

CASE BEING CONSIDERED FOR TREATMENT  
PURSUANT TO RULE 34(j) OF THE GENERAL RULES

No. 05-5359

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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WE THE PEOPLE FOUNDATION, INC., et al.

Appellants

v.

UNITED STATES OF AMERICA, et al.,

Appellees

ON APPEAL FROM AN ORDER OF  
THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

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**CERTIFICATE AS TO PARTIES, RULINGS,  
AND RELATED CASES**

(a) *Parties and Amici*. The following are all parties, intervenors, and amici who appeared before the district court and in this court:

Cherie Austin, plaintiff-appellant

Gary Austin, plaintiff-appellant

Ryan Austin, plaintiff-appellant

Steven Perry Austin, plaintiff-appellant

Joseph Banister, plaintiff-appellant

Jerrold L. Bergemeyer, plaintiff-appellant

Frank R. Bootz, plaintiff-appellant

John Boyce, plaintiff-appellant

Terry Bressi, plaintiff-appellant

Nora Bristol, plaintiff-appellant

Richard L. Bristol, plaintiff-appellant

Mark Brittain, plaintiff-appellant

Van Brollini, plaintiff-appellant

John Bruner, plaintiff-appellant

Brian P. Brush, plaintiff-appellant

Kevin L. Cannon, plaintiff-appellant

Craig M. Coble, plaintiff-appellant

Ronald W. Coble, plaintiff-appellant

Constitutional Defender Society, proposed *amicus* on appeal

Cheryl L. Cook, plaintiff-appellant

James T. Cook, plaintiff-appellant

Roger D. Cook, plaintiff-appellant

Sheila Cook, plaintiff-appellant

Stephen Cook, plaintiff-appellant

Johnny W. Corley, plaintiff-appellant

Cecelia Grace, plaintiff-appellant

Richard E. Hardy, plaintiff-appellant

Jackie Harrell, plaintiff-appellant

Internal Revenue Service, defendant-appellee

Sherry Peel Jackson, plaintiff-appellant

Louis M. Joy, plaintiff-appellant

Stacy Kline, plaintiff-appellant

Bob J. Malone, plaintiff-appellant

Mary Malone, plaintiff-appellant

Joseph Nelson, plaintiff-appellant

Aleta Q. Parker, plaintiff-appellant

David R. Parker, plaintiff-appellant

Queen Aleta Parker, plaintiff-appellant

Harrison Pugh, plaintiff-appellant

Kenneth Ray Pugh, plaintiff-appellant

David Schneider, plaintiff-appellant

Robert L. Schultz, plaintiff-appellant

Leon Sikes, plaintiff-appellant

Marilyn Smith, plaintiff-appellant

Jerry D. Stromer, plaintiff-appellant

Alvin A. Tolbert, plaintiff-appellant

John Turner, plaintiff-appellant

U. S. Department of Justice, defendant-appellee

U. S. Treasury Department, defendant-appellee

United States of America, defendant-appellant

We the People Congress, Inc., plaintiff-appellant

We the People Foundation, Inc., plaintiff-appellant

James A. Williams, plaintiff-appellant

John Wolfgram, proposed *amicus* on appeal

Don C. Wornock, plaintiff-appellant

(B) *Rulings under review.* The ruling under review is the order of the United States District Court for the District of Columbia entered August 31, 2005 (A. 13),<sup>1</sup> pursuant to the court's opinion and order also entered August 31, 2005 (A. 6–12).

(C) *Related cases.* This case has not previously been before this Court or any other appellate court or court in the District of Columbia, except for the case currently under appeal to this Court. We are aware that the appellants cite *Robert L. Schulz, et al. v. Washington County Board of Supervisors, et al.* (2<sup>nd</sup> Cir. – No. 05-0259), as a related case.

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<sup>1</sup> “A.” references are to pages in the separately bound record appendix. “R.” references are to docket items in the record below as numbered by the clerk of the district court.

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## GLOSSARY

<i>Abbreviation</i>	<i>Definition</i>
A.	Appellants' appendix
<i>Amicus Br.</i>	Brief of proposed <i>amici curiae</i> Constitutional Defender Association and John Wolfgram
Br.	Appellants' brief
Code or I.R.C.	Internal Revenue Code (26 U.S.C.)
FTCA	Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 <i>et seq.</i>
R.	Docket items in the record as numbered by the clerk of the district court
WTP	Appellants We the People Foundation, Inc., We the People Congress, Inc., and named individuals

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**BRIEF FOR THE APPELLEES**

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**STATEMENT OF JURISDICTION**

