APPENDIX A

19-2842-cv
Futia v. State of New York

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of November, two thousand twenty.

PRESENT: BARRINGTON D. PARKER,
DENNY CHIN,
Circuit Judges,
JANE A. RESTANI,
*Judge.**

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* Judge Jane A. Restani, of the United States Court of International Trade, sitting by designation.

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ANTHONY FUTIA, JR.,
and ROBERT L. SCHULZ,
Plaintiffs-Appellants,

-v- 19-2842-cv

STATE OF NEW YORK,
ANDREW CUOMO, individually
and in his official capacity
as Governor of the State of
New York, JOHN J. FLANAGAN,
individually and in his former
capacity as Majority Leader of
the New York State Senate,
ANDREA STEWART-COUSINS,
individually and in her former
capacity as Minority Leader of
the New York State Senate,
CARL E. HEASTIE, individually
and in his official capacity as
Speaker of the New York State
Assembly, THOMAS P. DINAPOLI,
in his official capacity as Comptroller
of New York State, and
BRIAN M. KOLB, individually
and in his official capacity as
Minority Leader of the
New York State Assembly,
Defendants-Appellees.

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FOR PLAINTIFFS-APPELLANTS:
ROBERT L. SCHULZ, *pro se*, Queensbury,
New York, and ANTHONY FUTIA, JR., *pro se*,
North White Plains, New York.

FOR DEFENDANTS-APPELLEES:
BRIAN D. GINSBERG, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, and Victor Paladino, Senior Assistant Solicitor General, *on the brief*), *for* Letitia James, Attorney General, Albany, New York.

Appeal from the United States District Court for the Northern District of New York (Suddaby, *C.J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiffs-appellants Anthony Futia, Jr. and Robert L. Schulz ("Plaintiffs") appeal the district court's judgment, entered August 22, 2019, dismissing their claims against defendants-appellees State of New York and several current and former New York state officials ("Defendants") for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), and for failure to state a claim under Rule 12(b)(6). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

Plaintiffs' federal claims are based on their allegations that Defendants violated the New York Constitution in decision-making related to setting the state civics curriculum, allocating grants and tax credits to a private business, setting government employees' salaries, and appointing judges. The sum of these

violations, Plaintiffs allege, denied them a republican form of government in violation of the Guarantee Clause of the United States Constitution. Plaintiffs further allege that Defendants' failure to respond to their "First Amendment Petition for Redress of Grievances" violated their rights under the Petition Clause of the First Amendment. They also allege claims under state law.

"When reviewing the dismissal of a complaint for lack of subject matter jurisdiction" under Rule 12(b)(1), "we review factual findings for clear error and legal conclusions *de novo*." *Liranzo v. United States*, 690 F.3d 78, 84 (2d Cir. 2012). We also review *de novo* the dismissal of a complaint for failure to state a claim under Rule 12(b)(6). *Forest Park Pictures v. Universal Television Network*, 683 F.3d 424, 429 (2d Cir. 2012). Finally, we review a district court's decision declining to exercise supplemental jurisdiction over state law claims for abuse of discretion. *Klein & Co. Futures, Inc. v. Bd. of Trade of City of New York*, 464 F.3d 255, 262 (2d Cir. 2006).

The district court did not err in dismissing Plaintiffs' Guarantee Clause claim for lack of subject matter jurisdiction because the claim presents nonjusticiable political questions, such as how the State of New York allocates tax credits, sets salaries of state employees, or selects judges. *See, e.g.*, *Rucho v. Common Cause*, 139 S.Ct. 2484, 2506 (2019) ("This Court has several times concluded . . . that the Guarantee Clause does not provide the basis for a justiciable claim."). The district court also did not err in dismissing Plaintiffs' Petition

Clause claim for failure to state a claim, because the right to petition the state does not mean there is a right to a response. *See Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1986) ("Nothing in the First Amendment or in this Court's case law interpreting it suggests that the right[] to . . . petition require[s] government policymakers to listen or respond to individuals' communications on public issues."). Finally, the district court did not abuse its discretion in declining to exercise supplemental jurisdiction over the state law claims.

We have considered Plaintiffs' remaining arguments and conclude they are without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ; and
ANTHONY FUTIA, JR,

Plaintiffs,

v.

STATE OF NEW YORK; ANDREW CUOMO, individually and in his official capacity as Governor of the State of New York; JOHN J. FLANAGAN, individually and in his former capacity as Majority Leader of the New York Senate; ANDREA-STEWART COUSINS, individually and in her former capacity as Minority Leader of the New York Senate; CARL E. HEASTIE, individually and in his official capacity as Speaker of the New York Assembly; THOMAS DiNAPOLI, in his official capacity as Comptroller of New York State; and BRIAN KOLB, individually and in his official capacity as Minority Leader of the New York Assembly,

Defendants.

1:19-CV-0056
(GTS/TWD)

APPEARANCES:

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HON. LETITIA A. JAMES

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OF COUNSEL:

CHRISTOPHER LIBERATI-CONANT, ESQ.

GLENN T. SUDDABY, Chief United States District Judge

DECISION and ORDER

Currently before the Court, in this *pro se* constitutional rights action filed by Robert L. Schulz and Anthony Futia, Jr. ("Plaintiffs") against the State of New York, New York Governor Andrew Cuomo, former New York Senate Majority Leader John J. Flanagan, former New York Senate Minority Leader Andrea-Stewart Cousins, New York Assembly Speaker Carl E. Heastie, New York Comptroller Thomas DiNapoli, and New York Assembly Minority Leader Brian Kolb ("Defendants") are the following two motions: (1)

Defendants' motion to dismiss Plaintiffs' Complaint for lack of subject-matter jurisdiction or, in the alternative, failure to state a claim; and (2) Plaintiffs' second motion for reconsideration of the Court's orders dismissing Plaintiffs' motion for summary judgment and denying their first motion for reconsideration. (Dkt. Nos. 14, 15.) For the reasons set forth below, Defendants' motion is granted and Plaintiffs' motion is denied as moot.

