IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

DEFENDANTS, the United States of America, the U.S. Treasury Department, the Internal Revenue Service and the U.S. Department of Justice, by and through their undersigned counsel, and pursuant to Fed. R. Civ. P. 12(b)(1) and (6), move to dismiss the amended complaint in this action.

As grounds for this motion, defendants submit that the Court lacks subject-matter jurisdiction. In particular, the complaint, as amended, is one against the United States as sovereign, yet it does not identify any genuine cause of action which complies with the terms and conditions of any waiver of the United States' sovereign immunity. Moreover, the amended complaint fails to state a claim upon which relief may be granted. It is well-settled law that nothing in the United States Constitution imposes any affirmative obligation on the federal government to listen to or respond to plaintiffs' "petitions," or to otherwise recognize plaintiffs' associations and bargain with them. Insofar as the plaintiffs claim that the defendants have retaliated against them on the basis of their speech in violation of the First Amendment by collecting

federal taxes and otherwise enforcing the United States' tax laws, the allegations are conclusory, and, in any event, are adequately remedied by the provisions for judicial review of agency action provided in the Internal Revenue Code.

Finally, the relief sought by plaintiffs, i.e., an order compelling the government to bargain with the plaintiffs and enjoining the government from collecting taxes from an indeterminate number of plaintiffs for an unspecified period of time, is specifically barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a).

These grounds are set forth and discussed in a memorandum in support of this motion, which is served and filed herewith.

The specific relief sought by this motion is an order dismissing the amended complaint, with prejudice. A proposed form of order is submitted herewith.

Dated: September 30, 2004

Respectfully submitted,

/s/ Ivan C. Dale
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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

This is an action to enjoin the United States and three of its agencies from collecting federal taxes from at least eight plaintiffs,[1] and to compel the government to respond to certain questions regarding the constitutionality and legality of the federal income tax, the Federal Reserve Bank, and any other issue plaintiffs raise in certain "petitions" to the government. Because the Court lacks subject-matter jurisdiction to grant any such relief, as the amended complaint does not comply with the terms or conditions of any waiver of the United States' sovereign immunity, because the amended complaint fails to state a claim upon which relief may be granted, and

[1]The amended complaint lists over 1,450 plaintiffs in the caption, but does not identify these individuals as plaintiffs within the body of the complaint. Because the caption is not regarded as containing any part of the claim, it is not determinative of the parties. See Nicol v. Baird, 234 F.2d 691 (D.C. Cir. 1956); 5A Wright & Miller, Federal Practice and Procedure § 1321 (3d Ed. 2004). Thus, only the eight plaintiffs named in paragraphs 3-5 and 14-18 of the amended complaint are proper party-plaintiffs to this action.

because the relief sought is barred by the Anti-Injunction Act, 26 U.S.C. § 7421, the defendants have moved to dismiss the complaint. This memorandum is submitted in support of that motion.

QUESTIONS PRESENTED

1. Actions under the Civil Rights Statute, 42 U.S.C. § 1983, and under Bivens v. Six Unknown Named Agents, must be brought against individuals, and not official agencies. Moreover, Section 1983 applies only to constitutional deprivations done under color of state law. Plaintiffs name only the United States and federal agencies as defendants, and do not allege that their rights were deprived under color of state law. Should plaintiffs' complaint under Section 1983 and / or Bivens be dismissed for lack of subject-matter jurisdiction?

2a. The First Amendment does not impose any affirmative obligation on the government to listen, or to respond to the petitions of its private citizens, or to recognize and bargain with associations of citizens. Should plaintiffs' complaint to compel the government to respond to certain questions regarding the constitutionality and legality of the federal income tax, the Federal Reserve Bank, and any other issue plaintiffs raised in certain "petitions" to the government be dismissed for failure to state a claim?

2b. When considering a motion to dismiss, the Court need not accept legal conclusions cast in the form of factual allegations. Plaintiffs allege only that defendants have engaged in various activities that are authorized and incident to the civil and criminal enforcement of our nation's federal tax laws, and make the

conclusory allegations that such activities were "in retaliation" for the exercise of First Amendment rights. Should plaintiffs' complaint to enjoin further enforcement of these tax laws against the plaintiffs be dismissed for failure to state a claim?

