

07-3729-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United States Of America,

Plaintiff-Appellee,

v.

No. 07-3729-cv

Robert L. Schulz, et al.,

Defendants-Appellants.

REPLY BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS

Dated: December 5, 2007

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PRELIMINARY STATEMENT

The Government's Brief makes the case, albeit unwittingly, for a reversal of the Summary Judgment and remand for a hearing, if not a reversal of the trial court's denial of Defendants' motion to dismiss.

The Government requests a *de novo* review, a request to consider the matter anew, the same as if it had not been heard before and as if no decision previously had been rendered, a request usually made by appellants in cases challenging administrative decisions, or where new evidence is discovered.

The Government presents what amounts to a new Complaint with new alleged "facts" and a new cause of action, giving rise to additional Due Process concerns.

The Government presents an entirely new claim, one that would significantly and dramatically expand the reach of its original complaint (and any injunction), well beyond the specific conduct targeted by the original complaint (Defendants' conduct related to the distribution of one of Defendants' Petitions for Redress of Grievances – the Blue Folder) to other conduct related to other Petitions for Redress.

The Government alleges new "facts" that should have been presented in the trial court where Defendants would have had a full and fair opportunity to

respond, without the time and word restraints attendant upon Reply Briefs to this Court, but that nonetheless present additional issues for trial.

SUMMARY OF THE ARGUMENT

Summary Judgment is in error as a matter of law. The Government failed to state a claim for which relief could be granted under Sections 6700 or 6701 of the Internal Revenue Code and the First and Ninth Amendments to the Constitution of the United States of America. The record before the District Court shows there has been no conduct related to the distribution of the Blue Folder that is subject to penalty under Sections 6700 or 6701 of the Internal Revenue Law, that that conduct is protected by the First and Ninth Amendments to the Constitution of the United States of America, and Defendants' motion to dismiss should have been granted.

Alternatively, Summary Judgment is in error as a matter of law due to the presence of multiple genuine issues of fact.

THE FACTS

In the District Court, in support of summary judgment, the Government filed a BRIEF (A 139) and a STATEMENT OF [21] MATERIAL FACTS, "As

To Which The United States Contends There Is No Genuine Issue For Trial.” (A 159-165).

Defendants filed a RESPONSE, effectively disputing (with sufficient documentary evidence) each of the Government’s 21 “facts.” (A 204-230).

Defendants effectively disproved each alleged “fact,” including such outlandish assertions by the Government as the following: Schulz *admitted* he sold 3500 copies of the Blue Folder for \$20 each (A 160, #4); Only on his website does Schulz encourage people to have tax professionals review the statements in the Blue Folder for accuracy (A 161, #9); Schulz charges people \$250-500 to participate in Operation Stop Withholding (A 161, #10); Schulz tells people to file Forms in lieu of a W-4 (A 162, #11); Schulz’s Statements on the Forms are false and designed to get individuals to stop paying taxes (A 162, #12); Schulz alters IRS Forms and instructs people to make false statements (A 163, #15); Schulz uses the Blue Folder to encourage people to underpay their taxes, stop filing and obstruct IRS examinations and collections (A 165, #19); Schulz’s distribution of the Blue Folders has harmed the Government in the amount of \$4.8 million (A 165, #20); Schulz’s specific questions regarding the 16th Amendment and “liability” have already been officially answered (A 160, #5).

Defendants’ RESPONSE also provided the District Court with 43 ADDITIONAL MATERIAL FACTS THAT ARE IN DISPUTE (A 231-246).

Defendants effectively denied each of 43 “factual assertions” proving the following: Defendants have not sought or obtained a **profit** from the distribution of the Blue Folder (A 231, #22 and A 244, #58); The Blue Folder is not a **Tax Termination Package** and gives no advice re tax avoidance and tax termination (A 231, #23 and #24); The Blue Folder is not covered by **Section 6700 or 6701** and is thus 6700 and 6701 are being used by the Government to further legitimate ends (A 233, #25 and #28); There is no hidden motive behind or nefarious “theme” of the Blue Folders, the only “**theme**” being the recommended review by tax professionals of the Forms’ specific legal citations (A 234, #29); The WTP Forms do not define who is or is not a “**taxpayer**” (A 235, #30), do not advocate “**No Answers, No Taxes**” (A 236, #32 and 237, #35), do not advise people they can opt-out of paying taxes if they stop **volunteering** to pay (A 236, #34 and A 237, #36 and #38 and A 238, #40), and do not deal with or mention **tax exemptions** (A 239, #45); Defendants have never claimed the IRC is **unconstitutional** (A 236, #31 and 238, #39); The Forms do not say the income tax applies only to **foreign source income** (A 236, #33); **Wage withholding IS different from tax withholding** (A 237, #37 and A 239, #43); The Forms do not include “**anti-tax arguments**” about what constitutes income (A 238, #41); There are no **tax consequences** for obtaining copies of the Blue Folder (A 238, #42); Schulz did not **create WTP** to “document this research into the tax code” (A 239,

