No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

MICHAEL BOWMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE
TO PROCEED *IN FORMA PAUPERIS*

The petitioner, Michael Bowman, requests leave to file the attached petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 39.1 of this Court and 18 U.S.C. § 3006A(d)(7). The petitioner was represented by counsel appointed under the Criminal Justice Act in the District of Oregon and on appeal in the Ninth Circuit Court of Appeals, and therefore no affidavit is required.

Respectfully Submitted on October 29, 2022.

s/Matthew Schindler
Matthew Schindler
Attorney for Petitioner

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On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Did the Ninth Circuit impermissibly ignore the express language of the Religious Freedom Restoration Act and deny Mr. Bowman his right to a jury trial when it held that he could not testify about how he believed Religious Freedom Restoration Act affected his obligation to file a tax return?

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The petitioner, Michael Bowman, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the District Court.

1. Opinions Below

After a stipulated facts bench trial, the United States District Court for the District of Oregon found Mr. Bowman guilty of willfully failing to file a tax return under 28 U.S.C. § 7203. *See* Appendix A. Without holding oral argument, the Ninth Circuit affirmed Mr. Bowman's conviction in an unpublished memorandum opinion. *See* Appendix B. The Ninth Circuit thereafter denied Mr. Bowman's petition for panel rehearing and for rehearing *en banc*. *See* Appendix C.

2. Jurisdictional Statement

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

3. Constitutional and Statutory Provisions

In pertinent part, the Fifth Amendment to the United States Constitution provides that: "No person shall… be deprived of life, liberty, or property, without due process of law..."

In pertinent part, the Sixth Amendment to the United States Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed…"

The relevant portion of 26 USC §7203 states that: "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be

guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution."

The Religious Freedom Restoration Act, 42 USC §2000bb-1 states as follows:

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution."

4. Statement of the Case:

A. Indictment and Superseding Indictment:

On February 23, 2017, Michael Bowman was indicted with one count of felony tax evasion and for misdemeanor counts of willful failure to file a tax return. ECF 1. February 24, 2017, Mr. Bowman made his first appearance having been arrested at his home by eight armed federal agents at 6 o'clock in the morning. ECF 7; 3-ER-483. Mr. Bowman was released on his own recognizance and the Federal Public defender's office was appointed to represent him. Id.

On March 13, 2017, current counsel was appointed to represent Mr. Bowman under the CJA. ECF 12. On October 9, 2017, Mr. Bowman filed motions to dismiss citing the failure to accommodate him in violation of 42 U.S.C. § 2000bb-1, improper joinder, violations of the statute of limitations, and failure to plead a criminal offense under 28 U.S.C. § 7201. ECF 20, 21. For reasons that have never been clear, on November 20, 2017, the government then reported that it had made an error in the indictment and would dismiss and re-indict Mr. Bowman. ECF 30. The defense motions were denied as moot. ECF 34. On November 29, 2017, the government filed a superseding indictment that did not materially change the allegations against Mr. Bowman except to change one of the misdemeanor counts. Compare ECF 2 and 31.

B. Motion Hearing on Motions to Dismiss:

After evaluating the new indictment, Mr. Bowman amended and refiled the same motions to dismiss. ECF 40, 42, 43. He also filed a motion to seal the new indictment because of the prejudice he was experiencing by virtue of the felony allegations against him appearing on background checks for employment. ECF 40. Responses and replies were filed, and the matter proceeded to a hearing before the District Court on April 11, 2018. ECF 57.

At the hearing, the District Court denied all of Mr. Bowman's motions except for the motion to dismiss the felony tax evasion count (Count 1) of the superseding indictment. ECF 57; 1-ER-105. The District Court dismissed the felony evasion count finding that the act of cashing an income check at one's own bank and in one's own bank account without more is not tax evasion under 28 U.S.C. § 7201. ECF 57; 1-ER-105, 129-131. The District Court denied Mr. Bowman's motion to dismiss because of the failure to comply with the Religious Freedom Restoration Act 42 U.S.C § 2000bb-1. ECF 57.

C. Pre-trial Proceedings:

Trial was set for August 12, 2019. ECF 64. The government filed various documents including a trial brief where it argued that "the defendant should be foreclosed from claiming that the tax laws, as applied to him, violate his constitutional or statutory rights in any form" citing *Cheek v. United States*, 498 U.S. 192 (1991). ECF 69 at 10. It also filed a motion in limine acknowledging Mr. Bowman's right to explain what he thought the law was in support of his good faith defense. ECF 71 at 4.

At the pretrial conference on August 5, 2019, the District Court focused on Mr. Bowman's willfulness defense under *Cheek*, his belief that he is entitled to an accommodation from the IRS under the Religious Freedom Restoration Act 42 U.S.C § 2000bb-1, and his reliance on the Constitution. 1-ER-108. Mr. Bowman challenged the idea that *Cheek* foreclosed his defense since he acknowledged that he is required to file returns, to pay taxes, and he accepted that taxation generally is constitutional. 1-ER-108-109. The defense explained the holistic process by which Mr. Bowman had come to believe that he was entitled to accommodation from the IRS under the Religious Freedom Restoration Act. 1-ER-111.

