No. _____

In the
Supreme Court of the United States

JASON P. STINSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

William F. Merlin, Jr.
Merlin Law Group, P.A.
777 S. Harbour Island Blvd.
Suite 950
Tampa, FL 33602-5747
(813) 229-1000

John J. Pappas
Counsel of Record
4815 New Broad Street
Suite 3024
Orlando, FL 32814-6649
(407) 451-9308
johnpappas@lawpro.biz

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether issuing a permanent injunction and an order to disgorge $949,000 against the owner of a tax preparation business under 26 U.S.C. § 7402 of the Internal Revenue Code violates due process when the amount of any illegally obtained monies was not introduced into evidence.

2. Whether a taxpayer's testimony that the tax return was inaccurate and that the taxpayer did not provide the inaccurate information to the tax preparer proves the tax preparer's intent to defraud.

3. Whether Stinson's due process rights were violated when the district court refused to consider the evidence of alleged sanctionable litigation conduct.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit were Petitioner, Jason P. Stinson, and Respondent, United States of America. The entities d.b.a. LBS Tax Services, and d.b.a. Nation Tax Services, LLC were included as defendant-appellant in the caption below but did not appear in the case or participate in the briefing.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, Petitioner states that the entities listed in the proceeding in the United States Court of Appeals for the Eleventh Circuit, d.b.a. LBS Tax Services, and d.b.a. Nation Tax Services, LLC, do not have a parent corporation and there is no parent or publicly held company owning 10% or more of the corporation's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

REGULATIONS AND RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Jason P. Stinson respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is reported at 729 F. App'x 891 (11th Cir. 2018) and found at Appendix, App. 1. The Court of Appeals' order denying Jason P. Stinson's timely petition for rehearing and rehearing *en banc*, was entered on February 22, 2019, and is found at App. 87. The March 6, 2017, memorandum opinion of the United States District Court for the Middle District of Florida granting the Government's motion for permanent injunction and request for disgorgement is reported at 239 F.Supp.3d 1299 (M.D. Fla. 2017) and is found at App. 19. The judgment of the United States District Court for the Middle District of Florida on March 7, 2017 is found at App. 17.

JURISDICTION

Petitioner seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit entered on May 1, 2018. App. 1. The Court of Appeals denied a timely petition for rehearing *en banc* on February 22, 2019. App. 87. This Court's jurisdiction is based on 28 U.S.C. § 1254(1) and United States Supreme Court Rule 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The statutory provisions at issue are reprinted in the appendix. App. 89.

STATEMENT OF THE CASE

I. Background

Jason P. Stinson ("Stinson") owned a tax preparation business that employed over fifty enrolled tax preparers in approximately six offices located through several states. For the tax years 2010-12, Stinson personally prepared about 350 returns. From 2010-15, the other tax preparers prepared about 13,900 returns. The preparation fees were paid upon receipt of the tax refund.

On September 23, 2014, the United States of America ("Government") filed a civil action against Stinson under three sections of the Internal Revenue Code: 26 U.S.C. §§ 7402, 7407, and 7408, seeking to enjoin Stinson from preparing and assisting in preparing tax returns for others and from owning and operating a tax return preparation business. On December 7, 2015, the Government filed a motion for a preliminary injunction against Stinson. The Government also sought an order requiring Stinson to disgorge to the Government proceeds that he and his businesses received as a result of the alleged negligent, willful, reckless or fraudulent preparation of tax returns.

Sections 7407 and 7408 of the Code permit, but do not require, district courts to enjoin tax return preparers if they have engaged in certain prohibited conduct. App. 102, 103. Section 7407 permits the IRS to issue monetary penalties against a tax return preparer who understates a taxpayer's liability due to an unreasonable position, who recklessly or intentionally disregards IRS rules, who claims the Earned Income Tax Credit ("EITC") without due diligence, who guarantees payment of a tax refund, or who commits one of a handful of additional violations. App. 102. Section 7408 prohibits "any person" from aiding or procuring the preparation of tax returns that are known to understate the tax liability of the filer. App. 103. Section 7402 provides remedies "in addition to and not exclusive of any and all other remedies." App. 100.

