IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

RAY HERRON and ELAINE HERRON	)	
	)	
Plaintiffs	)	CASE No. 08-cv-531
	)	(SOW)
v.	)	
	)	
IKE SKELTON, individually and in his official capacity as a member of the U.S. House of Representatives;	)	
Defendants	)	

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

Plaintiffs RAY HERRON and ELAINE HERRON (hereinafter, the " HERRONS") file this memorandum in opposition to Defendants' ("SKELTON'S") motion to dismiss, which motion was supported by SKELTON'S "SUGGESTIONS."

The Herrons incorporate by reference all facts and arguments included in their Complaint and Declarations filed on July 22, 2008. In addition, the Herrons state as follows:

Mr. Skelton's suggestion (on page 1) that this case arises from, "the Congressman's forwarding to the relevant federal agencies Plaintiff's pledge to withdraw their 'allegiance and support' from the federal government by not paying their taxes if they did not get the response they sought," is FALSE. The Herrons made no such a pledge and never sent such a pledge to Skelton, so Skelton could not have forwarded such a pledge by the Herrons to any federal agency. Neither the letter the Herrons delivered to Skelton's office on June 30, 2008, nor the computer disc containing the First Amendment Petitions for Redress of Grievance that was

attached to the letter contained any such pledge. See Exhibit A to Affidavit by Elaine Herron, dated July 22, 2008.

Mr. Skelton's suggestion (on page 1) that, "Mr. Herron appears to be affiliated with "We The People Foundation," an organization whose apparent intent is to force government officials to respond specifically to their grievances by threatening to withhold payment of taxes. See We The People Volunteer Report, State of Missouri…Available as Exhibit B," is IRRELEVANT in terms of this case and controversy. The We The People Volunteer Report is merely a list of people who volunteered to formally serve upon their members of Congress seven Petitions for Redress of Grievances, together with a transmittal letter. Mr. Herron volunteered to deliver the Petition package to his Representative, Mr. Skelton. Neither the Petitions for Redress nor the transmittal letter threatened to withhold payment of taxes. Even if Mr. Skelton's assumption regarding the organization's ultimate approach to holding Government accountable to the Constitution was accurate, neither the Petitions for Redress nor the Herron's transmittal letter to Skelton threatened to withhold payment of taxes. Upon receipt of the Herrons' Petitions for Redress of seven alleged violations of the Constitution, Skelton's choices were either to respond by answering the questions contained in the Petitions for Redress, as he is obligated to do within the meaning of the First Amendment's accountability clause, or ignore the Petitions knowing the Judiciary lacked the power to force him to respond and believing the Herrons lacked the Right and the power to force him to respond. Instead, Mr. Skelton – both within and beyond his *official capacity*, directly, and most deliberately, infringed on Herrons' claim and exercise of a Right protected by the First Amendment by retaliating against them.

Mr. SKELTON's suggestion (on page 2) that this case is similar to *We The People v. United States* (485 F. 3d 140 (D.C. Cir. 2997) if FALSE. Here, unlike *WTP v. U.S.*, there is a

claim of *retaliation,* by the Government against the Herrons, for simply Petitioning the Government for Redress of Grievances – a Right expressly recognized by the last ten words of the First Amendment. The Herrons have always paid their federal taxes and had not threatened to stop paying their taxes. Here, unlike *WTP v. U.S.*, there is a claim against a government official for utilizing and directing the vast resources of the federal government to *unlawfully* retaliate against the Herrons and harming the Herrons by libelously misinforming the IRS and the DOJ, using the official stationary of the United States House of Representatives, that the Herrons were engaged in "an effort to avoid federal taxes," causing numerous injuries to the HERRONS including (but not limited to) damages to their personal and professional reputations, emotional distress, and economic loss by forcing them to incur the expense of Petitioning the Court for Redress of Grievances, all in violation of the HERRONS' First Amendment Right of Redress and Speech.