I. RELEVANT BACKGROUND

A. Plaintiffs' Complaint

Generally, in their Complaint, Plaintiffs assert six claims: (1) Defendants violated Article IV, Section 4 of the United States Constitution ("the Guarantee Clause") in that, by their actions, they have threatened and compromised the constitutional guarantee to a republican form of government; (2) Defendants violated portions of the New York State Constitution by creating a Committee on Legislative and Executive Compensation because, in doing so, Defendants impermissibly transferred the power to make law outside of the legislature and improperly allowed an increase in legislative members' salaries; (3) Defendants violated portions of the New York State Constitution by lending money to Amazon as part of a deal they made with the private company; (4) Defendants have failed to comply with N.Y. Educ. L. § 801.2 by failing to ensure that schools in New York State teach children about the New York State Constitution; (5) Defendants violated portions of the New York State Constitution by

allowing Defendant Cuomo to appoint judges to the Court of Claims who were immediately assigned to positions as Supreme Court judges without having been duly elected; and (6) Defendants violated the First Amendment of the United States Constitution in failing to respond to Plaintiffs' "petitions for redress of grievances" that they served on Defendant Cuomo and that contained Plaintiffs' objections to the conduct underlying their claims above. (Dkt. No. 1, at ¶¶ 60-135 [Pls.' Compl.].)

B. Parties' Briefing on Defendants' Motion to Dismiss

1. Defendants' Memorandum of Law

Generally, in their memorandum of law, Defendants make two arguments. (Dkt. No. 14, Attach. 1, at 11-16 [Defs.' Mem. of Law].) First, Defendants argue that the Court should dismiss Plaintiffs' federal claims for lack of subject-matter jurisdiction for the following reasons: (a) Plaintiffs' claim under the Guarantee Clause should be dismissed because a challenged based on that clause has been found to present no justiciable question, noting in particular that this Court has previously dismissed a similar challenge by one of the Plaintiffs in a different lawsuit; and (b) Plaintiffs' First Amendment claim is frivolous because the First Amendment does not suggest that a petitioner has any right to receive a response to his or her petition. (*Id.* at 11-13.)

Second, Defendants argue as follows: (a) if the Court dismisses the above federal claims, the Court either cannot or should not exercise supplemental jurisdiction over Plaintiffs' remaining state law claims; (b) even if the Court chooses to exercise supplemental jurisdiction, these claims would necessarily merit dismissal based on application of the doctrine of sovereign immunity, which has not been waived or abrogated in this instance; and (c) supplemental jurisdiction is not warranted if the federal claims are dismissed because this case is still in its early stages and issues of state law predominate. (*Id.* at 13-16.)

2. Plaintiffs' Opposition Memorandum of Law

In opposition to Defendants' motion, Plaintiffs make five arguments. (Dkt. No. 18, at 5-11 [Pls.' Opp'n Mem. of Law].) First, Plaintiffs argue that their claim under the Guarantee Clause is justiciable because it does not involve a political question. (*Id.* at 5-7.)

Second, Plaintiffs argue that their First Amendment claim should not be dismissed because the language and history of the First Amendment and the right to petition for redress of grievances suggests that there exists a right to receive a response to those petitions. (*Id.* at 7-9.)

Third, Plaintiffs argue that the Court has subject-matter jurisdiction over their claims pursuant to Fed. R. Civ. P. 12(b)(1) because their federal claims are meritorious. (*Id.* at 9-10.)

Fourth, Plaintiffs argue that their claims should not be dismissed because they have stated claims upon which relief can be granted. (*Id.* at 10-11.)

Fifth, Plaintiffs argue that the Eleventh Amendment doctrine of sovereign immunity does not bar their claims because Defendants have avoided their constitutional responsibilities and exhibited wanton and reckless disregard for those responsibilities. (*Id.* at 11.)

C. Parties' Briefing on Plaintiffs' Second Motion for Reconsideration

Generally, in their memorandum of law in support of their second motion for reconsideration, Plaintiffs argue that the reasons given by the Court for denying their pre-answer motion for summary judgment as being premature are erroneous. (Dkt. No. 15, Attach. 2, at 1-10 [Pls.' Mem. of Law].) More specifically, Plaintiffs argue that (a) it was clear error for the court to deny Plaintiffs pre-answer motion for summary judgment under Fed. R. Civ. P. 56(d) without having received a Fed. R. Civ. P. 56(d) affidavit from Defendants, (b) it was clear error of law to deny that motion under Fed. R. Civ. P. 56(f) without giving notice and a reasonable time to respond, (c) the Court's denial of the motion based on the need to have an answer to be part of the record and narrow the issues was erroneous because any response to Plaintiffs' motion would have served those same purposes, (d) the Court's denial of the motion on its merits violated Plaintiffs' due process rights and is in any event erroneous because Defendants

would not have been able to dispute most of the facts raised by Plaintiffs, (e) Plaintiffs were prejudiced by the denial of their motion because the Court will be deciding Defendants' motion to dismiss without a full understanding of the undisputed facts, and (f) there is an appearance of bias based on the undersigned's "prior role" in a previous case involving Plaintiff Schulz as a litigant. (*Id.*)

II. GOVERNING LEGAL STANDARDS

A. Legal Standards Governing a Motion to Dismiss Based on Lack of Subject-Matter Jurisdiction

"It is a fundamental precept that federal courts are courts of limited jurisdiction." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978). Generally, a claim may be properly dismissed for lack of subject-matter jurisdiction where a district court lacks constitutional or statutory power to adjudicate it. *Makarova v. U.S.*, 201 F.3d 110, 113 (2d Cir. 2000). A district court may look to evidence outside of the pleadings when resolving a motion to dismiss for lack of subject-matter jurisdiction. *Makarova*, 201 F.3d at 113. The plaintiff bears the burden of proving subject-matter jurisdiction by a preponderance of the evidence. *Makarova*, 201 F.3d at 113 (citing *Malik v. Meissner*, 82 F.3d 560, 562 [2d Cir. 1996]). When a court evaluates a motion to dismiss for lack of subject-matter jurisdiction, all ambiguities must be resolved and inferences drawn in favor of the plaintiff. *Aurecchione v. Schoolman Transp. Sys., Inc.*,