To be enjoined under § 7407, the tax preparer who prepared the return must be found in violation of either two penalty statutes 26 U.S.C. § 6694 or § 6695. To be enjoined under § 7408, the tax preparer must be found in violation of penalty statute 26 U.S.C. § 6701, which requires the Government to prove fraud by clear and convincing evidence. App. 97.

II. Bench Trial

In 2016, the district court held a six-day bench trial and heard testimony from taxpayers who were former clients of Stinson's tax preparation business. At trial, the Government identified 18 of the 350 tax returns personally prepared by Stinson as having been inaccurately prepared. The preparation fees totaled about $15,000.

The Government admitted at trial it never identified any return as having been either negligently, recklessly, willfully, or fraudulently prepared by any tax preparer. The Government admitted Stinson asked it to identify and produce returns that it contended were prepared fraudulently. In response, the Government stated that it was not required to comb through thousands of tax returns to find returns that were prepared either negligently or fraudulently. Moreover, the Government stated that it did not have to identify these returns because Stinson has always been in a position to know which returns were merely negligently prepared or fraudulently prepared because he and his employees prepared the returns. The Government's position was that it is not required to identify which returns were illegally prepared and

which were merely negligently prepared. According to the Government, it does not matter.

Instead, the Government presented IRS Agent Holly Shields' hearsay documentation and testimony concerning a sample of 40 returns in its post-trial extrapolations of alleged wrongdoing and harm caused by tax preparers. Stinson was not provided the opportunity to cross-examine any witnesses regarding the Government's post-trial extrapolation because the Government did not introduce into evidence any testimony concerning ill-gotten gains. The trial court sustained the Government's objection to Stinson's attempts to question any of the Government witnesses regarding fraud or negligence, including Agent Shields. Shields admitted none of the returns in her "sample" were prepared by Stinson and none were determined to have been negligently or fraudulently prepared by any tax preparer.

III. The Government's post-trial extrapolations

The Government asked for $1,584,481.79 as a disgorgement award in its post-trial brief. The Government included a chart describing six categories of dollar amounts to be disgorged. For this Court's reference, an excerpt of the chart containing only categories 1 and 2, which were the categories utilized by the district court for its decision-making process, is copied below.

Amount	**Tax Years** (not year of filing)	**Explanation**
Category (1): $800,101.47	2012, 2013, 2014	In these years, Stinson's stores filed 1,965 tax returns with a Form Schedule A, and 1,861 of those tax returns had a Form Schedule A claiming unreimbursed employee business expenses. The amount here is the total fees Stinson collected from those 1,861 tax returns. (Pl. Ex. 768).
Category (2): $149,851.00	2011	This fee amount is derived only from tax returns that identify Stinson as the paid preparer and that included a Schedule A. Schedule C, or reported education credits where (1) no Form 1098-T was issued by an education institution for the taxpayer or a dependent; or (2) the grants or scholarships reported on the Form 1098-T exceeded qualifying education expenses. Because Stinson was shown to have

		fabricated education expenses and claimed personal expenses as business expenses, the Government contends that fees from these tax returns are appropriate for disgorgement.

The district court found the Government's "request" for disgorgement for all six categories totaling more than $1.5 million unreasonable because it could not discern whether the fees from categories 1 and 2 were duplicated in categories 3 through 6: "It is not a reasonable approximation to seek disgorgement from Stinson for twice the amount of fees for the same tax returns." App. 79-80. Instead, the district court adopted the Government counsel's extrapolations, in the absence of any random sample or expert testimony, for categories 1 and 2, holding they were a "reasonable approximation" and ordered disgorgement totaling $949,952.47.

The Government filed its post-trial brief in the late afternoon on the same day the Stinson's post-trial brief was due. Thus, Stinson was even denied the opportunity to submit rebuttal argument to the Government's post-trial calculations.

IV. The district court's rulings

On March 6, 2017, the district court entered an order of permanent injunction against Mr. Stinson. App. 19. The district court also entered a disgorgement order under § 7402 in the amount of $949,952.47, an

amount that it found "represents a reasonable approximation of his ill-gotten gains." App. 81.

