05-5359

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

We The People Foundation, et al.,	)	
	)	
Appellants	)	
	)	No. 05-5359
v.	)	
	)	
United States, et al.,	)	
	)	
Appellees	)	

APPELLANTS' PETITION FOR REHEARING EN BANC

Dated: June 22, 2007

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This proceeding involves a **first-impression** question of exceptional constitutional importance. The First Amendment is arguably the single most important sentence in the history of our Nation. Essential, unalienable, individual Rights were guaranteed by that sentence, including the right of the people to petition the government for redress of grievances. A decision denying that right, or even placing limitations upon it, is of exceptional constitutional importance.

To enforce their First Amendment Right to have their Petitions respectfully responded to by government, the People have the Right to retain their financial support of the government until the Government meets its responsibility to them to respond to the exercise of their First Amendment Right, as a number of Plaintiffs, but not all Plaintiffs, have done in this matter.

QUESTION PRESENTED

Whether Defendants (the "Government") are obligated under the First and Ninth Amendments to the Constitution to respond with formal, specific answers to the questions in the Petitions for Redress of **constitutional torts** that were respectfully served on the Government by Plaintiffs (the "People"), and whether the People have the Right under the First and Ninth Amendments to withdraw their financial support from the Government until their Grievances are Redressed **if the Government refuses to respond to those Petitions for Redress.**

The Question In Other Words

If the American People are truly free, with natural, individual Rights endowed by the Creator rather than privileges granted by the State, and if those Rights are unalienable **individual** Rights, and if the federal government is truly a servant government established by the sovereign People to secure those **individual** Rights, and if the power of the government to act is strictly limited by the original meaning of the words of the U.S. Constitution, and if the People have evidence that government officials in the political branches have stepped outside the boundaries drawn around

their power and are acting in spite of Constitutional prohibitions, and if the People have intelligently, rationally, professionally, non-violently and repeatedly Petitioned those officials in the political branches with proper statements of Grievances and proper prayers for Relief, and if the government officials have decided to ignore the People's Petitions, fail to justify their constitutionally tortious behavior and refuse be held accountable to the Constitution and the Bill of Rights, do the Sovereign People not then have a Natural, lawful Right to defend the Constitution and enforce their **individual** Rights by retaining money wanted by those government officials until their Grievances are Redressed, and to exercise such Right without retaliation by the government?

INTRODUCTION

The Opinion by the panel of this Court has, in error, removed the People's procedural vehicle embedded in the Constitution for enforcing the balance of the Constitution declaring, in effect, that the Government is no longer the servant of the Sovereign People.

If left undisturbed, the Opinion would remove the linchpin of the constitutional system of checks and balances that were deliberately designed as the cornerstone of our system of governance for the *peaceful* protection and preservation of the Constitutional Republic, individual Rights, and the Principle of Nature we recognize as Popular Sovereignty.

If left undisturbed, the Opinion would eviscerate the legal and functional substance of the capstone Right of the Bill of Rights -- i.e., the Right of the People to peacefully hold the Government accountable to the war, tax, money, privacy, and other provisions of the Constitution -- by denying the People their Right to a response from the Government to their Petitions for a Redress of **constitutional torts,** and by denying the People their Right to *peacefully* secure their Rights by *enforcing* their Right to Redress by retaining their money until their Grievances are Redressed.

After all, the Petition is to the individual, the minority and the Constitutional Republic, what the ballot is to the majority and a pure Democracy. Stripped of its original intent and power, the Petition Clause becomes nothing more than a redundant expression clause, leaving the People neutered, possessing no apparent non-violent means of preserving their unalienable Rights -- i.e., the very antithesis of the intent of the Framers and Ratifiers and the design of the Creator.

