IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ, ANTHONY FUTIA, Jr.)
)
Plaintiffs)
)
v.) CASE No. 1:19-CV-56
) GTS/TWD
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; BRIAN KOLB, individually and)
in his official capacity as Minority Leader of the)
New York State Assembly; THOMAS DINAPOLI,)
in his official capacity as Comptroller of New York)
State,)
Defendants)

PLAINTIFFS'MEMORANDUM OF LAW
IN RESPONSE TO DEFENDANTS'MOTION TO DISMISS

Dated: March 4, 2019

ROBERT L. SCHULZ, pro se
2458 Ridge Road
Queensbury, NY 12804
TEL: [518] 361-8157

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

UNITED STATES CONSTITUTION

NEW YORK STATE CONSTITUTION

STATUTES

PRELIMINARY STATEMENT

Defendants argue Plaintiffs' federal constitution "republican" and "petition" clause claims should be thrown out of court for lack of "subject matter jurisdiction," taking with them the four state law violations that are inextricably intertwined with and gave rise to the two federal claims, of necessity – i.e., due to the unavailability of "supplemental jurisdiction" and the availability of the "doctrine of sovereign immunity."

There is more than a casual connection between the four state law violations and the Republican and Petition Clause claims which are designed to provide Plaintiffs with federal constitutional protections against such a complete and dangerous breakdown of the rule of law **within the halls of State Government.**

In sum, the four state law violations include:

1. The State's violation of Section 801 of the State Education Law by failing to require each rising generation be taught in public and private schools in grade 8-12, the "history, meaning, significance and effect" of the provisions of the State Constitution, that the State Constitution governs the behavior of all elected and appointed officials in the State far more so than does the federal constitution which hardly ever comes into play in the day-to-day administration of the State and that it is the duty of each citizen to be attentive to possible danger or difficulties, and
2. The State's violation of Article III of the New York State Constitution by transferring the power of the State Legislature to make law to a body located outside of the halls of Government, and

3. The State's violation of Article VII of the New York State Constitution by contracting debt without voter approval and giving and lending the money and credit of the State in aid of a public corporation and a private undertaking, and
4. The State's violation of Article VI, Section 6 (c) of the New York State Constitution by routinely appointing rather than requiring the election of State Supreme Court Justices.

ARGUMENT

I. Plaintiffs' Republican Clause Claim Is Justiciable

Defendants' motion to dismiss Plaintiffs' republican ("guaranty") clause claim rests on irrelevant cases.

Defendants' reliance on *Baker v. Carr*, 369 U.S. 186, 224 (1962) is misplaced for at 228-229, after an extensive discussion of cases where it did and did not find the guaranty clause justiciable, the majority wrote, "Finally, we emphasize that it is the involvement in Guaranty Clause claims of the elements thought to define 'political questions,' **and no other feature**, which could render them nonjusticiable. Specifically, we have said that such claims are not held nonjusticiable because they touch matters of state governmental organization." (emphasis added).

Here, Plaintiffs' claims contain no elements that could reasonably be thought to define their claims as political questions. Plaintiffs' four claims are straightforward claims of lawlessness – i.e., law-breaking by the Defendants and the need to hold them accountable.

Plaintiffs' Complaint simply challenges Defendants' readily apparent violation of unambiguous Articles of the NY State Constitution and an unambiguous NY State Statute.

Baker, at 291, quoting *In re Duncan*, 139 U.S. 449 at 461 declared, "By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, **their governments, National and State, have been limited by written constitutions ....**"

Defendants have utterly failed to identify any element that could define Plaintiffs claims as political questions. Without a political element, Plaintiff's four state claims easily fall within the ambit of the Republican/Guaranty Clause.

Defendant's reference to *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y. v. Westchester Cnty.*, 712 F.3d 761, 774 (2d Cir. 2013) is also of no help to them for there the Second Circuit, in conformance with *Baker v Carr,* agrees that for a Republican/Guaranty Clause claim to be nonjusticiable there must be a political question saying, "[W]e have recognized that "*perhaps* not all claims under the Guarantee Clause present nonjusticiable political questions." (emphasis in the original).

