07-3729-cv

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA	)	
	)	
Plaintiff-Appellee,	)	**PETITION FOR**
	)	**EN BANC HEARING**
v.	)	
	)	
Robert L. Schulz, et al.,	)	
	)	
Defendants-Appellants.	)	

PETITION FOR EN BANC HEARING ON BEHALF OF APPELLANTS

Dated: April 7, 2008

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INTRODUCTION

Defendants-Appellants Robert Schulz, the We The People Foundation for Constitutional Education, Inc., and the We The People Congress, Inc., (hereinafter "Schulz") respectfully petition for a rehearing en banc because: 1) the panel violated the Code of Conduct for Judges of the United States and consideration by the full Court is necessary to cure the injustice; 2) the panel's decision conflicts with numerous Supreme Court and circuit court decisions regarding examination of the Constitution in cases that arise under the Constitution; therefore, consideration by the full Court is necessary to secure and maintain uniformity of the court's decisions; and 3) the case involves a *First Amendment*, first impression question of exceptional importance.

A digital recording of the oral argument was obtained from the Clerk and transcribed. Copies of the recording and the transcript are included in the addendum, together with a copy of the Panel's February 22, 2008 decision. A motion to add the addendum and for a stay of enforcement of the panel's decision pending determination of this petition has been filed with the Clerk of the Court.

FACTS

For the past 29 years, without receiving any compensation for his work, Robert Schulz has been intelligently, rationally and professionally attempting to hold government accountable to the NY and federal Constitutions by claiming and exercising the unalienable Right to Petition government for Redress of Grievances; he has also been educating other People about their responsibility to do the same. He has won many cases in state and federal courts, often setting important legal and constitutional precedent. While not an attorney, Schulz sets and maintains high standards for his work and is known and respected in the legal community in New York State.

On March 15, 2003, in order to reconcile significant, well documented discrepancies between the statutory requirements of Internal Revenue Code and the Government's institutionalized practice of forced withholding of pay by companies from workers' paychecks, Schulz Petitioned the federal Executive and Legislative branches for Redress of alleged Grievances. The Petition relied on and directly quoted relevant statutes, regulations and court decisions. The objective of the Petition was to secure a *legal* review of the material by the Government, or (if Government chose not to respond to the Petition) by corporate attorneys and accountants that might receive the Petition materials and, if then possible, to effect a *legal* termination of withholding if expressly provided by law. For a copy of the Petition see (A 293-407) (Docket 23).

The Petition included materials for workers to submit to their company officials with instructions that the materials be submitted to a "rigorous review" by the company and its "tax professionals." See Schulz Decl. #1, para. 4-5 (A-71) (Docket 12).

In addition, the Petition included a NOTICE to the Government from Schulz requesting to be notified if there was anything in the Petition that was false or misleading, and informing the Government of Schulz's intention to distribute the contents of the Petition to workers free of charge. (A 75.1-75.2). To repeat, the Petitions were *earmarked* for review by tax professionals, with the stated goal being the voluntary termination of wage withholding for ordinary workers as and *if provided for under U.S. tax law.* Schulz Decl. #1, para. 4-6 (A 71-72) (Docket 12).

Receiving *no response* from the Government, Schulz posted the entire Petition for Redress on the Foundation's website, allowing anyone to download and print the material *for free*. In addition, during April and May of 2003, Schulz personally distributed, free of charge, 3,500 copies of the Petition at 37 public meetings around the country. In advance, Schulz formally NOTICED the appropriate local federal DOJ and IRS officials of the date, time and location of each of the 37 meetings, requesting each time that someone from the Government attend the meeting and to advise Schulz if anything he was doing or saying was false or misleading. *At no time did the Government ever respond to any of the 37 NOTICES.* (see A 75.62-75.90).

Four years later, on April 2, 2007, with no documentary evidence of harm to the Government or that any worker had submitted a copy of the Petition to his company, and no evidence that any entity had stopped withholding as a consequence of its review of the material, the Government filed this civil action seeking to permanently prohibit Schulz from distributing copies of the Petition, "pursuant to the Court's inherent equity powers" and sections 7402 and 7408 of the Internal Revenue Code, as conduct subject to penalty under section 6700 (promoting an abusive tax shelter), and "any other penalty provision in the Internal Revenue Code." (Complaint, A 2-3).