STATEMENT OF FACTS

With two exceptions, the facts have been adequately summarized in the Opinion. First, the People take exception to the statement on page 3 of the slip opinion that reads; “In protest, some plaintiffs have stopped paying federal income taxes.” In fact, those plaintiffs that have stopped paying income taxes are not engaged in garden-variety political "protesting". They are claiming and formally exercising their Right to Petition. Having been repeatedly denied Redress, withdrawing their financial support is an integral element of the process of Petitioning for Redress of Grievances. They stopped because it remains their Right to do so -- as the only non-violent way to enforce their unalienable, natural Right to hold the Government accountable to the Constitution. The People know any Right that is not enforceable is not a Right. By affidavits filed with the District Court those Plaintiffs have inextricably linked their decision to not file another tax return to the Government’s failure to respond to their Petitions for Redress of **constitutional torts.** Withholding their monies is the practical exercise of their **individual** Right to Petition, their Right to Redress, their Right to constitutional governance and their Right of Popular Sovereignty.

Second, the People take exception to the statement on page 4 of the slip opinion; “Plaintiffs therefore asked the District Court to…prevent the Government from collecting taxes from them.” In fact, Plaintiffs asked the District Court to prevent the Government from collecting taxes from them **unless and until their Grievances were Redressed**, i.e., the People Petitioned the District Court to

protect them from the Government's abridgement of, and retaliation for, their act of claiming and exercising their Rights under the First Amendment and Ninth Amendments.

GOVERNMENT IS OBLIGATED TO RESPOND AND THE PEOPLE HAVE THE RIGHT OF REDRESS BEFORE TAXES

A. *Smith* and *Knight* Are Inapposite[1]

The Panel's application of the doctrine of *stare decisis* does not provide sufficient justification for a conclusion that Government does not have an obligation to respond to the People's Petitions for Redress of **constitutional torts**. Whatever effect the Panel's decision may have in strengthening the application of *stare decisis,* it is likely to be less important than what that Panel has done in eroding the Constitution by sanctioning the Government's retaliation, under color of law, against the People who have, in good faith, claimed and exercised all their Natural Rights guaranteed by the First and Ninth Amendments to hold the Government accountable to the Constitution, including the inextricably linked Right to a Response and the Right of Redress before taxes.

The Panel erred in failing to recognize the overriding distinguishing factual issue in this case -- the People's Grievances go directly to **constitutional torts -- that is, violations of the constitution, policies long ago set in stone by the Framers and Ratifiers, subject only to change by Constitutional Amendment,** not mere policy-making by sitting state legislative and administrative boards who are themselves governed by written State and U.S. constitutions.

In its Opinion, the Panel not only erred by failing to recognize this important distinguishing factual issue, it also erred by deciding to set aside and "not resolve" the People's primary and well-documented distinguishing legal argument in support of their Right to a Response and concurrent Right of enforcement – i.e., original intent. Instead, the Panel errantly decided that it was constrained by the Supreme Court precedents in *Smith* and *Knight.*

[1] *Smith v. Arkansas State Hwy Employees,* 441 U.S. 463; *Minn. State Bd. v. Knight*, 465 U.S. 271.

The Panel erred in dismissing this case on the ground of *stare decisis.* Unlike *Smith* and *Knight*, the Panel's decision in this case is a watershed decision of far reaching importance, threatening the public tranquility by denying not only a fundamental Right, but the "capstone Right" of all persons (i.e., the procedural vehicle for enforcing the rest of the Charter).

The constitutional principle or rule of conduct governing Government's obligation to respond to petitions to the federal Government by private citizens, in their private capacities, for redress of grievances involving **constitutional torts** (i.e., violations of certain prohibitions, restrictions or requirements placed on Government by the U.S. Constitution itself) has never been declared by any Court, including the *Smith* and *Knight* Courts, much less "settled through iteration and reiteration over a long period." At risk are the essential constitutional principles of "popular sovereignty," "government limited by a written Constitution" and "republicanism."

