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December 21, 2004

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Re: We the People Foundation, Inc., et al. v. United States, et al., Civ. No. 04-1211 (USDC D.D.C.)

Gentlemen:

Enclosed for service upon you is defendants' reply brief in support of their motion to dismiss the amended complaint in the above referenced case.

Please contact me at (202) 307-6615 if you have any questions or concerns.

Sincerely yours,

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IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

WE THE PEOPLE FOUNDATION INC., et al.,	)	
Plaintiffs,	)	
v.	)	No. 1:04-cv-01211 EGS
UNITED STATES, et al.,	)	
Defendants.	)	

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

This is an action to compel various agencies and officials of the federal government to "adequately respond" to certain questions regarding the constitutionality and legality of the federal income tax, the Federal Reserve Bank, and any other issues plaintiffs raise in certain "petitions" to these officials, and to enjoin the United States and certain of its agencies and officials from enforcing federal tax laws with regard to plaintiffs if they refuse to pay federal taxes until they receive an "adequate response" to the petitions. The defendants moved to dismiss the complaint, as amended, on September 30, 2004.[1] This brief is submitted to address

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[1]On November 12, 2004, the plaintiffs sought leave to file a second amended complaint, in order to add as defendants the President of the United States, the Secretary of the Treasury, the Commissioner of Internal Revenue, the Attorney General, the United States Congress, the Speaker of the House of Representatives, and the Senate Majority Leader, in their individual and official capacities, to remove one plaintiff, to add over 1,600 plaintiffs by identifying them in the body of the complaint, and "to respond to other issues raised by the defendants in their motion to dismiss." Defendants opposed the motion as futile, because the amendments did not address the fundamental defects in the complaint, described in the defendants' motion to dismiss and in this brief.

certain issues raised in the plaintiffs' opposition to the motion to dismiss, served on or about November 11, 2004.

DISCUSSION

I. NOTHING IN THE CONSTITUTION REQUIRES DEFENDANTS TO "ADEQUATELY RESPOND" TO PLAINTIFFS' CORRESPONDENCE.

Plaintiffs' complaint purportedly arises from the mailing of approximately 1,600 so-called "petitions for redress of grievances" to each of the President of the United States, the Secretary of the Treasury, the Commissioner of Internal Revenue, the Attorney General, the United States Congress, the Speaker of the House of Representatives, and the Senate Majority Leader. (Am. Compl. ¶ 28.) These "petitions" relate primarily to the constitutionality and legality of the federal income tax, but also to "the war powers clauses of the Constitution and the Iraq Resolution, the money clauses of the Constitution and the Federal Reserve System and the 'privacy' clauses of the Constitution and the USA Patriot Act." (Am. Compl. ¶¶ 7-8.)

Plaintiffs do not contend that their submission of these documents, their access to the courts or the media, or their right to argue for their beliefs has been impeded. Rather, they contend that the First Amendment, particularly the Petition Clause, obligates the recipients of this correspondence to "adequately respond," and that "non-responsive responses, including silence, are repugnant to the Petition Clause[.]" (Br. Opp. Mot. Dismiss 10.) Without delineating the contours of what would constitute an "adequate response," and while apparently conceding that even the first Congress had discretion to reject petitions (Br. Opp. Mot. Dismiss 13-14), plaintiffs rely

upon commentary in certain law journal articles to argue that the Petition Clause, as it was originally conceived, encompasses a right to government response to any document which may be denominated a petition (Br. Opp. Mot. Dismiss 9 n.5).

According to the commentary, at the founding of the Republic, the Petition Clause implied a "congressional duty to respond." Akhil R. Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1156 (1991). In the Civil War era, however, Congress enacted rules abolishing the duty to respond, a change later sanctioned by the Supreme Court. Note, A Short History of the Right to Petition Government for the Redress of Grievances, 96 Yale L.J. 142, 164 (1986); Bieregu v. Reno, 59 F.3d 1445, 1453 (3d Cir. 1995). Although sometimes arguing that it may be inconsistent with the meaning of petitioning in colonial times, the current commentary cited by plaintiffs generally agrees that interpreting the right of petition to impose a duty on the government to consider or act upon petitions addressed to it "could exceed the practical limitations of our system of government; with our present capacity for multiplying documents, the business of government could be halted if each paper produced in a massive petition campaign is addressed." Norman 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); see also Note, supra, at 165 ("The original character of the right of petition may impose an untenable restraint on the autonomy and agenda setting power of the federal legislature.").

