No. 24-

IN THE

Supreme Court of the United States

ANTHONY FUTIA, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the Summary Order of the United States Court of Appeals for the Second Circuit, in *Anthony Futia, Jr. v. United States of America*, No. 23-860, entered May 14, 2024, conflict with this Court's decision in *Borough of Duryea v Guarnieri*, 564 U.S. 379 (2011)?

Does the Summary Order of the United States Court of Appeals for the Second Circuit, in *Anthony Futia, Jr. v. United States of America*, No. 23-860, entered May 14, 2024, decide a federal constitution question that has not been, but should be settled by this Court?

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all the parties.

RELATED PROCEEDINGS

Anthony Futia, Jr. v. United States of America, No. 22-cv-6965, U.S. District Court for the Southern District of New York. Decided April 24, 2023.

Anthony Futia, Jr. v. United States of America, No. 23-860, U.S. Court of Appeals for the Second Circuit. Decided May 14, 2024.

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Anthony Futia, Jr. v. United States of America, No. 22-cv-6965, U.S. District Court for the Southern District of New York. Order entered May 23, 2023.

Anthony Futia, Jr. v. United States of America, No. 23-860, U.S. Court of Appeals for the Second Circuit. Summary Order entered May 14, 2024.

Anthony Futia, Jr. v. United States of America, No. 23-860, U.S. Court of Appeals for the Second Circuit. Order entered July 1, 2024.

Futia v. United States, No. 23-860, U.S. Court of Appeals for the Second Circuit, Notice of Document Returned, entered August 16, 2024.

Futia v. United States, No. 23-860, U.S. Court of Appeals for the Second Circuit, Notice of Document Returned, entered August 28, 2024.

JURISDICTION

The Summary Order sought to be reviewed was entered May 14, 2024.

The Order denying Futia's initial petition for rehearing was entered July 1, 2024.

The statutory provisions conferring on this Court jurisdiction to review on a writ of certiorari the Orders and Notices in question: Article III, Section 2, Clause 2.2 and 28 U.S.C. §1254(1).

PROVISIONS OF THE UNITED STATES CONSTITUTION INVOLVED IN THIS CASE

"Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances." First Amendment.

"No person shall be . . . deprived of . . . property, without due process of law. . . ." Fifth Amendment.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." Seventh Amendment.

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Ninth Amendment.

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." Sixteenth Amendment.

"[D]irect Taxes shall be apportioned among the several States which may be included within this Union,

according to their respective Numbers. . . ." Article I, Section 2 Clause 3.

"No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken." Article I, Section 9, Clause 4.

"The Congress . . . shall propose amendments to this Constitution . . . which . . . shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states. . . ." Article V.

CONSISE STATEMENT OF THE CASE

The primary issue in this case is whether the federal government is obligated by the petition clause of the First Amendment to the U.S. Constitution to provide a meaningful response to Futia's petitions for redress of the government's violation of rights secured to Futia by the Constitution, and whether the petition clause secures to Futia a right to non-violently enforce those rights should the government refuse to respond.[1]

No Court has ever declared the meaning of the petition clause of the First Amendment to the U.S. Constitution – neither the principal rights of the People nor the principal obligations of the government that are secured by the petition clause.

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1. All references to Futia are to petitioner Futia individually or as an active member since their incorporation in 1997 of the Board of Directors and Vice Chairman of the We The People Foundation for Constitutional Education, Inc. and the We The People Congress, Inc.., together "WTP".

Beginning in 2000, relying on an historical record of the fundamental principles that led to the enumeration of the petition clause in the First Amendment, Futia/WTP undertook what developed into a multi-year petition process, petitioning each of the three branches of the federal government for redress of the federal government's violation of the U.S. Constitution including but not limited to violations resulting from the government's Iraq Resolution, U.S.A. Patriot Act, Federal Reserve Act of 1913, and enforcement of Title 26 of the United States Code.

The executive and legislative branches did not respond to Futia's/WTP's petitions for redress of the grievances.

Overlooking Futia's/WTP's historical record of the fundamental principles that led to the enumeration of the right to petition in the First Amendment and the material facts of the petitions, the judicial branch in *We The People Foundation v. United States*, 485 F.3d 140 (D.C. Cir. 2007) provided an inapplicable response.

In 2011, in *Borough of Duryea v Guarnieri*, 564 U.S. 379, 394-395 (2011), the court held that to determine "the proper scope and application of the Petition Clause . . . Some effort must be made to identify the historic and fundamental principles that led to the enumeration of the right to petition in the First Amendment, among other rights fundamental to liberty."

Thus, in 2012 Futia decided to bring the matter to a head. He chose to exercise a right secured to him by the Petition Clause – the right of enforcement if the

government does not provide a meaningful response to a proper petition for redress of its violation of the Constitution. He retired from his 44-year employment with the Town of North Castle, N.Y. and decided not to pay the federal income tax on his monthly pension and social security payments notifying the federal government that he would not do so until the grievances that were the subject of his/WTP's multi-year First Amendment petition process were redressed – that is, until the government provided a meaningful response to the petitions.

For ten years, until 2022, Futia and the federal government corresponded. The government would ask Futia why he was not paying the tax on his pension and social security payments. Futia always responded asking why the government was not responding to his petitions for redress of its violations of the Constitution and stating that according to the historical record of the petition clause he had the right to non-violently enforce those rights as by "redress before taxes" until the government provided a meaningful response.

In 2022, the federal government managed to get the New York State Comptroller's Office to begin turning over to the Internal Revenue Service 70% of Futia's monthly pension payments, and the Social Security Administration to begin turning over 61% of Futia's monthly social security payments. In response, Futia filed this case against the federal government, coupling his Complaint with a request for discovery and a jury trial.

Without addressing any of the genuine, material facts included in his First Amendment petitions for redress, and

without addressing any fact included in Futia's detailed historical record of the Petition Clause, which quoted *Borough of Duryea v Guarnieri*, 564 U.S. 379 (2011), the Court of Appeals ruled the federal government was not obligated to respond to Futia's petitions for redress and denied Futia's requests for discovery and a jury trial.

ARGUMENT

Futia has been an active member of the Board of Directors and a Vice Chairman of the We The People Foundation for Constitutional Education, Inc. ("WTP") since its incorporation in 1997.[2]

WTP's official purpose is twofold: 1) to educate the general public about the history, meaning, effect and significance of the provisions of our State and Federal Constitutions and 2) to hold local, State and Federal government officials accountable to America's State and Federal Constitutions with full reliance on the right to petition the government for redress of grievances.[3]

Between 2000 and 2004, Futia/WTP properly and respectfully petitioned officials in the executive and legislative branches of the federal government for redress of violations of the Constitution resulting from the government's Iraq Resolution, U.S.A. Patriot Act, Federal Reserve Act of 1913, and enforcement of Title 26 of the United States Code. The petitions included genuine,

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2. Record on Appeal, *Futia v United States*, Case 23-860, Vol. 4, page 911, Vol. 5, pages 1247-1256.

3. Record on Appeal, *Futia v United States*, Case 23-860, Vol. 4, page 902, Futia Affidavit, par. 33.

material facts showing government was in violation of the U.S. Constitution.[4]

The petitions also included an historical record of the fundamental principles that led to the enumeration of the petition clause in the First Amendment to the U.S. Constitution showing the government was obligated to respond.[5]

There was no response to the petitions from either the executive or the legislative branches of the government.

In 2004, Futia/WTP filed a declaratory judgment action in the federal court in D.C. asking the Court to declare: 1) if the government was obligated to respond to the petitions, and 2) if, citizens had the right of enforcement should the government refuse to respond to their petitions. *We The People Foundation v. United States*, 485 F.3d 140 (D.C. Cir. 2007).

