UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ	)	
	)	
Plaintiff	)	
	)	
-against-	)	
	)	**Case No. 06-MC-131**
	)	**DNH/DRH**
UNITED STATES and THE	)	
INTERNAL REVENUE SERVICE	)	
	)	
Defendants	)	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TEMPORARY AND PRELIMINARY RELIEF

In support of this motion, based on the Declarations #2 and #3 by Robert Schulz, and the prior pleadings, Robert Schulz, who is *pro se*, states as follows:

RELIEF REQUESTED

Schulz moves this Honorable Court for an entry of an Order:

a) Temporarily and preliminarily enjoining, prohibiting and restraining THE INTERNAL REVENUE SERVICE and any other agency of the UNITED STATES that arguably may act in this matter under color of law, from enforcing the IRS Summons issued by IRS Agent Elsie Addington and served on the Glens Falls National Bank on October 12,

2006, naming the Plaintiff in this matter, ROBERT SCHULZ, until the Court determines the issues, and

b) Directing the INTERNAL REVENUE SERVICE to immediately notify the Glens Falls National Bank and Trust Company by telephone of the stay of the enforcement of the Summons and that the Bank is not to comply with the Summons until further notice by the IRS, and

c) Expediting these proceedings where this matter might be set for trial, and

d) Granting any further relief that to the Court may seem just and proper.

THE URGENCY

This memorandum is filed in support of the Show Cause Order to temporarily and preliminarily enjoin and prohibit the enforcement of an IRS Summons that has been served on the Glens Falls National Bank and Trust Company (hereinafter "Bank"), naming Plaintiff Robert Schulz.

The Summons requires the Bank to give the IRS a copy of Schulz's bank records for 2003 and 2004, including Bank Statements, deposits and withdrawals.

The Summons is returnable on or before November 9, 2006. The Bank's attorney (James Cullum) has advised Schulz that absent a restraining order by the Court, the Bank will send the summoned material to the IRS on November 7, 2006.

STATEMENT OF FACTS

The facts of the case are presented in detail in Declaration #2 by Schulz (attached), as well as in the pleadings filed on November 1, 2006.

In sum, Schulz, in association with other American citizens, has claimed and has been exercising his Rights under the First Amendment's Petition Clause.

In association with others, including the We The People Foundation for Constitutional Education, Inc. (hereinafter "Foundation"), Schulz has been Petitioning the Government for a Redress of Grievances relating to war powers, privacy, money and tax clauses of the Constitution of the United States of America.

In violation of the First Amendment's Petition Clause, the Government has failed to respond to the proper Petitions for Redress of constitutional torts.

Consequently, Schulz has claimed and is exercising his Right under the First and Ninth Amendments to enforce his Rights by withdrawing his support from the Government by refusing to file federal tax returns until his grievances are redressed.

The United States' Executive Branch, including the Internal Revenue Service, has not wanted to respond to the Petitions for Redress and has not been pleased with Schulz's promotion of the Petition for Redress and Government's failure to respond. Rather than respond to the Petitions for Redress of Grievances,

the Government served Schulz with a series of Summonses in 2003, labeling Schulz's promotion of the Petition Process a *potentially* abusive tax shelter under Section 6700 of the Internal Revenue Code and summoning his personal and private books, records and other material. *One of those summonses demanded from Schulz the same information as the summons now served on the Bank – the challenged Summons*.

Thus began IRS's pretextual enforcement program (hereinafter "WTP 6700") against Schulz's claim and exercise of his Rights, including but not limited to his Rights under the First Amendment's Petition Clause.

In response to the 2003 summonses, Schulz petitioned this Court to quash the Summonses on the grounds that they were issued in bad faith, motivated by an improper purpose of interfering with and chilling Schulz's exercise of constitutionally protected Rights of Petition, Association, Speech, Press, Privacy, Property and Due Process. This Court dismissed for lack of subject matter jurisdiction. On appeal, the Court of Appeals issued two decisions known as *Schulz I* and *Schulz II*.[1]

In *Schulz*, the Court held that an IRS administrative summons is only a request and that in the interest of Due Process, if the IRS wanted to enforce the summons the IRS would first have to bring Schulz to federal District Court where

[1] *Schulz v. IRS*, 395 F.3d 463 (2d Cir. January 2005)(*Schulz I*); *Schulz v. IRS*, 413 F.3d 297 (2d Cir. June 2005)(*Schulz II*).

he would be able to assert his defenses in a full adversarial proceeding and hearing. In *Schulz II*, the Court held that the Due Process principles it was applying would apply to all administrative directives and orders.

