ORIGINAL

23 NO. 7677

IN THE
SUPREME COURT OF THE UNITED STATES

DANIELA BOWMAN,

Petitioner,

v.

CORDELIA FRIEDMAN,

Respondent.

On Petition For a Writ of Certiorari to the
United States Court of Appeals for the
Tenth Circuit Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

It is a public record that petitioner is the only taxpayer in New Mexico who was deprived of property but denied due process evidentiary hearing when respondent allegedly perjured herself more than ten times and eliminated petitioner's evidentiary hearing.

Question 1 presented is: whether, in the face of the facts alleged in the complaint and therefore admitted by the motion to dismiss, the Tenth Circuit's ruling which rejected a person has a right to a due process evidentiary hearing is in conflict with the Due Process and Equal Protection Clauses of the Constitution.

Oklahoma Press Publishing Co. v. *Walling, 327 U.S. 186 (1946)* held that compulsory production is a valid Fourth Amendment claim where actual search and seizure does not occur but this Court required the judicial order be "validly made." The Tenth Circuit rejected *Oklahoma Press* and ruled the opposite.

Question 2 presented is: whether, in the face of the facts alleged in the complaint and therefore admitted by the motion to dismiss, the Tenth Circuit's ruling which rejected *Oklahoma Press* as a valid standard for compulsory production claim is in conflict with *"reasonableness"* standard of the Fourth Amendment of the Constitution.

The court below vested in itself a legislative power and changed a New Mexico statute adding text that does not exist thus rejecting the "expectation of privacy" of one's person and one's private papers recognized by the Constitution and this Court. The court below admitted that the actual text in the New Mexico statute does not apply to a person, but only to the government but refused to withdraw its illegal ruling supported by the non-existing text.

Question 3 presented is: whether a court sua sponte changing the text of a New Mexico statute and issuing a decision on the court-modified non-existing statutory text is in direct conflict with the United States and New Mexico Constitutions.

PARTIES TO THE PROCEEDING

Petitioner Daniela Bowman was the plaintiff in the district court and the appellant in the Tenth Circuit.

Respondent Cordelia Friedman was individual defendant in the district court and the appellee in the Tenth Circuit.

RELATED PROCEEDINGS

- Bowman v. Friedman, No. 23-2115, 10th Cir. (September 5, 2023) (unpublished) (affirming defendant's motion to dismiss under Fed.R.Civ.P. 12(b)(6))
- Bowman v. Friedman, No. 1:21-CV-00675-JB-SCY (July 21, 2021) (unpublished) (granting defendant's motion to dismiss under Fed.R.Civ.P. 12(b)(6))
- Bowman v. Manforte/NMTRD, No. A-1-CA-37874, Memorandum Opinion (N.M. Ct. App. February 28, 2020) (unreported)
- Bowman v. Manforte/NMTRD, No. D-101-CV-2018-00928 (March 23, 2018) (dismissed not on the merits, dismissed on discovery sanctions)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests this Court grant the writ of certiorari and review the judgment of the Tenth Circuit which rulings conflict established standards of this Court including the unauthorized legislative action by the court below in violation of the United States and New Mexico Constitutions.

This Court holds that the first prong in deciding a motion to dismiss for failure to state a claim is that "a court must accept as true all of the allegations contained in a complaint" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). The Tenth Circuit rejected that tenet without a reason. "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable..." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 556 (2007). The Tenth Circuit rejected even conclusive facts from the public record. The courts below rejected the veracity of petitioner's alleged facts, and determined the merits of disputed facts without presenting evidence or trial.

> "What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations. District court judges looking to dismiss claims on such grounds must look elsewhere for legal support." *Neitzke* v. *Williams*, 490 U.S. 319, 327 (1989)

This Court had never wavered in its rulings that a hearing is required in a constitutionally-protected deprivation process. "No man shall be condemned in his person or property without notice, and an opportunity to be heard in his defence, is a maxim of universal application." *Earle et al.* v. *McVeigh*, 91 U.S. 503, 510 (1875). The Tenth Circuit rejected this Court's decision, and provided no reason in denying

a "hearing is required." The Tenth Circuit also rejected New Mexico law that evidentiary hearing is required. It is a public record that petitioner is the only taxpayer in New Mexico who was deprived of her property but denied an evidentiary hearing. The Tenth Circuit rejected as true these facts taken from the public record, offered as evidence of her unequal treatment under the law.

This Court holds that the government use of perjured testimony "is without due process of law and in violation of the Fourteenth Amendment" *Mooney* v. *Holohan*, 294 U.S. 103 (1935). The Tenth Circuit rejected *Mooney*.. Here, respondent, a government agent, allegedly perjured herself more than ten times during a constitutionally-protected due process. Respondent's perjury eliminated petitioner's evidentiary hearing, and caused seizure of her person and her private papers.

This Court holds the compelled production by the government is a valid Fourth Amendment claim. "The Court answered both of those questions definitively in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946), where we held that the Fourth Amendment regulates the compelled production of documents, but less stringently than it does full-blown searches and seizures..." *Carpenter* v. *United States*, 138 S. Ct. 2206, 2254 (2018). The Tenth Circuit rejected *Oklahoma Press* and ruled the opposite, that petitioner's compulsory production Fourth Amendment claim is not a valid claim even if the

government agent perjured herself many times because no actual search or seizure occurred.

Undeniably, the separation of power is implied in the United States Constitution but it is openly mandated in the New Mexico Constitution, Article 3. Courts are not authorized to exercise legislative functions. The courts below changed New Mexico statute in order to justify a ruling contradicting basic protections of the Fourth and Fifth Amendments of the Constitution.

District Judge James O. Browning rejected that our society, the text of the Fourth Amendment, and this Court recognize the privacy of one's person and her private papers. In order to justify his denial of this privacy Judge Browning created a new state law, he changed the text of the New Mexico statute NMSA 1978, Section 7-1-8.4(A) (2015). Judge Browning's new statutory law eliminated petitioner's constitutional rights under the Fourth and Fifth Amendments of the Constitution and created a rift with other New Mexico statutes, and myriad federal and state legal cases. Judge Browning ruled on the new, non-existing statutory law and that ruling "decided" the merits of Bowman's complaint without a trial.

Petitioner objected to that abuse of authority and the District Court Magistrate Judge Steven Yarbrough admitted Section 7-1-8.4(A) does not apply to petitioner as written by New Mexico legislature, but the courts did not withdraw the illegal ruling. In her appeal, petitioner asked for a relief, but the Tenth Circuit affirmed the ruling by acquiescence.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is unreported (reproduced at Pet. App. 1a-9a.)

The decision of the District Court for the District of New Mexico is unreported (reproduced at Pet. App. 37a-61a.)

JURISDICTION

The Tenth Circuit entered judgment on March 27, 2024. This Court jurisdiction is invoked under 42 U.S.C. § 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Question 1 involves the Fourteenth Amendment to the United States Constitution.

Question 2 involves the Fourth Amendment of the United States Constitution.

Question 3 involves the implied Separation-of-Power Doctrine in the United States Constitution and New Mexico Constitution, Article 3, Section 1 which states:

"The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.***"

STATEMENT OF THE CASE

Factual Background

Petitioner was deprived of property.

