

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA)
)
Plaintiff-Appellee)
) No. 07-3729-cv
)
v.)
)
ROBERT L. SCHULZ;)
WE THE PEOPLE FOUNDATION FOR)
CONSTITUTIONAL EDUCATION, INC.;)
WE THE PEOPLE CONGRESS, INC.)
)
Defendants-Appellants)

**APPELLANTS’ REPLY IN SUPPORT OF
MOTION FOR STAY PENDING APPEAL**

Appellants Robert L. Schulz, who is pro-se, and We The People Foundation for Constitutional Education, Inc., and We The People Congress, Inc., who are represented by attorney Mark Lane (collectively, “Schulz” or “Defendants” or “Appellants”), state as follows:

THE GOVERNMENT’S NEW CLAIMS ARE FRIVOLOUS

With two exceptions, the Government begins with a re-statement of its false allegations about the distribution of the material in the Blue Folder - allegations the Government included in its complaint and motion for summary judgment as “facts” – “facts” that the Record shows were all (each and every one) effectively denied by Schulz with substantiated, non-conclusory documentary evidence. See especially Response to Statement of Material Facts (Docket # 21-24) and Motion for Reconsideration (Docket # 32 (the Docket Sheet misstates its content)).¹

¹ For instance, Defendants proved: the Blue Folder instructed people about how to legally stop “withholding,” not how to “opt out” of paying federal taxes; the 3,500 copies of the Blue Folder were distributed free of charge, not for money (donations or otherwise); Defendants did everything possible to continue distributing the material at NO COST, including making it available on their website for free download by anyone; they did not make any false

The significant exceptions are found in the footnote on page 5, repeated on page 9 and

10. For the first time, the Government has made the claim that Defendants' "customers":

"are encouraged to join a further scheme, also promoted by the defendants, involving a list of questions compiled by Schulz. The defendants contend that participants in the scheme need not file returns or pay taxes until the Government answers the questions. Within the last five months, the Court of Appeals for the District of Columbia Circuit rejected that argument in a suit brought by Schulz and his corporations. *We The People Foundation, Inc. v. United States*, 485 F.3d 140 (D.C. Cir. 2007). The defendants charge individuals a \$250 annual fee to participate in the scheme; employers may participate in the scheme for a \$500 annual fee. Over two thousand of the defendants' customers are plaintiffs in *We The People*." (Opposition, page 5, fn 2).

These claims were not presented in the District Court, are patently false, but are raised here in what Defendants argue is a clumsy, frivolous and desperate attempt by the Government to overcome Defendants' documentary evidence that Defendants have not operated as a commercial enterprise, that they gave the Blue Folder away at no cost, and that the Government's claim of harm caused by the distribution of the Blue Folder is totally groundless.

Obviously, the "further scheme" referred to is activity related to the Petitions for Redress of constitutional torts; that is, a program of encouraging people to claim and exercise their Rights under the First Amendment to seek a reconciliation of the differences between the way the Government is operating and certain prohibitions of the Constitution: the Iraq Resolution and the war powers clauses, the USA Patriot Act and the "privacy" clauses, the Federal Reserve System and the money clauses, and the direct, un-apportioned tax on labor and the tax clauses.²

statements about Social Security numbers; their material did not "threaten" employers; they did not make any fraudulent or misleading statements regarding frivolous tax theories.

² Tens of thousand of people signed the four proper Petitions for Redress of constitutional torts. The Petitions were properly served on the leaders of the Executive and Legislative branches in November of 2002 (four months before the U.S. applied its armed forces in hostilities in Iraq). The remedies sought are answers to questions prepared for Defendants by two of the nation's best constitutional scholars and money attorneys, and a host of other legal, research and tax professionals -- questions provided to and approved by Defendants for inclusion in the four Petitions for Redress. The Government has refused to respond to the Petitions for Redress. In July of 2004 (16 months after the introduction of the Blue Folder, and 16 months after the U.S. invaded Iraq), Defendants and 1450 individuals who signed the Petitions for Redress filed a declaratory judgment action seeking a declaration of their Rights and Government's obligations under the so-called "accountability clause" of the First Amendment: "Congress shall make no law... abridging... the Right of the People... to Petition the Government for a Redress of Grievances." *We The People v. United States*.

