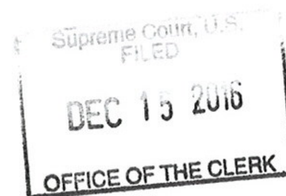

No. 16A606

In the Supreme Court of the United States

STEVEN S. MICHEL, *pro se*

Applicant,

v.

ADDISON MITCHELL MCCONNELL, JR., United States Senator,
CHARLES ERNEST GRASSLEY, United States Senator and
UNITED STATES SENATE,

Respondents.

EMERGENCY APPLICATION FOR INJUNCTION PENDING APPELLATE REVIEW

Directed to the Honorable John G. Roberts, Jr.
Chief Justice of the United States and
Circuit Justice for the District of Columbia Circuit

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Dated: December 15, 2016

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the District of Columbia Circuit:

INTRODUCTION

Judge Merrick Garland's nomination to the United States Supreme Court has been pending without Senate action since March 16, 2016, far longer than any other Supreme Court nominee in history. For the past ten months Respondents, Senate leadership, have blocked a Senate vote on that nomination and have stated their intention to continue to do so for the remainder of President Obama's term.

This obstruction has deprived me of my right as a voter, under the 17th Amendment, to have my elected senators participate with "one vote" in deciding whether to consent to Merrick Garland's appointment. This contrasts starkly with the voting strength exercised by the handful of senators that have, so far successfully, blocked Senate action. The conduct of Respondents has diminished the effectiveness of my vote for senators – an injury long recognized as sufficient to provide Article III standing.

On January 20, 2017, President Barack Obama's second term will end, and the nomination of Judge Garland will have been *de facto* rejected without any Senate consideration or vote. Unless this Court grants the injunctive relief I request, I will have been irreparably harmed because the senators I elected, and who are to represent me in the Senate, will have been denied a vote in the required Senate function of deciding whether to confirm Judge Garland.

The facts involved in this action have been attested to in the courts below and are undisputed, and the issues are straightforward:

1) Does the Constitution require the Senate to participate, by a vote of the full body, in the nomination and appointment of Supreme Court justices, specifically Judge Garland?

2) If the Senate must vote on Supreme Court nominations, and a small group of senators prevents that vote, *de facto* rejecting Judge Garland's appointment, does that diminish the effectiveness of my vote for senators who were blocked from casting their constitutional "one vote" on the Garland nomination?

I believe the answer to both these two questions is "yes," and that therefore the injunctive relief I request by this *Emergency Application* should be granted. In other words, when the entire Senate votes, my senators must be provided "one vote." And in the specific situation of Supreme Court nominations, the Constitution requires that the entire Senate must vote.

The relief I am seeking is an injunction pending appellate review that would require Respondents to take those actions, prior to the end of President Barack Obama's second term on January 20, 2017, necessary for the entire Senate to vote on whether to provide advice and consent for the appointment of Judge Merrick Garland to the Supreme Court. An immediate injunction is needed because otherwise, on January 20, 2017, President Barack Obama's second and final term will end, the nomination of Judge Garland will have been rejected by default, and I will have been forever deprived of my right as a voter to Senate representation on this very important nomination.

My specific request is that the Court issue an injunction requiring:

1) Respondent McConnell to schedule a vote of the full Senate, before the end of President Obama's term on January 20, 2017, on whether to provide advice and consent for the nomination of Judge Merrick Garland to the United States Supreme Court,

2) Respondent Grassley to hold any necessary Judiciary Committee hearings prior to the vote of the full Senate,

3) Respondent U.S. Senate, as a body, to vote before January 20, 2017 on whether it will provide its advice and consent to the nomination of Judge Garland to the United States Supreme Court, and

4) Respondents to promptly provide the Court and Applicant with a schedule to accomplish the above three requirements.

The relief I am requesting should provide sufficient time, approximately one month, for the Senate to vote. Historically, the average time for a Supreme Court nominee to be either confirmed, rejected or withdrawn has been 25 days.[1]

JURISDICTION

On August 25, 2016, I filed a *Petition* (aka *Complaint*) in the D.C. federal district court seeking declaratory and injunctive relief that would cause the Senate to vote on the pending nomination of Judge Merrick Garland to the United States Supreme Court.[2] The relief I requested was pursuant to 28 U.S.C. §2201 (declaratory judgments), 28 U.S.C. §2202 (further relief), 28 U.S.C. §1331 (federal question) and 28 U.S.C. §1651 (all writs). On November 17, 2016, the district court dismissed the *Petition* for lack of Article III standing and denied a pending motion for preliminary injunction. The district court's *Order* and *Memorandum Opinion* are Exhibit 3 to this *Application*.

The next day, on November 18, 2016, I filed a *Notice of Appeal* to the U.S. Court of Appeals for the D.C. Circuit, and on November 22, 2016 I filed an *Emergency Motion for*

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[1] "Supreme Court Nominees Considered in Election Years Are Usually Confirmed," *New York Times*, by Aisch, Keller, Lai and Yourish, 3/16/16

[2] DDC Case No. 16-cv-01729-RC

Injunction Pending Appeal.[3] That appellate court had jurisdiction pursuant to 28 U.S.C. §1291. On December 7, 2016, the appellate court granted Defendants' (Respondents) motion for summary affirmance of the district court dismissal (Exhibit 4).

This Court has jurisdiction to consider this *Emergency Application for Injunction Pending Appellate Review* pursuant to the All Writs Act, 28 U.S.C. §1651, and 28 U.S.C. §1254. 28 U.S.C. §1651(a) provides that the "Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Aside from assuring that my injury does not become irreparable while appellate review proceeds, an injunction will also aid in the appellate jurisdiction of this Court by protecting the viability and strength of the Court from Respondents' obstruction of an orderly replacement of justices. The plain language of §1651 encompasses such a broad reading.[4] The injunction I seek by this *Emergency Application* would have the same effect, with respect to the nomination of Judge Garland, as a writ of mandamus.