In June 2017 the New Mexico Tax and Revenue Department ("TRD") initiated an audit of Bowman's 2011 gross receipts tax return. TRD demanded additional taxes for the earnings of Bowman's work as an experimental physicist. "Many tax protest proceedings *** begin when the department [TRD] issues a notice of assessment of taxes to a taxpayer. Section 7-1-17(B)(2)." *Gemini Las Colinas LLC* v. *N.M. Taxation & Revenue Dep't*, 531 P.3d 622, 627 (N.M. Ct. App. 2023).

Bowman provided to TRD large volume of evidence claiming she was an "employee." NMSA 1978, Section 7-9-17 (1953)[1], exempts taxes on gross receipts of "employees." During the audit TRD did not require Bowman submit tax information because 3.2.105.7 NMAC and the controlling New Mexico authority on the issue of "employee-independent contractor" does not require tax information when determining if a taxpayer is an "employee." See *Harger* v. *Structural Servs., Inc.*, 121 N.M. 657 (1996). ROA 9, 23-24[2].

TRD ignored Bowman's evidence and assessed taxes anyway. NMSA 1978, Section 7-1-29.1(C)(2), requires that TRD have "substantial evidence" supporting demand for taxes when depriving taxpayers of property before taxpayers file a

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1 Sections from NMSA 1978, NMAC and NMRA mentioned in this petition are reproduced in Appendix B 65a-87a.

2 Record citations are to the record on appeal filed with the Tenth Circuit, abbreviated as "ROA __(page number)"

protest. Bowman protested, paid the assessed amount, and filed with TRD a "claim for refund." TRD denied Bowman's claim for refund and Bowman filed a lawsuit in state-court in order to present her evidence. ROA 30-32.

New Mexico procedural due process affords all taxpayers evidentiary hearing. This Court held that "[i]n the context of tax assessments and collections, a meaningful opportunity to be heard requires that a taxpayer be provided with either a pre-deprivation process or post-deprivation process to contest the validity of an imposed tax." *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36-37 (1990). Taxpayers in New Mexico ("NM") are afforded the choice of a pre- or post-deprivation hearing in an administrative quasi-judicial or state-court process. Bowman selected a post-deprivation hearing in state-court.

Property deprivation is a question of fact and due process must offer "effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." *Goldberg* v. *Kelly*, 397 U.S. 254, 267-68 (1970). The *Goldberg* standard is incorporated in NMSA 1978, Section 7-1-17 (Pet. App. 67a).

As a matter of law, TRD's tax assessment "is presumed to be correct." Section 7-1-17. The effect of the presumption of correctness is that the taxpayer has the burden of overcoming the presumption by coming forward with some countervailing evidence tending to dispute the factual correctness of the assessment by TRD.

Regulation 3.1.6.12(A) NMAC "requires the taxpayer to produce evidence." *Gemini,* 531 P.3d at 629. Section 7-1-17 and 3.1.6.12(A) NMAC are interpreted by NM courts as the taxpayer due process right to present evidence. See Annotations to Section 7-1-17 (Pet. App. 67a) quoting many NM legal cases.

The court interpreted that the taxpayer has to present their evidence first, and "determining whether the taxpayer has overcome the presumption of correctness is the first step in resolving a tax protest." *Gemini,* 531 P.3d at 629. The taxpayer is entitled to an evidentiary hearing as "the regulatory language only places a burden on the taxpayer; at this juncture, nothing is required of the department***. In short, 3.1.6.12(A) NMAC does not call for the hearing officer to consider the department's evidence in making this determination [of overcoming presumption of correctness]." *Ibid.* "[I]f the taxpayer has not overcome the presumption, the protest may simply be denied. In this scenario, there is no need for the department to present any evidence." (emphasis added) *Ibid.*

Only after the tribunal decides that Bowman has or has not "overcome the presumption of correctness" under the shifting burden can TRD present its evidence: "the existence of this [taxpayer's] burden means that the department cannot simply rely on the unreliability or incredibility of the taxpayer's evidence. Instead, the department must produce evidence to justify its assessment." *Id.* at 632. *Gemini* ruling is clear that the government cannot rely on the taxpayer's evidence to make its case.

Section 7-1-17 and 3.1.6.12(A) NMAC apply to all NM taxpayers, regardless of administrative or court process route or the choice of tribunal. NM law and its interpretation by NM courts affords Bowman, a NM taxpayer, the due process right to present her evidence to the state-court when she protested her deprivation.

How respondent eliminated Bowman's evidentiary hearing.

Respondent represented TRD in the due process lawsuit, a post-deprivation process in state-court. During discovery, when asked to provide the authorities supporting her case, respondent answered "3.2.105.7 NMAC". See Exemption-gross receipts tax, 3.2.105.7 NMAC "Definition of employee" (determining if "the person's "employer" have a right to exercise control") (Pet. App. 84a).

In discovery, respondent did not provide one competent evidence to support TRD's tax assessment while Bowman provided volumes of evidence (near 300 pages). Pursuant to Section 7-1-29.1(C)(2) having no competent evidence to support Bowman's property deprivation means TRD cannot "prevail" during an evidentiary hearing and TRD would be liable to pay Bowman's litigation costs, fees and refund Bowman's property with interest. ROA 9.

Artificial discovery issue. To solve the problem of "no evidence to support deprivation" respondent created a discovery issue. Respondent did not request records on the issue of the protest, "employee-independent contractor." Respondent

demanded Bowman's federal income tax return. Even the state tax agency, TRD, which conducted the audit, did not ask for any tax records. Respondent, herself, testified the supporting authority for her case is 3.2.105.7 NMAC, and this gross receipt tax regulation does not list any one tax record in determining the "right to control". See also *Harger*, 121 N.M. at 663 ("principal consideration is the right to control").

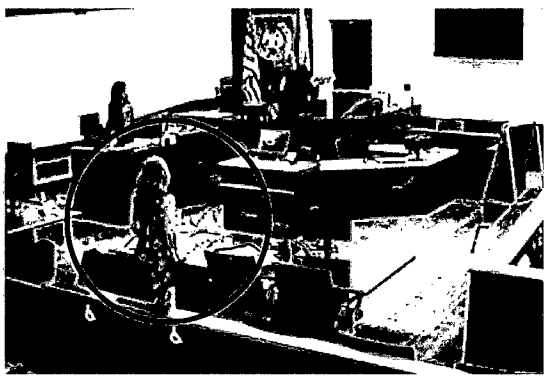
Without support in law, respondent pursued disclosure of Bowman's federal tax return with an order to compel, claiming this record is critical to her case and very relevant to the issue of "employee-independent contractor." Clearly respondent's statements are false because they contradict the protested issue and its governing law. ROA 23-24. Pursuant to Section 7-1-17 and *Gemini,* the taxpayer has the burden to make a case, the government does not need to present any evidence, and neither *Harger,* 3.2.105.7 NMAC, IRS or US courts require tax records when the issue to determine is "employee v. independent contractor". ROA 14.