Rather than follow the Appeals Court's instruction (or respond to the Petitions for Redress of constitutional torts), the Government stepped up its WTP 6700, pretextual enforcement campaign against Schulz, the Foundation and the Petition process. *The instant Summons is one part of the WTP 6700 program*.

The facts demonstrate clearly that the IRS's campaign has been aimed at identifying all people who were in any way supporting the Petition process, and using the weight of the IRS's enforcement powers to disrupt the constitutionally protected Petition process.

ARGUMENT

SCHULZ HAS A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS

A. SUMMONS IS ABRIDGING FIRST AMENDMENT RIGHTS

The challenged summons, alone and as part of the WTP-6700 program is violating Schulz's free speech, associational and petitioning Rights, as guaranteed by the First and Ninth Amendments to the United States Constitution, his privacy Rights as guaranteed by the Fourth Amendment of the United States Constitution, and his due process and property Rights as guaranteed by the Fifth Amendment.

Schulz is associating with a group of persons and organizations who have claimed and are exercising the capstone Right of Petitioning the Government for Redress of Grievances. They have associated with one another and have given of their time, money and talents for the common purpose of petitioning elected and appointed officials for Redress of certain constitutional torts and for educating the general public about issues involved in the Petition process. They have conducted regular meetings and telephone and Internet communications, seeking answers to questions in order to reconcile certain acts of the federal government with the enumerated powers and prohibitions of the Constitution of the United States of America, all for various uncontested legitimate reasons including civic education, protecting individual liberty and freedom, and holding government accountable to the Constitution.[2]

Schulz and his associates are being oppressed by the IRS who, closing its eyes to the Constitution and seeing only its enforcement powers, is interfering with and preventing Schulz from peaceably enforcing the Defendants' contested obligations under the United States Constitution, while violently enforcing Plaintiff's contested obligations under the Internal Revenue Code.

[2] Plaintiffs are seeking to reconcile the differences between Iraq Resolution and the war powers clauses, between the enforcement of the Internal Revenue Code and the tax clauses, between the Federal Reserve Act and the money clauses and between the USA Patriot Act and the privacy clauses.

WTP-6700, of which the challenged Summons is one part, is clearly intended to shut down Plaintiff We The People Foundation for Constitutional Education, Inc. and, with it, the People's Petition process, by impairing the ability and willingness of the People to associate, by cutting off the flow of donations and technical assistance to the Petition process via the Foundation, and by so bogging down the manager of the Petition process (Plaintiff Robert Schulz) by forcing him to respond to one initiative after another under the WTP-6700 program that he has little time to further the Petition process whether by litigation, civic education or civic action.

The record shows clearly the general pattern and specific steps being taken by the Government under WTP- 6700, of which the challenged summons is one part.

As the Declaration by Schulz shows, in requesting Schulz's personal bank records the IRS has admitted the purpose is to gain the identity of Schulz' friends and family members (who have provided Schulz with personal gifts to allow him to keep a roof over his head - not for services rendered), *so that they too could be examined by the IRS.*

The First Amendment bars a prosecution (as under 26 U.S.C. 6700) where the proceeding is motivated by the improper purpose of interfering with the

defendant's constitutionally protected [rights]. Bantam Books v. Sullivan, 372 U.S. 58 (1963); Dombrowski v. Phister, 380 U.S. 479 (1975).

The Supreme Court and the Founder's opinions are clear, Congress cannot violate Fundamental Rights possessed by the People.

> "And the Constitution itself is in every real sense a law-the lawmakers being the people themselves, in whom under our system all political power and sovereignty primarily resides, and through whom such power and sovereignty primarily speaks. It is by that law, and not otherwise, that the legislative, executive, and judicial agencies which it created exercise such political authority as they have been permitted to possess. The Constitution speaks for itself in terms so plain that to misunderstand their import is not rationally possible. 'We the People of the United States,' it says, 'do ordain and establish this Constitution.' Ordain and establish! These are definite words of enactment, and without more would stamp what follows with the dignity and character of law. The framers of the Constitution, however, were not content to let the matter rest here, but provided explicitly-'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land.' (Const. art. 6, cl. 2.) The supremacy of the Constitution as law is thus declared without qualification. That supremacy is absolute; the supremacy of a statute enacted by Congress is not absolute but conditioned upon its being made in pursuance of the Constitution. And a judicial tribunal, clothed by that instrument with complete judicial power, and, therefore, by the very nature of the power, required to ascertain and apply the law to the facts in every case or proceeding properly brought for adjudication, must apply the supreme law and reject the inferior stat- [298 U.S. 238, 297] ute whenever the two conflict. In the discharge of that duty, the opinion of the lawmakers that a statute passed by them is valid must be given great weight, Adkins v. Children's Hospital, 261 U.S. 525, 544 , 43 S.Ct. 394, 24 A.L.R. 1238; but their opinion, or the court's opinion, that the statute will prove greatly or generally beneficial is wholly irrelevant to the inquiry. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 549 , 550 S., 55 S.Ct. 837, 97 A.L.R. 947." *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) .