First, the district court held that taxpayer testimony of inaccurate returns was proof of the tax preparers' intent to defraud, and it determined this without any evidence of proper sampling or statistical extrapolations that correlated to the amounts to be disgorged. The district court acknowledged that Stinson has repeatedly taken the position that the Government cannot prevail because it has not presented a random sample, but rejected Stinson's argument and the case law cited by Stinson requiring random samples and expert opinion testimony to make statistical extrapolations. The court below ultimately concluded that a sample 40 inaccurate returns, none of which were found to have been prepared negligently, recklessly, or fraudulently by any tax preparer, may be used to determine the extrapolated harm caused by tax preparer wrongdoing. Thus, the district court decided under § 7402 the extrapolations and calculations need not be introduced into evidence to be subjected to minimum due process safeguards for the Government to obtain a disgorgement order. The district court was persuaded to use an amount based on extrapolations and other statistical analysis presented in a post-trial brief.

Second, the district court held that Stinson may possibly be penalized by the IRS in the future and presently enjoined by the courts solely because he was the owner of the business in which tax preparers incorrectly prepared some tax returns.

In entering a disgorgement order totaling $949,952.47, the district court accepted categories 1 and 2 in their entirety.

The district court found that the taxpayers' testimony of inaccurate returns was probative evidence of tax preparer intent to defraud.

V. The Eleventh Circuit's Opinion

In September 2016, the Eleventh Circuit affirmed the preliminary injunction granted by the district court. *United States v. Stinson*, 661 F. App'x 945, 946 (11th Cir. 2016). On May 1, 2018, the Eleventh Circuit affirmed the district court's March 6, 2017 memorandum opinion and March 7, 2017, judgment issuing a permanent injunction and a money judgment for disgorgement of $949,952.47. App. 1.

REASONS FOR GRANTING THIS PETITION

Stinson contends the judicial process resulting in a permanent injunction and an order requiring disgorgement in the amount of $949,952.47, wrongfully deprived him of his rights by not providing the due process of law afforded by the Fifth Amendment.

The courts below held that the Government was not required to disclose during discovery, or introduce into evidence during trial, either 1) an identification of the fees charged for tax returns the Government contended were ill-gotten and that were to be disgorged, or 2) any competent sampling and statistical extrapolation, presumably by a qualified expert, in a calculation of ill-gotten gains to be disgorged. Instead, the courts relied upon the Government's counsel's post-trial briefing and

the Criminal Sentencing Guidelines to make statistical extrapolations and calculate a disgorgement amount.

While courts have "wide latitude," due process requires a minimum standard of evidence for there to exist a "reasonable approximation" based on competent, probative, statistical extrapolation for a judgment. Speculative opinions of the Government's counsel post-trial without an opportunity to rebut them does not suffice. This is an unsettled area of the law and the issues are significant because the Government is with increasing frequency seeking disgorgement without competent evidence. The "wide latitude" standard invites abuse through the lack of foundational evidence as demonstrated here. Significant Fifth Amendment principals are at stake and are violated when there is not a minimum due process standard to be applied. This standard is necessary in determining even a "reasonable approximation" of an amount to be ordered disgorged.

Under Rule 10(a) of the Rules of the United States Supreme Court, this Court may grant certiorari when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." There appears to be a split in the circuits as to the Government's burden of proof when calculating the amount to be disgorged, and

whether a court may order disgorgement of fees that were not illegally obtained, which provides a basis for this Court's review under Rule 10(a). Moreover, this case represents a situation where the lower courts departed from the accepted rule of law, requiring an exercise of this Court's supervisory power.

I. Stinson was deprived of his due process rights under the Fifth Amendment.

A. A disgorgement judgment under § 7402 must satisfy due process under the Fifth Amendment.

The Fifth Amendment provides that the Government will not deprive a citizen of life, liberty, or property, without due process of law. U.S. CONST. AMEND. 5. This Court has observed that "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Brock v. Roadway Express Inc.,* 481 U.S. 252, 261 (1987). This Court has acknowledged the severity of depriving a person of the means of livelihood. *Id.* at 263. Procedural protections help guarantee that the Government will not make a decision directly affecting an individual arbitrarily, but will do so through the reasoned application of the rule of law.

