07-3729-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States Of America,

Plaintiff-Appellee,

v. **No. 07-3729-cv**

Robert L. Schulz*, et al*.,

Defendants-Appellants.

BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS

Dated: October 21, 2007

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. §1340 and 1345 and 26 U.S.C.7402 (a) and 7408. The Court of Appeals has jurisdiction pursuant to 28 U.S.C. Section 1291. The appeal is from a final decision of the District Court entered August 9, 2007 that disposes of all parties' claims. The appeal was taken on August 29, 2007.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Constitutional Questions

1. If, "Congress shall make no law…abridging…the right of the people to **Petition** the government for Redress of Grievances" (First Amendment), and if "The enumeration in the Constitution of certain Rights shall not be construed to deny or disparage others retained by the People" (Ninth Amendment) and if, "The Right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated,"(Fourth Amendment) and if, "No person shall be…deprived of life, liberty, or property without Due Process of law…." (Fifth Amendment), and if the Constitution must be construed in its entirety, and if the Government appears to be unconstitutionally applying the otherwise constitutional internal revenue laws, do Defendants, acting in their private capacities have a Natural Right to an official response to their Petition to the Government for Redress of the constitutional tort, and if the Government refuses to respond to the Petition for Redress, **are Defendants not then free to enforce their Natural Right to hold the Government accountable to the Constitution by, for example, considering Government's silence to be an admission, and to freely distribute copies of that Petition for Redress of Grievances for the purposes of furthering public debate, altering the way the Government operates,**

and exposing Government corruption, without retaliation by the Government via a civil injunction lawsuit or other enforcement actions?

*Without addressing the Question, the District Court implied its answer; "No, there is no Right under the 1st (**Petition Clause**) and 9th Amendments to distribute copies of the Petition for Redress of Grievances."*

2. If, "Congress shall make no law…abridging the freedom of **Speech**, or of the **Press**, or the right of the people to peaceably **Assemble**…." (First Amendment), and if "The enumeration in the Constitution of certain Rights shall not be construed to deny or disparage others retained by the People" (Ninth Amendment) and if, "The Right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated,"(Fourth Amendment) and if, "No person shall be…deprived of life, liberty, or property without Due Process of law…." (Fifth Amendment), and if the Constitution must be construed in its entirety, and if Defendants have evidence that the Government is unconstitutionally applying the otherwise constitutional internal revenue laws, **and if the People have Petitioned for Redress of the constitutional torts, and if the Government has refused to respond to the Petitions for Redress, are the People, free to distribute copies of the Petition for Redress to workers and company officials, without retaliation by the Government via a civil injunction lawsuit or other enforcement actions aimed at preventing Defendants from freely Speaking out and Associating with other People for the purposes of furthering public debate about the subject?**

*The District Court answered, saying in effect; "No, there is no Right under the 1st (**Speech, Press and Assembly Clauses**) and 9th Amendments to distribute copies of the Blue Folder."*

3. **Are the statements in the Blue Folder non-commercial, political Speech?**

The District Court answered, saying in effect; "No, the Blue Folder is commercial Speech. "

4. **Are the statements in the Blue Folder true?**

The District Court implied an answer; "No, the Blue Folder is false Speech."

5. **Are the statements in the Blue Folder non-inciting?**

The District Court answered, saying in effect; "No, the Blue Folder incited imminent law breaking and harm to the Government."

The Statutory Questions

6. **Has the Government failed to state a cause of action for which relief can be granted under 26 U.S.C. Sections 6700, 6701, 7408 and/or 7402?**

The District Court answered saying, in effect, "No, the Government has stated a valid claim for which the requested relief can be granted."

7. **Were there genuine issues as to any material facts, requiring a denial of the motion for summary judgment?**

The District Court, by its Decision and Order and denial of Defendants' motion for reconsideration answered, saying in effect; "No, there are no genuine issue as to any material facts."

8. **Is the District Court's Order overly broad and vague?**

The District Court, by its Decision denying the motion for modification and clarification of the Order answered, saying in effect; "No, the Order is not overly broad or vague."

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Between April of 2000 and November of 2002, Defendants and tens of thousands of People associated with them repeatedly Petitioned the Government in an attempt to reconcile and remedy conflicts between the Iraq Resolution and the war powers clauses of the Constitution, the USA Patriot Act and the "privacy" clauses of the Constitution, the Federal Reserve System and the money clauses of the Constitution, and the direct, un-apportioned tax on labor and the tax clauses of the Constitution.

The Government failed to respond, although Defendants assert they had a duty to speak.

Defendants' Petition for Redress of the Grievances regarding the federal income tax system requested answers to 538 questions spread over 15 lines of inquiry. Defendants sponsored a public hearing on the Grievances. Numerous tax attorneys, CPAs, former IRS employees (including three Agents and an attorney) and tax law researchers answered the 538 questions, under oath, providing overwhelming evidence of the fraudulent origin and illegal operation and enforcement of the federal income tax system.

In November of 2002, Defendants once again Petitioned the Government for Redress of the Grievances regarding the alleged unconstitutional application of the otherwise constitutional internal revenue laws. Serving every member of Congress, the President and the Attorney General, the Petition for Redress included a certified transcript of the record of the hearing, a video recording of the two-day Truth-In-Taxation Hearing and a request for a response.

Again, the Government failed to respond, although Defendants assert they had a duty to speak.

Considering the Government's silence to be an admission, Defendants prepared a series of statements and forms to be used by workers and company officials to legally terminate the institutionalized practice of withholding by the Company of pay from workers' paychecks, and the payment by the Company of that money to the IRS. The information included in the statements and forms was derived directly from the prior Petitions for Redress that the Government failed to respond to and from the testimony of the tax professionals at the Hearing.

However, before distributing the statements and forms to workers and company officials, Defendants once again Petitioned the Government for Redress of Grievances. On March 15, 2003, Defendants placed the statements and forms in a "Blue Folder" and sent the folder with a letter to the elected leaders of the Executive and Legislative branches and to the Attorney General, Treasury Secretary and IRS Commissioner, respectfully requesting a response as to the accuracy of the information, and informing the Government of Defendants' intent to distribute copies of the Blue Folders to workers and company officials, free of any charge or fee if Defendants did not receive a response from the Government.

The Government, again failed to respond to the March 15, 2003 Petition for Redress.

During April and May of 2003, Defendants handed out 3,500 copies of the Blue Folder at 37 public meetings, for free, without asking for or receiving any money for them. Defendants NOTICED the appropriate local federal Government official, in advance, of the date, time and location of each of the 37 meeting.

Defendants posted the entire contents of the Blue Folder on their website allowing anyone to download and print the material for free.

This is a civil injunction case brought by the United States of America (hereinafter the "Government") against Robert L. Schulz and two corporations he controls, namely the We The

People Foundation for Constitutional Education, Inc., and the We the People Congress, Inc. (hereinafter the "Defendants").

Pursuant to the Court's "inherent equity powers" and sections 7402 and 7408 of the Internal Revenue Code, the United States seeks, in general, to permanently enjoin and prohibit Schulz and the two corporate defendants, from distributing certain printed matter, as conduct allegedly subject to penalty under sections 6700 and 6701, and "any other penalty provision in the Internal Revenue Code." (Complaint, see A 2-3).[1]

The "Conduct Sought to be Enjoined" is printed matter that is [falsely] identified by the United States as a " 'Tax Termination Package' for Employers" and a " 'Tax Termination Package' for Employees'". (Complaint, see A 3-8).

This Complaint against Defendants arises from actions taken by Defendants in claiming and exercising certain Natural, unalienable Rights guaranteed by the First and Ninth Amendments to the Constitution, and taken by Defendants as a result of the failure of the Government to respond to Defendants' Petitions for Redress of Grievances against the Government.

B. THE COURSE OF PROCEEDINGS

Defendants moved to dismiss the complaint for failure to state a claim for which relief can be granted under the First (Petition, Speech and Assembly Clauses) and Ninth Amendments, and under Sections 6700 and 6701 of the Internal Revenue Code. (A 53-67), for failure to join a necessary party(ies) (A 67-68), for failure to include the "who, what, when, where and how" of the misconduct charged, and what is false or misleading about a statement, and why it is false. (A-69), and to strike from the complaint certain material as prejudicial, scandalous, irrelevant and immaterial. (A-68).

[1] References to "A" are to pages in the Appendix.

The Government responded with a motion for summary judgment (A-133), including a "Statement of Material Facts that the Government Contends Are Not In Dispute" (A-159).

Defendants opposed the motion for summary judgment (A-180), disputed each and every one of the Government's alleged "Facts," submitted additional material facts that were in dispute, and submitted other material facts that Defendants argued were not in dispute (A-204).

The Government replied (A-414), disputing Defendants' statement of facts (A-424)

Defendants moved for leave to file a Sur-Reply because the Government advanced an argument in its Reply that it had not advanced previously.[2] (A-444). The Court denied the motion. (A-446).

C. THE DISPOSITION BELOW

The District Court granted the Government's motion for summary judgment, permanently enjoining Defendants' Speech. The Order directed Defendants to turn individual identification information over to the Government, to post the Court's Order on the front page of Defendants' website for a period of one year, and to send a copy of the Order to people who obtained Defendants' Speech. (A-1).