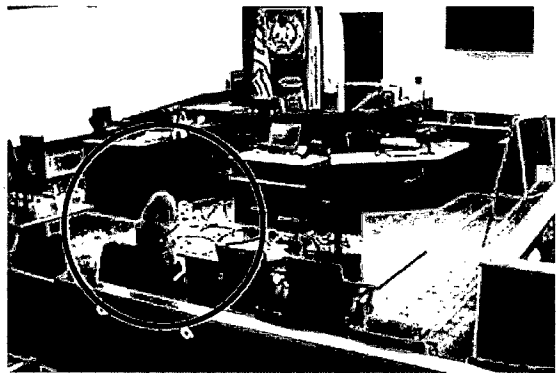
"Lex non cogit ad impossibilia." As a state tax agent, respondent can request and obtain any tax record for any taxpayer from IRS without permissions from the taxpayer. During the 7/19/2018 state-court hearing respondent voluntarily testified that Bowman's 2011 federal tax return is "too old for retention" by IRS, meaning it does not exist with IRS, and cannot be obtained from IRS. ROA 16. Bowman twice verified that fact to be true with a tax professional working with

IRS. A discovery order which demands the disclosure of a record that does not exist is an invalid order, simply a sham. Respondent who testified that the record cannot be obtained but is demanding its "disclosure" by Bowman is intentionally deceiving the court. "Lex non cogit ad impossibilia," meaning the law cannot demand something impossible. But state-court on 7/19/2018 did grant a verbal order to compel Bowman's non-exisiting tax records. That verbal order specified deadlines for disclosures, one of which was 8/20/2018, 30 days from the hearing. Bowman challenged that order as contrary to law, and the state-court scheduled another hearing for 7/27/2018.

Bowman's seizures. On 7/27/2018 in the courtroom, respondent suddenly "changed" the deadline for disclosure from 8/20/2018 to 7/27/2018, the day of the hearing. ROA 16-17. Respondent did not inform the state-court that she, on her own, changed the deadline but testified to the state-court that Bowman had not met the (false) deadline and was not in compliance with the verbal court order of 7/19/2018. Respondent demanded court's help in enforcing that verbal court order. Respondent's affidavits were factually false and the state-court record provides an undeniable proof of that. On 7/27/2018 when Bowman was seized she was not in violation of any court order. The state-court, misled by respondent, seized Bowman in the courtroom, and under the threat of incarceration demanded her private paper, form 4506, which could be used to request Bowman's federal return from IRS. ROA 16-17. Respondent could have obtained any tax record form IRS without

any forms or "permissions" from Bowman. Under coercion Bowman produced form 4506 and respondent seized the form. The state-court record provides undeniable proof that respondent seized Bowman's private paper, form 4506, while she was detained in the courtroom. ROA 83.





Bowman's seizure in the courtroom. Bowman "submits to judge's authority."

After the event of seizures the state-court filed with the clerk on 7/31/2018 a written order to compel form 4506 with the ultimate goal of compelling Bowman's federal tax return from IRS which does not exist. Under the looming possibility of another seizure, on 8/30/2018 (ROA 37) Bowman surrendered form 1040 Schedule C (tax record) from her own private collection of documents, not from IRS. This was the exact tax record respondent demanded when arguing for the compulsory order on 7/19/2018. ROA 13, 27.

In summary, Bowman submitted near 300 pages of private records, form 4506, and federal tax return form 1040 Schedule C. Bowman could not comply with the compulsory order of 7/31/2018 as written (compelling her federal tax return from IRS) since it demanded non-existing record. Respondent used the fact that

"technically" Bowman could not physically comply with 7/31/2018 court order and eliminated Bowman's evidentiary hearing for discovery sanctions. Respondent twice disobeyed the state-court orders for mediation and continued with false affidavits until she terminated the constitutionally-protected lawsuit, Bowman's due process.

Bowman appealed the discovery sanctions. Bowman's strategy was to convince the appellate court that neither respondent nor the lower court supported their decisions with the law. Bowman's goal was to reinstate her evidentiary hearing back on the docket. The court of appeals affirmed the lower court decisions in an unreported opinion, repeating all false statements made by respondent. During Bowman's appeal, she was not afforded an opportunity to make arguments on her property deprivation or present her evidence on her protested issue of "employee-independent contractor". ROA 77-81.

Procedural History

Bowman sued the respondent asserting two counts of constitutional violations, denial of procedural due process, and unreasonable search and seizure.

Bowman's complaint alleged that respondent's actions against Bowman created the first and only case in NM where a taxpayer was denied a due process evidentiary hearing. ROA 10, 20, 24. This fact is a public record. Bowman alleged that respondent knowing she cannot prevail in an evidentiary hearing, eliminated that evidentiary hearing by testifying falsely more than ten times. ROA 11.

Bowman incorporated the entire state-court record in her complaint and quoted respondent's statements word for word directly from it. ROA 30-39.

For each quoted statement, Bowman explained why respondent's statement is false supporting her conclusion with authorities and indisputable facts. One example: Bowman concluded respondent's statements must be false because they contradicted the statements of three different TRD hearing officers (quasi-judges) presiding over other NM taxpayers' protest hearings. ROA 23-24. Bowman's complaint alleged that respondent perjured herself when she testified in support of compulsory orders and when she demanded production of non-existing records making the compulsory order invalid. ROA 26-27. Bowman alleged that respondent lied that the federal tax return is relevant to the protested issue in conflict with 3.2.105.7 NMAC and *Harger*. The complaint alleged respondent testified falsely that Bowman was in non-compliance with the verbal court order (of 7/19/2019) and these false affidavits caused Bowman's seizure (on 7/27/2018) of her person and private papers. Bowman's complaint explained why respondent's false testimonies rise to perjury and how her actions amount to constitutional violations. ROA 26. Bowman alleged respondent used the invalid compulsory order (from 7/31/2018) to violate Bowman's due process right to an evidentiary hearing. ROA 27-28.

Judge Yarbrough decided to dismiss Bowman's claims immediately. Two days after Bowman filed her complaint the Magistrate Judge, Steven Yarbrough, issued an Order to Show Cause ready to dismiss Bowman's

complaint. He minimized the respondent's perjury, ruling it irrelevant. Government's use of perjured testimony is very relevant to any judicial due process, and it is the core of Bowman's complaint.

Judge Yarbrough presented two grounds for denying Bowman's due process claim: Bowman was afforded opportunity to confront respondent's lies, and Bowman made a sufficient court record for an appeal. Pet. App. 61a-62a.

Judge Yarbrough presented the following grounds for dismissing Bowman's Fourth Amendment claim: the state-court issued the allegedly "illegal" order, not respondent; discovery order is not equivalent to a search and seizure; and relying on *Childress* v. *City of Arapaho,* 210 F.3d 1154, 1156 (10th Cir. 2000) (quoting *Brower ex rel. Estate of Caldwell* v. *County of Inyo,* 489 U.S. 593 (1989)) neither respondent nor the state-court actually searched and seized the records that were the subject of the discovery order. Pet. App. 62a-63a.

Respondent did not appear until Bowman filed a motion for default judgment with damages. Respondent filed a motion to dismiss for failure to state a claim ("MTD"). Like a road-map, respondent's MTD copied word by word Judge Yarbrough's Order to Show Cause. Respondent also included an argument on "expectation of privacy". ROA 70-90.

District court dismissed Bowman's complaint. The district court did not rule petitioner's complaint contained: "not well-pleaded" allegations, "insufficient factual matter", "naked assertions", "conclusory statements", or

"threadbare recitals of a cause of action's elements". Therefore, this Court instructed "[the district] court must accept as true all of the allegations contained in a complaint" (*Ashcroft,* 556 U.S. at 678.)