On July 19, 2004, appellants We the People Foundation, Inc., We the People Congress, Inc., and several named individuals (collectively, "WTP") filed a complaint and, on September 16, 2004, an amended

complaint in the district court against the United States, the U.S. Treasury Department, the Internal Revenue Service, and the U.S. Department of Justice (collectively, “the Government”), seeking declaratory and injunctive relief. (R. 1; A. 14–134.)<sup>1</sup> WTP asserted jurisdiction under 28 U.S.C. §§ 1331, 1343, 1391(e), and 2679(b)(1) and 42 U.S.C. § 1983. (A. 90–91.) As explained below, the district court lacked jurisdiction over WTP’s claims because sovereign immunity had not been waived. In any event, the amended complaint failed to state a claim upon which relief could be granted.

The district court (Hon. Emmet G. Sullivan) entered judgment in favor of the Government on August 31, 2005. (A. 13.) On September 15, 2005, within 60 days thereafter, WTP filed a notice of appeal (R. 30), which was timely under 28 U.S.C. § 2107 and Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

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<sup>1</sup> “A.” references are to pages in the separately bound record appendix. “R.” references are to docket items in the record below as numbered by the clerk of the district court.

## STATEMENT OF THE ISSUES

1. Whether WTP's claims were subject to dismissal for lack of subject-matter jurisdiction because the Government had not waived its sovereign immunity to those claims.

2. Whether the complaint was correctly dismissed for failure to state a claim upon which relief could be granted where WTP failed to show that the Government had a duty to respond to its requests for information or to refrain from enforcing the federal tax laws against individual plaintiffs.

## STATUTES AND REGULATIONS

All relevant statutes are set forth in the addendum to this brief.

## STATEMENT OF THE CASE

This is an action to compel the United States (i) to provide “documented and specific answers” to questions that WTP presented to certain Government officials respecting the constitutionality of the federal income tax and other Government programs and activities and (ii) to enjoin the Government from enforcing the federal tax laws with respect to individual plaintiffs. (A. 78–79, 102–03.)



The Government moved to dismiss the amended complaint for lack of subject-matter jurisdiction and failure to state a claim upon which relief could be granted. (A. 135–62.) The district court issued an order, unofficially published at 96 A.F.T.R.2d (RIA) 6126, dismissing the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. (A. 6–13.) This appeal followed.

### STATEMENT OF THE FACTS

WTP instituted this action by filing a complaint and an amended complaint against the Government. (A. 14–103.) The amended complaint identified plaintiff We the People Foundation as a not-for-profit research and educational foundation that “has been spearheading, since 1999, a nationwide effort to get the government to answer specific questions, first regarding the government’s violation of the taxing clauses of the Constitution, and then, beginning in 2002, regarding the government’s violation of the war powers, money and ‘privacy’ clauses of the Constitution.” (A. 80.) It identified plaintiff We the People Congress as a not-for-profit membership organization whose mission “is to scrutinize governmental behavior at every level, compare that

behavior with the requirements of the State and federal Constitutions,” and then to “non-violently confront unconstitutional and illegal behavior by elected and/or appointed public officials.” (A. 80.) The amended complaint identified as individual plaintiffs Robert L. Schulz, Joseph Banister, John Turner, Sherry P. Jackson, Clifton Beale, and Paul Chappell. (*See* R. 6.)<sup>2</sup> It referred to individuals named in the caption but not in the body of the amended complaint as additional plaintiffs. (A. 80–81.)

The amended complaint alleged that WTP had petitioned the Government for “Redress of Grievances” relating “to the taxing clauses of the Constitution and the direct, un-apportioned tax on labor.” (A. 81; *see also* 84, 85, 88.) It asserted that WTP had asked the Government to show “where in the Internal Revenue Code it explicitly imposes the legal obligation on an individual American worker to pay taxes on his/her wages or the American companies that hire such workers must withhold.” (A. 96.) The amended complaint alleged that WTP had

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<sup>2</sup> References to Jackson and Chappell have been deleted from the copy of the amended complaint included in the appendix. (A. 82.)

submitted similar petitions relating 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.” (A. 84, 85, 88.) It asserted that unidentified individual plaintiffs had “given further expression” to their First Amendment rights “by not withholding and turning over to [the Government] money earned by him/her as a result of his/her labor.” (A. 80–81.)

The amended complaint alleged that the Government had failed “to properly respond” to WTP’s petitions. (A. 79, 84, 85, 87, 89.) It further alleged that individual plaintiffs “were suffering retaliation” from the Government “for Petitioning . . . for Redress of Grievances and for Peaceably Assembling and Associating with other individuals under the umbrella and auspices of the Plaintiff We The People organizations.”

