

**APPENDIX N**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,  
Plaintiff,

v.

1:07-cv-0352

ROBERT L. SCHULZ;  
WE THE PEOPLE FOUNDATION  
FOR CONSTITUTIONAL EDUCA-  
TION, INC.; and WE THE PEOPLE  
CONGRESS, INC.,

Defendants.

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THOMAS J. McAVOY  
Senior United States District Judge

**DECISION and ORDER**

(Filed Aug. 9, 2007)

The United States of America commenced the instant action seeking to enjoin Defendants from promoting an illegal tax shelter. Presently before the Court are Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12 and Plaintiff's cross-motion for summary judgment pursuant to Fed. R. Civ. P. 56.

**I. FACTS**

Defendant Robert L. Shulz ("Schulz") organized Defendant We the People Foundation for Constitutional

Education Inc., and We the People Congress, Inc. in 1997. The Complaint alleges that, although Shulz purports to have founded the corporate defendants for educational purposes, he “has used the two . . . entities . . . to market a nationwide tax-fraud scheme designed to help customers evade their federal tax liabilities and to interfere with the administration of the internal revenue laws.” Compl. at ¶ 6. Defendants distributed a “Tax Termination Package” as part of “Operation Stop Withholding” to help individuals stop withholding, paying, and filing federal taxes. The United States alleges that Defendants furthered their scheme through the use of false and misleading forms in place of standard Internal Revenue Service (“IRS”) forms, and based upon the false premises that the federal income tax system is voluntary, the 16th Amendment to the United States Constitution. was not properly ratified, and that federal income tax does not apply to most wages.

The Complaint alleges that, among other things, “[a]s part of the Tax Termination scheme, Defendants give customers (both employers and employees) step-by-step instructions on how to fraudulently terminate withholding of federal income and employment taxes.” Compl. at ¶ 14. The entire scheme is alleged to be premised upon false representations and legal positions known to have been rejected by the courts, including a criminal trial in which Schulz testified. See United States v. Simkanin, 420 F.3d 397 (5th Cir. 2005).

The Complaint alleges that Defendants' scheme causes harm to the United States by assisting customers to evade taxes and obstructing the IRS's efforts to administer the federal tax laws. The United States seek an injunction pursuant to Internal Revenue Code § 7408 precluding Defendants from making known false or fraudulent statements in connection with the organization or participation in the sale of a plan or arrangement regarding any tax benefit.

Presently before the Court is Defendants' motion to dismiss pursuant to, Fed. R. Civ. P. 12 and Plaintiff's cross-motion for summary judgment pursuant to Fed. R. Civ. P. 56.

## II. STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedures governs motions for summary judgment. It is well settled that on a motion for summary judgment, the Court must construe the evidence in the light most favorable to the non-moving party, see Tenenbaum v. Williams, 193 F.3d 581, 593 (2d Cir. 1999), and may grant summary judgment only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(e). An issue is genuine if the relevant evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). A party seeking summary judgment bears the burden of informing the court of the basis for the motion and of identifying those portions

of the record that the moving party believes demonstrate the absence of a genuine issue of material fact as to a dispositive issue. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the movant is able to establish a prima facie basis for summary judgment, the burden of production shifts to the party opposing summary judgment who must produce evidence establishing the existence of a factual dispute that a reasonable jury could resolve in his favor. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). A party opposing a properly supported motion for summary judgment may not rest upon “mere allegations or denials” asserted in his pleadings, Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522, 525-26 (2d Cir. 1994), or on conclusory allegations or unsubstantiated speculation. Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir. 1998).

### III. DISCUSSION

#### a. Plaintiff’s Request for Injunctive Relief

“Section 7408 of the Internal Revenue Code empowers a district court to grant an injunction when (1) the defendant has engaged in conduct subject to penalty under 26 U.S.C. § 6700, and (2) injunctive relief is appropriate to prevent recurrence of such conduct.” United States v. Gleason, 432 F.3d 678, 682 (6th Cir. 2005). “Because section 7408 expressly authorized the issuance of an injunction, the traditional requirements for equitable relief need not be satisfied.” Id.

**1. Internal Revenue Code § 6700**

The Court will first address whether Defendant's conduct implicates the proscriptions of 26 U.S.C. § 6700.<sup>1</sup> Section 6700 is aimed at abusive tax shelters. To obtain an injunction under § 6700, the government must prove five elements:

- (1) the defendants organized or sold, or participated in the organization or sale of, an entity, plan, or arrangement;
- (2) they made or caused to be made, false or fraudulent statements concerning the tax benefits to be derived from the entity, plan, or arrangement;
- (3) they knew or had reason to know that the

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<sup>1</sup> That section reads, in relevant part, as follows:

- (a) Imposition of penalty. – Any person who –
    - (1)(A) organizes (or assists in the organization of) –
      - (i) a partnership or other entity,
      - (ii) any investment plan or arrangement, or
      - (iii) any other plan or arrangement, or
    - (B) participates (directly or indirectly) in the sale of any interest in an entity or plan or arrangement referred to in subparagraph (A), and
  - (2) makes or furnishes or causes another person to make or furnish (in connection with such organization or sale) –
    - (A) a statement with respect to the allow-ability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter, or
    - (B) a gross valuation overstatement as to any material matter,
- shall [be guilty of a crime].

statements were false or fraudulent; (4) the false or fraudulent statements pertained to a material matter; and (5) an injunction is necessary to prevent recurrence of this conduct.

United States v. Estate Preservation Servs., 202 F.3d 1093, 1098 (9th Cir. 2000); Gleason, 432 F.3d at 682. The Court will address each element *seriatim*.

**a. Whether Defendants Organized or Sold, or Participated in the Organization or Sale of, an Entity, Plan, or Arrangement**

Under § 6700, “any ‘plan or arrangement’ having some connection to taxes can serve as a tax shelter’ and will be an ‘abusive’ tax shelter if the defendant makes the requisite false or fraudulent statements concerning the tax benefits.” United States v. Raymond, 228 F.3d 804, 811 (7th Cir. 2000). In Raymond, the Seventh Circuit found that “the definition of a tax shelter in § 6700 is ‘clearly broad enough to include a tax protester group.’” Id. (quoting United States v. Kaun, 827 F.2d 1144, 1147 (7th Cir. 1987)).

The facts in the Raymond case are quite similar to the present one.

Raymond and Bernhoft [were] active members of the U.S. Taxpayers Party and were the chief participants in a business known as Morningstar Consultants (“Morningstar”). Between January and June of 1996, Morningstar ran a weekly advertisement in a local

Wisconsin newspaper under the caption "Just Say No." The Just Say No advertisement contained the following statements: 1) "Federal, State & Social Security Taxes are Voluntary;" and 2) "The Internal Revenue Service has no Statutory Authority to: Compel you to Me a Tax Return, Require withholding from your paycheck, Levy or Lien your property, Audit your Books & Records." This advertisement was part of an effort by Morningstar to market the "De-Taxing America Program" (the "Program"). The Program consists of three volumes of materials. These materials contain information presenting the view that, among other things, the federal income tax is unconstitutional and that persons who are not federal employees or residents of the District of Columbia are not legally required to pay federal income tax. In addition to providing information regarding general tax-protest principles, the Program includes several forms and instructions to guide the purchaser through the process of "de-taxing." Purchasers are informed that if they complete the materials and directions in the Program they will be "withdrawn" from the jurisdiction of the federal government's taxing authorities and the social security system and will no longer be required to pay federal taxes. . . . Program customers are instructed to file W-4 forms with their employers asserting that they are exempt from federal taxation and requesting that the employers stop withholding federal income tax and social security payments from their paychecks. . . .

The Program also provides the purchaser with instructions on how to complete future tax returns to reflect that the purchaser has not incurred any tax liability in the previous year and consequently does not owe any federal income or social security taxes.

Id. at 806-07. "The Program purported to provide step-by-step instructions for 'removing' the purchaser from the federal income and social security tax systems. The Program materials assured readers that the federal government is without authority to tax them and that by following the instructions outlined in the Program individuals can legally refuse to pay federal income and social security tax." Id. at 811. The Seventh Circuit concluded that the program was a tax shelter. The Raymond court further found that because the defendants in that case had sold the product, it qualified as a plan within the meaning of § 6700.

Here, as in Raymond, Schulz has organized the two corporate Defendants. See Def.'s Stmt. of Mat. Facts at ¶ 1. Defendants offer materials to employees and employers stating that, among other things, Congress is without authority to legislate an income tax on people except in the District of Columbia and United States territories, the IRS is prohibited from compelling people to sign and file income tax returns, and the Sixteenth Amendment to the United States Constitution was never properly ratified and, therefore, the income tax violates the Constitution, Schulz Decl. #1 at Ex. B. Among other things, Defendants' materials instruct workers how to terminate their W-4 Agreement



and demand that the employer discontinue making withholdings from their pay. *Id.* at Ex. C. In fact, Defendants provide forms for that very purpose. *Id.*<sup>2</sup> Thus, the Court finds that Defendants have organized a “plan” or “arrangement.” Although there are some questions of fact concerning whether Defendants sold their materials, they clearly “organized” the materials for presentation.<sup>3</sup> Defendant Schulz admits that he undertook “‘Operation Stop Withholding,’ a national

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<sup>2</sup> Other examples of Defendants’ plan are set forth *infra* at pp. 9-10 and 22-23.