Under the heading, "Conduct Sought to be Enjoined," the Government wrote, falsely, "Tax Termination Package for Employers" and "Tax Termination Package for Employees." (Complaint, see A 3-8). However, as the record shows, the material was clearly, and solely intended to provide a *legal* method to terminate the practice of companies *withholding pay* from workers. The material was *not intended to terminate the payment of taxes properly owing and due under law by either employers or employees.*

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

ARGUMENT

1. THE PANEL VIOLATED THE FIRST THREE CANONS OF THE CODE OF CONDUCT FOR UNITED STATES JUDGES

The *C*ourt's discretionary *en banc* power was addressed in United States v Lynch , 223 U.S. App. D.C. 100, 690 F2d 213 (1984) (fn 22) (cure of gross injustice may serve as basis for en banc consideration of appeal notwithstanding provisions of Rule 35(a) which determines when hearing or rehearing en banc will be ordered because Rule 35(a) does not establish blanket policy barring en banc review). **The panel's behavior during oral argument was in conflict with the first three canons of the Code of Conduct for United States Judges**, which require judges to

accord litigants the full right to be heard according to the law, to uphold the integrity and independence of the judiciary, to respect and comply with the law, and to be patient, dignified, respectful and courteous to litigants.

During oral argument on February 4, 2008, the Panel damaged the integrity and independence of the Judiciary and showed bias by appearing as prosecuting attorney and cooperating with the Executive in a collective decision to deny Schulz his constitutional Right to Due Process. As clearly documented by the transcript, the Panel ignored the potent constitutional questions raised by the civil appeal before it, nor would the Panel allow those issues to be argued.

The Panel exhibited significant prejudice and bias against Schulz, presumably characterizing Schulz as a political nuisance -- a problematic heretic who persistently preaches against the established orthodoxy by daring to openly proclaim there exists a law that the free People of America can claim and exercise to peaceably hold their servant Government accountable to the Constitution – the accountability clause – i.e., the last ten words of the First Amendment -- and that there is *nothing* in American jurisprudence or recorded history that contradicts Schulz's interpretation of the meaning of the clause.

The Panel violated its duty to hear this case fairly and with patience. It was neither patient nor deliberative. The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge's activities, including the discharge of the judges' adjudicative duties under the law. The duty to be respectful of others includes the responsibility to avoid comment or behavior that can reasonably be interpreted as

manifesting prejudice or bias. The transcript clearly shows the Panel harbored deep prejudice and bias against Schulz.

Judges Newman and Sotomayor exhibited impatience and frustration. Unable to discredit Schulz's legal arguments and the array of exculpable evidence Schulz so meticulously presented in the District Court in **twelve sworn Declarations** (see A 71, 76, 107, 247, 254, 287, 408, 410, 312, 481, 492, 503)**,** the appellate Judges grilled Schulz on matters **that had nothing to do with the case before them.** Completely unprovoked, and without ever identifying any criminal code that had been violated, Judge Newman personally attacked Schulz and questioned Schulz, persistently urging (to the point of "instructing") the DOJ to criminally prosecute Schulz. Under persistent verbal pressure from Judge Newman (a former United States Attorney from Connecticut) the DOJ attorney finally agreed in open court to meet with his client (IRS) for the purpose of pursuing a criminal action against Schulz. The DOJ attorney was obviously surprised and unprepared to discuss this. The transcript shows he, too, was cut off when attempting to argue the issues of the instant case.

While attempting to present argument, Schulz was instead interrogated as though he was a criminal defendant in Judge Newman's courtroom. Judge Newman actually recommended so strongly that it instructed DOJ to prosecute Schulz criminally. Judge Newman ridiculed DOJ for bringing the civil case, even after DOJ admitted its client (IRS) had purposely decided not to pursue a criminal case, presumably because Schulz had not committed any crime. Without ever citing any criminal statute, Judge Newman (a former U.S. Attorney from Connecticut) persistently grilled DOJ's attorney to the point of forcing the DOJ attorney to capitulate, under pressure, that he would engage the DOJ and IRS to pursue a criminal action against Schulz.