The constitutional principle declared in *Smith* and *Knight* merely governs the obligation of governments "to listen and respond" to public employees who do (*Smith*) or do not (*Knight*) want to submit employment related grievances to their state employers through a labor association as required by state legislation.

The Court is respectfully requested to distinguish the instant case from *Smith* and *Knight,* where the facts, circumstances and legal arguments are so radically different that there is no risk of making *Smith* or *Knight* a legal anomaly. Here, the Court **is not dealing with an issue of statutory interpretation**, where the courts give stronger *stare decisis* effect to its holdings than in constitutional cases. See *Clark v. Martinez*, 543 U.S. 371,quoting *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U.S. 197, 205 (1991).

B. The People's Emphasis on Contemporary Historical Understanding and Practices is Consistent with the Supreme Court's Traditional Interpretive Approach to the First Amendment

The Panel erred by failing to factor into its Opinion the People's primary, extensively documented legal argument – that is, the meaning of the Petition Clause based on the "Framers' intent" approach to determining the construction of the Constitution's provisions and prohibitions. This is particularly difficult for the People to accept, especially in light of what the Panel's Judge Rodgers had to say in her concurring opinion, to wit:

> "That precedent [*Smith* and *Knight*], however, does not refer to the historical evidence and we know from the briefs in Knight that the historical argument was not presented to the Supreme Court…The Supreme Court's interpretation of the Constitution has been informed by the understanding that …it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth…the Supreme Court has rejected a pure textual approach in favor of an analysis that accords weight to the historical context and the underlying purpose of the clause at issue…In the context of the First Amendment, the Supreme Court has repeatedly emphasized the significance of historical evidence…Appellants point to a long history of petitioning and the importance of the practice in England, the American Colonies, and the United States until the 1830's as suggesting that the Right to petition was commonly understood at the time the First Amendment was proposed and ratified to include duties of consideration and response…Even those who take a different, based on a redefinition of the question and differences between English and American governments, acknowledge that there is 'an emerging consensus of scholars' embracing appellants' interpretation of the right to petition….the historical context and underlying purpose have been the hallmarks of the Supreme Court's approach to the First Amendment…Of course, this court cannot know whether the traditional historical analysis would have resonance with the Supreme Court in a Petition Clause claim such as appellants have brought…No doubt it would present an interesting question. For now it suffices to observe that appellants' emphasis on contemporary historical understanding and practices is consistent with the Supreme Court's traditional interpretive approach to the First Amendment." (footnotes and citations omitted).

To be frank, Judge Rogers' statement sounds more like a dissent than a concurring opinion.

As argued in the People's original Brief to the Court, there is absolutely nothing in American History or Jurisprudence that contradicts the People's interpretation of the meaning of the Petition Clause of the First Amendment. On the other hand, the People's interpretation is supported by all of history, from the English Magna Carta to the American Declaration of Independence and beyond.

For instance, 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, moveover, 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 the People).

Surely, 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.[2]

In addition, 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 addition, in 1774, the same Congress that adopted 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:

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

> "**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 addition, 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:

> **"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, an hou improvident would be the surrender of so powerful a mediator."** Thomas Jefferson: Reply to Lord North, 1775. Papers 1:225.

In addition, 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 with repeated injury. A Prince, whose character is thus 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

The Panel also erred to the extent its decision in any way was influenced by the hypothesis of Lawson and Seidman,[3] who theorized that Government is not obligated anymore to respond to

[3] Gary Lawson and Guy Seidman, "Downsizing the Right to Petition," 93 Nw. U.L. Rev. 739, 756

Petitions for Redress of Grievances[4] due to "modern notions of representative government…modern notions of separation of powers…[today's absence of] sound pragmatic reasons for taking petitions seriously [Lawson and Seidman give as examples the absence of any threat of loss of "formal power over money matters" and the absence of any threat "from the point of a bayonet"]. Lawson and Seidman also suggest that Petitions were merely devices for communication (not for the People to bind the Government to the Constitution), and that the Constitution's "express provisions for periodic election of legislative officials" somehow provide the People with the adequate means to "affect government choice." Lawson and Seidman ignore the self-evident fact that the Rights of individuals and the minority to cure constitutional torts they suffer cannot possibly be placed in the hands of the majority that elects our representatives.