Grounds for dismissal of due process claim. The district court rejected the judicial standard in *Ashcroft* and did not "accept as true" the facts that Bowman was deprived of constitutionally-protected property, not afforded evidentiary hearing, and that respondent perjured herself.

The court decided Bowman's claims are not "real" claims (Pet. App. 49a), implying they are frivolous, and proceeded to apply the standard in 28 U.S.C. §1915(e)(2)(B)(i), which can reject the truth in plaintiff's allegations *in forma pauperis* suits. Bowman's suit was not *in forma pauperis* and she is not a prisoner, but it is plain to see that the district court applied the "frivolous" standard because the courts below rejected the truth of all Bowman's allegations, even rejecting as true facts documented in the state-court record.

> "[Relying on *Neitzke]* §1915(d) [superseded by §1915(e)(2)] gives courts the authority to "pierce the veil of the complaint's factual allegations" means that a court is not bound, as it usually is when making a determination based solely on the pleadings, to accept without question the truth of the plaintiff's allegations." *Denton* v. *Hernandez,* 504 U.S. 25, 32 (1992)

The district court ruled that Bowman was afforded "sufficient" due process because: Bowman was afforded hearings to confront respondent's false affidavits, and Bowman made sufficient court record on which she could appeal. Pet. App. 49a-

51a. The district court did not cite any law supporting its ruling on what constitute "sufficient" due process for NM taxpayers.

Bowman objected every time she could (Docs.7,22,30,36,53,56,59,62) asserting the district court grounds for dismissal are in conflict with the facts of her case, her allegations and this Court's decisions. Petitioner argued this Court holds due process requires hearing on the property deprivation and NM law affords all taxpayers evidentiary hearing but Bowman did not have a hearing. Bowman argued government's use of perjured testimony is a denial of due process and Bowman alleged perjury by respondent. Bowman asserted she is the only NM taxpayer not afforded evidentiary hearing demonstrating discrimination toward her. The district court overruled all Bowman's objections and dismissed the claim.

Grounds for dismissal of Forth Amendment claim. The district court rejected the veracity of Bowman's allegation that respondent perjured herself. The district court rejected as true: 1) the fact (from state-court record) that respondent testified Bowman's federal return does not exist but compelled it with court order; 2) the fact that Bowman was seized; 3) the fact (from state-court record) that Bowman's private form 4506 was actually seized; and 4) the fact (from state-court record) that respondent actually obtained Bowman's federal tax information, form 1040 Schedule C. Pet. App. 46a-49a.

The district court ruled that for a valid Fourth Amendment claim Bowman must state both "unreasonable" seizure and actual seizure of her private

papers. The district court, on his own, "eliminated" all facts of actual seizure from Bowman's complaint and dismissed her Fourth Amendment claim ruling: "Bowman never produced her tax returns, and therefore, no search or seizure took place. See *Childress* v. *City of Arapaho*, 210 F.3d 1154, 1156 (10th Cir. 2000)("To state a claim under the Fourth Amendment, plaintiffs must show both that a 'seizure' occurred and that the seizure was 'unreasonable'. [*sic*] *Brower* v. *County of Inyo*, 489 U.S. 593, 599 (1989). We have previously considered when police pursuit rises to the level of a Fourth Amendment seizure.")" Pet. App. 47a.

The court overruled Bowman's objections (Docs.7,22,30,36,53,56,59,62) that her complaint meets the "reasonableness" standard for Fourth Amendment claims (*Oklahoma Press)* where in compulsory production claims actual seizure of Bowman's private papers is not required. Bowman objected that the discovery order is invalid if it compels non-existing record. Bowman objected that her privileged papers are protected by the Fifth Amendment and that *Brower* standard is only applicable to person's seizure during a police pursuit. The district court overruled all Bowman's objections and dismissed the claim.

The district court created new law. District Judge James Browning decided to rule on the "expectation of privacy" because in her MTD respondent, without support in law, argued: "[h]ere, Plaintiff had no expectation of privacy in her federal tax return when she put them at issue..." ROA 72. Judge Browning analysis considered only the records demanded in the order to compel, specifically

Bowman's federal tax returns from IRS which do not exist. Pet. App. 53a-56a.

Judge Browning started his analysis quoting Rule 1-026 NMRA (discovery) referring to "privileged" and "relevant" information. Pet. App. 54a. He did not reference this Court's decisions or NM law on protection of private or privileged papers. Immediately after that, Judge Browning changed his analysis to disclosure of "confidential" information. It is obvious Judge Browning did not differentiate between private, privileged and confidential papers. There is no constitutional law or NM law which requires taxpayer disclose privileged information. Therefore, in order to justify his ruling in favor of respondent Judge Browning made such law and changed the text of Section 7-1-8.4(A) to require taxpayers disclose their own privileged information, their tax returns. Pet. App. 55a.

Judge Browning did not rule on the "expectation of privacy" but he ruled that pursuant to the "new text he added" in Section 7-1-8.4(A) Bowman's federal tax return is non-privileged anymore because she filed lawsuit protesting her deprivation. Pet. App. 53a-56a. For this ruling Judge Browning relied on NM statutory text that does not exist, claiming "such a reading [of Section 7-1-8.4(A)] extends reasonably to requiring a taxpayer to reveal [tax return or return information]." The real text of Section 7-1-8.4(A) does not apply to any taxpayers, it refers to confidential information only, not to private or privileged records, and does not waive any privileges. With two words "extends reasonably," Judge Browning

justified his violation of the separation-of-power of the United State Constitution, and his violation of the sovereignty of the NM legislature.

Bowman objected and the Magistrate Judge Seven Yarbrough admitted the added text does not exist and agreed with Bowman's objections that the real text of Section 7-1-8.4(A) does not apply to petitioner, but the court did not withdraw the illegal ruling. Pet. App. 31a.

The Tenth Circuit dismissed Bowman's due process claim.

The Tenth Circuit affirmed the district court dismissal on the same grounds: contrary to *Ashcroft,* the court rejected as true respondent's perjury, decided Bowman was afforded "meaningful" due process because Bowman was afforded hearings to confront respondent's false affidavits, and ruled Bowman made court record on which she could appeal. Pet. App. 5a-6a.

The Tenth Circuit decision ignored the fact that Bowman was denied a hearing on her property deprivation and rejected Bowman's argument that court hearings confronting respondent's perjury do not meet the criteria of due process hearing. The court rejected Bowman's argument that NM law, Section 7-1-17 requires an evidentiary hearing. Bowman is the only NM taxpayer denied evidentiary hearing, but the Tenth Circuit rejected this indisputable fact because Bowman did not provide evidence of it. Pet. App. 7a (note 3). Bowman has not been afforded the opportunity to provide evidence yet, but this fact is a public record (no evidence necessary) and Bowman stated that in her Opening Brief.