Having already conceded in its motion in limine that Mr. Bowman had some right to explain his views on the law including the constitution, statutes, and the like, the government changed its mind at the hearing. ECF 71 at 4. It argued during the hearing that *Cheek* held that Mr. Bowman was not allowed to explain his view of the law unless it was sourced entirely from the tax code. 1-ER-111-116. The government then argued that Mr. Bowman's understanding of the plain language of the Religious Freedom Restoration Act cannot be presented to the jury because it is nothing more than a disagreement with the law. 1-ER-116. According to the government, under *Cheek*, the only laws Mr. Bowman can rely on to show his good faith must be found in Title 26. 1-ER-116-117. According to the government, Mr. Bowman cannot have a good faith defense based on the Religious Freedom Restoration Act's relationship with the tax code. *Id*.

Mr. Bowman countered that the government and District Court were misreading *Cheek* and misunderstanding the nature of his defense. 1-ER-117-121. Mr. Bowman had no intention of arguing that the tax code violated the First Amendment and therefore he did not have to file. 1-ER-125. The District Court noted that the government did not specifically raise this issue in its pretrial filings. 1-ER-122.

Mr. Bowman requested the opportunity to brief the issues directly, which the District Court allowed. 1-ER-126. A ruling on the issue was deferred and the pretrial conference was continued until August 9, 2019. 1-ER-129. Mr. Bowman reminded the Court that even absent any reference to any law, Mr. Bowman still had a defense based on the IRS inaction towards him over so many years. 1-ER-126.

In response to the request from the Court, Mr. Bowman briefed the issues the Court identified during the August 5, 2019 pretrial conference. ECF 86. The government filed a reply

that reversed the position it had just taken at the pretrial conference. ECF 87 at 5-6. Now according to the government, Mr. Bowman was entitled to "offer evidence that he subjectively believed, based on his reading of the First Amendment, or other constitutional or statutory provisions including RFRA, that certain tax laws did not apply to him or that he believed that the law as written allowed him a religious accommodation to § 7203." ECF 87 at 5. It further acknowledged that he could discuss the IRS inaction as it related to his understanding of the law. Id. Without irony, the government assured the Court that it did not wish to deny Mr. Bowman a good faith defense even though it tried to do exactly that at the prior pretrial conference. Id at 7; 1-ER-116-117.

At the second pretrial conference on August 9, 2019, the government's turnabout from the first pretrial conference was fully revealed. 1-ER-71-72. It agreed that Mr. Bowman could explain his subjective beliefs about an accommodation under the Religious Freedom Restoration Act. *Id*. The hearing concluded with Mr. Bowman objecting to the government's special proposed jury instruction 39 about good faith that was not required by the Ninth Circuit model criminal jury instructions. 1-ER-85.

D. The Jury Trial:

1. The Government's Case in Chief:

The government called a series of vendors who worked with Mr. Bowman to prove that he had been paid and therefore had income. See e.g., 3-ER-487, 497, 502, 512, 875. Mr. Bowman elicited from each that they would have provided the IRS notice of money paid to Mr. Bowman via a 1099 form. See e.g., 3-ER-492, 500-501, 509, 830. Through the government's witnesses, Mr. Bowman elicited the fact that even though the IRS was aware of his income for more than a decade

the only IRS collection action ever taken against him over 17 years was the filing of one lien that the IRS never collected on. 3-ER-581, 589, 600, 603, 606, 621, 660. Mr. Bowman further showed that for years IRS criminal had forced IRS civil to stop action on the file, and then the investigations did not lead to charges. 3-ER-600, 653.

At the close of the government's case, the defense argued for a judgment of acquittal based on the IRS's dilatory treatment of Mr. Bowman, the filing of substitute returns, and the impact that had on his mens rea. 2-ER-302. It is denied. *Id* at 303.

2. The defense case:

The defense case began with the government's objections to Mr. Bowman's proposed exhibit of the transcript of his 2004 criminal tax grand jury testimony and emails between Mr. Bowman and others. 2-ER-306. Mr. Bowman explained that the evidence was for the purpose of refuting the government's evidence suggesting that his religious accommodation idea was recent and therefore not held in good faith. 2-ER-307. The District Court admitted the emails but not the grand jury testimony. 2-ER-309.

The defense called the lead IRS CID agent on the case to establish that after 2004, IRS CID had no information that Mr. Bowman was involved with any promoters of illegal tax schemes. 2-ER-310.

Then the defense called Mr. Bowman to testify. 2-ER-312. Mr. Bowman explained his religious upbringing and personal faith. 2-ER-313-320. He testified to his experiences as a teen that led to his strong religious feelings about abortion. 2-ER-316-317, 328. He testified to his history of tax filings and the conflict that created for him. 2-ER-329-332, 335-338. Mr. Bowman testified that the reason he approached the tax scheme promoter was specifically because of

abortion and his religious concerns. 2-ER-339.