Also false is Mr. SKELTON's suggestion (on page 3) that, "In one 'petition' the Herrons declared that, '[i]f money is wanted by Rulers who have in any manner oppressed the People, they may retain it until their grievances are redressed.' Petition for Redress of Grievance at 3 (citation omitted). Attached as Exhibit E." The Herrons made no such declaration. Skelton's Exhibit E is a copy of one of the seven Petitons for Redress, signed by tens of thousands of people and served by the Herrons on Skelton on June 30, 2008. The attention of the Court is invited to the fact the partial "quote" provided by Skelton in his suggestion has been deliberately taken out of context with an obvious intent to mislead the Court regarding Skelton's unlawful acts of retaliation. In making his accusation, Skelton has quoted but a few of the words contained in the third paragraph on page 3 of the Petition for Redress. Rather than a "declaration" attributable to the Herrons, said paragraph instead clearly recites two historical quotations

regarding the inherent Right of the People to enforce the Right of Redress, one from an official Act of the Continental Congress in 1774, and one from a letter written by Thomas Jefferson in 1775. The full quotation actually reads:

> "WE THE PEOPLE reaffirm the essential principle underlying our system of governance, as expressed by the Founders, that "If money is wanted by Rulers who have in any manner oppressed the People, they may retain it until their grievances are redressed and thus peaceably procure relief, without trusting to despised petitions or disturbing the public tranquility" and "how efficacious its [the privilege of giving or withholding our money] intercession for redress of grievances and establishment of rights, and how improvident would be the surrender of so powerful a mediator.'" (*Journals of the Continental Congress*, 1:105-113 and Jefferson's Papers 1:225.'"

THE HERRONS HAVE STANDING TO SUE

Mr. Skelton's suggestion that the Herrons lack standing to sue is FALSE. The Herrons have articulated a tangible injury caused by Skelton's unconstitutional retaliatory action and the Court is able to cure said injury as requested by the Herrons. The Herrons are also entitled to a declaration of their Rights and Skelton's obligations under the last ten words of the First Amendment (the "accountability clause").

This is an action for declaratory and injunctive relief arising out of the unlawful behavior of a federal employee, employed by the legislative branch of the federal government, who has been sued in his individual and official capacities for retaliating against the Herrons for Petitioning him for a Redress of Grievances (violations of the Constitution), rather than responding to those Petitions for Redress.

Skelton's retaliation was a concrete, actual injury in fact within the zone of interest to be protected by the First and Ninth Amendments.

This is a civil action for injunctive relief against Skelton for acting outside of the scope of his employment by unconstitutionally utilizing and directing the vast resources of the federal government to unlawfully retaliate against the Herrons and harming the Herrons by libelously misinforming the Internal Revenue Service and the Department of Justice, using the official stationary of the United States House of Representatives, that the Herrons were engaged in "an effort to avoid federal taxes," causing numerous injuries to the Herrons including (but not limited to) damages to their personal and professional reputations, emotional distress, and economic loss by forcing them to incur the expense of petitioning the Court for Redress of Grievances, all in violation of the Herrons' First Amendment Right of Redress and Speech.

The Herrons, as Free People, have been placed in the intolerable position of : a) knowing the federal Government is violating the war powers, tax, money, privacy and other clauses of the Constitution; b) knowing their only representative to the United States House of Representatives refuses to answer questions or otherwise be held accountable under the *First Amendment's* accountability clause; and c) knowing their representative in the House of Representatives will retaliate swiftly and harshly against "constituents" who claim and exercise their natural Right to hold him accountable to the Constitution by identifying them as targeted federal "tax avoiders" by, *under the imprimatur and guise of an official capacity*, turning their names over to the revenue collectors and law enforcement arms of the Executive branch with a clear and deliberate intent to (unlawfully) expose them to IRS tax audits, property seizures, harassment, etc. and even possible civil or criminal investigations and/or prosecutions or other silencing and intimidation techniques, merely for peaceably exercising Rights clearly guaranteed by the Constitution.

MR. SKELTON IS NOT IMMUNE FROM THIS SUIT

Mr. Skelton's suggestion that he is immune from suit is FALSE. This case arises under the Constitution. The principal questions the Herrons have placed before the Court are: 1) whether Skelton is constitutionally prohibited from retaliating against the Herrons who simply Petitioned Skelton for a Redress of seven alleged violations of the Constitution (making no threats whatsoever); 2) whether Skelton is *obligated* to respond to the Herrons' First Amendment Petitions for Redress of violations of the Constitution; and 3) whether the Herrons have any Rights, other than those determined by the will of some majority (for instance, one more than half the number of people voting on Election Day in the precincts, or one more than half the number of people voting in the halls of Congress), if their Government representatives ignore their Petitions for Redress of violations of the Constitution, or worse yet, actively retaliate against them for Petitioning.

The Herrons are not seeking money damages.

All elected officials as federal employees are immune from suit individually for common law torts occurring within the scope of their employment. *See* 28 U.S.C. §2679(b)(1). However, Section 2679(b)(1) does not extend to "a civil action against an employee of the Government which is brought for a violation of the Constitution of the United States, or which is brought for a violation of a statute of the United States…" *See* §2679(b)(2).