#44); Defendants have never advocated the use of the Blue Folders to **forestall assessment and collection** of taxes or to voluntarily **withdraw** from the tax system (A 240, #46); The Blue Folders contain **specific citations to laws, regulations and court decisions, not “theories”** (A 240, #47); No person has paid “significant **sums of money**” for the Blue Folder (A 241, #48); The Forms have not been “**discredited**” nor have their specific legal citations ever been **denied** (A 241, #49 and A 242, #52) ; No employer has ever been **found guilty** of violating any of the laws cited on the Forms (A 241, #50); The Blue Folder has little if anything to do with the **payment** by an individual of his correct taxes (A 242, #51 and A 243, #56); Defendants statements about the effectiveness of Operation Stop Withholding was hearsay, based on anecdotal evidence, scuttlebutt, **tales and stories** (A 242, #53); Defendants have never **assisted** anyone in the preparation of forms to be filed with the IRS relating to the payment of taxes, either individual or corporate (A 243, #54); The WTP Forms are not for use to delay IRS **examinations and collections** (A 243, #55); The injunction will most definitely **harm Defendants** by neutering and eventually destroying the corporations’ civic education and civic action capabilities (A 243, #57); The facts and the law of this case bear no resemblance to and are clearly **distinguishable** from those of the “6700 tax evasion product and services cases” cited by the Government (A 244, #59); The conduct at issue in *We The People v*

United States is clearly distinguishable from the conduct at issue in the instant case (A 244, #60); The conduct at issue in *Buttoroff* is clearly distinguishable from the conduct at issue in the instant case (A 244, #61); The Blue Folders are not designed to help people **circumvent** the law (A 245, #62); The WTP Forms do not rely on “the **861 argument**” or the “Ratification of the **16th Amendment** argument” (A 245, #63); and Defendants’ use and distribution of the Blue Folder is the equivalent of claiming and exercising their Rights under the **Petition Clause** of the First Amendment (A 246, #64).

The Government filed a REPLY BRIEF (A 414-423) and a RESPONSE TO DEFENDANTS’ STATEMENT OF MATERIAL FACTS (A 424-443), in which the Government did not reply to Defendants’ denials of the Government’s 21 material facts, but “denied” of each of Defendants’ 43 material facts.

The Court’s attention is invited to the fact that after most of its denials in its REPLY BRIEF the Government added the assertion, “The United States denies this allegation, and contends no response is required because defendants’ ‘material fact’ amounts to a legal argument that is not supported by citations to the record as required by L.R. 7.1.”

In each case, the “L.R. 7” assertion is either inaccurate (a citation to the record was provided by Defendants) or misleading (a citation was not required –

Defendants could not prove a negative). See (A 231-246, paragraphs 24, 28, 29, 30, 37, 38, 40, 43, 44, 46, 49, 50, 52, 53, 56, 57, 58, 59, 60, and 64).

Along with their RESPONSE to the Government's statement of facts, Defendants filed a BRIEF that detailed 65 MATERIAL FACTS NOT IN DISPUTE. Most of these were citations of law and regulations (A 192-201). The Government did not deny any of the 65 statements or offer another interpretation of any of the statutes and regulations.

A reasonable jury would find the evidence favors Defendants, that is, proof by a preponderance of the evidence of conduct subject to penalty under 6700 and 6701 has not been made by the Government for it to obtain a summary judgment and a permanent injunction.

ARGUMENT

POINT I

SUMMARY JUDGMENT IS IN ERROR, THE FACTS SHOW NO CONDUCT SUBJECT TO PENALTY UNDER 6700 OR 6701

Summary Judgment is in error as a matter of law.

In effect, in its Response Brief to this Court the Government devoted 47 of its 58 pages to a re-configuration of the "facts" argued in the District Court, but with the addition of a few newly alleged "facts" (raised for the first time).

The fact remains; the Government has failed to state a claim for which relief could be granted under Sections 6700 or 6701 of the Internal Revenue Code and the First and Ninth Amendments to the Constitution of the United States of America.

It is not possible, nor necessary for Defendants to reply to the Government's voluminous, re-configured, re-statement of alleged "facts" that do not cross-reference the parties' STATEMENTS OF MATERIAL FACTS in the Record or the District Court's Decision and Order. Out of an abundance of caution, however, Defendants do reply (below) to a few of the newly alleged "facts."

