No. _____

# In The
# Supreme Court of the United States

WILLIAM J. BENSON, JOHN DOE I,
JOHN DOE II, JANE ROE,
*Petitioners*,

v.

UNITED STATES OF AMERICA,
*Respondent*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit*

## PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. Whether I.R.C. § 6700, the abusive tax shelter statute, abridges freedom of speech when used to censor and tax public dissemination of a compendium of information regarding the constitutional validity of the federal income tax.

2. Whether the Due Process Clause of the Fifth Amendment is violated when a district court finds it lacks jurisdiction to hear and consider a defense to two elements of a cause of action under I.R.C. § 6700, but does have jurisdiction to find in favor of the government on those two elements.

3. Whether I.R.C. § 6700 abridges the right of the people peaceably to assemble when a "customer list" of the purchasers of a compendium of information pertaining to whether the I.R.S. is violating the Constitution is ordered to be submitted to the I.R.S.

4. Whether the right of the people to petition the government for a redress of grievances is abridged when a court uses, as a basis to find a violation of I.R.C. § 6700, the fact that an individual filed a petition for redress of grievance with the I.R.S., i.e., whether the exercise of a fundamental, Constitutionally protected right can be regarded as evidence of a violation of the law.

5. Whether fundamental rights guaranteed by the First Amendment are being chilled by the use of I.R.C. § 6700 to suppress public debate on the entire subject of the constitutional validity of the federal income tax.

## List of All Parties

The parties to the action in the District Court were:

United States of America, Plaintiff;

William J. Benson, Defendant;

John Doe I, John Doe II and Jane Roe who moved in the District Court to intervene, of right, as party defendants.[1]

The parties to the action in the Court of Appeals were:

William J. Benson, Appellant and Cross-Appellee;

United States of America, Appellee and Cross-Appellant;

John Doe I, John Doe II and Jane Roe who moved to intervene, as cross-appellees.

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[1] Believing the First Amendment protects the putative intervenors names from disclosure, they proceeded in an alias capacity to preserve that protection.

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## Opinions Below

The Opinion of the United States Court of Appeals for the Seventh Circuit, filed April 6, 2009, affirming the Memorandum Opinion of the District Court granting summary judgment, and granting the Cross-Appeal of the United States. *United States v. Benson*, 561 F.3d 718 (7th Cir. 2009). App. A, pp. 1a-21a.

The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division, filed April 19, 2005, denying Benson's motion to dismiss the complaint under FED. R. CIV. P. 12(b)(1), 12(b)(6), and 12(b)(7). *United States v. Benson*, 2005 WL 947291 (N.D. Ill. 2005), 95 A.F.T.R.2d 2005-2164, 2005-1 USTC P 50,398.

The District Court's Docket Entry filed January 16, 2008, denying Benson's, the putative intervenors and the United States' motion to alter or amend. App. B, pp. 22a-25a.

The Permanent Injunction issued by the United States District Court for the Northern District of Illinois, Eastern Division, filed January 10, 2008. *United States v. Benson*, 2008 WL 267055 (N.D. Ill. 2008). App. C, pp. 26a-32a.

The Memorandum Opinion of the United States District Court for the Northern District of Illinois, Eastern Division, filed December 17, 2007, granting the United States' Motion for Summary Judgment. *United States v. Benson*, 2007 WL 4838232 (N.D. Ill. 2007), 101 A.F.T.R.2d 2008-422. App. D, pp. 33a-54a.

The Order of the Seventh Circuit Court of Appeals denying Benson's Petition for Rehearing En Banc, filed July 21, 2009. App. E, pp. 55a-56a.

## Jurisdiction

The Opinion of the Seventh Circuit sought to be reviewed was filed April 6, 2009. The Order denying the petition for rehearing *en banc* was filed July 21, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## Federal Constitutional and Statutory Provisions Involved

1. U.S. CONST. amend. I reads in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. U.S. CONST. amend. V reads in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

3. U.S. CONST. art. V reads in relevant part: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, . . . which, . . . shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States . . . ."

4. U.S. CONST. art. III, § 2, reads in relevant part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . to all

Cases to which the United States shall be a Party . . . ."

5. I.R.C. § 6700, reads in pertinent part:

(a) Imposition of penalty.--Any person who--

(1)(A) organizes (or assists in the organization of)--
(i) a partnership or other entity,
(ii) any investment plan or arrangement, or
(iii) any other plan or arrangement, or
(B) participates (directly or indirectly) in the sale of any interest in an entity or plan or arrangement referred to in subparagraph (A), and
(2) makes or furnishes or causes another person to make or furnish (in connection with such organization or sale)--
(A) a statement with respect to the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter, or
(B) a gross valuation overstatement as to any material matter, shall pay . . . a penalty . . . .

