

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3
4 WE THE PEOPLE FOUNDATION, INC.,
5 ET AL.,

6 Appellees,

No. 05-5359

7 v.

8 UNITED STATES OF AMERICA,
9 ET AL.,

10 Appellant.

11 Friday, October 6, 2006

12 Washington, D.C.

13 The above-entitled matter came on for oral
14 argument pursuant to notice.

15 BEFORE:

16 CHIEF JUDGE GINSBURG AND CIRCUIT
17 JUDGES ROGERS AND KAVANAUGH

18 APPEARANCES:

19 ON BEHALF OF THE APPELLANTS:
20 MARK LANE, ESQ.

21 ON BEHALF OF THE APPELLEE: CAROL A. BARTHEL, ESQ.
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23
24
25

Deposition Services, Inc.

C O N T E N T S

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MARK LANE, Esq.
On Behalf of the Appellants
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CAROL A. BARTHEL, Esq.
On Behalf of the Appellees
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REBUTTAL ARGUMENT OF:

MARK LANE, Esq.
On Behalf of the Appellants
24

P R O C E E D I N G S

1
2 THE COURT: Mr. Lane?

3 ORAL ARGUMENT OF MARK LANE, ESQ.

4 ON BEHALF OF THE APPELLANTS

5 MR. LANE: Good morning, Your Honors. May it please
6 the Court, my name is Mark Lane. I'm a member of the bar for
7 the District of Columbia and of this practice before this
8 Court.

9 I'm the attorney for some 14,000 individual plaintiffs in
10 this case and two corporations. I do not represent Robert
11 Schultz who brought this action pro se, and he is here should
12 the Court wish to put any questions to him. Only one of us
13 will speak, pursuant to the order of this Court, of course.

14 The Court issued an order on September 29 on some motion
15 directing that we be prepared to address the following
16 question and oral argument: Does Steel Company, the Citizens
17 for Better Environment citation require this Court to
18 determine whether the Federal Government has waived its
19 sovereign immunity with respect to appellant's claims before
20 the Court assesses the merits of those claims and we direct --

21 THE COURT: We have precedent that says that we
22 don't.

23 MR. LANE: Pardon?

24 THE COURT: We have precedent from this Court that
25 says we don't necessarily have to consider sovereign immunity

1 first, although admittedly there's some counter indications in
2 some cases, but the press down point (phonetic sp.) I think
3 says that we can consider the merits and so you might want to
4 address the merits.

5 MR. LANE: I'm just responding to the order.

6 THE COURT: No, I understand. I understand.

7 MR. LANE: So we've read the six cases and I can
8 say, briefly, that, of course the Steel Case is a Supreme
9 Court case. It's not a sovereign immunity case, but rather a
10 case in which the Court determined that the plaintiff lacked
11 standing, that the threshold jurisdiction question had to be
12 resolved before considering the merits of the case.

13 Seal, which is the second case before us by the Court is
14 a case decided by this Court in 1999. It considered the
15 question of sovereign immunity as applied to an interlocutory
16 appeal in the context of a criminal contempt case, and the
17 question was whether the statute passed by the Congress had
18 waived sovereign immunity.

19 The Court stated that sovereign immunity in that case is
20 less than a pure jurisdictional question and need not be
21 decided before a merits question, since sovereign immunity is
22 merely a quasi jurisdictional matter and enjoys only a hybrid
23 status.

24 In Long, which is an Eleventh Amendment case granting the
25 said legal power to assert sovereign immunity held that does

1 not automatically destroy original jurisdiction. And the
2 reason in that case by the Court was that the Supreme Court
3 itself had decided causative action questions before turning
4 to the Eleventh Amendment and the Court concluded that the
5 case load was not altogether clear, and I think that is
6 absolutely clear.

7 In Japan, the case decided by this Court had considered
8 the alien torte statute and stated that Seal does not dictate
9 the sequencing of jurisdictional issues.

10 This Court held there that the complaint presented non-
11 judiciable political questions.

12 The 6th Circuit case there rejected a First Amendment
13 claim stating that the speech did not touch on the matter of
14 public concern; therefore, was not a First Amendment case.
15 The Court concluded that it had not spoken with one voice on
16 whether the Court was required to resolve the sovereign
17 immunity.