Neither the instant civil Complaint nor the subsequent record of the case includes any hint or evidence of criminal behavior. It would not be unfair to assert that Judge Newman finds it much easier, and preferable, to incarcerate Schulz as a criminal, rather than address the potent, *first impression*, First Amendment questions that are at the heart of Schulz's civil case. *En banc* review is required to cure the injustice. "It is an essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." Marbury v. Madison, 5 U.S. 137, 175.

Schulz was humiliated. He left the courtroom feeling he had been "lynched" at an inquisition by a tribunal that was not the least bit concerned by the facts, the law, the First Amendment, or the Constitutional duties of the Judiciary. Public confidence in the judiciary has been eroded by the patently irresponsible and overtly improper conduct by Judges Newman and Sotomayor during oral argument. The system of government under the law has been injured. *The conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a not unreasonable conclusion that the Panel's ability to carry out its judicial responsibilities with integrity, impartiality, and competence was impaired.*

After receiving assurance from the DOJ that it would consider pursuing a criminal action the Panel affirmed, basing its terse ruling on "substantially the reasons set forth in the district court's decision."

2. THE PANEL'S DECISION CONFLICTS WITH NUMEROUS CIRCUIT AND SUPREME COURT DECISIONS; CONSIDERATION BY THE FULL COURT IS THEREFORE NECESSARY TO SECURE AND MAINTAIN UNIFORMITY OF THE COURT'S DECISIONS

This case arose because no court had ever interpreted the meaning of the "accountability clause" of the *First Amendment* -- the last ten words. This case arose because no court had ever reviewed the historical context and purpose of the clause – the Framers' intent, determining the Rights of the People and the obligations of the Government as guaranteed by the Clause. See for instance, Judge Rogers concurring opinion in We The People v United States, 485 F.3d 140 (D.C. Cir., 2007).

This case arose because of Schulz's scholarly review of and reliance upon the historical context and purpose of the accountability clause of the *First Amendment.* According to Schulz's interpretation of the Clause, the natural Rights of free individuals, acting in their private capacities, includes: a) the Right to hold government accountable to the law, particularly the Constitution, by Petitioning the Government for Redress of Grievances; b) the obligation of the Government to respond to such Petitions; and c) the Right of free individuals, as guaranteed by the *First and Ninth Amendments* to, at the very least, print, speak about and distribute copies of such Petitions, without retaliation, particularly if the Government refuses to respond to those Petitions.

Schulz's primary defense throughout these proceedings has been that the behavior the Government complains of was fully protected under the *First Amendment* and the *Ninth Amendment*. See for instance: a) Schulz's Memorandum of Law ("MOL") in support of his Motion to Dismiss at A 60-67; b) Schulz's MOL in opposition to the Government's Motion for Summary Judgment at A 187-190; and especially c) Schulz's MOL in support of his Motion for Reconsideration at A 471-480, which included a full list of the historical documentary evidence he relied upon.

However, neither the Government, nor the District Court, nor the Panel has examined the Constitution's provisions which have given rise to this case, or if they did, they have refused to honor them. They have not only refused to rebut Schulz's well-documented interpretation of the meaning of the provisions, *they have refused to provide **any** interpretation of their own*. Thus far, they have ignored Schulz's constitutional arguments. There has been no rebuttal to Schulz's primary defense. It is reasonable to assert, therefore, that the Panel's distinctly brief decision conflicts with the following ten court decisions:

A. Regarding Accountability and the First Amendment

The Panel decision conflicts with Marbury v Madison, 5 U.S. 137 (1803), which clearly stands for the propositions that the courts cannot close their eyes to the Constitution seeing only the law, that **a case arising under the Constitution of the United States cannot be decided without examining the instrument under which it arises** (Id at 179-180)**, that there is no provision of the Constitution that was intended to be without effect** (Id at 174)**,** that the Constitution controls any act by the judicial, legislative or executive repugnant to it (Id at 177), **and that if the application of a law (such as Section 6700 of the Internal Revenue Code) is repugnant to the Constitution that application is null and void** (Id at 180)**.** The Panel failed to examine the Constitution's provision that gave rise to this case. *En banc* review is required.