While there is some case law holding that courts may not issue injunctive relief in the form of a *writ of mandamus* against Congress,[5] the issue is unsettled and my position is that the current situation warrants that form of extraordinary relief. In the past, federal courts have issued mandamus against other branches of government when those branches neglected a clear legal duty. For example, in *In re Aiken County, et al.,* the D.C. Circuit Court of Appeals held, in granting a petition for a writ of mandamus against the Executive Branch, that:

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[3] CADC Case No. 16-5340

[4] See, §45:2 *Sutherland Statutory Construction*

[5] See, e.g. *Liberation News Service v. Eastland*, 426 F.2d 1379, 1384 (2d Circuit 1970)

> This case has serious implications for our constitutional structure. It is no overstatement to say that our constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard federal law in the manner asserted in this case....[6]

Similarly, in *American Hospital Ass'n v. Burwell* the D.C. Circuit discussed the use and availability of mandamus relief, and the circumstances and equities under which it would be granted:

> In the end, although courts must respect the political branches and hesitate to intrude on their resolution of conflicting priorities, our ultimate obligation is to enforce the law as Congress has written it. Given this, and given the unique circumstances of this case, the clarity of the statutory duty will likely will require issuance of the writ if the political branches have failed to make meaningful progress within a reasonable period of time – say, the close of the next appropriations cycle. *Cf. In re Aiken...* [7]

If enforcement of a statute can warrant mandamus, enforcement of my constitutional rights as a voter, and the duty to protect the structural safeguards of the federal government, is even more compelling.

In *Marbury v. Madison,*[8] Justice Marshall described the history and use of writs of mandamus, and wrote:

> [T]he case of *The King v. Baker et al.* states with much precision and explicitness the cases in which the writ may be used.... "this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one."

Marbury at 168-9. The circumstances described in Justice Marshall's opinion apply to the current situation and weigh in favor of the Court exercising its authority to provide a remedy to preserve "justice and good government."

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[6] In *In re: Aiken County, et al.*, 725 F.3d 255,259 and 266-7 (D.C. Circuit 2013), the U.S. Court of Appeals - D.C. issued a writ of mandamus against the executive branch, specifically the Nuclear regulatory Commission, compelling it to proceed with a legally mandated licensing process.

[7] *American Hospital Ass'n v. Burwell*, 812 F.3d 183 (D.C. Cir. 2016)

[8] *Marbury v. Madison*, 5 U.S. 137(1803)

BACKGROUND AND PROCEDURAL HISTORY

Supreme Court Justice Antonin Scalia died on February 13, 2016, creating a vacancy on the nine-member U.S. Supreme Court. On that same day Senate Majority Leader McConnell issued a statement saying: "this vacancy should not be filled until we have a new President."[9]

On February 23, 2016, an eleven-member majority of the Senate Judiciary Committee signed a letter to Leader McConnell stating that "this Committee will not hold hearings on any Supreme Court nominee until after our next President is sworn in on January 20, 2017" (Exhibit 1). By Senate rules, the Judiciary Committee provides recommendations to the full Senate on judicial nominees before those nominees are considered and voted upon by the Senate.[10] So, unless reversed, the February 23rd letter precludes Senate action, ever, on President Obama's nominee, and divests the President of his appointment power for nearly one-fourth of his four-year term.

On March 16, 2016, pursuant to Article II Section 2 of the U.S. Constitution, President Barack Obama nominated Merrick Garland, Chief Judge of the U.S. Court of Appeals for the D.C. Circuit, to fill the Supreme Court vacancy caused by Justice Scalia's death.

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[9] https://www.facebook.com/mitchmcconnell/posts/1021148581257166; see also "Republicans rule out replacing Antonin Scalia until new president is elected," by Stephen Dinan and Dave Boyer, *The Washington Times*, February 13, 2016; "McConnell and Grassley: Democrats shouldn't rob voters of chance to replace Scalia" by Mitch McConnell and Chuck Grassley, *The Washington Post*, February 18, 2016.

[10] The Senate Judiciary Committee recommends to the full body whether the Senate should advise and consent to a nomination by the President to fill a Supreme Court vacancy. Rule XXXI of the Standing Rule of the Senate (Rev. 2013) states: "When nominations shall be made by the President of the United States to the Senate, they shall, unless otherwise ordered, be referred to appropriate committees; and the final question on every nomination shall be, 'Will the Senate advise and consent to this nomination?'"

On June 21, 2016, the American Bar Association Standing Committee on the Federal Judiciary, after a months-long investigation, unanimously gave Judge Garland its highest rating of "Well-Qualified." In its June of 2016 newsletter, following the release of its rating, ABA President Paulette Brown was quoted:

> It is now imperative that the Senate fulfills its constitutional responsibilities to consider and act promptly on the Supreme Court nominee. While the Court continues to function, its 4-4 decisions do not establish precedent and leave open questions on issues that are vital to the lives of everyday people.[11]

As of December 10, 2016, Judge Garland's nomination had awaited Senate action for 270 days – the longest time, by far, for such a nomination in U.S. history. Prior to Judge Garland, the average time for a Supreme Court nominee to be either confirmed, rejected or withdrawn was 25 days, and the longest confirmation process was 125 days, for Justice Brandeis in 1916.[12]

This *Emergency Application* stems from a *Petition* (aka *Complaint*) that I filed D.C. district court on August 25, 2016 (Case No.16-cv-1729-RC). In that district court case I maintained that I suffered a diminished effectiveness of my vote for United States senators as a result of Respondents' conduct. Specifically, I asserted that the Constitution requires the Senate to vote on Supreme Court nominations and that, because my senators had been prevented by other senators from casting their 17th Amendment "one vote," then my injury is actual, specific and not common to all citizens.

To remedy that injury, I asked the court to declare that the full Senate must determine, within a reasonable time, whether to provide advice and consent to Judge

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[11] http://www.americanbar.org/publications/governmental_affairs_periodicals/washington letter/2016/june/garland.html

[12] "Supreme Court Nominees Considered in Election Years Are Usually Confirmed," *New York Times*, by Aisch, Keller, Lai and Yourish, 3/16/16

Garland's nomination and appointment. I also asked the court to require the Senate to make that determination.

On November 17, 2016 the district court dismissed the case I filed, finding that I lacked standing to bring my claims because my injury was generalized, abstract and common to all citizens (Exhibit 3). The Court made its findings without addressing the threshold question of whether the Senate must vote on Supreme Court nominees, which I believe is critical to determining the nature of the injury I have suffered. On November 18, 2016, I filed a *Notice of Appeal* and on November 22, 2016 I asked the Court of Appeals for the District of Columbia Circuit to issue a preliminary injunction requiring the Senate to vote on Judge Garland's nomination. On December 7, 2016, in Case No. 16-5340, the Court of Appeals granted summary affirmance of the district court dismissal (Exhibit 4).

The Defendants/Appellees in the lower court cases are the Respondents to this *Application*: Senator Mitchell McConnell, Senator Charles Grassley and the United States Senate.[13]

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[13] *Applicant* Steven S. Michel is a United States citizen, a resident of Santa Fe County in New Mexico, and a registered voter in that county of New Mexico. In recent elections Petitioner has voted for President Barack Obama and for the current U.S. Senators representing New Mexico, Thomas Udall and Martin Heinrich.