Defendants motioned the District Court for Reconsideration (A-450), for a stay pending appeal (A-487), and for modification and clarification of the Order (A-495). All three motions were promptly denied (A 512-515).

STATEMENT OF FACTS

Defendants incorporate by reference the facts presented to the District Court in Schulz Declarations #1 through #11, and each and every part thereof.

On March 16, 2002, Defendants formally Petitioned the Government [Congress and the U.S. Attorney General] for Redress due to violations of the tax clauses of the Constitution.

[2] For the first time the Government argued that 26 USC 3102 mandates the withholding of pay.

Defendants formally submitted a list of **538 specific questions** to be answered. The questions were broken down into fifteen lines of inquiry. Schulz Decl. #2, para. 61 (A-98), Exhibit G (A 106.1-106.109) (Docket 12). **The Government failed to respond.**

No branch of the Government had ever addressed, much less answered the questions. For instance, the March 16, 2002 Petition for Redress of Grievances included a line of inquiry regarding the "ratification" of the 16th Amendment to the Constitution (A 106.54-106.75) and a line of inquiry regarding "taxable sources" of income under 26 U.S.C. Section 61 and 26 U.S.C. Sections 861 and 862 (A 106.107- 106.110). The Government has steadfastly refused to provide formal, specific answers to the questions.

On February 27 and 28, 2002, credentialed professionals, including tax attorneys, CPAs, a forensic accountant and three former IRS agents answered, under oath, the **538 questions** included in the March 16, 2002 Petition for Redress of Grievances. The questions, answers and thousands of pages of documentary evidence supplied by the witnesses in support of their testimony, together with a certified transcript of the proceeding (two-day Truth in Taxation Hearing held in Washington DC and web cast live), were put on a set of four CD-ROMS. Schulz Decl. #2, para. 60 (A-98), Exhibit TT (Docket 12).

Included on the set of four CD-ROMS was a STATEMENT OF FACTS AND BELIEFS, which was the direct result of the testimony of the tax professionals given at the Truth in Taxation Hearing. The STATEMENT OF FACTS AND BELIEFS corresponded to the 538 questions that were included in said March 16, 2002 Petition for Redress, and includes the witnesses' citations to the evidence presented by the witnesses in support of their answer to the questions. Schulz Decl. #6, para. 6 (A-288) (Docket 23), Exhibit A (A-357-407) (Docket 23).

Therefore, the STATEMENT OF FACTS AND BELIEFS does include a section on the "ratification" of the 16th Amendment to the Constitution (A 373-386) and a line of inquiry regarding "taxable sources" of income under 26 U.S.C. Section 61 and 26 U.S.C. Sections 861 and 862 (A 392-394).

On April 10, 2002, Defendants again Petitioned the Government for Redress. Defendants delivered a set of the four CD-ROMS (including the STATEMENT OF FACTS AND BELIEFS) to every member of the Senate Finance Committee, the Chairman of the House Ways and Means Committee, the Chairman of the House IRS Oversight Committee, President Bush and Lawrence Lindsey. Schulz Decl. #2, para. 64 (A-99) (Docket 12). **The Government failed to respond**.

On April 15, 2002, Defendants again Petitioned the Government for Redress. Defendants delivered 3,300 constituent letters and a set of the four CD-ROMS (including the STATEMENT OF FACTS AND BELIEFS) to the 535 members of Congress, with a request for a reply from each member. Schulz Decl. #2, para. 65 (A-99) (Docket 12). For a sample of one of the constituent letters see Exhibit XX (A-106.110) (Docket 12). **The Government failed to respond**. Schulz Decl. #2, para. 65 (A-99) (Docket 12).

On November 8, 2002, Defendants again Petitioned the Government for Redress. Defendants served every member of Congress and President Bush with a Memorandum and four Petitions for Redress of constitutional torts regarding violations of the war powers, money, "privacy" and tax clauses of the Constitution. Each of the four Petitions for Redress, signed by thousands of Americans, requested answers to specific questions. Schulz Decl. #2, para. 69 (A-100) (Docket 12). For a copy of the Memorandum and the four Petitions for Redress see Exhibit ZZ (A-106.111-106.134)(Docket 12). **The Government failed to respond.**

On March 15, 2003, Defendants again Petitioned the Government [Attorney General, Treasury Secretary, IRS Commissioner and the leaders of the Executive and Legislative branches of the federal government] for Redress of Grievances regarding the unconstitutional application of the otherwise constitutional internal revenue laws. This Petition for Redress of Grievances focused on the Government's institutionalized practice of forcing entities to withhold pay from workers and divert the pay to the Government.

The March 15, 2003 Petition to the Government for Redress of Grievances included a copy of the STATEMENT OF FACTS, and various forms for workers and company officials to submit to a "rigorous review" by their "tax professionals (attorneys, CPAs and Accountants)." See Schulz Decl. #1, para. 4-5 (A-71) (Docket 12). For a copy of the March 15, 2003 Petition for Redress see (A 293-407) (Docket 23).

The March 15, 2003 Petition to the Government for Redress of Grievances included a request for a response from the Government regarding the accuracy of the Speech contained in the Petition's STATEMENT OF FACTS AND BELIEFS and/or the forms. (A-75.2).

The March 15, 2003 Petition to the Government for Redress of Grievances included a NOTICE that copies were going to be distributed to workers and company officials, free of charge, as a consequence of the Government's refusal to answer the questions included in the prior Petitions for Redress of Grievances regarding the origin, operation and enforcement of the federal income tax system, and the fact that those very questions "have now been answered by tax professionals," proving conclusively "that the individual income tax is, indeed, voluntary … that most workers are not subject to withholding and that most companies are legally not a "withholding agent." (A-75.2).

The March 15, 2003 Petition for Redress included a specific NOTICE by Defendants to be notified if there was anything in the Petition that was false or misleading, and informing the Government of Defendants' intentions to begin the widespread, **free** distribution of the Petition. (A 75.1-75.2).

The stated goal of the March 15, 2003 Petition for Redress was the *legal* termination of the withholding and diversion of pay from workers' paychecks. Schulz Decl. #1, para. 4-6 (A 71-72) (Docket 12).

The Government failed to Respond to the March 15, 2003 Petition for Redress.

During April and May of 2003, Defendants traveled to 37 cities, distributing 3500 copies of the Petition for Redress of Grievances regarding pay withholding. Schulz Decl. #1, para. 11 (A-73). Before each of the 37 meetings, Defendants formally NOTICED the appropriate LOCAL federal official in the Executive branch of the date, time and place of the meeting, and requested a response to the Petition for Redress. Schulz Decl. #1, para. 12 (A-74) (Docket 12), Exhibit F (A 75.62-75.90) (Docket 12). **The Government failed to respond.**

However, on April 4, 2003, the IRS sent Defendant Schulz a letter saying it had reviewed "certain material," under the authority of Section 6700 it was investigating a potential "abusive tax shelter" and it demanded Defendants' books and records. Schulz Decl. #3, para. 55 (A-123), Exhibit F (A-132.1) (Docket 12). [3]

Defendant Schulz refused in writing, on the ground that the request was an abridgment of his First Amendment Right to Petition the Government for Redress of Grievances. The IRS

[3] This was the beginning of IRS's WTP-6700 pretextual "enforcement" program; the actual purpose is to identify for harassment all persons who are contributing to the cause of holding the Government accountable through the Petition Clause of the First Amendment. See Schulz Declaration #3 for more information about WTP-6700.

served Schulz with a Summons, "requiring" Schulz to turn over his personal and private books and records.

Schulz petitioned the USDC to quash the Summons. The Second Circuit ruled that under the principles of Due Process, Schulz did not have to respond to the Summonses, and if the IRS wanted the information it would have to bring an enforcement proceeding in District Court where Schulz would be able to assert his defenses and where he might be entitled to a full adversarial proceeding and a hearing.[4]

After this strong ruling in favor of Defendants, the IRS moved the Second Circuit to modify its decision to require Schulz to respond to its administrative demand for his private records. The Second Circuit reiterated the compelling Due Process issues at stake.[5]

On May 10, 2004, Defendants again Petitioned the Government [President Bush, Treasury Secretary Snow, and Attorney General Ashcroft] for Redress of Grievances regarding the Government's violation of the tax clauses of the Constitution. Schulz Decl. #2, para. 78 (A-104) (Docket 12). At the end of its Attachment #1 (A-106.145), Defendants requested answers to 38 specific questions relating to "income" within the meaning of the **16th Amendment**. (A 106.152-106.161). At the end of its Attachment #2 (A-106.162), Defendants requested answers to 5 specific questions relating to **taxable sources** of "income."(A 106.202-106.203) (Docket 12). **The Government did not respond**.

In July of 2004, Defendants and 1450 named individuals filed a first impression, First Amendment declaratory judgment action in the USDC for the District of Columbia, seeking a declaration of the Rights of the People in their private capacities and the obligations of Government officials in their official capacities under the First Amendment's Petition Clause.