426 F.3d 635, 638 (2d Cir. 2005) (citing *Makarova*, 201 F.3d at 113).

B. Legal Standards Governing a Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted

It has long been understood that a dismissal for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6), can be based on one or both of two grounds: (1) a challenge to the "sufficiency of the pleading" under Fed. R. Civ. P. 8(a)(2); or (2) a challenge to the legal cognizability of the claim. *Jackson v. Onondaga Cnty.*, 549 F. Supp.2d 204, 211 nn. 15-16 (N.D.N.Y. 2008) (McAvoy, J.) (adopting Report-Recommendation on *de novo* review).

Because such dismissals are often based on the first ground, some elaboration regarding that ground is appropriate. Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a pleading contain "a *short and plain* statement of the claim *showing* that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) [emphasis added]. In the Court's view, this tension between permitting a "short and plain statement" and requiring that the statement "show[]" an entitlement to relief is often at the heart of misunderstandings that occur regarding the pleading standard established by Fed. R. Civ. P. 8(a)(2).

On the one hand, the Supreme Court has long characterized the "short and plain" pleading standard under Fed. R. Civ. P. 8(a)(2) as "simplified" and "liberal."

Jackson, 549 F. Supp. 2d at 212 n.20 (citing Supreme Court case). On the other hand, the Supreme Court has held that, by requiring the above-described "showing," the pleading standard under Fed. R. Civ. P. 8(a)(2) requires that the pleading contain a statement that "give[s] the defendant *fair notice* of what the plaintiff's claim is and the grounds upon which it rests." *Jackson*, 549 F. Supp. 2d at 212 n.17 (citing Supreme Court cases) (emphasis added).

The Supreme Court has explained that such *fair notice* has the important purpose of "enabl[ing] the adverse party to answer and prepare for trial" and "facilitat[ing] a proper decision on the merits" by the court. *Jackson*, 549 F. Supp. 2d at 212 n.18 (citing Supreme Court cases); *Rusyniak v. Gensini*, 629 F. Supp. 2d 203, 213 & n.32 (N.D.N.Y. 2009) (Suddaby, J.) (citing Second Circuit cases). For this reason, as one commentator has correctly observed, the "liberal" notice pleading standard "has its limits." 2 *Moore's Federal Practice* § 12.34[1][b] at 12-61 (3d ed. 2003). For example, numerous Supreme Court and Second Circuit decisions exist holding that a pleading has failed to meet the "liberal" notice pleading standard. *Rusyniak*, 629 F. Supp. 2d at 213 n.22 (citing Supreme Court and Second Circuit cases); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-52 (2009).

Most notably, in *Bell Atlantic Corp. v. Twombly*, the Supreme Court reversed an appellate decision holding that a complaint had stated an actionable antitrust claim under 15 U.S.C. § 1. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). In doing so, the Court

"retire[d]" the famous statement by the Court in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Twombly*, 127 S. Ct. at 560-61, 577. Rather than turn on the *conceivability* of an actionable claim, the Court clarified, the "fair notice" standard turns on the *plausibility* of an actionable claim. *Id.* at 555-70. The Court explained that, while this does not mean that a pleading need "set out in detail the facts upon which [the claim is based]," it does mean that the pleading must contain at least "some factual allegation[s]." *Id.* at 555. More specifically, the "[f]actual allegations must be enough to raise a right to relief above the speculative level [to a plausible level]," assuming (of course) that all the allegations in the complaint are true. *Id.*

As for the nature of what is "plausible," the Supreme Court explained that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "[D]etermining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not show[n]—that the pleader is entitled to

relief" *Iqbal*, 129 S. Ct. at 1950 (internal quotation marks and citations omitted). However, while the plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully," *id.*, it "does not impose a probability requirement." *Twombly*, 550 U.S. at 556.

Because of this requirement of factual allegations plausibly suggesting an entitlement to relief, "the tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by merely conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949. Similarly, a pleading that only "tenders naked assertions devoid of further factual enhancement" will not suffice. *Iqbal*, 129 S. Ct. at 1949 (internal citations and alterations omitted). Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (citations omitted).

Finally, a few words are appropriate regarding what documents are considered when a dismissal for failure to state a claim is contemplated. Generally, when contemplating a dismissal pursuant to Fed. R. Civ. P. 12(b)(6) or Fed. R. Civ. P. 12(c), the following matters outside the four corners of the complaint may be considered without triggering the standard governing a motion for summary judgment: (1) documents attached as an exhibit to the complaint or answer, (2) documents incorporated by reference in the complaint (and provided by the parties), (3) documents that, although not incorporated by reference, are "integral" to the

complaint, or (4) any matter of which the court can take judicial notice for the factual background of the case.[1]

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[1] *See* Fed. R. Civ. P. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."); *L-7 Designs, Inc. v. Old Navy, LLC*, No. 10-573, 2011 WL 2135734, at *1 (2d Cir. June 1, 2011) (explaining that conversion from a motion to dismiss for failure to state a claim to a motion for summary judgment is not necessary under Fed. R. Civ. P. 12[d] if the "matters outside the pleadings" in consist of [1] documents attached to the complaint or answer, [2] documents incorporated by reference in the complaint (and provided by the parties), [3] documents that, although not incorporated by reference, are "integral" to the complaint, or [4] any matter of which the court can take judicial notice for the factual background of the case); *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010) (explaining that a district court considering a dismissal pursuant to Fed. R. Civ. 12(b)(6) "may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint. . . . Where a document is not incorporated by reference, the court may neverless consider it where the complaint relies heavily upon its terms and effect, thereby rendering the document 'integral' to the complaint. . . . However, even if a document is 'integral' to the complaint, it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document. It must also be clear that there exist no material disputed issues of fact regarding the relevance of the document.") [internal quotation marks and citations omitted]; *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2009) ("The complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference.") (internal quotation marks and citations omitted); *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir.1995) (per curiam) ("[W]hen a plaintiff chooses not to attach to the complaint or incorporate by reference a [document] upon which it solely relies and which is integral to the complaint," the court may nevertheless take the document into consideration in