Respondent Addison Mitchell McConnell is a U.S. Senator from the State of Kentucky, and leader of the majority party in the Senate. As Majority Leader, Senator McConnell is able to schedule or refuse votes of the full Senate. He has refused to allow a vote on whether the Senate should provide advice and consent for the nomination of Judge Garland.

Respondent Charles Ernest Grassley is a U.S. Senator from the State of Iowa, and Chairman of the Senate Judiciary Committee. Pursuant to the Standing Rules of the Senate, all judicial nominations are referred to the Judiciary Committee, which then recommends to the full body whether it should provide advice and consent. As Chairman, Senator Grassley has refused to allow the Committee to consider the Supreme Court nomination of Judge Garland.

Respondent United States Senate is the constitutional body of the United States government that must determine whether to provide advice and consent for nominees to the Supreme Court. The Senate has not, and by the statements of a small group of senators that control Senate activity, will not undertake this constitutional duty with respect to the nomination of Judge Garland to the Supreme Court.

ARGUMENT

1) APPLICANT FACES CRITICAL AND EXIGENT CIRCUMSTANCES

It is important that this issue regarding Judge Garland's nomination be resolved in a time frame that permits any remedy to be meaningful and useful. For that to happen, the full Senate must determine whether to provide advice and consent for the appointment of Judge Garland before January 20, 2017,[14] the final day of President Obama's presidency.[15] After January 20th Judge Garland's nomination will no longer be viable, and the effectiveness of my vote for U.S. senators, so far as the question of confirming Judge Garland goes, will have been permanently diminished to zero. Consequently, unless the Court causes or directs the full Senate to determine whether to provide advice and consent for the Garland nomination before January 20, 2017, the harm to me will be irreparable. For obvious reasons, monetary damages, even if available, could not restore my voting power on this particular confirmation.

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[14] The Senate will in *(pro forma)* session to take action on nominations between now and January 20, 2017. The Senate calendar includes *pro forma* sessions every 3 days (excluding Sundays) between now and January 3, 2017, after which time the 115th Congress convenes: https://democrats.senate.gov/2016/12/10/schedule-for-pro-forma-sessions-and-tuesday-january-3-2017/#.WE2K91xvnGs The *pro forma* sessions are intended, at least in part, to preclude recess appointments, and therefore must be capable of confirming nominees. In *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2574 (2014), this Court concluded that, for purposes of the Recess Appointments Clause, "the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business."

[15] While Senate Standing Rule XXX1 calls for nominations to be returned to the President if not acted upon by the Senate during a particular session, the obvious purpose was to address situations where there was insufficient time for the Senate to act – not to provide a loophole to reject a nomination without Senate consideration. Despite this rule, there is no legal or constitutional foundation for a nomination to expire by inaction.

Of course if the Garland nomination is withdrawn for whatever reason, then the injunctive relief I request would be moot.

2) THE LEGAL RIGHTS OF APPLICANT ARE INDISPUTABLY CLEAR

The logic underlying the issue I have raised, and injury I have suffered, is simple, compelling and clear. When the entire Senate votes, the 17th Amendment requires that my Senators be provided "one vote."[16] To deny my Senators their "one vote" allotment diminishes the effectiveness of my vote for those senators just as if they were never elected or seated. In the specific case of the Supreme Court nomination of Judge Garland, the Constitution requires that the entire Senate must vote. Therefore, if my senators are not allowed to vote, I have been injured in a specific, concrete and particularized way not shared by voters in states with senators who, by blocking Senate action, achieve their desired rejection of that nomination.

To illustrate my claim, suppose that prior to voting on whether to consent to Judge Garland's appointment, a majority of senators decided that New Mexico's senators would not be allowed to vote on that confirmation. That would clearly be an unconstitutional action under the 17th Amendment, which requires that each senator have "one vote." The issue then becomes who, if anyone, has been injured by that deprivation. I believe it is equally clear that New Mexico voters, including me, would be the ones injured with a loss of effectiveness of their vote. That would be an actual and particular injury to myself and other New Mexico voters.

The facts underlying my *Application* are the same as just described – but on steroids. Twelve senators have procedurally blocked 88 senators from having a vote on whether to confirm Judge Garland.

[16] U.S. Constitution, 17th Amendment: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote...."

I understand that the injunctive relief I am asking the Court to provide is extraordinary: instruct the Senate to vote by a certain time on a Supreme Court nominee. But the situation at hand is also extraordinary, and unless remedied will irreparably injure me and threaten the viability of our three branches of government and our constitutional separation of powers.

a) Applicant has standing

When a group of senators blocks Senate consideration of a Supreme Court nominee, and senators representing me are prohibited from voting, I am deprived of the effectiveness of my constitutionally provided vote for United States senators. The 17th Amendment of the United States Constitution provides:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote....

(Emphasis added). This constitutional provision vests citizens with the right to vote for and elect senators who are each to have one vote in Senate actions. The 17th Amendment makes New Mexico's senators my elected representatives, who serve for my benefit.[17] Diminishing the "one-vote" power of elected senators is a specific injury-in-fact to voters such as me, of a nature long recognized as sufficient to establish standing. In *Dept. of Commerce. v. U.S. House of Representatives*[18] this Court held:

> Appellee Hoffmeister's expected loss of a Representative to the United States Congress undoubtedly satisfies the injury-in-fact requirement of Article III standing. In the context of apportionment, we have held that voters have standing to challenge an apportionment statute because "[t]hey are asserting 'a

[17] *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1863-4 (1995)
[18] *Dept. of Commerce et al. v. U.S. House of Representatives et al.*, 525 U.S. 316, 331-2 (1999)

plain, direct and adequate interest in maintaining the effectiveness of their votes.'"

It is important to recognize that the harm I am claiming is different from the generalized harm that has precluded voter standing in situations where, for example, without a vote of the full body the Senate declines to consider legislation. I understand that my voting power is not necessarily diminished when the Senate does not consider legislation that is within its discretion to act, or not act, upon. My voting power *is* diminished, however, when my senators are procedurally blocked by other senators from voting on items that the full Senate *must* vote on – such as whether to provide advice and consent for a Supreme Court nominee. When the entire Senate votes, my senators must be provided "one vote." And the Constitution requires the entire Senate to vote on Supreme Court nominees.

1. **When the President nominates a person to fill a Supreme Court vacancy, the Senate as a body must, within a reasonable time, vote to determine whether to provide advice and consent.**

The Senate cannot ignore a Supreme Court nomination. It must participate in the appointment process. The Framers of the Constitution intended the *entire* Senate to vote on Supreme Court nominees. This is supported by the Constitution's language, the Framer's contemporaneous writings, and the history of how the Nominations and Appointments Clause[19] has been administered over time.