<sup>3</sup> The evidence in the record is that Defendants provided the program materials and gave seminars for free. The evidence also demonstrates that Defendants used the materials to solicit donations to the organizations and to encourage people to join their organization for a fee. In a prior case involving Defendant Schulz, it was noted that

We The People Foundation’s website invites visitors to make a donation to an organization via credit card to PayPal or by mail directly to We the People Foundation. The address given for the We The People Foundation is Schulz’s home address. The website also contains an on-line store where products can be purchased through PayPal. One of the products sold over the website is the “Tax Termination Package,” which is offered for sale for \$39.95. The product is described as “Bob Schulz, Chairman of the We The People Foundation, stopped paying income taxes and filing returns. These are the materials he sent to the IRS. Make sure to get a copy for your personal records.” [The IRS] has also learned that the We The People Foundation filed IRS Form 990 for the years ending December 31, 2001, December 31, 2002, and December 31, 2003 and the returns indicate that the organization showed considerable revenue for each year.

Schulz v. U.S., 2006 WL 1788194, at \*1 (D.Neb.2006).

campaign to instruct company officials, workers and independent contractors on how to legally stop wage withholding.” Schulz Decl. #1 at ¶ 4. Defendants also offer to provide a “customized legal opinion letter from an attorney or CPA to be sent to your company or their tax and/or legal advisors.” Schulz Decl. #1 at Ex. C, p. 11. Stated otherwise, Defendants are promoting an abusive tax shelter. Accordingly, the first element is satisfied because Defendants organized a plan or arrangement concerning the avoidance of taxes.

**b. Whether Defendants Made or Caused to be Made, False or Fraudulent Statements Concerning the Tax Benefits to be Derived From the Entity, Plan, or Arrangement**

“[T]o prove a violation of § 6700, the Government must also show that the [defendants] made false or fraudulent statements concerning the tax benefits of participating in the plan or arrangement.” Raymond, 228 F.3d at 812. “Two types of statements fall within the statutory bar: statements directly addressing the availability of tax benefits and those concerning factual matters that are relevant to the availability of tax benefits.” United States v. Campbell, 897 F.2d 1317, 1320 (5th Cir. 1990). Once again, referral to Raymond is instructive. In that case, the Seventh Circuit found that the defendants’ statements that “payment of income tax is a voluntary activity and that individuals cannot be legally compelled to file tax returns or submit to tax investigations or penalties” “are clearly false

representations concerning the government's authority to tax its citizens." Id. That court concluded that "[t]hese statements made in conjunction with the sale of the Program operated as false assurances that refusing to pay taxes in accordance with the Program's instructions is a lawful activity for which the government has no legal authority to punish Program subscribers." Id.

Defendants' conduct here is virtually identical to that in Raymond. Defendants make claims similar to those in Raymond. Among other things, Defendants affirmatively state that domestic income is not taxable, the filing of a tax return is voluntary, see Defs' Mem. of Law at 10; Schulz Decl. #1 at Ex. B, p. 14, and that the 16th Amendment was not properly ratified and, therefore, the income tax is unconstitutional.<sup>4</sup> Defendants also instruct that, "[o]nce the government has been properly notified and termination of withholding has been procedurally put into effect, the [employer] has no further reporting requirements under U.S. law." Schulz Decl. #1 at Ex. C, p. 8. Defendants further claim that the IRS is prohibited by the Fourth and Fifth Amendments from compelling people to sign and file income tax returns. Schulz Decl. #1 at Ex. C. Defendants also claim that they, and other taxpayers, have the right to "retain[] [their] money until [their] grievances are redressed (remedied)." Schulz Decl. #1 at Ex. H, i. 2.<sup>5</sup>

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<sup>4</sup> Other false statements are discussed *infra* at pp. 22-23.

<sup>5</sup> Defendants sent a long list of questions to various government agencies demanding answers. It is Defendants' position that, until the government responds, it need not pay taxes.

These are all false statements of fact. See 26 U.S.C. (S)3102 (requiring employers to make deductions from wages); Raymond, 228 F.3d at 812 (discussing various similar false statements about taxes); Schiff v. United States, 919 F.2d 830 (2d Cir. 1990); United States v. Sitka, 845 F.2d 43, 47 (2d Cir. 1988) (“[F]ederal courts have upheld and relied on the Sixteenth Amendment for more than seventy-five years. . . . The Sixteenth Amendment was proposed by Congress and ratified by the states in accordance with procedures set out in Article V of the Constitution, and its ratification was then certified after careful scrutiny by a member of the executive branch acting pursuant to statutory duty. The validity of that process and of the resulting constitutional amendment are no longer open questions.”) (internal citations omitted); Coleman v. Commissioner of Internal Revenue, 791 F.2d 68, 70-72 (7th Cir. 1986) (statements that wages are not income and that the income tax is unconstitutional are false and “tired arguments”); United States v. Carley, 783 F.2d 341, 344 (2d Cir. 1986) (“[T]here is no question but that Congress has the authority to impose an income tax.”) (quoting Ficalora v. Commissioner, 751 F.2d 85, 87 (2d Cir. 1984)); Ficalora, 751 F.2d at 88 (wages are taxable income); Kile v. Commissioner of Internal Revenue, 739 F.2d 265, 267-68 (7th Cir. 1984) (similar to Coleman); Denison v. Commissioner of Internal Revenue, 751 F.2d 241 (8th Cir. 1984) (similar); Wright v. Commissioner of Internal Revenue, 752 F.2d 1059, 1062 (5th Cir. 1985) (claim that tax returns violate the right against self-incrimination is frivolous); see also Allamby v. United States, 207 Fed. Appx. 7, 9 (2d Cir.

2006) (“[A]rguments that the federal income tax is unconstitutional and that wages are not taxable income” have been “long-rejected”); Stearman v. Commissioner of Internal Revenue, T.C. Memo. 2005-39, 2005 WL 488646 (March 3, 2005), aff’d, 436 F.3d 533 (5th Cir. 2006).

Moreover, it is evident that Defendants’ false statements concern the tax benefits to be derived from the plan. As Defendants’ literature makes clear, their campaign includes “instructions for companies, workers and independent contractors on how to legally stop withholding, *filing and paying the tax.*” Schulz Decl. at Ex. C., p. 3 (emphasis added). The obvious claimed benefit from participating in Defendants’ plan is that individual income taxes need not be paid. Further, Defendants advise employers that they can “eliminate payment of ‘matching’ employment taxes (FICA, etc.),” id. at p. 7, another claimed tax benefit from participating in the plan.

The undisputed evidence further demonstrates that Defendants knew, or had reason to know, that their statements were false. See Estate Preservation Servs., 202 F.3d at 1102. “The ‘knew or had reason to know’ standard . . . includes what a reasonable person in the defendant’s subjective position would have discovered.” Estate Preservation Servs., 202 F.3d at 1103. The following factors are relevant in determining whether a defendant had the requisite scienter to violate § 6700: (1) the extent of the defendants’ reliance upon knowledgeable professionals; (2) the defendants’

level of sophistication and education; and (3) the defendants' familiarity with tax matters. Id.

There is a paucity of evidence, if any, suggesting that Defendants relied upon knowledgeable professionals. To the contrary, the evidence is that they relied on fringe opinions of known tax protestors whose theories have repeatedly been rejected by courts across the country. Several of the people on whom Defendants claim to rely have been convicted of tax crimes. Accordingly, this factor weighs in favor of finding the requisite intent.

Turning to the second and third factors, a search of case law reveals that Defendant Schulz has been litigating tax-related issues, and presenting similar arguments, for a long time. Schulz states in his Declaration #3 that he has extensive experience researching, writing briefs and arguing cases against "wayward government" in state and federal courts. Schulz Decl. #3 at ¶¶ 11-13. He specifically states he has significant experience researching and arguing tax-related issues. See generally id. Accordingly, Defendants have sufficient sophistication and education to be held accountable for their actions.<sup>6</sup>

Furthermore, Defendants have long been involved with these tax-related arguments. Defendant Schulz acknowledges that he is aware that numerous courts across the country have rejected attacks on the Sixteenth Amendment as improperly ratified. See Schulz

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<sup>6</sup> Inasmuch as Schulz operates the two corporate entities, his knowledge may be imputed to them.