Futia/WTP provided the D.C. Court with the numerous material facts in support of the subject petitions (referred to above), as well as the thorough historical record of the fundamental principles that led to the enumeration of the right to petition in the First Amendment (referred to above).

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4. Record on Appeal, *Futia v United States*, Case 23-860, Vol. 1, pages 165-173, Vol. 2, pages 466-489, Vol. 3, pages 612-682, Vol. 4, pages 940-1008, Vol. 11, pages 2884-2977, Vol. 12, pages 2983-2989, 3114-3173, 3193-3266.

5. Record on Appeal, *Futia v United States*, Case 23-860, Vol.3, pages 685-692, Vol. 5, pages 1258-1263.

In deciding the declaratory judgment action neither the Defendant nor the D.C. Court addressed any of the material facts included in Futia's/WTP's petitions. Nor did the Defendant or the D.C. Court address any of the material facts Futia/WTP included in the historical record of the fundamental principles that led to the enumeration of the right to petition in the First Amendment.

Instead, quoting *Smith v. Arkansas*, 441 U.S. 463 (1979) (*"Smith"*) and *Minnesota v. Knight*, 465 U.S. 271 (1984) (*"Knight"*), the D.C. court declared the government was not obligated to respond to the petitions. See *We The People Foundation v. United States*, 485 F.3d 140 (D.C. Cir. 2007).

Futia/WTP had argued before the D.C. Court: a) *Smith* and *Knight* were inapplicable as neither involved petitions by citizens against the federal government for redress of a violation of a constitutional right, and b) the petitioners in both *Smith* and *Knight* were petitioning in their roles as employees of state agencies and were petitioning their state agency employers for changes in internal agency procedures, such as its grievance procedures.

However, in its decision in *We The People Foundation v. United States*, 485 F.3d 140 (D.C. Cir. 2007) the D.C. Court of Appeals did admit:

a) the meaning of the right to petition was debatable and that "We need not resolve this debate"[6], and

6. *We The People Foundation v. United States*, 485 F.3d 140, 144 (D.C. Cir. 2007) the D.C.

b) the *Smith* and *Knight* precedent "does not refer to the historical evidence and we know from the briefs in *Knight* that the historical argument was not presented to the Supreme Court"[7], and

(c) "In the context of the First Amendment, the Supreme Court has repeatedly emphasized the significance of historical evidence"[8], and

d) that there is "an emerging consensus of scholars embracing appellants' interpretation of the right to petition"[9].

Shortly after said decision in *We The People Foundation v. U.S.*, this court held that to determine "the proper scope and application of the Petition Clause . . . Some effort must be made to identify the historic and fundamental principles that led to the enumeration of the right to petition in the First Amendment, among other rights fundamental to liberty." *Borough of Duryea v Guarnieri*, 564 U.S. 379, 394-395 (2011).

In 2012, Futia chose to exercise a right secured to him by the Petition Clause – the right of enforcement. He retired from his 44-year employment as Director of the Departments of Sewer and Water with the Town of North Castle, N.Y. and decided not to pay the federal income tax

7. *We The People Foundation v. United States*, 485 F.3d 140, 145 (D.C. Cir. 2007) the D.C.

8. *We The People Foundation v. United States*, 485 F.3d 140, 146 (D.C. Cir. 2007) the D.C.

9. *We The People Foundation v. United States*, 485 F.3d 140, 147 (D.C. Cir. 2007) the D.C.

on his monthly pension and social security payments until the grievances that were the subject of his/WTP's multi-year First Amendment petition process were redressed – that is, until the government provided a meaningful response to the petitions.

For ten years, from 2012 to 2022, Futia and the federal government often corresponded. The government would ask Futia why he was not paying the tax. Futia would respond asking why the government was not responding to his/WTP's petitions for redress of its violations of the Constitution and stating that according to the historical record of the petition clause he had the right to enforce those rights as by "redress before taxes" until the government provided a meaningful response to the petitions.

In 2022, the federal government managed to get the New York State Comptroller's Office to begin turning over to the Internal Revenue Service 70% of Futia's monthly pension payments, and the Social Security Administration to begin turning over 61% of Futia's monthly social security payments, thus depriving Futia of his right to non-violently enforce the individual rights that were the subject of Futia's/WTP's 2000 – 2012 historic, fact-based, entirely proper, First Amendment petition process.

In 2022, Futia responded by taking the federal government to court, claiming the government-defendant was violating his Right, as secured to him by the First Amendment's petition clause, to non-violently enforce rights secured to him by the Constitution following Defendant's abject failure to provide a meaningful response to Futia's/WTP's proper First Amendment

Petitions for redress of those constitutionally-grounded grievances.[10]

The basis for federal jurisdiction in the District Court was Art. III, Section 2 of the U.S. Constitution.

The record of this case shows Futia has relied on the same material facts and historical record of the petition clause that Futia/WTP relied on in *We The People Foundation v. United States*, 485 F.3d 140 (D.C. Cir. 2007) with one significant difference. The historical record of the petition clause provided to the District and Appellate court in this case ended with the following quotes from *Borough of Duryea v Guarnieri*, 564 U.S. 379 (2011).[11]

> To determine "[t]he proper scope and application of the Petition Clause . . . **Some effort must be made to identify the historic and fundamental principles that led to the enumeration of the right to petition in the First Amendment, among other rights fundamental to liberty.**" *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 394-395 (2011). (Emphasis added).
>
> "The First Amendment's Petition Clause states that 'Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.' The reference to 'the right of the people' indicates that the Petition Clause was intended to codify

10. Complaint, Vol. 1, page 1 – Vol. 4, page 1095

11. Record on Appeal, *Futia v United States*, Case 23-860, Vol. 5, page 1263.

a pre-existing individual right, which means that **we must look to historical practice to determine its scope.** (See *District of Columbia v. Heller*, 554 U.S. 570, 579, 592 (2008)." *Guarnieri* at 403. (Emphasis added).

"**There is abundant historical evidence that 'Petitions' were directed to the executive and legislative branches of government.**" *Guarnieri* at 403. (Emphasis added).

"Petition, as a word, a concept, and an **essential safeguard of freedom, is of ancient significance in English law and the Anglo-American legal tradition.**" *Guarnieri* at 394-395. (Emphasis added).

"[P]etitions have provided a vital means for citizens . . . **to assert existing rights** against the sovereign." *Guarnieri* at 397. (Emphasis added).

"Rights of speech and petition are not identical. Interpretation of the Petition Clause must be guided by the objectives and aspirations that underlie the right. A petition conveys the special concerns of its author to the government and, in its usual form, **requests action** by the government to address those concerns." *Guarnieri* at 388-389. (Emphasis added).

"One of the advantages of popular government, of which Jefferson was distinctly aware, was that it afforded a means of **redressing grievances against the government without**

> **the resort to force;** it provided, as he would later put it in his First Inaugural Address, 'a mild and safe corrective of abuses which are lopped by the sword of revolution where peaceful remedies are unprovided.'" (Emphasis added). David N. Mayer, "*The Constitutional Thought of Thomas Jefferson*," University Press of Virginia, 1994, at 107. See also Thomas Jefferson, *First Inaugural Address*, 4 March 1801, L.C.

Defendant and the Court sidestepped: 1) *Borough of Duryea v Guarnieri*, 564 U.S. 379 (2011), 2) Futia's/WTP's historic and fundamental principles that led to the enumeration of the right to petition in the First Amendment, and 3) the genuine, material facts Futia/WTP included in the subject petitions for redress, deciding instead to rely on the D.C. Court's ruling in *We The People Foundation v. United States*, 485 F.3d 140 (D.C. Cir. 2007), which inapplicably relied on this Court's decisions in *Smith v. Arkansas*, 441 U.S. 463 (1979) (*"Smith"*) and *Minnesota v. Knight*, 465 U.S. 271 (1984) (*"Knight"*), thereby declaring that the government was not obligated to respond to Futia's/WTP's petitions for redress of the grievances – its violations of rights secured by the U.S. Constitution..