Mr. Bowman tried to refer to the 2004 grand jury testimony ruled inadmissible by the District Court where he explained that he was seeking a religious accommodation. 2-ER-337. The government objected and the Court sustained the objection. Id at 338. Later, Mr. Bowman said that the experience testifying in front of the grand jury and his reading of RFRA, combined with the IRS collection inaction to give him with the impression that he had not committed any crime. 2-ER -368, 391.

Mr. Bowman testified to Oregon's aggressive collection efforts and its levies of his bank account and how different it was from the IRS. 2-ER-338, 360, 391, 396, 397, 403. Mr. Bowman testified that since Oregon took money from him involuntarily and he does nothing dishonest, Mr. Bowman's conscience remains clean, and his religious rights protected. 2-ER-338. Meanwhile, going all the way back to 2004, Mr. Bowman could not recall ever having spoken to a civil IRS agent, only IRS criminal agents. 2-ER-360-361. He explained all his fruitless efforts to speak to someone at the IRS or get a response to his correspondence about a religious accommodation. 2-ER-361. At the same time, the IRS never did anything to collect from him. 2-ER-367.

Mr. Bowman testified to the frustration that he experienced being unable to find anyone who would discuss an accommodation with him. 2-ER-363-364, 397, 399-400, 414. This was why he approached Saladino, the tax scheme promoter who claimed to be able to use legal means to achieve Mr. Bowman's goal of preserving his conscience and religious rights. 2-ER-436-439.

When his tax returns were rejected by the IRS, Mr. Bowman explained that he felt defrauded by the tax promoter who claimed his program that cost thousands of dollars was a lawful way for Mr. Bowman to preserve his conscience in his dealings with the IRS. 2-ER-437-439. Mr.

Bowman testified to a series of emails between Mr. Bowman and the tax scheme promoter that supported both his religious motive and his emerging belief that this was a scam. 2-ER-266-272. The District Court refused to admit the emails as a defense exhibit. 2-ER-269.

When told by the tax scheme promoter that Mr. Bowman might need to open bank accounts in someone else's name, Mr. Bowman rejected that idea. 2-ER-383. Mr. Bowman went on to affirm his abiding belief that he would never hide anything from the federal or state government because that would be inconsistent with his values. 2-ER-391-392. He refused to do anything dishonest in support of his view of the law and his right to an accommodation under the Religious Freedom Restoration Act. 2-ER-392.

In support of this principle, Mr. Bowman never changed company names. 2-ER-384-385. He never requested a customer pay him in cash or by any other mechanism except a check made out to his company. 2-ER-394-395. He never established any offshore or overseas bank or trust account. *Id*. He banked at the same bank, Bank of America, for most of his life until the Oregon levies caused the bank to close his account. 2-ER-384. Mr. Bowman maintained the same phone number for 28 years. 2-ER-389. He never attempted to do anything to avoid the issuance of a 1099 or W-2. 2-ER-401. Mr. Bowman testified to his understanding of 1099's and that he knew that the IRS knew what he was making, he knew that it was assessing him, and he knew it was filing substitute returns. 2-ER-401-402. It would send him letters but never do anything. 2-ER-367. Despite his transparency, the IRS never did anything to collect. 2-ER-397.

Then Mr. Bowman reviewed and explained the sources of law that had impacted his belief that the law required him an accommodation for his religious beliefs. 2-ER-335-343. Supreme Court cases about freedom of religion impacted his understanding of the law. Id at 341-342. He

explained his understanding of the Religious Freedom Restoration act and its relationship with *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1981). 2-ER-341-342. Mr. Bowman again attempted to refer to his grand jury testimony from 2004 where he discussed his religious objections and belief that under the Religious Freedom Restoration Act some process of accommodation must take place. 2-ER-344. The government objects and the District Court sustains the objection. 2-ER-345.

Mr. Bowman explained exactly how the filing requirement substantially burdened his free exercise of his religion by forcing him to pay to murder unborn children, something the government cannot possibly have a substantial interest in. 2-ER-414. Mr. Bowman also provided a nuanced explanation of why he was different from other tax protestors or conscientious objectors to taxation. 2-ER-394, 414. "Social Security, the post office, the military. These are constitutionally sound activities that we all need. Killing babies is not a compelling government interest. If it is, I'd like the government to go on the record and tell all of us right here and right now." 2-ER-414.

Mr. Bowman explained his understanding that the tax code was a rule of general applicability, he knew what that was and why that is important under the Religious Freedom Restoration Act. 2-ER-414-415. He explained why he thought he was entitled to raise that issue and how it did not inevitably lead to a situation where no one would pay taxes. 2-ER-414-415. He explained that it would be simple to accommodate him, and 150 million other Christians opposed to abortion if the government stopped funding Planned Parenthood or gave taxpayers who object a way out. 2-ER-417. Further, based on the plain language of the Religious Freedom Restoration Act, Mr. Bowman believed that it could be raised as a defense in this proceeding. 2-ER-417-418.

