No. _____

In The
Supreme Court of the United States

DAVID MICHAEL BISHOP and SLIM VENTURES, LLC,

Petitioners,

v.

UNITED STATES, INTERNAL REVENUE SERVICE, and TIMOTHY BAUER, Internal Revenue Agent (ID #0324589),

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

DANIEL E. WITTE, ESQ.
PEARSON BUTLER, LLC
1802 W. South Jordan Parkway,
Suite 200
South Jordan, UT 84095
(801) 495-4104
dan@pearsonbutler.com
Attorney for All Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

QUESTION #1.

Is the United States Internal Revenue Service[1] summons process subject to quashing and constraint by operation of the First Amendment as interpreted through this Court's line of precedents governing use of regulation and investigation tactics to chill or retaliate against disfavored First Amendment expression, including, inter alia, *Bantam Books, Inc. v. Sullivan,*[2] *303 Creative LLC v. Elenis,*[3] and this Court's pending decision in *Missouri v. Biden*[4]?[5]

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[1] Collectively, the Internal Revenue Service, Internal Revenue Agent (ID #0324589) with the pseudonym "Timothy Bauer" in his official capacity are the "IRS"; the IRS in connection with the Executive Branch is collectively the federal "Government."

[2] 372 U.S. 58, 59-64, 67 (1963) (hereinafter "*Bantam Books*").

[3] 600 U.S. 570, 589, 594, 600-01, 603 (2023) (hereinafter "*303 Creative*").

[4] ___ F.Supp.3d ___, 2023 WL 4335270 *73 (116 Fed.R.Serv.3d 559) (W.D. La.) *aff'd in part,* 83 F.4th 350, 359-68, 372-73, 377-94, 398 (5th Cir. 2023), *cert. granted, Murthy v. Missouri,* 144 S.Ct. 7 (2023) (hereinafter collectively "*Biden*").

[5] Hereinafter *Bantam Books*, *303 Creative*, *Biden*, and derivative precedents such as *White v. Lee,* 227 F.3d 1214, 1226-28 (9th Cir. 2000), *Otto v. City of Boca Raton, Florida,* 981 F.3d 854, 859-872 (11th Cir. 2020), *rehearing en banc denied,* 41 F.4th 1271 (11th Cir.); *Høeg M.D. v. Newsom,* 652 F.Supp.3d 1172, 1178-79, 1183-1191 (E.D. Cal. 2023), *Lightborne Pub., Inc. v. Citizens For Community Values,* 2009 WL 778241 *2, 7-8 (S.D. Ohio), and *ACLU v. City of Pittsburgh,* 586 F.Supp. 417, 421-25 (W.D. Pa. 1984) are collectively denoted the "***Bantam* Precedents**."

QUESTIONS PRESENTED—Continued

(The United States Court of Appeals for the Tenth Circuit[6] ruled[7] **NO**,[8] the *Bantam* Precedents don't apply to an IRS's investigation and summons at all and thus cannot be invoked to constrain, tailor, or quash an IRS summons.)

QUESTION #2.

In light of statements in *U.S. v. Clarke*,[9] and *U.S. v. Powell*[10] that tax summonses may be quashed or stayed "on any appropriate ground" and not just those in the core *Powell* factor test, may a taxpayer invoke as independent and/or additional bases for quashing an IRS summons the standards from the *Bantam* Precedents and/or other precedents and the post-*Powell* 26 U.S.C. § 7602(e) statute[11] (prohibiting "use" of a

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[6] Hereinafter the "Tenth Circuit."

[7] App. 1-29, Docket Number("DN") 010110962261, Court of Appeals, for Case Nos. 23-4020, 23-40121, 23-4022, 23-4026 and 23-4027, also at *Bishop v. U.S.,* 2023 WL 8368424 (10th Cir. 2023) (***hereinafter the challenged "Order and Judgment," "decision," "ruling," "opinion," "Order," or "O."***).

[8] *E.g.* App. 27, 27 n.9.

[9] 573 U.S. 248, 250, 254-55 (2014) (*citing Reisman v. Caplin,* 375 U.S. 440, 449 (1964)).

[10] 379 U.S. 48, 58 (1964).

[11] Petitioners contended § 7602(e) constituted an independent ground to quash IRS summonses but also operates in tandem with, and in modification of, 26 U.S.C. § 7605(b) ("Restrictions on examination of taxpayer.—No taxpayer shall be subjected to unnecessary examination or investigations . . ."), and a line of simpatico post-*Powell*, extra-*Powell* federal precedent principles for quashing and narrowing summonses (*see, e.g., Highland Capital*

QUESTIONS PRESENTED—Continued

"financial status or economic reality examination technique[]" to try to "determine the existence of unreported income of any taxpayer" without "a reasonable indication that there is a likelihood of such unreported income")?

(The Tenth Circuit ruled **NO**,[12] the core *Powell* factor test is Petitioners' only avenue for quashing a summons, and neither the *Bantam* Precedents nor 26 U.S.C. § 7602(e) can serve as grounds for quashing or tailoring an IRS summons.)

QUESTION #3.

Can an IRS agent obtaining IRS summonses enforcement rest his articulation of support for a purportedly legitimate *Powell* purpose in a *Clarke* declaration[13] solely upon the agents' own declaration assertion of a purported verbal confession from a targeted taxpayer who denies

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Man. L.P. v. U.S., 626 Fed.App'x 324, 328 (2d Cir. 2015), *U.S. v. Monumental Life Ins. Co.,* 440 F.3d 729, 726-37 (6th Cir. 2006), *U.S. v. Citizens State Bank,* 612 F.2d 1091, 1094-95 (8th Cir. 1980), *U.S. v. Goldman,* 637 F.2d 664, 667-68 (9th Cir. 1980), *U.S. v. Coopers & Lybrand,* 550 F.2d 615, 617, 619-21 (10th Cir. 1977), *U.S. v. Theodore,* 479 F.2d 749, 754 (4th Cir. 1973), *U.S. v. Matras,* 487 F.2d 1271, 1275 (8th Cir. 1973), *U.S. v. Solomon,* 437 F.2d 110 (5th Cir. 1971), and *Venn v. U.S.,* 400 F.2d 207, 210, 212 (5th Cir. 1968) (collectively, along with *Clarke* and *Reisman*, the "**Other Appropriate Grounds Precedents**").

[12] *E.g.* O. at App. 11-12, 14-16, 20-21, 20 n.8, 22-24, 25-27.

[13] *Clarke,* 573 U.S. at 250 (explaining IRS agent "affidavit" summonses procedure).

QUESTIONS PRESENTED—Continued

ever having made the confessional statement at all, without the agent first corroborating the alleged confession with a recording or document or other form of supporting evidence and without undergoing any *Clarke* Evidentiary Hearing[14] or testimonial cross-examination of any kind per request from the taxpayer who factually disputes having made any taxpayer confession to the agent?

(The Tenth Circuit said **YES**.[15])

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[14] *Id.* at 254-55 (announcing a "rule" that "As part of the adversarial process concerning a summons's validity, the taxpayer is entitled to examine an IRS agent when he can point to specific facts or circumstances plausibly raising an inference of bad faith. Naked allegations of improper purpose are not enough: The taxpayer must offer some credible evidence supporting his charge. But circumstantial evidence can suffice to meet that burden; after all, direct evidence of another person's bad faith, at this threshold stage, will rarely if ever be available. And although bare assertion or conjecture is not enough, neither is a fleshed out case demanded: The taxpayer need only make a showing of facts that give rise to a plausible inference of improper motive.") (hereinafter the aforementioned quote is the "***Clarke* Evidentiary Hearing Rule**" "***Clarke* Evidentiary Hearing**" or "***Clarke* Hearing"**).

[15] *E.g.* O. at App. 6-7, 11-12, 18, 20-21, 28.

PARTIES TO THE PROCEEDINGS

The parties to proceedings include appellants David Michael Bishop and Slim Ventures, LLC. Both were petitioners before the United States District Court, District of Utah, and appellants before the United States Court of Appeals for the Tenth Circuit. The United States, Internal Revenue Service, and "Timothy Bauer,"[16] Internal Revenue Agent (ID #0324589), were respondents and cross-petitioners before the District Court and appellees before the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

David Michael Bishop is a natural person. Slim Ventures, LLC, is a limited liability company, and there is no parent or publicly held company owning any stock or equity interest in Slim Ventures by any parent corporation or publicly traded corporation within the meaning of Rule 29.6.