Decl. #3 at ¶ 21. He also admits being aware of various Circuit Court of Appeals decisions rejecting the types of claims he makes in his materials. *Id.* at ¶¶ 23-24. In addition, the obligation to pay taxes is common knowledge. As the Second Circuit has stated, “[t]he payment of income taxes is not optional . . . and the average citizen knows that the payment of income taxes is legally required.” *Schiff* 919 F.2d at 834 (quoting *United States v. Schiff*, 876 F.2d 272, 275 (1989)). It is thus clear that Defendants actually knew, and certainly had reason to know, their statements were false.

Defendant claims that it has not made any false or fraudulent statements because it provided a disclaimer in its materials. Defendants’ materials state that:

The materials presented herein contain legal content referencing and directly citing official U.S. tax statutes, tax regulations and federal court decisions regarding the limited authority of the U.S. Government to impose income taxes or withholding, and the legal duties and obligations (or lack thereof) that are allegedly imposed upon American business and the Americans that labor for them.

**These materials are presented solely for educational purposes.** Although these materials may be used in attempting to secure and exercise one’s Constitutionally protected Rights . . . We The People makes NO representation that there materials constitute legal advice and furthermore specifically encourages all workers and business owners to

submit these materials to qualified legal counsel for review and advice.

Schulz Decl. #1 at Ex. C, p. 1.

The fact that Defendants purport to contain disclaimers in their materials is irrelevant. “[I]t is well established that a general, boilerplate disclaimer of a party’s representations cannot defeat a claim for fraud.” Dallas Aerospace, Inc. v. CIS Air Corp., 352 F.3d 775, 785 (2d Cir. 2003). Significantly, the purported disclaimer is insufficient for several reasons. First, nowhere do Defendants’ materials disclaim the basis for their claims concerning the tax laws. Rather, Defendants merely “encourage” people to have the material reviewed by “qualified legal counsel.” Second, although the materials are claimed to be presented only for education purposes, the materials affirmatively state that they are based on “legal content” “directly citing” various laws and court opinions. This gives the impression that the statements in the documents are based upon a sound legal foundation. Third, the purported disclaimer says that the materials may be used in attempting to secure and exercise one’s Constitutionally protected Rights.” This could be construed as consistent with Defendants’ position that the federal government may not impose an income tax because, among other arguments, the Sixteenth Amendment was not properly ratified. The “disclaimer,” therefore, appears not to disclaim at all. Fourth, the materials provided by Defendants represent that “[t]he information is the result of research by tax attorneys and CPA’s, a forensic accountant; a Special Agent of the



Criminal Division of the IRS, a former Revenue Agent of the IRS, a former IRS Auditor and Fraud Examiner, a constitutional attorney and numerous expert tax law researchers and certified paralegals". Schulz Decl. #1, at Ex. C, p. 5. This, again, detracts from the effectiveness of any purported disclaimer. Fifth, it appears that the: "disclaimer" appears on Defendants' website, but it is not clear whether it appears on all, the distributed materials. For example, no such disclaimer is included on the "Statement of Facts and Beliefs." Schulz Decl. #1 at. Ex. B. The Court, therefore, finds the claimed "disclaimer" to be irrelevant. Thus, the second element has been satisfied.

**c. Whether the False or Fraudulent Statements Pertained to a Material Matter**

The next issue is whether these false statements pertained to a material matter. "Material matters are those which would have a substantial impact on the decision-making process of a reasonably prudent investor and include matters relevant to the availability of a tax benefit." Campbell, 897 F.2d at 1320. Statements that one need not file tax returns, that employers need not make withholdings, that "companies, workers and independent contractors [can] . . . legally stop withholding, filing and paying the tax," Gordon Aff, at Ex. 4, etc. clearly are relevant to the availability of the tax benefit and, thus, are material. Indeed, Defendants' statements appear to be the cause of its clients/members in failing to file tax returns or otherwise

attempting to stop having taxes withheld from their wages.<sup>7</sup> The third element has been satisfied.

**d. Whether an Injunction is Necessary to Prevent Recurrence**

The final element is whether an injunction is necessary to prevent recurrence.

Factors that a court may consider in determining the likelihood of future Section 6700 violations and, thus, the need for an injunction include: (1) the gravity of the harm caused by the offense; (2) the extent of the defendant's participation; (3) the defendant's degree of scienter; (4) the isolated or recurrent nature of the infraction; (5) the defendant's recognition (or non-recognition) of his own culpability; and (6) the likelihood that defendant's occupation would place him in a

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<sup>7</sup> In support of this, the United States has provided copies of Defendants' "We The People" tax forms that have been submitted to the IRS or their employers by various individuals. Gordon Aff. at Exs. 27, 28. Defendants also have submitted affidavits from Defendants' members indicating that they have stopped paying taxes. See Deitz Decl. #1 at ¶ 13. Moreover, Defendants' own submissions reveal that people have acted upon Defendants' advice. See Schulz Decl. #1 at Ex. H, p. 2 ("Another case involves as group of 12 oil workers in Arkansas that recently sought to terminate their withholding agreements (W-4s) *en masse*, by submitting WTP [We The People] Form #1 to their company."). Other examples are listed in Schulz Decl. #1 at Ex. H ("[W]e are hearing daily about many individuals that have filed the forms. . . .").

position where future violations could be anticipated.

Estate Preservation Servs., 202 F.3d at 1105.

**(1) The Gravity of Harm**

The gravity of harm is manifest. Defendants have embarked upon a nationwide plan to disseminate its materials to encourage people to stop having taxes withheld from their wages. Defendants' materials are intended to cause employees to believe that they need not pay an income tax and employers to believe that they need not withhold taxes from employees' wages or pay matching amounts. As previously noted, people are acting upon Defendants' materials by submitting forms supplied and created by Defendants in an effort to get their employers to stop withholding taxes from their wages. This is causing individuals to expose themselves to criminal liability. Defendants' conduct also is causing insufficient payments to the United States Treasury. Lastly, Defendant's conduct is causing the IRS significantly increased efforts at collecting taxes. Although the exact cost of Defendants' conduct appears to be unknown, the IRS estimates that it spends \$1,607 in processing substitutes for returns for non-filers and, therefore, "[t]he estimated cost to the U.S. Treasury attributable to filing substitutes for returns for the 2991 unified returns equals \$4,806,537,<sup>8</sup>

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<sup>8</sup> As is explained below, the United States asserts that 997 of Defendants' customers have not filed federal tax returns for a

excluding the time or expense IRS Revenue Officers must expend attempting to collect unpaid taxes from these individuals. Gordon Aff. at ¶ 40. Thus, the gravity of the harm is sufficient to warrant injunctive relief. See Raymond, 228 F.3d at 813 (evidence of the administrative burden placed on the IRC to investigate the tax evasion activities and engage in collection efforts establishes harm).

**(2) The Extent of Defendants' Participation**

This factor clearly weighs in favor of an injunction. Defendants are the primary figures in establishing the plan and encouraging other to participate in it. See Raymond, 228 F.3d at 814.

**(3) Degree of Scienter**

The degree of scienter element also weighs in favor of injunctive relief. As previously discussed *supra*, Defendants were well aware (or reasonably should have been aware) that their assertions have been consistently rejected by the courts. Nevertheless, Defendants set up their plan, disseminated it, and fully expected that people would buy, or freely download, their materials and use them. In fact, Defendants claim (which is supported by the evidence submitted by the United States) that people have used their

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period of three years, which represents more than 2,991 unfiled tax returns. Gordon Aff. at ¶ 38.

forms to stop having taxes withheld from their wages. Thus, there is ample evidence that Defendants intended that their members and others would follow the instructions provided in the materials and submit the forms contained therein. Id.

**e. Isolated or Recurrent Nature of the Infraction**

The record evidence is that Defendants' conduct is not isolated. According to Defendants' own documents, Schulz "has now spoken to well over two thousand people as part of 'Operation Stop Withholding' and continues to be greeted by appreciative and attentive audiences everywhere." Schulz Decl. #1, at Ex. H, p. 1. Moreover, Defendants admit to having handed out "3,500 copies" of the "blue folder"<sup>9</sup> "at 37 meetings in 2003 and that [they] put the entire contents of the materials on the website for anyone to read, download and copy. . . ." Defs.' Responsive Stmt. of Mat. Facts at ¶ 4. The United' States submits evidence that "997 of defendants' customers . . . have not filed federal tax returns for a period of three years or more, which represents more than 2991 unified tax returns." Gordon Aff. at ¶ 38. Accordingly, this factor also weighs in favor of issuance of an injunction. See Raymond, 228 F.3d at 814.

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<sup>9</sup> The "blue folder" contains the materials prepared by Defendants and discussed throughout this opinion.

**f. Defendants' Recognition (or non-recognition) of Their Own Culpability**

Defendants express no recognition of their culpability. Despite the uniform rejection of their positions, they continue to maintain them and attempt to get others to adopt their views. As in Raymond, Defendants have "consistently held to their view that federal tax laws are unconstitutional and that the government has no authority to compel the payment of federal taxes." 228 F.3d at 814. Defendants also continue to claim that they may withhold money from the government until the government responds to its "petition for redress." Given Defendants' long-time pursuit of these goals, it is easy to conclude that they are likely to continue to engage in their conduct if not enjoined from doing so. Id. Indeed, Defendants' materials continue to be available via their website and the mails.