Furthermore, the Panel decision conflicts with Cohens v. Virginia, 19 U.S. 264 (1821), which stands for the proposition that any court that would withdraw any case from the jurisdiction of any part of the constitution **must sustain the exemption on the spirit and true meaning of the Constitution,** which spirit and true meaning must be so apparent as to overrule the words which

its framers have employed. (Id at 379-380). The Panel failed to offer any explanation for its removal of this case from the jurisdiction of the accountability clause, thus requiring *En banc* review.

Furthermore, the Panel's decision conflicts with Murray v. Hoboken Land, 59 U.S. 272 (1855), which clearly stands for the propositions that in order to ascertain whether a process is *due process*, the first step is to "examine the constitution itself, to see whether this process be in conflict with any of its provisions...." (Id at 277), and that in case a person is deprived of liberty by a process that conflicts with some provision of the Constitution, then **the Due Process Clause normally prescribes the remedy: *restoration of that person's liberty.*** Consideration by the full Court is therefore required, given the Panel's abdication of its duty to interpret the meaning of the accountability clause of the *First Amendment* to determine if deprivation of Schulz's liberty, property and privacy under IRC 6700 is in conflict with that clause and/or the Ninth Amendment.

Furthermore, the Panel decision conflicts with Hurtado v. People of California, 110 U.S. 516 (1884), which clearly stands for the proposition that the courts are **forbidden to assume, without clear reason to the contrary, that any part of the [First] Amendment to the Constitution is superfluous** (Id at 534). The Panel has clearly treated the Petition Clause as superfluous, in which case it has violated Schulz's Due Process Rights by failing to declare its constitutional function. *En banc* review is mandated.

Furthermore, the Panel decision conflicts with Prout v. Starr, 188 U.S. 537 (1903), which clearly stands for the proposition that all of the provisions of the Constitution are deemed to be of equal validity and that **an important function of the judiciary is to so interpret the various**

provisions and limitations contained in the Constitution that each and all of them shall be respected and observed (Id at 543-544). The Panel has shown disrespect for the accountability clause of the *First Amendment* by failing to observe and interpret the clause, and in the process the Panel has violated Schulz's Due Process Rights. "Each and all of them" means no exception. *En banc* review is required.

Furthermore, the Panel's decision conflicts with Myers v. United States, 272 U.S. 52 (1926), which clearly stands for the proposition that **real effect must be given to all the words used in the Constitution** (Id at 151-152)**.** The Panel was called upon to interpret and give effect to the last ten words of the First Amendment. It failed to do so, yet it orders Schulz, a free person, to be deprived of Fundamental Rights, punishing him for acting on a - *still unrefuted* - scholarly interpretation of the meaning of the words. *En banc* review is required.

Furthermore, the Panel decision conflicts with Williams v. United States, 289 U.S. 553 (1933), which clearly stands for the proposition that the judicial power of the United States extends to all cases in law and equity arising under the Constitution, and **in expounding the Constitution, every word must have its due force and appropriate meaning,** for every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood (Id at 572-573). The Panel failed to interpret the force and meaning of the words of the accountability clause. In the interest of Due Process of law, *en banc* review is required.

B. Regarding Free Speech and the First Amendment

Furthermore, the panel decision conflicts with McIntyre v Ohio Elec. Comm'n, 514 U.S. 334, 346-7 (1995), which clearly stands for the proposition that *strictest scrutiny* must be applied

when seeking to chill the expression of ideas. The Panel obviously failed in its duty to scrutinize Schulz's claim regarding the accountability clause of the *First Amendment,* before allowing a District Court Order to stand, chilling Defendants' ideas expressed through their Petitions for Redress, by requiring Schulz to turn over to the IRS the identities of those People who merely received copies of the Petition for Redress so the IRS can contact those People for the express purpose of targeting and examining them to determine their compliance with the tax laws (as DOJ admitted in oral argument before this Court last fall when it was hearing Defendants' motion for a stay pending appeal). In the interests of Due Process of law, *en banc* review is required.