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[16] "Timothy Bauer" is the Internal Revenue Service's pseudonym for their purported agent. Since a *declaration* was used rather than a *Clarke* Affidavit (i.e. an affidavit signed in the presence of a notary or other independent third party who has matched the signor against an official photo identification), and no agent has actually been presented in any court at any time for examination or cross-examination, and no recording or documentation has been presented in regard to the alleged existence or actions of the agent, neither the courts nor petitioners know if the IRS agent "declaration" was fabricated or ghostwritten. Appellants don't concede such points in disclosing "Timothy Bauer" as a "party."

RELATED CASES

This petition is the result of eight IRS summonses with related proceedings to quash in the United States District Court, District of Utah, 2:22-cv-00340, 2:22-cv-00341, 2:22-cv-00344, 2:22-cv-00345, 2:22-cv-00347, 2:22-cv-00340, 2:22-cv-00351, 2:22-cv-00352. Three of the cases were not appealed due to mootness (the target financial institutions reported no responsive documents).[17]

Also, in a final stipulated judgment which occurred over twenty years ago between the parties, *U.S. v. Bishop et al.,* 2:03-cv-01017 (D. Utah Dec. 5, 2003) (¶¶2-3), Bishop was expressly **not** declared or admitted to have done anything wrong, but agreed (simply to avoid the nuisance cost of further harassment from the IRS) to refrain from advocating the specific theory

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[17] A fourth case deemed moot by the District Court was appealed because the District Court judge acted in a hasty and incomplete manner such that the comprehensive court decisions applying to ***all*** summonses were actually only filed by the judge on the docket for ***one*** of the cases (District Court Case No. 2:22-cv-00340-DBB, the lowest numbered case, which was appealed as No. 23-4020), which he had deemed moot. Thus, appealing that moot case was necessary to get the docket technically reported and comprehensively into the record for the Tenth Circuit to be able to consider the other four cases with summonses not deemed moot by the District Court.

The situation caused confusion in the Order and Judgment (O. at App. 11 n.7, erroneously stating "petitioners failed to dismiss No. 23-4020" "for some unexplained reason" even though the Zions Bank summons had been ruled "moot").

RELATED CASES—Continued

(which the IRS disputed) that "taxpayers, typically those who were self-employed" might be able "to defer or avoid taxes by forming a foreign corporation which 'leased' their labor back to their business in the United States."[18] As discussed in footnote 49 herein, this present case doesn't involve anything involving labor lease-back topics or activity, so it is Petitioners' position the two cases aren't "related."

However, aside from the aforementioned cases, there are no other separate federal or state court cases which are related, or are arguably related, to the summonses or petition currently before this Court.

[18] O. at App. 3-4, 16; *see also U.S. v. Bishop et al.,* 2:03-cv-01017 (D. Utah Dec. 5, 2003) (¶¶2-3) (final stipulated judgment).

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INTRODUCTION

Appellant Petitioners David Michael Bishop ("Bishop") and Slim Ventures, LLC ("Slim Ventures")[19] posted an "Executive Summary"[20] and supporting research criticizing the Biden Administration's IRS in regard to selective and inconsistent tax treatment of monetized installment sales[21] ("MIS") transactions. A secret unit of the IRS which systemically monitors the internet speech of all Americans then contacted Petitioners, forced Petitioners to de-post Petitioners' Executive Summary and related materials, and unleashed a sweeping generalized investigation of Petitioners to scour Petitioners' financial and commercial dealings for any indication of any tax violation by Petitioners or anyone with a commercial relationship to Petitioners. This included cluster-bombing eight IRS summonses[22] on four different financial institutions, each containing dragnet demands to turn over every conceivable financial record about Petitioners for the past five years. Petitioners raised First Amendment and other grounds for quashing the summonses in federal court, asserting use of investigation to censor, chill, and retaliate against Petitioners' First Amendment expression, and

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[19] Collectively, Bishop and Slim Ventures are "Petitioners" or "Appellants."

[20] App. 113-27.

[21] 26 U.S.C. § 453(a-d) and App. 82-83.

[22] For excerpts of three of the substantively identical summonses, *see* App. 93-105.

the IRS asserted crossing requests for summonses enforcement, leading to the present petition.

DECISIONS BELOW

The Order and Judgment[23] of the United States Court of Appeals for the Tenth Circuit ("Court of Appeals" or "Tenth Circuit") for which certiorari is requested was filed on December 4, 2023, and this petition was timely filed within ninety days[24] thereafter. The Internal Revenue Code creates cause of action, specialized procedures, and federal question subject matter jurisdiction allowing Appellants as taxpayers to bring their petitions in the United States District Court of Utah to quash an Internal Revenue Service summons seeking to obtain the financial, tax, and related records pertaining to a taxpayer; the Code also expressly authorizes appellate jurisdiction for federal appellate review.[25]

Appellants[26] took five related cases on appeal to the United States Court of Appeals for the Tenth Circuit, including Appeal Case Nos. 23-4020, 23-4021, 23-4022, 43-4026, and 23-4027, which included four

[23] App. 1-29.

[24] Supreme Court Rule 13.2; 28 U.S.C. § 2101(c).

[25] *E.g.* 26 U.S.C. § 7609(h)(1); *see also* 26 U.S.C. § 7609(b)(2)(A); 26 U.S.C. § 7609(d)(2); 28 U.S.C. §§ 1291, 1294(1); *Clarke*, 573 U.S. 248; *Powell*, 379 U.S. 48.

[26] Collectively, Bishop and Slim Ventures are "Petitioners" or "Appellants."

petitions ("Four Cases") with four summonses ("Four Summonses") not technically moot and sought to be quashed: District Court Nos. 2:22-cv-00344, 2:22-cv-00345, 2:22-cv-00351, and 2:22-cv-00352.[27]

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[27] Petitioners are each associated with four petitions and four summonses, for a collective total of eight petitions and eight summonses, in connection with, as relevant, Civil Nos. 2:22-cv-00340, 2:22-cv-00341, 2:22-cv-00344, 2:22-cv-00345, 2:22-cv-00347, 2:22-cv-00348, 2:22-cv-00351, and 2:22-cv-00352 (collectively, the "Eight Cases"), involving Internal Revenue Service ("IRS") summonses targets Key Bank, Zions Bank, Wells Fargo, and Summit Crest. O. at App. 9 n.6; App. 60-67; App. 93-105 (illustrative excerpts of three summonses).

The District Court found that four summonses related to Key Bank and Zions Bank (Civil Nos. 2:22-cv-00340, 2:22-cv-00341, 2:22-cv-00347, 2:22-cv-00348) were all moot because those banks had already responded to the summonses to tell the IRS the summonses were meritless in that there were no responsive documents, and the IRS represented to the Court that the IRS had no interest in trying to further enforce those summonses. O. at App. 10-11, 11 n.7; App. 35 n.1, 45. The Four Summons/cases remaining, 2:22-cv-00344, 2:22-cv-00345, 2:22-cv-00351, and 2:22-cv-00352, involve targets Summit Crest (which has already told the District Court in writing it had no responsive documents, *see* Tenth Circuit Appendix (hereinafter "R—") R000101 (2:22-cv-00340, DN 16-2 at 1)) and Wells Fargo; the District Court ordered productions for the four summonses associated with them. App. 59, 59 n.120.

Over objection, and because of his haste and refusal to hold any conference or hearing, District Court Judge Barlow left complete docket entries in connection with only one of the cases. As per Tenth Circuit personnel, Petitioners dropped from appeal three summonses related to Key Bank and Zions Bank (Civil Nos. 2:22-cv-00341, 2:22-cv-00347, 2:22-cv-00348), appealed only 2:22-cv-00340 (the lowest number with the most complete District Court docket), 2:22-cv-00344, 2:22-cv-00345, 2:22-cv-00351, and 2:22-cv-00352 (these four involve summonses targets Summit Crest and Wells Fargo), and paid five filing fees. To avoid

The Utah District Court reneged on assurances for hearing in a December 22, 2022 Order[28] and a January 3, 2023 Order Referring Case to Magistrate[29] and issued an ambush denial of Petitioners' request to quash and simultaneous grant of the IRS' request to enforce summonses, by entering **1)** a January 9, 2023, *Memorandum Decision And Order Granting Respondents' Motion To (1) Summarily Deny Petitions To Quash IRS Summonses And (2) Enforce The Summonses And Denying Petitioners' Motions To Quash*;[30] **2)** a January 9, 2023, *Judgment In A Civil Case* for each of the eight cases;[31] and **3)** a February 22, 2023, *Memorandum Decision And Order Denying [32] Motion For Relief From Order And Judgment, And/Or To Stay Judgment, And/Or To Stay Execution On Judgment Pending Appeal*[32]. Notice of appeal from, inter alia, those dispositions was timely[33] filed on February 22, 2023.

confusing this Court, **Petitioners' adapted citation solution will, as it did below, continue to cite to the 2:22-cv-00340 docket, which has the lowest case number, contains the most complete copy of documents from the eight cases.**

[28] App. 32.