The fourth and final day of trial began with jury instructions and ended with the closing arguments. 2-ER-182-250. The District Court decided to author and provide its own willfulness/good faith instruction that did not match the model instruction which both parties had requested. ECF 100 at 25-26; 2-ER-193-194.

3. Jury deliberations:

The jury deliberations began the afternoon of Day 4 of the trial and the questions from the jury started soon after. 2-ER-250. Deliberations continued throughout August 16, 2019, Day 5 of the trial. 2-ER-170. More questions came from the jury. 2-ER-170. The first at 10:00 am was about the District Court's willfulness and good faith instruction. 2-ER-170. Mr. Bowman objected to the Court attempting to clarify a confusing, contradictory instruction the Court made up that Mr. Bowman never wanted in the first place. Id. Once the Court decided to answer anyway, Mr. Bowman did not object to the answers the Court proposed. 2-E-173. The government felt differently, objecting to the language the Court had offered. 2-ER-172-173. Finally, after more than 11 hours of deliberation, the entire panel of 12 jurors signed a note to the Court asserting that they could not reach a decision. 2-ER-175-176. At that point, the Court heard argument from both sides and declared a mistrial. 2-ER-176-177.

4. Post-Mistrial Status Conference:

On August 22, 2019 the Court convened a status conference that the defense understood was simply to set a new trial date. ECF 106. Instead, the District Court began with a discussion of Mr. Bowman's mens rea defense and its new understanding of the meaning of Cheek and good faith. 1-ER-57-62. That epiphany, apparently induced by a 90-year-old case footnoted in Cheek, compelled it to rule that because Mr. Bowman was relying on federal law outside of Title 26 as the

basis for his defense, and therefore under Cheek, he had no defense. 1-ER-62. The court deferred ruling until the pretrial conference it felt additional briefing would be appropriate. ECF 110; 1-ER-64-65. The new trial was set to begin December 10, 2019. 1-ER-64.

5. Second Trial Pretrial Conference:

Prior to the second trial's pretrial conference, the parties filed additional briefing regarding the admissibility of Mr. Bowman's defense and instructions on willfulness. ECF 107, 109, 125, 132. On November 21, 2019, the District Court conducted a pretrial conference for the second trial. ECF 139. During that conference, the District Court ruled as indicated during the status hearing on August 22, 2019, that Mr. Bowman's entire defense was irrelevant and inadmissible under *Cheek*. 1-ER-39. Furthermore, the defense could not put on evidence that about the IRS sloth and inaction since that was tied to his belief about an accommodation under RFRA. 1-ER-46-47. The defense made clear that it was objecting to the rulings by the Court as denying Mr. Bowman's right to present a defense and as an incorrect interpretation of willful in this context. 1-ER-50-52.

Considering the District Court's ruling that he had no defense, Mr. Bowman agreed to a stipulated facts bench trial encompassing the first trial as part of the record. ECF 142. This freed the government from the expenses of flying witnesses in from all over the country and all the other resources associated with a jury trial.

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6. Stipulated Facts Bench Trial:

Prior to the December 9, 2019 bench trial, Mr. Bowman filed an offer of proof supplementing his testimony at trial and further requesting that all the first trial and litigation be made part of the record. ECF 144, 145; 4-ER-836-841. The Court accepted the offer of proof and the request to make the first trial and related litigation part of the record for appeal. 1-ER-11-12. The Court determined that this time it would apply the Ninth Circuit Model Jury Instruction 9.38 to guide its judgment except for the language about a good faith defense, which the Court had excluded. 1-ER-12. The defense argued that the IRS inaction still provided a defense to willfulness even accepting that all Mr. Bowman's legal arguments were deemed irrelevant. 1-ER-15-18. The District Court found Mr. Bowman guilty of all four counts of willful failure to file tax returns. 1-ER-2, 28.

5. Legal Argument

A. The Ninth Circuit ignored the plain language of 42 U.S.C.A. § 2000bb-1(c) which required the District Court to present the lack of accommodation as a defense.

42 U.S.C § 2000bb-1(c) plainly states that it is a defense in any judicial proceeding that the government has not complied with the Act:

> "(c) Judicial relief
>
> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution."
>
> 42 U.S.C § 2000bb-1(c)

Mr. Bowman was entitled under the plain language of this statute to raise this as a defense to willfulness in his criminal tax case because it is a "judicial proceeding" and IRS and Department

of Justice failed to engage in the process required by RFRA. Mr. Bowman's testimony at trial established that his religious rights were being burdened by the mandate to pay for abortion, and that no one from the government would ever engage him in discussions about an accommodation. 2-ER-329-332, 335-338. Under the plain language of RFRA he had a right to present this as a defense in this judicial proceeding and the District Court erred in excluding it. 42 U.S.C § 2000bb-1(c).