Finally, Defendants reliance on *Schulz v. N.Y. State Exec.*, 960 F. Supp. 568, 575 (N.D.N.Y. 1997) is also misplaced. There, the Court held, "In light of the Guarantee Clauses' 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**." (emphasis added).

Here, the federal judiciary is being asked to allow the Republican/Guaranty Clause to be used to challenge a state's **lawbreaking** - its injurious violations of specific provisions of the State Constitution and State Education Law.

In *Schulz*, the Court went on to quote Chief Justice White writing for the majority in *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912), a case that challenged the referendum provisions of the Oregon Constitution, "Chief Justice White found the challenge nonjusticiable and described the claim as follows:

> It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, **not for the purpose of testing judicially some exercise of power, assailed on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation,** but to demand of the state that it establish its right to exist as a state, republican in form."

Here, in keeping with principle of law set forth in *Pacific States*, the State is called to the bar of this federal court for the purpose of testing judicially the State's exercise of power under the New York State Constitution and the New York State Education Law. Plaintiffs have not called the State to the bar of this federal court to test judicially any political question or element thereof.

II. Plaintiffs' Petition Clause Claim Is Justiciable

Defendants assert at page 8, "The language of the First Amendment does not suggest a right to a response …no authority appears to exist to support such right."

However, the language of the First Amendment's Right to Petition is as suggestive of a citizen's right to a response as the language of the Twenty-Six Amendment's Right to Vote is suggestive of a citizen's right to have his vote counted.

As Plaintiffs argued in their Complaint, "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).

Defendants would have us believe what the Petition Clause does not mean, without telling us what it does mean. That's not right.

Defendants' motion is untenable in light of: 1) Plaintiffs' thorough, fully documented and supported historical review and arguments included on pages 23-37 of Plaintiffs' Complaint; and 2) Defendants' total failure to question or refute any part of that review.

In view of Plaintiffs' factual dissertation of the full meaning of the Right, Defendants' reliance on *Apple v. Glenn*, 183 F.3d 477 (6th Cir. 1999), *Smith v Ark. State Highway Emps.*, 441 U.S. 463 (1979), *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, (1984) and *Williams v. Cnty. Of Onondaga*, 2018 U.S. Dist. LEXIS 175613 (N.D.N.Y. Oct. 12, 2018) is misplaced.

The Apple Court held that, "Although Apple is unquestionably inspired by strong political beliefs and sincere love of country, his claims lack the legal plausibility necessary to invoke federal subject matter jurisdiction." *Apple* at 480.

Plaintiffs agree with the Court in *Apple* that a citizen's right to petition the government does not **guarantee** a response to the petition or the right to compel government officials to act on or adopt a citizen's views.

As Plaintiffs' argued in their complaint at paragraphs 108-109:

> To be sure, a communication designated as a Petition for Redress requiring a formal, specific response from the government, would have to embody certain components to ensure that the document was a First Amendment petition and not a "pretended petition." Not all communications, nor just any document, can be regarded as a constitutionally protected Petition for Redress of Grievances.
>
> Plaintiff's Petition for Redress exceeded any rational standard requiring a formal, specific response from Defendants: it is serious and documented, not frivolous; it

> contains no falsehoods; it is not absent probable cause; it has the necessary quality of a dispute; it comes from a citizen outside of the formal political culture and involves a legal principle not political talk; it is punctilious and dignified, containing both a "direction" and a "prayer" for relief; it addresses a public, collective grievance with widespread participation and consequences; it is an instrument of deliberation not agitation; and, it provides legal Notice seeking substantive Redress to cure the infringement of a right leading to civil legal liability.