6. Rev. Stat. § 205, at the time in question, read: "Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as part of the Constitution of the United States."

## Statement of the Case

William J. Benson sold on a website a "compendium of information" consisting of two books he authored, official certified documents he personally obtained from the National Archives and various State Legislatures, publications authored and printed by the federal government, official court transcripts, court opinions, law review articles, letters from attorneys, and correspondence to and from members of Congress. Benson contended these documents show less than thirty-six states had voted to ratify the proposed Sixteenth Amendment according to the provisions of the Constitution. Benson stated the federal judiciary and Congress both contend they lack the authority to hear and adjudicate the matter. Benson urged the following action:

> **Let the people answer the question the government refuses to answer–and let the people preserve our Constitution. We the people must take political action in an attempt to force the government to decide**

**a very important question, i.e., "Was the 16th Amendment legally certified and ratified?"** If it was not, there is no law which can be violated and therefore, the people are being politically prosecuted.

. . . .

How can we restore the U.S. Constitution? The same way that "Old Ironsides" has always been restored - through the love and devotion of the people of this great land. We must, of course, patch that gaping hole in our Law. Apportionment of income taxes must be restored and the current tyrannical system of taxation administered by the IRS, the courts and the Justice Department, must be abolished immediately and replaced by a thorough and rigid Constitutional system.

There will undoubtedly be vicious resistance on the part of those with a vested interest in keeping the fraudulent status quo. Nevertheless, each of us who hopes that the Constitution survives into the next century must do whatever he or she can do to ensure that it is again made worthy to sail on the seas of sovereignty.

Together we must pledge our lives, our fortunes and our sacred honor to restore our great nation. **We must stand together and take political action to resolve the enormous political question the courts have declared exists as a result of the fraudulent certification and ratification of the**

> **Sixteenth Amendment.** As you read the enclosed material and the Law That Never Was, Volumes I & II by Bill Benson and Red Beckman you will gasp in amazement as you walk through the corridors of time and discover the biggest fraud ever perpetrated on the American People (emphasis added).

District Court Doc. 40, Exhibit K, pp. 8-9.

> Today, the federal government pretends that it has all encompassing power to tax the income of everyone, and that the only way to change this system is to vote for congressmen who promise to modify it. **The American public needs to be apprised that another alternative exists, and that this challenge can be effectively made by exercising your rights under the First Amendment to the United States Constitution** (emphasis added).

District Court Doc. 42, pp. 7-8.

The Department of Justice, Tax Division, alleged the above activities and speech violated I.R.C. § 6700, the "abusive tax shelter" statute, and filed a complaint to enjoin Benson from selling the "compendium of information." The DOJ argued Benson's statement, expounding his "theory" that the Sixteenth Amendment was not ratified, was false and fraudulent, and Benson knew the statement was false

and fraudulent,[2] because the Seventh Circuit has ruled the issue is "nonjudiciable" and "beyond review."[3] The complaint asked the court to issue an injunction and an order requiring Benson to disclose to the government a list identifying everyone who obtained the "compendium of information."

Benson filed a motion to dismiss. He argued that if the issue of the truth or falsity of his statement that

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[2] These are two elements the United States must prove to establish a violation of I.R.C. § 6700. *See United States v. Raymond,* 228 F.3d 804, 811 (7th Cir. 2000).

[3] No court, including the Seventh Circuit, has addressed the merits of Benson's contention that States intentionally amended the language of the proposed Sixteenth Amendment. The courts have held that because the issue is not open to review, there is a conclusive presumption that the Sixteenth Amendment was ratified. In Benson's prior criminal case, the trial court refused to hear the issue, presented not as a good faith defense to wilfulness but to the requirement that he was required to file a tax return, because the Seventh Circuit held the issue was "objectively unreasonable." On appeal of his criminal case, Benson asked the Seventh Circuit to remand to the district court to conduct an evidentiary hearing. That request was denied. The district court and Seventh Circuit here both contend the courts' refusal to address the merits of his argument in his criminal case establishes he knew his statements were false. (*See* App. A, pp. 8a-9a). All Benson learned from previous case law, including his own criminal case, is that the courts refuse to address an alleged constitutional violation of major importance to the America people, which is why he called for the people to engage in political activity. In essence, Benson is being prosecuted for failing to adhere to the ideological conformity of the government. While the subject matter may be different, there is no real distinction between this proceeding and that of the Roman Inquisition that found Galileo guilty when the truth of his statements was not considered because they were blasphemous.

the Sixteenth Amendment was not ratified is "nonjudiciable" and "beyond review," and cannot, therefore, be adjudicated, the court lacked jurisdiction over the subject matter. He argued, in the alternative, that if the court exercised jurisdiction but found his statement was false as a matter of law, the court would violate the Due Process Clause of U.S. CONST. amend. V. Finally, Benson argued that if the judicial branch was precluded from adjudicating an essential element of the alleged offense because the matter was a "political question" that fell within the purview of Congress, due process required Congress be joined as an indispensable party.