> "The claim and exercise of a Constitutional right cannot be converted into a crime." Miller v. U.S, 230 F 2d 486, 489

> "Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them". *Miranda v. Arizona*, 384 U.S. 436 (1966)

> "There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.
>
> "If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their WILL to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.
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> "Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental." Hamilton, *Federalist No. 78*

The Government wants to operate without constitutional restraint (hence the Petitions for Redress) and, the Government wants to operate without judicial review (hence the third party summons).

However, the Government does not have the unilateral prerogative to interpret its own authority to act unchecked outside the limited powers delegated to it by the terms and conditions of the Constitution.

The instant case is one of "first impression." Lacking any court ruling declaring the full contours of the meaning of the Petition Clause as it applies to ordinary natural citizens seeking Redress against their government for constitutional torts, and taking into account the plain language of and the Framers' intent behind the words of the Petition Clause, the 791 years of history documenting the evolution of Liberty from Runnymede to Philadelphia, and the complete absence of any case law in opposition to Schulz's interpretation, the ends of Justice and Liberty require that deference, and the presumption that those fundamental Rights exist as argued by Schulz, must be provided to Schulz who has claimed and is exercising those Rights.

The government can produce nothing that would limit or deny the exercise or enforcement of the Right of Petition by individual natural citizens. It could not, for "Congress shall make no law…abridging…the right of the People…to petition the government for redress of grievances." To avoid prior restraint or any infringement of the Right, the lack of oppositional precedent coupled with the plain language and the history, meaning effect and significance of our founding

documents and their legal precedents must be construed in favor of Schulz's likelihood to succeed on the merits.

Schulz has provided the Court with extensive historical and documentary evidence in support of the true legal meaning and power of the Right to Petition Government for Redress of Grievances. See Memo of law, dated November 1, 2006.

The Government is obligated to respond to Petitions for Redress of Grievances, and Schulz has a Right of enforcement, especially when, as here, the oppression is caused by unconstitutional government acts and the Government refuses to be held accountable by responding to the Petitions for Redress. The underlying, fundamental Right is not changed by the fact that the Petition Clause lacks an affirmative statement that Government shall respond to Petitions for Redress of Grievances. "It cannot be presumed, that any clause in the Constitution is intended to be without effect." Chief Justice Marshall in *Marbury v. Madison*. 5 U.S. (1 Cranch) 139 (1803).

The individual's Right, through the Petition Clause of the First Amendment, to hold any branch of the government accountable to the Constitution, is the "capstone" Right, the period at the end of the sentence on Liberty's evolution, for "law without it, is law without justice."

Freedom from unconstitutional government acts cannot be achieved without violence without the Right of Petition, which includes the Right of Response and Enforcement in the event the Government refuses to respond.

Despite the absence of a judicial declaration of the meaning of the Petition Clause, the plain language found in many historical documents that served as the very foundation of civilized society and ordered liberty-- our system of laws and our form of government-- support the claims made by Schulz regarding the full meaning of the Right to Petition.

Finally, the same Congress that adopted the Declaration of Independence unanimously adopted an Act in which they gave meaning to the People's Right to Petition for Redress of Grievances and the Right of enforcement as they spoke about the People's "Great Rights." Quoting:

> "**If money is wanted by rulers who have in any manner oppressed the People, they may retain it until their grievances are redressed, and thus peaceably procure relief, without trusting to despised petitions or disturbing the public tranquility.**" "Continental Congress To The Inhabitants Of The Province Of Quebec." Journals of the Continental Congress 1774, Journals 1: 105-13.

These references demonstrate the merit in law and in fact to Schulz's interpretation of his Right to Petition government to secure redress of constitutional torts, including government's obligation to respond to those Petitions and the Right of the People to *enforce* the Right of Redress, including the peaceful withholding of tax returns. Schulz's claims regarding the Right to Petition are fully

resonant with the Rights expressed within Magna Carta, the English Bill of Rights, the Journals of the Continental Congress, the Constitution and the Declaration of Independence.