III. ANALYSIS

A. Whether Plaintiffs' First Claim Must Be Dismissed

After careful consideration, the Court answers this question in the affirmative for the reasons stated in Defendants' memorandum of law. (*See*, *supra*, Part I.B.I. of this Decision and Order.) To those reasons, the Court adds the following analysis.

Although it is "the province and duty of the judicial department to say what the law is," there are instances where "the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights;" such a claim "is said to present a 'political question' and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction." *Rucho v. Common Cause*, 139 S.Ct. 2484, 2494 (2019). In *Baker v. Carr*, the Supreme Court indicated that, although "the mere fact that the suit seeks protection of a political right does not mean it presents a political question," it had been previously recognized that "if any department of the United States was empowered by the Guaranty Clause [to resolve an issue related to the republican form of government], it was not the judiciary." *Baker*, 369 U.S. 186, 220 (1962). In *Baker*, the Supreme Court cited numerous examples of their own

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deciding [a] defendant's motion to dismiss, without converting the proceeding to one for summary judgment.") (internal quotation marks and citation omitted).

past decisions in which they "refused to resort to the Guaranty Clause . . . as the source of a constitutional standard for invalidating state action," and explicitly stated that "the Court has consistently held that a challenge to state action based on the Guaranty Clause presents no justiciable question. . . ." *Baker*, 369 U.S. at 223-24 (collecting cases).

Although the Supreme Court has since qualified that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions," it does not appear that the Supreme Court has indicated in what circumstances such claims would be justiciable. *New York v. United States*, 505 U.S. 144, 185 (1992) (declining to decide whether the claim at issue was justiciable when disposing of the case on an alternative ground). Additionally, the Supreme Court has just this year reaffirmed the general principle that the Guarantee Clause is nonjusticiable. *Rucho*, 139 S.Ct. at 2506 (noting that "[t]his Court has several times concluded, however, that the Guarantee Clause does not provide a basis for a justiciable claim"). Given the current state of the law and the lack of guidance from the Supreme Court as to what circumstances might present a justiciable claim under the Guarantee Clause, the Court is bound to find that Plaintiffs' claim under the Guarantee Clause related to a denial of a republican form of government is a nonjusticiable political question. *See Schulz v. New York State Executive Pataki*, 960 F. Supp. 568, 574-76 (N.D.N.Y. 1997) (McAvoy, C.J.) (engaging in a lengthy discussion of the relevant law and history, including *New York v. United States*, noting that there

is "scant guidance in determining when the general rule of nonjusticiability should be abrogated," and concluding that "[i]n light of the Guarantee Clause's implicit protection of state governmental processes from the tyranny of an all-powerful federal sovereign, it would seem imprudent on the part of the federal judiciary to allow the Clause to be used to challenge a state's own lawmaking"). The state of the law has not been clarified much, if at all, in the intervening years since this Court decided *Schulz* and therefore the Court sees no reason to depart from that logic in this case.

Consequently, Plaintiffs' First Claim must be dismissed for lack of subject-matter jurisdiction.

B. Whether Plaintiffs' Sixth Claim Must Be Dismissed

After careful consideration, the Court answers this question in the affirmative for the reasons stated in Defendants' memorandum of law. (*See*, *supra*, Part I.B.I. of this Decision and Order.) To those reasons, the Court adds the following analysis.

As discussed above, Plaintiffs' First Amendment claim is based on the premise that the First Amendment contains the right not only to petition the government for redress of grievances, but also to receive a response to any such petition. However, Plaintiffs have failed to cite any case law to support this argument or its interpretation of historical context, and particularly to support their argument that the Supreme Court and

other cases cited by Defendants that state that no response is required under the First Amendment are not applicable in the context presented here. (Dkt. No. 18, at 7-9 [Pls.' Opp'n Mem. of Law].)

In *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984), the Supreme Court stated that "[n]othing in the First Amendment or 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." *Knight*, 465 U.S. at 283-87. Cases from other courts also indicate that no right to a response is contained in the First Amendment. *See We the People Foundation, Inc. v. United States*, 485 F.3d 140, 141 (D.C. Cir. 2007) (Kavanaugh, J.) ("Plaintiffs contend that the First Amendment guarantees a citizen's right to receive a government response to or official consideration of a petition for redress of grievances. Plaintiffs's argument fails because, as the Supreme Court has held, the First Amendment does not encompass such a right.") *cert. denied* 552 U.S. 1102 (2008); *Apple v. Glenn*, 183 F.3d 477, 479 (6th Cir. 1999) (finding that "a citizen's right to petition the government does not guarantee a response to the petition" in a context where the plaintiff alleged a First Amendment violation due to the defendant's failure to answer letters sent to that defendant by the plaintiff); *Kittay v. Giuliani*, 112 F. Supp. 2d 342, 354 (S.D.N.Y. 2000) (noting that the First Amendment does not "ensure that an elected official will necessarily act a certain way or respond in a certain manner to requests from

his constituents, and dismissing the claim because plaintiff did not allege that the government's actions prevented him from communicating his grievances to elected officials or otherwise denied his right to access the courts).