POINT II

ALTERNATIVELY, SUMMARY JUDGMENT IS IN ERROR BECAUSE THERE ARE GENUINE ISSUES FOR TRIAL

Alternatively, the District Court abused its discretion in failing to construe the evidence in the light most favorable to Defendants, accepting as true everything the Government presented and rejecting as false everything Defendants presented.

A reasonable jury would conclude that at the very least, there are multiple facts that are material to the case that are in genuine dispute.

POINT III

THE GOVERNMENT’S NEWLY ALLEGED “FACTS” ARE UNTIMELY, INACCURATE AND OF NO CONSEQUENCE

In its BRIEF to this Court, the Government presents new alleged “facts” that at this stage of the proceeding are untimely, giving rise to due process concerns. In an abundance of caution Defendants are compelled to respond to two of these new “facts” and do so below, proving they are incorrect and of no consequence to the conclusions reached in Points I and II above.

A. The Government’s New and Incorrect Alleged “Fact” Regarding IRS’s April 4, 2003 Letter to Schulz

On page 15 of its Brief, the Government incorrectly asserts, in effect, that by embarking on his cross country tour and handing out 3500 copies of the Blue Folder in 2003, Schulz ignored a Government warning, sent in response to its receipt of Schulz’s March 15, 2003 letter and Blue Folder (Schulz’s Petition for Redress of Grievances on pay withholding).

This newly alleged fact is not only untimely it is demonstrably inaccurate.

The record before the District Court has the Government admitting that it did not respond to Schulz’s March 15, 2003 letter Petition for Redress with its Blue Folder. The Government admitted by not denying numerous specific assertions that the Government did not respond. See for instance, Defendants’

Motion to Dismiss at (A 50), Schulz Declaration #1 at (A 73), and Defendants' Opposition to the Government's motion for Summary Judgment at (A 188).

In addition, Defendants argued again and again before the District Court that Defendants had submitted a total of 38 requests to the Government for a response to its March 15, 2003 Petition for Redress of Grievances, with its Blue Folder – requests that fell on deaf ears. See for instance, (A 71-74, especially paragraphs 6 and 12).

Now, however, before this Court, the Government alleges it did respond to the March 15, 2003 Petition for Redress. In the process, the Government puts a new meaning on IRS's April 4, 2003 letter to Schulz, a meaning that is not true, saying, "[On April 4, 2003] 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 IRC Section 6700 and a request for injunctive relief under Section 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...." (Br. 15).

The truth regarding IRS's April 4, 2003 letter to Schulz is as follows:

1. It is no warning about, and makes no reference to Schulz's March 15, 2003 letter Petition (A 75.1) or its attached MATERIAL -- the Blue Folder. It refers, simply to "certain materials." (A 132.1).

2. A reasonable jury would conclude, as Schulz did, that the letter was not referring to the March 15, 2003 letter or the Blue Folder) but was referring, instead, to the MATERIAL referred to in the following paragraphs.
3. The April 4 letter was sent after Defendants' symposium on the operation of the income tax system at the National Press Club (broadcast live by C-Span), and the letter was referring to the distribution of MATERIAL produced at that event, including copies of the C-Span tape of the broadcast. (A 78, para 7).
4. The April 4 letter was sent after Defendants' published four full page ads in USA TODAY and the Washington Times on the subject of the Right to Petition for Redress of Grievances, and the letter was referring to the distribution of copies of those MATERIALS. (A 82, para 19).
5. The April 4 letter was sent after Defendants published a full page ad in the Washington Times titled "Dear Government, Why Won't You Answer" on the subject of the Right to Petition Government for Redress of Grievances, and the letter was referring to the distribution of that MATERIAL. (A 81, para 16)
6. The April 4 letter was sent after Defendants' published a full-page ad in the New York Times regarding the Rights of the People and the

obligations of the Government under the Petition Clause, and the letter was referring to the further distribution of that MATERIAL. (A 98, para 59).

7. The April 4 letter was sent fourteen months after the Citizens' Truth in Taxation Hearing in Washington DC, and the letter was referring to the distribution of the MATERIALS produced at that hearing. (A 98, para 60).
8. The April 4 letter was sent twelve months after Defendants distributed a copy of the full record of the Truth in Taxation Hearing to every member of Congress, and the letter was referring to the further distribution of that MATERIAL. (A 99, para 65).
9. The April 4 letter was sent ten months after Schulz sent his June 17, 2002 letter to the IRS Commissioner regarding the Right of the People and the obligations of the Government under the First Amendment's Petition Clause, and the letter was referring to the widespread distribution of that MATERIAL.(A 100, para 67).
10. The April 4 letter was sent five months after the service on every member of Congress and the President of Defendants' four Petitions for Redress of constitutional torts, and the letter was referring to the widespread distribution of that MATERIAL. (A 100, para 69).