(A. 82.) It asserted that the Government had retaliated “by sending Plaintiffs threatening letters; placing liens on Plaintiffs’ property; levying and seizing Plaintiffs’ property and/or wages; raiding Plaintiffs’ homes and/or offices; forcing Plaintiffs to appear before administrative,

civil and/or criminal tribunals; denying Plaintiffs due process; or by other enforcement actions.” (A. 89; *see also* A. 82, 85, 99–100.)

In its prayer for relief, WTP sought an order “constraining the defendants to meet their obligations under relevant law . . . to provide to the Plaintiffs documented and specific answers to the reasonable questions asked of them by the Plaintiffs” and to address “each of the issues . . . raised by the Plaintiffs in their various Petitions to representatives of the United States Government.” (A. 102.) WTP further sought a temporary injunction prohibiting the Government from taking actions “against the named Plaintiffs in this proceeding and against all others similarly situated” in retaliation “for attempting to Petition the United States Government,” for assembling, for acting as plaintiffs in this action, or for the exercise of other constitutional rights. (A. 102–03.)

The amended complaint attached an affidavit by plaintiff Robert L. Schulz, chairman of We the People Foundation. (A. 104–34.) Schulz described WTP’s “process of petitioning the federal government for a Redress of Grievances relating to the direct, un-apportioned tax on

labor” and its “Operation Stop Withholding,’ a national campaign to instruct company officials, workers and independent contractors on how to legally stop withholding, filing and paying the income taxes.” (A. 105, 131.) He attached as exhibits copies of correspondence from WTP to various Government officials, primarily respecting the constitutionality of the federal income tax. (R. 7, exhibits; A. 248–537.)

Among these exhibits, a document described as a petition forwarded to the Justice Department in March 2002 propounded “538 questions, broken down into fifteen ‘lines of inquiry.’” (A. 127, 334.) Among these “lines of inquiry” were assertions that: “the Internal Revenue Code does not make most Americans liable to file a tax return and pay an income tax” (A. 353); “the income tax is a slave tax, prohibited by the 13<sup>th</sup> Amendment” (A. 359); “Congress lacks the Authority to legislate an income tax on the people except in the District of Columbia, the US Territories and in those geographic areas within any of the 50 states where the States have specifically authorized it” (A. 370); and “the 16<sup>th</sup> Amendment did not come close to being ratified but was fraudulently declared to have been ratified” (A. 387). Most of the

questions were requests for admissions, including the following: “[a]dmit that there is no statute anywhere in Subtitle A of the Internal Revenue Code which makes any person *liable* for the tax imposed in 26 U.S.C. § 1 or 26 U.S.C. § 871” (A. 357 (emphasis in original)); “[a]dmit that Americans own less of their labor than feudal serfs” (A. 366); “[a]dmit that . . . it is a violation of due process and a violation of delegated authority for any IRS tax official to refer to any person as a ‘taxpayer’ who does not first identify him or herself as such *voluntarily*” (A. 375 (emphasis in original)); “[a]dmit that there are no implementing regulations . . . which authorize imposition by the government of penalties or interest for nonpayment of the tax imposed under 26 U.S.C. § 1 or 26 U.S.C. § 871” (A. 413); and “[a]dmit that United States Supreme Court Chief Judge Taney in 1863 protested the constitutionality of the income tax as applied to him” (A. 428).

The Schulz affidavit attached as additional exhibits four petitions presented to Congress and the President in November 2002. (A. 129, 445–68.) The petition “for redress of grievances relating to the federal income tax” requested the President, *inter alia*, to “[d]irect the

Department of Justice to immediately cease all civil and criminal investigations, grand jury activity and prosecutions related to enforcement of federal Individual Income Tax laws” and “all investigations, enforcement and administrative activity related to the payment of taxes on individual income”; to “order the release of all persons currently in prison on convictions of crimes related to the individual income tax” and to grant “immediate Presidential pardons to any individual that has been convicted of an income tax crime”; to “[d]irect the IRS to inform the general public, all employers and tax payers that wage withholding, filing of returns and payment of monies for individual income tax purposes is not mandatory”; and to “[s]ubmit to Congress a bill calling for the formal repeal of the federal Individual Income Tax laws.” (A. 467–68.)

The remaining petitions sought “redress of grievances” relating to “the application of the armed forces of the United States in Iraq without a congressional declaration of war,” “the ‘war on terrorism,’” and “the Federal Reserve System.” (A. 446–64.) These petitions asked the Government to admit that, *inter alia*, “War Powers Resolution 50 U.S.C.