18 Defense before addressing the merits, the 6th Circuit had
19 issued several opinions stating the sovereign immunity need
20 not be addresses first, as well as several opinions stating
21 just the contrary.

22 And this Court in collator referred to the rule that
23 the United States cannot be sued without the consent of
24 Congress, and that was a lawsuit for money which was for
25 attorney's fees, and the last one (indiscernible) this Court

1 discussed standing and asserted that standing is, of course,
2 jurisdictional.

3 The Court granted the (indiscernible) because the
4 District Court had not shown a need for depositions that are
5 not considered alternate non-merit routes to dismissal.

6 So the question remains: Is this Court required to
7 determine whether the Federal Government has waived its
8 sovereign immunity with respect to appellant's claims before
9 the Court assesses the merits of those claims:

10 And our answer is a qualified yes and also no, I don't
11 think that's going to be a great deal of assistance to the
12 Court, but this is how we've reached that conclusion.

13 It's my belief that in a hypothetical case, judicial
14 economy and logic seem to suggest, although the law is clouded
15 and unclear, but they seem to suggest certainly to me that in
16 the hypothetical case, if the Court which (indiscernible) and
17 has jurisdiction here which is why we are all here at the
18 present time, if it determines that it does not have
19 jurisdiction, it may do so unless it wishes to make a
20 statement about the merits of the claims and could act without
21 regard to the merits.

22 In other words, we believe that the Court can rule either
23 way on this question, that it should deal with the question of
24 sovereign immunity first, but need not, because the law is
25 unclear.

1 However, this is a non-hypothetical case, and the Federal
2 Government does not have sovereign immunity in this case;
3 therefore, sovereign immunity need not be and can not be
4 waived by the Congress.

5 THE COURT: Well, let me, in a nutshell, why -- the
6 case operates, would operate --

7 MR. LANE: I can't quite hear, I'm sorry, Your
8 Honor.

9 THE COURT: If you were to prevail, the judgment of
10 the Court would operate against the FISK (phonetic sp.).

11 MR. LANE: I'm sorry, I can't hear you.

12 THE COURT: If you were to prevail --

13 MR. LANE: Yes.

14 THE COURT: -- our judgment would operate against
15 the United States Treasury. It would have an effect on the
16 FISK.

17 MR. LANE: No.

18 THE COURT: Why not?

19 MR. LANE: Because we're not asking for money
20 damages.

21 THE COURT: You're asking to withhold payment of
22 taxes.

23 MR. LANE: Well, that's a separate issue and that's
24 a question that only some of the plaintiffs are doing that.

25 A number of the plaintiffs are not asking for that. Some

1 of the plaintiffs are --

2 THE COURT: Well, where is that differentiation to
3 be found among the various plaintiffs? I'm looking at the
4 complaint and both the complaint and the brief strongly
5 suggest, indeed say, "That the ability to retain monies
6 otherwise taken in taxes is integral and essential to the
7 claim because you don't really get anything if you can't
8 enforce your point."

9 MR. LANE: Yes. We've submitted affidavits and some
10 of the plaintiffs have said they're withholding funds and
11 others have not, so these are two --

12 THE COURT: Well, whether they are or are not is
13 different than what you're claiming in your complaint and
14 arguing in your brief, right?

15 MR. LANE: That's regarding the injunction, Your
16 Honor, which is a separate portion of the complaint. We're
17 asking for injunctive relief and we're asking for declaratory
18 judgment.

19 And the injunctive relief is to enjoin the IRS from
20 harassing folks who are involved here, but let me say this,
21 Your Honor, in a very --

22 THE COURT: Hold on, hold on a second. Put the
23 harassment to the side for the moment.

24 MR. LANE: Yes.

25 THE COURT: That's your second cause of action;

1 right?

2 MR. LANE: Yes.

3 THE COURT: All right. The first cause of action
4 does seem to operate against the FISK, so why isn't it barred
5 by sovereign immunity?