**g. The Likelihood that Defendants' Occupation Would Place Them in a Position Where Future Violations Could Be Anticipated.**

Lastly, although Defendants are not professional tax advisers, Defendants' own papers demonstrate that they spend a substantial amount of time, money, and effort promoting their plan. Their main purpose is to continue to disseminate their plan and encourage employees and employers alike to participate. It is a virtual certainty that, absent injunctive relief, future violations can be anticipated.

For the foregoing reasons, the Court finds that injunctive relief is warranted.

**b. First Amendment**

Defendants move to dismiss and otherwise defend this action on the ground that their speech is protected by the First Amendment. Defendants argue that their tax-related materials are discussions of the manner in which government is operated and, therefore, constitutionally protected. Defendants further claim that their speech constitutes the lawful exercise of, the right to petition the government.

A very similar argument was presented to the Ninth Circuit in United States v. Freeman, 761 F.2d 549 (9th Cir. 1985). In that case, as here, it was alleged that the defendant “counseled violations of the tax laws at seminars he conducted.” Id. at 551. “He urged the improper filing of returns, demonstrating how to report wages, then cross out the deduction line for alimony and insert again the amount of the wages, showing them as ‘nontaxable receipts.’” Id. The defendant claimed “he did nothing more than advocate tax non-compliance as an abstract idea, or at most as a remote act, and that the First Amendment necessarily bars his prosecution.” Id.

The Ninth Circuit noted that:

Words alone may constitute a criminal offense, even if they spring from the anterior motive to effect political or social change. Where an indictment is for counseling, the

circumstances of the case determine whether the First Amendment is applicable, either as a matter of law or as a defense to be considered by the jury; and there will be some instances where speech is so close in time and substance to ultimate criminal conduct that no free speech defense is appropriate. . . .

Where there is some evidence . . . that the purpose of the speaker or the tendency of his words are directed to ideas or consequences remote from the commission of the criminal act, a defense based on the First Amendment is a legitimate matter for the jury's consideration.

Freeman, 761 F.2d at 551. Where, on the other hand, there is evidence that the defendant assisted in the filing of false returns, there is no First Amendment defense. Id. at 552. The Freeman court continued to note that:

Though a statute proscribes certain speech, in this case counseling, the defendant does not have a First Amendment defense simply for the asking. Counseling is but a variant of the crime of solicitation, and the First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words used are so close in time and purpose to a substantive evil as to become part of the ultimate crime itself. United States v. Barnett, 667 F.2d 835, 842-43 (9th Cir. 1982); [United States v. Buttorff, 572 F.2d [619] at 624 [(8th Cir. 1978)]. In those instances, where speech becomes an integral part of the crime, a First



Amendment defense is foreclosed even if the prosecution rests on words alone.

Id.

The Second Circuit agreed with this line of reasoning in United States v. Rowlee, 899 F.2d 1275 (2d Cir. 1990). In Rowlee, the Second Circuit noted that “speech is not protected by the First Amendment when it is the very vehicle of the crime itself.” 899 F.2d at 1278 (quoting United States v. Varani, 435 P.2d 758, 762 (6th Cir. 1970)). Similar to the Ninth Circuit’s analysis in Freeman, the Second Circuit noted that:

[C]onduct [is] not protected by the First Amendment merely because, in part, it may have involved the use of language. When speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

Id. (internal quotations, alterations, quotations, and citations omitted). To the extent one comments “generally on the tax laws without aiding, assisting, procuring, counseling or advising the preparation or presentation of the alleged false or fraudulent tax documents,” he does not violate the Internal Revenue Code. Id. at 1280. If, however, a defendant urges the preparation and presentation of false IRS forms with the expectation that the advice will be heeded, “the First Amendment afford[s] no defense.” Id.; see also United States v. Konstantakakos, 121 Fed. Appx. 902

(2d Cir. 2005) (Noting that “it has long been established that the First Amendment does not shield knowingly false statements made as part of a scheme to defraud” and that “[n]o different conclusion is warranted simply because a knowing falsehood might be couched as an ‘opinion.’”).

Much of Defendants’ conduct is protected speech. For example, Defendants are free to give speeches on whether the Sixteenth Amendment was properly ratified. The Court further understands that any injunctive relief will be a prior restraint. Nevertheless, as discussed, Defendants’ scheme violates § 6700 of the Internal Revenue Code. It is Defendants’ “speech” (primarily its written materials) that facilitates the violation of § 6700.

To the extent Defendants’ speech can be considered commercial speech,<sup>10</sup> it may be enjoined because the government may prohibit false, misleading or deceptive commercial speech, or speech that promotes unlawful, conduct. United States v. Bell, 414 F.3d 474, 480 (3d Cir. 2005); United States v. Schiff, 379 F.3d 621,

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<sup>10</sup> Several facts suggest that the speech may be considered commercial. This includes the following: (1) Defendants request a “donation” for each packet of materials they provide; (2) Defendants invite individuals to become members of their organization for a fee; Gordon Aff. at Ex. 20; (3) Defendants offer numerous items for sale, including videos, pamphlets, CD-ROMs, bumper stickers, brochures, flags, etc., see id.; (4) Defendants offer to sell a “customized legal opinion letter from an attorney or CPA” (noting “discounts are available for WTP Congress members”), Schulz Decl. #1, at Ex. C, p. 11; and (5) Defendants advertise their program.

626 (9th Cir. 2004).<sup>11</sup> Even assuming Defendants are not intending to profit from their services, they are offering a product that is based on false representations. Defendants seek to have people obtain and use copies of their tax avoidance program based upon false representations. Defendants sell numerous other products on their websites. Although Defendant may sometimes give their materials away for free, they do solicit a donation of \$20 for each packet of materials they provide. Thus, if the materials are properly characterized as commercial speech, they may be enjoined and the First Amendment provides no defense.

Assuming Defendants' speech to be political in nature, it still may be enjoined. The First Amendment does not protect speech that incites imminent lawless action. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Because Defendants are not merely advocating, but have gone the extra step of instructing others how to engage in illegal activity and have supplied the means of doing so (the "We The People" forms created by Defendants supported by a purported legal analysis of the tax laws), their speech may be enjoined. See United States v. Schiff, 269 F. Supp.2d 1262, 1280 (D. Nev.); see also United States v. Bell, 414 F.3d 474 (3d Cir. 2005); Raymond, 228 F.3d at 815-16; United States v. Fleschner, 98 F.3d 155, 158-59 (4th Cir. 1996) (no first amendment protection where the defendants held meetings and collected money from attendees whom they instructed and advised to claim unlawful

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<sup>11</sup> The Court already has concluded that many of Defendants' statements are false.

exemption and not to file income tax returns or pay tax on wages in violation of the law.); United States v. Moss, 604 F.2d 569, 571 (8th Cir. 1979); United States v. Kelley, 769 F.2d 215, 217 (4th Cir. 1985) (“The cloak of the First Amendment envelops critical, but abstract, discussions of existing laws, but lends no protection to speech which urges the listeners to commit violations of current law.”); United States v. Buttorff 572 F.2d 619, 624 (8th Cir. 1978) (“[T]he defendants did go beyond mere advocacy of tax reform. They explained how to avoid withholding and their speeches and explanation incited several individual to activity that violated federal law. . . .”).

As previously noted, the government has presented evidence that Defendants gave lectures, collected money in the form of donations and membership fees, provided forms with instructions on the preparation of the forms, and provided statements supporting their false legal beliefs/conclusions. See e.g. Gordon Decl. at Ex. 4 (“Our national campaign will include instructions for companies, workers and independent contractors on how to legally stop withholding, filing and paying the tax.”); id. at Ex. 5 (“Many of you will discover the [employer] has been negligently advised by its so-called ‘tax professionals’ (attorneys and CPA’s) who falsely claim the law requires the Entity to obtain your social security number’ or the law requires the Entity to withhold’ . . . .”); id. at Ex. 6 (“The Individual Income Tax is fraudulent in its origin and enforced without legal authority and without legal jurisdiction on most Americans and American entities. . . . Under

U.S. tax law you may *legally* stop withholding taxes and employment taxes, plus *legally* stop issuing W-2 and 1099 forms to your workers and payees/contractors. . . . Eliminate payment of 'matching' employment taxes (FICA, etc.); *id.* at Ex. 8 ("You will utilize the [We The People] Forms to willfully and legally cease withholding, deducting and diverting any portion of a worker's . . . earnings to pay any tax, fee or other charge. . . ."); *id.* at Ex. 9 (a form created by Defendants and intended to be signed by employees which states "I do not derive Subtitle A wage Gross Income . . . and my remuneration does not constitute wages for withholding purposes under IRC § 3401(a)(8)(A)(I)" and "I do not derive taxable income . . . from a taxable source. . . . I am outside the venue and the jurisdiction of 26 USC and 26 CFR," and "I incurred no liability for income tax imposed under subtitle. A of the Code for the preceding year."); *id.* at Ex. 10 (a form created by Defendants and intended to be signed by, employers which states "[i]t is the Entity's understanding that no American living in a state is 'subject to the jurisdiction of Congress,' generally speaking, unless one is a non-resident alien involved in immigration proceedings or nonresident employee. . . ."). The government also has supplied evidence of Defendants' clients or members using Defendants' materials to avoid tax withholdings, failing to file tax returns, or from otherwise refusing to pay money to the government. *See* Gordon Decl. at ¶¶ 33, 36, 37, 38 and Exs. 26, 27, 28. Because Defendants have actually persuaded others, directly or indirectly, to violate the tax laws, Defendants words and actions were directed toward such persuasion, and the

unlawful conduct was imminently likely to occur, the First Amendment does not afford protection. That being said, any injunction must be narrowly drawn to separate protected speech from unprotected speech and to protect Defendants' First Amendment rights.