A refusal, or failure, by Skelton to provide Redress by responding with formal, specific answers to the questions contained within the Herrons' *First Amendment* Petitions for Redress of constitutional torts is a violation of the Herrons' First Amendment Right, which violation is

repugnant to the common law as well as spirit and letter of the Constitution and is, therefore, a violation of Skelton's oath of office and not within the scope of Skelton's federal employment.

This is a civil action for declaratory relief against Skelton, in his official capacity as an elected employee of the federal Government, for violating the Herrons' unalienable, constitutionally guaranteed Right of Redress by failing to respond to said Petitions for Redress with formal, specific answers to the questions presented in the Petitions.

In violation of the First and Ninth Amendments to the Constitution, Skelton has already demonstrated his lack of respect for the Constitution and his oath of office by his willingness to immediately punish, libel, and silence constituents who move to hold him accountable to the Constitution.

The Herrons need the Court to apply the protections afforded by the First and Ninth Amendments to the Constitution.

THIS CASE IS NOT BARRED BY THE SPEECH AND DEBATE CLAUSE

Mr. Skelton's suggestion that the suit is barred by the Speech and Debate clause is FALSE.

While Skelton may be *obligated* to respond to Herrons' First Amendment Petitions for Redress of violations of the Constitution, neither the Herrons nor the Court can order him to respond. In addition, Skelton cannot be questioned in this Court "for any Speech or Debate in [the House of Representatives]". (Constitution: Article I, Section 6, Clause 1).

However, the Speech and Debate Clause does not extend to protect Skelton from claims resulting from the subject act of retaliation against the Herrons, who merely claimed their First

Amendment Right to Petition him for Redress of violations of the Constitution, and who exercised that Right, intelligently, rationally and professionally.

Neither does the Speech and Debate Clause prevent the Court from declaring the Rights of the Herrons and Skelton's obligations under the last ten words of the First Amendment.

Nor does the Speech and Debate Clause prevent the Court from directing Skelton, in his individual capacity, "to notify the Attorney General of the United States and the Commissioner of the Internal Revenue Service that they should disregard any and all prior communications from Skelton regarding the Herrons, and that they should return to Skelton the originals (and all copies) of all documents and materials they received from Skelton regarding the Herrons."

To be clear, the Herrons' primary claim against Skelton is based on his unlawful act of retaliation. In addition, the Herrons have requested a declaration of their Rights and Skelton's Obligations under the First Amendment's accountability clause.

HERRONS HAVE STATED A CLAIM FOR WHICH RELIEF CAN BE GRANTED

Mr. Skelton's suggestion that the Complaint fails to state a claim for which relief may be granted is FALSE. The Herrons have claimed Skelton unlawfully *retaliated* against them for exercising their First Amendment Right to Petition Skelton for Redress of certain violations of the Constitution (Complaint, STATEMENT OF THE CLAIM). The Court can certainly grant the relief that the Herron's have requested, namely to direct Skelton, "to notify the Attorney General of the United States and the Commissioner of the Internal Revenue Service that they should disregard any and all prior communications from Skelton regarding the Herrons, and that they should return to Skelton the originals (and all copies) of all documents and materials they received from Skelton regarding the Herrons." (Complaint, page 2)

In addition, having served Skelton with seven proper Petitions for Redress of violations of the Constitution, and having received no response to those Petitions for Redress (other than the act of retaliation), the Herrons have requested a declaration of their Rights and Skelton's obligations under the fifth of the five Rights guaranteed in the First Amendment to the Constitution of the United States of America.

Relying on *We The People v. U.S.*, 485 F.3d 140 (D.C. Cir. 2007), Skelton argues he is not obligated to listen or respond to any of the Herrons' seven Petitions for Redress of violations of the Constitution.

Skelton's reliance on *We The People* is misplaced for the reasons argued in the Complaint (incorporated here by reference) and herein.

The Founders would not have given the People our wonderful system of governance – our Constitutional Republic with its essential underlying principles including popular sovereignty, individual/unalienable Rights and separation of powers – while failing to incorporate within the Constitution itself, a means by which the People could peacefully hold the Government accountable for its violations of the other provisions of the Constitution, without trusting to either a majority in the Government's electoral process or to a majority in the Government's courts.