As Justice Gorsuch observed: "The refusal to supply readily available evidentiary support for a conclusion strongly suggests that the conclusion is, well, unsupported." *Biestek v. Berryhill,* 139 S. Ct. 1148, 1160 (2019) citing *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226, 59 S. Ct. 467, 83 L.Ed. 610

(1939) ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse").

In this case, the Government did not provide "direct proof," of the amount of wrongful gain from the wrongful conduct, but used an extrapolation to argue the amounts to be forfeited. The Government made its own extrapolations and statistical analysis post-trial without any expert opinion evidence. This approach to determining the amount of a judgment denies Stinson an opportunity to confront such calculations by way of cross-examination and rebuttal evidence. It is axiomatic that under the Fifth Amendment, the Government may not deprive a citizen of his rights based on post-trial speculation and conjecture. *See Daniels v. Twin Oaks Nursing Home*, 692 F.2d 1321, 1324 (11th Cir. 1982).

As this Court stated in *Arnett v. Kennedy,* 416 U.S. 134, 214–15, 94 S. Ct. 1633, 1674, 40 L. Ed. 2d 15 (1974):

> In our system of justice, the right of confrontation provides the crucible for testing the truth of accusations such as those leveled by appellee's superior and strenuously denied by appellee. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S., at 269, 90 S.Ct., at 1021 (citations omitted).

"A person should not be deprived of his livelihood 'in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination.' " *Id.,* citing *Green*, 360 U.S., at 508; *see Jenkins v. McKeithen,* 395 U.S. 411, 423-429 (1969); *Willner v. Committee on Character*, 373 U.S. 96, 103 (1963). Over $800,000 of the $949,952.47 Stinson is ordered to disgorge is based on fees charged for returns that were never examined and for which the Government presented no testimony. Stinson did not prepare, sign, or assist in the preparation of the vast majority.

B. The amount the Government claims should be disgorged must be introduced into evidence to provide the required due process.

The Government argued under § 7402 that it was not constrained by evidentiary case law and could use a "reasonable approximation" of "gross receipts" to calculate a disgorgement amount. The Government argued it may use a post-trial allegedly "reasonable approximation" because it did not have sufficient resources to audit 9,000 customers to distinguish mere errors or fraud and to determine the amount of the ill-gotten gains.

Even if a "reasonable approximation" is sufficient, competent statistical evidence and expert testimony is required to make statistical extrapolations. *See Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302, 1322 (N.D. Ga. 2008) (noting a representative sample of the universe must be selected and the data must be analyzed in accordance with accepted statistical principles, and objectivity of the entire process must be

assured); and *U.S. ex rel. Ruckh v. Genoa Healthcare, LLC,* 2015 WL 1926417 (M.D. Fla 2015) (based on the expert's testimony on statistics and statistical sampling methodologies, there are six "general steps of sampling.")

The Government needed to present and subject to cross examination an expert or a scientific basis admitted into evidence to support a "reasonable approximation" of the amount of disgorgement. *See United States v. Aegis Therapies, Inc.,* 2015 WL 1541491 (S. D. Ga. 2015) ("….they must now conjure an expert statistician if their extrapolation is to survive summary judgment.") *United States v. Rosin,* 263 Fed. Appx. 16 (11th Cir. 2008). (requiring expert testimony regarding proper statistical sampling.); *In re Horizon Organic Milk Plus DHA Omega 3 Marketing and Sales Practice Litigation,* 2014 WL 1669930 (S.D. Fla. 2014) (excluding an expert's testimony for failure to explain how studies involving discrete populations of individuals could be extrapolated to those outside of these discrete populations).