6 MR. LANE: First cause of action is for declaratory
7 judgment, Your Honor.

8 THE COURT: That you may retain monies otherwise
9 taken in taxes.

10 MR. LANE: Well, the first part of the declaratory
11 judgment is a request that the Court direct the Government to
12 answer these questions. That's the first thing we're asking.

13 And, Your Honor, a similar case was brought by Mr. Schulz
14 in the 2nd Circuit.

15 THE COURT: Well, that's the first thing you're
16 asking, but appended to that is the right to withhold the
17 monies so that the Government will respond to you.

18 MR. LANE: That's the second part.

19 THE COURT: And without the second part, the first
20 part, you told us, would be meaningless.

21 MR. LANE: I don't think so. Well, we're asking for
22 declaratory judgment by the Court, but the Government should
23 answer these questions.

24 THE COURT: And you said it would not give you any
25 effective relief unless you can also retain the monies.

1 MR. LANE: Some of the plaintiffs have said that the
2 only way they can enforce this is by retaining funds. Others
3 have not said that.

4 THE COURT: Well, your brief and your complaint say
5 that.

6 MR. LANE: Yes, that's on behalf of the vast
7 majority of the plaintiffs who say that.

8 THE COURT: Well, that's the argument that we have
9 and that's the claim that we have in front of us. And that
10 does seem to be a money claim, an odd kind of money claim, but
11 a claim --

12 MR. LANE: Yes, but these --

13 THE COURT: -- against the FISK.

14 MR. LANE: That's correct, Your Honor. These are
15 totally separate. The first thing we're asking is for a
16 declaratory judgment by this Court saying that these people
17 who are petitioning for many years and very respectfully and
18 very thoroughly are entitled to answers to the question.

19 And some of the plaintiffs are also saying, not all, some
20 are saying also that the only way we can enforce this
21 ourselves is by withholding sums of money, which goes back to
22 the very beginning of our country's history.

23 But these are two separate questions, and I'd like to say
24 this, Your Honor, that a similar action was brought by Mr.
25 Schulz and it's on page A170 of our motion and opposition to

1 the motion to dismiss.

2 And it is, I believe, remarkably similar in which the
3 action was brought in the 2nd Circuit, in the District Court
4 in the 2nd Circuit in which the plaintiffs asked for
5 declaratory judgment and injunctive relief, similar to what
6 was happening here.

7 And at that time the Government said that it's a question
8 of sovereign immunity and the Court ruled that that is
9 correct. It's a question of sovereign immunity.

10 On appeal, Mr. Schulz, on appeal before the 2nd Circuit
11 raised the question again, and this is what the Government
12 said on appeal, I'm quoting, "The Government argued below and
13 the District Court held that the Court lacked jurisdiction to
14 the absence of a waiver of sovereign immunity. Because this
15 case involves a constitutional challenge, we believe that
16 Section 702 of the Administrative Procedure Act,
17 (indiscernible) Section 702 constitutes a waiver." And I'm
18 citing a 7th Circuit case.

19 In other words, the Court there was presented, the 2nd
20 Circuit was presented with the Government, the same Government
21 here, in the same situation, saying, we withdraw the statement
22 about the need for a waiver for sovereign immunity, because of
23 the reasons that were stated. Because it's a constitutional
24 question; therefore there cannot be a need for sovereign
25 immunity when it's a constitutional question.

1 And why? Because the genius of the founders of discovery
2 gave us one sentence, which is probably the single most
3 important sentence, not just in judicial history, but in
4 American history, is the First Amendment.

5 It gives us the power of freedom of religion, speech,
6 assembly, press, and the right to petition the Government for
7 redress of grievances.

8 And the Congress cannot give or withdraw immunity.
9 Cannot diminish, not on a constitutional question, it cannot
10 diminish those constitutional rights by saying we're not
11 granting immunity, or say, okay, we are going to grant
12 immunity.

13 THE COURT: Well then what's the relevance of saying
14 702 is a waiver? No waiver is required under what you just
15 said.

16 MR. LANE: For constitutional questions --

17 THE COURT: Right.

18 MR. LANE: -- it's irrelevant. But, this is a
19 constitutional question.

20 THE COURT: Yes, and you're telling us that the
21 Government and the 2nd Circuit took this position about 702,
22 but the 702 seems to be quite beside your point.