The Court is urged to reject Skelton's argument, i.e., not to repeat the same mistakes made by the D.C courts in *We The People.* The principal (and well discredited) error made by the D.C. courts in *We The People* was their failure to recognize the fundamental difference between: 1) the Right of individuals to be heard by government officials who have ***unlawfully*** stepped outside the boundaries the Sovereign People long ago established to define the limited powers those public servants enjoy under the strict terms and limitations of the Constitution; and 2) the

constitutional right of the public generally to be heard by public bodies considering issues establishing public ***policy***.

Skelton is laboring under a misapprehension, as did the D.C. courts. None of the seven Petitions for Redress served by the Herrons on Skelton addressed mere matters of *public policy*. Each addressed and sought to remedy a separate violation of a clear and unambiguous prohibition or restriction long ago concretely articulated within our Constitution and not subject to the discretion of future elected policy makers.

The Supreme Court in *Smith* and *Knight* was asked to determine the constitutional obligation of public officials to respond to individuals who were questioning the wisdom of their government *policymakers*.

Here, however, the Herrons are asking the Court to determine the constitutional obligation of Skelton to respond, not to garden-variety political questions regarding the current government's policy*making* decisions, but to questions regarding the current government's constitutional *breaking* decisions.

Decisions and acts that are violative of the Constitution are not to be confused with garden variety, constitutionally compliant decisions by ordinary legislators during the daily course of politically influenced governance.

As argued in the Complaint, and to a large extent by Judge Rogers of the U.S. Court of Appeals in her separate opinion in *We The People*, the DC courts erred in dismissing the complaint on the basis of *stare decisis*. As Judge Rogers wrote, the facts and the law argued in *We The People* were not the same or similar to those in *Smith v Ark. State Highway Employees, Local 1315*, 441 U.S. 463 (1979), or *Minn. State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984).

The Court's attention is invited to a fatal defect in Skelton's futile attempt to prove *Knight* is dispositive. Skelton argued (Suggestions, page 9), "In *Knight*, the Supreme Court held that individuals 'have no constitutional right to force the government to listen to their views…The Constitution does not grant members of the public generally a right to be heard by public bodies making ***decisions of policy***.' *Knight*, 465 U.S. at 283. The Court reasoned: (emphasis added by the Herrons).

> Government makes so many **policy decisions** affecting so many people that it would likely grind to a halt were **policymaking** constrained by constitutional requirements on whose voices must be heard…Nothing in the First Amendment or in this Court's case law interpreting it suggests that the right to speak, associate, and petition require government **policymakers** to listen or respond to individual's communications on public issues. *Knight* at 285. (emphasis added by Herrons).

This proceeding involves a first-impression question of exceptional constitutional importance. The First Amendment is arguably the single most important sentence in the Constitution. Essential, unalienable, individual Rights were guaranteed by that sentence, including the Rights of the People to Petition the government to secure Redress to cure unconstitutional behavior. A decision denying these Rights, or even placing limitations upon them, is of exceptional constitutional importance as it would effectively place the government outside the reach of the People to hold it directly accountable for such transgressions.

No court has yet decided the underlying questions presented in the instant action; that is, whether private individuals have the Right to a response from their Government representatives to Petitions for Redress of violations of the Constitution, and (assuming they do have that Right) whether those private individuals have the Right to withdraw their allegiance and support from the Government should their Government representatives refuse to respond, or worse yet, retaliate.

The Right to government limited by the Constitution and based upon the consent of the governed is among the most precious of the Great Rights and Liberties guaranteed by the Bill of

Rights. The value in the Bill of Rights, particularly the Right to Redress and Enforcement, as an essential element in the direct, practical exercise of Popular Sovereignty and self-government is beyond question. It is, after all, the only practicable means by which the individual and the small group can secure their unalienable Rights against the majority, and to directly and peacefully hold the government accountable to the Constitution.

Indeed, this "capstone" Right was added to the First Amendment as the most critical element in the overall balance of power between the People and the Government, intended to preserve an environment conducive and protective of free political discourse, to the ends that government may be held accountable to the People, the Constitution and the Law, and that abuses of power may be curtailed and cured by peaceful means. Therein lays the very foundation of our Constitutional Republic and the Freedom of the People. This is the essence of the Right to Petition.

Any removal or diminution of the power of this, the People's procedural instrument for holding the Government accountable to the rest of the Constitution would drastically dismantle and destroy the well-engineered balance of power that exists between the People and their servant Government.