[29] App. 33. Despite initial assurances from orders and Court personnel, no hearing or conference of any kind was ever held by the District Court, notwithstanding motion requests before and after. App. 35, 35 n.3; 69 (denial of hearings).

[30] App. 34-59.

[31] App. 60-67.

[32] App. 68-81.

[33] R000254-288 (notice of appeal); *see*, *inter alia*, Fed.R.App.P. 3, 4.

STATEMENT OF JURISDICTION

The Order and Judgment[34] of the United States Court of Appeals for the Tenth Circuit for which certiorari is requested was filed on December 4, 2023; this petition was timely filed within ninety days[35] thereafter. This Court's subject matter and appellate jurisdiction is recognized under federal statutes and prior Court precedents.[36]

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First, Fifth, and Fourteenth Amendments to the United States Constitution govern this appeal, along with 26 U.S.C. § 7605(b) ("Restrictions on examination of taxpayer.—No taxpayer shall be subjected to unnecessary examination or investigations . . . ") and the post-*Powell* modification to that statutory scheme to further protect taxpayers 26 U.S.C. § 7602(e) ("The Secretary shall not use financial status or economic reality examination techniques to determine the existence of unreported income of any taxpayer unless the Secretary has a reasonable indication that there is a

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[34] O. at App. 1-29.

[35] Supreme Court Rule 13.2; 28 U.S.C. § 2101(c).

[36] *E.g.* 26 U.S.C. § 7609(h)(1); *see also* 26 U.S.C. § 7609(b)(2)(A); 26 U.S.C. § 7609(d)(2); 28 U.S.C. §§ 1291, 1294(1); *Clarke*, 573 U.S. 248; *Powell*, 379 U.S. 48; Neither the IRS nor any court below disputes the four remaining active summonses are not moot. *Church of Scientology v. U.S.*, 506 U.S. 9, 11, 13, 18 (1992).

likelihood of such unreported income."). The text of each provision, including the most relevant verbiage of each in bolded italics, is set out in Appendix ("App.") 82-86, along with some other relevant statutory provisions from the litigation and referenced in the Tenth Circuit's Order.

STATEMENT OF THE CASE

I. Factual Background

Bishop is an attorney with extensive experience in financial tax planning. Slim Ventures is an entity through whom Bishop works and renders services to clients. Petitioners cited and posted some scholarly analysis on their website[37] telling internet users that MIS appears to be legal under existing statutes, case law, and scholarly analysis[38] in the field.[39] Petitioners'

[37] Petitioners' cited and posted materials, which the IRS agent forced to be de-posted, included an "Executive Summary" (App. 113-27) and various articles, scholarly explanations, references to developments from the IRS and the courts in the law, etc., of the kind many law firms post on their websites to stir the pot, create reasons for the public to visit the site, and persuade others that the author has a sharp professional intellect. The IRS hasn't disputed the authenticity of the copious source materials which were referenced, quoted, linked, and/or otherwise included on Petitioners' site.

[38] *E.g.* Robert S. Bernstein, *Monetizing Installment Sales Transactions*, J. CORPORATE TAXATION (Nov/Dec 2004); Michael Packman, *Utilizing Installment Sales Instead Of 1031*, NYREJ (Nov 17, 2020).

[39] The IRS and Tenth Circuit (O. at App. 2) conceded installment sales are expressly allowed by 26 U.S.C. § 453(a-d), and

web postings and source materials[40] also pointed out that the IRS had issued various past materials endorsing or allowing MIS, and that the IRS was currently allowing well-resourced, well-connected companies and entities to use MIS. One message which could be inferred from the postings was the IRS is hypocritical, inconsistent, selective, and discriminatory in favor of the ultra-rich in terms of how the IRS has been interpreting, applying, and enforcing its approach(es) to MIS.

The IRS and the Biden Administration strongly disliked Petitioners' views about the legality of MIS and the depiction of the IRS and Administration as allegedly inconsistent and preferential in affording MIS to elite, wealthy, well-connected well-lobbied, influential taxpayers, compared to others of lesser wealth and influence. The IRS admits[41] that in 2021 a

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were unable to point to any court precedent where MIS had actually been disallowed. However, at one juncture (O. at App. 24) the Tenth Circuit incorrectly and inconsistently insisted it was unaware of Petitioners' citations to, inter alia, 26 U.S.C. § 453, *In re Martin*, Case No. 8-13-bk13134-TA (C.D. Cal. Bk. 2014), at Doc 87 (an order, a copy of which was provided to the Tenth Circuit at R000130-134, and available at App. 87-88, 89 ¶2, utilizing MIS as the foundation for an entire bankruptcy plan resolution), as well as law review articles, and earlier IRS literature, all indicating MIS use was allowed.

[40] App. 113-27; *see also*, *e.g.*, footnote 38 citations, *and also* R000070-75, 000111-157 in Tenth Circuit Appendix.

[41] *See*, *e.g.* App. 107 ¶¶4-6 ((R000065 (2-22-cv-00340, DN 13-1)) (***IRS Agent's declaration, submitted by the IRS (relevant excerpts submitted as an exhibit), attests Petitioners were detected, selected, targeted for investigation solely based on "material" "downloaded" from Petitioners' "website" which***

secret undercover IRS "Revenue Agent"[42] for a secret IRS program housed under the "Lead Development Center" ("LDC") within the IRS' Office of Promoter Investigations ("OPM") targeted and instigated an investigation (with subsequent summonses) ***solely*** on the (illegal) criteria of Petitioners' ***speech content on the internet***;[43] the IRS did ***not*** utilize speech-neutral[44]

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involved "promotion of MIS" views disfavored by the IRS)). Voluntary, open admission against interest under oath before a court is of course very powerful (and often conclusive) admissible evidence, not "conjecture."

[42] The purported secret IRS Agent (ID #0324589) was known only by his pseudonym "Timothy Bauer" and someone signed a declaration that way. App. 106-07. The District Court (App. 35, 73, *see also* O. at App. 10, 12, 18-19) repeatedly refused to allow any confrontation or cross-examination regarding the "Bauer" declaration, in any courtroom hearing or *Clarke* Hearing or otherwise, despite earlier orders (*e.g.* App. 32, 33) acknowledging a hearing was needed.

[43] The IRS eventually *de facto* admitted, and did not dispute, that it has a secret internet speech surveillance program; the OPM/LDC exists; and Petitioners were targeted through the surveillance program and summonses due to ***speech*** in Petitioner's "Executive Summary" posted on the internet (not any tax return filed or not filed, whistleblower tip, consumer complaint, collection of delinquent sum, or other pre-existing non-speech conduct of Petitioners). O. at App. 5 n.2; O. at App. 16 ("To be sure, the record indicates that the IRS first became aware of Slim Ventures because of information contained on Slim Ventures' web site promoting MIS.").

[44] "Speech-neutral methods" are defined to include, for example, *randomized audit selection or sampling processes* to select subjects for tax audits, pre-existing review of *inculpating tax returns from taxpayer and/or others*, inculpating *documents and information from third-party non-IRS sources*, issues from review of *public records*, criminal or civil *findings of misconduct*, and other targeting based on accused preexisting specific ***conduct***,

means or criteria. The IRS targeted Petitioners for investigation, auditing, and summonses expressly because the IRS did not like the content of the views promulgated on Petitioners' web site, as was expressly admitted in IRS Agent Bauer's declaration[45] and stated by someone self-identifying as "Agent Bauer" during contact with Bishop. The IRS asserts 26 U.S.C. § 6700[46]—which doesn't mention MIS and sets a very high bar even when an actual specific tax "plan" is involved—bestows this authority.[47]

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but ***doesn't*** include internet surveillance to select investigation and summonses targets based on taxpayer ***viewpoint expression***.