The President and the Senate share the power and duty to fill vacancies on the Supreme Court. The U.S. Constitution, Article II Section 2, provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of

[19] U.S. Constitution, Article II, Section 2

the supreme Court...." To the extent there is ambiguity as to what the "advice and consent" role of the Senate requires, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 5 U.S. 137, 177 (1803).

The Constitution's Article II, Section 2 establishes the inter-dependent roles of the President and Senate in filling Supreme Court vacancies. The President shall nominate, *and by and with* the Senate's advice and consent, shall appoint. When read in its entirety, Article II Section 2 clarifies that the appointment of justices to the Supreme Court is a power and duty *jointly* vested in the President and the Senate. This clarity is confirmed by the final clause of that section which states that, unlike the Supreme Court, the appointment of other officers may, by law, vest in the President *alone*:

> [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint... Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. (Emphasis added)

When the Senate refuses to participate, the constitutional process breaks down and the President is divested of his power to appoint. Extrapolating, if the Senate entirely neglected its advice and consent role, it would procedurally dismantle the judiciary. That does not make sense.

Edmond v. United States[20] decided by a unanimous Supreme Court, explains why the Senate is *required* to participate in the appointment process. Justice Scalia wrote:

> [T]he Appointments Clause of Article II is more than a matter of "etiquette or protocol"; it is among the significant structural safeguards of the constitutional scheme. By vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the Appointments Clause prevents congressional encroachment upon the Executive and Judicial Branches.... The

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[20] 520 U.S. 651 (1997)

> President's power to select principal officers of the United States was not left unguarded, however, as Article II further requires the "Advice and Consent of the Senate." This serves both to curb Executive abuses of the appointment power... and "to promote a judicious choice of [persons] for filling the offices of the union," The Federalist No. 76, at 386–387. By requiring the joint participation of the President and the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one.[21]

Alexander Hamilton explained in *The Federalist* that "[t]he ordinary power of appointment is confided to the President and Senate *jointly*...."[22] And, "[the Senate] can only ratify or reject the choice [the President] may have made."[23] Any fair reading of the *The Federalist* papers recognizes that *inaction* was not an option even contemplated by the Framers. Hamilton's writings also explain, at least in part, why the *entire* Senate must participate in the appointment process. He basically says that while "some individuals" in the Senate might be improperly influenced, if the entire "body" is acting there will always be a "large proportion" of "independent and public-spirited" senators to preserve the integrity of the process:

> But it is as little to be doubted that there is always a large proportion of the body which consists of independent and public-spirited men who have an influential weight in the councils of the nation... That it might therefore be allowable to suppose that the executive might occasionally influence some individuals in the Senate, yet the supposition that he could in general purchase the integrity of the whole body would be forced and improbable.[24]

Moreover, there was a reason why the Framers vested the appointment power in the President *and the Senate*, and not the electorate or the House of Representatives. The Senate was perceived to be a stable and deliberative body. Unlike the House of Representatives, it was not "so fluctuating" and "numerous" as to threaten an orderly

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[21] Ibid. at 659-60 (emphasis added)
[22] *The Federalist* No. 67
[23] *The Federalist Papers* No. 66
[24] *The Federalist,* No. 76.

appointment process – which, if assigned to the House, would invite "infinite delays and embarrassments." The Framers expected that the Senate would exhibit "deliberation" and "circumspection," and serve as an "excellent check" to assure that Presidential nominees were not governed by "private inclinations and interests."[25] The current situation in the Senate is the complete opposite of what the Framers intended – with a small group of powerful Senators obstructing an orderly nomination and appointment process to fill Supreme Court vacancies.

In addition to the Framer's contemporaneous expectation that full Senate participation was to be part of the jointly-administered Appointments Clause, the history of how that Clause has been administered supports the interpretation that a Senate up-or-down vote on nominees is required within a reasonable time.

The recent Supreme Court case of *NLRB v. Canning*[26] supports the premise that the Senate as a body must participate in appointments and decide whether to provide advice and consent. In *NLRB* the Court was tasked with interpreting the Recess Appointments Clause of the Constitution, which is part of the same Nominations and Appointments section at issue in this case. A question before the Court was: When does a Senate adjournment becomes a "recess" that triggers the President's power to temporarily appoint officials without Senate advice and consent? The Constitutional language surrounding recess appointments was sparse and ambiguous. In its decision, the Court explained that "*in interpreting the Clause, we put significant weight upon historical practice* (emphasis in original)."[27] The Court

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[25] *The Federalist* Nos. 70, 76, 77
[26] 134 S. Ct. 2550 (2014)
[27] *NLRB* at 2559

> confirmed that "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions" regulating the relationship between Congress and the President. *The Pocket Veto Case,* 279 U.S. 655, 689 (1929).[28]

The Court also held:

> That principle is neither new nor controversial. As James Madison wrote, it "was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them." . . . . And our cases have continually confirmed Madison's view.[29]

The Court then looked to the history of use of the Recess Appointments Clause, from 1789 to the present, to determine when an absence would became a "recess":

> . . . the President has consistently and frequently interpreted the word "recess" to apply to intra-session recesses, and has acted on that interpretation. The Senate as a body has done nothing to deny the validity of this practice for at least three-quarters of a century. And three-quarters of a century of settled practice is long enough to entitle a practice to "great weight in a proper interpretation" of the constitutional provision. *The Pocket Veto Case,* 279 U.S., at 689.

This same type of historical analysis demonstrates that the Nominations and Appointments Clause[30] requires full Senate participation that either confirms or rejects a nominee within a relatively short period of time.

The U.S. Senate's compilation of the disposition of every Supreme Court nomination from 1789 until the present shows that during that time there were 161 nominations (Exhibit 2). Of those, only nine nominations received "no action," and of those, four nominees were nevertheless confirmed or refused within months. Of the remaining five, one vacancy in 1866 was eliminated because the seat was abolished and the other four occurred in the short period between 1844 and 1853. In sum, but for a short *ante bellum*

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[28] NLRB at 2559
[29] *NLRB* at 8
[30] U.S. Const. Art. II, Sec. 2

period in the mid-1800s, the practice of the Senate has always been to consider and act expeditiously to confirm or reject a Supreme Court nominee. This history is at least as consistent and compelling as the history relied upon by the *NLRB* Court, and demonstrates that considering and acting on Supreme Court nominations within a reasonable time is constitutionally required. Contrary to what Respondents have alleged in the lower courts, a "reasonable time" is a standard that courts can ascertain.