Both *We the People* and *Apple* involved conduct similar to that which Plaintiffs engaged in here: sending petitions to governmental officials outside of any formal judicial or administrative avenue. Additionally, *We the People* involved petitions that were similar in that those petitions were made to protest what the plaintiffs saw as the apparent unlawfulness of the government's actions. Consequently, given the similarities between the situations and the relatively clear indication from the Supreme Court in *Knight* that the First Amendment does not contain a right to a response to a petition for redress of grievance, the Court sees no reason for reaching any conclusion different from those in the above cases.[2]

Additionally, the Court cannot ignore the fact that there is no evidence that Plaintiffs were prevented from petitioning the New York State government for redress of their grievances based on the simple fact

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[2] The Court also finds it notable that Plaintiffs are self-professed members of a New York branch of the same organization that was the plaintiff in *We the People*, and, in fact, Plaintiff Schulz is listed as the *pro se* plaintiff in that case. *We the People*, 485 F.3d at 140. Yet, despite therefore being aware of the D.C. Circuit's clear resolution of the very same legal issue now raised in this case, Plaintiffs have not acknowledged the existence of *We the People* anywhere in their papers or in any way attempted to explain why those legal principles do not also apply here.

that they were able to file the action that is the basis of this current motion. After all, it is well-recognized that access to the courts is a facet of the right to petition under the First Amendment. *See Borough of Duryea, Pennsylvania v. Guarnieri*, 564 U.S. 379, 387 (2011) ("The right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government."); *McDonald v. Smith*, 472 U.S. 479, 484 (1985) ("[F]iling a complaint in court is a form of petitioning activity."); *Alvarado v. Westchester Cnty*, 22 F. Supp. 3d 208, 214 (S.D.N.Y. 2014) ("[A]ny claim that plaintiffs were deprived of their right to petition the government for redress is belied by the fact of their bringing this lawsuit."). Nor have Plaintiffs alleged that they were denied the right to file any type of state administrative proceeding, such as an Article 78 proceeding under New York law. *See Gagliardi v. Vill. of Pawling*, 18 F.3d 188, 194-95 (2d Cir. 1994) (noting that the right to "seek administrative and judicial relief" are protected by the First Amendment, and finding that an Article 78 proceeding was petitioning conduct protected under the First Amendment). Therefore, regardless of whether or not Plaintiffs were entitled to a response to their other petitions under the First Amendment, Plaintiffs have not shown, and cannot show, that they have been denied their right to petition for redress of their alleged grievances merely because Defendants failed to respond to Plaintiffs' less formal mode of petitioning. As such, there has been no constitutional violation.

For the above reasons, Plaintiff's Sixth Claim is dismissed.

C. Whether the Court Should Exercise Supplemental Jurisdiction Over Plaintiffs' State Law Claims

After careful consideration, the Court answers this question in the negative for the reasons stated in Defendants' memorandum of law. (*See*, *supra*, Part I.B.I. of this Decision and Order.) To those reasons, the Court adds the following analysis.

Even assuming that this Court has sufficient subject-matter jurisdiction to possess the discretion to decide whether to exercise supplemental jurisdiction over Plaintiffs' remaining state law claims, the Court declines to exercise any such discretion based on the fact that all of Plaintiffs' federal claims have been dismissed. *See Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639-40 (2009) ("A district court's decision whether to exercise [supplemental] jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary."); *see also TPTCC NY, Inc. v. Radiation Therapy Servs., Inc.*, 453 F. App'x 105, 107 (2d Cir. 2011) (stating that, "[i]n deciding whether to exercise supplemental jurisdiction, a federal court should consider and weigh 'the values of judicial economy, convenience, fairness, and comity,' " and that " 'in the usual case in which all federal-law claims are eliminated before trial,' the balance of factors will weigh in favor of declining to exercise supplemental

jurisdiction") (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 & n.7 [1988]).

The Court therefore finds that Plaintiffs' remaining state law claims should be dismissed without prejudice to refiling in state court.

ACCORDINGLY, it is

ORDERED that Defendants' motion to dismiss (Dkt. No. 14) is **GRANTED**; and it is further

ORDERED that Plaintiffs' second motion for reconsideration (Dkt. No. 15) is **DENIED** as moot based on the dismissal of Plaintiffs' federal claims and the Court's finding that there is no basis to exercise supplemental jurisdiction over their remaining state claims; and it is further

ORDERED that Plaintiffs' Complaint is **DISMISSED** without prejudice to refiling in state court within the governing limitations period(s).

Dated: August 22, 2019
Syracuse, New York

/s/ Glenn T. Suddaby
Hon. Glenn T. Suddaby
Chief U.S. District Judge

APPENDIX C

Historical Record Of The Right To Petition Government For Redress Of Grievances

Plaintiffs' interpretation of the meaning of the Petition Clause of the First Amendment is strongly supported by all of history, from the English Magna Carta to the American Declaration of Independence and beyond. There is absolutely nothing in American History or Jurisprudence that contradicts Plaintiffs' interpretation.

The following are the highlights.

Chapter 61 of the Magna Carta (the cradle of Liberty and Freedom from wrongful government, signed at a time when King John was sovereign) reads in relevant part:

> 61. Since, moreover, for God and the amendment of our kingdom and for the better allaying of the quarrel that has arisen between us and our barons, we have granted all these concessions, desirous that they should enjoy them in complete and firm endurance forever, we give and grant to them the underwritten security, namely, that the barons choose five and twenty barons of the kingdom, whomsoever they will, who shall be bound with all their might, **to observe and hold, and cause to be observed, the peace and liberties we have granted and confirmed to them by this our present Charter**, so that if we, or our justiciar. or our bailiffs or any one of our officers, shall in anything be at fault towards anyone, **or shall have broken any one of**

> **the articles of this peace or of this security**, and the offense be notified to four barons of the foresaid five and twenty, the said four barons shall repair to us (or our justiciar, if we are out of the realm) and, laying the transgression before us, **petition to have that transgression redressed without delay**. And if we shall not have corrected the transgression (or, in the event of our being out of the realm, if our justiciar shall not have corrected it) **within forty days**, reckoning from the time it has been intimated to us (or to our justiciar, if we should be out of the realm), the four barons aforesaid shall refer that matter to the rest of the five and twenty barons, and those five and twenty barons shall, **together with the community of the whole realm**, distrain and distress us in all possible ways, namely, by **seizing our castles, lands, possessions, and in any other way they can, until redress has been obtained as they deem fit**, saving harmless our own person, and the persons of our queen and children: and **when redress has been obtained, they shall resume their old relations towards us**. . . ." (emphasis added by Plaintiffs).

