

21-5164

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

ROBERT L. SCHULZ, ANTHONY FUTIA, Jr.
and all others similarly situated ,

Appellants

**MOTION FOR
REHEARING**

v.

CONGRESS OF THE UNITED STATES OF
AMERICA, each member of the Senate
and House of Representatives,

Appellee

**MOTION FOR PANEL REHEARING AND MOTION
FOR REHEARING EN BANC¹**

The proceeding involves three questions of exceptional importance:

- 1. WHETHER THE PANEL JUDICIALLY REPEALED
CONSTITUTIONAL STANDING AND BY EXTENSION AN
ESSENTIAL PRINCIPLE OF OUR CONSTITUTIONAL
REPUBLIC – SEPARATION OF POWERS.**

The Panel’s Judgment reads in part, “The district court properly dismissed the case without prejudice for lack of subject matter jurisdiction, because appellants failed to establish their standing to sue.”

¹ This Motion is for a rehearing of the Judgment of the Court of Appeals filed on January 4, 2022, copy attached.

In their complaint, under the heading “Jurisdiction and Venue” (A 3), Plaintiffs claimed constitutional standing. They wrote, “The claims arise under the Constitution of the United States of America. The controversy involves violations of the Constitution. The Court has subject matter jurisdiction under Article III, Section 2 of the federal Constitution, which reads in relevant part: ‘The judicial power shall extend to all cases, in law and equity, arising under this Constitution.’”

Constitutional standing is jurisdictional. See *Raines v. Byrd*, 521 U.S. 811, 819 (1997)

If a court has constitutional jurisdiction to adjudicate, it has a “virtually unflagging obligation” to do so. *Colo. River Water Conservation Dist. V. United States*, 424 U.S.800, 820 (1976).

“The judiciary cannot, as the Legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. *With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us.* We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.” *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). (emphasis added).

Given the Complaint’s direct, fact-based challenge to Congress’s violation of the Constitution’s Electors, Guarantee and Petition Clauses, and thus Plaintiffs’

constitutional standing, the Court is duty bound – it has an “unflagging obligation” to adjudicate by applying the law to the facts of the case. To do what the District Court and the Panel have done – i.e., to judicially craft a set of exceptions to the obligation to hear and decide a matter that is within the Court’s jurisdiction is treason to the Constitution.

The District Court declared Plaintiffs lack standing because, “neither Plaintiff has asserted that their injury is in any way distinct from that suffered by any other taxpayer or citizen” and “Schulz and Futia have asserted no facts that show injury particularized to them.” (App. A 117, 118).

The Panel went along with the District Court’s unconstitutional, judicially-crafted, *impossible to satisfy* exception to the obligation to hear and decide a matter that is within the court’s jurisdiction.

According to the Panel, Congress or anyone in the Legislative and Executive branches can violate any provision of the Constitution – i.e., act outside the boundaries drawn around their power by the People, thus *definitively and conclusively* (“concretely”), *injure all citizens in like manner*, and the judiciary must *therefore* refuse to adjudicate a citizen’s challenge to the infringement.

That is treason to the Constitution.

As Appellants wrote on page 45 of their Brief, “Congress must not be enabled by the Court to effectively abolish any provision of the constitution on the ground

that the violation injures all citizens equally and impartially, without distinction. Such a doctrine is tyrannical, especially when coupled with a judicial doctrine that declares government is not obligated to respond to proper petitions for redress of grievances for they would severely cripple the principles of separation of powers and checks and balances, thereby rendering the Constitution itself good-for-nothing.”

The Panel’s position is untenable and must be reversed for it has the judiciary repealing constitutional jurisdiction and by extension the essential principle of separation of powers, allowing the Legislative and/or Executive to freely violate any prohibition or mandate the People have placed on the government by the terms of their Constitution, *thereby shifting the ultimate power in our society from the People to the Government where it was not intended to reside.*

Here, in denying Appellants their right to constitutional standing the Court has allowed Congress to displace the power committed by the Constitution to the State Legislatures to direct how presidential electors are to be appointed.

We, as a law abiding society do not amend the Constitution by ignoring it, as the facts of this case prove Congress has, or by judicial repeal as the Panel would have us do. No one is above the law.

**2. WHETHER THE PANEL’S DECISION JUDICIALLY
REPEALED *CONSTITUTIONAL ACCOUNTABILITY*
AND BY EXTENSION AN ESSENTIAL PRINCIPLE
UNDERLYING OUR CONSTITUTIONAL REPUBLIC –
CHECKS AND BALANCES.**

The Panel’s Judgment reads in part, “Finally, the district court correctly determined the complaint did not challenge Congress’ alleged failure to respond to appellants’ petition because the complaint does not set forward such a claim nor seek any relief in connection with the alleged failure to respond.”