3. The Anti-Injunction Act, 26 U.S.C. § 7421(a), 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," except as authorized under the Internal Revenue Code. Plaintiff seeks an order enjoining the United States and three of its agencies from collecting federal taxes from at least eight plaintiffs, and compelling the government to respond to certain questions regarding the constitutionality and legality of the federal income tax, the Federal Reserve Bank, and any other issue plaintiffs raised in certain "petitions" to the government. Plaintiff has not identified any authority under the Internal Revenue Code for either form of relief. Is all, or part, of the relief sought barred by law? 

SUMMARY OF THE ARGUMENT

In order to maintain an action in federal court against the United States or its agencies, plaintiffs must first point to a jurisdictional basis for the action, i.e., that their circumstance is described by some legal authority for a lawsuit against the sovereign. Secondly, they must allege facts which, if true, adequately state a legally recognized claim to the relief sought. Thirdly, the relief which is sought must not be otherwise prohibited by statute or other law.

Plaintiffs have not identified any legal authority which permits them to sue the United States and three of its agencies for the constitutional violations they allege. Further, they have not alleged facts which, if true, would constitute any violation of the constitution. Finally, the relief they seek is an order restraining the assessment or collection of federal tax, relief which is specifically barred by 26 U.S.C. § 7421(a). Accordingly, their complaint, as amended, fails to satisfy any of the predicates for a lawsuit against the government in federal court, and should be dismissed.

ARGUMENT

I. THE COURT LACKS SUBJECT-MATTER JURISDICTION OVER THE COMPLAINT, BECAUSE THE COMPLAINT DOES NOT COMPLY WITH THE TERMS AND CONDITIONS OF ANY WAIVER OF THE UNITED STATES' SOVEREIGN IMMUNITY.

Pursuant to the doctrine of sovereign immunity, the United States can be sued only when it has expressly consented to suit. See United States v. Sherwood, 312 U.S. 584, 586 (1941) (and cases cited therein). The doctrine is fundamental, applies to every sovereign power, and has long been recognized by the Supreme Court. See, e.g., Nichols v. United States, 74 U.S. 122, 126 (1869). The doctrine is jurisdictional in nature, operating as a complete bar to lawsuits against the government absent an explicit waiver of the immunity. Sherwood, supra, at 586.

Naming an agency of the United States as a defendant does not circumvent the immunity. 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

[g]overnment from acting, or to compel it to act." Dugan v. Rank, 372 U.S. 609, 620 (1963)(quotes and citations omitted). Here, plaintiffs' complaint is one to compel the United States and the agency defendants to provide "documented and specific answers" to plaintiff's questions and to enjoin the United States and the agency defendants from taking "retaliatory actions" against the plaintiffs. (Am. Compl. at 65, 89.) As such, the complaint is clearly one which seeks both "to restrain the government from acting" and "to compel it to act." As such, the complaint is unequivocally one against the sovereign, and plaintiffs must establish a waiver of that sovereign's immunity in order to establish this Court's jurisdiction.

A waiver of sovereign immunity must be explicit and is strictly construed in favor of the sovereign. United States v. Nordic Village, 503 U.S. 30, 33-34 (1992). It is the plaintiffs' burden to establish the jurisdiction of the Court; thus, plaintiff must allege sufficient facts to show a waiver of sovereign immunity. See, e.g., McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 188 (1936) (party seeking exercise of jurisdiction in his favor must allege sufficient facts essential to show jurisdiction).

Plaintiffs, in their statement of jurisdiction (Am. Compl. ¶¶ 53-57), identify four federal statutes and three constitutional amendments, none of which supplies the requisite waiver of sovereign immunity in this case. 28 U.S.C. § 1331, identified in paragraphs 54 and 55 of the complaint, is a general grant of federal jurisdiction over matters of federal law, and does not establish a waiver of the United States' sovereign immunity. See, e.g., Daly v. Dep't of Energy, 741 F. Supp. 202, 204 (D. Colo.

1990)("[E]very claim against the United States presents a federal question. Therefore, if § 1331 constituted a waiver of sovereign immunity, every plaintiff with a claim against the United States or one of its agencies could maintain a federal district court action. Clearly this is not the law.") Nor do the First, Fifth, and Fourteenth amendments alone, (see Am. Compl. ¶¶ 54, 55), create a waiver of the immunity. See, e.g., Navy, Marshall & Gordon, P.C. v. United States International Development-Cooperation Agency, 557 F. Supp. 484, 488 (D.D.C. 1983) ("Neither 28 U.S.C. § 1331, nor any provision of the Constitution, is a waiver of sovereign immunity[.]") Nor does 28 U.S.C. § 1343, (see Am. Compl. ¶ 56), which grants the district courts jurisdiction over certain civil rights actions otherwise "authorized by law," establish a waiver of the government's sovereign immunity. Section 1343 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, supra, at 488.