The Supreme Court has established judicially manageable standards to address Constitutional gaps similar to the one at issue in this case. Again, in *NLRB v. Canning*, the Court looked to historical practice to determine what a presumptively appropriate time would be for a Senate absence to become a "recess." The Court there held that

> . . . in light of historical practice, that a recess of more than 3 days, but less than 10 days is presumptively too short to fall within the Clause. We add the word "presumptively" to leave open the possibility that some very unusual circumstance – a national catastrophe, for instance, that renders the Senate unavailable but calls for an urgent response – could demand the exercise of the recess-appointment power during a shorter break. (It should go without saying – except that JUSTICE SCALIA compels us to say it – that political opposition would not qualify as an unusual circumstance.)[31]

By the same token Exhibit 2 (from verified pleadings in the courts below), a U.S. Senate compilation of the history of Supreme Court nominations in the United States, provides ample information for a Court to establish a presumptively reasonable time for the Senate to act on nominations. As discussed earlier, the longest Supreme Court nomination process prior to Judge Garland was 126 days, and the average time for a Supreme Court nomination to be vetted and resolved was 25 days.[32] While the Court need not decide now what a presumptively "reasonable time" for purposes of this *Emergency*

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[31] *NLRB* at 21

[32] "Supreme Court Nominees Considered in Election Years Are Usually Confirmed," *New York Times*, by Aisch, Keller, Lai and Yourish, 3/16/16

Application, it can certainly reject Respondents' position that "never" is an acceptable time-frame.

In 1998, in response to the slowing of the judicial confirmation process, former Chief Justice Rehnquist noted the obvious, "[t]he Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry, it should vote him up or vote him down."[33] In the present situation, we are not just dealing with a slowing, we are dealing with a complete stoppage.

2. **The lower court dismissals were in error. In blocking consideration of Judge Garland's nomination, Respondents denied New Mexico senators their 17th Amendment "one vote" in the confirmation process, and consequently injured Applicant by diminishing the effectiveness of his vote for senators relative to voters in states whose senators blocked Senate action.**

Both the district court and court of appeals determined that my claims should be dismissed because I did not suffer a constitutionally-sufficient injury to establish Article III standing. Both courts, however, reached their conclusion without ever addressing the threshold question of whether the Senate must vote within a reasonable time on duly-nominated Supreme Court justices. If a vote is required on Judge Garland's nomination, as I have argued, and New Mexico's senators have been blocked from voting by a few senators seeking to achieve a *de facto* rejection of the Garland nomination, the effectiveness of my vote for New Mexico senators has been diminished in a way not shared by other citizens.

The district court denied my preliminary injunction motion and dismissed my *Petition* on the basis that I lacked standing because my "alleged injuries are not sufficiently

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[33] "Senate Imperils Judicial System, Rehnquist Says," by John H. Cushman, Jr., *New York Times,* January 1, 1998, A1

individualized," i.e. they were too general and common to all citizens. (Exhibit 3). While the court was correct that a claimed Article III injury should not be generalized or common to all citizens, it neglected to recognize that a sufficient injury may be common to many citizens. And that is the case with the injury I have suffered.

While the Court of Appeals (D.C.) summarily affirmed the district court decision, it did so on the similarly erroneous conclusion that my injury is not "concrete and particularized," and is "wholly abstract and widely dispersed." Aside from *Lujan,* the appellate court relied upon *Raines v. Byrd*, 521 U.S. 811, 829 (1997) and *FEC v. Akins*, 524 U.S. 11, 23-24 (1998) (Exhibit 4). Rather than precluding my standing, however, I believe those two cases support my standing.

In *Raines* the Court was faced with a lawsuit by members of Congress stemming from the Line Item Veto Act. The Court there determined that the lawsuit should be dismissed because at that time there was not a "sufficiently concrete injury" – no vetoes had yet occurred. Of critical importance, however, is that two months later when the President actually used the line item veto on particular legislation, the court agreed that the injury had become particularized enough to establish Article III standing.[34] Moreover, *Raines* found that while an "institutional" injury to members of congress was not specific enough, a claim by an individual such as myself, had one been made, could suffice:

> .... In sum, appellees have alleged no injury to themselves as individuals (contra, *Powell*), the institutional injury they allege is wholly abstract and widely dispersed (contra, *Coleman*), and their attempt to litigate this dispute at this time and in this form is contrary to historical experience.[35]

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[34] *Clinton v. City of New York*, 524 U.S. 417 (1998)
[35] *Raines* at 828-9

Similarly, in *Federal Elections Commission v. Akins,*[36] the Court held that "an injury.... widely shared ... does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an 'injury in fact.'"[37] The fact that my injury is shared by other citizens, which I do not contest, does not defeat standing.[38] In determining that the voters in *FEC* had standing, the Court held:

> Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found "injury in fact".... This conclusion seems particularly obvious where (to use a hypothetical example) large numbers of individuals suffer the same common-law injury (say, a widespread mass tort), or where large numbers of voters suffer interference with voting rights conferred by law. [39]

In my situation I have not asserted an abstract or speculative situation where the effectiveness of my vote *could* be diminished under some particular future scenario. Rather, the New Mexico senators I voted for have been denied their "one vote" on a particular matter that *the full Senate* is required to consider: whether to consent to the nomination of Merrick Garland to the Supreme Court. While Respondents might claim that there is no actual, particularized injury because there has been no vote, this ignores the reality that 12 senators have caused an outcome (withholding consent) that constitutionally requires a vote of the majority of the Senate to accomplish. Certainly voters in Utah and Texas, whose four senators signed the letter blocking Senate action (Exhibit 1), have not been harmed –

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[36] 524 U.S. 11, 24 (1998)

[37] See also *Pye v. United States,* 269 F.3d 459, 469 (4th Cir. 2001), which held that "[s]o long as the plaintiff... has a concrete and particularized injury, it does not matter that legions of other persons have the same injury."

[38] In his concurrence in *Lujan v. Defenders of Wildlife,* Justice Kennedy explained: "While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way." *Lujan* at 581. See also *Warth v. Seldin,* 422 U.S. 490, 501 (1975).

[39] *FEC v. Akins* at 24

they have obtained extraordinary voting strength far more than their 1/100 constitutional allotment.

This Court has explained that my assertion of "a plain, direct and adequate interest in maintaining the effectiveness of [my] votes [is] not merely a claim of the right, possessed by every citizen, to require that the Government be administered according to law.... The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Baker v. Carr.* [40]

b) This case is justiciable, and the claims made do not impinge on either the "Speech or Debate Clause" of the U.S. Constitution or the "Political Question Doctrine."