[4] *Schulz v IRS*, 395 F.3d 463 (2d Cir. 2005)
[5] *Schulz v IRS*, 413 F.3d 297 (2d Cir. 2005)

The Court was asked to determine whether the Government is required to respond to Defendants' Petitions for Redress of **constitutional torts**, and whether the Plaintiffs had the Right of Peaceful Enforcement to cure constitutional torts if the Government refused to respond.[6]

Central to an understanding of the full contours of the Right to Petition the Government for Redress of Grievances is a body of historical and archived evidence regarding the Natural Right of the People to Accountability in Government, including the Natural Right of the People to a response from Government to their Petitions for Redress and the Natural Right of the People to Enforce their Right to cure constitutional torts. Included in this body of legal evidence is a quote from the Journals of the Continental Congress expressing this specific legal principle:

> **"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."**
>
> *Journals of the Continental Congress,1:105-113*

Following the filing of the (*We The People vs. United States*) declaratory judgment action in 2004, and after the decision in *Schulz* by the Second Circuit in 2005, the IRS stepped up the WTP-6700 "enforcement" program against Defendants, targeting anyone associated with them, including donors, Board members, contractors, those who signed the Petitions for Redress, as well as the plaintiffs in *We The People v United States*, all under the pretext that it was investigating an "abusive tax shelter" under 26 USC Section 6700.[7]

The Court's attention is invited to another matter that is currently before the USDC for the Northern District of New York. In October of 2006, the IRS served a third-party summons on Schulz's Bank. Schulz petitioned to quash the Summons on the ground that the IRS was acting in

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[6] The case is before the United States Supreme Court on a Petition for Writ of Certiorari. *We The People Foundation v. United States*, 485 F.3d 140, (DC Cir., May 8, 2007).

[7] See Declaration #3 for information regarding the IRS's WTP-6700 "enforcement" program.

bad faith.[8] Schulz argued, as here, that the "tax enforcement action" was issued solely to obstruct the exercise of First Amendment Rights. The IRS then filed a Declaration by the agent that issued the Summons, a Declaration Defendants assert to be fraudulent. Defendants assert she **falsely testified** under penalty of perjury that the Bank summons was issued because the IRS had evidence that money had been transferred from an on-line payment fulfillment system (PayPal) to accounts in the Bank controlled by Schulz. Schulz moved the Court to sanction the agent. Tellingly, the IRS did not refute the charge of perjury in its pleadings. Schulz Decl. #3, para. 88-93 (A-131-132) (Docket 12).[9]

After four years of "investigation", audits and litigation to quash numerous "bad faith" summonses, and while Defendants and the Government were waiting for the Northern District to decide whether to quash the Bank summons and sanction the IRS agent for fraud and perjury, the IRS filed the instant 6700 action.

SUMMARY OF THE ARGUMENT

I. The complaint should be dismissed for failure to state a claim for which relief can be granted under the First Amendment Petition clause.

II. The complaint should be dismissed for failure to state a claim for which relief can be granted under the First Amendment Speech clause.

III. The complaint should be dismissed for failure to state a claim for which relief can be granted under 26 U.S.C. sections 6700 and 6701.

IV. Alternatively, Summary Judgment should be denied due to the material facts at issue.

V. Alternatively, the overly broad and vague Order should be modified.

This case is clearly distinguishable from every case cited by the District Court.

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[8] *Schulz v United States*, Northern District of New York, Case No 06-mc-131, Judge David N. Hurd.
[9] That agent has since been removed from the Schulz case.

The material forming the basis of the Complaint is protected political and/or educational material. It does not, under even the most liberal construction, constitute a "scheme" to "incite" illegal tax evasion. Neither Schulz nor the We The People Organization garner any profit whatsoever from the material, which they hand out for free and make available for free on their website. Where the requesting party is unable for some reason to download the material from the website, Defendants merely request a nominal donation of $20 to partially recover the cost of a the person who has to stand at the copy machine to copy approximately 100 pages, make a trip to the office supply store for the Blue Folder and copy paper, package the material for mailing, make a trip to the post office to mail the package and pay the Priority Mail postage rate. Where the requesting party is unable to reimburse Defendants for the cost of reproduction, the materials are provided **free of charge**. Neither Schulz nor the We The People Organization has "customers" nor are they engaged in commerce. They are certainly not in the business of selling any products or services to "customers" or "investors."

The content of the Blue Folder is not only non-commercial, political speech, it is an integral element of the formal process of Petitioning the Government for Redress of constitutional torts. The material is therefore afforded not only the full protection of the First Amendment's Free Speech clause, it is wholly protected by the superseding Petition clause. The distribution of the Blue Folder is nothing less than the direct exercise of the First Amendment to further public debate, change the way government is operated and cure wrongful acts by the Government. Despite the fact that its contents may greatly offend the Government it is neither criminal nor civilly actionable, it is the highest form of Speech protected by the First Amendment, i.e., political expression.

There is no merit to the complaint on the facts or the law. The complaint was apparently filed to harass Defendants, to convert the claim and exercise of a constitutional Right into a crime, to deter and obstruct Defendants from exercising their Rights, and to have a constitutionally prohibited chilling effect on citizens who challenge the basis and scope of the Government's authority and on others who support the Defendants.

The Blue Folder does not provide any information to workers or company officials about "tax avoidance" or "tax termination." Nowhere in the Blue Folder are the words "Tax Termination Package" used. Although the materials contain some general legal research questioning the government's purported legal authority to impose direct, un-apportioned taxes on the labor of Americans (information repeatedly presented to the Government in prior Petitions for Redress that the Government refused to deny or respond to), the Blue Folder materials do NOT focus on taxes or "tax benefits" nor do they seek to encourage non-filing of returns, nor do they give any advice or personal assistance as to those matters to individual taxpayers.

I. The Complaint Should Be Dismissed For Failure To State A Claim For Which Relief Can Be Granted Under The First Amendment Petition Clause

"Congress shall make no law…abridging…the right of the People…to petition the government for redress of grievances." See Constitution of the United States of America, First Amendment. The Right, through the Petition Clause of the First Amendment, to hold any branch of the government accountable to the Constitution, is the "capstone" Right, the period at the end of the sentence on Liberty's evolution, for "law without it, is law without justice."

The material forming the basis of the Complaint is protected by the First (Petition Clause) and Ninth Amendments against retaliation by the Government. The District Court recognized Defendants' Petition Clause claim, writing at the top of page 18 of its decision, "Defendants

further claim that their speech constitutes the lawful exercise of their right to petition the government." (A-18). However, the Court said no more on the subject, notwithstanding the breadth and depth of Defendants' legal arguments regarding the full contours of the meaning of the Petition Clause, including Defendants' Right to a response from the Government to each Petition for Redress of constitutional torts and Defendants' Right of Enforcement.[10]

The factual Record of this case shows clearly that Defendants properly, repeatedly and respectfully Petitioned the Government for Redress of Grievances in an attempt to reconcile and remedy the conflicts between the Iraq Resolution and the war powers clauses of the Constitution, between the USA Patriot Act and the privacy clauses, between the Federal Reserve System and the money clauses, and between the direct, un-apportioned tax on labor (including the institutionalized practice by the Government of forcing entities to withhold pay from workers and divert the pay to the Government).[11]

The factual Record of this case shows clearly that the Government has refused to respond to each and every Petition for Redress of these constitutional torts, refusing to answer any of Defendants' legitimate questions.

This gives rise to a First Amendment question of exceptional public 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 for Redress to cure unconstitutional behavior. A decision denying these Rights, or even placing limitations upon them, is of exceptional constitutional importance.

[10] See Motion to Dismiss (A 60-65) (Docket 12), and Motion for Reconsideration (A 471-480) (Docket 32)
[11] See 3/16/02, 4/10/02, 4/15/02, 11/8/02 and 3/15/03 Petitions for Redress discussed on pages 6-10 above.

The full and fair question under the facts and circumstances of this case is, if "Congress shall make no law…abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to Petition the government for Redress of Grievances" (First Amendment), and if "The enumeration in the Constitution of certain Rights shall not be construed to deny or disparage others retained by the People" (Ninth Amendment) and if, "The Right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated,"(Fourth Amendment) and if, "No person shall be…deprived of life, liberty, or property without Due Process of law…." (Fifth Amendment), and if the Constitution must be construed in its entirety, and if Defendants have evidence that the Government is unconstitutionally applying the otherwise constitutional internal revenue laws and refuses to justify its behavior, **remaining silent in the face of Defendants' proper Petitions for Redress,** are Defendants, acting in their private capacities, free to distribute written information on the subject to workers and company officials (for free, with a request that those workers and company officials submit the material to a rigorous review for accuracy by their attorneys, CPAs and accountants), without retaliation by the Government via a civil injunction lawsuit or other enforcement actions aimed at preventing Defendants from freely Speaking out and Associating with other People for the purposes of furthering public debate about the subject, altering the way the Government operates, and exposing and correcting those un-Constitutional acts?

The Right to government limited by the Constitution and based upon the consent of the governed is among the most precious of the Grand Rights and Liberties guaranteed by the Bill of Rights. The value in the Bill of Rights, particularly the Right to Petition, as an essential element in the direct, practical exercise of Popular Sovereignty and self-government is beyond question. It is, after all, the only way for the individual and the small group to secure their unalienable

Rights against the majority, and to directly and peacefully hold the government accountable to the Constitution.

