No. 07-3729-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

ROBERT L. SCHULZ; WE THE PEOPLE FOUNDATION FOR CONSTITUTIONAL EDUCATION, INC.; and WE THE PEOPLE CONGRESS, INC.,
Defendants-Appellants

ON APPEAL FROM THE ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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PRELIMINARY STATEMENT

The Hon. Thomas J. McAvoy, United States District Court for the Northern District of New York, rendered the decision that is the subject of this appeal. Judge McAvoy's supporting opinion (A-1 – A-25) is not published.[1]

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[1] "A" references are to the separately bound record appendix filed by the appellants. "Br." references are to the appellants' opening brief. "SA" references are to the supplemental appendix submitted concurrently with this brief.

JURISDICTIONAL STATEMENT

This is an appeal of an order of the United States District Court for the Northern District of New York granting the United States injunctive relief against Robert L. Schulz (Schulz), We The People Foundation for Constitutional Education, Inc., and We The People Congress, Inc. (collectively, with Schulz, "the defendants") under Section 7408 of the Internal Revenue Code (26 U.S.C.) (I.R.C. or the Code). (A-27 – A-40.) The District Court had jurisdiction under 28 U.S.C. §§ 1340 and 1345 and I.R.C. §§ 7402(a) and 7408(a).

The District Court entered a final judgment in favor of the United States on August 15, 2007 (A-26), thereby disposing of all claims of all parties, and denied the defendants' last remaining post-judgment motion on August 27, 2007 (A-515). The defendants timely filed their notice of appeal (A-i) on August 29, 2007. *See* 28 U.S.C. § 2107(a), (b); Fed. R. App. P. 4(a)(1)(B), (4)(A). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the District Court abused its discretion in enjoining the defendants from engaging in activities that are subject to penalty under I.R.C. §§ 6700 and 6701, including the promotion or sale of an abusive

tax scheme based on the termination of withholding of federal employment and income taxes.

STATEMENT OF THE CASE

The United States brought this action to enjoin the defendants from promoting, selling, or otherwise furthering abusive tax schemes. (A-27 – A-40.) The defendants filed a motion to dismiss supported by affidavits and other materials not referenced in the complaint (A-41 – A-70; *see* A-140), and the United States cross-moved for summary judgment (A-133 – A-158). The District Court granted summary judgment to the United States (A-1 – A-25) and denied (A-512 – A-515) the defendants' motions for reconsideration (A-449), for modification of the injunction (A-494), and for a stay of enforcement (A-487 – A-491). This appeal followed.[2] (A-i.)

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[2] Shortly after filing this appeal, the defendants filed a motion in this Court for a stay of the District Court's order pending appeal. On Sept. 20, 2007, this Court granted the motion with respect to paragraph "c" of the District Court's order (A-24), which required the defendants to produce a list identifying all persons who have been provided the tax-related materials at issue, and denied the motion in all other respects.

STATEMENT OF FACTS

A. "Operation Stop Withholding"

1. Background

Robert L. Schulz organized We The People Foundation for Constitutional Education, Inc. ("WTP Foundation") and We The People Congress, Inc. ("WTP Congress") in 1997. (A-108, A-119.) Neither organization has any employees, and each has its corporate address at Schulz's home. (A-120.) Since 1999, WTP Foundation and WTP Congress have received and spent more than $2 million and $100,000, respectively, "in pursuit" of activities "personally planned and managed" by Schulz. (A-119.)

In 1999, Schulz has said, he began "*claiming and exercising the constitutional Right to Petition the Government for Redress of Grievances* regarding the fraudulent origin and illegal operation of the federal individual income tax." (A-115.) As chairman of WTP Foundation, Schulz "invited the leaders of the Executive and Legislative branches of the federal government to identify their most knowledgeable people on the subjects and have them attend a Foundation sponsored . . . symposium . . . to discuss the issues" with three proponents of constitutional challenges to the federal income tax,

Joseph Banister, William Benson, and Lowell Becraft.[3] (A-111 – A-116.) After C-Span televised the event (in which the Government did not participate), Schulz heard from a number of people who had decided to "enforce" their constitutional opposition to the income tax "by retaining their money until their grievances were redressed and their questions answered." (A-116 – A-117.) Schulz dubbed this stance "No Answers, NO Taxes." (A-118; *see* SA-19.)

Along with "[p]eople associated with the cause of the We The People organization," Schulz, too, "repeatedly petitioned the Executive and Legislative branches of the United States . . . for Redress of Grievances related to the money, war, tax and privacy clauses of the Constitution." (A-121; *see* A-106.112 – A-106.135.) When the Government did not respond, Schulz began to "promote the *Right of*

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[3] Well before Schulz's "symposium," Benson had been convicted of tax evasion, *United States v. Benson*, 67 F.3d 641 (7th Cir. 1995); and Becraft had been sanctioned for asserting the "frivolous" argument that the Sixteenth Amendment "does not authorize a direct non-apportioned income tax," *In re Becraft*, 885 F.2d 547 (9th Cir. 1989). According to Schulz, Banister had been "forced . . . to resign" from his position as a Special Agent in the IRS's Criminal Investigation Division after "questioning whether his enforcement of the internal revenue laws and the IRS's day-to-day administration of those laws, were out of step with the taxing clauses of the Constitution and the Fifth Amendment." (A-111 – A-112.)

Enforcement . . . by withdrawing [his] support of the government until [he] had secured Redress of . . . *constitutional torts*." (A-121.)

On March 15, 2003, Schulz "notified [then-]IRS Commissioner Mark W. Everson, the leaders of the federal Executive and legislative branches, the U.S. Attorney General, the Secretary of the Treasury and the Chief of the Criminal Investigation Division of the IRS" that, "based on their failure to respond" to his "petitions," he was undertaking a "national campaign" called "Operation Stop Withholding" to "educate officials of private companies that their workers are not subject to withholding, that they are legally not a 'withholding agent' and that the individual income tax is fraudulent in its origin and illegal in its operation." (A-71 – A-72, A-75.1.) In his letter to the Commissioner, Schulz explained that the campaign would "include instructions for companies, workers and independent contractors on how to legally stop withholding, filing and paying the tax," and he enclosed with the letter "[a] copy of the full packet of information we will be using during this campaign." (A-75.1.)

2. The "Blue Folder"

The "campaign" material for Operation Stop Withholding was contained in a folder labeled "Legal Termination of Tax Withholding

For Companies, Workers and Independent Contractors," which Schulz called the "Blue Folder." (A-72; A-75.2; *see* SA-1.) The first item in the Blue Folder was a cover letter from Schulz to "Chief Executives of American Companies," stating in part: "We trust that . . . you too will come to believe that your workers are not subject to withholding, that you are legally not a 'withholding agent,' and that you will utilize the Forms provided to willfully and legally cease withholding." (A-75.8.) In the letter, Schulz encouraged those "concerned about the heavy-handedness of the IRS and the time and expense of possibly having to deal with the IRS as a result of your decision to stop withholding" to "consider joining the tax honesty movement" by signing "the Personal Pledge (included in packet), indicating that if 500 companies agree to stop withholding . . . then you, too, will stop withholding." (*Id.*)

Immediately after the letter was a "Memo To American Companies" setting forth the following assertions (A-75.9 – A-75.10):

- Under U.S. tax law your workers are not subject to withholding.
- Under U.S. tax law you are <u>*not*</u> a withholding agent as legally defined by the Internal Revenue Code.
- The Individual Income Tax is fraudulent in its origin and enforced without legal

authority on most Americans and American companies. . . .

- Under U.S. tax law you can *legally* stop withholding income AND employment taxes from your workers and legally stop issuing W-2 and 1099 forms to your workers and independent contractors.

Under the heading "How Your Company Benefits," the memo listed the following (A-75.10):

- Immediately increase your bottom line by approximately 30%.
    - **Eliminate payment of "matching" employment taxes** (FICA, etc.) . . .
    - **Enjoy a significant competitive cost advantage over your competitors in direct labor & overhead costs** . . .
    - **Substantially reduce your payroll/tax administration and accounting labor personnel/service costs**
- Minimize company income tax reporting requirements to almost nothing.
- Instantly increase all of your workers' take home pay without affecting cash flow or profits. . . .
- Eliminate risk of lawsuits for unauthorized withholdings of earnings. . . .
- *Legally* protect, uphold and defend the Constitutional and full legal rights of your workers, independent contractors, and sole proprietors against federal and state tax

> liens, levies, administrative "judgments" and garnishments issued without bona fide legal authority or proper due process.