Justiciability: In deciding whether a claim is justiciable, two findings must be made: 1) that "the duty asserted can be judicially identified and its breach determined," and 2) that an effective remedy can be fashioned. *Baker v. Carr.*[41] In the action below, I had asked the district court to determine that the Senate has a non-discretionary duty to determine whether it will provide advice and consent to the Supreme Court nomination of Judge Garland, and that the Senate has breached that duty. I also requested that the district court grant both declaratory and mandamus relief to remedy that breach of duty. Granting that relief in a timely manner would cause the Senate to consider Judge Garland's nomination and would effectively remedy the situation. In *Powell,* the Court determined that declaratory relief alone could satisfy the justiciability requirement.[42]

[40] 369 U.S. 186, 208 (1962)
[41] 369 U.S. 186, 198 (1962)
[42] *Powell v. McCormack,* 395 U.S. 486, 516-518 (1969)

Speech or Debate Clause: The "Speech or Debate Clause" of the U.S. Constitution[43] provides that "for any Speech or Debate in either House, [senators or representatives] shall not be questioned in any other Place." The "Speech or Debate Clause" is not a bar to this action against Respondents Senator McConnell and Senator Grassley. That clause only provides protection from lawsuits against legislators resulting from "words spoken in debate… [c]ommittee reports, resolutions, and the act of voting… [and] things done generally in a session of the House by one of its members in relation to business before it."[44] The *refusal to act* by a handful of senators, in order to procedurally prevent the Senate from performing its duty to participate in the judicial appointment process, is not an activity "done generally" by senators "in relation to business before" them. In addition, "it is clear from the language of the Clause that protection extends only to an act that has already been performed." *U. S. v. Helstoski*.[45] Here, the issue relates to Senate inaction.

Notably, the Supreme Court explained in *Gravel v. United States* that the Speech or Debate Clause protections are limited:

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House…. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech and debate in either House, but "only when necessary to prevent indirect impairment of such deliberations.[46]

Respondents have argued below that the "Speech or Debate Clause" is an absolute bar to my claims. According to Respondents, because my claims relate to the nomination and appointment of a Supreme Court justice, and because the conduct complained of is

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[43] U.S. Constitution, Article I, Section 6
[44] *Powell* at 502
[45] 442 U.S. 477, 490 (1979)
[46] *Gravel v. United States*, 408 U.S. 606, 625 (1972)

legislative in nature, any action against Respondents is barred. It is not as simple as Respondents suggest.

First, the Constitution does not assign the Senate a role of non-participation in the appointment process. The Senate's role is to participate. Conduct by Respondents in furtherance of non-participation is not a legitimate legislative activity that would be protected by the Speech or Debate Clause.

Second, the Speech or Debate Clause does not apply to the Senate itself, and *Common Cause v. Biden*[47] does not preclude action against the Senate itself, as Respondents have previously contended. Just the opposite. *Common Cause* suggests that an action against the Senate was not only permissible, but necessary: "In short, Common Cause's alleged injury was caused not by any of the Respondents, but by an 'absent third party' - the Senate itself. [CITE]. We therefore lack jurisdiction to decide the case."[48] *Powell v. McCormack* left open the question of whether the Speech or Debate Clause would bar an action against individual members of Congress if no other remedy was available.[49]

Political Question Doctrine: The premise underlying the Political Question Doctrine is the desire to prevent federal courts from deciding policy issues. This doctrine "helps to preserve the separation of powers by ensuring that courts do not overstep their bounds."[50] The political question doctrine is a "narrow exception" to the rule that the judiciary has a

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[47] 748 F.3d 1280 (D.C. Cir. 2014)

[48] *Common Cause* at 1285

[49] *Powell* at note 26: "Given our disposition of this issue, we need not decide whether, under the Speech or Debate Clause petitioners would be entitled to maintain this action solely against members of Congress where no agents participated in the challenged action and no other remedy was available."

[50] *Baker v. Carr* at 210

responsibility to decide cases properly before it.[51] While the resolution of issues involving a coordinate branch of government will sometimes have political implications, the judicial branch must not neglect its duty to "say what the law is" merely because its decision may have "significant political overtones." *Marbury v. Madison.*[52]

The political question doctrine rests in part on prudential concerns calling for mutual respect among the three branches of government. [53] The Supreme Court has repeatedly rejected the view that a claim is nonjusticiable simply because a court is called upon to resolve the propriety or constitutionality of the act of another branch of government.[54] A blanket rule against judicial "interference," which Respondents have seemed to advocate, threatens the independence of the judiciary and its co-equal and critical role in protecting against legislative encroachments on the people's rights and freedoms. [55]In *United States v. Ballin,* the Court found that the "[C]onstitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights." [56]

The Indiana case of *Monfort v. State*[57] explained "[t]he separation of powers provision exists not only to protect the integrity of each branch of government, but also to

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[51] *Zivotofsky ex rel. Zivotofsky v. Clinton,* 132 S. Ct. 1421, 1427 (2012).

[52] At 177; See also, *Japan Whaling Ass'n v. American Cetacean Soc'y,* 478 U.S. 221, 230 (1986).

[53] *Goldwater v. Carter,* 444 U.S. 996, 1000 (1979) (Powell, J., concurring); *Nixon v. United States,* 506 U.S. 224, 253 (1993) (Souter, J., concurring in judgment); *Conn. Coalition for Justice in Educ. Funding, Inc. v. Rell,* 295 Conn. 240, 255, 990 A. 2d 206 (2010).

[54] *Zivotofsky,* 132 S.Ct. at 1432 (Sotomayor, J., concurring)(citing *United States v. Munoz,* 495 U.S. 385, 390-91 (1990)); *see also Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952) (noting that a categorical rule of nonjusticiability because of possible interference with executive power, even in times of war, has never existed).

[55] *Stern v. Marshall,* 564 U.S. 462, 483 (2011) (Roberts, C.J.) (explaining that the framers demanded that the judiciary remain "truly distinct from both the legislature and the executive")

[56] *United States v. Ballin,* 144 U.S. 1, 5 (1892)

[57] *Monfort v. State,* 723 N.E.2d 407, 413 (Ind. 2000), quoting Alexander Hamilton in *The Federalist* No. 78.

permit each branch to serve as an effective check on the other two," with the courts being considered as "bulwarks of a limited Constitution, against Legislative encroachment."

In determining that there was no political question barring the courts from deciding the *Powell* case, the court defended its established role (at 549):

> Our system of government requires the federal courts on occasion to interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.... [I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution.

3. INJUNCTIVE RELIEF WILL AID THIS COURT'S APPELLATE JURISDICTION

Granting the injunctive relief requested by this *Application* under the All Writs Act[58] will aid the Court's appellate jurisdiction in two ways. First, and most clear, is that it will preserve my claim and avoid irreparable harm in a manner that does not harm Respondents, and in fact serves the public interest. This will assist the Court's certiorari jurisdiction.[59] Second, it will help preserve the viability and strength of the appellate role of the Supreme Court by reinstating an orderly and timely nomination and appointment process for new justices.