Plaintiffs would argue that they did not lose any of their unalienable, Natural Rights when they reorganized Government and adopted the principle of separate powers. Nor have they given up their power over money matters or their Right to keep and bear arms.

However, in response to any notion that the People have lost a guarantee to one of their Rights under the Petition Clause because the Petition Clause is now superfluous, the People argue they do not, EVER, lose any guarantees to any fundamental Rights until they agree to give them up under the procedures of Article Five of the Constitution of the United States of America.

> "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)

[4] They make no distinction between grievances relating to constitutional torts and grievances relating to political or policy making matters.

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

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, 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."

In the end, it appears the Panel may have been deterred from a reversal by what it (incorrectly) perceived was a serious debate among the scholars regarding the obligation of the Government to respond to Petitions for Redress of Grievances, due to the hypothesis of Lawson and Seidman. Indeed, the Panel concluded its opinion stating, "We need not resolve this debate, however, because we must follow the binding Supreme Court precedent [in Smith and Knight]."[5]

Because this is a case of first impression it is instructive to review the history of the Right to Petition going to original intent. The People incorporate by reference the full legal argument included in their Brief to the Court regarding the historical record and purpose of the Petition Clause.

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.[6] The Right is not changed by the fact that the Petition Clause lacks an affirmative statement that Government shall respond to Petitions for, "It cannot be presumed, that any clause in the Constitution is intended to be without effect." Chief Justice

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[5] The Opinion listed most of the Law Review articles that the People relied on. However, the Panel overlooked one important historical review referenced by Appellants in their Brief to the Court; "The Vestigial Constitution: The History and Significance of the Right to Petition" by Gregory A. Mark, 66 Fordham L. Rev. 2153 (May, 1998).

[6] 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" 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).

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 accountable to natural Rights, originated in England in the 11th century[7] and gained recognition as a Right in the mid 17th century.[8] Free speech Rights first developed because members of Parliament needed to discuss freely the Petitions they received.[9] Publications reporting Petitions were the first to receive protection from the frequent prosecutions against the press for seditious libel.[10] Public meetings to prepare Petitions led to the Right of Public Assembly.[11]

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, [12] the American Colonies, [13] and the first Continental Congress[14] gave official recognition to the Right to Petition, but not to the Rights of Free Speech or of the Press.[15]

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[7] 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.
[8] See Bill of Rights, 1689, 1 W & M., ch. 2 Sections 5,13 (Eng.), reprinted in 5 THE FOUNDERS' CONSITUTION 197 (Philip B. Kurland & Ralph Lerner eds., 1987); 1 WILLIAM BLACKSTONE, COMMENTARIES 138-39.
[9] See David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right to Petition*, 9 LAW & HIST. REV. 113, at 115.
[10] See Smith, *supra* n.4, at 1165-67.
[11] See Charles E. Rice, *Freedom of Petition*, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 789, (Leonard W. Levy ed., 1986)
[12] See Smith, *supra* n4, at 1165.
[13] For example, Massachusetts secured the Right to Petition in its Body of Liberties in 1641, but 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).
[14] See id. at 464 n.52.
[15] 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* n6, at 115-16.