Chapter 61 was a procedural vehicle for enforcing the rest of the Charter. It spells out the Rights of the People and the obligations of the Government, and the procedural steps to be taken by the People and the King, in the event of a violation by the King of any provision of that Charter: the People were to transmit a Petition for a Redress of their Grievances; the King had 40 days to respond; if the King failed to respond in 40

days, the People could non-violently retain their money or violence could be **legally** employed against the King until he Redressed the alleged Grievances.[1]

The 1689 Declaration of Rights proclaimed, "[I]t is the Right of the subjects to petition the King, and all commitments and prosecutions for such petitioning is illegal." This was obviously a basis of the "shall make no law abridging the right to petition government for a redress of grievances" provision of our Bill of Rights.

In 1774, the same Congress that went on to adopt the Declaration of Independence unanimously adopted an Act in which they gave meaning to the People's Right to Petition for Redress of Grievances and the Right of enforcement as they spoke about the People's "Great Rights." Quoting:

> "If money is wanted by rulers who have in any manner oppressed the People, they may retain it until their grievances are redressed, and thus peaceably procure relief, without trusting to despised petitions or disturbing the public tranquility." "Continental Congress To The Inhabitants Of The Province Of Quebec." Journals of the Continental Congress 1774, Journals 1:105-13.

In 1775, just prior to drafting the Declaration of Independence, Jefferson gave further meaning to the People's Right to Petition for Redress of Grievances and the Right of enforcement. Quoting:

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[1] See Magna Carta Chapter 61. See also William Sharp McKechnie, Magna Carta 468-77 (2nd ed. 1914)

> "The privilege of giving or withholding our moneys is an important barrier against the undue exertion of prerogative which if left altogether without control may be exercised to our great oppression; and all history shows how efficacious its intercession for redress of grievances and reestablishment of rights, and how improvident would be the surrender of so powerful a mediator." Thomas Jefferson: Reply to Lord North, 1775. Papers 1:225.

In 1776, the **Declaration of Independence** was adopted by the Continental Congress. The bulk of the document is a listing of the Grievances the People had against a Government that had been in place for 150 years. The final Grievance on the list is referred to by scholars as the "capstone" Grievance. The capstone Grievance was the ultimate Grievance, the Grievance that prevented Redress of these other Grievances, the Grievance that caused the People to non-violently withdraw their support and allegiance to the Government, and the Grievance that eventually justified War against the King, morally and legally. The Congress gave further meaning to the People's Right to Petition for Redress of Grievances and the Right of enforcement. Quoting the Capstone Grievance:

> "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms; **Our repeated Petitions have been answered only by repeated injury**. A Prince. whose character is marked by every act which may define a Tyrant, is thus unfit to be the ruler of a free people. . . . We, therefore

> . . . declare, That these United Colonies . . . are Absolved from all Allegiance to the British Crown. . . ." *Declaration of Independence*, 1776 (emphasis added).

"It cannot be presumed, that any clause in the Constitution is intended to be without effect." Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 139 (1803)

"On every question of the construction of the Constitution, let us carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed." Thomas Jefferson, Letter to William Johnson, Supreme Court Justice (1823)

From *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

> "And the Constitution itself is in every real sense a law-the lawmakers being the people themselves, in whom under our system all political power and sovereignty primarily resides, and through whom such power and sovereignty primarily speaks. It is by that law, and not otherwise, that the legislative, executive, and judicial agencies which it created exercise such political authority as they have been permitted to possess. The Constitution speaks for itself in terms so plain that to misunderstand their import is not rationally possible. 'We the People of the United States,' it says, 'do ordain and establish this

Constitution.' Ordain and establish! These are definite words of enactment, and without more would stamp what follows with the dignity and character of law. The framers of the Constitution, however, were not content to let the matter rest here, but provided explicitly-'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land.' (Const. art. 6, cl. 2.) The supremacy of the Constitution as law is thus declared without qualification. That supremacy is absolute; the supremacy of a statute enacted by Congress is not absolute hut conditioned upon its being made in pursuance of the Constitution. And a judicial tribunal, clothed by that instrument with complete judicial power, and, therefore, by the very nature of the power, required to ascertain and apply the law to the facts in every case or proceeding properly brought for adjudication, must apply the supreme law and reject the inferior statute [298 U.S. 238. 297] whenever the two conflict. In the discharge of that duty, the opinion of the lawmakers that a statute passed by them is valid must be given great weight, *Adkins v. Children's Hospital*, 261 U.S. 525, 544, 43 S.Ct. 394, 24 A.L.R. 1238; but their opinion, or the court's opinion, that the statute will prove greatly or generally beneficial is wholly irrelevant to the inquiry. *Schechter Poultry Corp. v. United States*, 295 U.S. 495. 549, 550 S., 55 S.Ct. 837, 97 A.L.R. 947."

And from Hamilton, *Federalist No. 78*:

> "There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, they but what they forbid.
>
> "If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their WILL to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law.

> It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.
>
> "Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people. declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."