B. THE SUMMONS IS AN ACT OF INSOLENCE & DEFIANCE OF *TWO* U.S. COURT OF APPEALS ORDERS PROTECTING SCHULZ

In *Schulz v IRS*, 413 F. 3d 297, 302 (2d Circuit, 2005), the Court held that if the IRS felt it was entitled to Schulz's records it would have to initiate a lawsuit in federal district where, in the interest of due process, Schulz would be able to assert his constitutional defenses, and there would be a full adversarial proceeding and hearing, and a court order would be required before Schulz would have to turn over his private and personal information to the IRS.

Instead of honoring the spirit and intent of the Second Circuit rulings that spoke clearly and unrestrained regarding Schulz's Right to Due Process protections against IRS administrative actions, the IRS formally summoned Schulz's Bank for the information. It is important to note that the Bank in question is also located in the 2nd Circuit, indicating the degree of defiance IRS has exposed in its pursuit of quashing Schulz's exercise of his First Amendment Right to Petition.

The IRS may claim that the decision reflected in the *Schulz I* and *Schulz II* opinions has nothing to do with the new Bank summons because the controversy in

Schulz was about the jurisdiction of the federal court in a case involving a "two-party" summons, whereas the new Bank summons is a "three-party" summons.

However, as the Second Circuit indicated on page 10 in *Schulz*, whether in defense against a "two-party" or a "three-party" summons, in the interest of Due Process Schulz is entitled to a *full adversarial proceeding and judicial hearing* before being put in jeopardy of penalty by having his private and personal property turned over to the Government without his consent, as would be the case if the Bank complied with the Summons.

To repeat, Schulz responded to the IRS Summons in 2003 by petitioning the federal District Court to quash the summons on the ground that he had a Right to Petition the Government for Redress of Grievances and that the summons was a deliberate infringement of that Right – i.e., impermissible retaliation. In response, the United States Court of Appeals ruled that before Schulz could be put in jeopardy of penalty by having his private and personal property turned over to the Government without his consent, he was entitled, by Due Process, to *assert his defenses* in an adversarial judicial proceeding and hearing.[3]

Quoting *Schulz:*

> *"United States v. Euge*, 444 U.S. 707, 719, 63 L. Ed. 2d 141, 100 S. Ct. 874 (1980) ('The summoned party is entitled to challenge the issuance of the summons in an adversary proceeding in federal court *prior to*

[3] The 2d Circuit Court of Appeals also affirmed the lower court's dismissal for lack of jurisdiction, recognizing that unlike three-party summonses, the Internal Revenue Code does not specifically provide for petitions to quash two-party summonses.

enforcement, and may assert appropriate defenses.' (emphasis added))" *Schulz II* (*Schulz v IRS*, 413 F. 3d 297, 302 (2d Circuit, 2005).

"*Donaldson v. United States*, 400 U.S. 517, 525, 27 L. Ed. 2d 580, 91 S. Ct. 534 (1971) ('Thus the [IRS] summons is administratively issued but its enforcement is only by federal court authority in an adversary proceeding affording the opportunity for challenge and *complete protection* to the witness.' (internal quotations marks omitted, emphasis added))" *Schulz II* (*Schulz v IRS*, 413 F. 3d 297, 302 (2d Circuit, 2005).

"*Reisman* advances this view. 375 U.S. at 450 ('We remit the parties to the comprehensive procedure of the Code, which provides full opportunity for judicial review before any coercive sanctions may be imposed."); *see also Bisceglia*, 420 U.S. at 151 ("Congress has provided protection from arbitrary or capricious action by placing the federal courts between the Government and the person summoned [by the IRS].'). *Schulz I* provided our first opportunity to conform the law of this Circuit to that view." *Schulz II* (*Schulz v IRS*, 413 F. 3d 297, 302 (2d Circuit, 2005).

"The rule of due process upon which we relied in *Schulz I*, and upon which we rely now, can be stated thus: any legislative scheme that denies subjects an opportunity to seek judicial review of administrative orders except by refusing to comply, and so put themselves in immediate jeopardy of possible penalties 'so heavy as to prohibit resort to that remedy,' *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 333, 64 L. Ed. 596, 40 S. Ct. 338 (1920), runs afoul of the due process requirements of the Fifth and Fourteenth Amendments. This is so even if 'in the proceedings for contempt the validity of the original order may be assailed.' *Id*. at 335; *see also Reisman*, 375 U.S. at 446; *Ex parte Young*, 209 U.S. 123, 147-48, 52 L. Ed. 714, 28 S. Ct. 441 (1908)." *Schulz II* (*Schulz v IRS*, 413 F. 3d 297, 303 (2d Circuit, 2005).