Contrary to the Government's new (unsubstantiated and conclusory) claim, Defendants have never charged any individual or employer any amount of money (much less \$250 - \$500), to sign the Petitions, or to be a plaintiff in *We The People* or to otherwise participate in any of activity related to holding the Government accountable to the Constitution by claiming and exercising Rights under the First Amendment. The record shows Defendants are not in business to sell any goods or services and have never operated as a commercial enterprise, and that no reasonable jury could possibly conclude such. The record shows that without receiving any compensation whatsoever, Schulz has always personally handled all programmatic and administrative chores for all Defendants.

Contrary to the new (unsubstantiated and conclusory) allegation, the Blue Folder does not encourage the reader to participate in Defendants' "Petition for Redress" program. The Government repeats this new, patently false assertion, by referring to Defendants' "separate scheme (the subject of *We The People*, 485 F.3d 140) to charge taxpayers \$250-\$500 a year in order to join their petition for grievances." (Opp. page 9). Again, this is a false statement put before this Court to fabricate the commercial nexus necessary to prosecute this case.

The Government adds to the frivolity by saying, "Moreover, the District Court did not err in relying on the fact that defendants' dues-paying members, plaintiffs in the *We The People* suit, were also participants in the 'Operation Stop Withholding' materials providing the means by which members of the petition scheme might avoid paying taxes." (Opp. at 10).

The lower Court not say this, nor is there any indication that it relied on such a notion. There is no evidence that the plaintiffs in *We The People* are people who have paid any money to Defendants, much less "dues," or that they are people who received the Blue Folder. This is a false, unsubstantiated, conclusory claim.

There is absolutely no merit in fact to this statement. It is part and parcel of the Government's willingness to say anything (truthful or not) that would characterize Defendants as a commercial enterprise for First Amendment purposes, and that would link the 997 plaintiff-nonfilers in *We The People* to the Blue Folders for purposes of showing harm in order to defeat this motion. There is no merit to this new claim. It has obviously been fabricated and presented with malice to bias and deceive the Court against Defendants. Footnote #4 reads:

“Because there is no reason to believe that the members of the petition scheme and the individuals participating in “Operation Stop Withholding” are mutually exclusive groups, the extra-record documents that the defendants seek to introduce here (see Mot. 12-13) to identify the members of the petition scheme are irrelevant.” (Opp fn 4 at 10).

This explains the Government's willingness to introduce patently false claims at this stage of the proceeding, and attempt to pass them off as “facts.” Contrary to the new allegation, the purpose of the extra-record documents is not to “identify the members of the petition scheme” but to show that the *We The People* declaratory judgment action has 1450 plaintiffs and that most of them have submitted sworn affidavits that they stopped filing their tax returns because the Government has refused to respond to the four Petitions for Redress.

There are several reasons to believe any harm to the Government, from a group of 997 non-filers is due to the participants in the petition program, and not at all to the participants in the withholding program complained of. First of all, the participants in the petition program have said as much in their sworn affidavits to the DC court in *We The People*. In addition, the Government failed to deny the specific claim that the Government's assertion of harm caused by the distribution of the Blue Folder was groundless and a fraud on the Court because the Government was deliberately and impermissibly “mixing apples and oranges” by basing its allegation of harm caused by the distribution of the Blue Folder on information the Government obtained from the affidavits filed by 997 or more of the 1450 plaintiffs in *We The People*. The

Government failed to oppose the motion for reconsideration with its Declaration #11 -- further proof that the harm the Government was claiming was unrelated to the Blue Folder.

As the non-moving party Defendants' substantiated claim of no harm to the Government should have been accepted as true by District Court but was not. In fact, the District Court accepted Defendants' memorandum of law and supporting Declaration #11 but refused to accept its "voluminous" exhibits, including the 1450 affidavits from the Plaintiffs in *We The People*. That act by the Court was a violation of Due Process and an abuse of discretion. Defendants have asked this Court to correct that wrong by allowing Defendants to enlarge the record.

DEFENDANTS HAVE A STRONG LIKELIHOOD OF SUCCESS

The lesser "serious questions" standard applies. However, Defendants also enjoy a "strong likelihood of success" on the merits.

The District Court Erred By Ignoring Several Material Facts That Were Beneficial To Defendants And Resolving All Disputed Facts In Favor Of The Government.