The memo included "Instructions and Forms for Companies," beginning with a purported "Reminder" that "[t]he law does not allow the company to deduct sums for taxes, fees or other charges WITHOUT the worker's voluntary, written authorization." (*Id.*) The instructions described two steps "[t]o legally terminate withholding for your existing workers" (*id.*):

> Step 1: Obtain from the worker and place in his/her file a ***WTP Form #1***, "*Worker's Verified Statement and Notice To Terminate W-4 Agreement*."
>
> Step 2: Company completes and places in worker's file a ***WTP Form #2***, "*Company's Verified Affidavit with Letter of Transmittal Regarding Worker's Form W-4, Disclosure, Withholding and Non-Covered Status*."[4]

In the same vein, the memo stated that "[n]ew workers can legally eliminate all federal and state withholding of income taxes and employment taxes by declaring their status as a 'protected individual' in conjunction with filing the work employment eligibility verification

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[4] The acronym "WTP" was used throughout the Blue Folder to refer to materials prepared and provided by the We The People Foundation.

form and completing an affidavit declaring that they are not subject to withholding," and that "[i]ndependent contractors can legally opt out of backup withholding by submitting an affidavit attesting to their status as a 'Protected Individual' (who is not subject to backup withholding), and filing a 'Substitute W-9' which satisfies only that information required by the IRS." (A-75.10 – A-75.11.) For both categories, the memo advised that "the company concurs, via its affidavit," that withholding is not required. (A-75.11.) As for "existing workers," the memo detailed a two-step process based on WTP "Stop Withholding" forms. (*Id.*; *see* A-75.12.)

"Once the government has been properly notified and termination of withholding has been procedurally put into effect," the memo continued, "the company has no further reporting requirements under U.S. law." (*Id.*) The memo provided instructions for filing "final" IRS withholding and information returns, including a statement that "there will be NO further returns." (*Id.*)

Along with the "memo" for companies, the Blue Folder contained corresponding "Instructions for Workers & Contractors" and the referenced WTP "Stop Withholding" forms. (SA-3 – SA-5; A-75.15 – A-75.55.) For "existing workers" and "new hires," the instructions

included this "Note": "When the Entity unlawfully compels the . . . worker to submit a W-4 [the IRS's Employee's Withholding Allowance Certificate] (or its equivalent) and demand [a Social Security number] as a condition of keeping your job [or 'of being hired'], you must make the decision whether or not to complete and sign the form." (SA-3.) A final "Note for Workers and Contractors" advised participants in the scheme (SA-4):

> Ask the Entity and its 'tax professionals' to put in writing the specific laws to substantiate their false claims. Do not be surprised when they refuse to do so. The laws do not exist! Yet, the entity will still rely upon their so-called 'tax professionals' to deny you work or continue . . . the unlawful taking [of] amounts from your remuneration without your explicit consent.

The instructions then suggested six types of "recourse" for the worker or contractor if "the Entity fails to stop unlawful withholding after fifteen (15) days or after your second pay check (whichever occurs first)": (1) "consider contacting paralegals@prodigy.net about obtaining a signed, customized professional opinion letter from either a lawyer or a CPA addressed to the Entity or their legal or financial advisors who responded negatively to your documents"; (2) follow the "opinion letter" with a "Final Notice and Demand to Cease and Desist, Demand for

Payment and Demand for Production of Documents"; (3) "[w]hen the Entity fails to respond after twenty (20) days, utilize the state labor board/commission to file a WRITTEN claim against the Entity"; (4) "[i]f a Worker for a public agency, file a written 'Whistle Blower Act' claim against your agency"; (5) "[i]f a Worker belonging to a union, file a written, formal good faith grievance to the union"; and (6) "[a]fter exhausting your administrative remedies, . . . consider retaining professional services to decide whether to file a lawsuit (civil, criminal, tort or civil rights) against the Entity's tax professionals and/or its employees who continue to violate your rights." (SA-4 – SA-5.)

Finally, both the "Memo for Companies" and the "WTP Stop Withholding Instructions & Termination Forms" contained the following "Notice & Disclaimer" (A-75.9; A-75.13):

> The materials presented herein contain legal content referencing and directly citing official U.S. tax statutes, tax regulations, and federal court decisions regarding the limited authority of the U.S. Government to impose income taxes or withholding, and the legal duties and obligations (or lack thereof) that are allegedly imposed upon American businesses and the Americans that labor for them.
>
> **These materials are presented solely for educational purposes.** Although these materials may be utilized in attempting to secure

> and exercise one's Constitutionally protected rights, . . . We The People makes NO representation that these materials constitute legal advice and furthermore specifically encourages all workers and business owners to submit these materials to qualified legal counsel for review and advice.
>
> WTP has made every effort to provide these materials at **NO COST**.

3. Schulz's promotion of Operation Stop Withholding

One day after he unveiled Operation Stop Withholding in his letter of March 15, 2003, Schulz posted an article on the defendants' website – www.givemeliberty.org – entitled "IRS & DOJ Put on Notice: National Campaign To Stop Withholding."[5] (A-72; A-75.4 – A-75.5.) The article included links to the March 15 letter and to all of the contents of the Blue Folder, including the WTP "Stop Withholding"

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[5] Until the District Court issued the injunction in this case, the documents comprising the Blue Folder remained continuously available on the defendants' website, "24 hours a day, seven days a week." (Br. 35 n.30). The defendants also used the website to offer a "Tax Termination Package" for sale for $39.95. (SA-28; SA-31.) The promotional materials read in part as follows: "Bob Schulz, Chairman of the We The People Foundation, stopped paying taxes and filing returns. These are the materials he sent to the IRS . . . . With this package, any citizen can duplicate what Bob Schulz has done." (SA-28.) The Government views the Tax Termination Package and the Blue Folder as different manifestations of the same overall tax avoidance scheme. (A-28.)

forms referenced therein. (A-72; A-75.4; *see* A-75.13 – A-75.14.) The article stated that "WTP encourages everyone to freely download the documents and distribute copies to local businesses and all company officials that they may know or have contact with in their area." (A-75.5.) Those wishing to have "printed copies of the March 15, 2003 letter to the IRS, together with its enclosure, the 'Legal Termination of Tax Withholding for Companies, Workers and Independent Contractors' information package," were invited to "order same from our website store for a nominal donation of $20" or to "let us know if you cannot afford the $20." (*Id.*) In a second article posted to the website on March 21, 2003, Schulz assured readers that the procedure for terminating withholding advocated in the Blue Folder "conforms to the Internal Revenue Code and the specific requirements as set forth in the U.S. income tax regulations." (A-73; SA-6.)

On April 3, 2003, Schulz posted a third article entitled "Operation Stop Withholding Underway: No Objections by IRS or DOJ," in which he announced a "full schedule" of free public "workshops to instruct officials of private companies, workers and independent contractors on how to legally stop withholding, filing and paying the individual income tax." (A-73; SA-10.) "We want to make sure the 'troops' are well

briefed on the overall 'battle plan' and well instructed on our strategy and tactics," Schulz explained, adding that "the troops will then participate in a series of actions aimed at maximizing participation in [a] second round of meetings." (SA-10.) The article included links both to the Operation Stop Withholding Nationwide Meeting Schedule and for donations. (SA-11.) Noting the "need [for] a steady, predictable flow of operating funds," Schulz "encourage[d] people to make monthly donations for at least the next eight months" by using "a new on-line 'subscription' donation system on [the] website" that made it "possible for people to send WTP a fixed donation amount once or twice a month." (*Id.*)

The day after that posting, the IRS notified Schulz that it had "reviewed certain materials with respect to your tax shelter promotion" and was considering both the imposition of penalties under I.R.C. § 6700 and a request for injunctive relief under § 7408. (A-132.1.) Despite the warning from the IRS, Schulz embarked the next day on a 37-city tour of public meetings to promote Operation Stop Withholding, with stops in New Hampshire, North Carolina, Georgia, Florida, Texas, New Mexico, Arizona, California, Nevada, Oregon, Washington State, Utah, Colorado, Missouri, Iowa, Minnesota, Wisconsin, Illinois, and

Pennsylvania. (A-73 – A-74.) He distributed some 3,500 copies of the Blue Folder during the tour, which lasted 53 days. (*Id.*)

Along the way, Schulz posted three more articles to his website. In the first, titled "America: It's Time to Stop Withholding," Schulz said that he was "on the road and headed around the country to organize Operation Stop Withholding." (SA-13.) In addition to providing a link to his meeting schedule, Schulz discussed a newly filed action by the Department of Justice against a California attorney who was "'falsely advising customers that they do not have to pay federal income taxes," as well as developments in the Government's ongoing injunction case against a Nevada tax protester, Irwin Schiff. (SA-14 – SA-16.)