§ 1541 et seq., is violative of the War Powers Clauses: Article I, Section 8, clauses 10, 11, 14, 15 and 16 of the U.S. Constitution” and “the draft Resolution the President submitted to Congress in September, 2002, regarding the application of the armed forces of the United States against Iraq, would, if passed by Congress, represent an unconstitutional delegation by the Congress to the Executive of the War Powers reserved to Congress by . . . the U.S. Constitution” (A. 450); “the President’s November 11, 2001 executive order on military commissions for trying unlawful combatants is the equivalent of the Taliban’s secret Star Chamber” (A. 456); and “the Federal Reserve Banks are repugnant to the Constitution” (A. 463).

The Government moved to dismiss the amended complaint for lack of subject-matter jurisdiction and for failure to state a claim upon which relief could be granted. (A. 135–64.) In its motion, the Government also noted that, although over 1,450 individual plaintiffs were listed in the caption, only six were properly identified as plaintiffs in the body of the amended complaint. (A. 80, 82.) WTP sought leave to file a second



amended complaint in order, *inter alia*, to add plaintiffs by identifying them in the body of the complaint. (R. 15.)

The district court granted the Government's motion to dismiss, holding that the amended complaint failed to state a claim upon which relief could be granted. (A. 6–13.) The court observed that the Supreme Court has held that the First Amendment does not impose any affirmative obligation on the Government to respond to citizens' petitions. (A. 8 (quoting *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 465 (1979)). Accordingly, the court held, WTP's claims that the Government was required to "properly" respond to WTP's petitions failed to state a claim upon which relief could be granted. (*Ibid.*)

As for WTP's claims that the Government had retaliated against individual plaintiffs for exercising their First Amendment rights, the court noted that it appeared from the petition that these plaintiffs had challenged the validity of the income-tax laws by refusing to pay their income taxes, with the result that the IRS had taken enforcement actions against them. (A. 8–9.) The court observed that Congress has

provided methods for challenging the legitimacy of such enforcement actions by way of, *inter alia*, hearings pursuant to Sections 6320 and 6330 of the Internal Revenue Code (“I.R.C.” or “Code”) (26 U.S.C.), actions for wrongful levy under I.R.C. § 7426(a), and refund actions under I.R.C. § 7422(a). (A. 9.) The court held that individual plaintiffs had no First Amendment right to withhold money owed to the Government and to avoid governmental enforcement actions because they object to Government policy. (*Ibid.*) The court added that the injunctive relief WTP sought against such enforcement actions was barred by the Anti-Injunction Act, I.R.C. § 7421, and the tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201(a). (A. 10.) The court also denied as futile WTP’s motion for leave to file a second amended complaint. (A. 11.)

### **SUMMARY OF ARGUMENT**

1. This case was subject to dismissal for lack of subject-matter jurisdiction because WTP failed to show a waiver of the Government’s sovereign immunity to its claims. In its amended complaint, WTP asserted jurisdiction under 28 U.S.C. §§ 1331 and 1343, which provide

district courts with jurisdiction over civil actions arising under federal law and civil-rights actions; neither statute waives the Government's sovereign immunity. WTP also looked to 42 U.S.C. § 1983, which creates a cause of action for violation of federal rights by officials acting under color of state law, to support jurisdiction. That statute, however, does not apply to federal officers acting, as here, under color of federal law.

WTP also asserted that the court had jurisdiction under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.* That statute is inapplicable here, as it waives the Government's immunity for claims seeking damages for common-law torts committed by federal employees, not for actions seeking injunctive relief. This Act also expressly excludes from its waiver suits respecting the assessment or collection of taxes, like this one, and requires that the plaintiff have filed an administrative claim for relief, a jurisdictional prerequisite that WTP does not allege to have taken place here.

Although not relied on in its complaint, WTP argued in the district court that Section 702 of the Administrative Procedure Act (5 U.S.C.)

waives sovereign immunity to its claims. The provision permits suit for nonmonetary relief to persons aggrieved by certain agency actions. But WTP failed to allege or show a final “agency action within the meaning of a relevant statute” reviewable under Section 702. Moreover, Section 702 expressly provides that nothing in that provision “affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground.” Here, it is plain from the complaint that WTP’s claims are no more than attempts to interfere with the Government’s ability to assess and collect income and social security taxes. As such, WTP’s claims are made unreviewable by the Anti-Injunction Act, I.R.C. § 7421(a), which 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.”

2. The district court correctly dismissed WTP’s amended complaint for failure to state a claim upon which relief could be granted. As the court held, WTP had no First Amendment right to receive the response it demanded to its petitions. The Supreme Court has held that

the Constitution does not provide private individuals or groups with the right to receive responses to questions in documents denominated “petitions.” Moreover, the First Amendment does not permit a taxpayer to withhold his federal taxes and avoid governmental enforcement actions because the taxpayer disagrees with the Government’s policies.