Contrary to the Government's allegation (Opp. at 9), Defendants have contested the District Court's factual findings on many more than "two points."

As Defendants argued in the instant motion, "The record shows there are numerous material facts that are in serious dispute, not the least of which is whether Defendants distributed the Blue Folders for economic gain and whether the Government suffered any harm at all due to the distribution of the Blue Folders." (Defs Memo at 9).

For instance, in their Response to the Government's statement of material facts Defendants supported their opposition to the Rule 56 motion by substantively and legally denying each of the "facts." The record shows Defendants' potent opposition, rests on evidentiary documentation with probative value, not conclusory allegations, unsubstantiated denials or speculation. Defendants supported their Motion to Dismiss and opposition to the Rule

56 motion with substantiated Material Facts that the Government has failed to rebut. (Docket #21-24) (see also Record: 102-144 and Defs Affidavits #4,5,6,8,9 and 10).

Moreover, in the motion for reconsideration, Defendants argued sixteen Material Facts that were in genuine dispute that argued against summary judgment, and seven Material Facts not in dispute that argued against summary judgment. (Docket #32, which contains the motion for reconsideration and its supporting Declaration #11, even though the Docket sheet does not read that way) (see also Record: 209-240 and Defs Affidavit #11).³

Here, Defendants incorporated by reference “the questions raised in Defendants’ motion to dismiss (Record at 15-44) and in Defendants’ motion for reconsideration (Record at 208-240) and Defendants’ motion for modification and clarification (Record at 247-257).” (Memo at 10).

The District Court may only grant summary judgment if, when viewing the pleadings and the supporting documents in the light most favorable to the nonmoving party, the court determines that “there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). “In considering the evidence, the District Court is not to weigh the evidence and determine the truth of the matter, but it is to determine whether there is a genuine issue of material fact. 477 at 249. The moving party need not disprove matters on which the opponent has the burden of proof at trial. *Celotex v. Catrett*, 477 U.S. 317, 323.

The party opposing summary judgment “may not rest upon the mere allegations or denials of [the party’s] pleadings, but ...must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56 (e); *Matsushita v. Zenith*, 475 U.S. 574, 585-87

³ The Court’s attention is invited to the fact that Defendants’ Motion for Reconsideration provides what Defendants believe is an effective summary of the material facts that are in genuine dispute, with references to documentary evidence in the record (see Record at 209-240).

(1986). “However, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson* at 255.

The Blue Folder Is Protected By the “Accountability” Clause

Contrary to the Government’s false and misleading assertion, the District Court did not reject Defendants’ arguments that their activities were protected by the “right to petition the Government for redress.” (Opp. at 7). In point of fact, the District Court did not respond at all to Defendants’ principal argument that the March 15, 2003 letter to leaders of the Executive and Legislative Branches, the Blue Folder and the 37 follow-up letters to the regional federal officials throughout April and May of 2003 constitute a protected Petition for Redress.

The First Amendment Right to Petition was argued by Defendants in their Memorandum in support of their Motion to Dismiss (Docket #12) (Record at 34-39), in their Memorandum in Opposition to the Summary Judgment (Docket # 21) (Record at 85-88), and in their Memorandum in Support of the Motion for Reconsideration (Docket # 32) (Record at 231-240).

The Distribution of the Blue Folder Is Protected By the Speech Clause

The Government argues the Blue Folder may be commercial speech. The Supreme Court in *Bolger v. Young Drug Products*, 463 U.S. 60, 66-67 (1983) acknowledged three characteristics of commercial speech. First, it is a type of advertisement; second, it refers to a specific product; and third, the speaker has an economic motivation for the expression. The record shows the Blue Folder cannot be characterized as an advertisement, it does not refer to any specific product, and the Defendants have no economic motivation for any of the statement in the Folder.

The Government claims that among the dozens of statements in the Blue Folder one or two of the statements about the law are false. However, neither the Government has not put forth any evidence to show what makes the statements false, while Defendants on the other hand have

effectively denied the Government's claims based on specific documentary evidence, thus producing two additional material issues of fact that are in genuine dispute. Regardless, as non-commercial speech, the Blue Folders are protected speech even if there is a statement about the law that is false, as long as imminence is not a factor. As Justice Brandeis explained, "even advocacy of [law] violation, however reprehensible morally, is not justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on." *Whitney v. California*, 274 U.S. 357, 376 (1927).