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.[16] 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.[17]

Petitioning Government for Redress has played a key role in the development and enforcement of popular sovereignty throughout British and American history. [18] In medieval England, petitioning began as a way for barons to inform the King of their concerns and to influence his actions.[19] Later, in the 17th century, Parliament gained the Right to Petition the King.[20] This broadening of participation culminated in the official recognition of the right of Petition in the People themselves.[21]

The People used this newfound Right to question the legality of the Government's actions,[22] to present their views on controversial matters,[23] and to demand that the Government, *as the creature and servant of the People, be responsive to the popular will.*[24]

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[16] 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).
[17] See 5 BERNARD SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS at 1089-91 (1980).
[18] 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 Int'l); K. Smellie, Right to Petition, in 12 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 98, 98-101 (R.A. Seiligman ed., 1934).
[19] The Magna Carta of 1215 guaranteed this Right. See MAGNA CARTA, ch. 61, reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* n.5, at 187.
[20] See PETITION OF RIGHT chs. 1, 7 (Eng. June 7, 1628), reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* n5 at 187-88.
[21] 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* n5 at 188-89.
[22] For example, in 1688, a group of bishops sent a petition to James II that accused him of acting illegally. See Smith, *supra* n4, 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* n15 at 41-43.
[23] See Smith, *supra* n4, at 1165 (describing a Petition regarding contested parliamentary elections).
[24] 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* n4, at 1163-64.

In the American colonies, disenfranchised groups used Petitions to seek government accountability for their concerns and to rectify Government misconduct.[25] By the nineteenth century, Petitioning was described as "essential to … a free government,"[26] an inherent feature of a republic[27] and a means of enhancing Government accountability through the participation of citizens.

G**overnment accountability was understood to include response to petitions.**[28] American colonists, who exercised their Right to Petition the King or Parliament, [29] expected the Government to receive *and respond* to their Petitions.[30] 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.[31]

Frustration with the British Government led the Framers to consider incorporating a people's right to "instruct their Representatives" in the First Amendment.[32] Members of the First Congress easily defeated this right-of-instruction proposal.[33] 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*.[34]

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[25] See RAYMOND BAILEY, POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA 43-44 (1979).
[26] 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).
[27] 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]").
[28] See Frederick, *supra* n7 at 114-15 (describing the historical development of the duty of government response to Petitions).
[29] See DECLARATION AND RESOLVES OF THE CONTINENTAL CONGRESS 3 (Am. Col. Oct. 14, 1774), reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* n5 at 199; DECLARATION OF RIGHTS OF THE STAMP ACT CONGRESS 13 (Am. Col. Oct. 19, 1765), *reprinted in id*. at 198.
[30] See Frederick, *supra n7* at 115-116.
[31] See THE DECLARATION OF INDEPENDENCE para. 30 (U.S. July 4, 1776), reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* n5 at 199; Lee A. Strimbeck, The Right to Petition, 55 W. VA. L. REV. 275, 277 (1954).
[32] See 5 BERNARD SCHWARTZ, *supra* n15, 1091-105.
[33] The vote was 10-41 in the House and 2-14 in the Senate. See *id*. at 1105, 1148.
[34] See 1 ANNALS OF CONG. 733-46 (Joseph Gales ed., 1789); 5 BERNARD SCHWARTZ, *supra* n15, at 1093-94 (stating that representatives have a duty to inquire into the suggested measures contained in citizens' Petitions) (statement of Rep. Roger Sherman); *id*. at 1095-96 (stating that Congress can never shut its ears to Petitions) (statement

Congress viewed the receipt and serious consideration of every Petition as an important part of its duties.[35] Congress referred Petitions to committees[36] and even created committees to deal with particular types of Petitions.[37] Ultimately, most Petitions resulted in either favorable legislation or an adverse committee report. [38] 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.

CONCLUSION

For the reasons set forth above the Plaintiffs respectfully request that their request for an en banc consideration be granted.

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of Rep. Elbridge Gerry); *id*. at 1096 (arguing that the Right to Petition protects the Right to bring non-binding instructions to Congress's attention) (statement of Rep. James Madison).

[35] See STAFF OF HOUSE COMM. ON ENERGY AND COMMERCE, 99TH 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 part of Congress's time has been taken up in the reading and referring Petitions" (quotation omitted)).

[36] 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.

[37] 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).

[38] See Higginson, n34 at 157.