Benson's motion to dismiss was denied. The United States then moved for summary judgment. It provided no facts to support its allegation that Benson's statement was false and fraudulent, but instead relied upon the irrebuttable presumption that the statement was false because the Seventh Circuit holds the issue is "nonjudiciable" and "beyond review." The United States argued that because Benson knew about the Seventh Circuit case law, he knew or should have known his statement was false.

In response, Benson filed a FED. R. CIV. P. 56 statement of facts, which facts were supported by the official government documents in his possession. Those documents show, conclusively, that several states intentionally amended the language of the Sixteenth Amendment proposed by Congress, and that the United States admits such conduct violates U.S. CONST. art. V. Benson showed, subtracting the offending states from states that did ratify, that the number of ratifying states was less than the required thirty-six.

Benson also filed a memorandum of law in opposition to the summary judgment. Benson argued that the official government documents created a factual dispute as to substantial matters, whether his statement was true or false and whether he knew it was false, which factual disputes precluded issuance of summary judgment. Benson also argued that his advocacy urging people to exercise rights under the First Amendment was protected political speech that could not be enjoined.

The government, unable to challenge the authenticity of the official government documents, nor the truth of their contents, did not. Instead, it moved to strike Benson's statement of facts as "irrelevant, immaterial, impertinent and scandalous." The district court granted the government's motion and struck Benson's statement of facts.

Thereafter, three individuals, all of whom file tax returns and pay income taxes, filed a motion to intervene. John Doe I, who had purchased Benson's compendium of information, had filed a petition for redress of grievance with the Internal Revenue Service. John Doe II, who had purchased the compendium of information from Benson, did no more than read the material he obtained. Jane Roe wanted to purchase Benson's material but did not because she was afraid of governmental repercussions if she did. The three putative intervenors, as well as Benson, filed a motion for a protective order. They argued that: 1) Benson was engaged in "political speech" that could not be enjoined; 2) Benson's "political speech" could not be converted to "commercial speech" merely because it was sold; 3) no statement on his website was false at the time made; 4) the compendium of information did

not constitute a "partnership or other entity, an investment plan or arrangement, or any other plan or arrangement;" 5) compelled disclosure of the intervenors' names would abridge their rights to engage in lawful association in support of their common beliefs, would have a chilling effect on others, and would subject them to punishment and harassment for engaging in protected speech; 6) the First Amendment protected their right to speak, receive, read and possess Benson's material, and to petition for redress of grievance, without being classified as "tax protesters," being placed on a list of a suspected class of violators of the law, and/or being subjected to criminal investigation and/or civil audit by the Internal Revenue Service for no reason other than they chose to associate with Benson or purchase his material.

Benson also filed a motion asking the district court to exercise its equity jurisdiction since it now concluded that the law required it to direct a verdict in favor of the government as to the issues of whether Benson's statements were false, and he knew they were false. That motion was denied.

Prior to ruling on the motion to intervene or the motion for a protective order, the district court found that Benson failed to point to evidence that would create a genuinely disputed fact regarding whether the Sixteenth Amendment was properly ratified.[4] The court held that prior case law of the Seventh Circuit precluded Benson from arguing the truthfulness of his

[4] It is impossible to point to evidence when it has been stricken from the record!

position, the question being "nonjudiciable" and "beyond review." The court ruled it was objectively unreasonable for Benson to hold, and advocate, any other opinion than that held by the Seventh Circuit. The court held that Benson's "compendium of information" was a tax shelter, his statement that the Sixteenth Amendment was not ratified was false commercial speech, and Benson knew or should have known his statement was false, and it granted the United States' motion for summary judgment. The District Court did not, however, order Benson to produce the names and addresses of those who obtained his material. The District Court then denied the motions to intervene and for a protective order as moot.