This "capstone" Right to Petition the government for Redress of Grievances is critical in maintaining the balance of power between the People and the Government and in preserving an environment conducive and protective of free political discourse, to the ends that the 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 lies the very foundation of constitutional government and the Freedom of the People.

The Decision and Order by the District Court in this case has, by failing to give strict scrutiny to Defendants' Petition Clause Claim, removed the People's procedural instrument embedded within the Constitution for holding the Government accountable to the Constitution and Bill of Rights, thereby drastically dismantling the original balance of power between the People and the Government.

If left undisturbed, the Decision and Order would remove the capstone Right – the linchpin of the constitutional system of checks and balances – essential for the protection and preservation of the Constitutional Republic and its essential underlying principles of individual Rights, separation of powers, self-government and Popular Sovereignty.

If left undisturbed, the Decision and Order would eviscerate the legal and functional substance of the capstone Right of the Bill of Rights -- i.e., the Right of the People to peacefully hold the Government accountable to the war, tax, money, privacy, and other provisions of the Constitution -- by denying the People their Right to a Response from the Government to their Petitions for a Redress of **constitutional torts,** and by denying the People their Right to peacefully enforce their Rights for the purpose of furthering public debate on its subject matter,

changing the way the Government is operated and exposing Government corruption – the very core of the purpose of the First Amendment.

After all, the Petition for Redress is to the individual, the minority and the Constitutional Republic, what the ballot is to the majority and a pure democracy. Stripped of its original intent and power (to obtain a response from Government under threat of enforcement) the Petition Clause becomes nothing more than a redundant Expression clause, leaving the People with no apparent means of preserving their unalienable Rights -- i.e., the very antithesis of the intent of the Framers as evidenced by contemporary historical understanding and practices.

The Supreme Court has confirmed that, "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances" (*United States* v. *Cruikshank*, 92 U.S. 542, 552), and has recognized that the First Amendment expressly guarantees that right against abridgment by Congress as a Right that cannot be denied without violating those fundamental principles of liberty and justice that lie at the base of all civil and political institutions (*Hebert* v. *Louisiana*, 272 U.S. 312, 316 and *Powell* v. *Alabama*, 287 U.S. 45, 67), and has recognized this Right to Petition as one of "the most precious of the liberties safeguarded by the Bill of Rights" (*Mine Workers* v. *Illinois Bar Assn.*, 389 U.S. 217, 222), making explicit that, "the right to petition extends to all departments of the Government," and that "the right of access to the courts is . . . but one aspect of the right of petition" (*California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510).

The zone of interest to be protected by the Petition Clause 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.

The First of the Grand Rights is that governments are created by the People to serve and protect the People and their individual Rights. This Right is, as the Declaration of Independence proclaims, un-alienable. This Right is, as the Magna Carta demonstrates, the cradle of Liberty, forming the cornerstone of Western Civilization and our system of Law and Justice. This Right is articulated by the last ten words of the First Amendment. This Right is nothing less than the legal, procedural device by which We the People practically exercise self-governance and Popular Sovereignty, as individuals and as groups.

In the absence of any case law on point, Defendants' interpretation of the Petition or "Accountability" Clause has relied on contemporary historical understanding and practices, which is consistent with the Supreme Court's traditional interpretive approach to the First Amendment.

By failing to take into consideration Defendants' emphasis and reliance on contemporary historical understanding and practices, and by failing to subject Defendants' First Amendment questions to strict scrutiny or a hearing, the District Court deviated from the Supreme Court's traditional interpretive approach to the First Amendment.

Because this is a case of first impression involving a First Amendment prohibition whose meaning cannot be determined by the plain language approach to interpretation, it is necessary to apply and argue the contemporary historical understanding and practice, or "Framers' Intent," approach to the interpretation of the constitutional prohibitions.

Defendants' full original intent argument is included in the Record of this case. The following is a summary of the argument.

The Right is traced back to section 61 of the Magna Carta (1215) when the monarchy (King John) agreed: 1) that the People could Petition the King for redress of grievances; 2) that the King had 41 days to respond; and 3), that if the King failed to respond, the People could enforce their Rights by throwing off the King and his government, and seizing the King's castles, land and everything else belonging to the King except his life and that of the Queen and his children. See (A-472) for the text of Section 61 of the Magna Carta.

From then on in England, people claimed and exercised the Right to Petition the Government for Redress of Grievances, giving rise to recognition of the "derivative Rights" including free Speech, free Press and free Assembly (i.e., it being necessary to speak, write and meet with others in support of the Petitions for Redress).

In the American colonies, Petitions to Government for Redress of Grievances were received and submitted to committees for prompt consideration and response. It was unthinkable in those days that the Government would fail to consider and respond to the People's Petitions for Redress. Petitions changed the way Government operated. In fact, Akil Amar writes in his law review article that more state legislation came as a result of Petitions for Redress than for any other reason. See, THE BILL OF RIGHTS AS A CONSTITUTION, Akhil Reed Amar, 100 Yale L.J. 1131 (March, 1991).

In 1774, the same Continental Congress that adopted the Declaration of Independence passed an eight-page Act, unanimously, that proclaimed the first of the Grand Rights of the People was "government based on the consent of the people." In the very next paragraph, the Congress proclaimed the collateral Right of the People to withhold their allegiance and support from the Government by retaining their money until their Grievances were redressed.

In 1776, the Declaration of Independence clearly shows that the capstone Grievance was the failure of the British government to respond to the colonists' Petitions for Redress of Grievances. That failure was the proverbial "straw that broke the camel's back," the ultimate violation of the Rights of the People that led the colonists to throw off their government of 150 years.

In 1791, the People added the Right to Petition to the First Amendment in the American Bill of Rights, as the capstone Right, capping all others.

Until 1830, it was unthinkable for Government at any level in America not to respond to Petitions for Redress of Grievances, for fear of the Right of the People to enforce their Rights by withdrawing their allegiance and financial support. Even U.S. Congressmen submitted all Petitions for Redress of Grievances to a Committee for consideration and response. Every Wednesday Congress considered the Petitions for Redress.

In 1830, Southern Congressmen, frustrated by the flood of Petitions from People Grieving the issue of the Rights of slaves, managed to pass a procedural rule in Congress that permanently tabled any additional Petitions on the subject of slavery.[12]

It took John Quincy Adams five years to repeal the rule, but the precedent was established. That precedent became the basis of another and so forth, until the full contours of the meaning of the Right to Petition had become all but forgotten -- until 1985.

The Supreme Court had only to mention the Right to Petition in 1985 to wake up the scholars.[13] Following *MacDonald v Smith,* ten law review articles on the subject of the Right to Petition were published. None had ever been published before 1986. Included were extraordinary

[12] It might not have taken 35 years and a civil war to end slavery in America had the Government, for the first time in American history, not failed to respond to the People's Petitions for Redress.
[13] In *MacDonald v. Smith*, 472 U.S. 479 (1985) the Supreme Court held that just as the Right of Free Speech is not absolute (one can't yell "fire" in a dark crowded theater, the Right to Petition for Redress is not absolute (one can't liable or defame another).

works on the history, meaning, effect and significance of the Right to Petition, especially those by Prof. Gregory Mark at Rutgers and Prof. Akil Amar at Yale. For a list of the ten Law Journal articles, see (A-21, fn 35).

The District Court erred in deciding this constitutional question without taking Defendants' original intent argument into consideration.

The First Amendment bars a prosecution (as under 26 U.S.C. 6700) where the proceeding is motivated by the improper purpose of interfering with the defendant's constitutionally protected [rights]. *Bantam Books v. Sullivan*, 372 U.S. 58 (1963); *Dombrowski v. Phister*, 380 U.S. 479 (1975).

The Supreme Court and the Founder's opinions are clear; the United States cannot violate Fundamental Rights possessed by the People.

> "And the Constitution itself is in every real sense a law-the lawmakers being the people themselves, in whom under our system all political power and sovereignty primarily resides, and through whom such power and sovereignty primarily speaks. It is by that law, and not otherwise, that the legislative, executive, and judicial agencies which it created exercise such political authority as they have been permitted to possess. The Constitution speaks for itself in terms so plain that to misunderstand their import is not rationally possible. 'We the People of the United States,' it says, 'do ordain and establish this Constitution.' Ordain and establish! These are definite words of enactment, and without more would stamp what follows with the dignity and character of law. The framers of the Constitution, however, were not content to let the matter rest here, but provided explicitly-'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land.' (Const. art. 6, cl. 2.) The supremacy of the Constitution as law is thus declared without qualification. That supremacy is absolute; the supremacy of a statute enacted by Congress is not absolute but conditioned upon its being made in pursuance of the Constitution. And a judicial tribunal, clothed by that instrument with complete judicial power, and, therefore, by the very nature of the power, required to ascertain and apply the law to the facts in every case or proceeding properly brought for adjudication, must apply the supreme law and reject the inferior statute [298 U.S. 238, 297] whenever the two conflict. In the discharge of that duty, the opinion of the lawmakers that a statute passed by them is valid must be given great weight, *Adkins v. Children's Hospital*, 261 U.S. 525, 544 , 43 S.Ct. 394, 24 A.L.R. 1238; but their opinion, or the court's opinion, that the statute will prove greatly or generally beneficial is wholly irrelevant to the inquiry. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 549 , 550 S., 55 S.Ct. 837, 97 A.L.R. 947." *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

"The claim and exercise of a Constitutional right cannot be converted into a crime." *Miller v. U.S*, 230 F 2d 486, 489.

"Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them". *Miranda v. Arizona*, 384 U.S. 436 (1966).

Under a thin veil of presumptions and questionable assertions, the Government's 6700 "enforcement" program (hereinafter "WTP-6700") is violating Defendants' Petitioning Rights and their collateral Rights of Free Speech, Press and Association, as guaranteed by the First and Ninth Amendments to the United States Constitution, their collateral privacy Rights as guaranteed by the Fourth Amendment of the United States Constitution, and their collateral Due Process and Property Rights as guaranteed by the Fifth Amendment. WTP-6700, of which the instant Complaint is one part, is clearly intended to shut down the We The People Foundation for Constitutional Education, Inc. and the We The People Congress, Inc., and with them, the First Amendment Petition process, by impairing the ability and willingness of other People to associate, by cutting off the flow of donations and technical assistance to the Petition process via the Foundation, and by so bogging down the manager of the Petition process (Schulz) by forcing him and the We The People organization to respond to one attack after another under the WTP-6700 program that he has little time to further the Petition process whether by litigation, civic education or civic action. The record shows clearly the general pattern and specific steps being taken by the United States under WTP- 6700.

Defendants are associating with a group of persons and organizations who have claimed and are exercising the capstone Right of Petitioning the Government for Redress of Grievances. They have associated with one another and have given of their time, money and talents for the common purpose of petitioning elected and appointed officials for Redress of certain constitutional torts and for educating the general public about issues involved in the Petition

process. They have conducted regular meetings and telephone and Internet communications, seeking answers to questions in order to reconcile certain acts of the federal government with the enumerated powers and prohibitions of the Constitution of the United States of America, all for various uncontested legitimate reasons including civic education, protecting individual liberty and freedom, and holding government accountable to the Constitution.

As the Declarations by Schulz show, the IRS has admitted its purpose has been to gain the identity of those contributing in one way or another to Defendants' cause *so that they too could be examined by the IRS* – in other words, to chill their enthusiasm to continue their support.

The Government wants to operate without constitutional restraint (hence the Petitions for Redress) and, the Government wants to operate without judicial review (hence the WTP-6700 "enforcement" program). However, the Government does not have the unilateral prerogative to interpret its own authority to act unchecked outside the limited powers delegated to it by the terms and conditions of the Constitution.

The instant case is one of "first impression." Lacking any court ruling declaring the full contours of the meaning of the Petition Clause as it applies to ordinary natural citizens seeking Redress against their government for **constitutional torts**, and taking into account the plain language of and the Framers' intent behind the words of the Petition Clause, the 791 years of history documenting the evolution of Liberty from Runnymede to Philadelphia, and the complete absence of any case law in opposition to Defendants' interpretation, the ends of Justice and Liberty require that deference, and the presumption that those fundamental Rights exist must be provided to Defendants who have claimed and are exercising those Rights.

The Government can produce nothing that would limit or deny the exercise or enforcement of the Right of Petition by individual natural citizens. To avoid prior restraint or any infringement of the Right, the lack of oppositional precedent coupled with the plain language and the history, meaning effect and significance of our founding documents and their legal precedents must be construed in favor of Defendants.

The Defendants assert that the Government is obligated to respond to Petitions for Redress, and Defendants have a Right of enforcement, especially when, as here, the oppression is caused by unconstitutional government acts and the Government refuses to be held accountable by responding to the Petitions for Redress. The underlying, fundamental Right is not changed by the fact that the Petition Clause lacks an affirmative statement that Government shall respond to Petitions for Redress of Grievances. "It cannot be presumed, that any clause in the Constitution is intended to be without effect." Chief Justice Marshall in *Marbury v. Madison*. 5 U.S. (1 Cranch) 139 (1803).

II. The Complaint Should Be Dismissed For Failure To State A Claim For Which Relief Can Be Granted Under The First Amendment Speech Clause

The complaint should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim for which relief can be granted inasmuch as the conduct complained of constitutes constitutionally protected speech under the First Amendment.

It is important to note that the activity complained about is part and parcel of the Defendant's exercise of the First Amendment Petition process-[14] and strictest scrutiny must be applied when seeking to chill the expression of ideas. *McIntyre v Ohio Elec. Comm'n*, 514 U.S. at 347 (1995).

[14] The First Amendment Petition process is aimed at remedying certain constitutional torts – i.e., Government's violation of the war powers, privacy, money and tax clauses of the federal Constitution.

The First Amendment to the Constitution declares "Congress shall make no law … abridging the freedom of speech." The U.S. Supreme Court has at times interpreted the Amendment broadly, and as Justice Brandeis explained: "even advocacy of [law] violation, however reprehensible morally, is not a 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) (Brandeis, J., concurring). While the material and statements may be provocative, this is all the more reason to refrain from suppressing this speech. The right to criticize and question the government is "the heart of what the First Amendment is meant to protect." *McConnell v. Fed. Elect. Comm'n*, 540 U.S. 93, 248 (2003) (Scalia, J., concurring in part and dissenting in part). "Speech concerning public affairs is more than self-expression; it is the essence of self government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). "The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes." *Terminello v. Chicago*, 337 U.S.1, 4 (1949). A function of "provocative and challenging" free speech is to invite dispute. *337 U.S.* at 4. Free speech is best serving "its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *337 U.S.* at 4. Speech, while serving its laudable purpose may also "strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." 337 U.S. at 4. Political speech must be protected regardless of whether it has the intended effect on the audience. 337 U.S. at 4-5.

The Government is seeking to permanently enjoin Defendants from disseminating educational and political material pertaining to the "Legal Termination of Tax Withholding For Companies, Workers and Independent Contractors." This material is inextricably intertwined

with the Petition Process. For instance, the material was included in Defendants' March 15, 2003 Petition to the Government for Redress and derived from earlier Petitions to the Government for Redress. The Government failed to respond to any of those Petitions for Redress. For that reason and others, the material constitutes constitutionally protected political speech under the First Amendment. See *McIntyre v Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995).

Specifically, the purportedly objectionable material includes sections and excerpts of the Internal Revenue Code and Regulations, court cases and other references including:

a. Most workers are not required by law to supply their company with a social security number.[15]
b. Most workers are not compelled by law to submit a federal W-4 withholding certificate in order to work for a company.[16]
c. Most companies, and most workers can legally terminate a W-4 withholding agreement certificate.[17]
d. Most workers do not fit the definition of "employee" under the internal revenue laws.[18]
e. Most companies do not fit the definition of a "withholding agent," under the internal revenue code.[19]
f. Most personal earnings are not taxable under the internal revenue laws.[20]
g. Most companies are not required by law to make returns or statements of payments to their workers.[21]
h. Most workers are not required by law to participate in the Social Security entitlement program.[22]
i. The internal revenue laws do not define what is meant by "income".[23]
j. The word "income" means what the Supreme Court has consistently defined the word "income" to mean, which is "profit gained through the sale or conversion of capital assets".[24]
k. The IRS may not have legislative and territorial jurisdiction over most companies and most workers.[25]

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[15] See the March 18, 1999 letter from Charles Mullen, Director Office of Public Inquiries of Social Security Administration, included in Exhibit B to Declaration # 1.
[16] See 31 CFR 215.2(n) (1), 215.6, 215.9 and 215.11. See also 26 USC 3402 (p)(3)(A).
[17] See 26 CFR 3402(p)-1(b)(2).
[18] See 26 USC 3401(c), 3121(d), and 3306 (i).
[19] See 26 USC 7701(a)16, 26 CFR 301.7701-16 and 26 USC 1441 through 1446, 6201, and 6301.
[20] See 26 CFR 1.863-1(c) and 26 CFR 1.861-1.
[21] See 26 USC 6401.
[22] See Railroad Retirement Board v. Alton Railroad Co., 295 U.S.330.
[23] See Eisner v. Macomber, 252 U.S. 189,206
[24] See Stratton v. Howbert, 231 U.S. 399,414; Doyle v. Mitchell, 247 U.S. 179,185; So. Pacific v. Lowe 247 U.S. 330; Eisner v. Macomber, 252 U.S. 189 and Merchants Loan v. Smeitanka, 255 U.S. 509. See also House Report No. 1337; Senate Report No. 1622; U.S. Code Congressional and Administrative News, 83rd Congress, 2nd Session, pages 4155 and 4802, respectively (1954).
[25] U.S. Constitution, Article 1, Section 8, clause 17; U.S. v. Lopez, 514 U.S. 549 (1995), Adams v. U.S. 319 U.S. 312 (1943), and 40 U.S.C 255 (now 3111 and 3112).

l. Filing an individual tax return is voluntary (not compelled).[26]

Defendant's speech addresses **the way government is operated**, i.e., it is intended to cure *constitutional torts* against the People through the political mechanism provided by the unrestricted exercise of First Amendment Rights. Speech that advocates the exercise of fundamental Rights and provisions of U.S. law that may be highly offensive to the nation's revenue agents, cannot be used to deny the People the very Rights and tools, provided by the Constitution, necessary to insure their control over their servant government.

"Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This includes discussions of candidates, structures and forms of government, **the manner in which government is operated** or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press, which includes…newspapers, books, magazines … to play an important role in the discussion of public affairs." *Mills v. Alabama,* 384 U.S. 214, 218-219 (1966) (Defendants' emphasis). "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."*Roth v U.S.*, 354 U.S. 476, 484 (1957).

Defendants' Speech, Press, Assembly and Petition Rights are of exceedingly high value, for without them Defendants cannot hope to non-violently defend the Constitution and protect their individual, Natural Rights, Freedoms and Liberties from a tyrannical government. The high value of Free Speech will often lead those in power to seek to suppress it, as in the case at hand. See *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 777 (1978) (citing *Associated Press*

[26] See *U.S. v, Conklin* WestLaw 504211, (10th Circuit, 1994), wherein the court held, "The [5th Amendment] protects against compelled testimonial communications…," meaning filing an income tax return is voluntary.

v. United States, 326 U.S. 1, 20 (1945). "It is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression." 435 U.S. at 777 n. 11.

Instead of suppressing speech, the Supreme Court has underscored the importance of opening channels of communication to allow Americans to form their own judgments in making informed choices. See for instance, *VA State Bd. of Pharmacy v. Citizens*, 425 U.S. 748, 770 (1976).

Defendants' Operation Stop Withholding and the Blue Folder are part and parcel of the First Amendment Petition Process that, in turn, is part and parcel of an **ideology** that is rooted in the essential doctrines underpinning the American system of governance, including Popular Sovereignty. Ideological communication is different from pure commercial price and product advertising, which the government can properly regulate, the former deserving full First Amendment protections. See *Va. State Bd. of Pharmacy*, 425 U.S. at 776 (1976) (Stewart, J., concurring):

> "**Ideological expression**, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought – thought that may shape our concepts of the whole universe of man. Although such expression may convey factual information relevant to social and individual decision making, it is **protected by the Constitution, whether or not it contains factual representations and even if it includes inaccurate assertions of fact.** Indeed, disregard of the 'truth' may be employed to give force to the underlying idea expressed by the speaker." *Id* at 779-80. (Defendants' emphasis).

The "Blue Folder" Is Not Commercial Speech

Commercial speech has long been considered by the Supreme Court as less worthy of full First Amendment Protection than political speech because the Government need not tolerate inaccuracies in objective, factual commercial speech as it tolerates false assertions in political commentary. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976). Commercial speech is expression that "propose[s] a commercial transaction." *Va. State Bd. of Pharmacy*, 425 U.S. at 762 (1976). Operation Stop Withholding, including the

statements in the Blue Folder, do not propose a commercial transaction, and is therefore not commercial speech. The commercial speech doctrine relies on "the 'common-sense' distinction between speech proposing a commercial transaction … and other varieties of speech." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978). Neither Defendants' website language announcing the availability of the Blue Folder, nor the Blue Folder itself is an advertisement for any product sold for profit. The Blue Folder is not sold, much less sold for profit. It is the protected *political speech* of the Defendants.

The facts clearly demonstrate that the speech that is the object of this case does not relate in any way to the economic interest of any of the Defendants and is, therefore, not commercial speech. Commercial speech is "**expression related solely to the economic interests of the speaker and its audience**." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 561 (1980). (Defendants' emphasis). Justice Stevens concurred in the judgment, adding it was unclear in the decision as to "whether the subject matter of the speech or the motivation of the speaker [is] the limiting factor." Justice Stevens went on to say either interpretation "encompasses speech that is entitled to the maximum protection afforded by the First Amendment." *Central Hudson*, 447 U.S. at 579.

If and only if the speech is related solely to the **economic interests of the speaker** *and* its audience can it be suppressed as speech more likely to deceive than inform or speech that is related to illegal activity. *Central Hudson*, 447 U.S. at 563-564 (1980). (Def'ts emphasis).[27]

Beyond the fact that the Government, the Defendants assert, will not be able to (successfully) refute a single assertion made in Defendants' Blue Folder, the content does not

[27] Even if the challenged speech was commercial (which is not the case), the First Amendment affords protection "to the communication, to its source and to its recipients both." *Va. State Bd. of Pharm*, 425 U.S. 756.

constitute commercial speech as it has been defined by the Supreme Court. As such, it cannot be suppressed or afforded only the limited protections provided by the First Amendment.

Defendants offer no "tax avoidance products or services" – much less a "scheme" to evade taxes. Rather, Defendants' speech is primarily and purely an **exercise of their rights under the First Amendment.**

The Government's oft-repeated claims in the Complaint that the not-for-profit Defendants "marketed," "promoted" and "sold" "false" "tax fraud" "scheme" materials are inaccurate and prejudicial. Despite the fact that many national professional tax preparation and accounting firms publish voluminous tomes each year interpreting the thousands of pages of the IRC and purporting to offer every taxpayer every advantage to avoid taxes, these firms remain largely unbothered by IRS. Only citizens who aggressively exercise those same Free Speech Rights AND who advocate good faith legal arguments contrary to the widely held (but provably mistaken) beliefs regarding our Constitution, become targets to be harassed by the Justice Department and labeled "abusive tax scheme promoters."

In sum, speech is commercial speech if the speech proposes a **commercial transaction** (See *Va. State Bd. of Pharmacy*, 425 U.S. at 762 (1976)), is linked to **commercial profits** (See *Virginia State Bd. of Pharmacy*, 425 U.S. at 772 (1976)), and is related solely to the **economic interests of the speaker** and the audience (See *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York,* 447 U.S. 557, 561 (1980)) (emphasis added by Def'ts).

Even if the complained of speech "had commercial aspects … [it does] not negate all First Amendment guarantees." *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975).

Bolger v. Young Drug Products Corp., 463 U.S. 60 (1983) remains the only Supreme Court case to directly confront what, other than pure advertising, constitutes commercial speech.

See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES Section 11.3.2 (2d ed. 2002). *Bolger* 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. *Bolger*, 463 U.S. at 66-67 (1983).

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 statements in the Folder.

Fear by the United States that the audience may find Defendants' message persuasive is no justification for suppressing it or by characterizing the speech as commercial and denying it the full protection of the First Amendment. As argued above, the Government's claims that Defendants' speech is false or is "inciting" lawless acts, MUST be subject to examination under the doctrine of **strict scrutiny because it is fully protected political speech.** The District Court abused its discretion by improperly characterizing Defendants' political Speech as commercial, by declaring it false, and by holding that it imminently incited violations of the law without a strict scrutiny analysis.

III. The Complaint Should Be Dismissed For Failure To State A Claim For Which Relief Can Be Granted Under 26 U.S.C. Sections 6700 and 6701

The United States seeks an injunction pursuant to 26 USC Section 7408, which authorizes an action to enjoin promoters of abusive tax shelters from further engaging in conduct subject to penalty under Section 6700[28] (promoting abusive tax shelters) and Section 6701 (aiding and abetting understatement of tax liability).

[28] 26 U.S.C. 6700 (a) authorizes in part the imposition of a penalty on any person who:
(A) organizes (or assists in the organization of) –
(i) a partnership or other entity,

To establish a violation of Section 6700, the U.S must carry the burden of showing that:

(1) Defendants organized or sold, or participated in the organization or sale of an entity, plan, or arrangement;
(2) Defendants made or caused to be made false or fraudulent statements concerning the **tax benefits** to be derived from the entity, plan, or arrangement;
(3) Defendants knew or had reason to know that the statements were false or fraudulent;
(4) the false or fraudulent statements pertained to a material matter; and
(5) an injunction is necessary to prevent recurrence of this conduct.

Regarding the first prong of proving a Section 6700 violation, neither the We The People Foundation nor the We The People Congress has a commercial enterprise. They are not for profit corporations incorporated in 1997 under the laws of the State of New York. They are not in the business of selling goods or services.[29] None of the Defendants dispose of the Blue Folder by sale; they do not "sell" the Blue Folder; **the Blue Folder is given away for free**.[30]

Regarding the second and third prong of proving a Section 6700 violation, Operation Stop Withholding (the Blue Folder) addresses the issue of wage withholding. The statements in the Folder's documents that allegedly induce the offensive acts the Government complains of are

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(ii) any investment plan or arrangement, or
(iii) any other plan or arrangement, or
(B) participates (directly or indirectly) in the sale of any interest in an entity or plan or arrangement referred to in subparagraph (A), and
(i) makes or furnishes or causes another person to make or furnish (in connection with such organization or sale) --
(A) a statement with respect to the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter, or
(B) a gross valuation overstatement as to any material matter.

[29] Business means "Employment, occupation, profession, or commercial activity engaged in for gain or livelihood. Activity or enterprise for gain, benefit, advantage or livelihood. Black's Law Dictionary, Fifth Edition.