The district court should be directed to dismiss the case for lack of jurisdiction or, in the alternative, the district court’s order should be affirmed.

## ARGUMENT

### I

#### **WTP’s amended complaint was subject to dismissal for lack of subject-matter jurisdiction**

##### *Standard of review*

Whether a complaint is subject to dismissal for lack of subject-matter jurisdiction is a question of law to be reviewed *de novo*. *National Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1432 (D.C. Cir. 1995).

**A. Introduction: sovereign immunity**

The United States, as sovereign, may not be sued without its consent, the terms of which define the court's jurisdiction. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *United States v. Dalm*, 494 U.S. 596, 608 (1990); *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Waivers of sovereign immunity "cannot be implied but must be unequivocally expressed," *United States v. Mitchell*, 445 U.S. 535, 538 (1980), and must be "strictly construe[d]" in favor of the sovereign, *Lane v. Pena*, 518 U.S. 187, 192 (1996). See also *Webman v. Federal Bureau of Prisons*, 441 F.3d 1022, 1025 (D.C. Cir. 2006). Consequently, no suit may be maintained against the sovereign unless the suit is brought in strict compliance with the terms of a statute under which the sovereign has consented to be sued. *United States v. Idaho*, 508 U.S. 1, 7 (1993); *Soriano v. United States*, 352 U.S. 270, 276 (1957).

That WTP named federal agencies as defendants does not preclude application of the doctrine of sovereign immunity here. See *Meyer*, 510 U.S. at 475 ("[a]bsent a waiver, sovereign immunity shields the Federal Government and its agencies from suit"). See also, e.g., *Webman*, 441

F.3d at 1025; *Kalodner v. Abraham*, 310 F.3d 767, 770 (D.C. Cir. 2003); *Galvan v. Fed. Prison Indus.*, 199 F.3d 461, 463 (D.C. Cir. 1999). A suit against a federal agency is one against the sovereign if “the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.” *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (citations omitted); *accord Galvan*, 199 F.2d at 463. Here, WTP’s complaint is one to compel the United States and its agencies to provide “documented and specific answers” to WTP’s questions and to enjoin the United States and its agencies from enforcing the tax laws against individual plaintiffs. (A. 101–02.) Accordingly, the complaint is one that seeks both “to restrain the Government from acting” and “to compel it to act” subject to the jurisdictional bar of sovereign immunity. *See Dugan*, 372 U.S. at 620.

In the district court, WTP argued that, because WTP sought “only a declaratory judgment and injunctive relief, . . . the ‘sovereign immunity’ doctrine cannot bar [WTP] from maintaining this action.” (A. 165; *see also* A. 168.) But sovereign immunity bars suits against the

Government for equitable relief as well as for damages. *See, e.g., Webman*, 441 F.3d at 1025–26 (statute that waives sovereign immunity to equitable relief does not extend to money damages); *Settles v. U.S. Parole Commission*, 429 F.3d 1098, 1104 (D.C. Cir. 2005) (42 U.S.C. § 1983 does not waive federal government’s sovereign immunity to suit for declaratory and injunctive relief). The cases WTP cited below (A. 165), *Lane*, 518 U.S. at 196–200 (holding that sovereign immunity was not waived for claims for monetary damages under Rehabilitation Act Amendments of 1986), and *Czerkies v. U.S. Dep’t of Labor*, 73 F.3d 1435, 1438–39 (7<sup>th</sup> Cir. 1996) (holding that sovereign immunity had been waived for nonmonetary claim alleging denial of due process), are not to the contrary. Indeed, both decisions note that Congress had waived the Government’s sovereign immunity to certain suits for nonmonetary relief. *See Lane*, 518 U.S. at 196; *Czerkies*, 73 F.3d at 1438.

**B. WTP fails to show a waiver of sovereign immunity to its claims**

“The plaintiffs bear the burden of proof for establishing jurisdiction,” including a waiver of sovereign immunity. *Sopcak v. N.*



*Mountain Helicopter Serv.*, 52 F.3d 817, 818 (9<sup>th</sup> Cir. 1995); *accord Fostvedt v. United States*, 978 F.2d 1201, 1203 (10<sup>th</sup> Cir. 1992). The amended complaint asserted jurisdiction under 28 U.S.C. §§ 1331, 1343, 1391(e), and 2679(b)(1) and 42 U.S.C. § 1983. (A. 90–91.) None of these provisions waives the Government’s immunity to WTP’s claims. WTP also argued below that 5 U.S.C. § 702 provided a basis for jurisdiction. (A. 167, 171.) But WTP fails to show “agency action” within the meaning of that statute, which, moreover, does not permit judicial review of WTP’s claims with respect to federal taxes, which are barred by the Anti-Injunction Act, I.R.C. § 7421(a) and the Declaratory Judgment Act, 28 U.S.C. § 2201(a).

