IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMON CAUSE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 1:12-cv-00775-EGS
	)	
JOSEPH R. BIDEN, et al.	)	
	)	
Defendants.	)	

PLAINTIFFS' REPLY TO DEFENDANTS' SUPPLEMENTAL MEMORANDUM

The defendants have filed a supplemental memorandum "in support of [defendants' argument] that a court may address lack of justiciability under the political question doctrine without first reaching the issue of standing." Defendants' Supplemental Memorandum in Response to the Court's Minute Order of December 10, 2012, filed December 11, 2012, p. 1.

Plaintiffs do not disagree with defendants that, *as a theoretical matter*, the Court is not *required* to rule on the standing issues before the Court *may* address "lack of justiciability under the political question doctrine."

Plaintiffs respectfully submit, however, that this issue is a purely theoretical and academic one because dismissal of the complaint in this case based on the political question doctrine – whether before or after ruling on the issue of standing – is precluded by the rulings of the Supreme Court in *United States v. Ballin*, 144 U.S. 1, 5 (1892), *United States v. Smith*, 284 U.S. 6, 30, 33 (1932), *Christoffel v. United States*, 338 U.S. 84 (1949), and *Yellin v. United States*, 374 U.S. 109, 114 (1963).

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) held that all questions involving the constitutionality of acts of Congress (and *a fortiorari* of mere rules adopted by one house of

Congress) are questions of law and are committed under our system of Checks and Balances to the decision of the federal courts. If the rule were otherwise, there would be no check on the power of either House to adopt rules that violate the Constitution. As Chief Justice Marshall held in *Marbury*, and as the Court has repeated may times since (*see e.g. INS v. Chadha*, 462 U.S. 919, 943 (1983)), the Constitution itself provides judicially manageable standards for the resolution of issues regarding the validity of acts of Congress. It necessarily follows from the ruling in *Marbury*, that issues involving the constitutionality of a Senate rule, like those involving acts of Congress, are justiciable and are "political questions textually committed" by the Constitution to other branches of government and are subject to the exclusive jurisdiction of the federal courts.

In *United States v. Ballin*, the Supreme Court ruled on the merits of a claim that a House rule for keeping a journal and recording the presence of a quorum violated the Constitution. In upholding its jurisdiction to decide whether the House rule was valid, the Court said that "[w]ith the courts the question is only one of power. [While] the Constitution empowers each house to determine the rules of its proceedings, [i]t *may not by its rules ignore constitutional restraints or violate fundamental rights*." *Id.* at 5 (emphasis added). If the issue of the validity of the House rule had been a political question committed exclusively by Art. 1, § 5 to the discretion of the House, the Court could not have ruled on the merits of the plaintiffs' claims, but would have dismissed the case for want of jurisdiction.

Justice Brandeis relied on *Ballin* in *United States v. Smith* in overturning an attempt by the Senate to reconsider and rescind Smith's appointment to the Federal Power Commission in violation, not of the Constitution as in this case, but one of the Senate's own rules. The Court held that when "the construction to be given to the rules [of the Senate] affects persons other

than members of the Senate, *the question presented is necessarily a judicial one*" (*id.* at 33 (emphasis added)), that "the sole question is one of law" (*id.* at 30), and that the Court was not bound by the Senate's interpretation of its own rules (*id.* at 33), and ultimately rejected the Senate's interpretation and ruled in Smith's favor on the merits.

By the time the Court decided *Yellin v United States*, 374 U.S. 109, 114 (1963), the Court was able to say that "It has long been settled … that the rules of Congress are *judicially cognizable*." (emphasis added)); *see also Vander Jagt v. O'Neill*, 699 F.2d 1166, 1171 (D.C. Cir. 1982) ("[I]f Congress should adopt internal procedures which 'ignore constitutional restraints or violate fundamental rights' [quoting *United States v. Ballin*], it is clear we must provide remedial action … Article I [section 5 – which grants to each house the power to determine its own rules] does not alter our judicial responsibility to say what rules Congress may not adopt because of constitutional infirmity.").

CONCLUSION

Ballin, Smith, Christoffel and *Yellin*, all stand for the proposition, that the rule-making powers of each House of Congress, like their law making powers of Congress (*Marbury v. Madison*), are not absolute, but are subject to judicial review under our system of Checks and Balances. When the validity of a House or Senate rule is challenged as in *Ballin*, or an interpretation of a Senate or House rule is challenged as in *Smith, Christoffel* and *Yellin*, the federal courts have jurisdiction to decide the merits of plaintiffs' claims and cannot dismiss the cases under the political question doctrine.

Respectfully submitted this 12th day of December, 2012.

/s/ *Emmet J. Bondurant*
Emmet J. Bondurant
Georgia Bar No. 066900
bondurant@bmelaw.com

Bondurant Mixson & Elmore LLP
3900 One Atlantic Center
1201 W. Peachtree Street
Atlanta, Georgia 30309
Telephone: (404) 881-4100
Facsimile: (404) 881-4111

/s/ *Stephen Spaulding*
Stephen Spaulding
Staff Counsel of Common Cause
D.C. Bar No. 1001633
SSpaulding@CommonCause.org

Common Cause
1133 19th Street, NW
Suite 900
Washington, DC 20036
Telephone: 202-736-5781
Facsimile: 202-659-3716

Attorneys for Plaintiffs