However, in their Complaint, under the heading “FACTUAL BACKGROUND,” Appellants detailed the contents of the subject First Amendment Petition for Redress of Violations of the Electors and Guarantee Clauses of the Constitution and the extraordinary steps taken by Plaintiffs, beginning on December 18, 2020, to insure all members of Congress were served with a copy of the Petition, signed by citizen-voters residing in all 50 states, and to do so days before January 6, 2021 when Congress was scheduled to meet to count the votes cast by the Electoral College. (A 5-8).

The Petition included as an attachment a thorough review of the historical record of the Right to Petition, including ample evidence of the obligation of the Government to respond. (A 41-46).

In Appellants’ January 2, 2021 letter that transmitted the Petition to each and every member of Congress (A 21, 22), Appellants wrote in relevant part “Annexed

hereto, directed to the Congress of the United States of America, is a FIRST AMENDMENT PETITION FOR REDRESS OF VIOLATIONS OF THE GUARANTEE AND ELECTORS CLAUSES OF THE CONSTITUTION FOR THE UNITED STATES OF AMERICA, together with the names and addresses of citizens from each and every State in the Union who have signed the Petition. The Petition speaks for itself...*Should the Congress not publicly respond to the Petition by refuting said evidence, or granting the relief requested therein* but, instead, go on to ratify the 12/14/2020 vote of the Electoral College ...ratification would add credence to the belief held by a growing number of Americans that their Government is not the Government We the People instituted” (emphasis added).

Appellants made clear the fact that the purpose of the Petition for Redress was to hold Congress accountable to the Electors and Guarantee Clauses of the Constitution.

Congress did not respond, forcing Appellants to seek relief from the Court.

Appellants’ Complaint, filed on February 17, 2021, included a copy of the entire Petition for Redress, including its attachments. (A 17-82).

In their Complaint, under “ARGUMENT” (A 10), Appellants argued that “*Under the Petition Clause of the First Amendment, Congress had a duty to respond to the Petition...When given an opportunity to do so, Congress chose not*

to deny the violations ... Service of the Petition on Congress by the People, with its declaration of the violations of the Electors Clause, was such an act as naturally to call for comment from Congress if not true ... It has been proper and possible for Congress to assert the People's declaration as untrue.... By its silence, Congress has admitted the violations....”

Appellants' February 17, 2021 letter that transmitted the Complaint to each member of Congress reads in part, “On January 5, 2021 we had the Congressional Acceptance Site deliver to you at your office a FIRST AMENDMENT PETITION FOR REDRESS OF VIOLATIONS OF THE GUARANTEE AND ELECTORS CLAUSES OF THE CONSTITUTION FOR THE UNITED STATES OF AMERICA, together with the names and addresses of the 1,058 citizens representing all States in the Union who had signed the Petition ... no member of Congress has responded to the Petition although constitutionally bound to do ... Therefore, in defense of the Constitution, we have decided to request the assistance of the judicial branch ...Enclosed herewith is a Summons, Complaint and a Motion for an Expedited Summary Judgment.” (emphasis added).

A copy of said February 17, 2021 letter was attached as Exhibit A to Appellants' Affidavit filed together with and in support of Appellants' Brief.

Surely, the Complaint challenges both Congress' violation of the Petition Clause by its failure to respond to the Petition, and Congress' violation of the

Electors and Guarantee Clause by its inclusion in its count of the votes on January 6, 2021 the votes by electors who were not constitutionally chosen.

Surely, the relief requested by Appellants in their Complaint is designed to remedy both violations.

The Panel's decision must be reversed for it judicially repeals constitutional accountability via the Petition Clause, a most important check and balance, thereby shifting the ultimate power in our society from the People to the Government where it is not intended to reside.

.....

3. WHETHER FED. R. APP. P. 10(a)(1) APPLIES TO THIS CASE

Federal Rules of Appellate Procedure 10 (a)(1) declares the original papers and exhibits filed in the district court constitute the record on appeal.

Application of said rule to this case would be unfair and highly prejudicial to Appellants.

Surely, the rule was not meant to apply to a case like this where the Defendants have never been heard from though properly served with:

- i) a legally compliant Complaint that *cited the Court's jurisdiction* and included sufficient factual evidence proving Defendants' violation of the Constitution, and

- ii) a Court Summons directing them to respond to the Complaint, and
- iii) a Motion for Summary Judgment, and
- iv) a Motion for Default Judgment.

Surely, the rule was not meant to apply to a case like this where there was no defense – no response at all by Defendants much less an opportunity for Plaintiffs to reply.