Accordingly, the Court rejects Defendants' First Amendment defense and denies their motion to dismiss in its entirety.

#### IV. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is DENIED and Plaintiff's Cross-Motion for Summary Judgment is GRANTED.<sup>12</sup>

Accordingly, it is hereby ORDERED that:

- a. Defendants and their representatives; agents, servants, employees, attorneys, and those persons in active-concert or participation with them are hereby permanently enjoined from directly or indirectly:
  1. engaging in activity subject to penalty under 26 U.S.C. § 6700, including the organizing, selling, participation in the

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<sup>12</sup> Because Defendants submitted numerous materials outside of the pleadings in support of its motion to dismiss, the United States cross-moved for summary judgment, and Defendants have had an opportunity to reply to the cross-motion, Defendants' motion is properly considered as one made under Rule 56. See Fed. R. Civ. P. 12(b). Even without converting Defendants' motion, this matter is fully resolved upon Plaintiff's cross-motion for summary judgment.

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organization, or participation in the sale of any plan or arrangement and making a statement regarding the securing of any tax benefit that they know or have reason to know is false or fraudulent as to any material matter;

2. engaging in activity subject to penalty under § 6701, including preparing or assisting in the preparation of a document related to a matter material to the internal revenue laws that includes a position that they know will, if used, result in an understatement of tax liability;
3. promoting, marketing, organizing, selling, or receiving payment for any plan or arrangement regarding the securing of any tax benefit that they know or have reason to know is false or fraudulent as to any material matter;
4. engaging in any other activity subject to penalty under IRC §§ 6700 or 6701 or other penalty provision of the Internal Revenue Code;
5. advising or instructing persons and/or entities that they are not required to file federal tax returns or pay federal taxes;
6. selling, distributing or furnishing any document, newsletter, book, manual, videotape, audiotape, or other material purporting to enable individuals to discontinue or stop withholding, or payment of, federal taxes;

7. instructing, advising, or assisting anyone to stop withholding or paying of federal employment or income taxes; and
  8. obstructing or advising or assisting anyone to obstruct IRS examinations, collections, or other IRS proceedings.
- b. Defendants shall, at their own expense, notify all persons who have purchased or otherwise obtained their tax plans, arrangements, and materials of this Memorandum, Decision and Order and provide them with a copy of this Memorandum, Decision and Order;
  - c. Defendants shall produce to counsel for the United States a list identifying by name, address, e-mail address, telephone number, and Social Security number, all persons and entities who have been provided Defendants' tax preparation materials, forms, and other materials containing false information and otherwise likely to cause others to violate the tax laws of the United States;
  - d. Defendants, and anyone in active concert or participation with them, shall remove from their websites and all other websites over which they have control, all tax-fraud scheme promotional materials, false commercial speech concerning the internal revenue laws, and speech likely to incite others imminently to violate the internal revenue laws;
  - e. Defendants shall remove from its websites all abusive tax shelter promotional materials, false commercial speech, and materials



designed to incite others to violate the law (including tax laws), and, for a period of one year from the date of this Memorandum, Decision & Order, display prominently on the first page of the website an attachment of this Memorandum, Decision and Order;

- f. Defendants shall immediately implement the terms of this injunction and provide the Court with an affidavit of compliance within twenty-one days of the date of this Decision and Order; and
- g. This Court shall retain jurisdiction concerning Defendants' compliance with the injunctive relief.

IT IS SO ORDERED.

Dated: August 9, 2007

/s/ Thomas J. McAvoy  
Thomas J. McAvoy  
Senior, U.S. District Judge

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**APPENDIX O**

**United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Argued October 6, 2006      Decided May 8, 2007

No. 05-5359

WE THE PEOPLE FOUNDATION, INC., ET AL.,  
APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.,  
APPELLEES

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Appeal from the United States District Court  
for the District of Columbia  
(No. 04cv01211)

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(Filed May 8, 2007)

*Mark Lane* argued the cause for appellants. With him on the briefs was *Robert L. Schulz*, pro se.

*Carol Barthel*, Attorney, U.S. Department of Justice, argued the cause for appellees. With her on the brief were *Kenneth L. Wainstein*, U.S. Attorney at the time the brief was filed, and *Kenneth L. Greene*, Attorney, *Bruce R. Ellisen* and *Kenneth W. Rosenberg*, Attorneys, entered appearances.

Before: GINSBURG, *Chief Judge*, and ROGERS and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* KAVANAUGH, in which *Chief Judge* GINSBURG and *Circuit Judge* ROGERS join.

Concurring opinion filed by *Circuit Judge* ROGERS.

KAVANAUGH, *Circuit Judge*: Ratified in 1791, the First Amendment to the United States Constitution provides in part that “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.” Plaintiffs are citizens who petitioned various parts of the Legislative and Executive Branches for redress of a variety of grievances that plaintiffs asserted with respect to the Government’s tax, privacy, and war policies. Alleging that they did not receive an adequate response, plaintiffs sued to compel a response from the Government.

Plaintiffs contend that the First Amendment guarantees a citizen’s right to receive a government response to or official consideration of a petition for redress of grievances. Plaintiffs’ argument fails because, as the Supreme Court has held, the First Amendment does not encompass such a right. *See Minn. State Bd. for Cmty Colls. v. Knight*, 465 U.S. 271, 283, 285 (1984); *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 465 (1979).

Plaintiffs are numerous individuals and an organization that creatively calls itself "We the People." For purposes of this appeal, we take the allegations in the complaint as true. According to plaintiffs, they have engaged since 1999 in "a nationwide effort to get the government to answer specific questions" regarding what plaintiffs view as the Government's "violation of the taxing clauses of the Constitution" and "violation of the war powers, money and 'privacy' clauses of the Constitution." Joint Appendix ("J.A.") 80 (Am. Compl. ¶ 3). Plaintiffs submitted petitions with extensive lists of inquiries to various government agencies. On March 16, 2002, for example, plaintiffs submitted a petition with hundreds of inquiries regarding the tax code to a Member of Congress and to various parts of the Executive Branch, including the Department of Justice and the Department of the Treasury. On November 8, 2002, plaintiffs presented four petitions to each Member of Congress. Those petitions concerned the Government's war powers, privacy issues, the Federal Reserve System, and the tax code. On May 10, 2004, plaintiffs submitted a petition regarding similar issues to the Executive Branch, including the Department of Justice and the Department of the Treasury.

Plaintiffs contend that the Legislative and Executive Branches have responded to the petitions with "total silence and a lack of acknowledgment." J.A. 85 (Am. Compl. ¶ 35). In protest, some plaintiffs have stopped paying federal income taxes.

Based on their view that the Government has not sufficiently responded to their petitions, plaintiffs filed

suit in the United States District Court for the District of Columbia. They raised two claims. First, plaintiffs contend that the Government violated their First Amendment right to petition the Government for a redress of grievances by failing to adequately respond to plaintiffs' petitions. In particular, plaintiffs contend that the President, the Attorney General, the Secretary of the Treasury, the Commissioner of the Internal Revenue Service, and Congress neglected their responsibilities under the First Amendment to respond to plaintiffs' petitions. Plaintiffs want the Government to enter into "good faith exchanges" with plaintiffs and to provide "documented and specific answers" to the questions posed in the petitions. J.A. 78 (Am. Compl.).

Second, plaintiffs claim that government officials – by seeking to collect unpaid taxes – have retaliated against plaintiffs' exercise of First Amendment rights. Plaintiffs therefore asked the District Court to enjoin the Internal Revenue Service, the Department of Justice, and other federal agencies from retaliating against plaintiffs' exercise of their constitutional rights (in other words, to prevent the Government from collecting taxes from them).

The Government has responded that the federal courts lack jurisdiction over either claim because the Government has not waived its sovereign immunity with respect to the causes of action asserted by plaintiffs. As to the Petition Clause claim, the Government has contended in the alternative that plaintiffs have failed to state a claim for which relief could be granted

because the Petition Clause does not require the Government to respond to or officially consider petitions.

