UNITED STATES OF AMERICA
THE DEPARTMENT OF THE TREASURY

DIRECTOR OF PROFESSIONAL RESPONSIBILITY,)
)
Complainant,)
)
v.) Complaint No. 2003-2
)
JOSEPH R. BANISTER,)
)
Respondent.)
______________________________________)

RESPONDENT'S BRIEF IN OPPOSITION TO
THE IRS'S MOTION FOR SUMMARY DISBARMENT

The respondent, Joseph R. Banister ("Banister"), by and through his attorneys, The Law Office of Robert G. Bernhoft, S.C., hereby opposes the IRS's motion for summary disbarment without discovery or a hearing. At the outset, the complaint should be dismissed. The IRS's newly-confessed concurrent civil and criminal proceedings against Banister require the dismissal or abatement of this administrative action, based on well-settled Fifth Amendment rights against self-incrimination and sound public policy.

Alternatively, summary disbarment is inappropriate where material disputed facts exist and the IRS is non-entitled to judgment as a matter of law. First, Banister has had no opportunity whatever to develop facts in support of his affirmative and special defenses, and on this count alone summary disbarment is therefore inappropriate. Second, the IRS has not met its evidentiary burden on each and every element on which it bears the burden of proof at this premature stage of the litigation. Furthermore, judgment for the IRS would violate Banister's First Amendment right to free speech and Fifth Amendment rights to due process of law and against self-incrimination. Finally, common

law equitable estoppel principles foreclose judgment for the IRS based on its own acts of omission and commission.

I. The Complaint should be Dismissed or Abated based on New IRS' Admissions that it is Conducting Simultaneous Civil and Criminal Proceedings Against Banister.

No administrative agency can constitutionally force a person to choose between self-incrimination and serious economic reprisal. *Baxter v. Palmigiano*, 425 U.S. 308 (1976). Indeed, an agency may only compel such testimony if the agency immunizes the declarant from subsequent criminal prosecution. *See id*. In this regard, parallel proceedings are "unobjectionable" only so long as there is no "substantial prejudice to the rights of the parties involved." *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368 (D.C.App. 1980). The *Dresser Court* also outlined under what circumstances civil proceedings must be stayed:

> Other than where there is specific evidence of agency bad faith or malicious government tactics, **the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter**. The noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand the rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case.

Dresser, at 1376 (emphasis added).

This disbarment action is exactly the "strongest case for deferring civil proceedings" identified in *Dresser*. *Id.* The IRS now admits a criminal investigation is underway with an open grand jury contemplating indicting Banister for the same conduct it alleges here. (*See* Complainant's Mot. for Summ. J., p. 46.) Forcing Banister to testify endangers Banister's Fifth Amendment rights, allowing the impermissible realization of

all the evils anticipated by the *Dresser Court* – undermining Banister's right not to speak, expanding the scope of criminal discovery beyond the rules of criminal procedure, exposing the basis of Banister's possible defense to the prosecution in a preview of a potential criminal trial, and otherwise prejudicing Banister's defense.

Compounding matters, the IRS never informed Banister of the pending criminal investigation and grand jury proceeding, although the IRS admits it knew about both and even conferred with criminal investigators in February of 2001, well before the IRS filed the complaint which commenced this action. Banister's pre-hearing exchange materials and contemplated hearing testimony also evidence the sort of agency bad faith and malicious tactics decried in *Dresser*.

The agency ambushed Banister by refusing to answer his questions regarding the scope and nature of federal income taxation during his IRS tenure as a special agent, coercing his resignation in lieu of the required response, and then waiting until after he made public statements it disliked to convene a concurrent criminal investigation, grand jury proceeding, and disbarment action. The agency's repeated violation of its own regulations in dealings with Banister reflects a deviation from the norm only explained by IRS bad faith. Finally, if knowledge of criminal investigations and grand jury proceedings during this civil action's pendency, surveillancing Banister's political conversations and public appearances, and demanding summary disbarment without either a hearing or discovery aren't "malicious" tactics, it is difficult to imagine what would be.

The "summons" law cited by IRS further supports Banister's argument for dismissal or, in the alternative, abatement of this disbarment action. The IRS cites *Donaldson v. United States*, 400 U.S. 517, 534 (1971), which discusses the many

problems of IRS concurrent civil and criminal investigations. *Donaldson* involved a civil administrative summons issued by IRS – a much less intrusive device than economic reprisal via disbarment; still, the court held that a summons could not be enforced if the IRS had referred the target's case to the Department of Justice for criminal prosecution.