In the second article, posted May 5, 2003, and titled "Schulz to America: Stop Withholding," Schulz again told readers that he was undertaking "the cross-country speaking tour as We The People begins to organize Americans to exercise their legal rights and stop withholding of all taxes on their wages and salaries." (SA-18.) Invoking the slogan "No Answers, NO Taxes," Schulz said that his talks "articulate a compelling case that regardless of the content or the meaning of the tax laws, the People have an unquestionable,

constitutionally guaranteed Right to withhold payment of taxes" until his petition for redress is "officially answered" by the Government. (SA-19.) He also stated that "no representative of the government ha[d] contacted [him] to question either the content or the validity of the Stop Withholding termination forms or other claims WTP is making about the law" (*id.*), even though, as noted above, the IRS had done so nearly a month before (A-132.1).

"Anecdotal evidence . . . received by the WTP office indicates that 'Operation Stop Withholding may be starting to take on a life of its own," the second article continued. (SA-19.) Schulz assured readers that "we are hearing daily about many individuals that have filed the forms and their employers have, in fact, stopped all withholding – with no questions asked." (*Id.*)

The third posting likewise "identified the [Stop Withholding] operation as part of the on-going Right to Petition process" (A-75) and said that Schulz was continuing "his relentless call for ordinary people and business owners to legally terminate their wage withholding and to stop paying and filing in order [to] force the government to answer . . . questions regarding the federal income tax, *i.e.*, 'No Answers, NO Taxes'" (SA-21). The article related audience "anecdotes" making it

"very clear . . . that the IRS does indeed have a growing problem. . . . [P]eople are, in fact, terminating their 'voluntary compliance' with the tax system and directly challenging the authority of the government." (*Id.*)

B. The District Court proceedings

The United States filed its complaint in the District Court pursuant to I.R.C. § 7402(a), which provides statutory authority for such injunctive relief "as may be necessary or appropriate for the enforcement of the internal revenue laws," and § 7408, which authorizes injunctions where appropriate to prevent the recurrence of conduct subject to penalty under § 6700 or 6701, including, respectively, abusive tax shelter promotions and the aiding and abetting of understatements of tax liability. (A-27 – A-40; *see* Special Appendix, *infra.*) In its prayer for relief (A-38 – A-39), the Government asked that the District Court permanently enjoin –

> Defendants and anyone in active concert or participation with them from directly or indirectly:
>
> 1. Advising anyone that they are not required to file federal tax returns or pay federal taxes;
>
> 2. Selling or furnishing any document purporting to enable customers to

> discontinue or stop withholding or payment of federal taxes;
>
> 3. Instructing, advising, or assisting anyone to stop withholding or paying of federal employment or income taxes;
>
> 4. Obstructing or advising or assisting anyone to obstruct IRS examinations, collections, or other IRS proceedings; [and]
>
> 5. Engaging in other similar conduct that substantially interferes with the administration and enforcement of the internal revenue laws . . . .

The Government also requested that the District Court order the defendants to provide their customers with a copy of the injunction, to produce to Government counsel a list of persons (with identifying information) who have received the defendants' materials, and to remove the offending materials from the defendants' website and post a copy of the injunction on the website for one year. (A-39.)

The defendants moved to dismiss the complaint for failure to state a claim (A-41 – A-70), primarily on the ground that their activities were protected under the Free Speech Clause and the Petition Clause[6] of the

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[6] "Congress shall make no law … abridging … the right of the people … to petition the Government for a redress of grievances." U.S. Const. amend. I.

First Amendment (A-53 – A-65). While acknowledging that commercial speech "has long been considered by the Supreme Court as less worthy of full First Amendment [p]rotection than political speech," the defendants maintained that Operation Stop Withholding was "not commercial speech," because "[t]he Blue Folder is not sold, much less sold for profit." (A-57.) With respect to the Petition Clause, the defendants argued that the Blue Folder was "constitutionally protected" as "an integral part of exercising Defendants' Petition process for Redress of constitutional torts." (A-60.)

The defendants also contended that the complaint failed to state a claim under I.R.C. § 7408, because there was "no apparent threat of future violation" of § 6700. (A-65 – A-68.) Addressing the elements of such a violation (discussed below and in greater detail in Part A.2 of the Argument, *infra*), they reiterated that they were "not in the business of selling goods or services," and they asserted that the statements in the Blue Folder that were challenged by the Government were "focused on wage withholding" rather than "tax benefits" and had "no substantial impact on the decision-making process of any entity or worker." (A-66 – A-67.)

In its cross-motion for summary judgment under I.R.C. § 7408, the Government rebutted the defendants' § 6700 analysis.[7] (A-142 – A-149.) The Government asserted that the requested injunctive relief passed muster under the First Amendment, both because the defendants' activities amounted to commercial, rather than political, speech, and because the defendants' speech, even if stripped of its commercial aspect, encouraged and assisted specific violations of the tax laws. (A-151 – A-155.) "[N]ot a single court has refused on First Amendment grounds to enjoin speech that violates §§ 6700 or 6701," the Government observed.

The District Court granted the Government's motion for summary judgment and denied the defendants' motion to dismiss. (A-1 – A-25.) The court held that the Government was entitled to the injunction under I.R.C. § 7408, because it had established the five elements of a § 6700 violation set out in *United States v. Estate Preservation Services*, 202 F.3d 1093, 1098 (9th Cir. 2000). (A-4 – A-17.)

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[7] The Government also argued that the defendants' promotion of false or fraudulent withholding positions violated § 6701, because the defendants knew that their "advice and . . . documents" would result in understatements of liability; and that their deliberate and continuing interference with tax enforcement provided independent grounds for injunctive relief under § 7402(a). (A-149 – A-151.)

First, the court found that the defendants had "organized" a "plan or arrangement" to promote the termination of tax withholding through Operation Stop Withholding. (A-6 – A-7.) Second, the court identified numerous "false statements" made by the defendants and found that those statements – including "'instructions for companies, workers and independent contractors on how to legally stop withholding, *filing and paying the tax*'" – "concern the tax benefits to be derived from the plan." (A-10 [emphasis added by court]; *see* A-75.6.) Third, the court said, "the undisputed evidence . . . demonstrates that Defendants knew, or had reason to know, that their statements were false": they had "relied on fringe opinions of known tax protestors whose theories have repeatedly been rejected by the courts"; Schulz claimed "significant experience researching and arguing tax-related issues"; and he "acknowledges and admits" that the courts had rejected such attacks. (A-11 – A-12.) The court found that the defendants' "purported disclaimer" was "insufficient" and "irrelevant," not least because it "appears not to disclaim at all." (A-12 – A-13.)

Fourth, the court found that the defendants' false and fraudulent statements were "clearly relevant to the availability of the tax benefit" and, as such, were "material" to customers' decision-making. (A-14 – A-

15.) Indeed, the court said, the defendants' statements "appear to be the cause" of their customers' "failing to file tax returns or otherwise attempting to stop having taxes withheld from their wages." (A-15.) Fifth, the court concluded that an injunction was necessary to prevent recurrence of the defendants' conduct. (A-14 – A-17.) Taking into account the sub-factors described in *Estate Preservation Services*, *supra*, the court found that the "gravity of harm" from the defendants' "nationwide plan to . . . encourage people to stop having taxes withheld" was "manifest"; that the defendants were the "primary figures in establishing the plan and encouraging other[s] to participate in it"; that their dissemination of materials they knew (or "reasonably should have" known) to be discredited showed a high degree of scienter; that their conduct was "not isolated," as evidenced by Schulz's report of his speaking tour as well as the Government's evidence of numerous customers' failure to file returns; that the defendants "express no recognition of their culpability" but "continue to maintain" the same positions and "attempt to get others to adopt their views"; and that "their main purpose is to continue to disseminate their plan and encourage employees and employers alike to participate." (*Id.*) "It is a

virtual certainty that, absent injunctive relief, future violations can be anticipated," the court said. (A-17.)