Futia's Request For Discovery and a Jury Trial

In 2022, Futia coupled his Complaint in this case with a request for discovery and a jury trial.[12]

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12. Record on Appeal, *Futia v United States*, Case 23-860, Vol. 4, page 1095.

On April 24, 2023, with no mention of Futia's oft-repeated request for a jury trial, the District Court filed its Opinion and Order, granting Defendant's motion to dismiss and denying Futia's motion for preliminary relief as moot.[13]

On April 25, 2023 the District Court issued its Judgment, which made no mention of Futia's request for a jury trial.[14]

On May 3, 2023 Futia again demanded a jury trial.[15]

On May 23, 2023 the District Court converted Futia's May 3, 2023 demand for a jury trial to a motion for reconsideration and denied it.[16]

On October 17, 2023 Futia filed his Brief and Appendix with the Court of Appeals, arguing his right to a jury trial and demanding same.

On May 14, 2024, the Court of Appeals affirmed the Judgment of the District Court without addressing Futia's demand for a jury trial.

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13. Record on Appeal, *Futia v United States*, Case 23-860, Vol. 13, pages 3296-3311.

14. Record on Appeal, *Futia v United States*, Case 23-860, Vol. 13, page 3312.

15. Record on Appeal, *Futia v United States*, Case 23-860, Vol. 13, pages 3313-3317.

16. Record on Appeal, *Futia v United States*, Case 23-860, Vol. 13, page 3319.

New Evidence Arguing For The Writ

On May 14, 2024, the Court of Appeals issued its Summary Order. App. A.

On July 1, 2024, the Court denied Futia's petition for rehearing. App. B.

On July 8, 2024, the Court issued its Mandate. App. D.

On July 25, 2024, Futia filed a Freedom of Information Law request with the New York State Comptroller's Office, requesting "a certified list of all statutes which create a specific liability for taxes imposed by Subtitle A of the Internal Revenue Code. App. E.

On August 1, 2024, the State Comptroller's Records Access Officer responded by letter saying, "Personnel have informed me that after a diligent search, they have been unable to locate any records that satisfy your request." App. E.

On August 12, 2024, attaching the "New Decisive Evidence" received from the Comptroller's Office Futia filed a second petition for rehearing at the Court of Appeals. App E.

On August 16, 2024, by "Notice" and without explanation, the Court of Appeals rejected Futia's second petition for rehearing. App. E.

On August 22, 2024, Futia filed a Motion for Reconsideration at the Court of Appeals, arguing the

Comptroller's admission makes necessary recall of the Court's mandate in order to resolve a jurisdictional issue not previously raised and to make further arrangements so that the U.S Supreme Court would not be called upon to confront an issue for the first time without the benefit of a prior ruling. App. F.

On August 28, 2024, by "Notice" and without explanation, the Court of Appeals rejected Futia's motion for reconsideration. App. F.

CONCLUSION

This case involves a constitutional question of exceptional importance which should be heard and settled by this Court.

As argued, by deciding to ignore the historic and fundamental principles that led to the enumeration of the right to petition in the First Amendment the United States court of appeals for the Second Circuit has decided an important federal question in a way that conflicts with a relevant decision of this Court – i.e., *Borough of Duryea v Guarnieri*, 564 U.S. 379, 394-395 (2011).

In addition, by declaring the government is not obligated to respond to proper petitions for redress of its violations of the U.S. Constitution, said decision by the United States court of appeals has decided an important

federal constitutional question that has not been, but should be, settled by this Court.

Respectfully submitted,

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September 27, 2024

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED MAY 14, 2024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

23-860

ANTHONY FUTIA, JR.,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

May 14, 2024, Decided

PRESENT: JOSÉ A. CABRANES,
MARIA ARAÚJO KAHN,
Circuit Judges,
KATHERINE POLK FAILLA,
*District Judge.**

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* Judge Katherine Polk Failla, of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Appellant Anthony Futia, Jr. ("Futia") filed a *pro se* complaint alleging that the United States government violated his constitutional rights—specifically, the Petition Clause of the First Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments—by (1) enforcing a tax against him, (2) refusing to respond to correspondence in which he sought redress, and (3) imposing a levy against him for the taxes that he owed. Futia attached over a thousand pages of documents and sought declaratory and injunctive relief. With respect to the former, he sought a declaration that he was not guilty of failing to pay taxes and, with respect to the latter, he sought an injunction preventing the IRS from continuing to levy a portion of his Social Security payments. Futia also asked for a jury trial.

The government moved to dismiss Futia's complaint under Federal Rule of Civil Procedure 12(b)(1) and (b)(6). The district court dismissed Futia's complaint, reasoning that the government was protected by sovereign immunity and that the Declaratory Judgment and Anti-Injunction Acts—28 U.S.C. § 2201(a) and 26 U.S.C. § 7421(a), respectively—barred Futia's requests for declaratory and injunctive relief pertaining to taxation. *See Futia v. United States*, No. 22-CV-6965 (VB), 2023 U.S. Dist. LEXIS 71126, 2023 WL 3061903, at *4 (S.D.N.Y. Apr.

24, 2023). The district court further held that although Futia could seek limited non-monetary relief for certain constitutional claims under the Administrative Procedure Act, those claims ultimately lacked merit because the First Amendment right to petition the government does not include a right to a response, the government had not violated Futia's due process rights for the same reason, and the United States has the power to impose federal income taxes under the Sixteenth Amendment. *See* 2023 U.S. Dist. LEXIS 71126, [WL] at *5-7.[1] Futia appealed from the decision. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues on appeal, to which we refer only as necessary to explain our decision to affirm.

Because the district court made no factual findings, we review the dismissal under both Federal Rule of Civil Procedure 12(b)(1) and (6) *de novo*. *See Cangemi v. United States*, 13 F.4th 115, 129 (2d Cir. 2021) (subject matter jurisdiction); *VIZIO, Inc. v. Klee*, 886 F.3d 249, 255 (2d Cir. 2018) (failure to state a claim). In conducting our review, we assess whether the well-pleaded facts, accepted as true and with all reasonable inferences drawn in Futia's favor, state a plausible claim for relief. *See VIZIO*, 886 F.3d at 255. *Pro se* submissions are construed "to raise the strongest arguments they suggest." *Publicola v. Lomenzo*, 54 F.4th 108, 111 (2d Cir. 2022) (per curiam) (internal quotation marks omitted).

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1. The district court also denied leave to amend, *Futia*, 2023 U.S. Dist. LEXIS 71126, 2023 WL 3061903 at *8, but Futia does not challenge that aspect of the court's ruling. As such, it is abandoned. *See Green v. Dep't of Educ. of N.Y.*, 16 F.4th 1070, 1074 (2d Cir. 2021) (per curiam).

Appendix A

I. Subject Matter Jurisdiction

The district court correctly held that Futia had not shown that his claims for injunctive and declaratory relief pertaining to taxation fell within an applicable waiver of sovereign immunity. "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994). Because "[t]he doctrine of sovereign immunity is jurisdictional in nature," Futia bears the burden of showing that his claims "fall within an applicable waiver." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). Futia was explicitly barred from suing the government for the requested declaratory and injunctive relief under the Declaratory Judgment and Anti-Injunction Acts. The Declaratory Judgment Act prevents the court from making declarations "with respect to Federal taxes." 28 U.S.C. § 2201(a). The Anti-Injunction Act likewise provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). Accordingly, the portion of Futia's suit with the "objective aim" to declare his tax obligation void and enjoin the levying of tax owed was barred by the aforementioned federal statutes. *CIC Servs., LLC v. IRS*, 593 U.S. 209, 217, 141 S. Ct. 1582, 209 L. Ed. 2d 615 (2021).