Unlike *Donaldson*, the IRS is not merely "considering" a criminal referral regarding Banister; instead the IRS has actually made a criminal referral and presumably received authority from the Department of Justice to prosecute Banister criminally. With this background, the IRS now seeks summary disbarment and apparently hopes to force Banister to choose between forfeiting his livelihood and asserting his Fifth Amendment right against self-incrimination, in direct violation of *Donaldson* and its progeny. In fact, the Fifth Circuit condemned the very IRS practices involved here as the kind of "sneaky, deliberate deception" warranting the harshest sanctions against the agency. As the court held in *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977):

> '**Silence can only be equated with fraud** where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading.' . . . From the facts we find that the agent's **failure to apprise the appellant of the obvious criminal nature of this investigation was a sneaky deliberate deception by the agent** under the above standard and a **flagrant disregard for the appellant's rights.**

Id. (citing *United States v. Prudden*, 424 F.2d 1021, 1032 (5th Cir. 1970) (emphasis added).

Here, the IRS stood silent from February of 2001 until the eve of the hearing, never disclosing to Banister the private conferencing of the IRS agents with criminal investigators. Indeed, shockingly, the IRS admits they followed the guidance of the criminal investigators in initiating this proceeding. (*See* Complainant's Mot. for Summ. J., p. 46.) The IRS's silence under such circumstances works a fraud against Banister,

and as *Tweel* held, such unconscionable conduct reflects a "flagrant disregard" for Banister's rights, necessitating dismissal.

II. Summary Disbarment Should be Denied Because Material Facts are Disputed and the IRS is not Entitled to Judgment as a Matter of Law.

At the outset, the limited authority delegated to the IRS to disbar practitioners for their practice before the IRS requires notice of the allegations, an opportunity to comply, and a full hearing before stripping a practitioner of their economic livelihood. By necessary implication, such rules never authorize, nor could the rules authorize, summary disbarment without violating fundamental Fifth Amendment Due Process rights. It is well-settled that a respondent in an IRS disbarment proceeding is entitled to all requisites of elementary fairness, due notice, and opportunity to be heard. *See Washburn v. Shapiro*, 409 F. Supp 3 (S.D.Fla. 1976). A hearing necessarily entails the opportunity to confront evidence, present arguments, and be represented by counsel before an independent administrative law judge.

In short, the "opportunity for a proceeding" entails a complaint, the opportunity to answer the complaint, the right to seek and admit evidence, and the opportunity to be heard. The IRS filed a vague complaint which it amended on the eve of the hearing. The IRS now asks this court to summarily disbar Banister on that factually deficient complaint, without discovery and without a hearing. The IRS' motion for summary disbarment violates the regulations and the "elementary" requirements of Fifth Amendment due process mandated by the courts, and should therefore be denied.

Second, only "after adequate time for discovery" can summary judgment should be granted. See *Celotex*, 477 U.S. at 317. The IRS conveniently left out the "after adequate time for discovery" *Celotex* precondition to summary judgment – an omission

likely designed to protect the IRS's request to prohibit all discovery and exclude all of Banister's evidence from judicial consideration. (*See* Complainant's Mot. for Summ. J., pp. 8-9.) The IRS even argues that the main means of permissible discovery can only come at the hearing, but then perversely asks this court to deny Banister the very hearing to which it urges discovery should be confined. Even with full discovery, however, Banister's only opportunity to cross-examine witnesses and solicit testimony from the agency can come at the hearing. With an undeveloped record on the allegations of the agency, summary disbarment cannot be permitted without violating the rules and Banister's Fifth Amendment right to due process. Therefore, summary disbarment should not be granted.

Turning to the alternative analysis, summary judgment cannot be granted unless there are no material facts in dispute and the movant is entitled to judgment as a matter of law. *See Celotex Corp., v. Catrett*, 477 U.S. 317 (1986). When the party holding the burden on the issues moves for summary judgment, that party cannot rely on the mere pleadings, but must show the court from affirmative evidence that there is no "material" fact in dispute. *Celotex*, 477 U.S. at 317; *Jung v. FMC Corp.*, 755 F.2d 708 (9th Cir. 1985). A fact is material if it bears on the elements of the claim or the elements of a defense alleged by the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Furthermore, when the moving party has the burden of proof, summary judgment by assumption, inference and implication is not allowed. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); see also *Anderson, supra*. Thus, a court is not entitled to weigh the evidence and resolve disputed underlying factual issues." *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1161 (9th Cir. 1992) (citing *Morales v. Merit System*

Protection Bd., 932 F.2d 800, 803 (9th Cir. 1991)). Moreover, when the moving party holds the burden of proof on the issue, the movant must offer evidence sufficient to support a finding upon every element of its claim for relief, or the motion must be denied. *See Lockwood v. Wolf Corp.*, 629 F.2d 603, 611 (9th Cir. 1980).