In *Random Sampling Issues in a Federal Court Case, a case study*, the statistical expert authors emphasized the importance of determining and applying proper random sampling methodologies: "The main point of this paper is to highlight that the IRS in their statistical analysis improperly used their sample to make inferences about the population as a whole." Kennedy, Kristin and Bishop, James, *Random Sampling Issues in a Federal Court Case, a case study*,(2014) *Mathematics Department Journal Articles.*

Paper 37. https://digitalcommons.bryant.edu/math_jou/37

It is inappropriate to require courts to guess what should be a "reasonable approximation." Instead, in all cases, competent evidence must support any judgment. This includes cases where the Government is allowed to make a claim for a reasonable approximation of ill-gotten gain. Instead of introducing the required competent evidence to carry its burden of proof concerning an amount to be ordered disgorged, the Government, in violation of the Fifth Amendment, successfully relied upon counsel's speculative "theories" in its post-trial brief.

C. The courts below did not provide the minimum safeguards of due process by failing to require proof of the disgorgement amount subject to burdens of proof, cross-examination, and rebuttal evidence.

The courts below relied upon *SEC v. Lauer,* 2008 WL 4372896 (S.D. Fla. 2008), in reliance on the Government's post-trial statistical computations without any expert opinion testimony. However, in *Lauer,* the SEC retained an expert to opine as to a reasonable calculation of ill-gotten gain. In response, the defendant presented its own expert to render rebuttal opinions. The *Lauer* court expressly relied upon the SEC expert's opinions in calculating a disgorgement amount.

Initially the Government argued that because of Stinson's alleged fraud it may use "gross receipts" as a

measure of ill-gotten gains. Yet, *SEC v. Calvo,* 378 F.3d 1211 (11th Cir. 2004) holds that gross receipts may only be used when the defendant's records obscured matters. The Government never introduced evidence or argued that Stinson's records "obscured matters." It is undisputed that Stinson's records were in good order.

The Government agreed with Judge Carnes and then admitted it had persuaded the district court to ignore *Calvo* and allow the use of gross receipts simply because it was "*too much work*" for the Government to use a more precise method. It is a violation of Stinson's due process rights for the courts below to hold that the Government's burden of proof is reduced or becomes non-existent because it is "too much work" for the Government to gather and present the necessary admissible evidence to carry its burden of proof. The Government's position is that if it does not choose to spend its resources to examine the tax returns or to obtain a competent sample to make competent extrapolations through a competent expert witness, the Government is relieved of its burden of proof. During the Government's case-in-chief, the district court warned the Government that the Government could *not* rely only on gross receipts, and explained the Government was required to prove something other than just the total amount of fees. Ultimately, however, the district court ruled that neither *Calvo* nor any other evidentiary constraint or requirement applies to the claims for disgorgement under § 7402.

D. It violates due process to calculate an amount to be disgorged post-trial based upon Criminal Sentencing Guidelines as a substitute for evidence in this civil case.

The Government urged the courts below to rely upon the Criminal Sentencing Guidelines and criminal case law in a civil case to justify the denial of the fundamental safeguards of due process: burdens of proof, the rule of law, cross-examination, and rebuttal evidence. The Eleventh Circuit found:

> We reject Stinson's argument that the Government was only entitled to fees from returns specifically identified as falsely prepared returns. Although this was a civil matter, in the analogous criminal context, the U.S. Sentencing Guidelines "do not require that the sentencing court calculate the amount of loss with certainty or precision . . . [but only] a reasonable estimate based on the available facts." *United States v. Bryant*, 128 F.3d 74, 75-76 (2d Cir. 1997). As we have held, a trial court may extrapolate from available evidence, and such extrapolation may occur without interviewing every customer and preparer for every allegedly false or fraudulent return. *See United States v. Barber*, 591 F. App'x. 809, 823-24 (11th Cir. 2014).