As discussed previously, after January 20, 2017, the injury associated with the diminished effectiveness of my vote will be irreparable. The injury is the loss of my vote's effectiveness, not the outcome that may or may not be achieved by a vote on Judge Garland's appointment.

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[58] All Writs Act, 28 U.S.C. 1651

[59] The Court's authority under the Act "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may later be perfected." *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966)

In addition, it cannot be ignored that obstruction of the Senate confirmation process threatens the judiciary and this Court's appellate role. As was stated in an N.Y.U. Law Review article by Lee Renzin in 1998:

> The characteristics of the Senate that ostensibly enable it to make a vital contribution to the appointment process are rendered moot when the full Senate does not vote on nominees.... [T]he prospect of the Senate having the unilateral ability to dismantle the federal judiciary without a "check" – either by the people, through procedures designed to ensure accountability, or by the full Congress and the President, via bicameralism and presentment – is one which raises serious separation of power concerns. Simply put, Senators not only are infringing on the power of the other two branches, but they are doing so in a manner that robs the public of an opportunity to determine how their particular Senator feels about the nominees that reach the Senate. [60]

4. A BALANCING OF THE EQUITIES WEIGHS IN FAVOR OF AN INJUNCTION

a) An injunction will not harm other parties

While an injunction is necessary to protect my rights, causing the Senate to perform its Constitutionally-required role in the Supreme Court nomination process will not harm Respondents in any significant way. As I have stated throughout this action, I am not asking for a particular outcome of the confirmation process, only that the process itself be undertaken in a meaningful time-frame. The Senate may decide not to provide advice and consent for the Garland nomination, in which case the outcome will be the same as the current situation. Or, the Senate may vote as a body to confirm Judge Garland. If the Senate, by a majority vote, confirms the Garland nomination, there is again no harm to any party.

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[60] (citations omitted); "Advice, Consent, and Senate Inaction - Is Judicial Resolution Possible?" Lee Renzin, N.Y.U. Law Review, Vol.73:1739, Nov.1998 at 1757

Fulfilling its constitutional role can hardly be construed as a harm to any of the Respondents.

Nor would it be disrespectful of the Senate for the Court to require the Senate to undertake its constitutional role of advice and consent with respect to Judge Garland's nomination. *Powell v. McCormack* explained the issue well:

> Powell's right to sit would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of the respect due (a) coordinate (branch) of government, nor does it involve an 'initial policy determination of a kind clearly for nonjudicial discretion.' *Baker v. Carr*, 369 U.S. 217, 82 S.Ct. 691 at 710. Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.[61]

Finally, I would point out that the remedy I have requested is in fact consistent with Senate rules,[62] and how the Senate has historically administered Supreme Court nominations. Those rules call for nominations to be referred to the Judiciary Committee, which determines whether to recommend that a nominee be confirmed or rejected. The nomination then proceeds to the Senate floor, where the entire Senate votes on whether to confirm or reject a nominee. Nowhere do Senate rules suggest that a nomination may be forever ignored, and not even brought to the Senate floor for debate. Granting this *Emergency Application* would simply have the Court require the Senate to perform its Constitutional duty.

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[61] *Powell v. McCormack*, 395 U.S. 486, 548-9 (1969)

[62] Rule XXXI of the Standing Rules of the Senate

b) An injunction serves the public interest

In the particular situation of this *Emergency Application*, granting the injunction I have requested would serve the public interest for a number of reasons.

First, requiring the Senate to vote on Judge Garland's nomination would help to *restore* the balance of power among the three branches of our federal government. Respondents' refusal to consider the nomination of Judge Garland has adversely impacted all three of the branches:

> (1) the President is deprived of his power to appoint judges to the United States Supreme Court;
>
> (2) the Senate is unable to fulfill its "advice and consent" role in the judicial appointment process because senators are not allowed to vote on whether to provide advice and consent; and
>
> (3) the Supreme Court is deprived of its statutorily-prescribed nine justices,[63] creating a situation where the Court is unable to resolve important issues and establish a uniform system of laws throughout the United States.

Justice Kennedy has said that "It remains one of the most vital functions of this Court to police with care the separation of the governing powers."[64] In his dissent in *Morrison v. Olson*, Justice Scalia argued that, in the context of a separation of powers challenge to an action of Congress, the Court does *not* owe Congress the same level of deference that would be afforded when reviewing legislation.[65]

Second, granting the injunction would halt a further erosion of the separation and balance of powers. Recently, in a Wall Street Journal opinion article, President Obama explained the constitutional crisis that the country is facing, and the threat it poses to the

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[63] 28 U.S.C. §1

[64] *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J. concurring)

[65] *Morrison v. Olson*, 487 U.S. 654, 704-5 (1988) (Scalia, J., dissenting)

balance of power among the three branches of government. He discussed that if a group of senators

> refuse even to consider a nominee in the hopes of running out the clock until they can elect a president from their own party, so that he can nominate his own justice to the Supreme Court, then they will effectively nullify the ability of any president from the opposing party to make an appointment to the nation's highest court. They would reduce the very functioning of the judicial branch of the government to another political leverage point.
>
> We cannot allow the judicial confirmation process to descend into an endless cycle of political retaliation. There would be no path to fill a vacancy for the highest court in the land. The process would stall. Court backlogs would grow. An entire branch of government would be unable to fulfill its constitutional role. And some of the most important questions of our time would go unanswered.[66]

President Obama's forewarning appears to be valid. On October 17, 2016 Senator John McCain from Arizona was quoted as saying: "I promise you that we will be united against any Supreme Court nominee that Hillary Clinton, if she were president, would put up."[67] While a spokesperson for Senator McCain later walked that statement back, just prior to the November 8, 2016 election several other senators publicly suggested that the Senate could build on the obstruction of the Garland nomination and refuse to consider all Supreme Court nominees of a President, indefinitely.[68] This is a trend-line that threatens the judiciary and separation of powers, and must not go unchecked:

> In the past, when faced with novel creations of this sort, the Supreme Court has looked down the slippery slope – and has ordinarily refused to take even a few steps down the hill.

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[66] "Merrick Garland Deserves a Vote—For Democracy's Sake," by Barack Obama, President of the United States, *The Wall Street Journal*, July 17, 2016.