11. The April 4 letter was sent five months after the webcast of the culmination of Freedom Drive on the National Mall, and the letter was referring to the distribution of the MATERIALS produced at that event, including Schulz's "No Answers, No Taxes" speech. (A 101, para 71).
12. The April 4 letter was sent three months after the first webcast of the "Liberty Hour" in which Schulz detailed the history, meaning and constitutional significance of the Right to Petition, the rationale and justification for "No Answers, No Taxes," and the letter was referring to the further distribution of that MATERIAL. (A 101, para 73).
13. The April 4 letter was not delivered to Defendants' address until after Schulz had embarked on the tour. (A 102). Schulz did not see the letter until he took a break from the tour to return home to celebrate Easter, following his meeting in Phoenix (A 103). Schulz immediately contacted IRS Agent Roundtree and a date was set to meet in Schulz's hometown in Queensbury, NY on May 30, 2003. For more details regarding what transpired at and after the meeting, see (A 121-132). The following is a summary. Schulz provided Roundtree with a written response to the letter (see A 123, para. 56) (Docket 12, Exhibit F). Roundtree then handed Schulz a Summons that also mentioned Section 6700 and 7408 but did not mention Operation Stop Withholding or the

Blue Folder. (A 124, para. 57) (Docket 12, Exhibit G). Schulz sued the IRS to quash the Summons on the ground that it was an interference with his Rights under the First and Ninth Amendment. At no time during the proceedings in District Court and the Court of Appeals was there any mention of Operation Stop Withholding or the Blue Folder.¹

14. The Government offered no objection or denials in the Court below to the facts presented by Schulz in his Declaration #3 (Docket 12), including the discussion about the IRS's April 4, 2003 letter.

B. The Government's New and Incorrect Alleged "Fact" Regarding Schulz's June 17, 2002 Letter To The IRS

The Government's COMPLAINT (A 27-40) focuses exclusively on Defendants' program to stop *withholding* and specifically the distribution of the Blue Folder – the folder with the label, “Legal Termination of Tax Withholding For Companies, Workers and Independent Contractors.”²

Under the heading “Conduct Sought to be Enjoined,” the COMPLAINT discusses only: I. Defendants' “package” of *withholding* related instructions and forms for Employees; and II., Defendants' “package” of *withholding* related instructions and forms for Employers. (A 29-34).

¹ See *Schulz v IRS*, 395 F.3d 463 (2d Cir., 2005) (Schulz I), and *Schulz v IRS*, 413 F.3d 297 (2d Cir., 2005)

² For a copy of the contents of the Blue Folder see (A 287-407). For a copy of label on the Blue Folder see (SA-1)

Additional evidence of the fact that the only conduct covered by the Government's COMPLAINT is Defendants' conduct regarding the use of the Forms in the Blue Folder is provided by the Government in its STATEMENT OF MATERIAL FACTS, which reads, "Defendants' contribution [to the alleged tax avoidance scheme] is **limited** to selling the scheme as a how-to method for enabling customers to evade 'withholding, filing, and paying [] tax' using '**WTP Forms #1-10.**'" (A 160, paragraph #6). (Defendants' emphasis).

The Governments' COMPLAINT incorrectly referred to each "package" as a "Tax Termination Package" (A 29, 32). Defendants objected (A 48) in their Motion to Dismiss, saying:

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

Defendants' MOTION included a formal request to have the phrase removed from the Complaint because it was prejudicial and scandalous. (A 68).

The Government admitted in its OPPOSITION, in effect, that nowhere in the Blue Folder do Defendants use the words "Tax Termination Package," much less "Tax Termination Package for Employees" and "Tax Termination Package for Employers." The Government argued, weakly, that:

“defendants are wrong that the words “Tax Termination” do not appear in their materials. In fact, these words appear in the title of their package... The fact that the words do not appear consecutively does not change the fact that this shorthand description accurately portrays defendants’ scheme, which is advertised to allow customers to stop *withholding* of taxes.” (A 157).

The point, is this: by its plain language, the Government’s COMPLAINT sought only to enjoin the distribution of the instructions and forms contained in Defendants’ blue colored folder, no more, no less, and that any reference to a “Tax Termination Package” by the Government in its COMPLAINT is erroneous.

However, this is not to say there is no evidence of the Government’s desire to silence all of Defendants speech about the Right to Petition Government for Redress of constitutional torts.

As Defendants repeatedly pointed out in their pleadings, the Governments’ frequent mixing of “apples and oranges” (i.e., its misapplication to this case of facts about Defendants’ other conduct related to Defendants’ other Petitions for Redress of Grievances) is evidence of Government’s motive in this regard.

