No. 08-1312

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

WILLIAM J. BENSON,

Defendants - Appellant.

Appeal From The United States District Court
For the Northern District of Illinois, Eastern Division
Case No. 1:04-cv-07403
The Honorable Samuel Der-Yeghiayan

PETITION FOR REHEARING EN BANC

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Docket No. 08-1312

United States of America v. William J. Benson.

(1) The full name of every party that the attorney represents in the case is William J. Benson.

(2) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court are:

The Law Offices of Robert G. Bernhoft, S.C.

Robert G. Bernhoft

Jeffrey A. Dickstein

(3) There are no corporate parties.

Dated: May 5, 2009

/s/
Jeffrey A. Dickstein
Attorney for Petitioner

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PETITION FOR REHEARING EN BANC

The fundamental question of exceptional importance to be addressed in deciding to grant this petition for rehearing is: "Is it the official position of the Seventh Circuit that defendants, charged with unlawful conduct by the government, are no longer entitled to present evidence and defend against the charges?"

The government's complaint charged Benson with making a false statement and it moved for summary judgment. Benson defended by presenting evidence that his statement was true, thereby raising a question of fact as to an essential element of the offense. The District Court, on motion of the United States, struck the evidence as irrelevant and immaterial, thereby denying Benson the right to defend and depriving Benson of due process of law. On appeal, Benson raised eight specific arguments as to how the District Court committed error and abused its discretion in not allowing him to defend. The government forfeited seven of these points when it failed to brief the issues. The Panel, applying what is tantamount to a bill of attainder, reviving the doctrine of seditious libel, and failing to apply constitutionally mandated due process, failed to address the seven issues and upheld the illegal granting of summary judgment.

The Panel's decision answered the above question in the affirmative. The decision is, therefore, contrary to the precedent of the Seventh Circuit, other

courts of appeal, and the United States Supreme Court: *See Mullane v. Central Hanover Bank & Trust, Co.*, 339 U.S. 306 (1950); *Grannis v. Ordean*, 234 U.S. 385 (1914); *Cole v. State of Ark.*, 333 U.S. 196 (1948); *Federal Trade Com'n v. National Lead Co.*, 352 U.S. 419 (1957); *Morgan v. United States*, 304 U.S. 1 (1938); *Hamling v. United States*, 418 U.S. 87 (1974); *Washington v. Texas*, 388 U.S. 14 (1967); *Fein v. Selective Service System Local Bd. No. 7, Yonkers, N. Y.*, 405 U.S. 365 (1972); *Saunders v. Shaw*, 244 U.S. 317 (1917); *Wichita R. & Light Co. v. Public Utilities Commission of the State of Kan.*, 260 U.S. 48 (1922); *United States v. Cunningham*, 429 F.3d 673 (7th Cir. 2005); *Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005); *Sosnovskaia v. Gonzales*, 421 F.3d 589 (7th Cir. 2005); *Matter of Boomgarden*, 780 F.2d 657 (7th Cir. 1985); *In re Bartle*, 560 F.3d 724 (7th Cir. 2009); *United States. v. Sang Woo Kim*, 242 Fed.Appx. 355 (7th Cir. 2007); *United States v. $40,877.59 in U.S. Currency*, 32 F.3d 1151 (7th Cir. 1994); *Schultz v. Frisby*, 807 F.2d 1339 (7th Cir. 1986); *Kramer v. Jenkins*, 806 F.2d 140 (7th Cir. 1986); *Green v. Board of School Com'rs of City of Indianapolis*, 716 F.2d 1191 (7th Cir. 1983); *People of State of Ill. v. United States*, 666 F.2d 1066 (7th Cir. 1981); *Tadesse v. Gonzales*, 492 F.3d 905 (7th Cir. 2007); *Capric v. Ashcroft*, 355 F.3d 1075 (7th Cir. 2004); *United States v. Dunkel*, 927 F.2d 955 (7th Cir. 1991); *Sims v. Greene*, 161 F.2d 87 (3rd Cir. 1947); *Marshall Durbin Farms, Inc. v. National Farmers Organization, Inc.*, 446 F.2d 353 (4th Cir. 1971).