1. **28 U.S.C. § 1331.** The amended complaint (A. 91) asserted jurisdiction under 28 U.S.C. § 1331, which gives district courts jurisdiction over civil actions arising under the Constitution, laws, or treaties of the United States. General jurisdictional statutes like Section 1331, however, do not waive sovereign immunity; rather, the jurisdiction such statutes confer on the federal district courts is limited to cases in which the Government has consented to be sued. *Shanbaum*

*v. United States*, 32 F.3d 180, 182 (5<sup>th</sup> Cir. 1994); *Fostvedt*, 978 F.2d at 1203; *Arford v. United States*, 934 F.2d 229, 231 (9<sup>th</sup> Cir. 1991).

WTP argued in the district court that the 1<sup>st</sup> Amendment's Petition Clause "operates as a constitutional antidote to the doctrine of sovereign immunity" (A. 167), and *amici*<sup>3</sup> argue to this Court that, under the First Amendment, "a citizen suing the government has all of the rights to use those compulsory processes of law to obtain just redress under the law, as such a citizen has against any other wrongdoer" (*Amicus Br.* 3). The Supreme Court has held, however, that the constitutional nature of a claim does not bar the application of sovereign immunity. *See, e.g., Meyer*, 510 U.S. at 477–78 (Federal Tort Claims Act does not waive sovereign immunity for constitutional claims); *see also Czerkies*, 73 F.3d at 1437–38 ("[n]o statute waives the sovereign immunity of the United States . . . to constitutional claims generally"); *Navy, Marshall & Gordon, P.C. v. U.S. Internat'l Dev. Cooperation Agency*, 557 F. Supp.

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<sup>3</sup> Constitutional Defender Association and John Wolfgram have moved to file a brief in this appeal as *amici curiae*.

484, 488 (D.D.C. 1983) (“[n]either 28 U.S.C. § 1331, nor any provision of the Constitution, is a waiver of sovereign immunity”).

2. **28 U.S.C. § 1343 and 42 U.S.C. § 1983.** WTP asserted jurisdiction under 28 U.S.C. § 1343 and 42 U.S.C. § 1983, alleging that “Plaintiffs’ civil rights have been violated.” (A. 91.) Section 1343, which gives the district courts jurisdiction over civil-rights actions, is a “jurisdictional adjunct to the civil rights statutes” and “does not embody a waiver of sovereign immunity as against the U.S.” *Navy, Marshall & Gordon*, 557 F. Supp. at 488. Section 1983 creates a cause of action against “every person who, under color of [state law] . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution.” 42 U.S.C. § 1983. As this Court has recognized, “Section 1983 does not apply to federal officials acting under color of federal law.” *Settles*, 429 F.3d at 1104–05. *See also District of Columbia v. Carter*, 409 U.S. 418, 425 (1973); *Hindes v. FDIC*, 137 F.3d 148, 158 (3d Cir. 1998); *Carman v. Parsons*, 789 F.2d 1532, 1534 (11<sup>th</sup> Cir. 1986).

WTP did not allege that the Government acted under state law in failing to “properly respond” to WTP’s petitions or in enforcing the Code against individual plaintiffs. That certain states’ income-tax and tax-enforcement programs “piggyback” on federal tax law and enforcement programs, and that the federal government and state government participate in joint enforcement programs, as WTP argued below (A. 205), does not mean that the Government acts under color of state law when it enforces the Internal Revenue Code. *Cf. Settles*, 429 F.3d at 1106 (“[d]espite its role in administering parole for D.C. Code offenders, the Commission retains the immunity it is due as an arm of the federal sovereign”).

3. **28 U.S.C. § 2679(b).** WTP asserted a waiver of sovereign immunity under 28 U.S.C. § 2679(b)(2), part of the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 1346(b), 2671 *et seq.* (A. 90.) The FTCA waives sovereign immunity and provides a cause of action against the United States for the common-law torts of its employees. 28 U.S.C. § 2674. The FTCA does not waive the Government’s sovereign

immunity for constitutional torts. *Meyer*, 510 U.S. at 477–78; *McCollum v. Bolger*, 794 F.2d 602, 608 (11th Cir. 1986).