II. Petition Clause

We also agree with the district court that Futia's right to petition claim under the First Amendment, although not barred by sovereign immunity, fails to state a claim for relief. The First Amendment Petition Clause prohibits states from "abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend I. In arguing that the Petition Clause also guarantees a right to a governmental *response*, Futia contends that the district court erred in relying on *Smith v. Ark. State High. Emps., Loc. 1315*, 441 U.S. 463, 99 S. Ct. 1826, 60 L. Ed. 2d 360 (1979), and *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 104 S. Ct. 1058, 79 L. Ed. 2d 299 (1984), which held that no such right exists. He claims that those cases are distinguishable because they involved conduct by states, not the federal government. On this record, Futia does not put forth a cogent argument as to why the Petition Clause has been interpreted incorrectly by the Supreme Court or why the Petition Clause should be applied differently as between the federal government and states. This Court is "bound to follow the existing precedent of the Supreme Court until that Court tells us otherwise." *N.Y. State Citizens' Coal. for Child. v. Poole*, 922 F.3d 69, 79 (2d Cir. 2019). Accordingly, we conclude that the district court did not err in dismissing Futia's Petition Clause claim.

III. Due Process Clause

Futia's Due Process claim fails for the same reason as his Petition Clause claim. To the extent that Futia contends that the Sixteenth Amendment was not legally ratified, that argument has been rejected on both procedural and substantive grounds. *See United States v. Sitka*, 845 F.2d 43, 45-47 (2d Cir. 1988) (declining to reach the issue as a political question); *Miller v. United States*, 868 F.2d 236, 241 (7th Cir. 1989) (per curiam) (describing the "long and unbroken line of cases upholding the constitutionality of the [S]ixteenth [A]mendment") (citing *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 12-19, 36 S. Ct. 236, 60 L. Ed. 493, T.D. 2290 (1916)).

We have considered Futia's remaining arguments and conclude that they are without merit. Accordingly, we **AFFIRM** the judgment of the district court. Because some of Futia's filings contain his personal identifying information that should not have been filed unredacted on the public docket, the Clerk of this Court is directed to seal volume 13 of Futia's appendix (document 70) from public view; the district court is directed to do the same for documents 1-15 on its docket. *See* Fed. R. Civ. P. 5.2(a)(1); Fed. R. App. P. 25(a)(5).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

/s/ Catherine O'Hagan Wolfe

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED APRIL 24, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 22 CV 6965 (VB)

ANTHONY J. FUTIA, JR.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Filed April 24, 2023

OPINION AND ORDER

Briccetti, J.:

Plaintiff Anthony J. Futia, Jr., proceeding *pro se*, brings this action against defendant the United States of America, alleging the United States violated his First, Fifth, and Fourteenth Amendment rights by taxing plaintiff's income while failing to respond to his petitions for redress. Plaintiff also brings a motion for preliminary relief, seeking to enjoin defendant from levying $1,702.86 per month from plaintiff's social security payments for unpaid taxes, and to direct defendant to return to plaintiff's bank account the funds already levied pending the outcome of this action.

Appendix B

Now pending are (i) defendant's motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) (Doc. #21), and (ii) plaintiff's motion for preliminary relief. (Doc. #29).

For the reasons set forth below, the motion to dismiss is GRANTED, and the motion for preliminary relief is DENIED as moot.

BACKGROUND

For the purpose of ruling on the motion to dismiss, the Court accepts as true all well-pleaded factual allegations in the amended complaint, any documents attached thereto,[1] and certain factual allegations in plaintiff's opposition.[2] The Court draws all reasonable inferences in plaintiff's favor, as summarized below.

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1. In deciding a Rule 12(b)(6) motion, the Court "may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010).

Unless otherwise indicated, case quotations omit all internal citations, quotation marks, footnotes, and alterations.

2. Because plaintiff is proceeding *pro se*, the Court considers new allegations in the opposition, to the extent they are consistent with the complaint. *See Kelley v. Universal Music Grp.*, 2016 WL 5720766, at *6 (S.D.N.Y. Sept. 29, 2016).

Plaintiff will be provided copies of all unpublished opinions cited in this decision. *See Lebron v. Sanders*, 557 F.3d 76, 79 (2d Cir. 2009) (per curiam).

Appendix B

Plaintiff claims to be a "founding member" of the We the People Foundation for Constitutional Education, Inc.; We the People of New York, Inc.; and We the People Congress, Inc. (together, the "WTP Organizations"). (Doc. #1 ("Compl.") ¶ 4). According to plaintiff, the WTP Organizations

> promote the view that the historical record of the Petition Clause of the First Amendment proves: a) the government is obligated to respond to the People's questions, their proper Petitions for Redress of the Government's violations of the State and Federal Constitutions, and laws pursuant thereto; and b) if the government does not respond, the Right to Petition includes the Right of enforcement, including "redress before taxes."

(Doc. #28 ("Pl. Opp.") at 2). As for taxes, the WTP Organizations purportedly espouse the view that the Sixteenth Amendment was never properly ratified and the U.S. income tax system is unconstitutional because it violates the original U.S. Constitution. (*See, e.g.*, Doc. #1-1 at ECF 7-8; Doc. #1-3 at ECF 17; Doc. # 1-14 at ECF 6-24.)[3]

Over the past twenty-five years, plaintiff has "approved" and "been actively engaged" in the WTP Organizations' daily activities, including their "Petitions for Redress of dozens of violations of the New York

3. "ECF __" refers to page numbers automatically assigned by the Court's Electronic Case Filing system.

State and United States Constitutions by government officials." (Compl. ¶ 4). Plaintiff attaches to his complaint and opposition various petitions and other grievances he, and others that appear to be associated with the WTP Organizations, have sent to government officials regarding the alleged unconstitutionality of the U.S. income tax system. (*See, e.g.*, Docs. ##1-1–1-10, 1-14, 28-11–28-17). As part of these efforts, plaintiff purportedly engaged in "an intense, rational, professional approach, begun in 1999" to hold defendant "accountable to the rule of law, relying entirely on his constitutionally endowed Rights" and defendant's "obligations under the Petition Clause of the First Amendment." (Compl. ¶ 5). For over twelve years, defendant has allegedly refused to respond to plaintiff's petitions for redress "while continuing to enforce the direct, un-apportioned tax on labor." (*Id.* ¶ 6). Beginning in 2012, plaintiff decided "to exercise his Right to 'Redress before taxes'" and "stopped paying the direct, un-apportioned tax on his labor." (*Id.* ¶ 7). However, plaintiff indicates he paid income taxes in 2016 "under protest." (*Id.* ¶ 3). From 2012 through 2019, plaintiff contends defendant has sent him payment demands "while ignoring" and failing to respond to plaintiff's "totally reasonable, constitution-based explanation for his reason to stop" paying income taxes. (*Id.* ¶ 8).

Plaintiff alleges the Social Security Administration ("SSA") had "long been depositing $2,614" per month into his bank account. (Compl. ¶ 14). However, in a letter dated August 9, 2022, the SSA informed plaintiff that it was withholding $1,534.80 at the direction of the Internal Revenue Service ("IRS"), and would continue to withhold

this amount from plaintiff's social security payments each month, to "pay your debt to the IRS." (Doc. #1-16 at ECF 5).