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

The United States filed its complaint seeking to enjoin Benson from making a statement it contended was false. (Doc. 1). Thereafter, the United States moved for summary judgment on August 4, 2005. (Doc. 37). The District Court granted the motion for summary judgment on December 17, 2007 (Doc. 105), and issued a permanent injunction on January 10, 2008 (Doc. 116). Benson appealed the judgment of the District Court granting the United State's motion for summary judgment, raising the following issues:

1. Where an essential element of a cause of action brought by the United States is that a defendant made a false statement, application of the "enrolled bill rule" to create a conclusive presumption that the alleged statement is false violates the Due Process Clause of the Fifth Amendment.

2. Where an essential element of a cause of action brought by the United States is that a defendant made a false statement as to a material matter, application of the "enrolled bill rule" to exclude exculpatory evidence as irrelevant and immaterial violates the Due Process Clause of the Fifth Amendment.

3. District courts and courts of appeal misapply the doctrine of *stare decisis* when they conclude the decisions *in 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), preclude them from determining whether Article V of the Constitution was

violated.

4. The federal judiciary has a duty to enforce Article V of the Constitution when evidence is presented that a Secretary of State relied on false presumptions that certificates of ratification contained merely typographical errors incident to an attempt to make an accurate quotation, when in fact such certificates accurately show various states unconstitutionally amended the language of an amendment proposed by Congress.

5. Congressional enactment of Revised Statute 205, to the extent it creates a conclusive presumption of ratification of a constitutional amendment that was not, in fact, ratified by the states in accordance with Article V, constitutes an impermissible amendment, by legislation, of Article V of the Constitution.

6. A district court, after it concludes the "enrolled bill rule" and the doctrine of *stare decisis* results in a defendant being precluded from presenting any defense whatsoever commits reversible error when it refuses to exercise its equity jurisdiction to allow the introduction of evidence forming a complete defense to an essential element of a cause of action brought by the United States.

7. Application of 26 U.S.C. §§ 6700, 7402(a), and 7408 violates the First Amendment of the Constitution of the United States of America when used to enjoin a private person from expressing his opinion that a constitutional amendment was not ratified on the sole ground that the opinion is false.

8. A district court loses its subject matter jurisdiction under 26 U.S.C. §§ 6700, 7402(a), and 7408 when the controlling question as to an essential element of the cause of action, whether a statement is false or fraudulent, is deemed to be non-justiciable.

Benson supported these issues by citing and briefing the following precedent: *Field v. Clark*, 143 U.S. 649 (1892); *Leser v. Garnett*, 258 U.S. 130 (1922); *Coleman v. Miller*, 307 U.S. 433 (1939); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Heiner v. Donnan*, 285 U.S. 312 (1932); *Schlesinger v. State of Wisconsin*, 270 U.S. 230 (1926); *Tot v. United States*, 319 U.S. 463 (1943); *Vlandis v. Kline*, 412 U.S. 441, 446 (1973); *United States v. Bowen*, 414 F.2d 1268, 1273 (3rd Cir. 1969); *United States v. Simmons*, 476 F.2d 33, 37 (9th Cir. 1973); *United States v. Perry*, 474 F.2d 983, 984 (10th Cir. 1973); *United States v. Lake*, 482 F.2d 146 (9th Cir. 1973); *United States v. Belgrave*, 484 F.2d 915 (3rd Cir. 1973); *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999); *Jones v. Bolles*, 76 U.S. 364 (1869); *Ex parte Boyd*, 105 U.S. 647 (1881); *Payne v. Hook*, 74 U.S. 425 (1868); *State of Rhode Island v. Commonwealth of Massachusetts*, 40 U.S. 233 (1841); *Downs v. Hubbard*, 123 U.S. 189 (1887); *Marbury v. Madison*, 5 U.S. 137 (1803); *United States v. Ballin*, 144 U.S. 1 (1892); *Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429, *aff. reh.*, 158 U.S. 601 (1895); *Dunkel*, 927 F.2d; and *Johnson v. California*, 543 U.S. 499 (2005).