B. The Ninth Circuit misinterpreted *Cheek v. United States* when it precluded Mr. Bowman from testifying about his understanding of the Religious Freedom Restoration Act and how it affected his obligation to file a tax return.

The position the government first advanced at the pretrial conference, at the suggestion of the District Court, was that a defendant in a tax case cannot refer to something besides the tax code to support a defense based on willfulness. ECF 71. This unduly restrictive view of "willfulness" in a criminal tax case has never been endorsed by any court and it is fundamentally inconsistent with Mr. Bowman's rights to due process and to present a defense. 1-ER-60. Nowhere in *Cheek* does it say that a defendant in a criminal tax case cannot refer to laws outside the tax code to support a defense based on willfulness. The issue in *Cheek* was whether Cheek should have been acquitted as a matter of law because of his belief that the tax code was unconstitutional as applied to him:

> Cheek asserted in the trial court that he should be acquitted because he believed in good faith that the income tax law is unconstitutional as applied to him and thus could not legally impose any duty upon him of which he should have been aware….We thus hold that in a case like this, a defendant's views about the validity of the tax statutes are irrelevant to the issue of willfulness and need not be heard by the jury, and, if they are, an instruction to disregard them would be proper.
>
> *Cheek v. United States*, 498 U.S. 192, 204 (1991).

The Supreme Court's holding only considered the issue of whether his belief that the tax code was unconstitutional entitled him to a judgment of acquittal or a complete defense, not what evidence is admissible. The dicta is only applicable to someone like *Cheek* who claims the tax statutes are constitutionally or otherwise invalid. Mr. Bowman has never taken the position that the tax code as applied to him is unconstitutional and therefore his case must be dismissed. Mr. Bowman never advanced that argument.

The important holding of *Cheek* was whether the defendant's views on the law had to be objectively reasonable or whether it was his subjective belief that controlled. *Cheek v. United States*, 498 U.S. 192, 202 (1991). The significance of *Cheek* is the holding that it is the defendant's subjective belief that was relevant to good faith, not a "reasonable person." That was the Supreme Court's primary holding, not the dicta relied on by the District Court suggesting that the defendant's testimony about the tax code being unconstitutional is irrelevant. Mr. Bowman never testified that the tax code was unconstitutional. Furthermore, *Cheek* says nothing about a defendant's ability to testify as to his understanding of the law including the constitution or anything else when he is not arguing that the tax code is unconstitutional.

The Ninth Circuit's interpretation of *Cheek* denied Mr. Bowman the right to present a defense under the Sixth Amendment. The Ninth Circuit's *Cheek* analysis was wrong and so was excluding Mr. Bowman's defense. The District Court never wrote an opinion on these issues, but its oral pronouncements are an over complication of a simple legal principle: a defendant charged with a tax crime gets to testify why they believed what they believed about the law but the defendant cannot argue that the tax code itself is generally unconstitutional or invalid.

From the August 20, 2019 status conference: "So, first, to state what you all already know, not every statute has an element of willfulness, and not every statute allows a good faith defense. Many do not." 1-ER-59. That some offenses do not have a willfulness requirement like tax offenses is meaningless to the issue at hand because a criminal tax offense has a willfulness requirement. What significance does it have to Mr. Bowman that he cannot defend a bank fraud case based on his good faith belief concerning the law? If there is any significance to that fact at all, it supports Mr. Bowman's good faith defense. Why is the District Court even discussing bank and wire fraud?

Furthermore, the fraud cases that the government has cited to support its argument about restricting Mr. Bowman's good faith defense (*Sayakhom* for example) are inapplicable in this setting precisely because the mail fraud and wire fraud statutes do not require willfulness, but even in those cases, the defendant gets an instruction on "good faith" and the opportunity to present a defense based on his good faith. *United States v. Sayakhom*, 186 F.3d 928, 940 (9th Cir.), amended, 197 F.3d 959 (9th Cir. 1999)

If Mr. Bowman's jury had been instructed about good faith the same way that Sayakhom's jury was, he would have been acquitted:

> [Instruction Number] 12, good faith is a complete defense to the charges in the indictment since good faith on the part of the defendant is inconsistent with [willfully violating the law], which is an essential part of the charges. The burden of proof is not on the defendant to prove her good faith, of course, since she has no burden to prove anything.
>
> The United States must establish beyond a reasonable doubt that the defendant acted [willfully] as charged in the indictment. One who expresses an opinion honestly held by her or belief honestly entertained by her is not chargeable with fraudulent intent even though her opinion is erroneous or her belief is mistaken. And similarly, evidence which establishes only that a person made a mistake in

> judgment or an error in management or was careless does not establish fraudulent intent.
>
> While the term "good faith" has no precise definition, it means among other things a belief or opinion honestly held with an absence of malice or ill will and intention of taking unfair advantage of another.
>
> *United States v. Sayakhom*, 186 F.3d 928, 940 (9th Cir.), amended, 197 F.3d 959 (9th Cir. 1999)

Willfulness is not an element of the bank or wire fraud statutes which means that the government's burden to prove criminal intent is higher here than any of those cases, not lower, yet Mr. Bowman was barred from presenting a good faith defense based on a federal statute.