Plaintiff alleges defendant violated his First Amendment right to petition the government, and his Fifth and Fourteenth Amendment due process rights "by enforcing a direct, un-apportioned tax against Plaintiff, including the imposition of a levy, while refusing to provide Plaintiff with any response, much less a meaningful response, to Plaintiff's oft-repeated, intelligent, rational, professional, unique, [and] non-frivolous" grievances regarding defendant's purportedly unconstitutional "imposition and enforcement of said tax." (Compl. ¶ 1). As relief, plaintiff seeks: (i) a declaration that he "is not guilty of failing to pay the subject tax" for 2014, 2015, 2017, 2018, and 2019, and that he "is entitled to a refund of the tax paid under protest for 2016"; and (ii) an injunction enjoining defendant "from collecting any tax by levy on any property or rights to property belonging to" plaintiff "pending the outcome of this case."[4]

4. In the complaint, plaintiff also sought an injunction against JP Morgan Chase Bank NA and The Bank of Greene County "enjoining them from sending" his "money to the IRS pending the outcome of this case." (*See* Compl. at 4). However, plaintiff did not name these parties as defendants or plead any factual allegations against them in his complaint, so the Court cannot grant this relief. Accordingly, to the extent plaintiff attempts to bring any claims against these entities, such claims must be dismissed. Indeed, plaintiff filed a separate lawsuit against these entities and others in Supreme Court, Westchester County, which was subsequently removed to this Court. *See Futia v. Roberts*, No. 23-cv-1774 (S.D.N.Y. removed Mar. 1, 2023) (VB).

(*Id.* at 4).[5] Likewise, in his second motion for preliminary relief, plaintiff seeks "an Order enjoining defendant from continuing its taking of my monthly retirement pay and my monthly social security pay, and directing defendant to return to my bank account the full amount that it took, pending the final outcome of this case." (Doc. #29 at ECF 1).[6]

On August 15, 2022, the same day plaintiff commenced this lawsuit, plaintiff filed his first motion for preliminary relief. (Doc. #3). The Court denied that motion (Doc. #7), as well as plaintiff 's motion for reconsideration of that decision. (Docs. ##9, 13). On January 11, 2023, plaintiff filed a second motion for preliminary relief (Doc. #29), which is addressed in Section V *infra*.

5. Plaintiff re-starts the numbering of his paragraphs on page 4 of his complaint. To avoid confusion with plaintiff 's earlier paragraphs, the Court refers to the page number of the complaint for those newly-numbered paragraphs.

6. Although the Court previously observed that "Plaintiff plainly has a right to sue for any incorrectly assessed taxes pursuant to 28 U.S.C. § 1346(a)," the Court also previously determined "Plaintiff has failed to plead compliance with the necessary procedural requirements of filing such a suit." (Doc. #7). However, in his opposition, plaintiff clarifies he is not pursuing a statutory claim under this provision. (Pl. Opp. at 7-8). Instead, plaintiff states his "claims arise under the Constitution, not 28 U.S.C. 1346(a)" and he "has no interest in abandoning his Rights by proceeding under 28 U.S.C. 1346(a), a statute intended for those with cases in law and equity that do not arise under the Constitution." (*Id.*). Therefore, the Court analyzes the complaint and second motion for preliminary relief to assert claims solely under the Constitution.

In addition, in his opposition, plaintiff asserts that "under the original intent of the Petition Clause" he has a right "to a response from the Government to his Petition for Redress of the Government's violation of the Constitution's tax clauses." (Pl. Opp. at 6).

DISCUSSION

I. Standard of Review

A. Rule 12(b)(1)

A district court must dismiss an action pursuant to Rule 12(b)(1) "for lack of subject matter jurisdiction if the court lacks the statutory or constitutional power to adjudicate it." *Conn. Parents Union v. Russell-Tucker*, 8 F.4th 167, 172 (2d Cir. 2021).

When deciding a Rule 12(b)(1) motion at the pleading stage, the court "must accept as true all material facts alleged in the complaint and draw all reasonable inferences in the plaintiff's favor," except for "argumentative inferences favorable to the party asserting jurisdiction." *Buday v. N.Y. Yankees P'ship*, 486 F. App'x 894, 895 (2d Cir. 2012) (summary order). To the extent a Rule 12(b)(1) motion places jurisdictional facts in dispute, the district court may resolve the disputed jurisdictional fact issues by referring to evidence outside the pleadings. *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011).

Even when a plaintiff is proceeding *pro se*, he "has the burden of proving by a preponderance of the evidence

that such jurisdiction exists." *DeBoe v. Du Bois*, 503 F. App'x 85, 86 (2d Cir. 2012) (summary order). In other words, "[n]otwithstanding the liberal pleading standard afforded *pro se* litigants, federal courts are courts of limited jurisdiction and may not preside over cases if subject matter jurisdiction is lacking." *Clarkes v. Law Offs. of Michael G. Hughes*, 2018 WL 5634932, at *2 (E.D.N.Y. Oct. 30, 2018).

In addition, when a defendant moves to dismiss for lack of subject matter jurisdiction and on other grounds, the court should consider the Rule 12(b)(1) challenge first. *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674, 678 (2d Cir. 1990).

B. Rule 12(b)(6)

In deciding a Rule 12(b)(6) motion, the Court evaluates the sufficiency of the operative complaint under "the two-pronged approach" articulated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). First, a plaintiff's legal conclusions and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not entitled to the assumption of truth and are thus not sufficient to withstand a motion to dismiss. *Id.* at 678; *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010). Second, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. at 679.

To survive a Rule 12(b)(6) motion, the allegations in the complaint must meet a standard of "plausibility." *Ashcroft*

v. Iqbal, 556 U.S. at 678; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. at 556).

The Court must liberally construe submissions of *pro se* litigants and interpret them "to raise the strongest arguments that they suggest." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (per curiam) (collecting cases). "Even in a *pro se* case, however, . . . threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Chavis v. Chappius*, 618 F.3d 162, 170 (2d Cir. 2010). Nor may the Court "invent factual allegations" a plaintiff has not pleaded. *Id.*

II. Subject Matter Jurisdiction

Defendant argues sovereign immunity bars plaintiff's claims and that no waiver of immunity applies.

The Court agrees as to plaintiff's requests for declaratory and injunctive relief, but disagrees as to plaintiff's constitutional claims based on defendant's alleged failure to respond to plaintiff's petitions for redress.

Appendix B

A. Legal Standard

"Sovereign immunity is a jurisdictional bar," *Lunney v. United States*, 319 F.3d 550, 554 (2d Cir. 2003), and "[a]bsent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *Dorking Genetics v. United States*, 76 F.3d 1261, 1263 (2d Cir. 1996) (quoting *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994)). It is plaintiff 's burden to show Congress waived sovereign immunity over his claims against defendant. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). The Supreme Court has "frequently held that waivers of sovereign immunity are to be strictly construed, in terms of their scope, in favor of the sovereign." *Cooke v. United States*, 918 F.3d 77, 81 (2d Cir. 2019) (quoting *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999)). Consent to suit must be expressed unequivocally, with any ambiguity construed strictly in favor of the government. *See United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992).

B. Application

Here, the statutes to which plaintiff refers do not waive sovereign immunity with respect to plaintiff 's requests for declaratory and injunctive relief.

1. Declaratory Judgment and Tax Anti-Injunction Acts

First, Congress has preserved defendant's sovereign immunity by enacting statutes that prohibit the specific relief plaintiff seeks.

Appendix B

Plaintiff requests a declaration that he "is not guilty of failing to pay the subject tax" for multiple years and that defendant owes him a refund for 2016 when he paid "under protest." (Compl. at 4). However, the Declaratory Judgment Act "forbids courts from declaring obligations 'with respect to Federal taxes.'" *Nath v. JP Morgan Chase Bank*, 2016 WL 5791193, at *11 (S.D.N.Y. Sept. 30, 2016) (quoting 28 U.S.C. § 2201(a)); *see also Black v. United States*, 534 F.2d 524, 527 n. 3 (2d Cir. 1976) (noting 28 U.S.C. § 2201, "which generally provides for declaratory judgments, contains a specific exception for matters relating to federal taxes"). "Accordingly, courts routinely dismiss requests for judgments declaring federal tax obligations, even in the face of lengthy recitals of assumed violations of constitutional rights." *Clavizzao v. United States*, 706 F. Supp. 2d 342, 347 (S.D.N.Y. 2009) (quoting *Jolles Found. v. Moysey*, 250 F.2d 166, 169 (2d Cir. 1957)).