POINT IV

THE GOVERNMENT INJECTS A NEW CLAIM THAT IS OUT OF TIME AND BASELESS

After admitting in District Court that its COMPLAINT was limited to Defendants’ speech related to the Blue Folder, the Government is now requesting this Court to expand the reach of its complaint (and injunction), well beyond the target of the original complaint (Defendants’ conduct related to the distribution of

one of their Petitions for Redress of Grievances – the Blue Folder) to other conduct, particularly Defendants’ Petitions for Redress of Grievances regarding the Government’s violation of the war powers, privacy, money and tax clauses of the Constitution. (Br. at 13, fn 5, and at 56, last paragraph).

To accomplish this, the Government accuses Defendants anew of promoting a “Tax Termination Package,” which the Government alleges is a “different manifestation[] of the same overall tax avoidance scheme” to be “prohibited by the injunction.” (Br., 56).

However, as argued above, the Government admitted its use of the phrase “Tax Termination Package” in the COMPLAINT was erroneous (A- 157).

The Government now re-introduces the phrase “Tax Termination Package,” but re-assigns it to a letter from Schulz to the IRS, dated June 17, 2002 -- nearly one year before (and unrelated to) the start of Operation Stop Withholding and any speech related to the Blue Folder. (Br. fn 5, page 13).

Schulz’s Declaration #2 (Docket 12) detailed Defendant’s activities and speech related to all of Defendants’ Petitions for Redress of Grievances, beginning in May of 1999. Declaration #2 says this about the letter:

“On June 17, 2002, Schulz wrote a letter to the IRS Commissioner informing him that under the circumstances and for the reasons given in the letter and its attachments, he would no longer be filing tax returns. Exhibit YY is a copy of the letter to the IRS.” (A 100, para 67).³

³ From January 1, 2001 to this day, Schulz has not earned any money and thus has not filed a return or paid any tax on labor. To support his life and pay household expenses, Schulz sells parts of the land his home

Exhibit YY, along with the rest of the 62 Exhibits attached to Schulz Declaration #2, are on file at the District Court. Attached to the letter were five CDs, including the full transcript and video record of the February 2002, two-day Truth in Taxation Hearing (A 98, paragraph 60).

In its just introduced attempt to prove the June 17, 2002 letter is a “Tax Termination Package,” the Government presents a Declaration by IRS Agent Roundtree and a page from Defendants’ website (SA 28; SA 31), but not the letter. The Government was served with the letter along with Schulz Declaration #2 and all of its Exhibits. The Government could have and should have included a copy of the letter in its Supplemental Appendix, but chose not to.⁴

The Government provides no evidence of Defendants’ advocacy of “tax termination”. For instance, SA 31 makes no mention of a “Tax Termination Package.” At the top of the page it says, “The Schulz” and “\$39.95 See How Schulz Did it.” Obviously there is something missing and wrong with the Government’s evidence.

The following is the statement that has been on Defendants’ website for many years, accompanying the notice of the availability of copies of the June 17, 2002 letter with its attachment (the record of the Truth in Taxation Hearing on a

sits on. He sends the required percentage of the selling price to the federal and state tax authorities.
⁴ Any reasonable jury would conclude that the letter does not advocate tax resistance in any form and provides no tax advice or tax termination.

set of five CDs): “The Schulz June 2002 Letter to IRS Commissioner Rossotti to Exercise his Right to Petition. \$39.95.”

Repeating, the full transcript and video-audio record of the two-day, 16 hour Truth in Taxation Hearing on a set of four CDs is included in the letter. The letter and its attachments have been available from Defendant’s website for more than five years.

There is no reference to Schulz’s June 2002 letter in the Blue Folder or in the March 15, 2003 letter from Schulz to the IRS, or in the April 4, 2003 letter from the IRS to Schulz, or in the Government’s COMPLAINT, or in any of the Government’s pleadings in the court below. Until now the Government has had nothing to say about the June 2002 letter. Now, without giving Defendants an opportunity to defend it, the Government wants to (unconstitutionally) ban it, alleging incorrectly, this “Tax Termination Package [Schulz’s letter] and the Blue Folder [are] **different manifestations of the same overall tax avoidance scheme.**” (Br. fn 5, page 13).

POINT V

THE GOVERNMENTS’ ASSERTION REGARDING THE MEANING OF 26 U.S.C. SECTION 3402 IS UNTIMELY, INCORRECT AND A PROHIBITED CONCLUSIVE PRESUMPTION

In the District Court the Government failed to deny with any degree of specificity the meaning Defendants have given to the numerous statutory and

regulatory citations and statements included in the Blue Folder, either those on the WTP Forms and those on the STATEMENT OF FACTS AND BELIEF. Not once did the Government challenge, much less with any degree of specificity, the accuracy of any of those citations or statements. Instead, condescendingly, the Government simply waived them off, saying “frivolous” or “rejected by the Courts.”

