th Cir. 1972 ) (dismissing action seeking a judicial order that Congress adopt a uniform method of valuation for United States currency as an attempt "to compel Congress to exercise its discretion to legislate on a purely political question").[2] *See also Banks v. Ferrell*, 411 A.2d 54, 55-56 & n.8 (D.C. Ct. App. 1979) (political question doctrine applicable because "[t]he Article III case or controversy doctrine has been applied to limit the judicial power of the local courts in the District of Columbia"); *Walker v. United States*, No. 00-2125 at * 2 (W.D. Wash. March 19, 2001) (complaint seeking judicial order to compel Congress to call a Constitutional Convention under Article V raises political question more properly within the province of Congress).[3]

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[2] Sibley's demand for mandamus relief lacks merit. Members of Congress are not subject to 28 U.S.C. § 1361, the federal mandamus statute. *See Liberation News Service v. Eastland*, 426 F.3d 1379, 1384 (2d Cir. 1970); *Trimble v. Johnson*, 173 F. Supp. 651, 653 (D.D.C. 1959). Nor does the Complaint satisfy the rigorous standards for invoking mandamus relief. *See, e.g., Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980); *Northern States Power Co. v. United States Department of Energy*, 128 F.3d 754, 758 (D.C. Cir. 1997).

[3] We attach a copy of this decision as Exhibit B.

## Conclusion

For these reasons, the Court should dismiss the Complaint without leave to amend.

Dated: November 20, 2015

Respectfully submitted,

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