The zone of interest to be protected by the Accountability Clause of the First Amendment, together with the Ninth Amendment, goes beyond the Clause itself to all Natural Rights. The Petition Clause guarantees the Right to hold government accountable to each provision of the Constitution through citizen participation in their Right to self-government.

To remove the individual's Right to Petition for Redress of violations of the Constitution and the obligation of the Government to respond would be to convert our Constitutional Republic into a pure democracy where the Rights of the People and the Obligations of the Government depend upon only the will of one majority or another.

SKELTON'S RETALIATION IS UNLAWFUL

In Petitioning Skelton for a Redress of violations of the Constitution, the Herrons were clearly engaging in a protected activity.

By turning the Petitions for Redress over to the DOJ and IRS, together with a libelous and false notice that the Herrons were attempting to avoid paying federal taxes by promoting some kind of abusive tax shelter, Skelton took adverse action against the Herrons that would chill a person of ordinary firmness from continuing in their exercise of First Amendment activity involving Petitioning Government for a Redress of violations of the Constitution.

Skelton's retaliatory action was clearly motivated in part by the Herrons' exercise of the protected activity and is patently prohibited by the Constitution.

THIS ACTION IS NOT BARRED BY THE ANTI-INJUNCTION ACT

Mr. Skelton's suggestion that the relief sought is barred by the Anti-Injunction Act is FALSE. With regard to the Herron's action for injunctive relief due to Skelton's retaliation, there is nothing in the Anti-Injunction Act that bars the Court from directing Skelton, "to notify the Attorney General of the United States and the Commissioner of the Internal Revenue Service that they should disregard any and all prior communications from Skelton regarding the Herrons, and that they should return to Skelton the originals (and all copies) of all documents and materials they received from Skelton regarding the Herrons." Indeed, it is absurd that Skelton asserts the shield of the Anti-Injunction Act. This controversy is about the constitutional meaning of the last ten words of the First Amendment. It is not about the Herron's payment of, or liability

for, federal taxes nor is it about the application of a federal tax statute. This case is about an infringement upon a Fundamental Right expressly protected by the U.S. Constitution.

In addition, with regard to the Herron's action for declaratory relief due to Skelton's failure to respond to the Petition for Redress, there is nothing in the Anti-Injunction Act that bars the Court from declaring Skelton's *obligation* under the First Amendment to, "enter into good faith exchanges with the Herrons and to provide to the Herrons documented and specific answers to the reasonable questions asked of him in the seven Petitions for Redress of **violations of the Constitution.**

Finally, assuming the Court does declare Skelton is *obligated* to respond to the First Amendment Petitions for Redress, there is nothing in the Anti-Injunction Act that bars the Court from *then* declaring the First Amendment Right of the Herrons to withdraw their allegiance and support from the Government should Skelton fail to respond. After all, this is a Constitutional Republic, not a pure democracy, where the Constitution is a set of principles to govern the Government, is all that stands between the People and total tyranny and despotism, and trumps any law of Congress that is repugnant to it.

CONCLUSION

Based on the foregoing and their prior pleadings, the Plaintiffs respectfully request a final order:

a. Denying Defendants' motion to dismiss, and

b. Granting declaratory relief to the HERRONS by declaring the obligation of the Defendant IKE SKELTON, under the First Amendment to the Constitution of the United States of America, to enter into good faith exchanges with the HERRONS and to provide to the HERRONS documented and specific answers to the reasonable

questions asked of him in seven Petitions for Redress of Grievances regarding the federal Government's violations of the U.S. Constitution's war powers, money, "privacy," tax, "faithfully execute," and firearms provisions as well as the unconstitutional construction of a "North American Union," and

c. Granting injunctive relief to the HERRONS by directing SKELTON to formally notify the Attorney General of the United States and the Commissioner of the Internal Revenue Service that they should disregard any and all prior communications from SKELTON regarding the HERRONS, and that they should return to SKELTON the originals of all documents and materials they received from SKELTON regarding the HERRONS, and

d. Granting declaratory relief to the HERRONS by declaring the Right of the HERRONS to withdraw their allegiance and support from the federal Government should SKELTON not respond to the HERRONS by providing formal, specific answers to the questions contained in the seven Petitions for Redress, and

e. Granting injunctive relief to the HERRONS by constraining SKELTON from retaliating against the HERRONS if the HERRONS decide to withdraw their allegiance and support from the federal Government until the constitutional violations are Redressed, and

f. Retaining jurisdiction of this action to ensure compliance with the Court's decisions, and

g. Granting any other, non-financial relief that to the Court may seem just and proper.

Dated: December 16, 2008

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