[45] *See*, *e.g.* App. 107 ¶¶4-6 (***IRS Agent's declaration, submitted by the IRS (relevant excerpts submitted as an exhibit), attests Petitioners were detected, selected, targeted for investigation solely based on "material" "downloaded" from Petitioners' "website" which involved "promotion of MIS" views disfavored by the IRS***); O. at App. 16.

[46] 26 U.S.C. §§ 6700(a)(1)(A)(iii), and 6700(2)(A) doesn't trump the First Amendment; it seeks to comply with the First Amendment by setting a very high "reason to know is false or fraudulent as to any material matter" minimum standard for invoking the provision even with respect to any accused "statement" which might be said to exist in, arguendo, any specific tax "plan or arrangement." App. 83-84. (The Executive Summary was expressly not held out as any inherent specific plan, arrangement, or tax filing. App. 127 (Executive Summary disclaimer).)

[47] Bald IRS assertions (*see* O. at App. 2-3) don't establish MIS or public MIS debate as illegal. *Cf. Cargill v. Garland*, 57 F.4th 447-57 (5th Cir. 2023) (en banc), *cert. granted*, 144 S.Ct. 374 (2023) (ATF interpretation didn't render bump stocks illegal). The Tenth Circuit's only citations and "evidence" (O. at App. 3, 19) in support of the IRS' proposition that MIS is impermissible were recent pronouncements *from the IRS itself* purporting to reverse earlier IRS actions and pronouncements. The Tenth Circuit (O. at

It is undisputed[48] **A)** neither Petitioner has ***any existing delinquent tax balance*** (i.e. no risk of assets dissipating to thwart satisfaction of a judgment or known obligation); **B)** neither Bishop personally nor Slim Ventures has ever been found to have actually ***done*** anything unlawful;[49] **C)** the IRS has no evidence

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App. 6 n.4, 16) and the IRS implied that Crow's MIS concepts were ruled illegal by the Ninth Circuit, but that litigation never dealt with any First Amendment issue, expressly dealt only with procedural issues relating to *past known specific transactional conduct*, and didn't reach the substantive merits of Crow's MIS theory. *S. Crow Collateral Corp. v. U.S.*, 2018 WL 2454630 *1 n.2 (D. Idaho), *aff'd* 2018 WL 2454628 (D. Idaho), *aff'd* 782 Fed.App'x 597, 598 (9th Cir. 2019) ("the Court does not opine on the legality or tax treatment of these or any other particular [MIS] transactions [of Crow]"). Indeed, one bankruptcy court *expressly endorsed the Crow approach to MIS* and *based an entire bankruptcy plan on it*. App. 89 (*In re Martin*, Case No. 8:13-bk-13134 (C.D. Cal. Bk. 2014), ¶2); *see also* App. 82-83 (26 U.S.C. § 453).

[48] *See* O. at App. 15-16; *see also*, *e.g.*, R000170 (2-22-cv-00340, DN 19 at 13).

[49] Once Petitioners raised a First Amendment theory for quashing summonses, the IRS backfilled a pretextual justification for initiating investigation and summonses. The IRS excavated a 2003 stipulated injunction (negotiated under the cloud of outdated First Amendment precedents much less protective of commercial free speech than current precedents), in which Bishop was expressly **not** declared or admitted to have done anything wrong, but in which Bishop agreed (simply to avoid nuisance cost from IRS harassment) to refrain from advocating the specific theory (deemed by the IRS to be impermissible if actually implemented) that "taxpayers, typically those who were self-employed" might be able "to defer or avoid taxes by forming a foreign corporation which 'leased' their labor back to their business in the United States." O. at App. 3-4, 16; *see also U.S. v. Bishop et al.*, 2:03-cv-01017 (D. Utah Dec. 5, 2003) (¶¶2-3) (final stipulated judgment). It's undisputed Bishop has always abided by his commitment not to advocate lease back theories. The current

either Petitioner ***has ever actually engaged in or induced any "improper" financial or tax transaction at any time*** (even as measured against the ***IRS' recently gainsaid anti-MIS position***);[50] **D)** even if,

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investigation, two decades later, had nothing to do with labor leases. The summonses' demands had no focus, tailoring, or scope anchored to the 2003 injunction. Nor does the IRS or the Tenth Circuit posit Bishop has even advocated *anything* forbidden by statute or existing court precedent. But even if, arguendo, there had been some actual nexus between the consent decree and the current dragnet summonses cluster-bombed on every conceivable financial institution, the First Amendment would still be implicated because the injunction involved speech and any attempted leveraging of the injunction to the present context would be for the improper purpose of censoring speech. *See also In re Pearson*, 990 F.2d 653, 658 (1st Cir. 1993) ("the district court is not doomed to some Sisyphean fate, bound forever to enforce and interpret a preexisting decree without occasionally pausing to question whether changing circumstances have rendered the decree unnecessary, outmoded, or even harmful to the public interest"; "wrongful" use of a consent decree is not permitted); *U.S. v. City of Miami*, 2 F.3d 1497, 1508 (11th Cir. 1993) (consent decree was potentially obsolete and subject to being vacated).

The Tenth Circuit asserted the IRS didn't have to prove MIS was actually illegal as a legal or tax concept, or that Petitioners were actually advocating or doing anything conceptually false or fraudulent before embarking on an investigation or summonses blitz initiated to target Petitioners' First Amendment speech. O. at App. 17-18. The Tenth Circuit implicitly rejected the *303 Creative* standard for protecting commercial speech against Government chilling, asserting *Powell* allows IRS targeting of speech without any need to show the nature of the speech was illegal, or any improper return or other conduct was alleged to have occurred; instead, *Powell* allows targeting and chilling of speech by the IRS as long as Petitioners are deemed unable to show the IRS harbored subjective bad intent. O. at App. 25.

[50] App. 116-18, 116 n.1, 118 n.2, 127 ("Executive Summary" with internet links documenting eleven examples of prestigious

arguendo, the IRS could show Petitioners had actually committed any MIS which the IRS now disfavors, the ***IRS cannot show MIS is actually illegal at all***,

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well-known companies successfully utilizing MIS, and also a ***cite and link to a Chief Counsel Internal Revenue Service Memorandum No. 20123401F (Aug. 24, 2012),*** *https://www.irs.gov/pub/irs-lafa/20123401F.pdf* ***discussing "Application of Judicial Doctrines to Monetized Transaction" wherein the IRS appears to indicate that at least some MIS transactions were/are permissible***). The IRS doesn't dispute Petitioners' posted materials were authentic; instead, the IRS was angry because Petitioners' stated the IRS has treated MIS as legal in selective fashion toward the well-connected and that the same IRS standards should apply for ***all*** taxpayers.

Although the Tenth Circuit Opinion disputed whether Petitioners merely mused in abstract on the internet on a basis flawed for other legal reasons (O. at App. 15, 21, 25, 28), the Tenth Circuit didn't dispute Appellants' Executive Summary (App. 118, 127) expressly discloses that there are a variety of " 'judicial doctrines' related to 'substance over form' and 'business purpose' " which must be satisfied in a customized manner; says every "transaction is different and unique" for a taxpayer, discloses "Circumstances may affect tax and legal outcomes," disclaims any "tax, legal, or investment advice" or role for Appellants as "a broker, sales representative, investment adviser, or tax or legal advisor,, indicates Appellants don't take "any transaction fee or payment for transaction services," and says "Interested parties should consult their legal, tax and investment advisors before participating in any transaction." Yet the Tenth Circuit (O. at App. 5) inaccurately asserted "Slim Ventures' website promised that '[a]n owner of highly appreciated assets c[ould] sell them and defer 100% of up to 95% of the value in cash,' " when in fact the Executive Summary did just the opposite, indicating Appellants ***weren't*** providing a plan or promise for anyone specifically and instead providing generic scholarly citations and illustrative generic math scenarios (App. 118, 127; *see also* 116-18, 116 n.1, 118 n.2, 127; R000111-157 (2:22-cv-00340 DN 16-3 through 16-8 (IRS, legal, and scholarly tax law publications favoring MIS))).

and the IRS ***admitted*** in its own filings "no court has yet considered whether MIS are fraudulent,"[51] and scholarly tax articles "tout their supposed efficacy;"[52] **E)** the ***IRS has allowed MIS for various other (well-resourced) taxpayers***;[53] **F)** the IRS has ***already utterly failed to garner even a single relevant document in connection with 4 of 8 summonses*** used for its fishing expedition;[54] and **G)** Summit, one of the targets with the two remaining summonses, has ***already told the District Court it has no relevant records to produce***.[55] These considerations, combined with the fact the IRS admitted it targeted Petitioners on the basis of their internet expression, negate the credibility and soundness of the IRS' substantive position (especially in the First Amendment context, which has tests completely

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[51] Petitioners pointed out at all stages of litigation below that at least one federal court and certain portions of the IRS Code have actually endorsed use of MIS. *In re Martin*, Case No. 8-13-bk13134-TA (C.D. Cal. Bk. 2014) (¶2), available at App. 87-88, 89 ¶2 and also R000131); App. 82-83 (26 U.S.C. § 453 "Installment method"). ***Not a single federal statute actually mentions MIS as illegal***. The Tenth Circuit reluctantly conceded 26 U.S.C. § 453, but erroneously asserted *In re Martin* as provided by Petitioners, in which a federal bankruptcy court expressly authorized MIS as the basis for a Crow MIS plan, couldn't be found. (O. at App. 2, 24.)