The United States did not address seven of the eight issues. The decision of the Panel also did not address the same seven issues. Seventh Circuit precedent holds a party who fails to brief a legal issue forfeits it. "The appellee's brief should squarely meet the appellant's points." PRACTITIONER'S HANDBOOK FOR APPEALS, p. 74. *United States v. Papia*, 910 F.2d 1357, 1363 (7th Cir.1990) ("Federal Rule of Appellate Procedure 28(a)(4) requires that parties accompany their arguments with citation to relevant authorities."); *Mathis v. New York Life Ins. Co.*, 133 F.3d 546, 548 (7th Cir.1998) ("A litigant who fails to press a point by supporting it with pertinent authority . . . forfeits the point."). *See also Pelfresne v. Village of Williams Bay*, 917 F.2d 1017, 1023 (7th Cir.1990) (the court will not do a party's research); *United States v. Brown*, 899 F.2d 677, 679 (7th Cir.1990) (this court has no duty to construct legal arguments for litigants). Rather than following precedent and finding these issues in Benson's favor, the Panel did not address them, either in oral argument or in its written opinion.

STATEMENT OF FACTS NECESSARY TO ARGUMENT OF THE ISSUES

In November 2004, the United States brought suit against Benson seeking an injunction under the abusive tax shelter provisions of Title 26, Section 6700. (Doc. 1). An essential element the United States was required to prove was "that the defendant made statements about the tax benefits investors would receive if they participated in the shelter which the defendant knew or

had reason to know were false or fraudulent." *United States v. Raymond*, 228 F.3d 804, 811 (7th Cir. 2000). (Doc. 106, p. 7).

The alleged specific false or fraudulent statement Benson made is:

> Benson falsely tells customers that the federal income tax is unconstitutional because, according to his legally frivolous theory, the Sixteenth Amendment to the Constitution–which was adopted in 1913 and permits Congress to impose federal income taxes–was not properly ratified by the states.
>
> Doc. 1, p. 3, ¶ 8.

The United States moved for summary judgment. (Doc. 37). In response, Benson filed his Rule 56, Local Rule 56.1 Statement (Doc. 53) in which he set forth the facts that several states **intentionally amended** the language of the proposed Sixteenth Amendment, conduct the Executive Department admits is constitutionally impermissible. No court, including the Seventh Circuit, has ever addressed this issue. Since no court has addressed the issue, no case law has ruled against the argument.[1] Benson showed, taking into account the number of states that intentionally amended the language of the proposed amendment, that less than the constitutionally required thirty-six states voted to ratify the Sixteenth Amendment, thus proving his alleged "false and fraudulent" statement listed in the complaint was, in fact, true. (Doc. 53).

Benson's facts are uncontroverted as proven by certified State and National

1. The Panel, however, found Benson knew, or should have known his statement was false by citing to off-point case law. Such finding, based on an inappropriate application of the *stare decisis* doctrine, is itself a violation of due process of law.

Archive documents; not being able to refute the facts, the United States objected to them on the grounds they were "irrelevant, immaterial, impertinent and scandalous." (Doc. 54). Benson filed a Motion to Strike [the United States' response] and Motion to Have Facts Deemed Admitted (Doc. 56). The District Court denied Benson's motion to strike and found Benson guilty of violating the statute. The procedure used by the District Court violated due process of law and constituted an abuse of discretion. The Panel's opinion does not discuss Benson's due process arguments.

ARGUMENT AND AUTHORITIES

The failure of a court to give due consideration to a litigant's arguments denies the litigant due process and is an abuse of discretion. In plain terms, Benson was denied the right to present a defense. *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); *In re Bartle*, 560 F.3d 724, 730 (7th Cir. 2009).

In the District Court, Benson's evidence was struck and not considered based upon an irrebuttable presumption. According to the United States Supreme Court, finding guilt based upon a conclusively presumed fact violates due process. *Sandstrom,* 442 U.S. at 521-523; *Stanley,* 405 U.S. at 654-657; *Heiner,* 285 U.S. at 325-29; *Tot*, 319 U.S. at 468-69; and *Vlandis,* 412 U.S. at

446. Just as this argument was not discussed by the District Court, it was not discussed by the Panel. Rather than addressing the merit of the issues, the Panel labeled Benson a "tax protester."[2]