The Tenth Circuit rejected Bowman's argument that NM law cannot discriminate between the same class of taxpayers. That is especially true when Bowman supported her argument with the public record, she being the only one discriminated. "When a statute or regulation, as applied, discriminates as between taxpayers, that discrimination must rest on some rational basis." *Kaiser Steel Corp.* v. *Revenue Division*, 96 N.M. 117, 124 (N.M. Ct. App. 1981). Bowman argued that if taxpayers selecting administrative process are afforded all due process elements: merits hearing, notice, cross examination, presentation of evidence, tax liability determination, and "all other rights essential to a fair hearing" (22.600.3.24(A) NMAC and Section 7-1B-8(F)) then the same due process elements (not procedures) should be available to taxpayers selecting the state-court process.

The Tenth Circuit rejected Bowman's argument stating: "[u]nder this logic, one could commence a civil action under §7-1-26(E), defy all of the court's discovery orders, and still be entitled to a ruling on the merits" (Pet. App.7a) and "***[Bowman] circumvented the usual process by disobeying the state-court's orders***[.]" (Pet. App. 6a.)

The Tenth Circuit dismissed Bowman's Fourth Amendment claim.

The Tenth Circuit affirmed the district court dismissal of Bowman's Fourth Amendment claim on different grounds: relying on *Brower*, the court decided Bowman failed to allege seizure of any of her tax documents, and ruled Bowman's

seizure of her person was "reasonable" action by the judge. The Tenth Circuit rejected as true Bowman's allegations of respondent's perjury. Pet. App. 7a-9a.

The seizure of Bowman's person and her private papers is not the core of Bowman's complaint. The compelled production order supported by respondent's perjury is Bowman's complaint. In *Oklahoma Press* this Court set the standard for Fourth Amendment claim that an order for compulsory production is "unreasonable" when the order is not "validly made". Bowman's complaint repeated 35 times the words "false," "perjury," and "lies", clearly stating the order to compel is invalid, therefore, applying *Oklahoma Press* standard Bowman's complaint stated a valid Fourth Amendment claim regardless of the actual seizure of her papers.

The courts below rejected *Oklahoma Press* and applied *Brower* instead. Bowman is a precedent, the only legal case of compulsory production, to be reviewed and dismissed under *Brower* standard. Bowman was not chased by the police but she was actually seized, and her papers were actually seized. Even under the "new" standard, *Brower*-on-compulsory-production, Bowman stated a valid Fourth Amendment claim because Bowman's person and papers were actually seized, willfully but unintendedly pursuant to an invalid writ of assistance.

The Tenth Circuit found that Bowman's seizure by the state-court was "reasonable." Pet. App. 8a. Bowman have not made allegations against the state-court. Bowman's claim is about respondent's perjury who under the color of law manipulated the state-court and used the court as a tool to achieve her goal.

The Tenth Circuit took wrong facts from respondent's Answer Brief when it described the sequence of the state proceedings. Pet. App. 2a-3a. The description of events in respondent's Answer Brief are incorrect and imply that Bowman was seized on 9/20/2018 and that she was not in compliance with the state-court order to compel. Resp. C.A. Br. 3-4. It is a state-court record that Bowman was seized on 7/27/2018, that respondent changed the deadline dates in the verbal order of 7/19/2018, and that respondent falsely claimed Bowman was not in compliance with the deadlines. These facts are indisputable. Respondent's misrepresentation of facts is not limited to the state-court lawsuit. In her pleadings to the federal district court and Tenth Circuit, respondent also made false statements of fact and law.

Tenth Circuit did not reverse the unconstitutional actions of district court. The Tenth Circuit did not comment on the ruling of "expectation of privacy" and the unconstitutional actions by Judge Browning who changed the NM statute in order to impose unconstitutional requirements on Bowman. Bowman appealed for a relief but the Tenth Circuit ignored that appeal.

REASONS FOR GRANTING THE PETITION

"EQUAL JUSTICE UNDER LAW". These words, written above the main entrance to the Supreme Court Building, express the ultimate responsibility of the Supreme Court of the United States, very much applicable to Petitioner's case.

Reason 1: Sixteen conflicting rulings demand review of this Court.

1. The Tenth Circuit's actions conflict *Ashcroft.* The courts below cannot

both dismiss a claim under Rule 12(b)(6) and reject the established standard for Rule 12(b)(6). The courts are not afforded discretion when deciding MTD under Rule 12(b)(6). "These are [Supreme Court's] commands, not suggestions." *Ramirez v. Guadarrama*, 2 F.4th 506, 518 (5th Cir. 2021). The commands are "must accept alleged facts as true", "should assume veracity of well-pleaded factual allegations", not dismiss if Bowman alleged "enough facts to state a claim to relief", and "must allow discovery." *Ibid.*

The courts below did exactly the opposite: absent determination of "insufficient factual matter," "conclusory allegations," or "naked allegations", the courts below did not accept Bowman's alleged facts as true, instead accepted respondent's allegations as true; the courts rejected the veracity of Bowman's factual allegations, and did not allow discovery because the courts already decided the merits of the disputed facts. The courts below not only rejected the commands of this Court, but also rejected the indisputable facts from the state-court record.

2. The Tenth Circuit rejected Bowman is entitled to a hearing under the Due Process Clause. The court below dismissed Bowman's claim finding Bowman had "sufficient" and "meaningful" process because Bowman was afforded hearings to confront respondent's perjury, and Bowman made court record on which she could appeal.

For more than 150 years this Court have ruled due process requires a hearing which must discuss the "constitutionally-protected right." Being afforded a

hearing to confront respondent's perjury does not meet that criteria. This Court has rejected the opinion that court process in itself is sufficient regardless of what it is safeguarding. There is no property interest in discussing respondent's false affidavits, and the purpose of a due process hearing must be "the protection of a substantive interest to which the individual has a legitimate claim of entitlement." *Olim* v. *Wakinekona*, 461 U.S. 238, 250 (1983) ("Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement."); see also *Fleury* v. *Clayton*, 847 F.2d 1229, 1231 (7th Cir. 1988) ("There is neither a `liberty' nor a `property' interest in procedures themselves ..."). Since Bowman was not afforded hearing on her property deprivation, the Tenth Circuit dismissal is in conflict with the standard of this Court and the fundamental principles of the Due Process Clause.

3. The Tenth Circuit also rejected NM law. The Circuit sidestepped Section 7-1-17 and 3.1.6.12(A) NMAC that are interpreted by NM courts to afford all NM taxpayers evidentiary hearing. The indisputable facts are simple, Bowman's property was taken but she did not have any evidentiary hearing on her property deprivation. Since Bowman did not obtain a judgment on her property deprivation, her state-court appeal also did not appeal her property deprivation. Therefore, regardless of the volume of the state-court record, none of that record contains Bowman's evidence or arguments on her deprivation. NM courts are unanimous, all taxpayers are afforded evidentiary hearing, and the Tenth Circuit violated the

Constitutions when it rejected the sovereign authority of the NM legislature to make law, and the NM courts to interpret that state law.

4. The Tenth Circuit rejected Bowman was discriminated under the Equal Protection Clause. The Tenth Circuit ruling is in conflict with the public facts that petitioner is the only taxpayer in NM for the last 30 years (864 protesting taxpayers) who was denied evidentiary hearing, and the only taxpayer in NM who was denied evidentiary hearing because the taxpayer could not disclose non-existing information requested by TRD. Bowman is the only taxpayer whose evidentiary hearing respondent eliminated. Bowman is a true case of a "class of one" (1 out of 864) where Bowman has been treated differently by respondent in every possible way. The Tenth Circuit rejected this public fact as true.