Benson filed a notice of appeal. The putative intervenors did not file a notice of appeal as they had nothing from which to appeal; the court had protected the release of their names. The United States filed a notice of cross-appeal from that portion of the summary judgment refusing production of the list of names and addresses it wanted. The putative intervenors then filed a motion for leave to intervene as cross-appellees to protect the disclosure of their names. A single judge of the Seventh Circuit denied the motion, stating that the putative intervenors should have filed a notice of appeal and didn't, but could file a motion for leave to file an amicus brief if only they disclose their real names in the motion and proposed amicus brief.[5] On a motion for review, a three

[5] Thereby providing their names and rendering their issues moot.

judge panel denied the motion to intervene and denied a motion to alter the briefing schedule.[6]

The Seventh Circuit Panel sustained the granting of the summary judgment and permanent injunction, and remanded the case to the district court directing it to order Benson to produce the list of the names and addresses the government wanted. Benson filed a timely motion for Rehearing *En Banc*. The motion was denied on July 21, 2009.

## REASONS FOR GRANTING THE WRIT

### The Use of I.R.C. § 6700 to Censor and Tax Political Speech on the Entire Subject of the Constitutional Validity of the Federal Income Tax Abridges the First Amendment.

The use of tax law to censor and suppress political speech critical of the government has repeatedly been condemned by this Court. S*ee Grosjean v. Am. Press Co., Inc.*, 297 U.S. 233, 244-250 (1936). Notwithstanding this condemnation, the Seventh Circuit, *en banc*, has sanctioned the district court's use of I.R.C. § 6700 to silence and punish Benson's political speech.

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[6] The motion to alter the briefing schedule was necessary because by the time the Seventh Circuit denied the motion to intervene, the time to file an amicus brief had already expired.

This Court recognizes that:

> **Under the First Amendment there is no such thing as a false idea.** However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.FN8 [emphasis added.]
>
> > FN8. As Thomas Jefferson made the point in his first Inaugural Address: "If there be any among us who would wish to dissolve this Union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

Neither the district court, nor the Seventh Circuit, *en banc*, shares this Court's recognition, rather, they expressly reject it.

Congress enacted the abusive tax shelter statute, I.R.C. § 6700, to curb the sale and promotion of fraudulent investment schemes marketed with the false promise that the investment would produce tax savings.[7] The false statements to be penalized were specifically identified as false statements pertaining to

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[7] *See* Joint Committee on Taxation, *Background and Present Law Relating to Tax Shelters* (JCX-19-02), Mar. 19, 2002.

"the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement," I.R.C. §6700(a)(2)(A), or "a gross valuation overstatement," I.R.C. § 6700(a)(2)(B). The statute must be "strictly construed" as it is a penal statute which imposes a monetary penalty. *See Commissioner v. Acker*, 361 U.S. 87, 91 (1959).

Benson's speech that people must utilize the First Amendment to preserve the taxing clauses of the Constitution are not statements reached by I.R.C. §§ 6700(a)(2)(A) or (B), nor does the "compendium of information" he markets constitute a partnership or other entity, an investment plan or arrangement, or any other plan or arrangement reached by I.R.C. § 6700(a)(1)(A).

Urging "political action" in an effort to require the government to address an issue that both Congress[8] and the federal judiciary[9] say they do not have

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[8] Benson's compendium of information contains a letter from Congressman Tom Lantos, stating the issue of the ratification of the 16th Amendment must be heard by the courts because "[n]either the legislative nor administrative branches of government have jurisdiction."

[9] The Seventh Circuit and other court of appeals hold the declaration of a Secretary of State under Rev. Stat. § 205 is conclusive upon the Courts, and review for fraud and violation of U.S. CONST. art. V is precluded by the enrolled bill rule and political question doctrine. *See United States v. Thomas*, 788 F.2d 1250 (7th Cir. 1986); *United States v. Foster*, 789 F.2d 457 (7th Cir. 1986); *United States v. Ferguson*, 793 F.2d 828 (7th Cir. 1986); *Miller v. United States*, 868 F.2d 236 (7th Cir. 1988); *Lysiak*

jurisdiction to address does not constitute the sale of an abusive tax shelter. Governmental censorship of 1) documents and speech establishing proof that a fraud was, and is, being committed by the government, and/or 2) a call to advocacy does, however, violate the First Amendment.

This court, in order to assure that rights under the First Amendment are not abridged, is obligated to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964)). The threshold issue of whether Benson's speech is protected is one of law. *Connick v. Myers,* 461 U.S. 138, 148 n.7 (1983).