[52] *E.g.* citations in footnotes 38, 50-51; 2-22-cv-00340, DN 19 at 13; 2:22-cv-00340, DN 16-3 through 16-8 (cases, articles, announcements, IRS bulletins favoring MIS).

[53] *E.g.* App. 116-17, 116 n.1, 118 n.2; *e.g. also* 2:22-cv-00340 DN 16-3 through 16-8 (exhibits).

[54] O. at App. 8, 10.

[55] R000101 (2:22-cv-00340, DN 16-2 at 1, 30 at 6-7).

different than the Fourth Amendment and *Powell*'s substitute test for the Fourth Amendment), and demonstrate the IRS' bad faith and untethered retaliatory dragnet summonses. Accordingly, Petitioners sued to quash. It is in Petitioners' interest and the public interest to stop bad faith weaponization of IRS summonses, and the IRS' ominous attacks on the First Amendment and professionals expressing opinions critical of IRS interpretations.

II. Procedural Background

Despite repeated requests, and assurance at one point that hearing and ruling about procedural matters and evidentiary hearing would be held before the assigned magistrate,[56] District Court Judge David Barlow reneged on those assurances and ambushed Petitioners by short-circuiting the entire process, such that not a single hearing or conference of any kind (let alone any *Clarke* Evidentiary Hearing) was held in District Court. Judge Barlow shrugged at, and indeed appeared to embrace, the prospect that allowing the IRS to target speech "would violate . . . free speech rights and lead to 'impermissible implementation of a Chinese-style system of social credits, where the Government as a Ministry of Truth trolls . . . the public arena to target . . . individuals . . . to deter disfavored

[56] *E.g.* App. 32, 33, *see also* footnotes 27-32 and surrounding text.

expression.'"[57] His general theme[58] was that the IRS needs to collect taxes and should thus be trusted and empowered with essentially unfettered power.

The Tenth Circuit slightly distanced itself from Judge Barlow with a fig leaf conceit that the IRS' *de facto* position in appellate oral argument and court filings couldn't really be that the IRS' "'power has no limiting principle whatsoever and the First Amendment, *Powell* test, taxpayer protections statutes, federal courts, *Clarke* investigatory hearings, and other protective protections of our legal system are *de facto* vestigial and illusory,'" or that the "'IRS has no limitation other than its own whim'" and "'can selectively and deliberately target anyone for expensive investigations based solely on disfavored speech.'"[59] But the Tenth Circuit offered no analysis, no articulation of any limiting principle offered by the IRS or by the Tenth Circuit, no reason the legal reasoning of the Tenth Circuit ruling (especially the determination that the *Bantam* Precedents are irrelevant and inapplicable to the IRS)[60] wouldn't operate to allow the

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[57] App. 80, 80 n.59 (ruling); App. 52-55, 53 n.96, 54 n.99 (ruling).

[58] App. 41-42, 52, 57 (ruling); App. 80, 80 n.59 (ruling).

[59] O. at App. 20-21, 20-21 n.8.

[60] The Tenth Circuit also rejected the *Bantam Book* and *303 Creative* standard for protecting against free speech (whether "the type of investigation" and subpoena conduct "would chill a person of ordinary firmness," *White*, 227 F.3d at 1226-28; *see also 303 Creative*, 600 U.S. at 588-89 (final conviction or civil "monetary fine[]" is not required for burden or harassment to represent an impermissible abridgment of the First Amendment's right to

IRS to target anyone for expensive dragnet investigations based solely on disfavored speech, and no example of any situation where a *Clarke* Evidentiary Hearing could actually be obtained (especially if even *self-admissions in an IRS agent declaration* are insufficient). Instead, the Tenth Circuit "summarily reject[ed]" such considerations.[61]

Still, the Tenth Circuit did indicate that technically their ruling would apply only to what the IRS was doing to *Petitioners* and not constitute "binding precedent" for anyone else; the ruling would have only "persuasive value" inside and outside the Tenth Circuit.[62] This apparently allows future federal courts to selectively treat the same IRS conduct as unconstitutional on a future occasion, presumably if committed by someone other than the Biden Administration or if victimizing a well-connected special interest taxpayer.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

Per Supreme Court Rule 10(a, c), the Tenth Circuit has decided important federal questions of relevance

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speak freely")) and said that an IRS summons cannot be quashed for First Amendment or any other reason unless subjective bad mental intent on the IRS agent could be proven (in advance of being granted any *Clarke* Evidentiary Hearing or hearing or discovery process of any other kind, no less). O. at App. 12, 26-28, 27 n.9.

[61] O. at App. 20-21, 29.

[62] O. at App. 1 n.*.

to every American taxpayer in a way that "conflicts with relevant decisions of this Court," conflicts with other prior rulings of the Tenth Circuit as well as other federal court of appeals and district courts,[63] and has so far departed from the accepted and usual course of judicial proceedings (and sanctioned such deviation by the Utah District Court) as to call for an exercise of this Court's supervisory power.

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[63] *E.g. Church of World Peace*, 775 F.2d at 266-68 (IRS request to enforce summons denied due to improper purpose and chilling effect on First Amendment rights and statutory rights, as analyzed inside and outside of the *Powell* "improper purpose" factor test); *White*, 227 F.3d at 1226-28 (investigation and subpoenas by Government HUD officials designed to chill legal arguments and community advocacy HUD felt was seeking illegal objective, violated the First Amendment; "the type of investigation" and subpoena conduct "would chill a person of ordinary firmness"); *Citizens State Bank*, 612 F.2d at 1094-95 (protecting " 'advocacy of both public and private points of view, particularly controversial ones . . . advancement of beliefs and ideas . . . and freedom of speech' " against IRS summonses misuse; "when the one summoned has shown a likely infringement of First Amendment rights, the enforcing courts must carefully consider the evidence of such an effect to determine if the government has shown a need for the material sought. . . . If disclosure of some of the records would have no First Amendment implications, ordering the release of those records would, of course, be proper. But if appellants' First Amendment rights would be infringed by forcing the bank to divulge certain documents, compelled disclosure is permissible only if the government makes the requisite showing of compelling need."); *Lightborne Pub., Inc.*, 2009 WL 778241 *7-8 (First Amendment violated when threats and investigation from a coalition of governmental entities, including the IRS (as an accomplice but not a party), was used to suppress speech); *see also U.S. v. Alvarez*, 132 S.Ct. 2537, 2547 (2012) ("Government as Ministry of Truth" impermissible).