The District Court dismissed plaintiffs' complaint. *We The People v. United States*, No. 04-cv-1211, slip op. at 6 (D.D.C. Aug. 31, 2005). The Court ruled that the First Amendment does not provide plaintiffs with the right to receive a government response to or official consideration of their petitions. *Id.* at 2-3. In addition, the District Court concluded that the Anti-Injunction Act bars plaintiffs' claim for injunctive relief with respect to the collection of taxes. *See id.* at 5 (citing 26 U.S.C. § 7421).

## II

Plaintiffs raise two legal arguments on appeal. First, plaintiffs contend that they have a First Amendment right to receive a government response to or official consideration of their petitions. Second, plaintiffs argue that they have the right to withhold payment of their taxes until they receive adequate action on their petitions.

The Government renews its argument that plaintiffs' claims are barred by sovereign immunity. In response, plaintiffs have contended that Section 702 of the Administrative Procedure Act waives the Government's sovereign immunity. That section provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . . The United States may be

named as a defendant in any such action. . . .” 5 U.S.C. § 702. The Government acknowledges that Section 702 waives sovereign immunity from suits for injunctive relief. See *Dep’t of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260-61 (1999) (describing Section 702 as waiving the Government’s immunity from actions seeking relief other than money damages); *Trudeau v. FTC*, 456 F.3d 178, 186 (D.C. Cir. 2006) (“[T]here is no doubt that § 702 waives the Government’s immunity from actions seeking relief other than money damages.”) (internal quotation omitted). The Government contends, however, that plaintiffs’ claims fall within an exception to Section 702 that provides: “Nothing herein . . . affects other limitations on judicial review. . . .” 5 U.S.C. § 702. The Government further argues that the Anti-Injunction Act presents just such a barrier to judicial relief in this case because of the Act’s provision that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person.” 26 U.S.C. § 7421(a).

We agree with the Government that the Anti-Injunction Act precludes plaintiffs’ second claim related to collection of taxes. See *Bob Jones Univ. v. Simon*, 416 U.S. 725, 726-27, 749-50 (1974). In asserting that claim, plaintiffs 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. See *Alexander v. “Americans United” Inc.*, 416 U.S. 752, 759-60 (1974).

Plaintiffs also raise, however, a straight First Amendment Petition Clause claim – namely, that they have a right to receive a government response to or official consideration of their various petitions. By its terms, the Anti-Injunction Act does not bar that claim, and Section 702 waives the Government’s sovereign immunity from this suit for injunctive relief, at least with respect to plaintiffs’ allegations regarding actions of certain of the named defendants. *See* 26 U.S.C. § 7421; *cf. Trudeau*, 456 F.3d at 187. We therefore will consider that claim on the merits.

### III

The First Amendment to the Constitution provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I. Plaintiffs contend that they have a right under the First Amendment to receive a government response to or official consideration of a petition for a redress of grievances. We disagree.

In cases involving petitions to state agencies, the Supreme Court has held that the Petition Clause does not provide a right to a response or official consideration. In *Smith v. Arkansas State Highway Employees*, for example, state highway commission employees argued that a state agency violated the First Amendment



by not responding to or considering grievances that employees submitted through their union. *See* 441 U.S. 463, 463-64 & n.1 (1979). In response, the Court held that “the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.” *Id.* at 465.

Likewise, in *Minnesota State Board for Community Colleges v. Knight*, the Supreme Court evaluated a state law that required public employers to discuss certain employee matters exclusively with a union representative; this prevented nonunion employees from discussing those matters with their employers. 465 U.S. 271, 273 (1984). Holding that the state statutory scheme had not “unconstitutionally denied an opportunity to participate in their public employer’s making of policy,” the Court reiterated: “Nothing in the First Amendment or in this 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.” *Id.* at 285, 292. Therefore, the Court concluded that individuals “have no constitutional right as members of the public to a government audience for their policy views.” *Id.* at 286.

Plaintiffs contend that *Smith* and *Knight* do not govern their claims in this case because those cases addressed petitions to state officials regarding public policy, not claims that the Federal Government has violated the Constitution. Plaintiffs’ attempted distinction is at best strained. In both cases, the Supreme

Court flatly stated that the First Amendment, which has been incorporated against the States by the Fourteenth Amendment, does not provide a right to a response to or official consideration of a petition. *Knight*, 465 U.S. at 285; *Smith*, 441 U.S. at 465. Nothing in the two Supreme Court opinions hints at a limitation on their holdings to *certain* kinds of petitions or *certain* levels of Government. In short, the Supreme Court precedents in *Smith* and *Knight* govern this case.

#### IV

Plaintiffs cite the work of several commentators who suggest that *Smith* and *Knight* overlooked important historical information regarding the right to petition. Those commentators point to the government practice of considering petitions in some quasi-formal fashion from the 13th century in England through American colonial times – a practice that continued in the early years of the American Republic. Based on this historical practice,, plaintiffs and these commentators contend that the Petition Clause should be interpreted to incorporate a right to a response to or official consideration of petitions. See, e.g., Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 155 (1986); James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 Nw. U. L. REV. 899, 904-05 & n.22 (1997); Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From a Different Cloth*, 21

HASTINGS CONST. L.Q. 15, 17-18 (1993); Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions*, 106 HARV. L. REV. 1111, 1116-18 (1993); cf. David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right of Petition*, 9 LAW & HIST REV. 113, 116-18, 141 (1991).

Other scholars disagree, arguing based on the plain text of the First Amendment that the “right to petition the government for a redress of grievances really is just a right to petition the government for a redress of grievances.” Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 766 (1999); cf. Norman B. Smith, “*Shall Make No Law Abridging . . . “: An Analysis of the Neglected, but Nearly Absolute, Right of Petition*,” 54 U. CIN. L. REV. 1153, 1190-91 (1986). These scholars note that the Petition Clause by its terms refers only to a right “to petition”; it does not also refer to a right to response or official consideration. See N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (24th ed. 1782) (“To petition”: “to present or put up a Petition”); S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) (“To petition”: “To solícite; to supplicate”). As they suggest, moreover, the Framers and Ratifiers did not intend to incorporate every historical practice of British or colonial governments into the text of the Constitution. See Lawson & Seidman, 93 NW. U. L. REV. at 756-57; cf. *Williams v. Florida*, 399 U.S. 78, 92-93 (1970); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 274-76 (1989) (“Despite this

recognition of civil exemplary damages as punitive in nature, the Eighth Amendment did not expressly include it within its scope.”).

We need not resolve this debate, however, because we must follow the binding Supreme Court precedent. *See Tenet v. Doe*, 544 U.S. 1, 10-11 (2005). And under that precedent, Executive and Legislative responses to and consideration of petitions are entrusted to the discretion of those Branches.

The judgment of the District Court is affirmed.

*So ordered.*

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ROGERS, *Circuit Judge*, concurring: The text of the Petition Clause of the First Amendment does not explicitly indicate whether the right to petition includes a right to a response. Appellants ask the court to consider the text in light of historical evidence of how the right to petition was understood at the time the First Amendment was adopted. Essentially, they contend that the Petition Clause should be read in light of contemporary understanding, which they suggest indicates that the obligation to respond was part and parcel of the right to petition.

As the court points out, we have no occasion to resolve the merits of appellants’ historical argument, given the binding Supreme Court precedent in *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979), and *Minnesota State Board for Community*

*Colleges v. Knight*, 465 U.S. 271 (1984). Op. at 9. That precedent, however, 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.

The Supreme Court's interpretation of the Constitution has been informed by the understanding that:

"The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth."

*Konigsberg v. State Bar of California*, 366 U.S. 36, 50 n.10 (1961) (quoting *Gompers v. United States*, 233 U.S. 604, 610 (1914)). Even where the plain text yields a clear interpretation, the Supreme Court has rejected a pure textualist approach in favor of an analysis that accords weight to the historical context and the underlying purpose of the clause at issue. For example, in *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Supreme Court stated that "[t]he history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause. We have refused 'to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history.'" *Id.* at 678 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 671 (1970));

*see id.* at 673-75. Nor is the Supreme Court's rejection of literalism limited to the First Amendment.<sup>1</sup>

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<sup>1</sup> For instance, in Eleventh Amendment cases, the Supreme Court has rejected "ahistorical literalism," *Alden v. Maine*, 527 U.S. 706, 730 (1999), and instead has turned to "history, practice, precedent, and the structure of the Constitution," *id.* at 741; *see id.* at 711-24, 730-35, 741-44, explaining that "[a]lthough the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, 'we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms,'" *id.* at 729 (omission in original) (quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991))); *see also Seminole Tribe*, 517 U.S. at 69-70; *Principality of Monaco v. Mississippi*, 292 U.S. 313, 320-26, 330 (1934); *Hans v. Louisiana*, 134 U.S. 1, 10-11, 15 (1890). In construing the Fifth Amendment in *Ullmann v. United States*, 350 U.S. 422, 424-25, 438-39 (1956), the Supreme Court rejected the contention that the privilege against self-incrimination protects an individual who is given immunity from prosecution from being forced to testify before a grand jury: For "the privilege against self-incrimination[,] . . . it is peculiarly true that 'a page of history is worth a volume of logic.' For the history of the privilege establishes not only that it is not to be interpreted literally, but also that its sole concern is . . . with the danger to a witness forced to give testimony" that may lead to criminal charges. *Id.* at 438-39 (internal quotation marks omitted) (citations omitted) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)). And in interpreting the *Ex Post Facto* Clause, the Supreme Court in *Collins v. Youngblood*, 497 U.S. 37 (1990), relied on history rather than adopting a literal construction:

Although the Latin phrase "*ex post facto*" literally encompasses any law passed "after the fact," it has long been recognized by this Court that the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them. As early opinions in this Court explained, "*ex*

In the context of the First Amendment, the Supreme Court has repeatedly emphasized the significance of historical evidence. A few examples suffice to illustrate the point. In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), the Supreme Court acknowledged that:

[The] right of access to criminal trials [by the press] is not explicitly mentioned in terms in the First Amendment. But we have long eschewed any narrow, literal conception of the Amendment's terms, for the Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.