Congress is prohibited from passing bills of attainder–legislation which inflicts punishment without a judicial trial. *Cummings v. Missouri*, 71 U.S. 277, 287 (1866). The Panel here did what Congress cannot; it labeled Benson a "tax protester" and failed to give him judicial consideration of the legal arguments raised in his defense. Seventh Circuit precedent condemns the Panel's action:

> We cannot have much confidence in the judge's considered attention to the factors in this case, when he passed over in silence the principal argument made by the defendant . . . A judge who fails to mention a ground of recognized legal merit (provided it has a factual basis) is likely to have committed an error or oversight.
>
> *United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005).
>
> The procedure that the IJ employed in this case is an affront to Ms. Sosnovskaia's right to be heard. Regardless of the strength of her case on the merits, fundamental tenets of proper administrative procedure demand that before Ms. Sosnovskaia be deported, she should be granted a fair hearing in which the judge gives due consideration to her arguments.
>
> *Sosnovskaia v. Gonzales*, 421 F.3d 589, 594 (7th Cir. 2005).

In *Capric v. Ashcroft*, 355 F.3d 1075 (7th Cir. 2004), quoting the Supreme Court, the Seventh Circuit stated:

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2. In 1895, Mr. Pollock challenged the constitutionality of the federal income tax; he **was not labeled** a "tax protester." The Supreme Court heard Mr. Pollock's argument and ruled in his favor. *See Pollock*, *supra*, 157 U.S. Benson is entitled to the same non-biased equal access to the courts and protection of the law.

> *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001)) ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); *Ambati v. Reno*, 233 F.3d 1054, 1061 (7th Cir.2000) . . . Due process requires that an applicant receive a full and fair hearing which provides a meaningful opportunity to be heard. *Kerciku*, 314 F.3d at 917.
>
> *Capric,* 355 F.3d at 1087.
>
> The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.'
>
> *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

When both the District Court and the Panel failed to consider the seven issues raised by Benson, he was denied the right to be heard.

> Moreover, because the district court failed to consider Sang Woo Kim's arguments before entering the default judgment, we cannot say that the court exercised its discretion at all. Before we can review a discretionary ruling, we first must conclude that the court exercised its discretion in the first place by considering arguments relevant to its decision, *see United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir.2005), and we will find an abuse of discretion when the district court fails to do so, *see United States v. Roberson*, 474 F.3d 432, 436 (7th Cir.2007).
>
> *United States. v. Sang Woo Kim*, 242 Fed.Appx. 355, 358 (7th Cir. 2007).
>
> However, the Supreme Court has established that notwithstanding an individual's status, where he is vulnerable to being sued, he has the right to defend himself in the action brought against him; that the constitutional right to defend is inseparable from the liability to suit. *McVeigh v. United States*, 78 U.S. (11 Wall.) 259, 20 L.Ed. 80 (1870); *Hovey v. Elliott*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897).
>
> . . .

> A different result would be a blot upon our jurisprudence and civilization....
>
> *United States v. $40,877.59 in U.S. Currency*, 32 F.3d 1151, 1153-54 (7th Cir. 1994).

In a tax case in which the defendant did not file tax returns, this Court stated:

> The due process clause requires more than a runaround, and Kramer is entitled to one clear shot to show that he did not receive adequate process. The Commission has offered to file affidavits if we think the issue open; the better course, however, is to remand to the district court, so that it may take such evidence and make such findings as the evidence supports.
>
> *Kramer v. Jenkins*, 806 F.2d 140, 141 (7th Cir. 1986).

Benson, under the same reasoning, is entitled to "one clear shot" to have his evidence and arguments considered.

Due process consists of the opportunity to prove that charges leveled against a defendant are false. *Green v. Board of School Com'rs of City of Indianapolis*, 716 F.2d 1191, 1193 (7th Cir. 1983).