The Tenth Circuit ruled[64] that the IRS—unlike every other federal and state agency—is exempt from the limitations of the First Amendment as set forth in, inter alia, the *Bantam* Precedents,[65] including notable

[64] The Tenth Circuit also ruled the IRS can use investigation and summonses to target a taxpayer uttering disfavored views about tax law even if A) there is no indication the taxpayer ever committed any tax violation, B) the taxpayer is expressing views about MIS or other tax matters which have not been declared illegal or fraudulent or incorrect by any existing statute or court precedent, and C) the IRS itself has previously held or allowed the same position as what the taxpayer's internet speech is advocating and has engaged in an inconsistent or reversing IRS position, such that the IRS is targeting political criticism and has a conflict-of-interest in regulating the speech. The Tenth Circuit said all such considerations were "irrelevant," reasoning the IRS isn't chilling or harming free speech because, years later and after having been dragged through the stress, interruptions, smearing effects, and enormous financial cost imposed by an IRS investigation, "petitioners can assert these arguments if and when the IRS charges them with a tax violation related to their promotion of MIS." O. at App. 21. However, the *Bantam* Precedents have recognized that a weaponized investigation designed to target speech has an impermissible chilling and censoring effect even if no adverse enforcement action or prosecution ever materializes. *E.g. White*, 227 F.3d at 1226-28; *see also Citizens State Bank*, 612 F.2d at 1094-95. The IRS is especially problematic, as it is largely immune from legal or financial accountability on the backend for malicious prosecution, 42 U.S.C. § 1983 remedies, or other relief available against many other agencies found to have committed misconduct or civil rights violations. The Tenth Circuit's approach strips away practical First Amendment constraints upon the IRS. The IRS cannot properly target speech by launching a chilling or retaliatory investigation and summonses carpet-bombing campaign, especially with a free-ranging set of summonses not anchored or tailored to any specific return or third-party tip or collection obligation or other specific alleged conduct.

[65] Judge Mary Briscoe of the Tenth Circuit authored not only the appellate decision in this case, but also the Tenth Circuit First

recent federal court implementation in *Biden*[66] and elsewhere in similar[67] cases. This was a profound error which conflicts with other federal court decisions and should garner this Court's immediate and decisive correction. This appeal poses a question about whether the IRS as a government agency really is, as asserted in the Tenth Circuit's ruling,[68] uniquely unconstrained by the protections of the *Bantam* Precedents. Respectfully, this Court should reverse the Tenth Circuit and reaffirm the bedrock First Amendment principle that all governmental entities, including the IRS, are

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Amendment opinion overturned in *303 Creative*. In oral argument and elsewhere, Petitioners' presentation heavily emphasized this Court's opinion in *303 Creative*, and the Fifth Circuit's opinion in *Biden*, and urged the Tenth Circuit to respect those precedents through specific analysis and guidance about why the protections in those cases did (or didn't) apply to protect Petitioners' free speech by constraining the IRS' nationwide internet surveillance and express censorship demands. Unfortunately, Judge Briscoe's opinion defied *303 Creative*, ignored *Biden*, and implicitly rejected both by a summary and sweeping declaration that the entire line of *Bantam Books* precedent and various First Amendment principles do not apply to, or constrain in any way, the IRS investigatory and summonses process. O. at App. 26-27, 27 n.9.

[66] *Missouri v. Biden*, ___ F.Supp.3d ___, 2023 WL 4335270 *73 (116 Fed.R.Serv.3d 559) (W.D. La.) *aff'd in part*, 83 F.4th 350, 359-68, 372-73, 377-94, 398 (5th Cir. 2023), *cert. granted, Murthy v. Missouri*, 144 S.Ct. 7 (2023) (ruling that the *Bantam Books* line of precedents applies to federal agencies and forbids such agencies from using threats or tactics designed to chill free speech on the internet).

[67] *Høeg M.D.*, 652 F.Supp.3d at 1178-79, 1183-91 (striking down government attempts to chill disfavored professional medical opinions about COVID); *cf. also Citizens State Bank*, 612 F.2d at 1094-95.

[68] O. at App. 11-12, 26-28, 27 n.9.

subject to the protections and limitations set forth in the *Bantam* Precedents.

One of the key constraints imposed by the First Amendment and by statute upon the IRS' power to investigate, audit, and summons is that such IRS efforts must be grounded in—and summonses requests must be tailored to—*conduct*, meaning actual *specific known tax returns* (or failure of a specific taxpayer to file any tax return), *specific identified accused improper transactions*, *specific whistleblower or client complaints or allegations*, *specific conviction*, or a *specific known debt to be collected*.[69] Those same legal authorities—and especially the First Amendment and the *Bantam* Precedents—forbid the IRS (and every other government actor) from targeting a taxpayer on

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[69] The Tenth Circuit strained to circumvent or ignore this distinction between *speech* and *conduct*, but their own quoted legal authorities highlight the conduct/expression distinction. O. at App. 12 (emphasis added) (quoting *Clarke*, 573 U.S. at 249-50 (quoting 26 U.S.C. § 7602(a)(1)) (emphasis added) ("Congress has . . . 'granted the Service broad latitude to issue summonses "[f]or the ***purpose of ascertaining the correctness of any return***, ***making a return where none has been made***, determining the ***liability of any person for internal revenue tax*** . . . , or ***collecting*** any such liability."'"); *see also 303 Creative*, 600 U.S. at 596-97 (speech cannot be conflated into conduct, commercial speech about controversial topics cannot be censored); *Coopers & Lybrand*, 550 F.2d at 617, 620-21 (important to ask if "documents summoned dealt directly with the taxpayer's return as filed or were a source of information for the return" identified with the summons; a free-ranging dragnet summons untethered to a return is abusive and impermissible). Neither the IRS nor the Tenth Circuit could identify any statute or precedent authorizing the IRS to investigate, audit, or summon on the basis of speech content alone.

the basis of the content of the taxpayer's First Amendment *expression* rather than targeting *conduct* qua a specified tax return, missing return, or other *specific known accused act of conduct*. Without this distinction and the protection of the First Amendment and the *Bantam* Precedents (especially *303 Creative* and *Biden*), an Administration could use the IRS to surveille the internet, identify taxpayers, attorneys, journalists, medical providers, professionals, politicians, and others with disfavored First Amendment expression, then subject the target to a generalized, non-tailored investigation or audit incorporating carpet-bombing of numerous, generic, overbroad summonses designed to dragnet through a taxpayer's entire financial life in search of a grievance (instead of a tailored inquiry into a known accused specific grievance or tax return). Without the protection of the First Amendment and constraints imposed by statutes and caselaw insisting on adequate nexus and summonses tailoring anchored to a specific identified return or incident of conduct, the legal costs, business harm, inconvenience, and social derogation of IRS audits, investigations, and summonses can be perpetually weaponized to target, intimidate, and systemically censor all American citizens expressing disfavored views.[70]

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[70] The IRS' effort to target professional tax law criticisms by a financial professional is especially problematic given that numerous tax issues are complex, confusing, and ambiguous; tax precedents are often evolving and influenced by professional critiques over time. *Cf. South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 2092 (2018).

The IRS, like other governmental entities, is subject to onion ring layers of constitutional and statutory constraints. Any proposed investigation, audit, summonses, or other action must clear *all* hurdles imposed by *each* separate onion ring of legal analysis. Thus, the *Powell* factor[71] analysis, which was designed to provide a watered-down administrative test for summonses in place of the Fourth Amendment probable cause standard, was never intended to serve as a preemptive substitute in relation to other independent non-Fourth Amendment protections against abusive investigation or other doctrinal justifications with separate criteria for quashing a summonses (such as the First Amendment at issue in this case, or the post-*Powell* 26 U.S.C. § 7605(b) statute, or other doctrines such as attorney-client privilege, separation of powers, "roadmap" scope of summonses, etc.).[72]

Perhaps sensing the legal vulnerability of such a stance, the Tenth Circuit tried to hedge its bets by asserting a fallback position that although "the record indicates that the IRS first became aware of Slim Ventures because of information contained on Slim Ventures' web site promoting MIS"[73], "importantly, it was not the petitioners' mere expression of thought that

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[71] O. at App. 13 (listing factors).

[72] This was made clear in *Clarke*, 573 U.S. at 250 (*citing Reisman*, 375 U.S. at 449), and other precedent such as *Highland Capital Man. L.P.*, 626 Fed.App'x. at 328, *Citizens State Bank*, 612 F.2d at 1094-95, *U.S. v. Coopers & Lybrand*, 550 F.2d at 617, 619-21; *see also* the Other Appropriate Grounds Precedents in footnote 11.