23 MR. LANE: Well, no. They are saying, they gave two
24 reasons. One they said because it's a constitutional
25 question, and the second was 702.

1 But the founding fathers were concerned, and talked about
2 it, and wrote about it, about these rights being whittled down
3 by anyone else, and said specifically, remember how it begins,
4 Congress shall make no law.

5 How can Congress make a law diminishing those rights when
6 in fact, the very First Amendment begins with the words that
7 Congress shall make no law, so that the position of the
8 founders could not be misunderstood.

9 THE COURT: Thank you, Mr. Lane. Ms. Barthel?

10 MR. LANE: Thank you, Your Honor.

11 ORAL ARGUMENT OF CAROL A. BARTHEL, ESQ.

12 ON BEHALF OF THE APPELLEE

13 MS. BARTHEL: May it please the Court.

14 Under the Steel Company, the Court held that a Court
15 should decide a sovereign immunity first, under normal
16 circumstances, but also found certain circumstances under
17 which, as I said, the purity of that rule was diluted, and
18 these were cases in which the Court had held on merits before
19 reaching a jurisdictional issue, and that primarily practical
20 ones, and the Court found these circumstances defensible.

21 In Justice O'Connor's concurrent she said, there may very
22 well be others in which it would be defensible.

23 THE COURT: Does the Government have a general
24 position, not just in this Court, but generally that it's
25 permissible for the Courts to reach the merits before

1 sovereign immunity, or is the Government taking a position on
2 that in other --

3 MS. BARTHEL: We believe in this case that the Court
4 should decide first.

5 THE COURT: My question is just does the Government
6 have a position generally on whether Courts must consider
7 sovereign immunity first, or it can go to the merits before
8 sovereign immunity?

9 MS. BARTHEL: The Government is not going to direct
10 the Court on what it must do, but --

11 THE COURT: No, I'm asking the Government's
12 position.

13 MS. BARTHEL: -- it should in most cases.

14 THE COURT: Pardon me?

15 MS. BARTHEL: It should in most cases.

16 THE COURT: Should do what?

17 MS. BARTHEL: Decide sovereign immunity first.

18 THE COURT: But not must.

19 MS. BARTHEL: Not must.

20 THE COURT: And in this case?

21 MS. BARTHEL: In this case it probably should.

22 There do not seem to be any particular reasons militating
23 against such a decision.

24 It's not a matter, like in the Seal Case, in which as the
25 Court noted that it had a constitutional issue of first

1 impression, whether sovereign immunity could be waived and was
2 available in the case of criminal contempt.

3 THE COURT: Just piggy-backing on Mr. Lane's
4 argument, if the First Amendment said Congress shall make no
5 law and further there should be a right to petition and a
6 right to receive responses to that petition, then --

7 MS. BARTHEL: That would completely eliminate
8 sovereign immunity jurisprudence altogether, because every
9 complaint that asserted First Amendment claim would have to be
10 heard.

11 THE COURT: My point is: Do we have to decide the
12 merits of the argument as to what is encompassed and the right
13 to petition first before we can decide whether or not the case
14 is barred by sovereign immunity.

15 MS. BARTHEL: You have to consider the content of
16 the complaint to see what it is that is being sought.

17 THE COURT: Well, just so I'm clear, under my
18 hypothetical, would we have to decide whether or not the right
19 to petition includes a right to get responses first?

20 MS. BARTHEL: I think you might. I had not
21 considered that before, but it --

22 THE COURT: Well, Mr. Lane quotes the First
23 Amendment, "Congress shall make no law."

24 MS. BARTHEL: It completely obliterates --

25 THE COURT: And there's a lot of history there too.

1 MS. BARTHEL: But this Court and the Supreme Court
2 have held that sovereign immunity protects the Government
3 except when it is waived by statute, and --

4 THE COURT: So if the Constitution said that you
5 have a right, there's nothing you can do about it unless the
6 Government had waived sovereign immunity.