> The issuance of a preliminary injunction under such circumstances is contrary not only to the Rules of Civil Procedure but also to the spirit which imbues our judicial tribunals prohibiting decision without hearing. Rule 65(a) provides that no preliminary injunction shall be issued without notice to the adverse party. Notice implies an opportunity to be heard. Hearing requires trial of an issue or issues of fact. Trial of an issue of fact necessitates opportunity to present evidence and not by only one side to the controversy.
>
> ...
>
> If anything more was required to indicate with certainty that a preliminary injunction may not issue without giving the party sought to

> be enjoined an opportunity to present evidence on his behalf, it is furnished by the provisions of Rule 51(a) which requires the court, in all actions 'tried upon the facts without a jury' to state separately its conclusions of law and 'in granting or refusing interlocutory injunctions' similarly (to) set forth the findings of fact and conclusions of law which constitute the grounds of its action.' The conclusion is inescapable that since a district court is required by the rule to make findings of fact, the findings must be based on something more than a one-sided presentation of the evidence. Finding facts requires the exercise by an impartial tribunal of its function of weighing and appraising evidence offered, not by one party to the controversy alone, but by both. A helpful analogy is supplied by the Pennsylvania law. *See Varzaly v. Yuhasz*, 128 Pa.Super. 314, 318, 193 A. 63. It is appropriate to point out also that after evidence has been presented by both sides an opportunity must also be afforded to both sides to argue the effect of that evidence to the court. *Cf. Morgan v. United States*, 304 U.S. 1, 58 S.Ct. 773, 999, 82 L.Ed. 1129. Since Greene was not given the opportunity to present evidence on his behalf (and of course was not afforded the opportunity to argue it), the preliminary injunction should be set aside even if there were no other ground for doing so.
>
> *Sims v. Greene*, 161 F.2d 87, 88-89 (3rd Cir. 1947).

> Two interrelated rights of the defendants are critical to the case: fair notice and an effective opportunity to controvert the facts adduced in support of plaintiffs' motion. Rule 65(a) requires notice. It does not define what 'notice' must be. But we know that it implies a hearing. *Miami Beach Federal S. & L. Assn. v. Callander*, 256 F.2d 410 (5th Cir. 1958); *Hawkins v. Board of Control*, 253 F.2d 752 (5th Cir. 1958); *Sims v. Greene*, 161 F.2d 87 (3d Cir. 1947). 'Hearing requires a trial of (issues) of fact. Trial of (issues) of fact necessitates an opportunity to present evidence,' *Hawkins, supra*, at 753, and not by only one side to the controversy, *Sims, supra*.
>
> *Marshall Durbin Farms, Inc. v. National Farmers Organization, Inc.*, 446 F.2d 353, 356 (4th Cir. 1971).

"It goes without saying that the requirements of a fair hearing include notice of the claims of the opposing party and an opportunity to meet them. *Morgan v.*

United States, 1938, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129." *Federal Trade Com'n v. National Lead Co.*, 352 U.S. 419, 427 (1957). "The right to a hearing means the right to a meaningful hearing." *Gonzales v. United States*, 348 U.S. 407, 415 (1955). The right to a meaningful hearing embraces the right to present evidence and to have that evidence considered by the tribunal. *Morgan v. United States*, 304 U.S. 1, 19 (1938).

> Of course, at the subsequent hearing the IJ refused to consider Professor Levine's affidavit or testimony. This was a violation of Tadesse's right to present evidence on her own behalf, for an IJ may not bar whole chunks of material evidence favorable to the petitioner. *See Rodriguez Galicia v. Gonzales*, 422 F.3d 529, 538-40 (7th Cir.2005); *Niam v. Ashcroft*, 354 F.3d 652, 659-60 (7th Cir.2004); *Kerciku v. INS*, 314 F.3d 913, 918-19 (7th Cir.2003) (*per curiam*).
>
> *Tadesse v. Gonzales*, 492 F.3d 905, 911 (7th Cir. 2007).

Saunders v. Shaw, 244 U.S. 317, 318 (1917) was a suit for an injunction against the collection of a drainage tax. At the trial the plaintiff offered certain evidence; the defendant objected and the evidence was excluded as inadmissible under the pleadings. The defendant then put in testimony but objected to the plaintiff's opposing evidence on the ground the question was not open. In ruling on a writ of error, the Court reversed and remanded, stating it could not "be sure that the defendant's rights are protected without giving him a chance to put his evidence in."