Throughout their pleadings, Defendants repeatedly asserted that nowhere in American history or jurisprudence can one find a formal, specific answer to any of the specific questions poised by those legal citations and statements, not by any government official or agency, or any academician or judge.⁵

For the first time in this case, here on appeal, the Government finally addresses one of the many legal citations included in the withholding Petition for Redress (the Blue Folder). The Government claims Defendants have asserted, in error, the legal meaning of the withholding regulation, CFR 31.3402(p)-1(a) Voluntary Withholding Agreements, by failing to cite the complete sentence. (Br., page 36, 37). In short, the Government asserts (in error) that "Voluntary Withholding Agreements" cannot be used with respect to the payment of amounts constituting "wages".

⁵ As the record shows (Schulz Declaration #1), this is the reason Schulz has gotten involve in these issues: he saw highly intelligent, trained and well-studied professionals acting on their beliefs because they were unable to get the Government to answer what appeared to be legitimate and serious questions, and a Government all too reluctant to provide the People with answers to a few questions, and all too willing, instead, to expend extraordinary amounts of money and resources on enforcement actions. There had to be a better way, a way that recognized both the Rights of the People and the obligations of the Government.

In reply, Defendants begin with a review of several key legal terms as defined in the statutes. We begin with the definition of the legal term "Wages" (Emphasis added by Defendants):

[TITLE 26](#) > [Subtitle C](#) > [CHAPTER 24](#) > § 3401

[§ 3401. Definitions](#)

(a) **Wages**

*For purposes of this chapter, the term “wages” means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash; **except that such term shall NOT include remuneration paid—***

[. . .]

(4) **for service NOT in the course of the employer’s trade or business** performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is \$50 or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For purposes of this paragraph, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if—

- (A) on each of some 24 days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer’s trade or business; or
- (B) such individual was regularly employed (as determined under subparagraph (A)) by such employer in the performance of such service during the preceding calendar quarter; or

[. . .]

(11) **for services NOT in the course of the employer’s trade or business**, to the extent paid in any medium other than cash; or...

Below are the definitions of the legal terms "Employee" and "Employer" from the same IRC Section 3401:

(c) *Employee*

For purposes of this chapter, the term "employee" includes an

officer, employee, or elected official **of the United States**, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term "employee" also includes an officer of a corporation.

(d) Employer

For purposes of this chapter, the term "employer" means the person for whom an individual performs or performed any service of whatever nature, as the **employee** of such person,.,...

The IRC's definition of the legal term "trade or business" reads:

[26 U.S.C. §7701\(a\)\(26\)](#)

"The term 'trade or business' [includes](#) [is limited to] the performance of the functions of a [public office](#)."

Starting with these definitions alone, a reasonable jury would conclude first, that to qualify as "wages" for withholding purposes, remuneration must be derived from the employer's "trade or business." Secondly, using the well established rules of statutory construction, particularly *Expressio unius est exclusio alterius*,⁶ that the only "wages" subject to mandatory withholding are those paid in the performance of a "public office" and under the law, ordinary American workers are not "employees" subject to mandatory withholding.

It is common knowledge that hundreds of thousands of People have been asking the Government for decades for an explanation – to explain the apparent

⁶ "Expressio unius est exclusio alterius. A maxim of statutory interpretation meaning that **the expression of one thing is the exclusion of another**. *Burgin v. Forbes*, 293 Ky. 456, 169 S.W.2d 321, 325; *Newblock v. Bowles*, 170 Okl. 487, 40 P.2d 1097, 1100. Mention of one thing implies exclusion of another. **When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred**. Under this maxim, if statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded." [Black's Law Dictionary, Sixth Edition, page 581]

unconstitutional enforcement and operation of this otherwise constitutional statute (3402(a)(1)) and its implementing regulation (31.3402(p)-1) -- and whose questions have been met with silence.

Rhetorically, Defendants ask why has the Government refused to respond? Why does the Government not honor outstanding requests to meet with its citizens in a public forum to address and answer the questions is suspicious at best. Why would the Government not want to put the major issues to rest?

The Government then asserts (Br., page 37) that 26 USC 3402(p), "Voluntary Withholding Agreements" authorizes the use of such agreements in a variety of situations, excepting the payment of "wages". Not so ironically, Defendants fully agree.