> "Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." (citations omitted) *Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564 (2000)

NM courts held Section 7-1-17 affords all taxpayers at least an evidentiary hearing. NM law describes in detail exactly which due process elements are afforded to taxpayers selecting administrative process: merits hearing, notice, cross examination, presentation of evidence, tax liability determination, and "all other rights essential to a fair hearing" (22.600.3.24(A) NMAC and Section 7-1B-8). Since due process should not discriminate, taxpayers, selecting the state-court as a tribunal such as Bowman, should be afforded the same due process elements (not

procedures) as taxpayers selecting administrative process.

The Tenth Circuit rejected this argument stating: "[u]nder this logic, one could commence a civil action under §7-1-26(E), defy all of the court's discovery orders, and still be entitled to a ruling on the merits" (Pet.App. 7a) and "***[Bowman] circumvented the usual process by disobeying the state-court's orders***[.]" (Pet.App. 6a.).

The Tenth Circuit's "logic" is in conflicts with the facts from NM protest hearings: respondent demanded the federal taxes of *Marduk Consultants* and *Bryan Huskisso*n, neither taxpayer complied and each taxpayer was still afforded evidentiary hearing. See Table of Authorities, In the Matter of the Protest of *Marduk Consultants*, D&O No. 20-13, and In the Matter of the Protest of *Bryan Huskisso*n, D&O No. 21-03.

The Tenth Circuit's "logic" conflicts the interpretation of NM courts. See *Gemini* (Pet. 6-8). The state must have "substantive evidence" of the property deprivation before a protest occurs. Section 7-1-29.1(C)(2). The taxpayer has the burden to produce evidence (Section 7-1-17), the state does nothing, and if the burden shifts, the state cannot rely on taxpayer's evidence to substantiate the deprivation. Respondent can obtain any tax record from IRS without Bowman's permission, and does not have standing to demand any specific "evidence" with a discovery order because if the taxpayer fails to provide the necessary evidence "the protest may simply be denied [after the evidentiary hearing]. In this scenario, there

is no need for the department to present any evidence." (emphasis added) *Gemini*, 531 N.M. at 629. The Tenth Circuit's ruling that Bowman can be discriminated against because she selected "civil action" in court not the administrative process is in conflict with the Equal Protection Clause. If a court finds NM law discriminates then Bowman's complaint should "convert" into **substantive** due process claim.

5. The Tenth Circuit's dismissal of due process claim was based on wrong assumptions. The Tenth Circuit made a ruling based on two disputed material facts: Bowman "disobeyed the court's orders" and "the discovery order was a valid order." Bowman disputed those facts and alleged otherwise in her complaint. Contrary to. *Ashcroft*, the Tenth Circuit rejected the veracity of Bowman's allegations, and made a ruling based on its own assumptions that the order to compel was valid order and that Bowman disobeyed it.

This Court ruled that invalid judicial order cannot be the grounds for valid sanctions. In *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964), this Court vacated and remanded a contempt conviction for reconsideration in view of the fact that "the District Court acted on the assumption that its order was valid."

The Tenth Circuit ignored the issue of "lex non cogit ad impossibilia" in conflict with this Court's ruling: "the justification for coercive imprisonment as applied to civil contempt depends upon the ability of the contemnor to comply with the court's order." *Shillitani* v. *United States*, 384 U.S. 364, 371 (1966). If Bowman's federal tax return does not exist, the sanctions against Bowman were improperly

entered. Respondent's own testimony provided a solid proof from the state-court record that the order to compel was invalid when it demanded non-existing record. See also *In re Grand Jury Proceedings*, 744 F.3d 211, 218 (1st Cir. 2014)("Because it was impossible for NITHPO [Bowman] to purge itself of contempt, the contempt order served no coercive purpose and was therefore improperly entered.")

6. The Tenth Circuit conflicts *Mooney*. The Tenth Circuit contradicted *Ashcroft* when rejected as true Bowman's allegation of respondent's perjury. Respondent's false affidavits are the core of Bowman's complaint. This Court ruled that being afforded an opportunity to confront respondent's perjury in state-court does not excuse respondent's "deliberate deception" on the state-court ten different times and does not dissolve the consequences of her "contrived" actions.

> "that [due process] cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured."
> *Mooney,* 294 U.S. at 112.

The Tenth Circuit was unperturbed by the sheer number of false affidavits uttered by respondent, but the Tenth Circuit is not authorized to reject the law established by this Court that government's use of perjured testimony is a denial of due process even if Bowman had "sufficient" due process. "State's knowing use of perjured testimony does constitute denial of due process and in violation of the Fourteenth Amendment." *Id.* at 103.

7. The Tenth Circuit's dismissal conflicts *Oklahoma Press* that Bowman's compulsory production claim does not state a valid Fourth Amendment claim because Bowman's tax records were not actually seized. This Court held that compulsory productions are "figurative" searches, do not require actual seizure, and present only the question of "the validity of authorized judicial orders." *Oklahoma Press,* 327 U.S. at 202. Under this standard Bowman's complaint stated a valid claim. Actual seizure of Bowman's private papers is irrelevant and not dispositive of her claim. Bowman's tax records to which the Tenth Circuit is referring do not exist and cannot possibly be seized, which provides a solid proof of the validity of the claim. The Tenth Circuit cannot reject respondent's own true testimony solidified in the state-court record.

8. The Tenth Circuit misapplied the "reasonableness" standard. Initially, the district court refused to "admit" Bowman was seized. Pet. App. 48a. Then, the district court admit it, but stated Bowman's seizure was not Fourth Amendment seizure because it was pursuant to an "order to compel," not an invalid "warrant." Pet. App. 32a. The Tenth Circuit changed that "opinion" again, ruling Bowman's detention actually occurred but the action of the judge was "reasonable," and therefore, Bowman failed to state "unreasonable" seizure of her person.

The Tenth Circuit's ruling is in conflict with Bowman's named parties. Bowman never filed a claim against the state-court and never alleged that state-court actions were "unreasonable." The actions of the state-court cannot be the focus

of any ruling of "reasonableness" and has no weight on Bowman's claim. Respondent manipulated and still manipulates the courts to do her "bidding." The executing officers [in this case, state-court] are not liable for executing a "defective" warrant. However, respondent's false affidavits supporting the warrant (*Franks*) or writ of assistance (*Oklahoma Press*) carries the full liability under the Fourth Amendment.

> It is a violation of the Fourth Amendment for an affiant to knowingly and intentionally, or with reckless disregard for the truth, make a false statement in an affidavit.
> *Franks* v. *Delaware*,438 U.S. 154, 171-72 (1978)

9. The Tenth Circuit "untimely" reasonableness determination contrary to law. The Tenth Circuit not only focused on the wrong party when deciding "reasonableness" but also contradicted judicial procedure in the timing of its analysis.

> We have long held that the "touchstone of the Fourth Amendment is reasonableness." *Florida* v. *Jimeno,* 500 U.S. 248, 250 (1991). Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances. In applying this test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.
> *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996)

The Tenth Circuit did not follow the instructions of this Court. Determining "reasonableness" is a fact-specific process after all the facts have been collected for a "totality of circumstances" analysis. Bowman's judicial process has been cut short of the fact-finding phase. The Tenth Circuit should be ruling on the MTD under Rule 12(b)(6) applying *Ashcroft* standard and the court's ruling of

"reasonableness" is premature, unauthorized by legal standard and contrary to the proper judicial due process of taking evidence, trial and jury.