Plaintiff's request to enjoin the United States from "from collecting any tax by levy on any property or rights to property belonging to" plaintiff, such as his social security payments (Compl. at 4), is likewise barred by the Tax Anti-Injunction Act, which states "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." *Clavizzao v. United States*, 706 F. Supp. 2d at 346 (quoting 26 U.S.C. § 7421(a)); *see Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974) (Tax Anti-Injunction Act's "language could scarcely be more explicit"). Accordingly, instead of waiving "sovereign immunity for tax-related challenges like the one presented here," "Congress has, in fact, done the opposite" with the Tax Anti-Injunction

Act. *Scheuering v. United States*, 2014 WL 6865727, at *3 (S.D.N.Y. Dec. 4, 2014).

2. Administrative Procedure Act

Second, the Administrative Procedure Act does not waive defendant's sovereign immunity with respect to plaintiff's requests for declaratory and injunctive relief. However, the Court construes plaintiff's complaint and opposition to assert a claim under the First, Fifth, and Fourteenth Amendments based on defendant's purported failure to respond to plaintiff's petitions, and to seek other relief for which the Administrative Procedure Act waives defendant's sovereign immunity to suit.

Plaintiff argues the Court has subject matter jurisdiction in light of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 ("Section 702"). (Pl. Opp. at 7). Section 702 "generally waives the Federal Government's immunity from a suit 'seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity.'" *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012) (quoting 5 U.S.C. § 702). However, the waiver provision of Section 702 "does not apply if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought by the plaintiff." *Id.* Thus, plaintiff is precluded from "exploiting the APA's waiver to evade limitations on suit contained in other statutes." *Id.*

Appendix B

a. Declaratory and Injunctive Relief

Here, as discussed above, plaintiff has failed to demonstrate that the United States waived sovereign immunity with respect to his requests for declaratory and injunctive relief. Therefore, plaintiff "cannot rely upon the APA to obtain injunctive or declaratory relief that is prohibited by the Anti-Injunction Act . . . or the Declaratory Judgment Act." *Larson v. United States*, 2016 WL 7471338, at *7 n. 12 (S.D.N.Y. Dec. 28, 2016).

Although plaintiff contends his "only purpose of this suit and his actions leading up to this suit was and is to redress a grievance—that is, to set right a violation of the Constitution, not to restrain the assessment or collection of any tax," this is belied by his other allegations. (Pl. Opp. at 7). Specifically, elsewhere in his opposition, plaintiff argues, "the Petition Clause also grants him the natural, un-alienable right to injunctive relief—that is, the necessary, indispensable and unavoidable right to retain his taxes until the grievance is redressed in the interest of preventing a future wrong." (*Id.* at 6).

Accordingly, the Administrative Procedure Act does not waive defendant's sovereign immunity over plaintiff's request for a declaratory judgment regarding his tax liability or to enjoin defendant from collecting taxes, and the Court lacks subject matter jurisdiction over those claims. *See We the People Found., Inc. v. United States*, 485 F.3d 140, 141-42 (D.C. Cir. 2007) (holding the court lacked subject matter jurisdiction to address plaintiffs' request to enjoin the government "from retaliating against

plaintiffs' exercise of their constitutional rights (in other words, to prevent the Government from collecting taxes from them)").

b. Constitutional Claims

However, the Court construes plaintiff's complaint and opposition to separately allege a First Amendment Petition Clause claim, as well as due process claims under the Fifth and Fourteenth Amendments, based on defendant's alleged failure to respond to plaintiff's petitions. The Administrative Procedure Act waives defendant's sovereign immunity with respect to these claims.

In *We the People Foundation, Inc. v. United States* ("We the People"), a case brought by one of the WTP Organizations plaintiff founded, the court examined (i) whether the plaintiffs had "a First Amendment right to receive a government response to or official consideration of their petitions," and (ii) whether plaintiffs had "the right to withhold payment of their taxes until they receive adequate action on their petitions." 485 F.3d at 142. The court determined the second claim was barred and held that plaintiffs cannot "seek to restrain the Government's collection of taxes, which is precisely what the Anti-Injunction Act prohibits, notwithstanding that plaintiffs have couched their tax collection claim in constitutional terms." *Id.* at 143. However, as to the first claim, the D.C. Circuit found that Section 702 waives sovereign immunity—and therefore confers subject matter jurisdiction—over "a straight First Amendment Petition Clause claim—namely, that [plaintiffs] have a right to

receive a government response to or official consideration of their various petitions." *Id.*

Here, plaintiff asserts a claim similar to the "straight First Amendment Petition Clause claim" asserted in We the People. *Compare* Pl. Opp. at 6 (plaintiff "has a Right to response from the Government to his Petition for Redress of the Government's violation of the Constitution's tax clauses" under the First Amendment's Petition Clause), *with We the People Foundation v. United States*, 485 F.3d at 141-42 (court had subject matter jurisdiction over plaintiffs' request that the government "enter into 'good faith exchanges' with plaintiffs and . . . provide 'documented and specific answers' to the questions posed in the petitions"). He likewise asserts due process claims under the Fifth and Fourteenth Amendments alleging defendants are "enforcing a direct, un-apportioned tax against Plaintiff, including the imposition of a levy, while refusing to provide Plaintiff with any response, much less a meaningful response, to Plaintiff 's . . . Petition for Redress." (Compl. ¶ 1).

Because these claims seek relief other than money damages and claim that an agency or an officer or employee thereof acted or failed to act in an official capacity, the Administrative Procedure Act waives sovereign immunity as to these claims, and the Court has subject matter jurisdiction over them to the extent they seek a response from defendant.

However, as discussed below, because plaintiff has failed to state a claim under any of these Amendments, his claims must be dismissed under Rule 12(b)(6).

III. First Amendment Claim

Defendant argues plaintiff fails plausibly to allege a First Amendment claim because the constitutional right to petition the government does not include a right to a response.

The Court agrees.

"The First Amendment protects a right to . . . petition the government for the redress of grievances." *Ayala-Rosario v. Westchester Cnty.*, 2020 WL 3618190, *5 (S.D.N.Y. July 2, 2020). However, "[t]he right to petition in general guarantees only that individuals have a right to communicate directly to government officials. . . . It does not guarantee, as plaintiff contends, . . . that an elected official will necessarily act a certain way or respond in a certain manner to requests from his constituents." *Kittay v. Giuliani*, 112 F. Supp. 2d 342, 354 (S.D.N.Y. 2000) (citing *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1984)), *aff'd*, 252 F.3d 645 (2d Cir. 2001). Indeed, "[n]othing in the First Amendment or in [the Supreme] Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. at 285; *see also Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979) (noting "the First Amendment does not impose any affirmative obligation on the government to listen, [or] to respond"); *Futia v. New York*, 837 F. App'x 17, 20 (2d Cir. 2020) (summary order), *cert. denied*, 141 S. Ct. 1741 (2021).

Here, based on his own allegations, plaintiff has exercised his right to petition defendant to redress his grievances since 1999 when he began submitting petitions to various federal officials regarding the alleged unconstitutionality of federal income tax. (*See, e.g.*, Compl. ¶¶ 4-6). Because plaintiff "does not allege [defendant] prevented him from communicating any grievance," *see Kittay v. Giuliani*, 112 F. Supp. 2d at 354, he fails plausibly to allege defendant violated his constitutional right to petition the government.