The District Court then goes on to suggest that we are still guessing about what "willful" means 30 years after *Cheek*. "Whether there is such a grant and what its scope is a question of statutory interpretation of congressional intent." 1-ER-59. First off, the issue of whether there is a good faith defense based on willfulness is no longer an open question of statutory interpretation because it was answered by *Cheek*. *Cheek v. United States*, 498 U.S. 192, 201–02 (1991). Second, hundreds of courts before this one have considered the same question and found that willfulness means something very specific: "federal tax law imposed a duty on [him] [her], and the defendant intentionally and voluntarily violated that duty." Mr. Bowman's good faith defense fits squarely within this definition. He understood that he was required to file, and he believed that RFRA excepted him from that requirement absent an accommodation, that is the very definition of an "erroneous understanding of the application of the tax laws to him."

The position the District Court took at the August 5, 2011 pretrial conference which the government first refused to endorse but then accepted is fundamentally inconsistent with Mr.

Bowman's right to a jury trial and to present a defense. Nowhere in *Cheek* or in any reported case does it say that a defendant in a tax case cannot refer to a federal statute besides the tax code to support a good faith defense in a tax case. The District Court made that up at the first pretrial conference and suddenly the government started nodding its head in agreement. Read correctly, *Cheek* compels the conclusion that the source of the belief does not matter if it is "law" and the defendant subjectively believed it, just as the government conceded before the first trial. *See* ECF #71 at 3-7.

The Ninth Circuit's reading of *Cheek* is also flawed because there is no analytical difference between a tax protester citing Title 26 to claim that he is not a human subject to tax and Mr. Bowman saying that he relied on Title 42 in his belief that he was entitled to an accommodation under the tax code to defend against criminal intent in a criminal tax case. Both are misunderstandings of the law that affect the defendant's beliefs about the application of the tax code to him and therefore his willfulness. As explained in *Cheek* it is really that simple:

> Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty. We deal first with the case where the issue is whether the defendant knew of the duty purportedly imposed by the provision of the statute or regulation he is accused of violating, a case in which there is no claim that the provision at issue is invalid. In such a case, if the Government proves actual knowledge of the pertinent legal duty, the prosecution, without more, has satisfied the knowledge component of the willfulness requirement. *But carrying this burden requires negating a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws.* This is so because one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist. In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and

> belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable.

Cheek v. United States, 498 U.S. 192, 201–02 (1991).

This is the critical language from *Cheek* about "the law" that the District Court continues to misconstrue and apparently desires to rewrite. Mr. Bowman's concession that he understood the filing requirement satisfies the government's burden to prove "knowledge", but it cannot be used to prove his willfulness. *Id.*

What the Ninth Circuit did cannot be squared with *Cheek*. Nothing in *Cheek* suggests that the source of the misunderstanding about the application of the tax laws to the defendant is important. *Cheek* requires only that the source supported defendant's good faith belief that he was not "violating any of the provisions of the tax laws." *Id* at 202.

The Ninth Circuit's analysis is an overcomplication that denied Mr. Bowman his fundamental right to a jury trial on the all the elements of the offense. *Cheek* recognized this danger: "forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." *Id* at 203. Evidence about Mr. Bowman's beliefs concerning RFRA's application to the tax code's requirement that he file a return fit neatly within *Cheek's* definition of evidence that negates willfulness and therefore the Ninth Circuit's ruling denies Mr. Bowman his right to a jury trial on the issue of willfulness.

During the August 20, 2019 post-trial status conference the District Court said: "but I think the extrapolation is required by what I view as the core holding of Cheek, which is that the only misunderstanding Congress was interested in accommodating by providing a good faith defense to such a defendant is the defendant who honestly tries to understand the complexity of the tax code

and gets it wrong but doesn't willfully get it wrong. And that's not our case." 1-ER-60. First, that is not the core holding of *Cheek*. The core holding of *Cheek* is that the defendant's subjective belief controls. That is what *Cheek* has been cited for thousands of times. Second, there was no evidence in the record suggesting that is what Congress intended. Finally, what the court describes as "not our case" is exactly our case. Even assuming the District Court's guess about Congressional intent is correct, Mr. Bowman's good faith defense fits squarely within it. Mr. Bowman may have understood that he was required to file, but he "honestly" believed that 42 U.S.C. § 2000bb-1 excepted him from that requirement absent an accommodation. That is exactly an "erroneous understanding of the application of the tax laws to him" allowed in *Cheek.* Its source outside of Title 26 is unimportant.