Accordingly, plaintiffs' basis for a waiver of the United States' sovereign immunity must rest on the remaining two statutory provisions cited -- the federal civil rights statute, 42 U.S.C. § 1983 (Am. Compl. ¶ 56), or the Bivens exception described in the Federal Tort Claims Act at 28 U.S.C. § 2679(b)(2) (Am. Compl. ¶ 53). Each of these is considered in turn below.

A. Section 1983 Is Not a Recognized Basis for a Suit Against the United States or Federal Agencies Acting Under Color of Federal Law.

Plaintiffs complain that "the government cannot retaliate for the exercise of the constitutional right to petition for redress of grievances," and that "[s]uch retaliation is

cognizable under Title 42, U.S.C. § 1983." (Am. Compl. ¶ 84.) Plaintiffs invoke the jurisdiction of this Court pursuant to that statute. (Am. Compl. ¶ 56.) However, section 1983 only applies to individual officials acting under color of state law. Gabriel v. Corrections Corp. of America, 211 F. Supp. 2d 132, 136 (D.D.C. 2002). As a result, plaintiff's invocation of section 1983 as the jurisdictional basis for this lawsuit against the United States and three of its agencies fails on two grounds.

First, there is no allegation that any of the defendants were acting under color of state law. Section 1983 deals only with those deprivations of rights that are accomplished under the color of the law of "any State or Territory." 42 U.S.C. § 1983. "[F]ederal agencies and officers are facially exempt from section 1983 liability inasmuch as in the normal course of events they act pursuant to federal law." Hindes v. Fed. Deposit Ins. Co., 137 F.3d 148, 158 (3d Cir. 1998); see also District of Columbia v. Carter, 409 U.S. 418, 425 (1973). Here, the "retaliation" complained of includes the mailing of notices and demands for payment, the attachment of federal tax liens, levying upon wages and property, executing administrative searches, and litigating or prosecuting administrative, civil, and criminal cases. (Am. Compl. ¶ 48.) All of these activities are normally incident to the civil and criminal enforcement of our nation's federal tax laws. Nowhere in the plaintiffs' 90-page complaint, as amended, is there any suggestion that any defendant was acting under color of state law. Indeed, the defendants are the United States and three *federal* agencies in their institutional capacities. Accordingly, plaintiff's reliance on section 1983 is misplaced.

Secondly, the government and its agencies cannot be defendants in a section 1983 action. 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. Neither the United States, generally, nor any federal agency is a "person" subject to 1983 liability, whether or not acting under color of state law. See Hindes, supra, at 158; accord Elliott v. Fed. Deposit Ins. Co., 305 F. Supp. 2d 79, 84 (D.D.C. 2004). Accordingly, plaintiffs' action against the United States, two Cabinet-level departments, and one federal agency, is improper.[2]

B. Bivens Actions Against Federal Agencies Are Not Authorized by Law.

The other statutory provision to which plaintiffs point as providing the basis for a waiver of the United States' sovereign immunity is 28 U.S.C. § 2679(b). (Am. Compl. ¶ 53.) This section is part of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), 2671, et seq.. The FTCA provides a cause of action, after the exhaustion of administrative remedies, against the United States for the common law torts of its employees. Kline v. El Salvador, 603 F. Supp. 1313, 1316-17 (D.D.C. 1985). The FTCA does not waive sovereign immunity with respect to alleged constitutional wrongs. Id.

[2]At all events, the federal agencies cannot be subjected to suit. "When Congress authorizes one of its agencies to be sued *eo nomine*, it does so in explicit language, or impliedly because the agency is the offspring of such a suable entity." Blackmar v. Guerre, 342 U.S. 512, 514 (1952). None of the defendant agencies has been authorized to sue or be sued. Hence, they cannot be sued in this action.