Though the Rights to Popular Sovereignty and its "protector" Right, the Right of Petition for Redress have become somewhat forgotten, they took shape early on by Government's ***response*** to Petitions for Redress of Grievances.[2] The Right is not changed by the fact that

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[2] See A SHORT HISTORY OF THE RIGHT TO PETITION GOVERNMENT FOR REDRESS OF GRIEVANCES. Stephen A. Higginson, 96 Yale L.J. 142(November, 1986); "SHALL MAKE NO LAW ABRIDGING . . . ": AN ANALYSIS OF THE NEGLECTED, BUT NEARLY ABSOLUTE, RIGHT OF PETITION. Norman B. Smith. 54 U. Cin. L. Rev. 1153 (1986);"LIBELOUS"

the Petition Clause lacks an affirmative statement that Government shall respond to Petitions. To repeat. "It cannot be presumed, that any clause in the Constitution is intended to be without effect." Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 139 (1803). For instance, the 26th Amendment guarantees all citizens above the age of 18 the Right to Vote, it does not contain an affirmative statement that the Government shall count the votes.

The Right to Petition is a distinctive, substantive Right, from which other First Amendment Rights were **derived**. The Rights to free speech, press and assembly originated as **derivative** Rights insofar as they were necessary to protect the **preexisting** Right to Petition. Petitioning, as a way to hold Government

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PETITIONS FOR REDRESS OF GRIEVANCES—BAD HISTORIOGRAPHY MAKES WORSE LAW. Eric Schnapper. 74 Iowa L. Rev. 303 (January 1989):THE BILL OF RIGHTS AS A CONSTITUTION, Akhil Reed Amar. 100 Yale L.J. 1131 (March, 1991); NOTE: A PETITION CLAUSE ANALYSIS OF SUITS AGAINST THE GOVERNMENT: IMPLICATIONS FOR RULE 11 SANCTIONS, 106 Harv. L. Rev. 1111 (MARCH, 1993); SOVEREIGN IMMUNITY AND THE RIGHT TO PETITION: TOWARD A FIRST AMENDMENT RIGHT TO PURSUE JUDICIAL CLAIMS AGAINST THE GOVERNMENT, James E. Pfander, 91 Nw. U.L. Rev. 899 (Spring 1997);**THE VESTIGIAL CONSTITUTION**: THE HISTORY AND SIGNIFICANCE OF THE RIGHT TO PETITION, Gregory A. Mark, 66 Fordham L. Rev. 2153 (May, 1998): DOWNSIZING THE RIGHT TO PETITION, Gary Lawson and Guy Seidman, *93 Nw. U.L. Rev. 739* (Spring 1999); A RIGHT OF ACCESS TO COURT UNDER THE PETITION CLAUSE OF THE FIRST AMENDMENT: DEFINING THE RIGHT, Carol Rice Andrews, 60 Ohio St. L.J. 557 (1999) ; MOTIVE RESTRICTIONS ON COURT ACCESS: A FIRST AMENDMENT CHALLENGE, **Carol Rice** Andrews, 61 Ohio St. L.J. 665 (2000).

accountable to natural Rights, originated in England in the 11th century[3] and gained recognition as a Right in the mid-17th century.[4] Free speech Rights first developed because members of Parliament needed to discuss freely the Petitions they received.[5] Publications reporting Petitions were the first to receive protection from the frequent prosecutions against the press for seditious libel.[6] Public meetings to prepare Petitions led to the Right of Public Assembly.[7]

The Right to Petition was widely accorded greater importance than the Rights of free expression. For instance, in the 18th century. the House of Commons,[8] the American Colonies,[9] and the first Continental

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[3] Norman B. Smith. "Shall Make No Law Abridging . . . ": Analysis of the Neglected. But Nearly Absolute; Right of Petition, 54 U. CIN. L. REV. 1153, at 1154.

[4] See Bill of Rights, 1689, 1 W & M., ch. 2 Sections 5.13 (Eng.), reprinted in 5 THE FOUNDERS' CONSTITUTION 197 (Philip B. Kurland & Ralph Lerner eds., 1987); 1 WILLIAM BLACKSTONE, COMMENTARIES 138-39.

[5] See David C. Frederick, *John Quincy Adams. Slavery, and the Disappearance of the Right to Petition*, 9 LAW & HIST. REV. 113, at 115

[6] See Smith, *supra* n.3, at 1165-67.

[7] See Charles E. Rice, *Freedom of Petition*, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 789. (Leonard W. Levy ed., 1986)

[8] See Smith, *supra* n.3, at 1165.

[9] For example, Massachusetts secured the Right to Petition in its Body of Liberties in 1641, hut freedom of speech and press did not appear in the official documents until the mid-1700s. See David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455. 463 n.47 (1983).

Congress[10] gave official recognition to the Right to Petition, but not to the Rights of Free Speech or of the Press.[11]

The historical record shows that the Framers and Ratifiers of the First Amendment also understood the Petition Right as distinct from the Rights of free expression. In his original proposed-draft of the Bill of Rights, Madison listed the Right to Petition and the Rights to speech and press in two separate sections.[12] In addition, a "considerable majority" of Congress defeated a motion to strike the assembly provision from the First Amendment because of the understanding that all of the rights in the First Amendment were separate Rights that should be specifically protected.[13]

Petitioning Government for Redress has played a key role in the development and enforcement of popular sovereignty throughout British and American history.[14]

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[10] See id. at 464 n.52.

[11] Even when England and the American colonies recognized free speech Rights, petition Rights encompassed freedom from punishment for petitioning, whereas free speech Rights extended to freedom from prior restraints. See Frederick, *supra* n.5, at 115-16.

[12] See New York Times Co. v. U.S., 403 U.S. 670, 716 n.2 (1971) (Black, J., concurring). For the full text of Madison's proposal, see 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1834).

[13] See 5 BERNARD SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS at 1089-91 (1980).

[14] See Don L. Smith, *The Right to Petition for Redress of Grievances: Constitutional Development and Interpretations* 10-108 (1971) (unpublished Ph.D. dissertation) (Univ. Microforms

In medieval England, petitioning began as a way for barons to inform the King of their concerns and to influence his actions.[15] Later, in the 17th century, Parliament gained the Right to Petition the King.[16] This broadening of participation culminated in the official recognition of the right of Petition in the People themselves.[17]

The People used this newfound Right to question the legality of the Government's actions,[18] to present their views on controversial marters,[19] **and to demand that the Government, *as the creature and***

Int'l); K. Smellie, Right to Petition, in 12 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 98, 98-101 (R.A. Seiligman ed., 1934).