[30] Approximately 3,500 copies were initially handed out at 37 meetings, free of charge, and all the material has been available on the website, 24 hours a day, seven days a week since April of 2003, free of charge. The posted policy has always been: 1) that the We The People organization prefers to communicate electronically; 2) if for some reason someone could not download the material, the material would be mailed to him; 3) to cover the cost of supplies, printing and mailing a nominal donation of $20 is suggested; 4) if anyone said he could not afford the $20, the material would be mailed to him anyway. Schulz Decl. #5, para. 4-17 (A 254-257) (Docket 23), Exhibits B-K (A-258-280) (Docket 23).

clearly and overwhelmingly focused on wage withholding. Although the materials contain some general legal research questioning the government's purported legal authority to impose direct, un-apportioned taxes on the labor of Americans, the Blue Folder materials do NOT focus on taxes or "tax benefits" nor do they seek to encourage non-filing of returns, nor do they give any personal advice or personal assistance as to those matters. Beyond advocating the protected exercise of the Right to Petition, the Blue Folders -- the material core of what the Government claims is the "abusive tax scheme," merely addresses the private legal relationship between workers and their companies, and the legal Right of workers to terminate (or contract in absence of) a **voluntary** wage withholding agreement (*Again, see* 26 CFR 3402(p)-1). Any claimed actual harms flowing from understatement or underpayment of taxes due, or non-filing of returns is not the direct result of the speech or acts of the Defendants, but of the acts of unnamed third parties responsible for allegedly filing or preparing those assessments or returns.

Regarding the fourth prong of proving a Section 6700 violation, the statements made in the Blue Folder are not material within the meaning of Section 6700, having no substantial impact on the decision-making process of any entity or worker, other than the decision by the worker to submit the statements to the entity, and the entity's decision to submit the statements to its tax and legal professional(s).

The Government has failed to state a cause of action for which relief can be granted under 26 U.S.C. Sections 6700, 6701, or 7408 or 7402. The District Court abused its discretion in determining that Defendants' Speech constituted an "abusive tax shelter." The Complaint should be dismissed.

IV. Summary Judgment Should Be Denied Due To The Material Facts At Issue

A decision on a motion for summary judgment under Rule 56 requires the evidence be construed in the light most favorable to the non-moving party;[31] Rule 56 authorizes summary judgments only if there is no genuine issue as to any material fact and if judgment is appropriate as a matter of law. FRCP 56 c. A party opposing a properly supported motion for summary judgment may not rest upon "mere allegations or denials"[32] or on conclusory allegations or unsubstantiated speculation.[33]

The District Court committed clear error in granting the Government's motion for summary judgment. There are numerous genuine issues as to material facts, and there are material facts favoring Schulz that are not in dispute. Proof by a preponderance of the evidence, of conduct subject to penalty under 6700, has not been made by the Government for it to obtain an injunction, much less a summary judgment.

The Court relied on, but mis-applied, *U.S. v Raymond*, 228 F.3d 804 (7th Cir. 2000). The Court has also clearly misapplied *U.S. v. Freeman*, 761 F.2d 549 (9th Cir. 1985).

Defendants, in their "RESPONSE TO STATEMENT OF MATERIAL FACTS AND ADDITIONAL MATERIAL FACTS THAT ARE IN DISPUTE" (the "Statement") supported their opposition to the Rule 56 motion by substantively and legally denying each of the Government's material facts.[34] The Record shows Defendants' potent opposition, provided under penalty of perjury, rests on evidentiary documentation with probative value, not conclusory allegations, unsubstantiated denials or speculation. Defendants have supported their Motion to Dismiss and opposition to the Rule 56 motion by providing the Court with substantiated Material Facts that the Government has not denied.

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[31] Tenenbaum v. Williams, 193 F.3d 581, 593 (2d Cir. 1999).
[32] Rexnord v Bidermann, 21 F.3d at 525-26 (2d Cir. 1994).
[33] Scotto v Almenas, 143 F.3d at 114 (2nd Cir. 1998).
[34] Docket # 21 through # 24.

Contrary to the District Court's Decision and Order at page 2, nowhere does the Educational Program use the words, "Tax Termination Program." Whether the Program is a "Tax Termination Program" is a material fact in dispute. The Program does not counsel individual tax payers to do anything but ask the companies they work for to submit certain written material to a "rigorous review" by their "tax professionals (attorneys, CPAs and accountants) to determine if it is appropriate for the company to legally stop ***withholding, filing and paying*** to the IRS certain monies taken from the paychecks of their workers.

In error, the District Court relied heavily on the legal principles set forth in *U.S. v Raymond*, 228 F.3d 804, and likened the Educational Program to Raymond's "De-Taxing America Program." However, unlike the "De-Taxing America Program" which was the subject of *Raymond*, Schulz's Educational Program does not include forms and instructions to guide anyone "through a process of 'de-taxing.'" *Raymond* at 807. Nor does the Educational Program inform anyone "that if they complete the materials and directions in the Program they will be 'withdrawn' from the jurisdiction of the federal government's taxing authorities and the social security system and will no longer be required to pay federal taxes." *Raymond* at 807. Nor does the Educational Program provide materials that are "pre-printed with the purchaser's name and various personal information" to be sent to "various government agencies, including the Internal Revenue Service ('IRS')." *Raymond* at 807. Nor does the Educational Program suggest, much less instruct anyone to "file W-4 forms with their employers asserting that they are exempt from federal taxation." *Raymond* at 807. Nor does the Educational Program suggest, much less instruct anyone to "request a refund of taxes paid in prior years." *Raymond* at 807. Nor does the Educational Program suggest, much less provide instructions to individual tax payers "on how to complete future tax returns to reflect that the purchaser has not incurred any tax liability in the

previous year and consequently does not owe any federal income or social security taxes." *Raymond* at 807. Nor does the Educational Program suggest or instruct individual tax payers to "cease paying federal taxes after completing the instructions provided in the Program materials." *Raymond* at 807.

The Court erred in saying, "The obvious claimed benefit from participating in Defendants' plan is that individual income taxes need not be paid." (Order at 10). This is unsubstantiated and inaccurate. The Educational Program provides no such tax benefit. The only claimed benefit to an individual participating in the plan could be the (legal) cessation of *withholding* of pay by his company, no more, no less. Indeed, the Forms that provide the legal basis for executing such request are the key elements of Speech the government complains of. The Educational Program in no way counsels the individual regarding the use of his money nor how to handle his (alleged) ultimate liability for filing and payment of income taxes.

Contrary to the District Court's Decision and Order at page 5, Defendants are not a "tax protestor group." Unlike the Defendants in *Raymond*, none of Defendants' activities are about taxes, per se. Defendants are not against taxes. Defendants are squarely for the Constitution and holding government accountable to the Constitution. This case is certainly not about protesting taxes. See for instance Schulz Decls 2, 3, 4 and 9.

Contrary to the District Court's Decision and Order at page 15-16, the Educational Program has not harmed anyone. The Court claims the Educational Program has the potential of putting individuals in harm's way and has actually harmed the Government. However, the Gravity of the Harm, if any, is a material fact in dispute. There is no evidence before the Court that the Program has actually caused any company to stop withholding, much less evidence that a company stopped withholding after the recommended "rigorous review by legal counsel and tax

professionals (attorneys, CPAs and accountants). There is no factual evidence before the Court that the Program is causing "insufficient payments to the Treasury" or "significantly increased efforts at collecting taxes" (Order at 15).

The Government (particularly IRS Agent Gordon) has misled the Court into believing that 997 participants in the Educational Program "have not filed federal tax returns for a period of three years, which represents more than 2,991 unfiled tax returns" and that the estimated cost to the Government "attributable to filing substitutes for returns for the 2991 unfiled returns is $4,806,537. (Order at 15).

In denying these unsubstantiated allegations, Defendants argued the time and expense the IRS devoted to assessing and collecting taxes due the United States from individuals or corporations is an irrelevant fact having nothing to do with the distribution of the Blue Folder.[35] Defendants argued that Agent Gordon was "mixing apples with oranges."[36]

The record shows the Defendants in this case are the lead Plaintiffs in *We The People v. U.S.,* which case has over 1400 named Plaintiffs.[37] The record also shows that by the end of 2002, most of the over 1400 named Plaintiffs in *We The People v. U.S.* signed all four of the Petitions for Redress of constitutional torts relating to the Government's violation of the war powers, privacy, money and tax clauses of the Constitution, and signed an Affidavit in 2004, saying that because the Government has not responded to any of those four Petitions for Redress they stopped filing tax returns until their Grievances were redressed.