7 MS. BARTHEL: The Supreme Court has already held to
8 the contrary that that is not the case.

9 THE COURT: You're talking about the merits now?

10 MS. BARTHEL: That's correct.

11 THE COURT: And their right to petition.

12 MS. BARTHEL: That's correct.

13 THE COURT: Well, if we have to avert to that
14 precedent in the Supreme Court in order to determine whether
15 there's been a waiver of sovereign immunity, then we might as
16 well stop before we get to the sovereign immunity question,
17 right? There's sort of a round vala (phonetic sp.) here in
18 which you're saying in order to resolve sovereign immunity we
19 have to look at the cause of action in light of the law.

20 If we look at the cause of action in the light of the
21 law, according to your position, there's no cause of action,
22 so we don't have to resolve sovereign immunity. Fair enough?

23 MS. BARTHEL: Probably.

24 THE COURT: Well, the Government's taking a lot of
25 bold positions here today.

1 MS. BARTHEL: Legally, that the statutes here, none
2 of them, when over sighted, waive the Government's sovereign
3 immunity and that the argument that he has presented that the
4 sovereign immunity is essentially waived by the First
5 Amendment is simply not correct.

6 THE COURT: Well, 702 is a pretty strong argument;
7 isn't it?

8 MS. BARTHEL: As the Court remarked this is largely
9 a damages action, which is excluded from the (indiscernible)
10 of sovereign immunity in 702.

11 THE COURT: Well, but Mr. Lane said, you know, that
12 the first claim, while it has components, could be resolved in
13 his favor, without -- even if he's denied the fiscal aspect of
14 it.

15 MS. BARTHEL: Your Honor, this case is being handled
16 by the tax division, because the Government regards it as a
17 tax case.

18 THE COURT: Well, that can hardly be dispositive of
19 this question.

20 MS. BARTHEL: It is a tax case because not only are
21 the primary questions that are raised by us tax questions, but
22 that part of the relief sought is that they should not have to
23 pay taxes.

24 THE COURT: Part of it, but if they're denied that
25 aspect of it, there's still a claim for relief, namely a

1 declaration that they have a right to a response, and that
2 would not offend the FISK.

3 MS. BARTHEL: To the extent that it, and we doubt
4 that there is much extent to which it would affect, not affect
5 taxes.

6 It is nonetheless barred because --

7 THE COURT: Well, wait a minute. The Court says you
8 may not retain your tax monies, but you are entitled to a
9 right to a response, how does that affect the FISK?

10 MS. BARTHEL: It does affect the FISK because with
11 respect to taxes, and both the Anti Injunction Act and the
12 Declaratory Judgment Act make clear that you cannot have
13 actions with respect to taxes; that the Internal Revenue Code
14 sets out a comprehensive system of remedies for taxpayers who
15 find themselves objecting --

16 THE COURT: But they've also made petitions with
17 respect to privacy and war powers and other matters.

18 MS. BARTHEL: To the extent that this does not
19 affect taxes at all, and we both agree that it doesn't because
20 the relief involved is not paying taxes --

21 THE COURT: That's part of the relief.

22 MS. BARTHEL: We note that they don't identify an
23 agency, much less an agency action. That this is being
24 brought against the Government, because the Government
25 representatives --

1 THE COURT: Well, they've mentioned that they've
2 sent petitions to various agencies and to the President, I
3 think.

4 MS. BARTHEL: This is being brought against the
5 Government, generally, and we believe that the Government has
6 not waived its sovereign immunity in Section 702, unless you
7 indicate that there is an agency who has offended you.

8 THE COURT: Well, am I mistaken in recalling that
9 the complaint alleges petitions having been submitted to
10 various elements of the United States?

11 MS. BARTHEL: Primarily to the Justice Department,
12 with respect to taxes, Your Honor.

13 THE COURT: Primarily, but not exclusively; isn't
14 that right?

15 THE COURT: Yeah, I sent letters to a lot of
16 different people, including the President of the United
17 States.

18 MS. BARTHEL: And Congress. And Congress, of
19 course, is not an agency.

20 THE COURT: Well, right, but the President or some
21 of these other entities are agencies.

22 MS. BARTHEL: We believe, Your Honor, that this is a
23 tax case and that the Government has not waived its sovereign
24 immunity to it.