Finally, the District Court rejected the defendants' argument that the activities to be enjoined were protected by the First Amendment, regardless of whether those activities were considered commercial or political speech. (A-17 – A-23.) The court acknowledged that "[m]uch of Defendants' conduct is protected speech" and that, for example, they were "free to give speeches on whether the Sixteenth Amendment was properly ratified." (A-20.) The court stated, however, that the First Amendment affords no protection for a defendant who "urges the preparation and presentation of false IRS forms with the expectation that the advice will be heeded" or who makes "knowingly false statements . . . as part of a scheme to defraud." (A-19.)

The court observed that the challenged speech might indeed be considered commercial, because the defendants advertised their program, requested "donations" for the Blue Folder, encouraged customers to become paying members of their organization, and sold videos, pamphlets, CD-ROMs, bumper stickers, brochures, and flags. (A-20 n.10; *see* SA-31 – SA-35.) Citing *United States v. Bell*, 414 F.3d 474, 480 (3d Cir. 2005), and *United States v. Schiff*, 379 F.3d 621, 626

(9th Cir. 2004), *cert. denied*, 546 U.S. 812 (2005), the court explained that their speech could be enjoined to that extent, "because the government may prohibit false, misleading or deceptive commercial speech." (A-20.) "Assuming Defendants' speech to be political in nature," the court continued, "it still may be enjoined," because "[t]he First Amendment does not protect speech that incites imminent lawless action." (*Id.)* "Defendants are not merely advocating," the court said, "but have gone the extra step in instructing others how to engage in illegal activity and have supplied the means of doing so" by creating and distributing the We The People forms. (A-21.)

"That being said," the court noted, "any injunction must be narrowly drawn to separate protected speech from unprotected speech and to protect Defendants' First Amendment rights." (A-22.) The court accordingly enjoined the defendants from engaging in activity subject to penalty under I.R.C. §§ 6700 and 6701. (A-23.) Further, the court required the defendants to notify their customers of its decision and order, to produce their customer list to counsel for the United States, to remove the offending material from their websites, and to display the court's decision and order on their websites for one year. (A-23 – A-24.)

The defendants moved for reconsideration on the ground that both disputed and undisputed material facts precluded summary judgment. (A-447 – A-484.) In the alternative, they moved for modification of the injunction so that they could "understand precisely which speech is enjoined." (A-498; *see* A-495 – A-501; A-503 – A-510.) After the District Court denied those motions and the defendants' motion for a stay pending appeal (A-485 – A-493), Schulz submitted a declaration regarding compliance, in which he stated that "all links, on all websites over which [he had] control, to the WTP forms that were in the Blue Folder and that are the subject of the Government's complaint in this action, were disabled"; that the court's decision and order had been posted on all such websites; and that he was "searching [his] files" for the customer information called for in paragraph (c) of the injunction and expected to be "in a position to comply with most of the requirements of paragraph (c)" by September 6, 2007 (A-517 – A-518).

SUMMARY OF ARGUMENT

The Government brought this civil injunction action to prevent the defendants from promoting and/or selling abusive tax schemes grounded on theories that have been rejected by the courts many times over several years. The District Court correctly held on summary

judgment that the Government was entitled to the requested injunction under the specific authority in I.R.C. § 7408.

1. To obtain an injunction under I.R.C. § 7408, the Government must demonstrate (1) that the defendant has engaged in conduct subject to penalty under I.R.C. § 6700 or § 6701 and (2) that injunctive relief is appropriate to prevent recurrence of such conduct. To show a violation of I.R.C. § 6700, the Government must prove (1) that a person has organized or sold (or assisted in the organization of) an entity, plan, or arrangement; (2) that he made or furnished statements concerning tax benefits to be derived from the entity, plan, or arrangement; (3) that he knew or had reason to know the statements were false or fraudulent; and (4) that the false or fraudulent statements pertained to a material matter. To show a violation of § 6701, the Government must prove that the person prepared or assisted in the preparation of a tax return or other document that he knew or had reason to believe would be used in connection with any material matter arising under the internal revenue laws and, if so used, would result in an understatement of tax liability.

The statutory requirements are satisfied here. First, the evidence firmly establishes that the defendants initiated and organized a

national campaign called Operation Stop Withholding and that, in furtherance of the campaign, they disseminated (whether for free or in exchange for a suggested "donation") a package of materials – complete with instructions and forms – entitled "Legal Termination of Tax Withholding For Companies, Workers and Independent Contractors" (the Blue Folder). Second, the evidence is overwhelming that the defendants made false and fraudulent statements in the course of promoting Operation Stop Withholding and distributing the Blue Folder. The Blue Folder itself is replete with such statements. The entire scheme is based on frivolous legal theories that have been rejected by the courts many times.

Third, the District Court correctly found that the defendants knew or had reason to know that their statements were false. Schulz was aware that the theories espoused in the Blue Folder and elsewhere regarding the income tax in general and wage withholding in particular had been definitively rejected by every court to have considered them. Moreover, Schulz was aware that taxpayers had been penalized, sanctioned, and even convicted of conspiracy or criminal tax fraud for pressing such theories (indeed, Schulz testified in the trial of at least one such taxpayer). Fourth, the defendants' false and fraudulent

statements pertained to material matters in that, as the defendants readily admit, they had a substantial impact on the decisions of workers and companies to participate in Operation Stop Withholding.

Finally, the District Court correctly concluded that an injunction was necessary to prevent a recurrence of the defendants' improper conduct. Schulz is the central figure behind a nationwide scheme to encourage and assist taxpayers in "opting out" of wage withholding and associated information reporting, and the harm to the United States from his continuing effort to impede the administration of the tax laws is manifest. Future violations of § 6700 and/or § 6701 appear inevitable unless the defendants are enjoined.

2. The defendants' contentions on appeal are meritless. First, the District Court's order in no way impinges on the defendants' right to submit their grievances to the Government as contemplated in the Petition Clause of the First Amendment. Moreover, courts have repeatedly held that statements such as those at issue here – whether viewed as false or fraudulent "commercial" speech or political speech that incites and facilitates imminent lawless behavior – are not protected under the Free Speech Clause of the First Amendment. On the statutory side, the defendants' half-hearted attempt to demonstrate

that their conduct is not described in § 6700 rests on arguments that are either irrelevant (*e.g.*, their insistence that they are not engaged in a "commercial enterprise") or disingenuous (*e.g.*, that their statements in support of the cessation of wage withholding do not pertain to any "tax benefits").

The judgment of the District Court is correct and should be affirmed.

ARGUMENT

The District Court did not abuse its discretion in enjoining Schulz and the We The People organizations from engaging in activities described in I.R.C. §§ 6700 and 6701, including the promotion or sale of their Operation Stop Withholding abusive tax scheme

Standard of review

A district court's decision to grant an injunction is reviewed for abuse of discretion. *E.g., Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006); *United States v. Estate Pres. Servs.*, 202 F.3d 1093, 1098 (9th Cir. 2000). The District Court's grant of summary judgment – *i.e.*, its determination that the United States is entitled to injunctive relief as a matter of law – is subject to *de novo* review. *See Bronx Household of Faith v. Bd. of Educ. of the City of New York,* 492 F.3d 89, 96 (2d Cir.

2007) (permanent injunction pursuant to grant of summary judgment); *see also United States v. Raymond*, 228 F.3d 804, 810 (7th Cir. 2000) (same, in the context of I.R.C. § 7408). Summary judgment is appropriate only if there are no genuine issues of material fact, such that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

A. The District Court correctly held that the Government was entitled to an injunction under I.R.C. § 7408, because the defendants' promotion of Operation Stop Withholding and their distribution of the Blue Folder violated §§ 6700 and 6701

1. Statutory requirements

Section 7408(a) of the Internal Revenue Code authorizes the United States to seek to enjoin a person from engaging in conduct subject to penalty under, *inter alia*, § 6700 or § 6701. Section 7408(b) authorizes a district court to issue an injunction if it finds that (1) the person has engaged in such conduct and (2) injunctive relief is appropriate to prevent the recurrence of such conduct.