Federal officials acting within the scope of their employment are shielded from liability under the FTCA. 28 U.S.C. § 2679(b)(1). However, that immunity does not extend to an "action against an employee of the Government which is brought for a violation of the Constitution of the United States[.]" Id. § 2679(b)(2). Actions against individual federal officials for certain types of alleged constitutional violations are judicially authorized by Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

A unanimous Supreme Court held, ten years ago, that Bivens does not provide a cause of action against federal agencies. Fed. Deposit Ins. Co. v. Meyer, 510 U.S. 471, 486 (1994). A direct action against federal agencies would undermine the entire purpose of Bivens actions, which is to deter the wrongful conduct of the individual officer, not the official conduct of the agency. Id. at 485. Plaintiffs in their complaint allege only official conduct, and name only the United States and three of its agencies as defendants. Accordingly, neither Bivens nor the FTCA provides a basis for a waiver of the United States' sovereign immunity under the circumstances of this case.

Having failed to identify a statutory or judicial waiver of the United States' sovereign immunity that would authorize a claim for the extraordinary relief sought by plaintiffs, the amended complaint is ripe for dismissal under Fed. R. Civ. P. 12(b)(1).

II. THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

Not only is there no cause of action against federal agencies, generally, for alleged constitutional violations, but the amended complaint in this case has failed to allege facts which, if true, would comprise a constitutional violation. Plaintiffs allege

two purported constitutional violations -- first, that the defendants have failed to "properly respond to plaintiffs' petitions for redress of grievances" (Am. Compl. ¶ 1), and secondly, that the defendants have retaliated against the plaintiffs for petitioning for redress of grievances" (Am. Compl. ¶ 2). Without more, the allegations of the amended complaint relating to either of these contentions are insufficient to establish a constitutional claim. Accordingly, the complaint should also be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

When considering a motion to dismiss, the Court accepts the facts in the complaint as true and the plaintiff is entitled to the benefit of all inferences that can be derived from the facts alleged. Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994). The Court need not, however, "accept legal conclusions cast in the form of factual allegations." Id. Although a motion to dismiss is granted and the complaint dismissed if only no relief could be granted on those facts, the complaint, at a minimum, must allege sufficient facts to "give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests." Conley v. Gibson, 355 U.S. 41, 45-47 (1957).

In this case, relief could not be granted on either of the two sets of facts alleged by plaintiffs. As to the first, the law is clear that there is no First Amendment obligation to "properly respond" to plaintiffs' "petitions for redress of grievances." As to the second, the plaintiffs cite only the general enforcement of the federal tax laws and have made only vague and conclusory allegations that such enforcement was

retaliatory. These allegations have not given the federal defendants "fair notice" of the claim and the factual grounds on which it rests. To the extent that constitutional violations can or do occur during the enforcement of federal tax laws, these violations are adequately remedied by the panoply of means Congress provided to challenge federal tax enforcement actions at every stage of the administrative process.[3]

A. There is No First Amendment Obligation to "Properly Respond" to Plaintiffs' Petitions.

The First Amendment provides that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I. This right to associate and to advocate, however, provides no guarantee that the protected speech will be effective, or even heard. Smith v. Ark. State Highway Employees, Local 1315, 441 U.S. 463, 464-65 (1979). The Supreme Court has repeatedly and consistently held that "the First Amendment does not impose any affirmative obligation on the government" to listen, or to respond to the petitions of its private citizens, or to recognize and bargain with associations of citizens. Id. at 465; see also Minnesota State Board v. Knight, 465 U.S. 271, 286 (1984) (plaintiffs "have no constitutional right as members of the public to a government audience for their policy views."). As a result of this clear and

[3]See 26 U.S.C. §§ 6110 (disclosure and non-disclosure of rulings), 6320 (due process reviews for federal tax liens), 6330 (due process reviews for tax levies), 7422 (tax refund actions), 7426 (wrongful levy actions), 7428 (judicial review of exempt organization rulings), 7429 (judicial review of termination and jeopardy assessments), 7430 (attorney's fees for prevailing taxpayers), 7431 (actions for wrongful disclosures and inspections of returns), 7432 (wrongful failure to release tax lien), 7433 (wrongful collection), and 7609 (action to quash administrative summonses).

unwavering line of Supreme Court authority, plaintiffs' allegations that the President, the Attorney General, the Secretary of the Treasury, the Commissioner of Internal Revenue, and the United States Congress failed to "properly respond to [p]laintiffs' petitions for redress of grievances" (Am. Compl. ¶ 1), do not state a claim upon which relief may be granted. To comprehend the soundness of such a result, one need only imagine the numerous and motley lawsuits that would stream into our courts if the alleged failure of the President, the Attorney General, the Secretary of the Treasury, the Commissioner of Internal Revenue, or the United States Congress to "properly respond" to the correspondence of private citizens gave rise to a right to sue these individuals. Indeed, the Supreme Court thoroughly considered the matter in Minnesota State Board v. Knight, set forth a clear rule, and explained its rationale for consistently declining to recognize a First Amendment right to have a federal officer or agency "properly respond" to petitions for redress of grievances. That rationale is equally persuasive in the present case:

> Not least among the reasons for refusing to recognize such a right is the impossibility of its judicial definition and enforcement. Both federalism and separation-of-powers concerns would be implicated in the massive intrusion into state and federal policymaking that recognition of the claimed right would entail. Moreover, the pragmatic considerations identified by Justice Holmes in Bi-Metallic Investment Co. v. State Board of Equalization, [239 U.S. 441 (1915)], are as weighty today as they were in 1915. Government makes so many policy decisions affecting so many people that it would likely grind to a halt were policymaking constrained by constitutional requirements on whose voices must be heard. "There must be a limit to individual argument in such matters if government is to

> go on." Id. at 445. Absent statutory restrictions, the State must be free to consult or not to consult whomever it pleases.
>
> However wise or practicable various levels of public participation in various kinds of policy decisions may be, this Court has never held, and nothing in the Constitution suggests it should hold, that government must provide for such participation. In Bi-Metallic the Court rejected due process as a source of an obligation to listen. Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues. Indeed, in Smith v. Arkansas State Highway Employees, 441 U.S. 463, 464-466 (1979), the Court rejected the suggestion. No other constitutional provision has been advanced as a source of such a requirement. Nor, finally, can the structure of government established and approved by the Constitution provide the source. It is inherent in a republican form of government that direct public participation in government policymaking is limited. See The Federalist No. 10 (J. Madison). Disagreement with public policy and disapproval of officials' responsiveness, as Justice Holmes suggested in Bi-Metallic, supra, is to be registered principally at the polls.

Minnesota State Board, 465 U.S. at 285.

Accordingly, plaintiffs have failed to state a cognizable constitutional claim in their first cause of action, namely, that the government has failed to address or respond to their petition(s) for redress of grievances. (Am. Compl. ¶¶ 28-42, 58-76.)

B. Plaintiffs Have Not Stated a Claim for First Amendment Retaliation.

Plaintiffs' second cause of action relates to the allegation that "the Internal Revenue Service and the Department of Justice have taken retaliatory actions against the plaintiffs for petitioning for redress of grievances and expressing those grievances publicly." (Am. Compl. 84.) The alleged "retaliatory actions" include the mailing of notices and demands for payment, the attachment of federal tax liens, levying upon

wages and property, executing administrative searches, litigating or prosecuting administrative, civil, and criminal cases, or "other enforcement actions." (Am. Compl. ¶ 48.) As a remedy for this "retaliation," plaintiffs seek an order enjoining the Internal Revenue Service, the Department of Justice, "and any other agency of the United States that arguably may act in this matter under color of law, from taking further retaliatory actions against the named Plaintiffs in this proceeding and against all others similarly situated[.]" (Am. Compl. 89.)

The governmental conduct complained of is not prohibited. The alleged "retaliatory actions" listed in paragraph 48 of the complaint (with the exception of the conclusory allegation that the government has deprived plaintiffs of due process) are all authorized and incident to the necessary enforcement of our nation's civil and criminal federal tax laws.[4] Plaintiffs allege that this otherwise lawful conduct is "clearly unconstitutional and morally reprehensible" in this case because it was in retaliation for the plaintiff's exercise of their right of free speech. (Compl. ¶ 89). This is insufficient to state a claim for First Amendment retaliation. The allegations that the conduct of the government in enforcing federal tax laws is "unconstitutional" or

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[4]See, e.g., 26 U.S.C. §§ 6303 (requiring the Secretary of the Treasury to send demands for payment of taxes), 6321 (lien on taxpayer's property arises by operation of law), 6331 (authorizing administrative levies on wages and other property), 7601-08 (authorizing issuance of summonses, carrying of firearms, and entry upon taxpayer's property and other examinations), 7402-05 (authorizing actions to enforce liens and other civil actions), 7407-08 (authorizing actions to enjoin certain income tax preparers, promoters of abusive tax shelters, and persons aiding and abetting the understatement of tax liability), and 7201-75 (listing tax-related crimes and offenses); 28 U.S.C. §§ 515, 547 (authorizing United States Attorneys and delegates of the Attorney General to prosecute such crimes and offenses).