Paragraphs 63-69 from a Declaration by Defendant Schulz filed with the DC Court on 10/3/06 in *We The People v U.S.* is instructive and were repeated in Defendants' motion for reconsideration in the instant case (A 462-463), to show that the 997 nonfilers Agent Gordon was

[35] Statement at 28.
[36] Statement at 25
[37] See Complaint with caption attached to Schulz Declaration #11.

referring to (if they exist at all -- there being no proof in the record) were from the list of plaintiffs in *We The People Foundation v United States*, most of whom submitted affidavits in 2004 to the DC District Court hearing that case, saying that they were retaining their money until their grievances were redressed.[38]

The Court should not condone any infringement of Defendants' Due Process rights or any obstruction of Justice. It is improper for the Government to lead the Court into believing that somehow, as a consequence of their participation in the Educational Program, 997 people have gotten their companies to stop withholding and those 997 people then stopped filing and paying their taxes for three years. It is improper for the Government to lead the Court to believe that it has cost the IRS over $4 million to assess and collect **those** taxes from **those** 997 people. It is improper for the Government to do all this knowing full well that the 2991 unfiled tax returns being pursued by the IRS are not from 997 people participating in the Educational Program but are in fact, largely from 997 Plaintiffs in *We The People.*

Contrary to the District Court's Decision and Order at page 10,16**,** Defendants' statements regarding the 16th Amendment and Liability have not been rejected by the Courts and are not false.[39]

Contrary to the District Court's Decision and Order at page 11, Defendants did, in fact, rely on knowledgeable professionals.[40]

Contrary to the District Court's Decision and Order at page 12, the Educational Program included legal disclaimers and instructs people to have the material reviewed by "qualified legal counsel."[41]

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[38] The 1400+ Affidavits were attached to Schulz Declaration #11but were rejected by Judge McAvoy (A-511).
[39] Regarding the 16th Amendment, see Defendants' denials in the Statement at 5, 6, 17, 41, 47 and 63. Regarding the so-called "861" issue, see Defendants' denials in the Statement at 5, 14, 33, 41, 47 and 63.
[40] Statement at 4 and 6.

Contrary to the District Court's Decision and Order at page 16, Defendants did not expect or want people to buy the Educational Program. In fact, many thousands of paper copies of the materials were distributed for free, which is what Defendants told the Government would be the case.[42]

Contrary to the District Court's Decision and Order at page 17, Defendants have never said the tax laws are unconstitutional.[43]

Contrary to the District Court's Decision and Order at page 17, Defendants' "main purpose" is not "to continue to disseminate the Educational Program and encourage employees and employers alike to participate." The subject Program is an insignificant part of Defendants' overall plans and activities.[44]

Contrary to the District Court's Decision and Order at page 18, Defendants do not counsel "violations of the tax laws" or "improper filing of returns." [45]

Contrary to the District Court's Decision and Order at page 18 and 19, Defendants' speech was never an integral part or a vehicle of any crime and never incited a crime. Imminency was never a factor.[46] Defendants have never assisted in the filing of tax returns.[47] Defendants never urged the preparation of presentation of any false IRS forms.[48] Defendants did not knowingly make any false statements as part of any scheme to defraud. The Government's and the District Court's allegations that Defendant's positions are "frivolous" is in error. The statements the Court is referring to derive from the questions included in Defendants' Petitions for Redress of Constitutional torts. Defendants have bluntly, frankly and correctly asserted that

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[41] Statement at 6,7,8,9,12,16 and 19. See especially #12.
[42] Statement at 2,3,4,22,23,25,26,27,48,58 and 59.
[43] Statement at 31,39
[44] Statement at 1, 19 and 44. See also Schulz Declaration #3, Exhibit E.
[45] Statement at 3,5,8,10,20,23,24,30,34,35,36,37,38,40,42,43,45,46,50,51,55,56 and 62.
[46] Id
[47] Id
[48] Id, plus Statement at 15,54 and 61.

those questions have never been answered by any court of law, any government agency or any academician.[49] In addition, no substantive rebuttal has ever been made to Defendant's specific assertions that withholding is voluntary for most American workers and that most American companies are not, by law, "withholding agents."

Contrary to the District Court's Decision and Order at page 20, the Educational Program is not commercial speech much less false commercial speech. As demonstrated in the pleadings, the We The People Congress is a membership program that has a single focus and program – to institutionalize citizen vigilance, county-by-county. The membership fee is to help the WTP Congress develop and execute its program. The program is an outgrowth of a program started by Schulz in 1990 in NY State and is entirely separate from the Educational Program and Blue Folder distributed by the We The People Foundation for Constitutional Education. The WTP Congress is a separate membership organization. The fact that someone joins the WTP Congress and pays a membership fee does not, in any way at all cause the Educational Program to become commercial speech. That's a stretch than can't be made. In fact, the Government Plaintiffs have identified NO activity attributable to the Congress that it has taken in support of the alleged 6700 violations. Likewise, the overwhelming list of activities engaged in by the Foundation have no connection whatsoever to the subject Educational Program: seminars on the state of the Constitution, freedom drives (with car flags), conferences, Liberty Hour webcasts, research leading to Petitions for Redress, demonstrations in Washington, DC, the declaratory judgment action on the Right to Petition in the DC court, press conferences at the National Press Club, bumper stickers that advertise the website, newspaper ads, and so forth. As fully explained in the pleadings, we try to provide copies of everything we do for general educational purposes. Its

[49] Regarding the 16th Amendment, see Defendants' denials in the Statement at 5, 6, 17, 41, 47 and 63. Regarding the so-called "861" issue, see Defendants' denials in the Statement at 5, 14, 33, 41, 47 and 63.

only when an item can't be put on the website for free download do we offer to mail copies, in which case we request a nominal donation to partially cover our costs but always waived if the person tells us he can't afford to send the donation.

Contrary to the District Court's Decision and Order at page 20, where the Court wrote, "Although Defendant may sometimes give their materials away for free, they do solicit a donation for $20 for each packet of materials they provide," the record clearly shows the situation to be the complete reverse. Many thousands of copies The Educational Program have been given away completely for free, both in printed form and downloaded from the WTP website. A few times, People have asked that the Program be copied and mailed to them and a $20 donation was requested to partially cover the cost of doing so. In addition, the policy has always been that if the person who could not download the Program for free said he did not have the $20 the Program was always mailed to them anyway. If Defendants did not have the time to copy the material the $20 donation was returned and the person was then notified of the fact. **Defendants have not denied the evidence included in Schulz Declaration #5 (A254-287). This is a significant material fact in dispute.**

Contrary to the District Court's Decision and Order at page 20, Defendants most certainly do not "offer to sell a customized legal opinion letter from an attorney or CPA." An online link to the Educational Program states, word for word, "Click Here to request information about ordering a customized legal opinion letter from an attorney or CPA to be sent to your company or their tax and/or legal advisors. (Note: WTP is not involved with the creation or solicitation of these letters. WTP receives NO portion of their cost. Special discounts are available for WTP Congress members.)" The "Click Here" link brings up the email form and address of Preferred Services, the organization founded by a certified paralegal that prepared and copyrighted the

forms. The party interested in having an attorney or CPA provide an opinion on the contents of the Educational Program deals directly with Preferred Services. The message says Preferred Services offers a discount from its normal fee for such opinion letters to the person requesting a letter. This means whatever money travels from the person requesting the letter to Preferred Services is reduced by some amount. Schulz and the WTP organizations are not, and have never been, involved in any manner in the transaction, and the Government has failed to produce any evidence to the contrary. The offer by Preferred Services and any follow up transaction that may occur between Preferred Services and the person requesting a legal opinion letter does not convert Defendants' Speech and/or the Educational Program into commercial speech.

Upon information and belief, the licensed attorneys that prepare(d) such letters for Preferred Services, including Paul Chappell, an attorney who retired from the IRS's Office of the Chief Counsel, also reviewed, and formally approved the detailed content of the Educational Program forms distributed by Defendants.

Contrary to the District Court's Decision and Order at page 20, Imminency is not a factor in the Educational Program. This is obvious from the nature of the Speech comprising the Program and the context of the distribution of such Speech.[50]

V. The Order Is Overly Broad and Vague

Defendants incorporate by reference the arguments included in their motion for modification and clarification of the District Court's Order. (A 495-510)

CONCLUSION

The Government will suffer no harm, much less irreparable harm if the permanent injunction does not issue. Its law enforcement structure and process will remain unimpaired and

[50] In addition, the fact that someone may have sent material from the Program to the IRS as justification that he does not have to pay taxes is certainly an unintended consequence of the Program. People send all kinds of materials to the IRS.

is well equipped to handle any law breaking. On the other hand, Defendants' harm due to the posting of the District Court's Order on Defendants' website and certainly as a result of turning over to the Government the identification information of any of Defendants' associates and supporters is immediate and irreparable. Defendants' fundamental Rights are being infringed. When fundamental rights are violated, even for minimal periods of time, the harm is irreparable. *Elrod v. Burns*, 427 U.S. 347.

The Government has not factually identified any injury being suffered. The Government will suffer no harm, or immeasurable harm if the permanent injunction does not issue, and certainly no irreparable harm.

Based on the above and on the accompanying Declarations, Defendants respectfully request an order dismissing the Complaint for failure to state a claim for which relief can be granted, with prejudice, or, in the alternative, denying the motion for summary judgment and remanding for further proceedings, or, in the alternative, narrowing the Order, specifically declaring what Speech within the Blue Folder is false and what Speech within the Blue Folder might imminently incite illegal behavior.

CERTIFICATE OF COMPLIANCE

In keeping with the Court's Rules, this brief contains 13,481 words.

Dated: October 22, 2007

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