[73] O. at App. 16.

prompted the IRS to issue the challenged summonses."[74] This was so, the Tenth Circuit said, because according to IRS Agent Bauer's (disputed) declaration, "Bauer first interviewed Bishop and learned from him that he and Slim Ventures had been actively promoting MIS for profit for a period of approximately three years, averaging three to four transactions per month" and because the "IRS' IRP system"[75] indicated that "'Slim Ventures held a substantial amount of money with Wells Fargo during 2020.'"[76]

But this second fallback rationale jumps out of the frypan and into a bonfire of legal and factual deficiencies (even putting to the side the First Amendment violation caused by instigating an audit or investigation on the basis of First Amendment website expression). For starters, in both District Court and the Tenth

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[74] O. at App. 16; O. at App. 28 ("the record establishes that the issuance of the summonses was prompted, in large part, by Bishop's own [verbal] admission . . . to Bauer . . [of] MIS transactions . . . ").

[75] The "IRS Information Returns Processing System" ("IRP") affords the secret IRS internet surveillance team with the technical capability to target a taxpayer expressing disfavored speech on the internet and troll through data regarding that taxpayer's private bank accounts without first securing a warrant or notifying any financial institution or account holder involved. *Cf.* O. at App. 7.

[76] O. at App. 7, 18. The IRS placed no evidence or documents on the record to show that the "IRS's IRP system" actually indicated any such thing at any time, and the District Court refused to allow any *Clarke* Evidentiary Hearing or other opportunity to conduct discovery or even cross-examine Agent Bauer about any of the various supposed facts or logical implications associated with his declaration account.

Circuit, Petitioners had challenged *Agent Bauer's declaration assertions* about the alleged verbal self-confession[77] *Bishop* supposedly gave to *Bauer* on September 30, 2021,[78] as a facially ridiculous fabrication.[79]

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[77] The disputed factual question of whether Bishop offered a voluntary verbal self-confession is within Bishop's personal knowledge. In the absence of an undisputed recording or document or neutral witness evidencing the purported confession, the only proper way to resolve such the disputed IRS agent assertion was to have both Bishop and Agent Bauer undergo testimony and cross-examination in a *Clarke* Hearing so the District Court could observe dueling witnesses and make firsthand credibility determinations. It was entirely partial and improper for the District Court to prejudge the matter, credit some portions of Agent Bauer's declaration while ignoring other unhelpful admissions in that same declaration, and resolve all credibility inferences and purpose determinations in Bauer's favor while forgoing a *Clarke* Hearing (and all other hearings and conferences) entirely. The Tenth Circuit (*e.g.* O. at App. 6-8) erred in uncritically assuming the IRS' version of events to be true and relying on portions of Agent Bauer's declaration as fact and permissible purpose while ignoring the unhelpful admissions in the same declaration, especially given no *Clarke* Hearing had ever been held to resolve the disputed narrative. Unfortunately, declarations from the IRS cannot uncritically be assumed true. *E.g. Lakepoint Land II, LLC v. Commission*, 2023 WL 5551183 *3, 2023 RIA TC Memo 2023-111 (unreliable IRS declaration).

[78] *See* O. at Opp. 6-7.

[79] Since the 2003 consent decree obviously shows a career spanning at least 20 years, the IRS and Tenth Circuit assertion (O. at App. 6-7; App. 107-08 ¶¶4, 9, 11-12) that Bishop confessed that Bishop's *first "pay day"* came with Appellants' *recent use of the 2021 Executive Summary* (App. 113-27) is thus farcical on its face. Moreover, the blindly accepted and uncross-examined notion in Bauer's declaration that Bishop would say anything about MIS of a *confessional* nature, and ***volunteer an inculpatory "admission" to Bauer*** that "he [Bishop] and Slim Ventures had been actively promoting MIS for profit for a period of approximately

The Petitioners told the lower courts this, observed that there was at minimum a plausible and

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three years, averaging three to four transactions per month" (O. at App. 18-19, 28; App. 108 ¶12), even while Bishop was supposedly *simultaneously and inconsistently* "leaving myriad questions unanswered" and *refusing* "to respond to the IRS's requests for his accounting records, bank statements, and client list" or information about supposed MIS transactions (O. at App. 7, 16; App. 107-08 ¶¶4, 9, 11-12), is ***false and facially contrary to common sense***.

The IRS afforded ***no recordings, transcripts, emails, contemporaneous interview notes, or other documents to actually evidence the disputed proposition that Bishop or Bishop's Texas counsel had ever confessed or admitted to anything whatsoever*** on September 30, 2021, or any other time. ***Nor did the IRS provide any documents or evidence whatsoever, other than Agent Bauer's bald declaration assertions***, that Bauer and the IRS had ever relied on any evidence, documents, purpose, intent, etc., other than the motivation Bauer had openly stated prior to litigation and admitted in his Declaration—the IRS didn't like the content of Petitioners' Executive Summary. Yet the Tenth Circuit (O. at App. 19-22) and District Court (App. 35, 35 n.3; 69), even while acknowledging that Petitioners had requested a *Clarke* Hearing (the *Clarke* Evidentiary Hearing Rule uses a "plausibility," not preponderance, standard), which both lower courts refused to even quote despite Petitioners' verbatim incorporation into Petitioners' statement of issues for decision and appeal), refused to subject these and other absurd, bald assertions (made by an anonymous, undisclosed, and possibly even nonexistent person using the pseudonym "Agent Bauer") to any cross-examination, verification, discovery, or hearing review. Instead, the Tenth Circuit allowed the ***bald IRS agent declaration assertions to be preemptively credited*** as to a ***factually disputed narrative*** even though ***no opportunity occurred to confront or cross-examine Agent Bauer***, or present conflicting rebuttal testimony or other evidence through a ***Clarke Hearing***.

circumstantial[80] possibility of improper purpose and First Amendment violation given, inter alia, the admissions of Agent Bauer in the first three paragraphs of his own declaration about targeting Petitioners' speech, and requested a *Clarke* Hearing. Petitioners wanted to cross-examine Bauer about the late-breaking disputed factual narrative in Bauer's declaration, Bauer's admissions about instigating investigation for the purpose of targeting and investigating due to speech in the Executive Summary, Bauer's specious declaration assertions that Bishop had admitted to MIS transactions or anything else whatsoever, the purposes of the IRS and Bauer, and the event narrative. Moreover, and quite apart from the *Clarke* Evidentiary Hearing standard for non-First Amendment *Powell* summons disputes, the Tenth Circuit and other federal courts had previously ruled that "an evidentiary hearing" is warranted when an IRS summons or "bank subpoena" poses an "arguable First Amendment

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[80] *See* footnote 14, quoting the *Clarke* Evidentiary Hearing standard at *Clarke*, 573 U.S. at 254-55 ("circumstantial evidence can suffice to meet [taxpayer's] . . . burden; . . . a fleshed out case is [not] demanded . . . only . . . facts that give rise to a plausible inference of improper motive"). In this instance Agent Bauer's declaration admission actually constituted clear and convincing, ***direct evidence and confession of an improper purpose***. *See*, *e.g.* App. 107 ¶¶4-6 ((R000065 (2-22-cv-00340, DN 13-1) (***Agent's declaration admits Petitioners were detected, selected, targeted for investigation solely based on "material" "downloaded" Petitioners' "website" which involved "promotion of MIS" views disfavored by IRS***)).

infringement" or a "potential First Amendment violation."[81]

Additionally, even if, arguendo, Petitioners had somehow had ever given Agent Bauer the unlikely and undocumented gainsaid verbal confession, the IRS' eight summons—cluster-bombed on four different financial institutions, and seeking every conceivable financial document one can imagine for five-year period[82]—had no nexus, or tailoring to any supposed specific transaction, specific year, or specific financial institution alerted upon by any supposed Bishop confession or IRP System indicators, as required by the Other Appropriate Grounds Precedents. Moreover, the IRS placed no evidence or documents on the record to show the "IRS's IRP system" actually indicated any "substantial amount of interest in 2020" or "substantial amount of money with Wells Fargo during 2020,"[83] let alone Summit.[84]

Of course, even if, arguendo, the IRS' IRP system had actually shown substantial sums of money and/or interest in one Wells Fargo bank account of Slim Ventures, such wouldn't inherently indicate any specific or

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[81] *E.g. In re First Nat. Bank, Englewood, Colo.*, 701 F.2d 115, 118-19 (10th Cir. 1993) (*citing Citizens State Bank*, 612 F.2d 1091 and remanding for evidentiary hearing regarding First Amendment issues).

[82] *E.g.* App. 95-96, 100-01, 104-05.

[83] O. at App. 18.