"retaliatory" are "legal conclusions cast in the form of factual allegations," and this Court need not accept them as true. Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994). Moreover, that the plaintiffs complain that federal agencies comprised of hundreds of thousands of employees have enforced federal tax laws in a "retaliatory" fashion hardly puts these agencies on "fair notice" of the conduct complained of and the factual basis of the claim. Conley v. Gibson, 355 U.S. at 47.

On closer inspection of the complaint, however, it is clear that at least some of the plaintiffs are "enforcing" their right to petition the government by "the withholding of monies they might otherwise relinquish to the government." If a person fails to pay over taxes, when due, they may be subject to criminal penalties, see 26 U.S.C. § 7203, as well as civil liability, id. §§ 6151(a), 6651(a). There is no First Amendment right to immunity from civil or criminal liability simply because, in advance of any enforcement action, a person announces that they are breaking the law. See United States v. Judicial Watch, Inc., 371 F.3d 824, 828-30 (D.C. Cir. 2004).

Further, as to each and every official action of which plaintiffs complain, there is a corresponding means in the Internal Revenue Code for challenging the action before and after it occurs, if, indeed, the action violates their First Amendment rights. For example, the Service must publicly disclose certain written determinations, 26 U.S.C. § 6110, and rulings with respect to exempt organizations are subject to judicial review. Id. § 7428. Taxpayers are given the right to notice and a hearing before the filing of notices of federal tax lien or the making of levies. Id. §§ 6320, 6330.

Taxpayers are given a cause of action for damages for wrongful disclosures of tax information, levies, failures to release liens, or collection actions, id. §§ 7426(a), 7431-33. Taxpayers may sue for refunds of amounts erroneously or illegally assessed or collected. Id. § 7422(a). Administrative summonses are subject to meaningful judicial review. Id. §§ 7604, 7609. Where, as here, Congress has provided a comprehensive statutory scheme for challenging agency conduct, the Court need and should not fashion a judicial remedy of its own. See Schweiker v. Chilicky, 487 U.S. 412, 423 (1988) ("Bivens remedies will not be created when the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of [the program's] administration."); Judicial Watch, Inc. v. Rossotti, 317 F.3d 401, 408-11 (4th Cir. 2003); Schreiber v. Mastrogiovanni, 214 F.3d 148, 152 (3d Cir. 2000); Cameron v. Internal Revenue Service, 773 F.2d 126, 129 (7th Cir. 1985).

For these reasons, then, plaintiffs have failed to state a claim upon which relief can be granted, and this action should be dismissed.

III. THE RELIEF SOUGHT BY THE COMPLAINT IS BARRED BY THE ANTI-INJUNCTION ACT, 26 U.S.C. § 7421(a).

As discussed above, plaintiffs' First Amendment rights are otherwise protected by the panoply of provisions in the Internal Revenue Code that enable taxpayers to challenge in Court each and every enforcement action complained of. As such, the relief sought by plaintiffs is barred by the Anti-Injunction Act, 26 U.S.C. § 7421.

As a general rule, the Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person[.]" Id. § 7421(a). The statutory exceptions to this general rule are set forth in § 7421(a), which cross-references fourteen other sections of the Internal Revenue Code pursuant to which a claim for injunctive relief against assessment or collection activities may be maintained.[5]

As the Supreme Court has emphasized, the language of the Act "could scarcely be more explicit," reflecting its overarching objective of protecting "the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference." Bob Jones University v. Simon, 416 U.S. 725, 736 (1974). The Act has two primary objectives -- "efficient and expeditious collection of taxes with a minimum of judicial interference, and protection of the collector from litigation pending a refund suit." United States v. American Friends Serv. Comm., 419 U.S. 7, 12 (1974). The effect of the act is simple and obvious: courts lack jurisdiction to issue injunctive relief in suits seeking to restrain the assessment or collection of taxes. Moreover, "the statute applies not only to the actual assessment or collection of a tax, but is equally applicable to activities leading up to, and culminating in, such assessment and collection." Lowrie v. United States, 824 F.2d 827, 830 (10th Cir. 1987).

[5]These sections are 26 U.S.C. §§ 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b) and 7436.