10. The Tenth Circuit's ruling in conflict with *Brower's* facts. This Court applies *Brower* only in a narrow set of circumstances, seizure of a person in police pursuits. See *Brower*, 489 U.S. at 599, ("Seizure" alone is not enough for §1983 liability; the seizure must be "unreasonable."") There is no set of facts in Bowman's complaint or in the state-court record that indicate a police pursuit or Bowman's forceful termination of her movements. Over Bowman's many objections, the Tenth Circuit applied *Brower's* seizure standard to a set of facts never alleged by Bowman.

This Court have never applied *Brower* to a "seizure of private papers." With its ruling the Tenth Circuit created a fundamental rift with the Fourth Amendment protections. The Tenth Circuit's interpretation of *Brower* applied to compulsory production leads to the absurd conclusion that there is no violation of the Fourth Amendment if the government invades the sanctity of a person/papers with invalid or no judicial order as long as private papers are not actually seized. The implications of such interpretation are fatal to the guaranteed Fourth Amendment's protections, the Tenth Circuit is not safeguarding but allowing arbitrary government intrusions. This Court cannot allow such misinterpretation of its decisions. "The basic purpose of this [Fourth] Amendment, ***, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967).

11. The Tenth Circuit in conflict with "*Brower*-on-compulsory-production" standard. Applying *Brower* to compulsory production is in profound conflict with the Fourth Amendment's protections as shown earlier. But even so, Bowman's alleged facts are: respondent procured invalid order to compel, and respondent caused the actual seizure of Bowman's person and her private papers. Bowman's complaint met the *Oklahoma Press* compulsory production standard but Bowman's complaint also met the "*Brower*-on-compulsory-production" standard that the Tenth Circuit is insisting on using in Bowman's case. The Tenth Circuit dismissal is in conflict with its own "new" and self-imposed "*Brower*-on-compulsory-production" standard.

12. The courts below's "expectation of privacy" ruling conflicts the Constitution. Judge Browning did not rule at all on Bowman's "expectation of privacy" of her person since Judge Browning rejected her seizure was real. The district court ruled that Bowman waived her "expectation of privacy" of her federal tax return because Bowman filed a protest of her property deprivation. Judge Browning based his ruling on a "new" NM law, which Judge Browning made up, himself, by changing the text of NM statute, Section 7-1-8.4(A). Pet. 17-19.

Judge Browning's ruling is about Bowman's federal tax return compelled by the discovery order which respondent testified **does not exist**. Even though Judge Browning's analysis is irrelevant because the records do not exist, his ruling is in monumental contradiction with the Constitution, and this Court must reversed that ruling in order to restore Bowman's constitutional rights.

Judge Browning's analysis failed to distinguish between private, privileged and confidential information. This is a gross judicial error since records containing different types of information are subject to different protections and laws. Judge Browning considered privileged information to be the same as confidential, which is legally wrong. This Court have ruled that private papers (in one's possession) are protected by the Fourth Amendment, privileged papers are protected by the Fifth Amendment, and disclosure of confidential tax information (in NM) is governed by Section 7-1-8.4. Confidential tax information is simply Bowman's tax returns in the possession of TRD (and others).

It is clear that Judge Browning "skipped" the private and privileged protections under the Constitution and analyzed only disclosures of "confidential" information under Section 7-1-8.4(A). Bowman have not claimed any "expectation of privacy" in her confidential records, thus any discussion of Section 7-1-8.4(A) is not relevant to Bowman's complaint. It appears Judge Browning was unaware that confidential record is not the same as private or privileged, but this gross mistake does not make Judge Browning's ruling legal. The Tenth Circuit refused to correct this gross judicial error when Bowman objected. Now, this Court must correct this illegal decision and reverse it as contrary to law and the Constitution.

This Court and IRS held that tax records are compulsory (*Garner* v. *United States*, 424 U.S. 648, 652 (1976)) and in one's possession they are also privileged (*Fisher* v. *United States*, 425 U.S. 391 (1976)). If Bowman's tax returns

are privileged (when in her possession) they are not discoverable; they are also under the protection of the Fifth Amendment (civil tax cases) and the "expectation of privacy" analysis does not apply to such records. Therefore, from the beginning, Judge Browning's analysis whether Bowman has "expectation of privacy" in her tax records is defective and in conflict with the Fifth Amendment and all decisions of this Court on privileged information.

The "expectation of privacy" analysis is performed only under the Fourth Amendment because the "zone of privacy" could be breached with a valid warrant or writ of assistance. Bowman's seizure on 7/27/2018 and the seizure of her private papers (form 4506 and form1040) were under the protection of the zone of privacy, but "breachable" with a valid writ of assistance. This is what Judge Browning did not analyze and did not rule on, but this is what Bowman's complaint is about.

This Court decides "expectation of privacy" using the standard in *Katz* v. *United States,* 389 U.S. 347, 361, (1967) ("search triggering the Fourth Amendment occurs when the government violates an "expectation of privacy" that "society is prepared to recognize as 'reasonable'.) The Fourth Amendment plain text includes protection of one's person and papers and, accordingly, this Court holds: "[o]ne's privacy embraces what the person has in his home, his desk, his files, and his safe as well as what he carries on his person." *Couch* v. *United States*, 409 U.S. 322, 343-44 (1973). Undeniably, our society, the Constitution, and this Court have recognized the "expectation of privacy" of one's person and the papers in one's possession.

The district court ruling that protesting property deprivation automatically waives person's "expectation of privacy" is in conflict with the Fourth Amendment and this Court's decisions. The Fourth Amendment does not prohibit "invading" one's privacy zone with a valid judicial order but taxpayer's filing a protest does not qualify as being a warrant or writ of assistance.

13. The courts below denied Bowman Fifth Amendment protection.

In the sphere of taxes in civil cases and investigations, Bowman is entitled to the Fifth Amendment protection of her privileged tax information in her possession. Bowman objected on the grounds that regardless of whether the order to compel was valid or not, compelling her tax information would be a violation of her Fifth Amendment rights. See Bowman's Motion to Alter or Amend (Doc.56, 21-22.)

> to the extent that an unincorporated sole proprietorship is not a "collective entity," and its [tax] documents are therefore entitled to Fifth Amendment protection. See *United States* v. *Doe*, 465 U.S. 605, 612–14, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984) (holding that the compelled production of a sole proprietorship's [tax] records would violate the Fifth Amendment).
> *Oberlander* v. *United States*, 971 F.3d 40, 56 (2d Cir. 2020)

The courts below denied Fifth Amendment protection to Bowman, ruling Bowman's argument does not cure that "actual search and seizure" did not occur. The court was wrong again, that fact only proves Bowman did not waive her Fifth Amendment rights for these records voluntarily. Bowman's Fourth Amendment "zone of privacy" could be invaded with a valid writ of assistance but the protections under the Fifth Amendment are absolute for privileged records. The only reason why Bowman did not include in her complaint a claim of Fifth Amendment violation

by respondent is because Bowman's federal tax return does not exist as testified by respondent and as verified by a tax professional.