[84] The IRS admitted it "doesn't possess records" which actually "connect[] Petitioners" to "MIS Transactions." R000059 (2:22-cv-00340, DN 13 at 15).

suspicious conduct with regard to any tax return or incident of past conduct. Reliance on such generic facts and overreaching inferences constitutes "use" of a "financial status or economic reality examination technique[]" to try to "determine the existence of unreported income of any taxpayer" without "a reasonable indication that there is a likelihood of such unreported income"[85]—a tactic forbidden by the plain language of a post-*Powell* taxpayer protection statute, 26 U.S.C. § 7602(e). This statute—both independently and in tandem with 26 U.S.C. § 7605(b) and the Other Appropriate Grounds Precedents—operates to prevent the IRS from bootstrapping the mere "financial status or economic reality" of one alleged bank account balance into an excuse for "subject[ing] a "taxpayer" to "unnecessary examination or investigations" through a summons or other means.[86]

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[85] Although the Tenth Circuit (O. at App. 24-25) asserted "it is not readily apparent how the statute is relevant to a challenge to the validity of the summonses at issue," the plain language of the post-*Powell* statute just quoted requires specific (and not generalized inference techniques) showing a "reasonable indication" there is "a likelihood" of "unreported income"—extra taxpayer protection not around when the *Powell* decision issued. Petitioners also cited numerous post-*Powell* federal court decisions to the same effect which didn't cite section 7602(e), but these too were ignored.

[86] The 26 U.S.C. § 7602(e) prohibition against "use" of a "financial status or economic reality examination technique[]" to try to "determine the existence of unreported income of any taxpayer" without "a reasonable indication that there is a likelihood of such unreported income" is an important statutory taxpayer protection which applies to <u>all</u> stages of IRS activity from inception of investigation up through tactics at any hearing or trial; the Tenth

The IRS has repeatedly pretended, and the Tenth Circuit's recent ruling[87] indulges, the legal fiction that *Powell* is the only avenue or test for quashing IRS summonses, when in reality the *Powell* factor test per se is only *one non-exclusive avenue* for quashing a summons which doesn't supplant other independent legal avenues or doctrines for doing so (such as those related to the First Amendment[88]; various taxpayer protection statutes[89]; and an entire line of post-*Powell* precedents[90] with other non-supplanted summons

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Circuit (O. at App. 23-24) erred in manufacturing a non-existent limitation constricting application of the statute only to what happens in a "tax case" instead of what happens leading up to any potential tax case as well. *Cf. Baldwin v. C.I.R.*, 648 F.2d 483, 488 (8th Cir. 1981) (where taxpayer protection issue was the same, First Amendment and statutory protection couldn't be limited to IRS summonses stage, and also extended to "a request for discovery under the Tax Court Rules").

[87] O. at App. 25-26.

[88] See the *Bantam* Precedents, pin-point citations and explanations in footnote 5, and also footnotes 57-70 (including, especially, *303 Creative*; *Biden*; *White*; *Bantam Books, Inc.*; *Lightborne Pub., Inc.*; *ACLU*; *see also Church of World Peace*; *Gertner*; *Høeg M.D.*; *Greenberg*; *Otto*; *Citizens State Bank*).

[89] *E.g.* 26 U.S.C. § 7605(b) ("**Restrictions on examination of taxpayer.**—No taxpayer shall be subjected to unnecessary examination or investigations . . . "); and 26 U.S.C. § 7602(e) (curtailing IRS use of "financial status or economic reality examination techniques"). Petitioners have been subjected to "examination and investigation[]" that is not only "unnecessary" but legally prohibited, and are having status and economic reality techniques invoked against them to try to perpetuate and conduct investigation and summons.

[90] For post-*Powell*, extra-*Powell* principles for quashing and narrowing summonses, *see, e.g.*, the Other Appropriate Grounds Precedents cited in footnotes 9, 11, 72.

constraints concerning fishing expeditions, disproportionality, tailored relevance, etc.).

To be enforced, an IRS summons must adequately satisfy not just ***some*** applicable factors or tests or legal obligations, but ***all*** layers of requirements as imposed by the Constitution, statutes, case law, all factors of the *Powell* test, ***and*** all applicable federal and IRS rules. The IRS Opposition (and Judge Barlow) erred in positing that if the IRS satisfies the *Powell* test[91] the IRS is automatically entitled to summons enforcement, *quod erat demonstrandum*. Just the opposite is true.[92]

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[91] The IRS summonses fail the *Powell* factor test as well, especially the "improper purpose" factor.

[92] *Clarke*, 573 U.S. at 250, 254-55 (*citing Reisman*, 375 U.S. at 449) (tax summons may be quashed or stayed "on any appropriate ground," not just those in core *Powell* test); *Church of World Peace*, 775 F.2d at 266-68 (IRS request to enforce summons denied due to improper purpose and chilling effect of summons on First Amendment rights, and statutory rights, apparently analyzed inside and outside of the *Powell* "improper purpose" factor test); *Highland Capital Man. L.P.*, 626 Fed.App'x. at 328 ("In addition to seeking to quash a summons by disproving one of the *Powell* factors, a taxpayer may urge that action 'on any appropriate ground,' *United States v. Clarke* . . . including the protection of 'attorney-client privilege' "); *Citizens State Bank*, 612 F.2d at 1094-95 (protecting " 'advocacy of both public and private points of view, particularly controversial ones . . . advancement of beliefs and ideas . . . and freedom of speech' " against IRS subpoena misuse; "when the one summoned has shown a likely infringement of First Amendment rights, the enforcing courts must carefully consider the evidence of such an effect to determine if the government has shown a need for the material sought. . . . If disclosure of some of the records would have no First Amendment implications, ordering the release of those records would, of course, be proper. But if appellants' First Amendment rights would be infringed by

The Tenth Circuit and the District Court improperly refused to allow any *Clarke* Hearing or other opportunity to conduct discovery or even cross-examine Agent Bauer about any of the various supposed facts or logical implications associated with his declaration account and the aforementioned disputed issues.

CONCLUSION

The credible operation of our federal system cannot abide open defiance of this Court's precedents by the Tenth Circuit and Judge Briscoe. Nor can our American system of free expression, ordered liberty, representative government, and independent attorney advice properly function if IRS investigation and summonses tactics are exempt from the First Amendment and the *Bantam* Precedents.

The IRS' lawfare and the Tenth Circuit's decision are an effort to circumvent this Court's First Amendment precedents and weaponize IRS tools of surveillance, investigation, and summons in implementation

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forcing the bank to divulge certain documents, compelled disclosure is permissible only if the government makes the requisite showing of compelling need."). A taxpayer targeted on the basis of First Amendment speech is not only entitled to independent non-*Powell* traditional constitutional analysis and Constitutional protection inherently sufficient to quash, but also gets a second treatment for First Amendment violations under the *Powell* test analysis for variants of bad faith improper purposes to abuse a court's process, to harass a taxpayer, or otherwise go fishing. *See also* the Other Appropriate Grounds Precedents, footnote 11.

of a Chinese-style system of social credits. By utilizing secret, unfettered, continuous electronic surveillance of the internet by the IRS, the Government as a Ministry of Truth can troll the public arena to target individuals, companies, attorneys, journalists, scholars, and other critics to deter disfavored expression. Retaliatory dragnet IRS investigations and summonses—untethered and untailored to the needs of auditing any specific tax return or accused specific tax conduct/transaction—can then be used to search for a grievance against a disfavored speaker, rather than verification in relation to a specific articulated tax return or incident of tax conduct.

Petitioners respectfully believe that this Court should either **A)** grant Petitioners' petition through a full hearing and a full opinion reversing the Tenth Circuit, or alternatively and at minimum, **B)** decide (and hopefully affirm) the *Biden* case pending before it from the Fifth Circuit and then vacate the Tenth Circuit's Opinion with a succinct remand instruction to the Tenth Circuit for further consideration of this case in light of the First Amendment standards set forth in *Bantam Books*, *303 Creative*, and *Biden*, and also

application of the *Clarke* Hearing plausibility standard for granting an evidentiary hearing.[93]

Respectfully submitted,

DANIEL E. WITTE, ESQ.
PEARSON BUTLER, LLC
1802 W. South Jordan Parkway,
Suite 200
South Jordan, UT 84095
(801) 495-4104
dan@pearsonbutler.com
Attorney for All Petitioners

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[93] *See*, *e.g.*, *Klien v. Oregon Bureau of Labor and Indus.*, 143 S.Ct. 2686 (2023) (using the succinct alternative "B)" approach).