Accordingly, plaintiff's First Amendment claim must be dismissed.

IV. Due Process Claims

Defendant argues plaintiff has not plausibly alleged a violation of his due process rights under the Fifth and Fourteenth Amendments because (i) plaintiff does not have a First Amendment right to receive a response to his grievances before federal income taxes are imposed and enforced; and (ii) the United States has the power to impose and enforce federal income taxes under the Sixteenth Amendment, contrary to plaintiff's petitions for redress. Therefore, defendant argues, plaintiff has not alleged he was deprived of a constitutional right without due process.

The Court agrees.

The Sixteenth Amendment "provides Congress with the necessary authority to impose a direct, non-

apportioned income tax." *United States v. Sitka*, 845 F.2d 43, 46 (2d Cir. 1988) (citing *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 12-19 (1916)). The Second Circuit has confirmed "the federal income tax is constitutional." *See Zuckman v. Dep't of Treasury*, 448 F. App'x 160, 161 (2d Cir. 2012) (summary order). And it is "well settled that" due process "is not a limitation upon the taxing power conferred upon Congress by the Constitution; . . . the Constitution does not conflict with itself by conferring, upon the one hand, a taxing power, and taking the same power away, on the other hand, by the limitations of the due process clause." *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. at 24.

Accordingly, courts have declined to find due process violations based on the imposition or withholding of federal income tax under the Sixteenth Amendment. *See, e.g.*, George v. United States, 2022 WL 562758, at *2 (N.D. Cal. Feb. 24, 2022) (collecting cases and dismissing plaintiffs' claims about unconstitutionality of federal income tax "[b]ecause the Sixteenth Amendment is constitutional"); *United States v. Shimek*, 445 F. Supp. 884, 889 (M.D. Pa. 1978) ("Federal income tax withholding does not result in a taking of property without due process and is a legitimate exercise of Congress' power to make all laws necessary and proper for the taxing of income pursuant to the Sixteenth Amendment to the United States Constitution.").

In addition, "[t]he constitutionality of the levy procedure, of course, has 'long been settled.'" *United States v. Nat'l Bank of Com.*, 472 U.S. 713, 721 (1985) (quoting *Phillips v. Comm'r*, 285 U.S. 589, 595 (1931)). "Time after time the Supreme Court has upheld the constitutionality

of summary administrative procedures [for levying unpaid taxes] contained in the Internal Revenue Code against due process challenges, on the basis that a post-collection remedy (*e.g.*, a tax refund suit) exists and is sufficient to satisfy the requirements of constitutional due process." *Celauro v. U.S. I.R.S.*, 411 F. Supp. 2d 257, 269 (E.D.N.Y. 2006) (collecting Supreme Court cases), *aff'd*, 214 F. App'x 95 (2d Cir. 2007) (summary order).

Here, plaintiff alleges his due process rights were violated by defendant "imposing and enforcing a direct, un-apportioned tax on his labor without responding to his Petition for Redress of the Government's violation of the tax clauses of the Constitution." (Pl. Opp. at 1; *see* Compl. ¶ 1).

However, as discussed in Part III *supra*, plaintiff has no First Amendment right to receive a response to his petitions. In addition, it is not a taking of plaintiff's property without due process for the United States to impose an income tax on citizens like plaintiff, which is permitted by the Sixteenth Amendment, or to impose a levy to satisfy unpaid taxes.

Accordingly, plaintiff's due process claims must be dismissed.

V. Motion for Preliminary Relief

Because the Court dismisses this case in its entirety, it need not address the merits of plaintiff's motion for preliminary relief, which is now moot.

VI. Leave to Replead

A district court ordinarily should not dismiss a *pro se* complaint for failure to state a claim "without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (quoting *Gomez v. USAA Fed. Sav. Bank*, 171 F.3d 794, 795 (2d Cir. 1999)). Here, however, reading the complaint liberally, the Court does not find any allegations that suggest plaintiff has a valid claim he has merely "inadequately or inartfully pleaded" and therefore should be "given a chance to reframe." *Id.* On the contrary, the Court finds that repleading would be futile, because the problems with plaintiff 's causes of action are substantive, and supplementary and/or improved pleading will not cure their deficiencies. *See id.*

Accordingly, the Court declines to grant plaintiff leave to file an amended complaint.

CONCLUSION

Defendant's motion to dismiss is GRANTED.

Plaintiff 's motion for preliminary relief is DENIED as moot.

The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore in forma pauperis status is denied for the purposes of an appeal. *Cf. Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

The Clerk is instructed to terminate the motions (Docs. ##21, 29), and close this case.

Chambers will mail a copy of this Opinion and Order to plaintiff at the address on the docket.

Dated: April 24, 2023
White Plains, NY

SO ORDERED.

/s/
Vincent L. Briccetti
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED MAY 23, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

22 CV 6965 (VB)

ANTHONY J. FUTIA, JR.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

On August 16, 2022, plaintiff, proceeding *pro se*, filed this action alleging the United States violated his First, Fifth, and Fourteenth Amendment rights by taxing plaintff's income while failing to respond to his petitions for redress. (Doc. #1).

Further, on August 16, 2022, plaintiff filed a motion for preliminary relief, seeking to enjoin the United States from levying $1,702.86 per month from plaintiff's social security payments for unpaid taxes, and to direct the United States to return to plaintiff's bank account the funds already levied pending the outcome of this action.

Appendix C

On April 24, 2023, the Court issued an Opinion and Order granting defendant's motion to dismiss and denying plaintiff's motion for preliminary relief as moot. (Doc. #37).

On May 3, 2023, plaintiff filed a letter addressed to the judge previously assigned to this case entitled "Demand for a Jury Trial," and referencing the Court's April 24, 2023, Opinion and Order. (Doc. #39). In this letter, plaintiff argues his "right to a trial by jury is inviolate meaning the right cannot be violated—it is free from any impairment" and "[d]enying my right to a trial by jury under the facts and circumstances of this case would be treasonous to the Constitution and would speak to your conflict of interest." (*Id.*). The Court construes plaintiff's letter as a motion for reconsideration of the Opinion and Order dated April 24, 2023.

"To prevail on a motion for reconsideration, the movant must demonstrate 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *Catskill Dev., L.L.C. v. Park Place Ent. Corp.*, 154 F. Supp. 2d 696, 701 (S.D.N.Y. 2001) (quoting *Doe v. N.Y.C. Dep't of Soc. Servs.*, 709 F.2d 782, 789 (2d Cir. 1983)). Such a motion should be granted only when the Court has overlooked facts or precedent that might have altered the conclusion reached in the earlier decision. *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995); *see also* Local Civil Rule 6.3. The movant's burden is weighty to avoid "wasteful repetition of arguments already briefed, considered and decided." *Weissman v. Fruchtman*, 124 F.R.D. 559, 560 (S.D.N.Y. 1989).

Appendix C

Upon due consideration of plaintiff's arguments in the motion for reconsideration, the Court finds them to be without merit. Plaintiff does not point to any facts or legal precedent that warrant reconsideration of the Opinion and Order dated April 24, 2023.

Accordingly, plaintiff's motion for reconsideration is DENIED. (Doc. #39).

The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this Order would not be taken in good faith, and therefore *in forma pauperis* status is denied for the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962).

Chambers will mail a copy of this Order to plaintiff at the address on the docket.

Dated: May 23, 2023
White Plains, NY

SO ORDERED:

/s/ Vincent L. Briccetti
Vincent L. Briccetti
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JULY 1, 2024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 23-860

ANTHONY FUTIA, JR.,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

July 1, 2024, Decided

SUMMARY ORDER

Appellant Anthony Futia, Jr., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

Appendix D

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

/s/ Catherine O'Hagan Wolfe

APPENDIX E — NOTICE OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 16, 2024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

23-860cv
(22-cv-6965, Southern District of
New York, White Plains, Brisccetti, J.)