[67] DeBonis, Mike and Kane, Paul: "Supreme Court is an issue again after McCain suggests Clinton blockade," *The Washington Post*, October 17, 2016, https://www.washingtonpost.com/news/powerpost/wp/2016/10/17/supreme-court-is-an-issue-again-after-mccain-suggests-clinton-blockade/

[68] Senators McCain, Burr, Cruz and Cornyn. See, Fox, Lauren: November 2, 2016, http://talkingpointsmemo.com/dc/cornyn-won-t-say-if-gop-will-block-clinton-s-scotus-noms

Free Enterprise Fund, dissent at 700.[69] In *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.* 501 U.S. 252 (1991), Justice Stevens found that a congressional scheme permitting future encroachment of other branches must be nipped in the bud:

> The statutory scheme challenged today provides a blueprint for extensive expansion of the legislative power beyond its constitutionally confined role.... As James Madison presciently observed, the legislature 'can with greater facility, mask under complicated and indirect measures, the encroachments which it makes on coordinate departments.' Heeding this warning that legislative 'power is of an encroaching nature,' we conclude that the Board of review is an impermissible encroachment.[70]

Third, if the Senate votes on Judge Garland's nomination, citizens will be provided a voting record on a very important issue. Providing a voting record of senators serves the public interest because that record enables citizens to exercise their role as informed electors in a representative government.[71]

Fourth, granting the injunction may help restore the judiciary to its statutorily-prescribed levels. The degradation of the judiciary caused by Senate obstruction and inaction is not trivial. According to the Administrative Office of the U.S. Courts, judicial vacancies have been increasing to the point where, as of October 17, 2016, there were a total of 99 judicial vacancies in the federal court system, and 59 nominations pending. There are currently 35 "judicial emergencies" in the United States due to the Senate's delay, neglect and obstruction of the judicial nomination and appointment process. All of these numbers have increased significantly since I filed my original *Petition* in late August. A

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[69] *Free Enterprise Fund v. Accounting Oversight Board*[69] 537 F.3d 667, 700 (D.C. Cir. 2008) (reversed at 130 U.S. 477 (2010))

[70] *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.* 501 U.S. 252, 277 (1991)

[71] "Advice, Consent, and Senate Inaction - Is Judicial Resolution Possible?" Lee Renzin, N.Y.U. Law Review, Vol.73:1739, Nov.1998 at 1747-8

"judicial emergency" in federal court is a situation in which the courts are unable to keep pace with the cases before them. [72]According to the American Bar Association, the number of judicial vacancies existing at the end of the current 114th Congress will be among the highest ever.[73]

Fifth, an injunction that results in the confirmation of a ninth justice could specifically address the inability for the Supreme Court to decide important issues brought before it. Four consequential cases on the Supreme Court's 2016 docket were decided by default as a result of a 4-4 tie, which has the effect of affirming the lower court judgment.[74] When the circuit courts disagree, the Supreme Court must be able to resolve those disputes in order to provide a uniform system of laws throughout the United States. Otherwise, citizens may have different speech, due process and other rights depending on where in the United States they live. While there is no guarantee that requiring a Senate vote on the Garland nomination before January 20, 2017 would result in the confirmation of a ninth justice, it might.

Sixth, in deciding whether to grant the injunctive relief I have requested, the Court should assign value to the importance of individual claims like mine to preserving the

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[72] http://www.uscourts.gov/judges-judgeships; For Circuit Courts, it is defined as "any vacancy in a court of appeals where adjusted filings per panel are in excess of 700; or any vacancy in existence more than 18 months where adjusted filings are between 500 to 700 per panel." For District Courts it is defined as "any vacancy where weighted filings are in excess of 600 per judgeship; or any vacancy in existence more than 18 months where weighted filings are between 430 to 600 per judgeship; or any court with more than one authorized judgeship and only one active judge.

[73]http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014dec19_vacnomscons.authcheckdam.pdf

[74] *United States v. Texas*, No. 15-673; *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, No. 13-496; *Friedrichs v. California Teachers Association*, No. 14-915; *Hawkins v. Community Bank of Raymore*, No. 14-520.

structural safeguards of our democracy. At the end of his concurring opinion in *NLRB v. Canning*, 134 S. Ct. 2550, 2617 (2014), Justice Scalia wrote:

> It is not every day that we encounter a proper case or controversy requiring interpretation of the Constitution's structural provisions. Most of the time, the interpretation of those provisions is left to the political branches – which, in deciding how much respect to afford the constitutional text, often take their cues from this Court. We should therefore take every opportunity to affirm the primacy of the Constitution's enduring principles over the politics of the moment.

Similarly, in *Bond v. United States*, 564 U.S. 211, 222 (2014), the court held:

> Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well. In the precedents of this Court, the claims of individuals – not of Government departments – have been the principal source of judicial decisions concerning separation of powers and checks and balances.

See also, *Free Enterprise Fund v. Accounting Oversight Board*[75] 537 F.3d 667, 714 (D.C. Cir. 2008) (reversed at 130 U.S. 477 (2010)), (Kavanaugh dissent: "the separation of powers protects not simply the office and officeholders, but also individual rights. As Justice Kennedy has stated, 'Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.'")

Finally, aside from redressing my individual injury as a voter for New Mexico senators, there is also the larger public interest in redressing the fundamental unfairness to those citizens that elected Barack Obama as President in 2012. As of the date this *Application* is filed, Judge Garland's nomination will have been pending far longer than any other Supreme Court nominee in United States history. Unless remedied before the end of President Obama's term on January 20, 2017, the electorate that voted for President

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[75] 537 F.3d 667, 714 (D.C. Cir. 2008) (reversed at 130 U.S. 477 (2010))

Obama in 2012 will have been forever deprived of an outcome of the election – which was to provide President Obama with all of the powers and duties of the Presidency for the entirety of his four-year term, including the power to nominate and appoint Supreme Court justices.

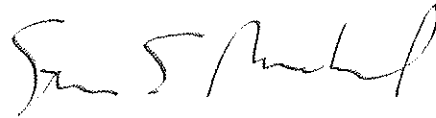
CONCLUSION

I have filed this *Emergency Application* because the effectiveness of my vote for United States senators has been diminished as a result of the obstruction of Respondents. That obstruction has denied the senators that represent me in the Senate of their ability to vote on whether to confirm the nomination of Judge Garland, and has provided the obstructing senators with extraordinary voting power, violating the 17th Amendment allocation of "one vote" per senator. This conduct has caused me specific, actual injury-in-fact sufficient to establish Article III standing. The injunction I request by this *Emergency Application* is the only remedy available to redress that injury and avoid irreparable harm.

WHEREFORE, for the foregoing reasons, I pray for a Court order granting this *Emergency Application for Injunction Pending Appellate Review,* and providing such other and further relief as the Court deems just and proper.

Dated: December 15, 2016

Respectfully submitted,



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