Apple's claim lacked "the legal plausibility necessary to invoke federal subject matter jurisdiction. The reviewing court held that the lower court's dismissal was appropriate because Apple's claim appeared to be "frivolous, unsubstantial in nature, and totally implausible."

Here, Defendants assert Plaintiffs are attempting to "enforce a constitutional right that does not exist," without refuting any part of Plaintiffs' thorough historical review of the right and without offering their own meaning of the Petition Clause.

Defendants have not shown that the First Amendment Petition for Redress of Grievances that Plaintiff served on Defendants on November 28, 2018 did not meet or exceed the Framers' intent much less the standards set forth in paragraph 109 of the Complaint, thereby requiring a formal, specific response from Defendants to the grievances set forth therein.

Defendants' reliance on *Smith v. Arkansas* and *Minn. v. Knight* is also misplaced for the reasons provided in paragraphs 100 – 103 of Plaintiffs' Complaint, logic Defendants obviously failed to take into consideration in their apparent refusal to give any credence to Plaintiff's historical review. Plaintiffs restate the content of said paragraphs as if repeated here.

Finally, *Williams v. Cnty. of Onondaga* is also irrelevant as Plaintiffs can find no connection between that case and Plaintiffs Petition Clause Claim.

III. Court Has Subject Matter Jurisdiction Under Rule 12(b)(1)

The District Court does not lack subject matter jurisdiction.

According to the principles of law laid down in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998), Plaintiffs' federal claims are jurisdictional; they involve a federal controversy as neither of Plaintiffs federal claims and none of Plaintiffs' state claims are insubstantial, implausible, foreclosed by prior decisions of the U.S. Supreme Court, or devoid of merit.

Plaintiffs have met their burden of establishing jurisdiction under Rule 12(b)(1) according to the principles of law set forth in *Rodriguez v. Fed. Bureau of Prisons*, No. 9:10-CV-1013 (LEK/TWD), 2012 U.S. Dist. LEXIS 185412, at *18 (N.D.N.Y. Nov. 30, 2012).

Plaintiffs have presented federal and state questions that are plainly substantial as to be meritorious and present issues worthy of adjudication, according to the principles of law set forth in *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1189 (2d Cir. 1996), notwithstanding the fact that *Nowak* did not arise under the federal constitution. Here, plaintiffs seek relief under the "republican" and "petition" clauses of the federal constitution. There, plaintiff sought relief under a federal statute, the Employee Retirement Income Security Act (ERISA), 29 U.S.C.S. § 1132(a)(1)(B).

IV. Plaintiffs Have Stated Claim For Which Relief Can Be Granted

Plaintiffs have stated claims for which jurisdictional relief can be granted by the Court.

Plaintiffs' complaint contains "detailed factual allegations" and it is devoid of "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," in conformance with *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Defendants have not denied any fact on Plaintiffs' Statement of Material Facts which Plaintiffs have squarely stated are not in genuine dispute. Nor have Defendants identified

attempts by Plaintiffs to have legal conclusions masquerade as a factual conclusions. Thus, Defendants have obviously accepted as true all allegations in the Complaint.

V. Eleventh Amendment Is No Bar

The Eleventh Amendment does not offer immunity to State Defendants who are charged in federal court with avoiding their responsibilities and duties under the Republican and/or Petition Clauses of the United States Constitution.

The Eleventh Amendment offers no protection to State Defendants charged with the wanton, reckless disregard for the consequences of their lawless, anti-republican behavior - especially their violations of the consent of the People as expressed in the State Constitution.

This is true whether the State does, as is the case of New York State, or does not accept federal funds.

If the Eleventh Amendment were allowed to trump the Republican and Petition Clauses citizen-plaintiffs here and everywhere would have little to no recourse against State Defendants turning dishonest and unprincipled unless those Defendants agreed to be sued in federal court. That would be a recipe with disastrous consequences for the United States of America, the land of the Free.