[15] The Magna Carta of 1215 guaranteed this Right. See MAGNA CARTA, ch. 61, reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* n.4, at 187.

[16] See PETITION OF RIGHT chs. 1, 7 (Eng. June 7, 1628), reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* n.4 at 187-88.

[17] In 1669, the House of Commons stated that. "it is an inherent right of every commoner in England to prepare and present Petitions to the House of Commons in case of grievances, and the House of Commons to receive the same." Resolution of the House of Commons (1669), reprinted in 5 THE FOUNDERS' CONSTITUTION. *supra* n.4 at 188-89.

[18] For example, in 1688, a group of bishops sent a petition to James II that accused him of acting illegally. See Smith, *supra* n.3, at 1160-62. James II's attempt to punish the bishops for this Petition led to the Glorious Revolution and to the enactment of the Bill of Rights. See Smith, *supra* n.14 at 41-43.

[19] See Smith, *supra* n.3, at 1165 (describing a Petition regarding contested parliamentary elections).

servant of the People, be responsive to the popular will.[20]

In the American colonies, disenfranchised groups used Petitions to seek government accountability for their concerns and to rectify Government misconduct.[21] **By the nineteenth century, Petitioning was described as "essential to . . . a free government,"[22] an inherent feature of a republic[23] and a means of enhancing Government accountability through the participation of citizens.**

Government accountability was understood to include response to petitions.[24] American colonists,

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[20] In 1701, Daniel Defoe sent a Petition to the House of Commons that accused the House of acting illegally when it incarcerated some previous petitioners. In response to Defoe's demand for action, the House released those Petitioners. See Smith, *supra* n.3, at 1163-64.

[21] See RAYMOND BAILEY, POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA 43-44 (1979).

[22] THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 531 (6th ed. 1890).

[23] See CONG. GLOBE, 39th Cong., 1st Session. 1293 (1866) (statement of Rep. Shellabarger) (declaring petitioning an indispensable Right "without which there is no citizenship" in any government); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 707 (Carolina Academic Press ed. 1987) (1833) (explaining that the Petition Right "results from [the] very nature of the structure [of a republican government]").

[24] See Frederick, *supra* n.5 at 114-15 (describing the historical development of the duty of government response to Petitions).

who exercised their Right to Petition the King or Parliament,[25] expected the Government to receive *and respond* to their Petitions.[26] The King's persistent refusal to answer the colonists' grievances outraged the colonists and as the "capstone" grievance, was a significant factor that led to the American Revolution.[27]

Frustration with the British Government led the Framers to consider incorporating a people's right to "instruct their Representatives" in the First Amendment.[28] Members of the First Congress easily defeated this right-of-instruction proposal.[29] Some discretion to reject petitions that "instructed government." they reasoned, would not undermine Government accountability to the People, **as long as Congress had a duty to consider petitions and *fully respond to them*.**[30]

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[25] See DECLARATION AND RESOLVES OF THE CONTINENTAL CONGRESS 3 (Am. Col. Oct. 14, 1774). reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* n.4 at 199; DECLARATION OF RIGHTS OF THE STAMP ACT CONGRESS 13 (Am. Col. Oct. 19, 1765), *reprinted in id.* at 198.

[26] See Frederick, *supra* n.5 at 115-116.

[27] See THE DECLARATION OF INDEPENDENCE para. 30 (U.S. July 4, 1776), reprinted in 5 THE FOUNDERS CONSTITUTION, *supra* n.4 at 199: Lee A. Strimbeck, The Right to Petition, 55 W. VA. L. REV. 275, 277 (1954).

[28] See 5 BERNARD SCHWARTZ, *supra* n.13, 1091-105.

[29] The vote was 10-41 in the House and 2-14 in the Senate. See *id.* at 1105, 1148.

[30] See 1 ANNALS OF CONG. 733-46 (Joseph Gales ed., 1789); 5 BERNARD SCHWARTZ, *supra* n.13, at 1093-94 (stating that representatives have a duty to inquire into the suggested measures contained in citizens' Petitions) (statement of Rep.

Congress viewed the receipt and serious consideration of every Petition as an important part of its duties.[31] Congress referred Petitions to committees[32] and even created committees to deal with particular types of Petitions.[33] Ultimately, most Petitions resulted in either favorable legislation or an adverse committee report.[34] **Thus, throughout early Anglo-American history, general petitioning (as opposed to judicial petitioning) allowed the people a means of direct political participation that in turn demanded government *response* and promoted accountability.**

Roger Sherman); *id.* at 1095-96 (stating-that Congress can never shut its ears to Petitions) (statement of Rep. Elbridge Gerry); *id.* at 1096 (arguing that the Right to Petition protects the Right to bring nonbinding instructions to Congress's attention) (statement of Rep. James Madison).

[31] See STAFF OF HOUSE COMM. ON ENERGY AND COMMERCE, 99111 CONG., 2D SESS., PETITIONS, MEMORIALS AND OTHER DOCUMENTS SUBMITTED FOR THE CONSIDERATION OF CONGRESS, MARCH 4, 1789 TO DECEMBER 15, 1975, at 6-9 (Comm. Print 1986) (including a comment by the press that the principal pan of Congress's time has been taken up in the reading and referring Petitions" (quot. omitted)).

[32] See Stephen A. Higginson, Note, *A Short History of the Right to Petition the Government for the Redress of Grievances*, 96 YALE L. J. 142, at 156.

[33] See H.J., 25th Cong., 2d Sess. 647 (1838) (describing how petitions prompted the appointment of a select committee to consider legislation to abolish dueling).

[34] See Higginson, n.32 at 157.