While it is refreshing to have the Government respond to one of the 65 material facts Defendants have alleged are not in dispute (A 192-201), even if the response is incomplete or inaccurate, the fact remains the Government has not denied the others, including but not limited to those covered by 26 USC Section 3402(p)(3)(A) (withholding of other than wages is also voluntary), 31 CFR Section 215.6 (Standard Agreement between Treasury Secretary and Entity is required for withholding), 26 CFR Sections 1441-1446 (Non-resident Aliens and Foreign Corporations withholding), 26 USC 7701 (a) 16 and 26 CFR 301.7701-16 (term "withholding agent" means any

person required to deduct and withhold any tax under the provisions of Section 1441, 1442, 1443 or 1446), 26 USC 3504 (Form 2678 Employer Appointment of Agent required), 8 USC 1324(a)(3)(A) (protected individuals cannot be compelled to provide *any* specific document in order to work in America), 26 CFR 301.6109-1(c) (Entity required to make an affidavit *for its file* stating the Entity made two requests for Tax Identification Number), and similar statutes, regulations and case law. See also Schulz Decl #6, Exh A, par 2 c-q, Exhibits C-Q.

Rivera v. Baker West, Inc., 430 F.3d 1253, 1259 is inapposite. Rivera was not exercising the Right to Petition and Rivera was not arguing that his salary was not "wages" under the law.

POINT VI

THE BLUE FOLDER IS WITHIN THE ZONE OF INTEREST TO BE PROTECTED BY THE SPEECH CLAUSE

Notwithstanding the record the Government asserts, incorrectly, that Defendants' distribution of the Blue Folder is not protected by the First Amendment's Speech clause on the ground that by distributing the Blue Folder, Defendants are inciting imminent lawbreaking, a reasonable jury would conclude otherwise. It would conclude:

- a. If the content of the Blue Folder was not false, no law has been violated and no harm has been done.

- b. If the content of the Blue Folder was false it does not matter if Defendants were inciting people to act if Defendants were not inciting people to break the law.
- c. Defendants are not inciting people to break the law.
- d. Defendants are distributing the Blue Folder to workers, inciting the workers to do no more than incite the people who pay them for their labor to do no more than incite their tax professionals (attorneys, CPAs and Accountants) to review the content of the Blue Folder for accuracy and, depending on the results of their review, to possibly incite the pay master to stop withholding.
- e. Defendants' do not incite people to break the law. Giving workers certain materials regarding pay withholding laws to pass on to others to review for accuracy is not a crime, and is protected speech, even if one or more of the statements is false.
- f. If, after Defendants' inciting conduct, and the workers' inciting conduct, and the pay master's inciting conduct, and the tax professionals inciting conduct a law is violated, it cannot be said Defendants incited the lawbreaking, imminently or otherwise.
- g. There is ample evidence before the Court that Defendants distributed the Blue Folder, but no evidence of any "incitement."

The Government argues that because it is “batting a thousand” in other cases brought against other defendants for conduct subject to penalty under Sections 6700 and 6701, and similar cases, this Court should affirm the District Court’s summary judgment and injunction. In making this claim the Government cites various court cases.

That’s no reason to affirm. Beyond that, the facts, circumstances and law of the instant case are clearly distinguishable from each and every case cited by the Government. See the table below.

U.S v. _____	<u>Speech/Case involved:</u>	<u>Defendants?:</u>
Fleshner, Clarkson 98 F.3d 155; 1996	Advised inflating allowances on W-4s, not to file returns, hide income	No.
Raymond/Bernhoft 228 F.3d 804; 2000	Commercial "de-tax" program, file for refunds, file false W-4s	No.
Schiff, Nuen, Cohen 379 F.3d 621; 2004	Book, detailed instructions on filing 1040 "zero" returns, break IRS Offers in Comp.	No.
Bell 414 F.3d 474; 2005	Sold professional personal fee-per-service advising & assisting prep. of IRS forms.	No.
Buttorff 572 F.2d 619; 1978	Advised inflated W-4 allowances, exempt status filings, personally aided & abetted	No.
Buttorff 761 F.2d 1056; 1985	Admitted commercial sale of Trust kits and services, + prepared client tax returns	No.
Savoie / Caucus Club 594 F. Supp. 678; 1984	Paid preparation of personal tax returns, advised inflating W-4 exemptions, 1040s w/ Sched. "C", + use of false deductions.	No.
Moss aka Freeman 604 F.2d 569; 1979	Speech advising filing false W-4s (no details in holding), + fees for personal legal counseling	No.