As is relevant here, § 6700(a) imposes a penalty on any person who makes statements regarding "tax benefit[s]" of "any . . . plan or arrangement" organized or sold by him that he knows (or has reason to know) are false or fraudulent as to any material matter. Similarly,

§ 6701(a) imposes a penalty on any person who assists in, or advises with respect to, the preparation of any document that the person knows (or has reason to believe) will be used in connection with any material tax matter, if the person knows that such use would result in an understatement of the tax liability of another person.

To obtain an injunction under I.R.C. § 7408, therefore, the Government must demonstrate (1) that the defendant has engaged in conduct subject to penalty under § 6700 or § 6701 and (2) that injunctive relief is appropriate to prevent recurrence of such conduct. I.R.C. § 7408(b); *Estate Pres. Servs.*, 202 F.3d at 1098; *United States v. Gleason*, 432 F.3d 678, 682 (6th Cir. 2005)*; United States v. Raymond*, 228 F.3d 804, 811 (7th Cir. 2000). To show a violation of § 6700, the Government must establish (1) that the defendant has organized or sold, or participated in the organization or sale of, an entity, plan, or arrangement; (2) that he made (or caused to be made) false or fraudulent statements concerning the tax benefits to be derived from the entity, plan, or arrangement; (3) that he knew or had reason to know that the statements were false or fraudulent; and (4) that the false or fraudulent statements pertained to a material matter. *Estate Pres. Servs.*, 202 F.3d at 1098; *Gleason*, 432 F.3d at 682; *Raymond*, 228

F.3d at 811. In order to establish a violation of § 6701, the Government must establish (1) that the defendant prepared, assisted in, procured, or advised the preparation of any portion of a return, affidavit, claim, or other document; (2) that the defendant knew (or had reason to believe) that such portion would be used in connection with any material matter arising under the internal revenue laws; and (3) that the defendant knew that such portion (if so used) would result in an understatement of the tax liability of another person. *United States v. Kotmair*, 2006 WL 4846388, No. 05-1297 (D. Md. Nov. 29, 2006). As we shall demonstrate, the District Court correctly determined that the elements of a violation of either statute, coupled with the necessity of an injunction to prevent recurrence of such prohibited conduct, were present in this case.

2. The defendants engaged in conduct subject to penalty under I.R.C. § 6700

a. The defendants organized or sold a plan or arrangement within the meaning of § 6700(a)(1)(A)(iii)

It is undisputed that Schulz created the We The People Foundation and the We The People Congress and, through those entities, undertook the "national campaign" called Operation Stop

Withholding. (A-72.) The two organizations and Operation Stop Withholding are, moreover, entities, plans or arrangements within the meaning of I.R.C. § 6700(a)(1)(A)(iii) as a matter of law. *See Raymond*, 228 F.3d at 811-15 (recognizing broad scope of the provision); *Abdo v. United States*, 234 F. Supp. 2d 553, 562 (M.D.N.C. 2002) (same), *aff'd by unpublished op.*, 63 Fed. Appx. 163 (4th Cir. 2003), *cert. denied*, 540 U.S. 1120 (2004); *United States v. Savoie*, 594 F. Supp. 678, 680 (W.D. La. 1984) (same).

The defendants' assertion (Br. 35; A-66) that WTP Foundation and WTP Congress are "not for profit corporations" and are "not in the business of selling goods or services" is irrelevant, regardless of whether it is true.[8] By its terms, § 6700 does not limit sanctionable conduct to the sale of goods or services or to activities undertaken for profit. Indeed, § 6700(a)(1) applies equally to (A) the "organization" *or*

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[8] The record reflects that the defendants did sell a "Tax Termination Package" on their website for $39.95 (SA-28; SA-31), as well as the ancillary items mentioned by the District Court (A-20 n.10; *see* SA-31 – SA-35). Furthermore, the defendants' efforts to strengthen and systemize the flow of "donations" for Operation Stop Withholding (*see* SA-11) overshadow their insistence that "the Blue Folder is given away for free" (Br. 35).

(B) the "sale" of a plan or arrangement. Thus, there is no genuine dispute that the defendants organized a plan or arrangement.

b. The defendants made false or fraudulent statements concerning the tax benefits to be derived from their plan

As the Government observed in its summary judgment motion, "[p]ractically every statement made by [the] defendants regarding the tax benefits associated with their program [was] false or fraudulent," and their "contention that their materials [did] not relate to tax benefits ignore[d] the substance of everything they filed." (A-142 – A-143.) The very name of the program – Operation Stop Withholding – trumpeted its tax benefits, and the Blue Folder spelled them out: an "immediate[ ] increase" in an employer's "bottom line," nonpayment of the employer's "'matching' employment taxes (FICA, etc.)," the diminution of "company income tax reporting requirements to almost nothing," an "instant[ ] increase" in workers' take-home pay, protection against federal and state tax liens and levies. (A-75.10.) As the District Court recognized (A-9 – A-10), however, the defendants' promises rested on a catalog of falsehoods regarding the validity and application of the income tax.

The defendants' attempts to create triable issues of fact by merely denying that the offending statements either were false or were made at all (Br. 41-44; A-464 – A-465) remain entirely unavailing. *See, e.g., Powell v. Nat'l Bd. of Med. Exam'rs,* 364 F.3d 79, 84 (2d Cir. 2004) (nonmovant must come forward with specific facts showing that there is a genuine issue for trial). The defendants fare no better by continuing to insist (Br. 35-36; *see* A-66 – A-67) that Operation Stop Withholding "clearly and overwhelmingly focused on wage withholding," rather than on the validity of the income tax, because the proposition that wage withholding is voluntary – the core message of the Blue Folder (*see* SA-2) – is demonstrably false.

The defendants err at the outset by ignoring the plain language of the withholding statute, which clearly states that "every employer making payment of wages *shall* deduct and withhold upon such wages a tax …" I.R.C. § 3402(a)(1) (emphasis added). Instead, they purport to rely (Br. 36; A-75.15, A-192, A-209 – A-210, A-352 – A-353) on Treas. Reg. § 31.3402(p)-1, which deals with "voluntary withholding agreements." Their reading of the Regulation, however, is selective and incomplete.

The defendants' analysis (A-210) begins and ends with the statement in Treas. Reg. § 31.3402(p)-1(a) that "[a]n employee and his employer may enter into an agreement under section 3402(b) to provide for the withholding of income tax . . . " The defendants ignore the remainder of that sentence: " . . . upon payments of amounts described in paragraph (b)(1) of § 31.3401(a)-3, made after December 31, 1970." *Id.* Treas. Reg. § 31.3401(a)-3(b)(1), in turn, refers to "any remuneration for services performed by an employee for an employer which, without regard to this section, does *not* constitute wages under section 3401(a)." (Emphasis added.)

In other words, Treas. Reg. § 31.3402(p)-1(a) contemplates such "voluntary withholding agreements" only with respect to amounts that would *not* otherwise be subject to withholding, because they do not constitute wages. As such, it comports with the statutory delegation of rule-making authority in I.R.C. § 3402(p)(3), which authorizes regulations providing for voluntary withholding agreements with respect to amounts that do not constitute wages. But the regulation furnishes no support for the defendants' statements that *all* wage withholding is voluntary (*see, e.g.*, SA-2), and contrary authority is

easily found. *See, e.g., Rivera v. Baker West, Inc.*, 430 F.3d 1253, 1259 (9th Cir. 2005) (duty to withhold is mandatory).

As noted above, the defendants further contend (Br. 36, 39) that their statements regarding the alleged voluntary nature of wage withholding do not pertain to any "tax benefit," but "merely address[ ] the private legal relationship between workers and their companies." According to the defendants, "[t]he only claimed benefit to an individual" from participation in Operation Stop Withholding would be "the (legal) cessation of *withholding* of pay by his company, no more, no less." That is specious on its face.