Furthermore, the Panel's decision conflicts with Brandenburg v. Ohio, 395 U.S. 444, 447-48, (1969) which clearly stands for the proposition that speech is protected unless both the intent and the tendency of the words produce or incite an *imminent* lawless act – i.e., one likely to occur as a **direct** effect of the offending Speech. Despite the assertions of the Government and the District Court, the record demonstrates that neither the intent nor tendency of Schulz's speech produced or incited **any** imminent lawless act. **None was likely to occur as the speech was clearly *earmarked* for review by tax attorneys and accountants.** No lawless action occurred, as evidenced by the record, anecdotal tales and stories notwithstanding. Clearly, Schulz's speech was not so close in time, purpose and substance to any substantive evil or ultimate illegal conduct. Beyond this, the Panel's failure to conduct a strict scrutiny analysis leaves unanswered the question of whether Schulz's Speech actually misrepresented the law, thus resulting in the presumptive conclusion by the Panel that his Speech was false. *En banc* review is required.

Furthermore, the panel decision conflicts with United States v. Rowlee, 899 F.2d 1275 (2d Cir. 1990), United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1985), quoting United States v. Barnett, 667 F.2d 835, 842-43 (9th Cir. 1982), and United States v. Buttoff, 572 F.2d 619, 624 (8th Cir. 1978), which clearly stand for the propositions that the First Amendment's free Speech clause protects speech where the speech is not the very vehicle of the crime itself, and where there is evidence that the purpose of the speaker or the tendency of his words are directed to ideas or consequences remote from the commission of any illegal act, and that did not solicit or counsel violation of the law in an immediate sense.

There is ample evidence that all of Schulz's speech (i.e., the Forms he made available to the public, without charge) were specifically *earmarked* for review by private tax professionals for private educational purposes, remote from the filing of any forms with the IRS or any other federal agency. Schulz's speech was earmarked for tax attorneys and accountants all over America, to be provided to them by corporations and their workers, to be checked for accuracy. Also included with the Forms were copies of Schulz's requests to the Government for a determination of the accuracy of the statements.

In all instances Schulz made statements that were of abstract generality, remote from any advice, personal or otherwise, to commit any specific illegal act. He always included legal disclaimers with the material, and always **encouraged the readers to submit the material to tax attorneys and accounts for a rigorous review to verify the accuracy of the material.** Even if Schulz was advocating unlawful activity (which was not the case), a jury might well have concluded the intent and tendency of his speech, in the larger context of the entire history of the case, tended to diminish the imminence of any potential unlawful activity. There is no evidence in the record that

Schulz's use of words were *both* intended and were likely to produce an imminent illegal act (one likely to occur) within the legal meaning of Section 6700 or 6701 of the internal revenue code– promotion of or participation in an illegal tax shelter, or any other section of the Code. In fact, the United States has failed to produce any evidence and the record remains void of evidence of any unlawful action taken by any receiver of Schulz's speech.

C. Regarding Summary Judgment under Rule 56

Furthermore, the panel decision conflicts with Tenenbaum v. Williams, 193 F.3d 581, 593 (2d Cir. 1999), which clearly stands for the propositions that 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, and that **a summary judgment should only be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact** and that the movant is entitled to judgment as a matter of law. **The Record clearly shows there are dozens of facts that are material to the case that are in genuine dispute.** The Panel is in clear error.

The Government responded to Schulz's motion to dismiss with a motion for summary judgment (A-133), including a "Statement of [21] Material Facts that **the Government Contends** Are Not In Dispute" (A-159).