The only response to the Complaint, besides the District Court’s issuance of the Summons ordering Defendants to respond or face a default judgment came from the District Court in the form of a Memorandum Opinion and Order filed on June 16, 2021 that concluded, “In sum, the plaintiffs have failed to establish Article III standing and, as a result, this Court lacks jurisdiction over this action ... The Clerk of the Court shall close this case.”

Under those circumstances, Plaintiffs reply papers could not be filed in the District Court; they had to be filed at the Court of Appeals. *Those papers could not be part of “the original papers and exhibits filed in the district court.”*

In light of the ongoing constitutional crisis at the heart of the Complaint, Plaintiffs immediately appealed to the Court of Appeals from the District Court’s Order.

On July 16, 2021 this Court issued an Order which set the return date for Appellants Brief and Appendix at September 7, 2021 and stated in relevant part, “All issues and arguments must be raised by appellants in the opening brief.”

Appellants perfected their appeal on August 23, 2021. Besides the need to address the issues included in the District Court’s response to the Complaint, Appellants were forced to anticipate and address “all issues and arguments” Defendants might have included in a response to the Complaint in the lower court or might yet include in a response to Appellant’s Brief.

Appellants’ Brief included such issues and arguments. Naturally, Appellants Brief included factual evidence in support of their arguments. Given word and page limitation rules, the factual evidence took the form of Exhibits attached to a sworn affidavit, *much the same as would have occurred in papers filed in the District Court if the response to the Complaint had come from Defendants rather than a case-closing Order by that Court.*

At the direction of this Court, Appellants filed a motion that read, “Appellants hereby move the court for permission to file the Affidavit that accompanied Appellants’ opening Brief as an Affidavit or in the alternative as a Supplemental Appendix.”

The Court’s denial of Appellants’ motion to accept the Affidavit is highly prejudicial for the Affidavit does nothing more than provide the Court with

factual evidence in support of “all the issues and arguments” presented in Appellants’ Brief.

In response to the District Court’s *sua sponte* dismissal of the case for lack of jurisdiction, Appellants Brief argues not only the constitutional jurisdiction of the Court, it also replied to the District Court’s judicially crafted set of exceptions to their obligation to hear and decide a matter that is within the Court’s constitutional jurisdiction, providing factual evidence in support of their arguments in the form of exhibits attached to the sworn Affidavit.

To be clear, the Affidavit consists entirely of exhibits containing factual evidence in support of arguments presented in Appellants’ Brief, arguments that challenge the basis of the District Court closure of the case.

For example, in countering the District Court’s reliance on the need for a showing of Plaintiffs’ personal injury, as misguided as that reliance is under the facts and record of this case, Plaintiffs argued they have devoted a significant part of their lives to holding government accountable to the rule of law since 1997 and beyond. As evidence, Plaintiffs provided, as Exhibit F annexed to the Affidavit, a copy of the We The People Foundation for Constitutional Education Inc.’s Certificate of Incorporation that lists Plaintiffs as founders and members of the Board of Directors. It is well known and easily verifiable that the Foundation and its predecessor, with Plaintiffs’ personal involvement, has

been the force behind more than 130 lawsuits brought against government officials to hold them accountable for stepping outside the boundaries drawn around their power by our State and Federal Constitutions.

As another example, Appellants argued in opposition to the District Court's findings regarding the issue of causation and redressability (footnote 2). Appellants supported their argument with Exhibits G and H annexed to the Affidavit.

As yet another example, Appellants argued in opposition to the District Court's finding regarding the issue of the obligation of Congress to respond to Plaintiffs' First Amendment Petition for Redress (footnote 1). Appellants supported their argument with Exhibit A annexed to the Affidavit.

Removal of the Affidavit with its factual evidence from the Record on Appeal is unwarranted and clearly prejudicial to Appellants; it would unjustly weaken Appellants' arguments, seemingly to favor a preconceived idea.

Surely FRAP Rule 10(a)(1) does not apply to this case where there was no appearance by any Defendant in the district court much less any papers filed by Defendants , and no opportunity for Plaintiffs to file any papers in the District Court in reply to the District Court's case-closing Memorandum Opinion and Order.

CONCLUSION

On the basis of the above, Appellants request:

- a. A reversal of the Court's denial of Appellants' motion for leave to file the Affidavit as an Affidavit or as a supplemental appendix, and
- b. A reversal of the Court's affirmation of the District Court's October 1, 2021 order, thereby honoring Appellants' standing, the court's subject matter jurisdiction and Appellants' Petition Clause claim, and for such other relief as the court may deem just and proper.

Respectfully submitted,

January 17, 2022

ROBERT L. SCHULZ, pro se
2458 Ridge Road
Queensbury, N.Y. 12804
(518) 361-8153

ANTHONY FUTIA, JR. pro se
34 Custis Ave.
N. White Plains, NY 10603
(914) 906-7138