The Government's position is that the courts may rely post-trial on the Criminal Sentencing Guidelines and criminal cases to justify its post-trial extrapolations and calculations. This case provides the Court an ideal opportunity to address the issue of the required burden

of proof. The basis for the *Stinson* opinion conflicts both with other Eleventh Circuit law and that of the Ninth Circuit Court of Appeals. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005) (the burden of proof is on the party seeking relief); *U.S. Sec. & Exch. Comm'n v. Hall*, 759 F. App'x 877, 883 (11th Cir. 2019) ("[t]he SEC is entitled to disgorgement upon producing a reasonable approximation of a defendant's ill-gotten gains. . ." (internal quotation omitted)); *Fed. Trade Comm'n v. AMG Capital Mgmt.*, LLC, 910 F.3d 417, 427 (9th Cir. 2018) (the party seeking disgorgement "bears the burden of proving that the amount it seeks in restitution reasonably approximates the defendant's unjust gain.") Stinson is not aware of any authority in a civil action where the Government may deprive a citizen of his or her property rights based upon the use of the Criminal Sentencing Guidelines.

E. The amount of disgorgement should not be based on mere speculation.

The Government's post-trial extrapolations resulted in a disgorgement judgment of $949,952.47. About 97% of this amount was calculated by including tax preparation fees for tax returns Stinson did *not* prepare, many of which the Government admits may have been prepared negligently versus fraudulently. Here, the Government has successfully obtained a substantial disgorgement amount based upon negligently or inaccurately prepared returns. The Government admitted that it does not know which returns were allegedly fraudulent, and successfully argued it does not matter. The IRS did not penalize any

tax preparers under any of the subject statutes. According to the Government, mere inaccurate returns may be used in a calculation of disgorgement. *See United States v. Chipungu,* 2019 WL 885667 (M.D. Fla. January 25, 2019) ("given that every one of the original sixty returns reviewed by the Government required adjustment, the Government produced a reasonable approximation of Defendant's ill-gotten gains [in the amount of] $487,879.24"). "Adjustment" only means "inaccurate."

Disgorgement based on fees received for merely negligently prepared returns is wrong and unconstitutional. It is also in conflict with other decisions of the Eleventh Circuit and other Circuits. *See U.S. Sec. & Exch. Comm'n v. Hall*, 759 F. App'x 877, 883 (11th Cir. 2019) ("[t]he SEC is entitled to disgorgement upon producing a reasonable approximation of a defendant's ill-gotten gains. . .") (internal quotation omitted)); *Fed. Trade Comm'n v. AMG Capital Mgmt*., LLC, 910 F.3d 417, 427 (9th Cir. 2018) (the party seeking disgorgement "bears the burden of proving that the amount it seeks in restitution reasonably approximates the defendant's unjust gain."); *see also Fed. Trade Comm'n v. Vylah Tec, LLC,* No. 2:17CV228-PAM-MRM, 2019 WL 722085 (M.D. Fla. 2019) (defendants are liable to the extent of their ill-gotten gains.); *United States v. St. Jean*, 2018 WL 4178342 (N.D. Ga. 2018) (where an owner was ordered to disgorge over $300,000 in ill-gotten gains).

At the Government's urging, the courts below disregarded precedent that required the fee to have been *illegally* obtained to be the subject of

disgorgement. *See e.g., SEC v. Hooper*, 2019 WL 1952810 (9th Cir. 2019) (disgorgement extends to "gains flowing from [ ] illegal activities"); *SEC v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014) ("disgorgement serves to remedy securities law violations by depriving violators of the fruits of their illegal conduct"). Ordering Stinson to disgorge monies based on fees received for the lawful preparation of tax returns conflicts with other Circuits and deprives Stinson of the due process protection provided under the Fifth Amendment.

F. Due process does not allow courts to rely upon double-hearsay of taxpayers and hearsay expert opinion of Government employees.

The Government had full access to and control over its employees – the auditors who all lived in the vicinity of the district court. The Government did not call a single auditor to testify at trial or by way of deposition testimony. Instead, the Government successfully urged the district court to rely upon the double-hearsay of taxpayers and the expert opinion hearsay of IRS auditors, all of which was prepared primarily, if not solely, to be used as evidence against Stinson.

Paraphrasing Justice Gorsuch, the refusal to provide the readily available "direct proof" calls into question the trustworthiness of the indirect proof being offered. In fact, the Government objected to Stinson taking the depositions of these auditors based on relevance and hearsay.