The Ninth Circuit consistently conflated Mr. Bowman's argument about how RFRA impacted his understanding of how the tax code applied to him absent an accommodation with Cheek's arguments that the tax code was constitutionally invalid. *See Cheek*, 498 US at 206. Even assuming they are congruent, which they are not, the fact of the matter is that the way *Cheek* has been applied and understood by the federal courts is much more consistent with Justice Scalia's concurring opinion in *Cheek* anyway than with the dicta at the end of Justice White's majority opinion that was superfluous to the core holding. *See Id* at 208-209.

Under any reading of *Cheek,* this case is different because Mr. Bowman's argument is not that the tax code is constitutionally invalid but rather that he believed federal law, passed long after *Cheek* was decided, expressly afforded him an exception from the filing requirement absent an accommodation. This is exactly the kind of misunderstanding about the application of the tax code that Congress did not want to criminalize. It is also obviously what Congress contemplated would

be a jury question, not a legal question for the court, when it used "willful" in the statute.

Under the Ninth Circuits reasoning, Congress provides the tax protestor whose arguments have been rejected by hundreds of criminal juries and tax courts has a good faith defense but not Mr. Bowman whose defense was based on the express language of RFRA. That makes no sense. Mr. Bowman cannot find where in the any of the criminal tax statutes Congress said that it intended to provide a tax protestor a defense because he made up something based on Title 26 and not Mr. Bowman because he references RFRA and how it impacted his understanding of the tax code.

C. The Ninth Circuit ignored its own precedents.

The Ninth Circuit Model instruction is based on *Cheek*. *See* Ninth Circuit Model Instruction 9.42. It reads in part "A defendant who acts on a good faith misunderstanding as to the requirements of the law does not act willfully even if his understanding of the law is wrong or unreasonable." *Id.* This language from *Cheek* is included because it stands for the idea that it is the individual's subjective understanding of the law controls. That is exactly Mr. Bowman's situation. Nowhere in that instruction or in *Cheek* does it suggest that the specific *source* of that understanding is significant except that it must be the "law."

The District Court during the August 20, 2020 status conference declares that the Ninth Circuit has not provided it with guidance on the scope of a willfulness defense through its model instruction: "This is well expressed in the Ninth Circuit's model instruction on willfulness, which provides no generic instruction but explains that it is context specific." 1-ER-59. Mr. Bowman still cannot understand what the District Court was talking about. Perhaps it was erroneously referring to Model Instruction 5.5 which does not provide a specific definition of "willful."

Contrary to the District Court's statement, the Ninth Circuit has provided very specific language about "willful" in the context of a criminal tax offense. Ninth Circuit Model Instruction 9.42 provides exact language about what willfulness means in a criminal tax case that was applicable both to Mr. Bowman's defense and the government's theory of guilt. Both parties requested it and instead the District Court did something else. The District Court did not have to go on a journey of discovery through footnotes in 40-year-old cases referencing 90-year-old cases to understand a willfulness defense in a criminal tax case because the Ninth Circuit model instruction explains it clearly.

The Circuit Court ignored *Trevino* which the drafters of the model instruction specifically included to explain the scope of the good faith defense and which supports Mr. Bowman's argument: "a claim that because of a misunderstanding of the **law**, he had a good-faith belief that he was not violating any of the provisions of the **tax laws**." *United States v. Trevino*, 419 F.3d 896, 901 (9th Cir.2005). That has always been the essence of Mr. Bowman's defense.

Instead of simply applying the model instructions, the Ninth Circuit has restricted the good faith defense in a criminal tax case in a way inconsistent with *Cheek, Trevino,* and *Powell.* Under the Ninth Circuit's misreading of *Cheek, Trevino,* and *Powell*, a good faith defense in a tax case is limited to "a claim that because of a misunderstanding of the **tax laws and only the tax laws**, he had a good-faith belief **only under the tax laws** that he was not violating any of the provisions of the **tax laws**." That is not the correct definition of willfulness, and it cannot be squared with Ninth Circuit caselaw. *United States v. Trevino*, 419 F.3d 896, 901 (9th Cir.2005); *United States v. Powell*, 955 F.2d 1206, 1214 (9th Cir. 1991).

The District Court was wrong when it said that no case addresses Mr. Bowman's defense. 1 -ER-60. In *United States v. Powell*, 955 F.2d 1206, 1214 (9th Cir. 1991) the Ninth Circuit specifically considered *Cheek* and rejected the District Court's myopic view of the evidence available to Mr. Bowman where the government must prove willfulness in a criminal tax case*:*

> "forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." *Cheek,* 111 S.Ct. at 611. Although a district court may exclude evidence of what the law *is* or *should be, see United States v. Poschwatta,* 829 F.2d 1477, 1483 (9th Cir.1987), *cert. denied,* 484 U.S. 1064, 108 S.Ct. 1024, 98 L.Ed.2d 989 (1988), it ordinarily cannot exclude evidence relevant to the jury's determination of what a defendant *thought the law was* in § 7203 cases because willfulness is an element of the offense. In § 7203 prosecutions, statutes or case law upon which the defendant claims to have actually relied are admissible to disprove that element if the defendant lays a proper foundation which demonstrates such reliance. *See United States v. Harris,* 942 F.2d 1125, 1132 n. 6 (7th Cir.1991); *United States v. Willie,* 941 F.2d 1384, 1391–99 (10th Cir.1991).
>
> *United States v. Powell*, 955 F.2d 1206, 1214 (9th Cir. 1991).