> Freedom of speech is "indispensable to the discovery and spread of political truth," *Whitney v. California*, 274 U.S. 357, 375, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring), and "the best test of truth is the

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*v. C.I.R.*, 816 F.2d 311 (7th Cir. 1987); *United States v. Sitka*, 845 F.2d 43 (2d Cir. 1988); *United States v. Stahl*, 792 F.2d 1438 (9th Cir. 1986); and *United States v. Benson*, 941 F.2d 598 (7th Cir. 1991.) Benson challenged the correctness of these cases in both the district court and the Seventh Circuit, arguing *Marbury v. Madison*, 5 U.S. 137 (1803), mandates judicial review, and to the extent Rev. Stat. § 205 attempts to deprive the judiciary of jurisdiction, it is unconstitutional. *Dickerson v. United States*, 530 U.S. 428, 437 (2000)("Congress may not legislatively supersede our decisions in interpreting and applying the Constitution."). Both courts below failed to address his arguments.

power of the thought to get itself accepted in the competition of the market . . . ." *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting). The First and Fourteenth Amendments remove "governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity . . . ." *Cohen v. California*, 403 U.S. 15, 24, 91 S.Ct. 1780, 1786, 29 L.Ed.2d 284 (1971). This Court has emphasized that the First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern . . . ." *Thornhill v. Alabama*, 310 U.S. 88, 101-102, 60 S.Ct. 736, 744, 84 L.Ed. 1093 (1940); *see Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1436, 16 L.Ed.2d 484 (1966).

. . . .

The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. As a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, *supra*, at 95, 92 S.Ct., at 2290; *see Cox v. Louisiana*, 379 U.S. 536, 580-581, 85 S.Ct. 466, 469-470, 13 L.Ed.2d 487 (1965) (opinion of Black, J.) . . . If the marketplace of ideas is to

> remain free and open, governments must not be allowed to choose "which issues are worth discussing or debating . . . ." 408 U.S., at 96, 92 S.Ct., at 2290. *See also Erznoznik v. City of Jacksonville*, *supra*, 422 U.S., at 214-215, 95 S.Ct., at 2275; *Tinker v. Des Moines School District*, 393 U.S. 503, 510-511, 89 S.Ct. 733, 738-739, 21 L.Ed.2d 731 (1969). To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.

*Consolidated Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York,* 447 U.S. 530, 534-38 (1980).

> The First Amendment categorically demands that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The right of a man to think what he pleases, to write what he thinks, and to have his thoughts made available for others to hear or read has an engaging ring of universality.

*Dennis v. United States*, 341 U.S. 494, 520-21 (1951)(Frankfurter, J., concurring).

The fact that Benson distributes his political speech through sales over the Internet does not convert it to commercial speech:

> In addition, plaintiffs' distribution of literature does not lose First Amendment status simply "because the written materials sought to be distributed are sold rather than given away, or because contributions or gifts are solicited in the course of propagating the faith."

*Heffron v. Int'l Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981). *See also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983); *New York Times Co. v. Sullivan,* 376 U.S. 254, 265-266 (1964); *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975).

Furthermore, the fact that Benson had an economic motivation for selling his material is clearly not sufficient by itself to turn the materials into commercial speech. *See Bigelow v. Virginia*, 421 U.S. 809, 818 (1975); *Ginzburg v. United States*, 383 U.S. 463, 474 (1966); *Thornhill*, *supra*; *Smith v. People of the State of California*, 361 U.S. 147 (1959).

Commercial speech pertains to advertising. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495 (1996)("Advertising has been a part of our culture throughout our history. Even in colonial days, the public relied on 'commercial speech' for vital information about the market."). The Seventh Circuit, in order to sustain a finding of false commercial speech, held the material sold contained falsities, thereby extending the commercial speech exception beyond advertising. Whether such expansion violates the First Amendment is an important question of constitutional law that has never been, but should be, addressed by this Court.

Not only does Benson have the right to engage in political speech unhampered by governmental attempts to squelch his message, but there is a corresponding First Amendment right of every citizen to receive it:

> Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. *Martin v. Struthers*, 319 U.S. 141, 146-147 (1943).

*Breard v. City of Alexandria, La.*, 341 U.S. 622, 628 (1951).

> The refusal to allow King to obtain a book on computer programming presents a substantial First Amendment issue. Freedom of speech is not merely freedom to speak; it is also freedom to read. *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); *Lamont v. Postmaster General*, 381 U.S. 301, 306-07, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965); *Conant v. Walters*, 309 F.3d 629, 643 (9th Cir.2002). Forbid a person to read and you shut him out of the marketplace of ideas and opinions that it is the purpose of the free-speech clause to protect.

*King v. Fed. Bureau of Prisons*, 415 F.3d 634, 638 (7th Cir. 2005) (Posner, J.).

The right to receive the information also includes the right not to be put on a list:

> The addressee carries an affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. Public officials like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as "communist political propaganda." The regime of this Act is at war with the "uninhibited, robust, and wide-open debate and discussion that are contemplated by the First Amendment." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686.

*Lamont v. Postmaster General of United States,* 381 U.S. 301, 307 (1965).