Stinson's due process rights required that he be given the opportunity to cross-examine the Government's witnesses. *See California v. Green*, 39 U.S. 149,158 (1970). When the Government knows it may have to justify its decisions with sound reasons, its conduct is likely to be more cautious, careful, and correct. Opportunity to be heard includes the opportunity to cross-examine witnesses. *Goldberg v. Kelly,* 397 U.S. 254, 262 (1970). Where factual disputes exist pertaining to deprivation of property rights, due process requires more than a simple opportunity to argue or deny. *Id.* at 269. Due process also requires that defendant be given an opportunity to introduce rebuttal evidence. *Id.* at 266. In violation of Stinson's fundamental due process rights, the Government's position, as approved by the courts below, is that the Rules of Evidence concerning hearsay do not apply.

G. The Government must first carry its burden of proof with competent evidence for a disgorgement amount and it must introduce into evidence the identity of the tax returns and the preparation fees received from those tax returns it contends were illegally obtained.

The Government successfully argued that it had no burden of proof to identify the tax returns, and preparation fees charged, to calculate an amount to be ordered disgorged under § 7402. The decisions and orders below conflict with other Circuits. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005) (the burden of proof is on the

party seeking relief); *U.S. Sec. & Exch. Comm'n v. Hall*, 759 F. App'x 877, 883 (11th Cir. 2019) ("[t]he SEC is entitled to disgorgement upon producing a reasonable approximation of a defendant's ill-gotten gains. . ." (internal quotation omitted)); *Fed. Trade Comm'n v. AMG Capital Mgmt*., LLC, 910 F.3d 417, 427 (9th Cir. 2018) (the party seeking disgorgement "bears the burden of proving that the amount it seeks in restitution reasonably approximates the defendant's unjust gain."); *see also United States v. Salmon,* 2018 WL 6495070 (E.D.N.C. 2018) (the defendant had an opportunity to submit rebuttal evidence in response to the Government's claim for a disgorgement amount).

The Government also successfully argued that a return need not be fraudulent to support an injunction or the equitable relief of disgorgement in this case under § 7402. The Government's position is that preparation fees charged for tax returns prepared negligently (most not even by Stinson) may be the subject of a disgorgement calculation as ill-gotten gain against Stinson. This Governmental overreach alone is a reason to grant certiorari.

The Government's position was that it was impossible for the IRS to review thousands of tax returns to determine which ones are merely inaccurate versus which ones contain fraudulent claims. More than 97% of the returns used to calculate the $949,952.47 disgorgement amount were never reviewed or the subject of any testimony.

III. A tax preparer must be the primary tax preparer for that tax return to be penalized under §§ 6694 or 6695 and therefore enjoined under § 7407.

The IRS never penalized any taxpayer. Yet the district court granted a permanent injunction against Stinson under § 7407. But § 7407 requires he be penalized under either §§ 6694 or 6695, which also requires that Stinson must have been the primary tax preparer; that is, the preparer who actually prepared and signed the tax return. *Lowery v. U.S.*, 2018 WL 4266526 (W.D.N.C. Aug. 15, 2018); *see also* Treasury Regulation 1.6694(b) (under § 6694 "there is only one member of the firm primarily responsible" for that return); and Treasury Regulation 1.6695-2 (under § 6695 only the signing preparer may be penalized). Notably, Stinson neither prepared, assisted in the preparation, nor signed any tax return after 2013. Based on the wrongful urging of the Government, the courts below found the alleged wrongful conduct of other tax preparers attributable to Stinson solely because he owned the business, and, with regard to 1,861 returns Stinson did not prepare, ordered Stinson disgorge the amount of $800,101.00.

IV. Inaccurate tax returns unsubstantiated by the taxpayer are not evidence of a tax preparer's intent to defraud.

This Court has long held that fraud is never presumed, but must be proven. *See Jones v. Simpson*, 6 S. Ct. 538 (1886). Fraud cannot be lightly inferred, but must be established by clear and convincing proof. *See Rogers v. Commm'r of Internal Revenue*, 111 F.2d

987, 989 (6th Cir. 1940). Fraud requires actual knowledge of the fraud. See, *Mattingly v. United States*, 924 F.2d 785, 791 (8th Cir. 1991). The Government successfully argued under § 7408 for a permanent injunction depriving Stinson of his constitutional rights. It contended that the testimony of a taxpayer that her tax return is not accurate and that she did not provide the inaccurate information to her tax preparer is proof of the tax preparer's intent to falsify the tax return. This testimony, by definition, is not proof of the tax preparer's intent to defraud.