Instead of bringing Schulz into federal court where he could assert his defenses and where he would have a public, adversarial hearing and a receive the full protection of the Court, the IRS served a summons on his Bank requesting that the Bank turn over the personal and private information the IRS was denied access to in the 2nd Circuit, believing the Bank would have little direct interest in asserting Schulz's defenses, would be hesitant to become embroiled in a dispute between the

Government and one of its customers, could not be an advocate for customers and would otherwise not want to engage in battling someone else's legal controversy.

The effect of the Bank complying with the summons without a court order *would be the same as if the IRS used force against Schulz directly*, without his consent, and without a judicial hearing. Schulz would be penalized. He would have his private and personal information seized by the Government without his consent and most disturbingly, with the intent (and effect) of infringing his First Amendment Right to Petition and further engaging in acts of malicious intent seeking to obstruct justice. Schulz would be denied the Due Process Rights the 2nd Circuit Court of Appeals ruled must be protected under our Constitution, i.e., the Right to face his accuser and *assert his defenses* in a *full* adversarial judicial proceeding and hearing before suffering injury.

Beyond ignoring the *two* 2nd Circuit orders in *Schulz* which specifically address the issue of Due Process protections with respect to IRS administrative acts and which explicitly require an Article III judicial hearing before Schulz can be injured by such an administrative action, the IRS would have this Court believe the rulings in *Schulz* apply only to "two-party" IRS Summonses and not to the other various forms of IRS administrative actions. This strained interpretation would itself, pose a substantial Due Process controversy if such an asymmetrical application of Due Process protections were to apply to only one form of IRS

administrative action, while virtually sanctioning the denial of Due Process and infliction of injury in other, equally abusive forms IRS administrative actions.

Schulz has not been able to find another example in American legal history where the IRS summoned a taxpayer's personal and private information, was told by a court of competent jurisdiction, much less a United States Court of Appeals *(twice)*, that a citizen was entitled to Due Process and as such, must be allowed to assert his defenses in an adversarial judicial proceeding and hearing, and the IRS, *in defiance of such Appellate Order*, proceeded to administratively seize the very records and private information the Court intended to protect, from a disinterested third party institution that would not have the least interest in battling the IRS or in asserting the citizen's constitutional defenses.

The Government is clearly attempting to inappropriately circumvent the clear mandate of the Second Circuit by seeking to secure documents through the back door after the court has closed the front door. Due process is not a game; the ruling of the Second Circuit should be accorded full respect by all, including the Government.

Under the facts and circumstances of this case, the 2005 decision by the 2nd Circuit in *Schulz,* with its sound reiteration of the revered principle of Due Process, was correct and ought to be the law of this case.

In short, much hangs in the balance while Schulz awaits the Court's determination of this historical controversy. Given the facts and circumstances of this case, it would not be unreasonable to provide Schulz with some measure of protection against a Government adversary that continues to openly demonstrate its intent to impede Justice and quash fundamental Rights.

IMMEDIATE AND IRREPARABLE HARM

Addington said that she wants the identities of Schulz's friends and family members that have been helping him keep a roof over his head so she can examine their tax returns (Schulz Declaration #3).

An important part of the irreparable injury finds its roots in the on-going abridgment by the Government of Schulz's First Amendment Rights of association, petition and speech, and Rights of Due Process, Privacy and Property. Schulz's friends and family members will not want to continue their private charity if it means they will be hassled by the IRS.

Schulz's First Amendment Rights must be upheld prior to enforcement if they are to be enjoyed at all. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Ellrod v. Burns (1976) 427 U.S. 347, 373, 96 S.Ct. 2673, 2690.*

As the record shows, the harmful effects of such out of control behavior by the government and government's unwillingness to justify its behavior has chilled the enthusiasm of countless friends and supporters of the Schulz's Right to speak and publish freely and to freely Associate with others in the exercise of the Right to Petition.

CONCLUSION

Schulz asks this Honorable Court to temporarily and preliminarily confine the power of the Government to pass judgment on what constitutes the meaning of the Petition Clause by granting the relief requested, thereby putting a stop to the IRS's abridgment of fundamental Rights, and by staying the enforcement of the Summons, at least until the full contours of the meaning of the Petition Clause is finally determined by the Judiciary.

Respectfully submitted.

Dated: November 3, 2006

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