Schulz, opposed the Government's motion for summary judgment and replied to the Government's opposition to his motion to dismiss. (See A 180-413). He included a detailed denial of each of the 21 facts the Government contended were not in dispute, effectively placing each of those 21 facts

in genuine dispute. (See A 180-231). In addition, Schulz included 43 additional statements of material "fact" cited from the Government's pleadings which he effectively disputed. (A 231-246). Schulz supported his facts with evidence contained in sworn Declarations # 4,5,6,8,9, 10. (A 247-413). Most notably, Schulz demonstrated Defendants' activities were not exposing any individuals to criminal activity and had not harmed the Government. The record shows the Government was not able to support its claim that Defendants' activities were harming the Government.

In his motion to the District Court for Reconsideration (see A 449-484), Schulz argued it was unlawful for the Court not to construe the evidence before the Court in the light most favorable to Schulz, and to grant a summary judgment in spite of the number of material facts that are in genuine dispute. Schulz neatly summarized each principal material FACT IN DISPUTE (A 458-468) and each principal FACT NOT IN DISPUTE (A 468--471). In addition, Schulz argued Summary Judgment could not be granted as a matter of law, regarding the unsettled area of law at controversy in this case, at least until the Supreme Court or some other court of competent jurisdiction provides a declaration of the intended effect of the accountability clause, other than the one provided by Schulz and the historical context and purpose of those words. (see A 471-480).

In other words, Schulz supported his opposition to the Rule 56 motion by substantively and legally denying each of the Government's professed "facts" and presenting additional material facts that are in genuine dispute. The Record shows Schulz's potent opposition, provided under penalty of perjury, rests on evidentiary documentation with probative value, not conclusory allegations, unsubstantiated denials or speculation.

Before the Court's Panel, Schulz supported his appeal from the District Court's Order by analyzing the Order and proving the District Court had committed clear error in terms of each of the material facts, simply accepting as true all of the Government's asserted facts, while rejecting all of (Defendant) Schulz's facts without any adversarial public hearing, without discovery, and without interrogating the litigants. (See Brief on Behalf of Defendants-Appellants, pages 38-45). The Panel's decision conflicts with Tenenbaum v. Williams, 193 F.3d 581, 593 (2d Cir. 1999). Consideration by the full Court is necessary to secure and maintain uniformity of the court's decisions.

3. THIS CASE INVOLVES A FIRST-IMPRESSION QUESTION OF EXCEPTIONAL CONSTITUTIONAL IMPORTANCE

Consideration by the full court is necessary because this case involves a first-impression question of exceptional constitutional importance under the *First and Ninth Amendment*s– that is, the Right of ordinary People, in their private capacities, to Petition the Government for *Redress* of Grievances (to cure violations of the law by the government), and the Right of the People to, **at a minimum**, freely print, distribute, speak and assemble to discuss Petitions, particularly if the Government fails to respond to such Petitions, and to do so without retaliation, harassment or infringement by the Government. Any decision denying the substance of such Right, or placing limitations upon it, or converting the exercise of such Right into a crime is of exceptional constitutional importance.

No court has ever interpreted the meaning of the "accountability clause" of the *First Amendment* -- the last ten words. No court has ever declared the historical context and purpose of the clause – the Framers' intent, determining the Rights of the People and the obligations of the

Government as guaranteed by the Clause. See for instance, Judge Rogers concurring opinion in We The People v United States, 485 F.3d 140 (D.C. Cir., 2007).

The Panel was obligated to declare Schulz's Rights and the Government's obligations with respect to the First Amendment and the Ninth Amendment. It also failed to declare his corollary Rights expressly articulated by the Founders in both the Declaration of Independence and the Journals of the Continental Congress, and as were exercised before, during and after the guarantees were expressly added to the Constitution, amply demonstrated by contemporary historical analysis.

CONCLUSION

With all due respect for the Court, Schulz contends the Panel's decision was judicially insufficient, the Panel denied Schulz Due Process via its overt exhibition of prejudice and bias, the Panel erred in granting Summary Judgment in violation of the rules of Civil Procedure, and the Panel failed to address the fundamental facts and legal arguments put forth in the appeal.

Defendants respectfully request an Order granting en banc review with the aim of reversing the Panel's decision, denying the Government's motion for summary judgment, and either granting Defendant's Motion to Dismiss or remanding to the District Court for discovery and hearing.

Respectfully submitted this 7th day of April, 2008.

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