Smith <i>657 F. Supp. 646; 1986</i>	Trust related legal advice & personal assistance sold commercially. Advice counsels inflated tax deductions via trusts.	No.
Barnett <i>667 F.2d 835; 1982</i>	Illegal PCP drug case. Speech instructed violation of an explicit, statutory prohibition	No.
Freeman <i>761 F.2d 549; 1985</i>	Instructed false reporting on Form 1040s. Personally assisted filings.	No.
Kelley <i>769 F.2d 215; 1985</i>	Sold instructions and advice re obtaining refunds via false returns, filing of false W-4 forms and inflating W-4 exemptions	No.
Kaun <i>827 F.2d 1144; 1987</i>	Counseled to impede IRS via FOIAs, refund requests, non-std returns, common law liens	No.
Rowleee/Patriot Soc. <i>899 F.2d 1275; 1990</i>	Instructed filing "Exempt" W-4s, sold personal legal assistance to non-filer clients	No.
White/Soc/ Ed. Citizens <i>769 F.2d 511; 1985</i>	Instructed on obtaining refunds filing of W-4s, inflating deductions, Schedule "C"	No.
Rice v. Paladin Press <i>128 F.3d 233; 1997</i>	Sold detailed terrorist manual on how to kill humans, construct statutorily illegal/banned weapons	No.
Malinowski <i>472 F.2d 850; 1973</i>	Political protest of Viet Nam, criminal convict. for false W-4, w/ 15 exemptions.	No.

At the heart of the Government's case are numerous conclusive presumptions of fact purporting to establish that virtually every aspect of Defendants' Speech regarding withholding and the income tax laws are false. Indeed, these conclusive presumptions form the very nexus of the Government's complaint and constitute the basis for the District Court's erroneous conclusion.

In fact, Defendants' Blue Folder is speech protected by the Speech Clause.

POINT VII

THE BLUE FOLDER IS WITHIN THE ZONE OF INTEREST TO BE PROTECTED BY THE PETITION CLAUSE (AND THE 9TH AMENDMENT)

The Government asserts that 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." [emphasis added] (Br. 29).

This begs the question, "Contemplated by whom?"

This is yet another of the patently self-serving conclusions of law proffered by the Government. The Government's attorneys know full well that no U.S. Court has *ever* declared the full contours of the constitutional meaning of the Petition clause including the Rights of citizens acting in their private capacities, and it remains for the intents and purposes of this controversy, unsettled law.⁷

Most egregiously, the Government fails (again) to respond to Defendants' argument that was presented in full in Defendants' pleading in the District Court (Docket 24) (Schulz Declaration #9, Exhibit A) (see also A 411) (see also the summary of the argument in Defendant's Brief to this Court, pages 22-25). The argument is based on the historical record and original intent of the Petition

⁷ Notwithstanding the recent decision in error by the DC Court of Appeals in *We The People v United States*. The Court's attention is invited to the fact that Defendants are among those who have filed a Petition for Writ of Certiorari in *We The People*. The matter has been docketed: 07-680 and 07-681. The Government has just waived its Right to Respond.

Clause, a record that includes the words of the Founders expressing the Right of the People to Withhold Taxes, if necessary, to Secure Redress⁸

“If money is wanted by rulers who have in any manner oppressed the People, they may retain it until their grievances are redressed, and thus peaceably procure relief, without trusting to despised petitions or disturbing the public tranquility.”

"Continental Congress To The Inhabitants Of The Province Of Quebec."
Journals of the Continental Congress 1774, Journals 1: 105-13.

The Government's failure (again) to recognize this affirmative defense and its failure (again) to actually cite any statutory or judicial basis supporting its conclusions regarding what our Founders "contemplated" by the Petition Clause, renders this matter an unresolved issue of material fact supporting, at a minimum, dismissal of Summary Judgment.

'It must be conceded,' said this court, speaking by Mr. Justice MILLER, in *Loan Ass'n v. Topeka*, 20 Wall. 655-662, 'that there are such rights in every free government beyond the control of the state. A government which recognized no such rights,-which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power,-is after all but a despotism.' *Hurtado v. People of State of California*, 110 U.S. 516, 537 (1884)

.....

⁸ That conduct – the exercise of the Right of Enforcement through the retention of money -- is NOT a part of or advocated by Defendants in Operation Stop Withholding or the Blue Folder, as demonstrated by the record.

"It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Frost & Frost Trucking Co. v. Railroad Commission of California*, [271 U.S. 583, 594](#)

"Constitutional rights would be of little value if they could be thus indirectly denied. *Lane v. Wilson*, [307 U.S. 268, 275](#), 59 S.Ct. 872, 876" *Smith v. Allwright*, 321 U.S. 649, 664 (1944)

CONCLUSION

Appellants request a reversal, dismissing the case or, alternatively, remanding for a hearing, but before another Judge.

CERTIFICATE OF COMPLIANCE

In keeping with the Court's Rules, this brief contains 6,998 words, not including footnotes but not including the signature blocks below.

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