In *United States v. Carlson,* 754 F.3d 1223, 1230 (11th Cir. 2014), the court reasoned that an inaccurate tax return standing alone is insufficient circumstantial evidence to prove fraud because mere inaccuracy does not suggest the tax preparer knew the returns understated the correct tax. App. 66. As the *Carlson* court also explained: "The problem is that this circumstantial evidence says nothing about what Carlson *actually knew*. Any conclusion that Carlson *actually knew* the return understated tax is not made based on this evidence, but rather is made from *pure speculation." Id.*

Under §§ 7408 and 6701, for the Government to obtain a permanent injunction against a tax preparer, there cannot be speculation as to the fraudulent intent of the tax preparer. This is a violation of Stinson's due process right to a fair and meaningful trial. All the tax preparers testified they never intentionally falsified a tax return and Stinson never encouraged them to do so. Not a single taxpayer testified that they conspired with any tax preparer to falsify a tax return. The

Government, specifically the IRS, admitted it could not identify any tax return fraudulently prepared.

V. Stinson's due process rights were violated when the district court refused to consider the record facts stated in support of Stinson's claim for sanctions.

The district court did not consider Stinson's cited record facts in support of his claims that the Government's bad faith litigation conduct directly caused the wrongful deprivation of Stinson's rights without due process of law.

At a minimum, due process requires courts to read ("hear") the factual basis provided in support of a defendant's claims and address them, especially when what is claimed is that the courts are being deceived about material facts and applicable law by, no doubt, what the court presumes to be a trustworthy party.

For instance, Stinson cited, among many others, the following undisputed record facts:

1. The Government represented after discovery had closed that it had identified "thousands" of fraudulently prepared tax returns. However, at that time the Government knew that it had not, and that their own IRS agent witnesses would testify at trial that the Government had not. The district court relied upon these representations and granted the Government a preliminary injunction solely based on fraud.

2. The Government represented that IRS Agent Shields testified the IRS Forms 4549, which calculated each taxpayer's deficiency, were regular business

records kept by the IRS. Notably, IRS Agent Shields actually testified that she did not calculate IRS "deficiencies" and Form 4549 was not used in the normal course of IRS business but only used as evidence against Stinson, at the Government's counsel's request, months after discovery had closed. Yet the Government represented that the business records the Government sought to introduce in this case were not created for the sole purpose of litigation. The district court was deceived by the Government's misrepresentations and found that because Shields used IRS Form 4549, her activities were performed in the normal and regular course of IRS business and therefore these documents were admissible under the business records exception to the hearsay rule. App. 48, fn 41. The district court relied upon this "evidence" in issuing a permanent injunction and disgorgement order.

3. When Stinson argued that the Government's audit reports should not be allowed into evidence because he was not permitted to take the auditors' depositions based on relevance and hearsay grounds, the Government denied these facts three times. Trusting the Government's representations, the district court admitted these audit reports into evidence. However, the Government had acknowledged Stinson's request to depose these auditors and contended Stinson should not be allowed to conduct their depositions because the auditors' testimony is irrelevant and full of hearsay.

The district court's refusal to consider these record facts violated Stinson's due process rights to be heard,

and contributed to, if not caused, the wrongful denial of Stinson's unalienable rights.

VI. CONCLUSION

The Petitioner requests that the Court grant the petition for writ of certiorari.

Respectfully submitted,

William F. Merlin, Jr.
Merlin Law Group, P.A.
777 S. Harbour Island Blvd.
Suite 950
Tampa, FL 33602-5747
(813) 229-1000

John J. Pappas
Counsel of Record
4815 New Broad Street
Suite 3024
Orlando, FL 32814-6649
(407) 451-9308
johnpappas@lawpro.biz

Counsel for Petitioner