CONCLUSION

Plaintiffs respectfully request an Order denying Defendants' Motion to Dismiss, and

a. Declaring Defendants are in violation of Article IV, Section 4 of the Constitution for the United States of America which guarantees to People of New York State a government republican in form and substance, and

b. Declaring Defendants are in violation of a fundamental, unalienable Right guaranteed Plaintiffs by the First Amendment to the Constitution for the United States of America

and Article I, Section 9 of the Constitution for the State of New York, by failing to respond to Plaintiff's November 28, 2018 Petition for Redress of Grievances; and

c. Declaring Part HHH of S. 7509-C/ A. 9509-C of the Laws of 2018, and the 2018 Committee on Legislative and Executive Compensation and its recommendations to be unconstitutional, null and void; and

d. Directing the Defendant Comptroller to reduce the compensation of State Legislators and Executives commensurate with any increase in their compensation resulting from Part HHH of S. 7509-C/ A. 9509-C; and

e. Declaring the November 12, 2018 Memorandum of Understanding between the State of New York, Amazon.com Services, Inc. and the City of New York and any agreements pursuant thereto to be unconstitutional, null and void , and

f. Directing Defendants to notify the Court within ninety (90) days of the date of its Order how Defendants will, by the start of the 2019-2020 school year, have all teachers of all children in grades 8-12, in public and private schools in the State of New York, teaching the "history, meaning, effect and significance" of the provisions of the United States' Declaration of Independence and the provisions of the current Constitutions for the State of New York and the United States of America, in compliance with Section 801 of the New York State Education Law, and

g. Declaring Defendant Governor's practice of appointing people to the Court of Claims and immediately assigning those people to the State Supreme Court as Acting State Supreme Court Justices to be violative of Article VI, Section 6 (c) of the New York State Constitution; and

h. Directing Defendants to notify the Court within sixty (60) days of the date of its Order of the specific steps to be taken by Defendants to ensure that as of December 31, 2019 all State Supreme Court Justices will have been elected to their positions, and

i. Declaring Defendants have deprived Plaintiffs of certain fundamental Rights under color of law in violation of 42 U.S.C. Section 1483, and

j. Directing Defendants to personally pay for a series of three, two-hour courses of public instruction, to be held in a law library located in each county of the State of New York, on the history, meaning, significance and effect of the provision of the New York State Constitution, the federal Constitution and the Declaration of Independence, using funds contributed by persons to accounts established by Defendants for the purpose of supporting Defendants' reign as Governor and Leaders of the Legislature of the State of New York, said courses of instruction to be conducted between July 4, 2019 and September 17, 2019 by constitutional attorneys and college professors as recommended by the Federalist Society, and approved by Plaintiffs and approved by Plaintiffs, in compliance with Section 801 of the State Education Law as amended in 1947; and

k. Granting any other relief to the Plaintiffs that the Court may deem just and proper, including but not necessarily limited to a reimbursement of Plaintiffs' costs and fees related to this case.

Respectfully Submitted, March 4, 2019

ROBERT L. SCHULZ, pro se
2458 Ridge Road
Queensbury, NY 12804
[518] 361-8153

ANTHONY FUSCA, JR., pro se
34 Custis Ave.
N. White Plains, NY 10603
[914] 906-7138

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ, ANTHONY FUTIA, JR. Plaintiffs v. STATE OF NEW YORK, et al. Defendants	)	**CERTIFICATE OF SERVICE** CASE No. 1:19-cv-56 GTS/TWD

CERTIFICATE OF SERVICE

ROBERT L. SCHULZ, declares under penalty of perjury:

1. I am a party to the matter captioned above.

2. On March 4, 2019, at 1:55 p.m. I handed a copy of the annexed Response to Defendants' Motion to Dismiss to CRISTAL GAZELME at the office of LETITIA JAMES, Attorney General of the State of New York, at the Justice Building in Albany, NY 12224.

ROBERT L. SCHULZ, pro se
2458 Ridge Road
Queensbury, NY 12804
518-538-2799