As the defendants pointed out in their "Memo to American Companies," the less withheld for taxes, the more income the wage-earner will take home. (A-75.10.) Moreover, the defendants cannot disregard the tax benefits they touted for *employers*, including the elimination of the employer's share of FICA taxes (currently 7.65 percent of the statutory wage base) and the reduction of tax reporting requirements "to almost nothing." (*Id.*) The defendants should not be heard now to claim that their false statements regarding wage withholding had nothing to do with tax benefits.

c. The defendants knew or had reason to know that their statements were false or fraudulent

Although the defendants dispute that they knowingly made false statements (Br. 42), they do not dispute the District Court's finding (A-12) that they "certainly had reason to know" – if they did not already know – "that their statements were false." Nor can the defendants raise a triable issue of fact in this regard, when the record establishes that a "reasonable person" in the defendants' "subjective position" would have "discovered" the falsity of the statements, which is all that the "reason to know" standard requires. *United States v. Estate Pres. Servs.*, 202 F.3d at 1103; *see Consol. Edison Co. of New York, Inc. v. United States*, 221 F.3d 364, 370 (2d Cir. 2000). In finding that the defendants had "reason to know" that their statements were false, the District Court properly took into account (A-10 – A-12) the defendants' reliance on "fringe opinions of known tax protesters" (*see* A-111 – A-115) rather than on "knowledgeable professionals"; Schulz's claim of "significant experience researching and arguing tax-related cases" (*see* A-108 – A-110); and his familiarity not only with tax matters in general, but also with the negative response his arguments, and others like them, have elicited from the courts (*see* A-113 – A-118). *See Estate*

Pres. Servs., 202 F.3d at 1103; *Gleason*, 432 F.3d at 683; *United States v. Kaun*, 827 F.2d 1144, 1149 (7th Cir. 1987).

The defendants' claim of reliance on knowledgeable professionals (Br. 41) is effectively foreclosed by the patently frivolous nature of their statements. Inasmuch as "the average citizen knows that the payment of income taxes is legally required," *Schiff v. United States*, 919 F.2d 830, 834 (2d Cir. 1990), *cert. denied*, 501 U.S. 1238 (1991), it follows that no knowledgeable professional would assert otherwise. The same is true with regard to wage withholding, as Schulz well knows.[9] *See United States v. Simkanin*, 420 F.3d 397, 400-01 (5th Cir. 2005) (in upholding conviction of Schulz follower, at whose trial Schulz had testified, *id.* at 403, for failure to withhold taxes from his employees' paychecks, court noted that an accountant and an attorney had warned

[9] As the District Court further found (A-12 – A-13), to the extent that the defendants seek to foist a "due diligence" obligation on participants in Operation Stop Withholding by means of the "disclaimer" in their instructions (*see* Br. 41; A-215), the attempt must fail. The two paragraphs of the disclaimer (A-75.9) are essentially contradictory, with the first highlighting "legal content" vetted by "numerous" experts (A-75.8), and the second paragraph offering the materials "solely for educational purposes," with "NO representation" that they "constitute legal advice."

of the legal ramifications of such a course of action), *cert. denied*, 547 U.S. 1111 (2006).

d. The defendants' false statements pertained to a material matter

A false statement pertains to a material matter in the context of § 6700 if it would have a substantial impact on the decision-making process of a reasonably prudent person. *United States v. Campbell*, 897 F.2d 1317, 1320 (5th Cir. 1990). Schulz's highly positive reports from the road, including "[a]necdotal evidence" that Operation Stop Withholding was gaining "a life of its own" (SA-19) belies any claim that his statements did not have the requisite substantial impact on his audiences. Moreover, whatever the nature of their receipts, the fact remains that WTP Foundation and WTP Congress have together taken in over $2 million since 1999. (A-119.) It strains credulity to suppose that taxpayers would open their pockets and pocketbooks to that degree if they were not buying into Schulz's promise of tax-based financial rewards.

The defendants concede as much – wittingly or not – when they argue that the statements contained in the Blue Folder "hav[e] 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).*" (Br. 36; emphasis added.) The worker's "decision to submit the statements," and the entity's decision to accept them, are, of course, the critical steps to "terminat[ing] withholding" laid out in the WTP instructions, to be accomplished with the WTP forms. (*See* A-75.10.) In other words, the defendants acknowledge that the statements in the Blue Folder do have a substantial impact on participants' decisions to join and implement the defendants' scheme.

3. The defendants' conduct also was subject to penalty under I.R.C. § 6701

As noted above, conduct penalized by § 6701 involves (1) the preparation of (or assistance in the preparation of) a document, (2) which the defendant knew (or had reason to believe) would be used in connection with any material matter arising under the internal revenue laws, and (3) knowledge that such portion (if so used) would result in an understatement of the tax liability of another person. Although the District Court here did not separately analyze these requirements before enjoining the defendants from violating § 6701 (*see* A-4 – A-14, A-23), the record reveals no triable issue of fact as to

whether they are met. *See, e.g.*, *Shumway v. United Parcel Service, Inc.*, 118 F.3d 60, 63 (2d Cir. 1997) (court may affirm on any ground supported by the record, whether or not relied upon below).

On this record, it is beyond cavil that the defendants provided participants in Operation Stop Withholding with forms that were specifically intended to be used in connection with a material matter arising under the tax laws – *to wit*, the termination of wage withholding – as well as instructions for using the forms. Through the public workshops and website postings, the defendants also provided abundant encouragement both to members of the public and to people already committed to the We The People "cause" to follow the instructions and use the forms. Given the nature of the defendants' ends – "Stop Withholding"; "NO taxes" – and their actual or constructive knowledge that their forms were spurious and their instructions false, it follows that they knew that the use of their forms would directly result in numerous understatements of tax liabilities. *See* I.R.C. § 3403 (employer is liable for the payment of the tax required to be deducted and withheld).

4. An injunction is necessary to prevent recurrence of the defendants' prohibited conduct

While conduct subject to penalty under I.R.C. § 6700 or § 6701 is a necessary predicate for an injunction under § 7408, the Code further requires, in § 7408(b)(2), that "injunctive relief [be] appropriate to prevent recurrence of such conduct." In evaluating the likelihood of future violations, courts consider the following factors: (1) the gravity of the harm caused by the conduct; (2) the extent of the defendant's participation in the scheme; (3) the defendant's degree of scienter; (4) the isolated or recurrent nature of the conduct; (5) the defendant's recognition (or, as in this case, non-recognition) of his own culpability; and (6) the likelihood that the defendant's occupation would place him in a position where future violations could be anticipated. *Estate Pres. Servs.*, 202 F.3d at 1105; *Gleason*, 432 F.3d at 683; *Kaun*, 827 F.2d at 1149-50.

The District Court correctly found here that all six factors weigh in favor of injunctive relief. (A-14 – A-17.) The court accurately perceived grave harm, not only to the public fisc and public agencies such as the IRS, but also to members of the public lured by the false promise of Operation Stop Withholding. (A-14 – A-15.) Furthermore,

as discussed in the Statement of Facts, *supra*, Schulz created the We The People organizations; he "personally planned and managed" (A-119) their activities; and he devised, launched, and personally promoted Operation Stop Withholding, their main event. The defendants were fully aware that their arguments were being successfully challenged by the Government and rejected by the courts; indeed, Schulz made a point of keeping his website audience current on the legal problems that could and did arise (*see* SA-6 – SA-7; SA-14 – SA-17; SA-21 – SA-25.) By pressing their "national campaign" (A-72) since at least March 2003, the defendants have ensured that the prohibited conduct is not "isolated" in any sense; and they have shown a distinct unwillingness to see or admit the error of their ways. With the Blue Folder materials readily reproducible, the website as a platform, significant fundraising efforts, and substantial funds coming in, the defendants would be well placed to continue their abusive scheme were they not enjoined from doing so.

On appeal (Br. 39-41, 45-46), the defendants contest only the District Court's finding of harm, and they have thus waived any other challenge they might have raised in this regard. *See*, *e.g., Zhang v. Gonzales,* 426 F.3d 540, 541 n.1, 545 n.7 (2d Cir. 2005). In particular,

the defendants take issue with the court's consideration of evidence submitted by the United States regarding the estimated administrative cost of processing substitute returns for the 997 Schulz followers who have failed to file federal tax returns for three or more years. (A-15; A-178.) Tellingly, the defendants do not dispute the assertion that these persons have stopped filing returns; instead, they attribute such nonfiling to the "No Answers, NO Taxes" movement rather than to Operation Stop Withholding. (Br. 40-41.) In other words, the defendants maintain that their followers have stopped filing returns not because of their statements that wage withholding is voluntary, but because of their statements that those who subscribe to a "petition for redress" have a constitutional right to stop paying taxes until their grievances are adequately remedied.