So too, the recipients of Benson's message have a protected First Amendment Right to petition the government for redress of grievance. The Seventh Circuit used the fact that at least one taxpayer submitted the compendium of information to the IRS when questioned about failing to file an income tax return to find "Benson did organize a plan or arrangement and participated in the sale of an interest in the plan or arrangement." *Benson*, 561 F.3d at 722 (App. A, p. 7a). Such finding violates the First Amendment to the United States Constitution:

> Resort to administrative, legislative, political or judicial processes is protected by the first amendment so long as the petitioner is concerned with obtaining relief afforded by the system. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991)*; California Motor Transport. Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *Noerr,* 365 U.S. 127, 81 S.Ct. 523. Even if the seeking of relief is animated by malevolence or self-interest, the first amendment protects the right to petition of the person whose activities are genuinely aimed at procuring favorable government action. *Omni*, 111 S.Ct. at 1354 (*quoting Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n. 4, 108 S.Ct. 1931, 1937 n. 4, 100 L.Ed.2d 497 (1988)).

*Leblanc-Sternberg v. Fletcher*, 781 F. Supp. 261, 266 (S.D.N.Y. 1991); *Dennis, supra*.

The right to petition is inseparable from the right to speak. *See McDonald v. Smith*, 472 U.S. 479, 482 (1985) (characterizing right to petition as "an assurance of a particular freedom of expression"); *Day v. South Park Indep. Sch. Dist.*, 768 F.2d 696 (5th Cir. 1985) (right to petition is governed by "public concern" analysis of Pickering), *cert. denied*, 474 U.S. 1101 (1986).

The Seventh Circuit found that because some readers of Benson's material relied upon it to decide not to file income tax returns, Benson's speech must be enjoined. The finding is erroneous:

> The fact that some misguided participants or spectators at the rally may "turn in" their draft cards, as symbolic of their disapproval of the Vietnam War, does not justify the denial of the right of citizens to express views which may provoke such conduct. Any individual who, by his voluntary act, surrenders his draft card, can be effectively prosecuted under existing federal law. That potential provocation may result from heated debate is not a valid reason to preclude discussion.

*Resistance v. Comm'rs of Fairmont Park, City of Philadelphia, Pa.*, 298 F. Supp. 961, 963 (E.D. Pa. 1969).

The fact that some recipients of Benson's material may not file income tax returns does not justify the denial of the right of Benson to express views which may provoke such conduct, nor the right of others to receive the material. Unless Benson's speech is directed toward advocacy of inciting or producing imminent lawless action and is likely to incite or produce such action, it remains fully protected political speech. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). There is no evidence anywhere within the record below that Benson advises anyone not to file tax returns or that he otherwise incites imminent lawless action.

So too, there is a First Amendment right to associate for the purpose of engaging in the other activities protected by the First Amendment. *See Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). The IRS's contemplated investigation of citizens for the mere possession of Benson's literature

also violates perhaps the greatest liberty of all, the right to be let alone by government:

> It is now well established that the Constitution protects the right to receive information and ideas. "This freedom [of speech and press] . . . necessarily protects the right to receive . . . ." *Martin v. City of Struthers*, 319 U.S. 141, 143, 63 S.Ct. 862, 863, 87 L.Ed. 1313 (1943); *see Griswold v. Connecticut*, 381 U.S. 479, 482, 85 S.Ct. 1678, 1680, 14 L.Ed.2d 510 (1965); *Lamont v. Postmaster General*, 381 U.S. 301, 307-308, 85 S.Ct. 1493, 1496-1497, 14 L.Ed.2d 398 (1965) (Brennan, J., concurring); *cf. Pierce v. Society of the Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). This right to receive information and ideas, regardless of their social worth, *see Winters v. New York*, 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840 (1948), is fundamental to our free society. Moreover, in the context of this case--a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home--that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy. "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the

> government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized man." *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting). *See Griswold v. Connecticut*, *supra*; *cf. NAACP v. Alabama*, 357 U.S. 449, 462, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488 (1958).

*Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

The chilling effect of governmental efforts to obtain the names of members of a group who engage in advocacy is readily apparent. *See United States v. Grayson County State Bank*, 656 F.2d 1070, 1074 (5th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982); *In re First Nat'l Bank, Englewood, Co.*, 701 F.2d 115, 118 (10th Cir. 1983). *See also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)(reversing compelled disclosure of membership list) and *Gibson v. Fla. Leg. Investigation Comm.*, 372 U.S. 539, 544 (1963)(holding compelled disclosure of affiliation with groups engaged in advocacy may constitute an effective restraint on freedom of association); *Thornhill v. State of Alabama*, 310 U.S. 88, 101-102 (1940)("The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.").