More importantly, however, whatever the merits may be of competing arguments advanced in academic circles, the Supreme Court has fully considered the

matter and has held conclusively that petitioners "have no constitutional right to force the government to listen to their views," Minnesota State Board v. Knight, 465 U.S. 271, 283 (1984), and that "the First Amendment does not impose any affirmative obligation on the government" to recognize, bargain with, or respond to groups such as the plaintiffs, Smith v. Ark. State Highway Employees, Local 1315, 441 U.S. 463, 465 (1979).[2] As in Smith, the defendants have, in this case, according to the allegations of the complaint, simply ignored the petitions of plaintiffs. Under the First Amendment, the state actor is free to do so. This Court is bound by applicable Supreme Court precedent. See State Oil Co. v. Khan, 522 U.S. 3, 20 (1997). Should plaintiffs wish to reverse these precedents,[3] they must do so in the appropriate forum.

Plaintiffs' efforts to distinguish this controlling precedent are circular and ill-reasoned. First, they argue that Smith is "clearly differentiated" from the instant case, "which confronts intentional and Constitutional torts by the government[.]" (Br. Opp. Mot. Dismiss 17.) In so arguing, plaintiffs are attempting to lift themselves up by their bootstraps. This case does not involve a constitutional tort any more than did Smith, Knight, or their progeny: the existence of such a constitutional violation

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[2]As a result, plaintiffs' contention that this is a "first-impression case" (Br. Opp. Mot. Dismiss 2), is erroneous.

[3]See also San Filippo v. Bongiovanni, 30 F.3d 424, 437 (3d Cir. 1994) ("the petition clause does not require the government to respond to every communication that the communicator may denominate a petition"); Cecelia Packing Corp. v. United States Dep't of Agriculture, 10 F.3d 616, 623 (9th Cir. 1993) ("The First Amendment guarantees the right to participate in the political process; it does not guarantee political success"); Fraternal Order of Police v. Ocean City, 916 F.2d 919 (4th Cir. 1990); Welch v. Paicos, 66 F. Supp. 2d 138, 161-162 (D. Mass. 1999).

depends upon the recognition of a First Amendment obligation to respond to the individual correspondence of private citizens. No such obligation exists.

Second, plaintiffs argue that Smith, Knight, and their progeny are distinguishable because "they deal with public policymaking by units of local and state government." Plaintiffs, in turn, are seeking to compel high-ranking federal officials -- in particular, the President of the United States, three federal agencies, generally, the Secretary of the Treasury, the Commissioner of Internal Revenue, the Attorney General, the United States Congress, the Speaker of the House of Representatives, and the Senate Majority Leader -- to enter into "good faith exchanges" with the plaintiffs and to provide "documented and specific answers" to their questions. It is unclear what relevant distinction the plaintiffs are trying to make by this argument, but that the defendants (or at least the defendants proposed in the second amended complaint) are the President and other high-ranking officials only adds more support to the argument that they should be free from the banality of having to respond individually to plaintiffs' anti-tax and other arguments.[4] Indeed, these elected officials and their

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[4]In fact, however, members of all three branches have already responded to anti-tax arguments identical to those raised by plaintiffs, such as that the Internal revenue Code does not require individuals to file a return or pay a tax, or employers to withhold tax from the paychecks of their employees, or that the Sixteenth Amendment was not properly ratified, etc. The Internal Revenue Service publishes guidance discussing all or most of plaintiffs' positions on the income tax. See The Truth About Frivolous Tax Arguments, IRS Pub. No. 2105 (Rev. 10-2003). The Senate Finance Committee held a hearing owing to concerns it had over these arguments, and published correspondence from plaintiff We the People Foundation in its transcript of proceedings. See S. Hearing No. 107-77, Taxpayer Beware: Schemes, Scams, and Cons, 107th Cong., 1st Session (Apr. 5, 2001). Finally, the judiciary has been responding to anti-tax arguments such as these for decades. See, e.g., Schiff v. United States, 919

appointees should be protected from unnecessary interference with the jobs that the electorate has put them in office to do. In a representative democracy, efforts to change the agenda of such officers are "to be registered principally at the polls." Knight, supra, 465 U.S. at 285.

As a result of this clear and unwavering line of Supreme Court precedent, then, plaintiffs fail to state a claim in their allegations that federal officials violated their First Amendment rights by not "properly responding" to their "petitions."