The defendants' attempt to segregate their statements regarding wage withholding from their statements regarding nonpayment of taxes is belied by their admission that the Blue Folder and Operation Stop Withholding are "an integral element of" (Br. 15), "part and parcel of" (Br. 27, 31), and "inextricably intertwined with" (Br. 28-29) the "Petition Process" and its rallying cry of "No Answers, NO Taxes." Moreover, to the extent the defendants believe that the injunctive relief

sought by the Government was limited to false statements regarding wage withholding, they are mistaken. As noted above, the United States also requested that the defendants be enjoined from "[a]dvising anyone that they are not required to file federal tax returns or pay federal taxes," from "[o]bstructing or advising or assisting anyone to obstruct IRS examinations, collections, or other IRS proceedings, and from "[e]ngaging in other similar conduct that substantially interferes with the administration and enforcement of the internal revenue laws." (A-38 – A-39.) Such relief was necessary and appropriate under I.R.C. § 7408 and was properly granted by the District Court.[10]

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[10] Although the District Court did not rely on I.R.C. § 7402(a) in granting the injunction, that provision furnishes independent grounds on which to uphold the court's ruling. Section 7402(a) confers jurisdiction on Federal district courts to issue, "at the instance of the United States," orders of injunction and such other judicial process "as may be necessary or appropriate for the enforcement of the internal revenue laws." The record in this case, as discussed above in connection with § 7408, leaves no doubt that the defendants have interfered with the enforcement of the tax laws and show no signs of changing their ways.

B. The District Court correctly rejected the defendants' First Amendment arguments

As they did in the District Court (A-187 – A-190; A-471 – A-480), the defendants direct the bulk of their arguments on appeal (Br. 16-34) not to the requirements for an injunction under the Code, but to the proposition that the relief sought by the United States infringes upon their First Amendment rights. The District Court correctly rejected these arguments in granting the requested injunction (A-17 – A-23), and the defendants have shown no error in the court's ruling.

As an initial matter, it bears noting exactly what the injunction at issue prohibits. The defendants' distribution of materials, via their websites and otherwise, is prohibited only to the extent that the materials promote the fraudulent tax scheme. The injunction does *not* prohibit the defendants from selling legitimate tax advice, criticizing the Government, or engaging in legitimate tax-related activities or advocacy. (A-23 – A-24.) Indeed, the District Court specifically noted that the defendants were "free to give speeches on whether the Sixteenth Amendment was properly ratified" (A-20), pointless though the endeavor might be. Once the illegal instructions, documents, and related advertising that entail violations of §§ 6700 and 6701 are

removed, distribution of the remaining materials, or display of the remaining portions of the websites, would be permitted.[11]

1. The injunction does not infringe the defendants' right to free speech

Central to the defendants' claim that the injunction violates their right to free speech under the First Amendment is their insistence (Br. 31-34) that their tax-related statements constitute political, rather than commercial, speech. *See, e.g., Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm. of New York*, 447 U.S. 557, 566 (1980) (affording

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[11] Although the defendants also contend (Br. 45) that the injunction order is "overly broad" and "vague," they advance no argument in that regard, purporting instead to incorporate their arguments below by reference. Merely incorporating an argument made to a district court does not preserve a question for appellate review. *Frank v. United States*, 78 F.3d 815, 833 (2d Cir. 1996), *vacated on other grounds*, 521 U.S. 1114 (1997); *accord Norton v. Sam's Club*, 145 F.3d 114, 118 n.1 (2d Cir. 1998) (noting that this rule is "tempered in *pro se* cases by [the court's] duty to construe liberally papers filed by *pro se* litigants," but that the appellee in that case – as here – was represented by counsel). *See also De Silva v. Di Leonardi*, 181 F.3d 865, 866-67 (7th Cir. 1999) ("adoption by reference amounts to a self-help increase in the length of the appellate brief"; "brief must make all arguments accessible to the judges, rather than ask them to play archaeologist with the record").

That Schulz correctly understands the scope of the District Court's order is demonstrated by his affidavit of compliance with that order, where he states that he has disabled the links on his websites to "the WTP forms that were in the Blue Folder and that are the subject of the Government's complaint in this action." (A-517.)

lower degree of First Amendment protection to commercial speech). To the extent the defendants erroneously assert (Br. 3, 34) that the District Court's adverse ruling turned on the characterization of their statements as commercial speech, the argument is a red herring. The court considered two possibilities and reached the same result. (*See* A-20 & n.10.) The record supports the court's observation that at least some of the defendants' activities "may" be considered commercial speech, but the court went on to "assum[e]" that the defendants' speech was political in nature – and still found it subject to being enjoined. (A-20.)

The Supreme Court has held that *both* speech related to illegal conduct *and* false commercial speech are not protected by the First Amendment. *E.g.*, *Cent. Hudson Gas & Elec. Corp.,* 447 U.S. at 564; *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (invoking "principle that constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of . . . law violation *except where* such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action") (emphasis added). The Court also has made clear that banning a course of conduct does not violate the First Amendment "'merely because the conduct was in part

initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" *Ohralik v. Ohio St. Bar Ass'n*, 436 U.S. 447, 456 (1978) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

Thus, numerous examples exist of communications that may be regulated without offending the First Amendment. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973) (order prohibiting newspaper from publishing discriminatory advertisement); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 696-699 (1978) (injunction against publication of ethical canon); *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 616 (1980) (ban on secondary picketing). Of particular relevance here, the Supreme Court has emphasized that the First Amendment "does not shield fraud." *Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612 (2003). In each of these cases, legislation or injunctions aimed at prohibiting specific commercial activities were upheld, even though the prohibition had an indirect impact on speech.

Similarly, the courts have held that the First Amendment does not shield publishers who aid and abet crimes by distributing instructions on how to commit those crimes. *United States v. Bell*, 414

F.3d 474, 483 (3d Cir. 2005); *United States v. Schiff,* 379 F.3d 621, 626 (9th Cir. 2004), *cert. denied*, 546 U.S. 812 (2005); *Rice v. Paladin Enter., Inc.*, 128 F.3d 233 (4th Cir. 1997); *United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982). To be sure, as this Court has explained, one who comments "generally on the tax laws . . . *without* aiding, assisting, procuring, counseling or advising the preparation or presentation of . . . false or fraudulent tax documents," does not violate the Internal Revenue Code. *United States v. Rowlee*, 899 F.2d 1275, 1280 (2d Cir. 1990) (emphasis added). For those who aid or abet other taxpayers in filing false or fraudulent tax forms, however, "the First Amendment afford[s] no defense." *Id.* In the same vein, the Fourth Circuit has observed that "[t]he cloak of the First Amendment envelops critical, but abstract, discussions of existing laws, but lends no protection to speech which urges the listeners to commit violations of current law." *United States v. Kelley*, 769 F.2d 215, 217 (4th Cir. 1985) (citing *Brandenburg v. Ohio*, *supra*). As the court explained in *Rice*, 128 F.3d at 249, teaching "techniques" is far different from mere "theoretical advocacy."

Thus, every circuit that has addressed the issue has "concluded that the First Amendment is generally inapplicable to charges of aiding and abetting violations of the tax laws." *Rice*, 128 F.3d at 245

(collecting cases); *see also, e.g.*, *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985) (upholding conviction on two counts of aiding and abetting and counseling violations of the tax laws, "[e]ven if the conviction on these counts rested on spoken words alone"); *United States v. Kelley*, 769 F.2d at 217 (upholding aiding and abetting conviction for urging the filing of false returns "with every expectation that the advice would be heeded"); *United States v. Moss*, 604 F.2d 569, 571 (8th Cir. 1979) (upholding aiding and abetting conviction for explaining how to avoid withholding and inciting several people to act), *cert. denied*, 444 U.S. 1071 (1980); *United States v. Buttorff*, 572 F.2d 619, 623-24 (8th Cir. 1978) (upholding conviction for aiding and abetting the filing of false or fraudulent withholding forms based on speech that incited individuals to violate the law), *cert. denied*, 437 U.S. 906 (1978); *accord United States v. Fleschner*, 98 F.3d 155, 158-59 (4th Cir. 1996) (upholding conviction for conspiracy to defraud the United States of income tax revenue by encouraging people to violate tax laws and convincing them that it was legal).