The FTCA, which waives sovereign immunity for suits against the Government for money damages, does not waive the Government’s immunity to WTP’s claims, which are solely for nonmonetary relief. (See A. 102–03.) Moreover, the FTCA expressly excludes from its scope “[a]ny claim arising in respect of the assessment or collection of any tax,” 28 U.S.C. § 2680(c), a provision that has been given broad application to suits for damages stemming from activities undertaken to collect taxes. See *Fishburn v. Brown*, 125 F.3d 979, 982 (6<sup>th</sup> Cir. 1997); *Aetna Cas. & Surety Co. v. United States*, 71 F.3d 475, 478 (2d Cir. 1995); *Perkins v. United States*, 55 F.3d 910, 913 (4<sup>th</sup> Cir. 1995). In any event, WTP did not allege that any of the individual plaintiffs filed an administrative claim for relief, a jurisdictional prerequisite to filing suit under the FTCA. 28 U.S.C. § 2675. For these reasons, the FTCA does not waive the Government’s sovereign immunity to WTP’s claims.

4. **5 U.S.C. § 702.** Although the statute was not referred to in its complaint, WTP suggested in the district court that Section 702

of the Administrative Procedure Act, 5 U.S.C., provided a basis for jurisdiction. (A. 167; *see also* A. 171.)<sup>4</sup> Section 702 provides that “[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.” 5 U.S.C. § 702. In this case, the amended complaint failed to show or allege that WTP was aggrieved in any way by final “agency action within the meaning of a relevant statute.” *See* 5 U.S.C. §§ 551(13), 702, 704.

In any event, WTP’s amended complaint falls within an exception to the waiver of sovereign immunity provided in Section 702, which states that nothing in that provision “affects other limitations on judicial review or the power or duty of the court to dismiss any action or

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<sup>4</sup> WTP suggested below that the Department of Justice’s purported concession that Section 702 waived sovereign immunity in another case involving Schulz precluded the Government from asserting that § 702 did not waive sovereign immunity here. (A. 160–70.) No such estoppel applies to this case, which involves other issues. In any event, “[s]overeign immunity may not be waived by federal agencies.” *Settles*, 429 F.3d at 1105; *see also Czerkies*, 73 F.3d at 1438 (“[t]he issue is a jurisdictional one, so we are not bound by the government’s concession”).

deny relief on any other appropriate legal or equitable ground” or “confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.” 5 U.S.C. § 702. *See also* 5 U.S.C. § 701(a)(1) (judicial review unavailable under APA if “statutes preclude judicial review”); *Fornaro v. James*, 416 F.3d 63, 66 (D.C. Cir. 2005) (APA excludes from its waiver of sovereign immunity claims for which adequate remedy is available elsewhere and claims seeking relief are forbidden by another statute); *Transohio Sav. Bank v. OTS*, 967 F.2d 598, 607 (D.C. Cir. 1992) (same); *Lee v. Blumenthal*, 588 F.2d 1281, 1283 (9<sup>th</sup> Cir. 1979) (Section 702, “by its own terms, does not affect existing limitations on district court jurisdiction”).

In this case, the Anti-Injunction Act, I.R.C. § 7421, is precisely such a limiting statute, precluding exercise of jurisdiction under Section 702. *See* discussion, *infra*; *see also Hughes v. United States*, 953 F.2d 531, 537 (9<sup>th</sup> Cir. 1992) (Section 702’s limited waiver of sovereign immunity does not override other statutory provisions prohibiting injunctive relief from the collection of taxes); *Lonsdale v. United States*,

919 F.2d 1440, 1444 (10<sup>th</sup> Cir. 1990) (same); *Warren v. United States*, 874 F.2d 280, 282 (5<sup>th</sup> Cir. 1989) (same).

**C. The Anti-Injunction Act, I.R.C. § 7421(a), precludes the injunctive relief WTP seeks**

**1. The Anti-Injunction Act bars injunctive suits with respect to federal taxes**

WTP's claims are expressly barred by the Anti-Injunction Act, I.R.C. § 7421(a). This statute provides generally that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom the tax is assessed." The principal purpose of the Anti-Injunction Act is to preserve the Government's ability to assess and collect taxes with "a minimum of pre-enforcement judicial interference" and "to require that the legal right to disputed sums be determined in a suit for refund." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974). The Anti-Injunction Act deprives the courts of jurisdiction to enjoin any aspect of IRS activity directed towards the assessment or collection of federal taxes. *Id.* at 738–39. Further, "allegations that the IRS acted with bad faith, non-tax related motives



. . . do not render the Anti-Injunction Act inapplicable.” *Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401, 406 (4<sup>th</sup> Cir. 2003); *see also Bob Jones Univ.*, 416 U.S. at 740 (plaintiff’s attribution of non-tax-related motives to the IRS “ignores the fact that the [taxpayer] has not shown that the Service’s action was without an independent basis in the requirements of the Code”). A proceeding that falls within the Act’s proscription must be dismissed for lack of subject-matter jurisdiction. *See Alexander v. “Americans United” Inc.*, 416 U.S. 752, 757–58 (1974).