Applied to the facts of this case, I.R.C. § 6700 abridges the First Amendment and constitutes an unconstitutional enlargement of the commercial speech exception. These are important questions of federal law that have not been, but should be, decided by this Court.

**Denying Benson a Defense and Refusing to Address His Legal Arguments Violates the Due Process Clause of the Fifth Amendment.**

This Court has succinctly ruled the federal judiciary has an obligation to review the administrative acts imposed by legislation upon a Cabinet official to insure such acts do not violate the Constitution of the United States. *See Marbury v. Madison*, 5 U.S. 137 (1803). The district court disagrees, and its disagreement has been sanctioned by the Seventh Circuit, *en banc*. Both the district court and the Seventh Circuit have refused to address Benson's argument that the interpretation of Rev. Stat. § 205 to prevent judicial review of the fraudulent acts of a Secretary of State is repugnant to U.S. CONST. art. III, § 2. This is also an important question of federal law that has not been, but should be, decided by this Court.

This Court has repeatedly held that an element of an offense, such as the factual question of whether a statement is false or the speaker knew it was false, cannot be sustained by resort to an irrebuttable presumption.[10] The district court disagrees, and its disagreement has been sanctioned by the Seventh Circuit, *en banc*.

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[10] *See Sandstrom v. Montana*, 442 U.S. 510, 521-523 (1979); *Stanley v. Illinois*, 405 U.S. 645, 654-657 (1972); *Heiner v. Donnan*, 285 U.S. 312, 325-29 (1932); *Schlesinger v. State of Wisconsin*, 270 U.S. 230 (1926); *Tot v. United States*, 319 U.S. 463, 468-69 (1943); *Vlandis v. Kline*, 412 U.S. 441, 446 (1973); *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999), and *Jones v. Bolles*, 76 U.S. 364, 368 (1869).

Rev. Stat. § 205 placed an administrative duty on Secretary of State Knox to review the "official notices" of the various States regarding their action on the proposed Sixteenth Amendment. The "official notices" submitted by the States consisted of the duly-enrolled Senate, House or concurrent resolutions, signed by the appropriate officials of the States' legislative bodies, and placed in the custody of each State's Secretary of State. As such, the "official notices" are no different than a federal "enrolled bill," which this Court holds is conclusive as to what was passed by legislative action. *See Field v. Clark*, 143 U.S. 649 (1892); *Leser v. Garnett*, 258 U.S. 130 (1922); and *Coleman v. Miller*, 307 U.S. 433 (1939). Benson advocates the official documents he obtained from the National Archives shows Secretary of State Knox ignored the duly-enrolled resolutions submitted by the States, and instead fraudulently and conspiratorially relied on a series of false presumptions to declare that the taxing clauses of the Constitution were amended:

> Furthermore, under the provisions of the Constitution **a legislature is not authorized to alter in any way the amendment proposed by Congress**, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment. It, therefore, **seems a necessary presumption**, in the absence of an express stipulation to the contrary, that a legislature did not intend to do something that it had not the power to do, but rather that it intended to do something that it had the power to do, namely, where its action has been affirmative, to ratify the amendment proposed by Congress. **Moreover, it could not be presumed that by**

> **a mere change of wording, probably inadvertent**, the legislature had intended to reject the amendment as proposed by Congress where all parts of the resolution other than those merely reciting the proposed amendment had set forth an affirmative action by the legislature (emphasis added).

Memo from the Office of the United States Solicitor to Secretary of State Knox, Feb. 15, 1913, District Court Doc. 11, pp. 9-10; Doc. 69, pp. 19-20.

Benson presented facts showing the language contained in the "official notices" were not "inadvertent errors," but the result of deliberate amendment by the legislatures of the various States. No prior decision of any district court, any court of appeals, nor this Court, has ever addressed the effect of a State intentionally amending the language of a proposed constitutional amendment. This is an important question of constitutional law that has not been, but should be, settled by this Court.

Benson argued that the lower courts' interpretation of Rev. Stat. § 205, which interpretation allows the Constitution to be amended by two false presumptions, rather than by the actual ratification of thirty-six states, constituted a congressional amendment of the requirements of U.S. CONST. art. V. Both the district court and the Seventh Circuit refused to address this issue, thereby denying Benson due process. The Seventh Circuit's willingness to allow the Constitution to be amended by false presumption, and its contention that it has no judicial authority to review the issue, constitutes such a departure from the usual course of judicial proceedings as to warrant the

exercise of the supervisory power of this Court. Rather than applying the law as announced by this Court in *Field, supra; Leser, supra; and Coleman, supra,* the Seventh Circuit converted an administrative declaration of ratification by Secretary of State Knox into an "enrolled bill," and held the "enrolled bill rule" and the "political question doctrine" established conclusive presumptions that Benson's statement regarding the Sixteenth Amendment was false and fraudulent, and that he knew it was false. The use of these artificially concocted, conclusive presumptions, denied Benson due process.