Mr. Bowman's defense at trial was completely consistent with *Powell* which interprets *Cheek* and holds that "the law" the defendant relied on for his good faith belief can exist outside of Title 26. *Id.* Nothing in *Powell* says that he cannot mention the Constitution or the RFRA or any law. *Id. Powell* and *Cheek* cannot be squared with the Ninth Circuit's ruling on this issue because Mr. Bowman's understanding of how RFRA impacted his legal obligation to file under Title 26 is obviously "evidence relevant to the jury's determination of what [he] thought the law was…" *Id.*

D. The cases from outside the Ninth Circuit support Mr. Bowman's argument.

The government cited *United States v. Willie,* 941 F.2d 1384, 1391–99 (10th Cir.1991) in briefing before the first trial. It does not support the District Court's conclusion Mr. Bowman

cannot testify to any law other than the tax code. *Id. Willie* did not even consider defendant's testimony, it addressed only the admissibility of exhibits cumulative to defendant's testimony. *Id. Willie* was a 2-1 decision over a dissent arguing that too many limits had been put on Willie's ability to provide evidence about the law as he believed it. *United States v. Willie*, 941 F.2d 1384, 1400–01 (10th Cir. 1991). There was no issue in the trial about Mr. Willie testifying to his understanding of the law and constitution, which we know he did because that was part of the harmless error analysis. *Id.*

When the Sixth Circuit Court of Appeals considered the same issue, it found the dissent's arguments in *Willie* persuasive. *United States v. Gaumer*, 972 F.2d 723, 724 (6th Cir. 1992)(also cited in the government's motion). The Sixth Circuit rejected the limitation the government attempts to impose here:

> "In *United States v. Willie,* 941 F.2d 1384 (10th Cir.1991), *cert. denied,* 502 U.S. 1106, 112 S.Ct. 1200, 117 L.Ed.2d 440 (1992), however, the Court of Appeals for the Tenth Circuit held that a defendant generally has no right to present otherwise excludable legal documents offered to support a claim that he thought he was under no obligation to file a tax return. Judge Ebel dissented, suggesting that if a defendant knew of data "in the Constitution, statutes, legislative history, or the like" allegedly supporting a professed view that he was not required to file a tax return, the material would be admissible to negate willfulness as long as there was a "nexus" between the material and the defendant's stated views. *Id.* at 1402 (Ebel, J., dissenting). We find Judge Ebel's dissent persuasive.
>
> *United States v. Gaumer*, 972 F.2d 723, 724 (6th Cir. 1992).

Again, there is no suggestion in either *Gaumer* or *Willie* that the defendant cannot testify about the Constitution or any other law that he relied on in defending against willfulness for the purposes of the tax crime. Furthermore, just like the Ninth Circuit in *Powell*, it holds that Gaumer is entitled to admit materials that he relied on in formulating those beliefs. There is no question that

Mr. Bowman testimony and the record from the trial laid an adequate foundation between his understanding of RFRA and the tax code for it to be admissible on the issue of willfulness.

E. Conclusion – This was an abortion of justice:

The Ninth Circuit has taken dicta from *Cheek* and used it to eviscerate Mr. Bowman's right to present a defense. In a case where the government was required to prove his subjective intent under a willfulness standard, Mr. Bowman was entitled to present his beliefs about the relationship between the Religious Freedom Restoration Act, a federal statute which expressly says it is a defense in any judicial proceeding, and his obligation to file a tax return. The Court should grant certiorari to clarify the scope of *Cheek* and the law that a criminal tax defendant can rely on to support his subjective intent and good faith. Mr. Bowman seeks a new trial where his constitutional right to present a defense about his subjective intent is honored.

Respectfully submitted October 29, 2022,

s/Matthew Schindler
Matthew Schindler #964190
Attorney for Michael Bowman

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL BOWMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

CERTIFICATE OF SERVICE AND MAILING

I, Matthew Schindler, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.3, service has been made of the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI on the counsel for the respondent by depositing in the United States Post Office, in San Clemente, California on October 29, 2022 first class postage prepaid, a certified true, exact and full copy thereof addressed to:

Suzanne Miles, AUSA
US Attorney's Office
1000 SW Third Ave #600
Portland, OR 97204

Further, the original and ten copies were mailed to the Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on October 29, 2022, with first-class postage prepaid.

DATED October 29, 2022.

s/Matthew Schindler
Matthew Schindler
Attorney for Petitioner