ANTHONY FUTIA, JR.,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Filed August 16, 2024

DEBRA ANN LIVINGSTON, CHIEF JUDGE.

NOTICE OF DOCUMENT RETURNED

The enclosed second petition for rehearing is rejected for filing because the:

( ) moving party is not counsel of record.

( ) response may not be accepted because motion has been decided.

Appendix E

( ) relief requested must be sought in district court in the first instance.

(x) appeal is closed, and this Court no longer has jurisdiction.

Inquiries regarding this case may be directed to the undersigned 212-857-8560.

Appendix E

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Case No. 23-860

ANTHONY J. FUTIA, Jr,.

Plaintiff-Petitioner-Appellant,

v.

UNITED STATES

Defendant-Respondent-Respondent.

PETITION FOR REHEARING

SECOND PETITION FOR REHEARING*

Appellant ("Futia"). submits this, his second, combined petition for panel rehearing and petition for rehearing en banc, following his receipt of an official response from the Office of the State Comptroller, State of New York to his FOIL Request #2024-0649 dated August 1, 2024.

NEW, DECISIVE EVIDENCE

In sum, Futia argued in this Court and the District Court that between 1999 and 2012, while employed by the Town of North Castle, he had properly petitioned Defendant for redress of its violation of the Constitution's tax and due process clauses, claiming in part that there

is no law that made him and the average citizen liable for taxes imposed by Subtitle A of the Internal Revenue Code.

As the record of this case shows, for those thirteen years, Defendant refused to respond to Futia' s entirely proper First Amendment Petition for Redress of those violations.

As the Record shows, upon retirement Futia decided to enforce his rights, secured to him by the Constitution, by retaining his retirement and social security pay, in full, unless and until those grievances were redressed.

As the Record shows, Futia initiated this case following Defendant's success in the year 2022 in getting the Office of the State Comptroller of the State of New York and the Social Security Administration to seize almost all of Futia's monthly retirement pension payments and monthly social security payments to cover what Defendant claimed was federal income tax due and owing on those payments for two years following his retirement in 2012.

On July 25, 2024, Futia served a proper, lawful FOIL Request on the New York State Comptroller Thomas P. DiNapoli requesting, "a certified list of all statutes which create a specific liability for taxes imposed by Subtitle A of the Internal Revenue Code." See Exhibit A attached hereto.

On August 1, 2024, the Office of the State Comptroller responded to Futia's FOIL Request saying it was unable to locate any records that satisfied the request. See Exhibit B.

Appendix E

To be clear, throughout this case, Futia's federal government, Defendant United States, has failed to identify a law that makes Futia liable to pay the federal income tax. Now, however, Futia's state government, the State of New York is on record saying there is no such law.

Futia argues said response is decisive, for it has the power of deciding this matter.

Futia respectfully requests an order directing Defendant to return the funds it received from both the Office of the State Comptroller and the Social Security Administration with instruction that those funds be paid to Futia as originally intended.

Respectfully submitted.

Dated August 12, 2024

/s/

ANTHONY J. FUTIA, Jr., pro se
34 Custis Ave
North White Plains, NY 10603
(914) 906-7138
Futia2@optonline.net

Appendix E

Exhibit A

ANTHONY J. FUTIA, JR.
34 CUSTIS AVENUE
NORTH WHITE PLAINS, NY 10603
914-906-7138

July 25, 2024

New York State Comptroller Thomas P. DiNapoli
Records Access Office
Communications, 15th Floor
Office of the State Comptroller
110 State Street
Albany, NY 12236-0001

Subject: FOIL Request

Dear Comptroller DiNapoli:

I am a sovereign citizen of the state of New York and a retired member of the New York State retirement system.

I am requesting a certified list of all statutes which create a specific liability for taxes imposed by Subtitle A of the Internal Revenue Code.

Sincerely,

/s/

Anthony J. Futia, Jr

Appendix E

cc: New York State Senator Shelly B. Mayer
United States Congressman Michael Lawler

Attachments:

05/29/2019 Affidavit, Anthony J. Futia, Jr
02/24/2023 New York State Comptroller's Office communications
07/04/2024 Blue Folder tax information

Appendix E

Exhibit B

THOMAS P. DINAPOLI
STATE COMPTROLLER

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER
110 STATE STREET
ALBANY, NEW YORK 12236

PRESS OFFICE
Tel: (518) 474-4015
Fax: (518) 473-8940

August 01, 2024

Mr. Anthony J. Futia
34 Custis Avenue
White Plains, NY 10603

Re: FOIL Request #2024-0649

Dear Mr. Anthony J. Futia,

This is in reply to your fax/letter dated 07/25/2024, wherein, pursuant to the Freedom of information Law (Public Officers Law, Article 6), you requested a certified list of all statutes which create a specific liability for taxes imposed by Subtitle A of the internal Revenue Code.

Personnel have informed me that after a diligent search, they have been unable to locate any records that satisfy your request.

Appendix E

Sincerely,

/s/

Jane Hall
Records Access Officer

APPENDIX F — NOTICE OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 28, 2024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

23-860cv
(22-cv-6965, Southern District of
New York, White Plains, Brisccetti, J.)

ANTHONY FUTIA, JR.,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Filed August 28, 2024

DEBRA ANN LIVINGSTON, CHIEF JUDGE.

NOTICE OF DOCUMENT RETURNED

The enclosed motion for reconsideration is rejected for filing because the:

( ) moving party is not counsel of record.

( ) response may not be accepted because motion has been decided.

( ) relief requested must be sought in district court in the first instance.

(x) appeal is closed, and this Court no longer has jurisdiction.

Inquiries regarding this case may be directed to the undersigned 212-857-8560.

Appendix F

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Case No. 23-860

ANTHONY J. FUTIA, Jr.,

Plaintiff-Petitioner-Appellant,

v.

UNITED STATES,

Defendant-Respondent-Respondent.

MOTION FOR RECONSIDERATION*

Appellant ("Futia") submits this motion for reconsideration of the Court's August 16, 2024 decision that rejected the filing of Futia's second petition for rehearing filed on August 15, 2024. The court's decision rejecting said filing was received by Futia August 22, 2024.

A copy of Futia's Second Petition for Rehearing is attached hereto as Exhibit A.

A copy of the Court decision rejecting Futia's Second Petition for Rehearing is attached hereto as Exhibit B.

The court gave as its reason for rejecting Futia's second petition for rehearing "appeal is closed and this Court no longer has jurisdiction." The Court was obviously

referring to the fact that it had issued its Mandate on July 8, 2024.

However, in extraordinary circumstances an appellate court, by motion or on its own, may recall a mandate that has issued. The U.S. Supreme Court has held that "the courts of appeals are recognized to have an inherent power to recall their mandates...to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 549 (1998).

Futia's second motion for rehearing followed such a grave, unforeseen contingency, giving rise to a profound jurisdictional issue not previously raised in the instant case – i.e., an admission by the New York State Comptroller that there is no law that required Futia to file a federal Form 1040 or to pay the federal income tax. See Exhibit A.

Surely, such a critical, serious admission, which goes to the very heart of Futia's case, makes necessary recall of the mandate in order to add instruction about a post judgment interest – to resolve a jurisdictional issue not previously raised and to make further arrangements so that the U.S. Supreme Court would not be called upon to confront an issue for the first time without the benefit of a prior ruling.

Futia respectfully requests the Court reconsider and exercise its discretion to an end justified by the logic, facts and effect of the newly obtained, critically important, post mandate evidence by granting Futia's Second Motion for Rehearing.

Appendix F

Respectfully submitted.
Dated: August 22 , 2024

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This document contains 401 words.