Since the district court decided that it will rule on "expectation of privacy" of non-existing records then the court cannot deny Bowman's protection under the Fifth Amendment on those non-existing records, such an act of denial is simply unconstitutional. This Court must reverse the entire "expectation of privacy" ruling as being in conflict with the Fifth Amendment. "An unconstitutional act is not a law; it binds no one, and protects no one." *Huntington* v. *Worthen,* 120 U.S. 97, 101-02 (1887).

14. The courts below rejected NM law, Rule 11-502 NMRA which affords NM taxpayers the privilege of non-disclosure of tax records. "We hold that the Act, whose taxpayer confidentiality provisions are properly recognized and utilized to create an evidentiary privilege against disclosure of tax information by Rule 11-502, bars discovery of Schneider's [taxpayer's] gross receipts tax information." (emphasis added) *Breen,* 2012-NMCA-101 ¶3.

The federal tax returns demanded in the order to compel do not exist, but if they existed Bowman's tax return is privileged, and non-discoverable. The Fifth Amendment protects such records and NM law, Rule 11-502, specifically affords non-disclosure privilege of Bowman's tax returns regardless of being federal or state tax records. Judge Browning's ruling that Bowman's tax return is non-privileged is in square conflict with NM law, Rule 11-502.

15. Judge Browning "engage[d] in ad hoc rule-making and waiver analysis" of privileges contrary to NM law. See Rule 11-511 NMRA, *Breen* (2012-NMCA-101 ¶¶28, 33), and *Public Service Company* (129 N.M. at 492):

> "we hold that our courts must adhere closely to waiver as defined in Rule 11-511 [voluntary waiver] and are not free to engage in ad hoc rule-making and waiver analysis as requested by Defendants." (emphasis added) *Ibid.*

Undeniably, Rule 11-502 affords taxpayers the privilege of non-disclosure of tax records. Judge Browning's "ad hoc rule making" involved changing Section 7-1-8.4(A) and creating a new statutory requirement waiving Bowman's privilege of non-disclosure because she filed a protest. In NM, the "at issue" doctrine is not authorized by law, waiver of privileges is only voluntary, and filing a constitutionally-protected protest does not waive any of Bowman's privileges. This "new waiver" of privilege imposed by Judge Browning is in violation of the Constitutions and in direct conflict with a specific NM law.

16. The courts below rejected NM law in *Harger* and 3.2.105.7 NMAC. When Judge Browning decided, sua sponte and without reference to law, that Bowman's federal tax returns are relevant to her issue on "employee-independent contractor", his ruling was in direct conflict with all decisions of IRS and NM hearing officers (quasi-judges) presiding over protest hearings of the same issue. See all protest hearings in Table of Contents, *Eaton* v. *Bureau of Revenue*, 84 N.M. 226 (N.M. Ct. App. 1972), *Bartels* v. *Birmingham*, 332 U.S. 126 (1947), *Goldberg* v. *Whitaker House Coop.*, 366 U.S. 28 (1961), and many more. Judge Browning's ruling

is erroneous because it is in conflict with 80 years of decisions of this Court on the issue of "employee-independent contractor," and in conflict with NM precedents and regulations.

Reason 2: <u>This Court must reverse illegal legislative actions by the courts below.</u> Petitioner may be the only case where the federal court changed NM law, admitted doing so, but refused to correct its illegal action. Judge Browning did not rule by the law, he changed the law to accommodate his ruling. This Court must prevent anarchy in the circuits. The real text of Section 7-1-8.4(A) has never been challenged, its plain text is unambiguous and it is in perfect harmony with other statutes and the Constitutions. <u>Section 7-1-8.4(A) is not even relevant to Bowman's claims</u>. Discussions were offered in this petition (at 17-19, 32-38).

Judge Browning justified his actions with *Breen,* 2012-NMCA-101, ¶27, where the ruling in ¶27 involved Section 7-1-8.4 and inapplicable to Bowman since she did not claim "expectation of privacy" of her confidential papers. However, Judge Browning's ruling is in conflict with *Breen* decisions on privileged papers, *Id.* at ¶¶3, 28, 33, which confirmed Rule 11-502 affords taxpayers non-disclosure for tax returns. Judge Browning's ruling is also in conflict with *Breen* decision on waiver of privileges which confirmed Rule 11-511 allows only voluntary waiver (*Id.* at ¶34, "we note that only the taxpayer has the ability to waive the privilege, as only the taxpayer possesses the privilege.") If Judge Browning had ruled according to *Breen,* he would not have reached his illegal decision.

Judge Browning justified his action with the decision of the New Mexico Court of Appeals (NMCA) on Bowman's appeal. Pet. App. 55a. This justification with NMCA's unreported opinion is unconvincing if Judge Browning ruling is in conflict with 1) Bowman's absolute right of non-disclosure under the Fifth Amendment, 2) the undeniable NM rights of non-disclosure under Rule 11-502 of tax returns, 3) the "voluntary only" waiver in Rule 11-511, and 4) the NM reported precedents in *Breen* and *Public Service Company*. Judge Browning's "judicial notice" of NMCA's decision of Bowman's appeal is in conflict even with the Tenth Circuit instructions "that when a district court considers its own files and records in ruling on a Rule 12(b)(6) motion, the documents may only be considered to show their contents, not to prove the truth of matters asserted therein." (emphasis added) *Johnson* v. *Spencer*, 950 F.3d 680, 705 (10th Cir. 2020) (internal quotations and citation omitted).

Judge Browning quoted *Stohr* v. *N.M Bureau of Revenue*, 1976-NMCA-118, but only the favorite "dicta" from an unrelated precedent. If Judge Browning had actually read this case, he would have judicially noted that *Stohr*, a NM taxpayer, was afforded all due process elements, not afforded to Bowman such as a hearing where he presented his evidence and arguments. In *Stohr*, two different tribunals considered his evidence to make a decision on taxpayer's property deprivation, and the courts did not compel his privileged papers. In *Stohr*, the court used the "right to control" criteria (3.2.105.7 NMAC) to rule on his issue of

"employee-independent contractor."

Bowman appealed for a relief from Judge Browning's ruling that his "new statutory waiver" of privileged records is not authorized by law and the Constitutions but the Tenth Circuit did not reverse the illegal legislative action of the district court they are supervising. Now, this Court must protect the Constitutions and reverse the illegal ruling.

Reason 3: <u>Petitioner's case is a precedent</u> of colossal proportions where sixteen different times the courts below made decisions in conflict with this Court's rulings, and where the court below conducted a legislative act in violation of the US and NM Constitutions. Petitioner is the only compulsory production case to be reviewed under *Brower*, not *Oklahoma Press;* the only compulsory production case dismissed when Bowman's complaint met *Oklahoma Press* and *Brower* standard; the only NM taxpayer denied evidentiary hearing; the only person denied her Fifth Amendment rights; the only person sanctioned for not disclosing non-existing records; the only complaint dismissed under Rule 12(b)(6) where the court rejected all alleged facts and the indisputable facts from another court's record. This Court must grant the writ and resolve this unique precedent. This Court must assert its authority and not let anarchy reign.

CONCLUSION

The courts below rejected every legal standard established by this Court. For the reasons above the writ of certiorari should be granted.

Respectfully submitted,

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