25 THE COURT: Well, is that just because you're from

1 the tax division? I mean, is this, we'll solve every problem
2 that looks like a nail, if you're a hammer? If all you have
3 is a hammer?

4 MS. BARTHEL: Your Honor, we don't believe that
5 Section 702 has waived the Government's immunity.

6 THE COURT: But the complaint is against the
7 Internal Revenue Service, the Department of Justice, the
8 Treasury Department, the United States, so I mean they've
9 named some agencies here from whom they've requested
10 information.

11 THE COURT: Are you prepared to defend anyone other
12 than the Tax Division?

13 MS. BARTHEL: I beg your pardon?

14 THE COURT: Do you hear that?

15 MS. BARTHEL: Pardon?

16 THE COURT: Are you prepared to defend anyone other
17 than the Tax Division here?

18 MS. BARTHEL: I'm here representing the United
19 States, Your Honor.

20 THE COURT: That's what I thought. But what's your
21 answer then. There were petitions submitted to other elements
22 of the Government --

23 MS. BARTHEL: We do not believe that they've
24 identified an agency whose employee has -- we don't believe
25 they've stated a cause of action against an agency or an

1 employee for which there is a waiver of sovereign immunity
2 under 702.

3 THE COURT: Well, 702 waives sovereign immunity for
4 final agency action with respect to matters other than taxes;
5 correct?

6 MS. BARTHEL: With respect to matters that have not
7 been committed to an exclusive statute such as the Internal
8 Revenue Code --

9 THE COURT: Right.

10 MS. BARTHEL: -- for matters that don't involve
11 money damages, --

12 THE COURT: Right.

13 MS. BARTHEL: And for matters for which there is no
14 other reason not to, for which that are otherwise capable of
15 being considered.

16 And we don't believe that they have identified a cause of
17 action against our Government, being an employee of our
18 Government agency, and therefore, that the Government has not
19 waived its sovereign immunity in this case.

20 THE COURT: Well, I've heard your conclusion twice,
21 but I'm still looking for the reason. Why isn't -- they've
22 submitted petitions regarding depravity (phonetic sp.) and to
23 various Governmental addressees. They didn't get any answer.
24 At some point not answering ripens into final agency action.
25 No taxes involved, now what?

1 MS. BARTHEL: We believe that they still need to
2 identify an agency.

3 THE COURT: So is it a competing problem?

4 MS. BARTHEL: In part, yes, Your Honor.

5 THE COURT: Okay. That does clarify it. Any
6 further questions? Thank you.

7 MS. BARTHEL: Thank you, Your Honor.

8 THE COURT: I'll give you a minute, Mr. Lang.

9 REBUTTAL ARGUMENT OF MARK LANE, ESQ.

10 ON BEHALF OF THE APPELLANTS

11 MR. LANE: Thank you very much, Your Honor. This is
12 not a tax case. This is a First Amendment case brought
13 pursuant to the First Amendment calling for -- requesting that
14 the Government respond to petitions.

15 THE COURT: What does this Court do with the Supreme
16 Court?

17 MR. LANE: Pardon?

18 THE COURT: What is your view of the responsibility
19 of this Court to follow Supreme Court decisions, interpreting
20 the First Amendment to reject --

21 MR. LANE: There is not, I believe not one case
22 where the Supreme Court has ruled on a constitutional
23 question. I think this is a case of first impression.

24 Each of the cases --

25 THE COURT: You mean that the Supreme Court has not

1 specifically ruled that under the First Amendment the right to
2 petition does not include a right to get answers?

3 MR. LANE: Yes, when it's a strictly constitutional
4 question. For example, Smith, which is the only case cited by
5 the District Court, is a case in which the Supreme Court says
6 in this context we find that et cetera. They make their
7 ruling in this context.

8 But what is the context? It's a state action, where the
9 state's law gave these individuals the right to have some kind
10 of -- file a grievance. And instead of doing this
11 individually, they've formed an organization, and the
12 organization did it, and the Courts ruled all the way up,
13 including the Supreme Court that they had a state remedy, they
14 didn't pursue it. They sought another state remedy.