By seeking an order from the district court requiring the Government to respond to WTP’s requests for admissions with respect to federal taxes, and to suspend enforcement of the Code against individual plaintiffs until this was accomplished, WTP’s request plainly was “for the purpose of restraining the assessment or collection of any tax.” I.R.C. § 7421(a). The Anti-Injunction Act precluded the district court from exercising jurisdiction over these claims.<sup>5</sup>

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<sup>5</sup> Although the complaint stated that it sought “declaratory relief,” the relief sought was to “constrain[ ]” the Government to meet its alleged obligations under law, *i.e.*, an affirmative injunction. (A. 102.) In any event, 28 U.S.C. § 2201 exempts from the scope of the

**2. None of the exceptions to the Anti-Injunction Act applies here**

In addition to certain statutory exceptions to the Anti-Injunction Act not relevant here, the Supreme Court has recognized two limited judicial exceptions: where the plaintiff has no alternative legal avenue for challenging a tax, *South Carolina v. Regan*, 465 U.S. 367, 373 (1984), and where “it is clear that under no circumstance could the Government ultimately prevail” and “equity jurisdiction otherwise exists,” *Enochs v. Williams Packing & Navig. Co.*, 370 U.S. 1, 7 (1962). See *National Taxpayers Union v. United States*, 68 F.3d 1428, 1436 (D.C. Cir. 1995). Neither of these exceptions applies to permit this suit with respect to the tax claims at issue.

In *South Carolina*, 465 U.S. at 373–81, the Court held that the Anti-Injunction Act did not preclude the State of South Carolina from

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Declaratory Judgment Act disputes “with respect to federal taxes.” See *Flora v. United States*, 362 U.S. 145, 164–65 (1960); *Foodservice and Lodging Inst., Inc. v. Regan*, 809 F.2d 842, 844 (D.C. Cir. 1987). Accordingly, to the extent that WTP sought a declaratory judgment with respect to federal taxes, the Government had not waived its sovereign immunity to its claims.

filing an original action in the Supreme Court to enjoin enforcement of a provision in the Code because Congress had not provided the state with an alternative method of contesting the exaction. The Court stressed, however, that its holding did not extend to organizations of taxpayers who had such alternative remedies: “[b]ecause taxpayers have alternative remedies, it would elevate form over substance to treat such organization as if they did not possess alternative remedies.” 465 U.S. at 381 n.19. *See also National Taxpayers Union*, 68 F.3d at 385 (even if organization had independent standing to challenge tax law, *South Carolina* exception “does not apply to litigation of tax claims by organizations that represent taxpayers”); *Foodservice and Lodging Inst., Inc. v. Regan*, 809 F.2d 842, 844–45 (D.C. Cir 1987) (*South Carolina’s* “narrow exception” to Anti-Injunction Act did not apply to claims of trade organization whose members had alternative remedy).

In this case, the individual plaintiffs have alternative remedies to challenge the assessment and collection of their federal taxes. Code Sections 6213(a) and 7442 permit taxpayers to sue the Commissioner of Internal Revenue, before the tax is assessed and payment is required,

by filing a petition in the Tax Court for redetermination of tax deficiencies asserted by the Commissioner. In addition, taxpayers may sue for a refund of taxes in the district court or Court of Federal Claims after the taxes have been paid. 28 U.S.C. §§ 1346, 1491. Further, taxpayers may challenge collection actions in proceedings under I.R.C. §§ 6320 and 6330. Taxpayers may sue for damages for wrongful disclosure of tax information, wrongful levies, wrongful failure to release liens, or wrongful collection actions. I.R.C. §§ 7426(a), 7431–33. As noted above, the principal purpose of the Act is to prevent taxpayers from circumventing the precisely defined channels established by Congress for the adjudication of tax disputes. Accordingly, the exception recognized in *South Carolina* is inapplicable here.

In *Williams Packing*, the Supreme Court held that the Anti-Injunction Act is inapplicable if the taxpayer establishes both that (i) equity jurisdiction would otherwise exist and (ii) it is clear that the Government could not prevail on the merits in any circumstances. This exception must be construed narrowly in favor of the Government. See *Randell v. United States*, 64 F.3d 101, 107 (2d Cir. 1995).