This then, leaves us with the issue of "imminence," that is, whether the Blue Folder can or has incited anyone to violate a law.

Imminence is not a factor. This is obvious from the content of the materials in the Blue Folder, which does nothing more than instruct workers to submit certain written material to the companies they work for *and instructs the companies to submit the material to a rigorous review for accuracy by their tax professionals, including their attorneys and CPAs.*⁴

Although the materials contain some general legal research questioning the government's purported legal authority to impose a direct, un-apportioned taxes on the labor of Americans, the materials do NOT focus on taxes or "tax benefits." Nor do they seek to encourage non-filing of returns or give any advice or personal assistance as to those matters. Defendants' speech was never an integral part or a vehicle of any crime and never incited a crime. Imminence was never a factor. Defendants have never assisted in the filing of tax returns. Defendants have never urged the preparation of presentation of any false IRS forms.

Notwithstanding the true nature of the Blue Folder as a Petition for Redress of Grievances regarding the institutionalized practice of the withholding of pay from paychecks, that seeks nothing more than answers to intelligent questions, and notwithstanding Defendants'

⁴ See for instance Record at page 224, fn 22.

strenuous argument to the contrary, the Government asserts the Blue Folder has incited 997 people to stop filing tax returns for the last three years. Defendants have proved that claim is totally groundless. In addition, the Government argues Defendants have “incited” workers to submit the material to their companies. Well, that is what the forms are for, and it is not a crime to do so, especially since the material repeatedly encourages the companies (and the workers) to submit the material to a rigorous review by their tax professionals. Finally, the Government argues that a person sent the material to the IRS. Defendants have no control over the misuse of the material. People do misinterpret speech and People do send all kinds of things to the IRS.

The Government argues Defendants speech should be enjoined because of its success in having the Courts enjoin the speech of numerous other defendants under Section 6700. The Government cites several cases. However, the facts and the law of this case are significantly and substantially different from those in each and every one of the cited cases. Here, unlike the situation in the cited cases, Defendants are not a commercial enterprise; they gave the challenged speech away for free – at no cost. And most importantly, here, unlike the situation in the cited cases, the speech is a Petition for Redress of specific grievances, first submitted to the leaders of the Executive and Legislative branches as a Petition for Redress of the Grievances relating to the institutionalized practice of pay withholding, requesting answers from the Government to specific questions. Receiving no response, the material was then distributed to workers for submission to their paymasters, requesting that they request answers from their legal counsel.

The Distribution of the Blue Folder Is Protected By the Assembly Clause

Contrary to the Governments allegation (Opp. at 17), the record does not show that Defendants operated as a commercial enterprise: far from it. Therefore, the Government’s

argument that the distribution of the Blue Folder and the identities of the recipients of the Blue Folder are not protected by the Assembly Clause of the First Amendment is without merit.

In addition, under the facts and circumstances of this case, there is no compelling state interest, including the public fisc or national security, that justifies enjoining the distribution of the Blue Folder and the release to the Government of the identities of its recipients.

CONCLUSION

The Government wants to chill all speech and petitioning activities that might threaten the current flow of revenue into the Treasury or the current tax code itself through a policy of retaliation. The Government has expressly admitted in its motion for summary judgment that; “Whether their customers actually embrace or use the scheme is irrelevant [page 11]...The defendant’s activities undermine public confidence in the fairness in the federal tax system....” (page 13). Thus its claim that the alleged scheme also may “incite violations of the internal revenue laws” (page 13) is contradicted and is purely a pretext for violating the First Amendment Rights of Defendants and the citizens who are on their mailing list.

Defendants’ Petitioning activity, even though it might undermine the public’s confidence in the fairness or legality of the operation and enforcement of the tax system, is clearly protected by the Right to Petition. If it is not, the current, widespread speech and petitioning activities involving the tax code will be severely restricted.

Based on the above and all the prior pleadings in this matter, Defendants respectfully request an order granting the motion for a stay of the enforcement of the District Court’s Order pending appeal, and expediting the appeal, and granting such other and further relief as to the Court seems just and proper.

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