Applying these principles, every court that has considered the issues has held that selling or promoting tax-evasion instructions may be enjoined consistent with the First Amendment as both "fraudulent

conduct" and false commercial speech. *See, e.g., Estate Pres. Servs.*, 202 F.3d at 1096 n.3, 1097, 1099, 1106 (enjoining as "fraudulent conduct" and misleading "commercial speech" the "marketing" and "selling" of a "training manual" that provided "false tax advice"); *Bell*, 414 F.3d at 484 (enjoining speech that "advertised, marketed or sold false tax advice, or aided and abetted others, directly or indirectly, to violate tax laws"); *United States v. Raymond*, 228 F.3d at 807, 815 (enjoining as "false or misleading commercial speech" advertisements and a three-volume book relating to a tax scheme described by the District Court in this case (A-5; A-8) as similar to that of the defendants here); *United States v. Kaun*, 827 F.2d at 1152 (enjoining as false "commercial speech" and speech used to "further an illegal activity" written materials providing false information regarding the tax laws); *United States v. Smith*, 657 F. Supp. 646, 648-649, 658 (W.D. La. 1986) (enjoining as "commercial speech, which effectively promotes unlawful activity," a book containing false tax advice), *aff'd per curiam*, 814 F.2d 1086 (5th Cir. 1987); *United States v. Buttorff*, 761 F.2d 1056, 1057 n.1, 1065 n.11, 1066 (5th Cir. 1985) (enjoining certain "written information" as false "commercial speech [that] promotes an illegal activity"); *United States v. White*, 769 F.2d 511, 512, 516-517 (8th Cir. 1985) (enjoining "a

cassette tape and written materials," including sample tax forms and "detailed instructions" about "fraudulent means to evade federal income taxes," as false "commercial speech" and speech used to promote "an illegal activity"); *United States v. Savoie*, 594 F. Supp. 678, 680, 682-83 (W.D. La. 1984) (enjoining two "tax publications" promoting fraudulent statements such as "Wages Not Income" as illegal conduct and false "commercial speech"). Indeed, not a single case has refused to enjoin – on First Amendment grounds – speech that violates §§ 6700 or 6701.

The District Court correctly found that the defendants' speech in this case, whether commercial or political, lies in the realm of "inciting or assisting" illegal tax evasion. This is not a case involving "theoretical discussion of non-compliance with laws"; rather, "action was urged; the advice was heeded, and false forms were filed." *United States v. Kelley*, 769 F.2d at 217. The defendants went far beyond "questioning" the wage withholding system; they provided step-by-step instructions, complete with forms, for thwarting that system. Similarly, the defendants did not merely encourage their audiences to subscribe to various petitions for redress; they actively helped people to stop paying taxes until their grievances were remedied.

2. The injunction does not infringe the defendants' right to petition the Government for redress

Although the District Court did not specifically address the defendants' claim that the injunction would infringe upon their right to petition the Government for redress, the contention is frivolous on its face. It bears repeating that the defendants are free to communicate their political message, so long as they cease instructing customers how to make illegal tax filings and assisting them in doing so. The injunction here is limited to restraining the defendants from engaging in conduct that is false commercial speech, that incites others to violate laws, and that assists others in violating laws. Thus, the injunction in no way limits the ability of the defendants and their followers to exercise the right to submit their grievances to the Government.

The defendants apparently believe (Br. 17) that the Petition Clause contemplates the right to receive a response from the Government, which in turn implies a right of enforcement through nonpayment of taxes (the defendants' advocacy of which would be prohibited by the injunction). In *United States v. Malinowski*, 472 F.2d 850, 857 (3d Cir. 1973), the Third Circuit noted that "[t]o urge that violating a federal law which has a direct or indirect bearing on the

object of protest is conduct protected by the First Amendment is to endorse a concept having no precedent." Moreover, the D.C. Circuit has squarely rejected the defendants' arguments in this regard. *We The People Foundation, Inc. v. United States*, 485 F.3d 140 (D.C. Cir. 2007), *reh'g en banc denied* (Aug. 3, 2007).

Thus, the defendants' claim that the injunction would contravene their rights under the Petition Clause is meritless. To equate "No Answers" with "NO Taxes" may serve the defendants' interests, but it is not a relationship contemplated by the law.

CONCLUSION

For the foregoing reasons, the order of the District Court granting injunctive relief to the United States is correct and should be affirmed.

Respectfully submitted,

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SPECIAL APPENDIX

Internal Revenue Code of 1986 (26 U.S.C.):

SEC. 6700. PROMOTING ABUSIVE TAX SHELTERS, ETC.

(a) IMPOSITION OF PENALTY. — Any person who —

(1)(A) organizes (or assists in the organization of) —

(i) a partnership or other entity,

(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

(2) 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,

shall pay, with respect to each activity described in paragraph (1), a penalty equal to the $1,000 or, if the person establishes that it is lesser, 100 percent of the gross income derived (or to be derived) by such person from such activity. For purposes of the preceding sentence, activities described in paragraph (1)(A) with respect to each entity or arrangement shall be treated as a separate activity and participation in

each sale described in paragraph (1)(B) shall be so treated. Notwithstanding the first sentence, if an activity with respect to which a penalty imposed under this subsection involves a statement described in paragraph (2)(A), the amount of the penalty shall be equal to 50 percent of the gross income derived (or to be derived) from such activity by the person on which the penalty is imposed.

* * * * *

SEC. 6701. PENALTIES FOR AIDING AND ABETTING UNDERSTATEMENT OF TAX LIABILITY.

(a) IMPOSITION OF PENALTY. — Any person —

(1) who aids or assists in, procures, or advises with respect to, the preparation or presentation of any portion of a return, affidavit, claim, or other document,

(2) who knows (or has reason to believe) that such portion will be used in connection with any material matter arising under the internal revenue laws, and

(3) who knows that such portion (if so used) would result in an understatement of the liability for tax of another person,

shall pay a penalty with respect to each such document in the amount determined under subsection (b).

* * * * *

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

(a) TO ISSUE ORDERS, PROCESSES, AND JUDGMENTS. — The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby

provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

* * * * *

SEC. 7408. ACTIONS TO ENJOIN SPECIFIED CONDUCT RELATED TO TAX SHELTERS AND REPORTABLE TRANSACTIONS.

(a) AUTHORITY TO SEEK INJUNCTION. — A civil action in the name of the United States to enjoin any person from further engaging in specified conduct may be commenced at the request of the Secretary. Any action under this section shall be brought in the district court of the United States for the district in which such person resides, has his principal place of business, or has engaged in specified conduct. The court may exercise its jurisdiction over such action (as provided in section 7402(a)) separate and apart from any other action brought by the United States against such person.

(b) ADJUDICATION AND DECREE. — In any action under subsection (a), if the court finds —

(1) that the person has engaged in any specified conduct, and

(2) that injunctive relief is appropriate to prevent recurrence of such conduct,

the court may enjoin such person from engaging in such conduct or in any other activity subject to penalty under this title.

(c) SPECIFIED CONDUCT. — For purposes of this section, the term "specified conduct" means any action, or failure to take action, which is —

(1) subject to penalty under section 6700, 6701, 6707, or 6708, or

(2) in violation of any requirement under regulations issued under section 330 of title 31, United States Code.

* * * * *

CERTIFICATE OF SERVICE

It is hereby certified that, on this 19th day of November, 2007: (1) ten paper copies of this brief were mailed to the Court, and an electronic copy of the brief, in PDF format, was electronically filed with the Court by emailing a copy to briefs@ca2.uscourts.gov; and (2) service of this brief was made upon the attorney for the represented appellants, and on the *pro se* appellant, by mailing, First-class regular mail, two paper copies thereof and a diskette in PDF format, in an envelope properly addressed to each of them as follows:

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