*Id.* at 604 (internal quotations marks omitted) (citations omitted). In *Lynch v. Donnelly*, the Supreme Court acknowledged that its "interpretation of the

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*post facto law*" was a term of art with an established meaning at the time of the framing of the Constitution.

*Id.* at 41 (internal citations omitted) (citing *Calder v. Bull*, 3 Dall. 386 (1798)); see *Minnesota v. Carter*, 525 U.S. 83, 88-89 (1998); *Maryland v. Craig*, 497 U.S. 836, 844-49 (1990); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502-03 (1987); *Goldstein v. California*, 412 U.S. 546, 561-62 (1973); *Gravel v. United States*, 408 U.S. 606, 616-18 (1972); *Wright v. United States*, 302 U.S. 583, 607 (1938) (Stone, J., concurring); *Olmstead v. United States*, 277 U.S. 438, 476-77 (1928) (Brandeis, J., dissenting); *Boyd v. United States*, 116 U.S. 616, 634-35 (1886).

Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees.” 465 U.S. at 673; *see id.* at 673-77. In *Marsh v. Chambers*, 463 U.S. 783, 786-94 (1983), the Supreme Court looked to contemporary practice from the early sessions of Congress and to later congressional practice in holding that paid legislative chaplains and opening prayers do not violate the First Amendment. *See Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 583-85 (1983); *Engel v. Vitale*, 370 U.S. 421, 425-33 (1962); *Everson v. Bd. of Educ.*, 330 U.S. 1, 7-15 (1947); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 240, 245-49 (1936); *Near v. Minnesota*, 283 U.S. 697, 713-18 (1931).<sup>2</sup>

Appellants point to the long history of petitioning and the importance of the practice in England, the American Colonies, and the United States until the 1830’s as suggesting that the right to petition was commonly understood at the time the First Amendment was proposed and ratified to include duties of consideration and response. *See* Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 22-33 (1993); Norman B.

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<sup>2</sup> Similar analysis is found in the Supreme Court’s interpretation of other provisions of the Constitution. *See Crawford v. Washington*, 541 U.S. 36, 42-50 (2004) (Sixth Amendment); *Atwater v. City of Logo Vista*, 532 U.S. 318, 326-40, 345 n.14 (2001) (Fourth Amendment); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 782-83, 800-15 (1995) (Tenth Amendment); *Hamelin v. Michigan*, 501 U.S. 957, 975-85 (1991) (Eighth Amendment); *Wesberry v. Sanders*, 376 U.S. 1, 2-3, 7-17 (1964) (Art. I, § 2).



Smith, "Shall Make No Law Abridging . . .": *An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1154-68, 1170-75 (1986). Based on the historical background of the Petition Clause, "most scholars agree that the right to petition includes a right to some sort of considered response." James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 905 n.22 (1997); see David C. Frederick, *John Quincy Adams, Slavery, and the Right of Petition*, 9 LAW & HIST. L. REV. 113, 141 (1991); Spanbauer, *supra*, at 40-42; Stephen A. Higginson, Note, *A Short History of the Right to Petition*, 96 YALE L.J. 142, 155-56 (1986); Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions*, 106 HARV. L. REV. 1111, 1116-17, 1119-20 (1993); see also Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1156 (1991) (lending credence to Higginson's argument that the Petition Clause implies a duty to respond). Even those who take a different view, based on a redefinition of the question and differences between English and American governments, acknowledge that there is "an emerging consensus of scholars" embracing appellants' interpretation of the right to petition. See Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 756 (1999).

The sources cited by appellants indicate that "[t]he debates over the inclusion of the right to petition reveal very little about why the convention delegates

may have regarded the right as important or what the 'framers' intended with respect to the substantive meaning of the right." Frederick, *supra*, at 117 n.19 (citing 4 BERNARD SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 762-66, 840-42 (1980)); see Higginson, *supra*, at 155-56. But neither textual omission<sup>3</sup> nor the absence of explicit statements by Framers or Ratifiers on the precise issue has been dispositive in the Supreme Court's First Amendment jurisprudence. Instead, the historical context and the underlying purpose have been the hallmarks of the Supreme Court's approach to the First Amendment. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-71 (1964); *Roth v. United States*, 354 U.S. 476, 481-84, 488 (1957); *Beauharnais v. Illinois*, 343 U.S. 250, 254-55 (1952).

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<sup>3</sup> See, e.g., *Globe Newspaper*, 457 U.S. at 604. The Supreme Court has adopted the same approach in interpreting other provisions of the Constitution. For example, in holding that the Speech or Debate Clause applies to a Senator's aide even though it mentions only "Senators and Representatives," the Supreme Court in *Gravel* observed that although the Clause "speaks only of 'Speech or Debate,'" its precedent, consistent with adhering to the underlying purpose of the Clause, "ha[d] plainly not taken a literalistic approach in applying the privilege" to protect committee reports, resolutions, and voting. *Gravel*, 408 U.S. at 617; see *id.* at 616-18. In the Fourth Amendment context, although the Amendment speaks only to protecting people in their houses, the Supreme Court in *Carter* noted that its precedent, in some situations, had extended that protection to apply to individuals' privacy in other people's houses. *Carter*, 525 U.S. at 88-89; see also *Faretta v. California*, 422 U.S. 806, 819 & n.15 (1975); *Goldstein*, 412 U.S. at 561-62; *Principality of Monaco*, 292 U.S. at 320-23, 330; *Hans*, 134 U.S. at 10-11, 15.

The Supreme Court's free speech precedent is illustrative. Although the textual meaning of "speech" is as clear, in terms of dictionary definitions, as the meaning of "petition," the Supreme Court has interpreted "speech" broadly in order to protect freedom of expression:

The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. . . . [W]e have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments."

*Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)); cf. *NAACP v. Button*, 371 U.S. 415, 430 (1963). The text of the First Amendment mentions neither writing nor conduct, and at the time of the Founding, as now, the word "speech" meant expression through "vocal words."<sup>4</sup>

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<sup>4</sup> 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) ("speech": "The power of articulate utterance; the power of expressing thoughts by vocal words," "Language; words considered as expressing thoughts," "Particular language; as distinct from others," "Any thing spoken," "Talk; mention," "Oration, harangue," "Declaration of thoughts"); 2 THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1790) ("speech": "The power of articulate utterance, the power of expressing thoughts by vocal words; language, words considered as expressing thoughts; particular language as distinct from others; any thing spoken; talk, mention; oration, harangue"); see NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (24th ed. 1782) ("speech": "Language, Discourse"); see also THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1731 (3d ed.

Yet the Supreme Court has considered both the history and purpose of the First Amendment in according a broad interpretation to the Free Speech Clause. Looking, in part, to the Framers' intent, the Supreme Court has held that the Free Speech Clause applies to written communications, *see City of Ladue v. Gilleo*, 512 U.S. 43, 45, 58 (1994); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 61 (1983); *Martin v. Struthers*, 319 U.S. 141, 141-42, 149 (1943), as well as a broad range of expressive activities, including spending to promote a cause, *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 767 (1978); *Buckley*, 424 U.S. at 19-20, burning the American flag, *see Johnson*, 491 U.S. at 399-400, 404-06, and dancing nude, *see City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991). Furthermore, although the dictionaries do not exclude any particular types of oral communication from the definition of "speech," the Supreme Court has held, in light of the historical context, that the First Amendment does not protect obscene speech, *Roth*, 354 U.S. at 481-85, 488; *Miller v. California*, 413 U.S. 15, 23 (1973), libelous speech, *Beauharnais*, 343 U.S. at 254-55, 266, false commercial speech,

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1992) ("speech": "The faculty or act of speaking," "The faculty or act of expressing or describing thoughts, feelings, or perceptions by the articulation of words," "Something spoken; an utterance," "Vocal communication; conversation"); THE NEW OXFORD AMERICAN DICTIONARY 1630 (2d ed. 2005) ("speech": "the expression of or the ability to express thoughts and feelings by articulate sounds"); 16 THE OXFORD ENGLISH DICTIONARY 175-77 (2d ed. 1989) ("speech": "The act of speaking; the natural exercise of the vocal organs; the utterance of words or sentences; oral expression of thought or feeling").

see *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563-64 (1980); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 77172 (1976), or speech that is “likely to cause a breach of the peace,” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569, 573 (1942).