II. PLAINTIFFS HAVE NO FIRST AMENDMENT RIGHT TO FAIL TO PAY TAXES UNTIL THEY RECEIVE A RESPONSE TO THEIR "PETITIONS."

Not only do plaintiffs erroneously assert that they have a First Amendment right to "adequate responses" from governmental officials to their private correspondence, they claim they have a "[r]ight to retain their money until their grievances are redressed." (Br. Opp. Mot. Dismiss 2.) Specifically, 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 *[sic]* direct, un-apportioned taxes on Plaintiffs' labor[.]" (Id. at 30-31.)

There is no First Amendment right to withhold money owing to the Government, and receive immunity from civil and criminal enforcement of tax laws, until an "adequate response" to petitions is received. Plaintiffs can cite no case in

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F.2d 830 (2d Cir. 1990); Hilvety v. World of Powersports, Inc., 13 Fed. Appx. 427 (7th Cir. 2001); Miller v. United States, 868 F.2d 236, 241 (7th Cir. 1989). Plaintiffs, then, ultimately cannot prove that the government has not responded to their claims, but only that their advocacy has met with little or no success.

which such a right is recognized. The suggestion that, on April 15 of any given year, an individual can immunize him or herself from income tax liability simply by mailing something denominated a petition to a federal official, expressing dissatisfaction with some official action, is preposterous.[5]

On the other hand, history is replete with those who have sought to engage in civil disobedience by violating our nation's tax laws. See, e.g., Kahn v. United States, 753 F.2d 1208, 1216 (3d Cir. 1985) (discussing Henry David Thoreau's imprisonment for refusing to pay poll taxes in protest of the Mexican-American War). The law with regard to these persons is clear -- however noble their cause, their civil disobedience will be subject to appropriate sanction for the laws that are broken. Among many other cases are: United States v. Malinowski, 472 F.2d 850, 858 (3d Cir. 1973) ("To urge that violating a federal law which has a direct or indirect bearing on the object of protest is 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."); 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. Kelley, 864 F.2d 569, 576-77 (7th Cir), cert. denied,

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[5]Of course, as Judge Easterbrook has wryly noted, "[s]ome people believe with great fervor preposterous things that just happen to coincide with their self-interest." Coleman v. Commissioner, 791 F.2d 68, 69 (7th Cir. 1986).

493 U.S. 811 (1989) (actions that constitute more than mere advocacy not protected by First Amendment); 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[.]"); and Adams v. Comm'r, 170 F.3d 173, 182 (3d Cir. 1999)("[P]laintiffs engaging in civil disobedience through tax protests must pay the penalties incurred as a result of engaging in such disobedience."). As a result, plaintiffs' contention that they may legally withhold taxes otherwise owing to the government to enforce their constitutional rights is wholly incorrect, and fails to state a claim upon which relief may be granted.

III. PLAINTIFFS MAY NOT ENJOIN THE GOVERNMENT FROM COLLECTING THOSE TAXES THEY ARE REFUSING TO PAY.

Finally, even assuming, *arguendo*, that plaintiffs' First Amendment arguments were not meritless, as explained more fully in the defendants' motion to dismiss, the relief sought by plaintiffs -- an injunction against the enforcement of our nation's civil and criminal tax laws against citizens -- is specifically barred by the Anti-Injunction Act, 26 U.S.C. § 7421. The proper application of the Anti-Injunction Act to this case is discussed on pages 19 through 24 of the memorandum in support of the defendants' motion to dismiss.

Plaintiffs respond simply by saying that such an application of the Anti-Injunction Act, itself, is unconstitutional. This is not true. Plaintiffs' constitutional rights are protected by the comprehensive scheme in the Internal Revenue Code for challenging agency conduct of the type described by plaintiffs. Summonses (26 U.S.C.

§ 7609), assessment (§ 7422), liens (§§ 6320, 7425), levies (§§ 6330, 7426) and other collection actions (§ 7433) are all subject to judicial review. Where "the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations," the Court shall not create a remedy of its own. Schweiker v. Chilicky, 487 U.S. 412, 423 (1988). Taxpayer injunction suits may not be used as a collateral or alternative mechanism for resolving disputes such as the one in this case. Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7-8 (1962). The plaintiffs have not met their burden of proving that they fall within the narrow, exceptional class of cases that are not subject to this general rule. See Enochs, supra; South Carolina v. Regan, 465 U.S. 367 (1984). Accordingly, the Court lacks subject-matter jurisdiction to grant the injunctive relief sought by plaintiffs.

CONCLUSION

For the foregoing reasons, the defendants respectfully submit that their motion to dismiss the complaint, as amended, should be granted.

Dated: December 21, 2004

Respectfully submitted,

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