15 So in this context, said the Court, in this context, this
16 request is denied.

17 But it was not a First Amendment issue. It was not a
18 constitutional issue, and the Government has never cited a
19 single case and that Fourth Amendment, we couldn't find one
20 either, but that's why I think this is a case of first
21 impression, but the Government has not cited a single case nor
22 has the Court below, in which it is a pure constitutional
23 question, where the Court ruled that you don't have to answer
24 petition.

25 Nobody's even to find what a petition is. We have asked,

1 we've asked this Court to establish reasonable standards for
2 what is a petition. If somebody's on a crowded subway in New
3 York, and writes a little note and says the Government should
4 do something about this subway, it's too crowded and it slows
5 it down, and a Government employee picks it up, that is not a
6 petition in our view, but if any reasonable standard is
7 established, what these people have done for years, serving
8 every member of Congress, meeting with the White House,
9 meeting with the executives, meeting with representatives of
10 the Congress, meeting with the IRS, over, and over, and over.

11 THE COURT: What about Chief Judge Ginsburg's point
12 that when you --

13 MR. LANE: I'm sorry.

14 THE COURT: What about Chief Judge Ginsburg's
15 question that suggested that when you ask a question and
16 there's no answer, after a certain period of time, that's your
17 answer?

18 MR. LANE: That's not what the Constitution says.
19 The First Amendment says the people -- Congress shall make no
20 law interfering with the right of the people to petition for
21 redress of grievances.

22 A petition for redress of grievances doesn't mean any
23 more than freedom of speech. It doesn't mean you go out on
24 the corner and say something, but then the Government can
25 shoot you down.

1 THE COURT: You think that the right to petition
2 means that if I petition saying I want no taxes to be imposed
3 on incomes over \$50,000 that the Government can't turn me
4 down? That that would be a denial of my First --

5 MR. LANE: That's not a petition, that's just an
6 opinion. These -- this is --

7 THE COURT: No, I'm petitioning the Court in your
8 terms. I've written letters to the President, to Congress, to
9 all these agencies.

10 MR. LANE: Saying that you want something. The fact
11 that you want something is not a petition.

12 What is happening here is these folks for years have
13 carefully drafted questions about Government policies, not
14 just -- it's not just the IRS --

15 THE COURT: All right. Here's my hypothetical.

16 MR. LANE: May I just -- excuse me.

17 THE COURT: Excuse me. Go ahead.

18 MR. LANE: And they've asked the Government why are
19 you doing this? Not saying we want you to do this. Why are
20 you doing this? What is the statute which says this? What is
21 the explanation?

22 THE COURT: Now wait a minute. The right to
23 petition concerns redress of grievances, not just
24 informational polls.

25 MR. LANE: No, but they do have grievances and they

1 set forth their grievance --

2 THE COURT: And they're seeking redress.

3 MR. LANE: They're seeking redress of grievance by
4 asking by petitioning the Government to answer their
5 questions.

6 THE COURT: So the redress they want is an answer,
7 not an action?

8 MR. LANE: Well, to start out with an answer, yeah.
9 They would be, they've all said this, everyone. If we get an
10 answer, we'll pay all the taxes. Even the ones who aren't
11 paying the taxes, who are withholding their funds at this
12 point, which is something that the (indiscernible) has
13 suggested, as a matter of fact. They didn't make it up. But
14 not everyone has done that, and those issues are totally
15 separatable in any event.

16 What does it mean if you have the right to freedom of
17 press and you have a printing press, but as soon as you print
18 the first issue, you get thrown in prison. You don't have
19 freedom of press. What does the right to petition mean if the
20 Government can say as it has in this case, the Government has
21 said over and over in this case, "We don't have to answer, we
22 don't even have to read a petition."

23 Well, if that's so, everyone in the world, Iraq and every
24 place else, they have freedom which gives them the right to
25 petition. If it really means you just ask it and nobody's

1 going to answer you.

2 That's not what this democracy is about.

3 THE COURT: Thank you, Mr. Lane.

4 MR. LANE: Thank you, Your Honor.

5 THE COURT: Ms. Barthel, thank you. Case is
6 submitted.

7 (Recess.)

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CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

Jennifer Geist

October 18, 2006

DEPOSITION SERVICES, INC.