Each of these arguments was raised in the district court and the Seventh Circuit. The United States failed to brief the arguments in either court. Both courts failed to address the arguments. The failure to even address legal arguments is a denial of due process;[11] denial of due process is such a fundamental departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

## CONCLUSION

The fact that the United States felt compelled to enjoin Benson is proof that his ideas, supported by the documents he sells to support his ideas, is gaining acceptance in the marketplace of ideas. Assuming the lower courts are correct that his ideas regarding

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[11] *See Washington v. Texas*, 388 U.S. 14, 19 (1967). Both parties to a law suit "have a constitutional right to be heard on their claims, and the denial of that right to them is the denial of due process which is never harmless error." *See Matter of Boomgarden*, 780 F.2d 657, 661 (7th Cir. 1985).

whether the Sixteenth Amendment was ratified is a "political question" that cannot be litigated by the courts, then his speech urging the American people to use the First Amendment to force the government to correct what he perceives to be a violation of the Constitution is certainly protected "political speech."

The denial of due process also establishes Benson's speech is protected political speech. Under the First Amendment, the government is not only precluded from determining that it is objectively unreasonable for a person to disagree with the official governmental position, but it is precluded from punishing that belief with a penalty tax. The application of the penalty provisions of I.R.C. § 6700 to the facts herein constitutes a tax on Benson's exercise of his right to freedom of speech. The amount of the penalty/tax, under the statute, is determined in direct relationship to the number of people with whom Benson associated and shared his speech. Such a penalty/tax is prohibited by the Constitution. *See Grosjean, supra*. In the context of this case, to the extent I.R.C. § 6700 authorizes such a penalty/tax, the section is overbroad and abridges the First Amendment.

While respect must be given to the legislative intent to curb abusive tax shelters, so too respect must be given to the right of the people to advocate against the income tax on the grounds that it is being fraudulently imposed upon the people. It is incumbent that this Court grant certiorari to weigh the competing interests to insure the Constitution is not violated:

> Mr. Justice Brandeis was even more pointed in his concurrence in *Whitney v. California*, 274 U.S. 357, 378-379, 47 S.Ct. 641, 649, 71 L.Ed.

> 1095 (1927): "[A legislative declaration] does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution . . . . Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature."
>
> A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.

*Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843-44 (1978).

Another compelling reason this Court should grant certiorari is that the Benson case is but a test case for launching the Department of Justice, Tax Division's, "Tax Defier Initiative," which is nothing short of a declaration of war against those who would debate and

contest the fundamental validity of the tax laws.[12] Immediately after the release of the initiative, the government filed *United States v. Pinnacle Quest International*, Case No. 3:08-cv-00136 (N.D. Fla., Pensacola Div. filed Apr. 7, 2008), wherein it was alleged that selling speech on audio CDs, and tickets to attend lectures, where people peacefully assembled and heard speeches on the issue of taxes and a wide variety of other subjects, constituted an abusive tax shelter. This was followed by *United States v. Hirmer*, Case No. 3:08-cr-70 (N.D. Fla., Pensacola Div. filed Aug. 21, 2008), now pending, wherein those who formed and operated PQI have been charged with several felonies for promoting "anti-government" views on taxation, such as the view that the Sixteenth Amendment was not ratified in accordance with the requirements of U.S. CONST. art. V. *See Hirmer*, *id.*, Indictment, Doc. 3, filed 8/21/08).

The Benson case is a pernicious attack on the First and Fifth Amendments; it condones censorship through taxation. The departure from fundamental concepts of due process, the right to present evidence and defend, coupled with the lower courts' refusal to acknowledge and be bound by prior precedent of this Court, as well as the need for this Court to address

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[12] "WASHINGTON - Today Nathan J. Hochman, Assistant Attorney General of the Justice Department's Tax Division, announced the creation of the National Tax Defier Initiative or TAXDEF. The purpose of this initiative is to reaffirm and reinvigorate the Tax Division's commitment to investigate, pursue and, where appropriate, **prosecute those who take concrete action to defy and deny the fundamental validity of the tax laws**." *See* http://www.usdoj.gov/opa/pr/2008/April/08_tax_275 (emphasis added).

questions of first impression vitally important to the American people, are all grounds why the petition for writ of certiorari should be granted.

Respectfully Submitted,

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