In this case, plaintiffs clearly seek injunctive relief -- even if it is styled, in part, as "declaratory relief" in the prayer. (Am. Compl. 89.) They seek an order "constraining the defendants to . . . [enter] into good faith exchanges with the plaintiffs and 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 in their official respective capacities." Id. They also seek "a temporary injunction against the United States Internal Revenue Service and the Department of Justice and any other agency of the United States that arguably may act in this matter under color of law, from taking any further retaliatory actions against the named plaintiffs in this proceeding[.]" Id. "Retaliatory actions," as defined in the complaint, include the mailing of notices and demands for payment, the attachment of federal tax liens, levying upon wages and property, executing administrative searches, and litigating or prosecuting administrative, civil, and criminal cases. (Am. Compl. ¶ 48.)

To the extent the former request for relief would require tax administrators otherwise responsible for the assessment and collection of taxes to set aside their official duties and respond to the plaintiffs' correspondence, the former request for relief is arguably one "for the purpose of restraining the assessment or collection of any tax." The latter request for relief, which would effectively prevent the government from investigating and prosecuting tax crimes, as well as from determining tax liability and using the Code's notice and levy procedures for collecting such liability, is patently one "for the purpose of restraining the assessment or collection of any tax." Plaintiffs have not identified that their case falls with any of

the sections of the Internal Revenue Code which Congress contemplated as an avenue for the relief sought. Accordingly, the Court lacks jurisdiction to grant that relief on the further ground that it is barred by the Anti-Injunction Act.

Nor do the narrow, judicially-created exceptions to the Anti-Injunction Act change this result. In South Carolina v. Regan, 465 U.S. 367 (1984), for example, the Supreme Court found that, because the circumstances surrounding the enactment of Anti-Injunction Act suggested that Congress intended only to limit relief to the channels provided by statute, it would not operate to bar a suit where there existed no alternative statutory avenue to challenge the legality of the tax. Id. at 378. In Regan, the State of South Carolina, because it was not subject to federal income tax, had no means by which to challenge the constitutionality of certain amendments to the Internal Revenue Code that, ultimately, forced the state to issue its bonds in a particular manner. By contrast, in the present case, plaintiffs have all of the avenues described in part II.B, supra, by which to contest federal tax enforcement actions. Therefore, the case is wholly outside of the judicial exception contemplated by Regan. See Foodservice & Lodging Institute, Inc. v. Regan, 809 F.2d 842, 844 (D.C. Cir. 1987).

In Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962), the Court concluded that the Anti-Injunction Act would not apply if (1) when the facts and law are examined in the light most favorable to the government, under no circumstances could the government prevail, and (2) equity jurisdiction otherwise existed. The

burden is on the plaintiffs to demonstrate that the suit falls within the purview of any judicially created exception to the Anti-Injunction Act. Bowers v. United States, 423 F.2d 1207, 1208 (5th Cir. 1970); Vuin v. Burton, 327 F.2d 967, 969 (6th Cir. 1964). Plaintiffs cannot meet that burden here.

In particular, as explained in part II.A, supra, there is no First Amendment obligation to "properly respond" to plaintiffs' petitions. Further, plaintiffs have not alleged any facts supporting a claim of First Amendment retaliation, other than to make the conclusory allegation that it occurred.[6] Accordingly, not only have plaintiffs failed to establish that "under no circumstances could the government prevail," they are unable to establish that they might be able prevail on their claims. Because plaintiffs cannot fit their causes of action within one of the exceptions to the Anti-Injunction Act, the amended complaint must be dismissed.

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[6]Plaintiffs allege only that they engaged in protected speech, and that subsequently demands for payment were sent, levies conducted, and litigation commenced. *Post hoc ergo propter hoc* is legally insufficient to support a finding of retaliation. Bermudez v. TRC Holdings, Inc., 138 F.3d 1176, 1179 (7th Cir. 1998); accord, Maduka v. Meissner, 114 F.3d 1240, 1241-42 (D.C. Cir. 1997).

Further, upon information and belief and notwithstanding the amended complaint's allegations to the contrary, the class of plaintiffs in this action is not limited to those who were the subject of some kind of enforcement action. Rather, the class of plaintiffs has been made open to anyone who states that they signed a petition for redress of grievances and signs up on the website of We the People Foundation, http://www.givemeliberty.org, or by calling a toll-free number. Accordingly, many taxpayers, should they join the suit, will not succeed on the substance of these allegations.

CONCLUSION

For the reasons stated above, defendants respectfully request that this action be dismissed, with prejudice, and for any further relief deemed appropriate by the Court.

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Respectfully submitted,

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