In a similar tax case in which both lower courts failed to address a due process question, the Supreme Court held:

> The charge that the order made a classification denying due process and the equal protection of the law was a mixed question of law and fact, upon which the complainant had a right to be heard. Neither court passed on it. For this reason, if there was nothing else, the decree of the Circuit Court of Appeals would have to be reversed. *Lane v. Pueblo of Santa Rosa*, 249 U. S. 110, 114, 39 Sup. Ct. 185, 63 L. Ed. 504.
>
> *Wichita R. & Light Co. v. Public Utilities Commission of the State of Kan.*, 260 U.S. 48, 54-55 (1922).

CONCLUSION

At one time in history, high Church officials, after labeling Galileo a "heretic" and ignoring his facts, convicted him for daring to suggest the earth was not the center of the universe. The District Court and the Panel applied the same infamous procedure in this case by labeling Benson a "tax protester" and striking his facts, facts deemed false by official decree.

Benson cannot be found guilty of making a false statement by a court completely ignoring the facts that prove his statement is true. Nor can Benson be found guilty by directed verdict founded upon a government created irrebuttable presumption. The use of such procedure violates due process of law, and is "a blot upon our jurisprudence and civilization."

The right to express an opinion, without political censorship, is the essence of liberty. The First Amendment makes abundantly clear the government cannot encroach upon this cherished right. *See Grosjean v. American Press Co.*, 297 U.S. 233, 243 (1938). The Founding Fathers, well aware of historical abuses of governmental power, wrote the First and Fifth Amendments, and the

prohibition of bills of attainder, into our Constitution. These protections were specifically designed to keep the government from labeling a citizen a "tax protester," or any other name, and finding him guilty, without a trial, of unlawful conduct . Benson has an unalienable right to defend, and to present facts and argument in that defense.

Courts have a solemn duty to consider the evidence and base its ruling on the evidence in conformity with constitutional requirements.[3] That solemn duty was here violated. "Illegitimate and unconstitutional practices get their first footing...by silent approaches and slight deviations from legal modes of procedure." *Boyd v. United States*, 116 U.S. 616, 635 (1886). The Panel's opinion, through its deafening silence, approved the District Court's deviation from constitutional modes of procedure.

That the Panel's decision violates due process is clear. Whether it is the official policy of the Seventh Circuit that fundamental rights are no longer a part of American Jurisprudence is the question now presented for En Banc consideration.

/s/
JEFFREY A. DICKSTEIN
Attorney for Petitioner

3. "A central tenet of our republic–a characteristic that separates us from totalitarian regimes throughout the world–is that the government and private citizens resolve disputes on an equal playing field in the courts. When citizens face the government in the federal courts, the job of the judge is to apply the law, not to bolster the government's case." *Beaty v. United States*, 937 F.2d 288, 293 (6th Cir. 1991).

Certificate of Compliance with Page and Type Requirements

1. This brief complies with the page limitations of FED. R. APP. P. 35(b)(2) and 40(b) in that it does not exceed fifteen pages.

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect Version 14, Bookman Old Style typeface, 12 point size font in the main text, and 11 point size font in the footnotes.

Dated: May 5, 2009.

/s/
Jeffrey A. Dickstein
Attorney for Petitioner

Circuit Rule 31(e)(1) Certificate

IT IS HEREBY CERTIFIED than on May 5, 2009, a .pdf version of the Petition for Panel and En Banc Rehearing, generated from WordPerfect, was posted via the Internet to the Web site of the Seventh Circuit Court of Appeals and was e-mailed to counsel for the United States at the following address:

Richard.L.Parker@usdoj.gov
Andrea.R.Tebbets@usdoj.gov

/s/
Jeffrey A. Dickstein
Attorney for Petitioner

Proof of Service

IT IS HEREBY CERTIFIED that two copies of the Petition for Panel and En Banc Rehearing was placed in the United States Mail, postage prepaid, on May 5, 2009, addressed to counsel for the United States as follows:

Richard L. Parker
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Appellate Section
PO Box 502
Washington DC 20044

IT IS FURTHER HEREBY CERTIFIED than on May 5, 2009, a .pdf version of the foregoing, generated from WordPerfect, was e-mailed to the following address:

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/s/
Jeffrey A. Dickstein
Attorney for Petitioner