Of course, this court cannot know whether the traditional historical analysis would have resonance with the Supreme Court in a Petition Clause claim such as appellants have brought. It remains to be seen whether the Supreme Court would agree to entertain the issue, much less whether it would agree with appellants and “most scholars” that the historical evidence provides insight into the First Congress’s understanding of what was meant by the right to petition and reevaluate its precedent, or conversely reject that analysis in light of other considerations, such as the nature of our constitutional government. No doubt it would present an interesting question. For now it suffices to observe that appellants’ emphasis on contemporary historical understanding and practices is consistent with the Supreme Court’s traditional interpretative approach to the First Amendment.

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**APPENDIX P**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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WE THE PEOPLE, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 04-1211
v.	)	(EGS)
	)	
UNITED STATES, <i>et al.</i> ,	)	
	)	
Defendants.	)	
<hr/>	)	

**OPINION & ORDER**

(Filed Aug. 31, 2005)

Plaintiff We the People Foundation for Constitutional Education, Inc. and several individually-named plaintiffs, including *pro se* plaintiff Robert L. Schultz, bring this action against the United States of America, the U.S. Treasury Department, the Internal Revenue Service, and the U.S. Department of Justice. Plaintiffs' Complaint "arises from the failure of the President of the United States and his Attorney General and his Secretary of the Treasury and his Commissioner of the Internal Revenue Service, and the failure of the United States Congress, to properly respond to Plaintiffs' Petitions for Redress of Grievances against their government, namely: grievances relating to violations of the U.S. Constitution's war powers, taxing, money, and "privacy" clauses." *See* Plaintiffs' Amended Complaint ("Compl.") at 66. Plaintiffs also allege that the Executive Branch has retaliated against plaintiffs for

petitioning the government and for “Peaceably Assembling and Associating with other individuals under the umbrella of the We the People Foundation for Constitutional Education and the We the People Congress.” Id.

Pending before the Court are defendants’ Motion to Dismiss and plaintiffs’ Motion to Amend the Complaint. Upon consideration of the motions, the oppositions thereto, and the replies in support thereof, and for the following reasons, it is hereby

**ORDERED** that the defendants’ Motion to Dismiss is **GRANTED**. It is further

**ORDERED** that the plaintiffs’ Motion for Leave to File Amended Complaint is **DENIED**.

## **I. Motion to Dismiss**

### **A. Standard of Review**

A motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) should be granted when it appears “beyond doubt” that there is no set of facts that plaintiffs can prove that will entitle them to relief. *See Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1114 (D.C. Cir. 2000). “Accordingly, at this stage in the proceedings, the Court must accept as true all of the complaint’s factual allegations.” *Johnson v. District of Columbia*, 190 F. Supp. 2d 34, 39 (D.D.C. 2002).

## B. Discussion

The First Amendment provides that “Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. Amend. I. Plaintiffs contend that they therefore have a constitutional right to a response to the petitions they have filed with the various defendants, and that defendants have committed constitutional torts against plaintiffs in failing to respond to their petitions. See Pl. Opposition to Def. Motion to Dismiss (“Pl. Opp.”) at 9-10. The Supreme Court, however, has held that “the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.” See *Smith v. Ark. State Highway Employees, Local 1315*, 441 U.S. 463, 465 (1979). Plaintiffs’ claims that the defendants are obligated to “properly” respond to plaintiffs’ petitions shall thus be dismissed for failure to state a claim upon which relief may be granted.

Plaintiffs’ claims based on the “retaliatory actions” the defendants have allegedly taken against plaintiffs for exercising their First Amendment rights are similarly flawed. The governmental actions plaintiffs complain of include sending plaintiffs threatening letters, placing liens on their property, raiding plaintiffs’ homes or offices, and forcing plaintiffs to appear before administrative or other tribunals. Compl. at ¶ 48. It appears that because plaintiffs have not received responses to their petitions, they have “decided to give further expression to their Rights under the First



Amendment to Speech, Assembly and Petition, by not withholding and turning over to government direct, un-apportioned taxes on Plaintiffs' labor – money earned in direct exchange for their labor (not to be confused with money “derived from” labor).” Pl. Opp. at 30-31.

Congress has provided methods for challenging the legality of such enforcement actions and to prevent governmental abuse. For example, taxpayers have the right to notice and a hearing before the federal government can file a notice of a tax lien or levy. 26 U.S.C. §§ 6320, 6330. Citizens have a right of action for wrongful levies or other collection actions and for wrongful failure to release liens. *Id.* at §§ 7426(a). And taxpayers may sue to recover money erroneously or illegally assessed or collected by the government. *Id.* at § 7422(a).

Plaintiffs do not, however, have a First Amendment right to withhold money owed to the government and to avoid governmental enforcement actions because they object to government policy. *See, e.g., Adams v. Comm’r*, 170 F.3d 173, 182 (3d Cir. 1999) (“Plaintiffs engaging in civil disobedience through tax protests must pay the penalties incurred as a result of engaging in such disobedience.”); *United States v. Rowlee*, 899 F.2d 1275, 1279 (2d Cir. 1990) (“The consensus of this and every other circuit is that liability for a false or fraudulent return cannot be avoided by evoking the First Amendment[.]”) (citing cases); *United States v. Kelley*, 864 F.2d 569, 576-77 (7th Cir.), *cert. denied*, 493 U.S. 811 (1989)(actions that constitute more than mere

advocacy not protected by the First Amendment); *Welch v. United States*, 750 F.2d 1101, 1108 (1st Cir. 1985) (“[N]oncompliance with the federal tax laws is conduct that is afforded no protection under the First Amendment[.]”); *United States v. Ness*, 652 F.2d 890, 892 (9th Cir.), *cert. denied*, 454 U.S. 1126 (1981) (“Tax violations are not a protected form of political dissent.”); *United States v. Malinowski*, 472 F.2d 850, 857 (3d Cir. 1973) (“To urge that violating a federal law which has a direct or indirect bearing on the object of protest conduct protected by the First Amendment is to endorse a concept having no precedent in any form of organized society where standards of societal conduct are promulgated by some authority.”).

Moreover, the injunctive relief that plaintiffs seek, that is, “a temporary injunction against the United States Internal Revenue Service and the Department of Justice and any other agency of the United States that arguably may act in this matter under color of law, from taking any further retaliatory actions against the named plaintiffs in this proceeding,” is clearly barred by the Anti-Injunction Act, 26 U.S.C. § 7421. *See, e.g., Foodservice & Lodging Institute, Inc. v. Regan*, 809 F.2d 842, 844 (D.C. Cir. 1987) (“The Anti-Injunction Act 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.’ 26 U.S.C. § 7421(a) (1982). The Declaratory Judgement Act provides that ‘[i]n a case of actual controversy within its jurisdiction, except with respect to Federal taxes . . . any court of the United States . . . may declare the rights and other

legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.' 28 U.S.C. § 2201(a) (Supp. III 1985). By their terms, these statutes clearly bar the appellant's claims for injunctive and declaratory relief as to the [challenged IRS regulations].").

For the above cited reasons, plaintiffs' complaint must be dismissed for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6).

## **II. Motion for Leave to File Amended Complaint**

In light of the preceding discussion and the Court's ruling granting the defendants' motion to dismiss the complaint, plaintiffs' motion for leave to amend their complaint to add additional defendants, including the President of the United States, the United States Congress, the Commissioner of the Internal Revenue Service and others, as well as adding 1,600 plaintiffs, shall be **DENIED** as futile. See *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099 ("Courts may deny a motion to amend a complaint as futile . . . if the proposed claim would not survive a motion to dismiss.") (citations omitted); see also *Nat'l Wrestling Coaches Ass'n v. U.S. Dept. of Educ.*, 263 F. Supp. 2d 82, 103-04 (2003), *aff'd*, 366 F.3d 1047 (D.C. Cir. 2004), *cert. denied*, 125 S.Ct. 2537 (2005) (citing and discussing cases supporting a district court's discretion pursuant to Fed. R. Civ. P. 15(a) to deny a motion for leave to amend complaint on the grounds of futility).

**III. Conclusion**

For the reasons set forth herein, it is hereby **ORDERED** that the defendants' motion to dismiss the complaint is **GRANTED** and plaintiffs' motion for leave to amend their complaint is **DENIED**. An appropriate order accompanies this Opinion & Order.

Signed: EMMET G. SULLIVAN  
U.S. District Judge  
August 31, 2005

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