Thus, a moving party with the burden of proof must affirmatively show the court, through evidence, not assumptions or assertions, that the most generous reading of the record in favor of the non-movant shows no possible fact in dispute as to a single element of any claim or defense in any part of the case. The IRS fails to meet that heavy burden. The IRS fails to even allege the requisite facts constituting the elements of the offenses charged, and hence cannot meet its burden of establishing the necessary foundation of undisputed facts as to each element of the offenses. In contrast, the undisputed facts show Banister's First and Fifth Amendment rights would be substantially violated by summary disbarment or any adverse action by the agency at this time. Similarly, those undisputed facts demonstrate that Banister is entitled to dismissal on grounds of equitable estoppel. Dismissal, therefore, not summary disbarment, is the appropriate action.

A. Material Facts in Dispute Preclude Summary Disbarment.

The IRS relies on inferences, assumptions, and appearances to supports its various claims on its motion for summary disbarment. What the IRS failed to do was allege the requisite facts and to provide an evidentiary basis for those facts as to each and every element of its claims. This reflects the IRS's own apparent misunderstanding of the elements of the offenses it charged. For example, while the IRS makes liberal use of the word "frivolous" throughout its summary judgment motion as to all of the regulation violations alleged, the word "frivolous" is used in only one section of the entire body of practice regulations; e.g., Section 10.34 regarding "frivolous" tax returns. Even there,

however, the practitioner enjoys a safe harbor from sanction as long as the tax return position was adequately disclosed to the IRS, was not the result of gross incompetence, and the client was informed of possible penalties. *See* 31 C.F.R. § 10.34.

Turning to the specific allegations, the IRS alleged in its original complaint that Banister violated three practice regulations in his practice before IRS; e.g., 31 C.F.R. §§ 10.22 (diligence as to accuracy), 10.34 (standards for tax return preparation position or advice), and 10.51 (disreputable conduct). Banister denied each of these allegations in his answer. (*See* Answer, ¶¶ 12-25.) But the IRS instituted this proceeding without according Banister an opportunity to achieve compliance as the regulations require:

> A proceeding will not be instituted under this section until…the proposed respondent…has been accorded opportunity to demonstrate or achieve compliance with all lawful requirements."

31 C.F.R. § 10.54 (2000).

This Fifth Amendment Due Process requirement derives from section 558 of the Administrative Procedures Act, and effectively insures a "second chance" to all practitioners before sanctions can issue. As the Ninth Circuit recently observed:

> **The statute requires written notice and an opportunity to demonstrate or achieve compliance, all 'before the institution of agency proceedings.' In this instance, the government did not follow the statutorily-mandated procedures.** The show cause letter stated that "permit action is warranted" and proposed 100 percent cancellation of the permit, requesting a response as to 'why this proposed permit action should not be taken.' Anchustegui was **entitled to written notice that would afford him the opportunity to correct deficiencies in his performance** under this permit. *See Air North America v. Dep't of Transp.*, 937 F.2d 1427, 1438 (9th Cir. 1991*)* ('the purpose of section 558 c is to provide individuals with an **opportunity to correct their transgressions before the termination or suspension of their licenses'**).

See Anchustegui v. Dep't of Agriculture, 257 F.3d 1124, 1129 (9th Cir. 2001) (some citations omitted) (emphasis added).

The undisputed fact is that the IRS never afforded Banister any such compliance opportunity. The undisputed fact is that Banister never raised any issue that the IRS advised him was frivolous, reckless, or grossly incompetent. Thus, this proceeding could not be instituted nor can it be maintained.

Regarding Section 10.22, the quality of Banister's "diligence" cannot be determined on this record because there is no evidence other than the complaint's allegations and Banister's denials. It bears noting, however, that the IRS attached Banister's "Investigating the Federal Income Tax: A Preliminary Report" to its original complaint, which report apparently resulted from several years of intensive investigation on Banister's part. If anything, the best evidence strongly suggests that Banister performed the requisite due diligence under Section 10.22 – a contention he expects the IRS to contest at the hearing.

Regarding Section 10.34, that regulation sets out detailed "safe harbor" criteria for a practitioner advising a client with respect to tax return positions or preparing or signing returns. *See* 31 C.F.R. § 10.34 (2000). In addition to denying the Section 10.34 allegations, Banister's "Statement of Facts" alleged that he had, in fact, performed the various safe harbor acts. (*See* Answer, ¶¶ 8, 10-11.) Furthermore, the IRS references just one single instance of filing one return on behalf of one client in its complaint against Banister. And Banister, following the rules, disclosed the details of the basis for the taxpayer's position to the IRS and disclosed the risk of penalty to his clients. *See id.* Moreover, the IRS points to no evidence that the so-called "861" return position was "patently improper," or that Banister's conduct in this regard was "willful, reckless, or a result of gross incompetence." 31 C.F.R. § 10.34(a)(4)(ii)(b).

Notably for this case, the IRS did not even issue a formal opinion on the "861" position until well over a year after Banister prepared Thompson's return. *See* IRS Notice 2001-40, Issued: June 6, 2001. But in an apparent attempt to resolve the question on summary judgment whether Banister's return position was "frivolous" (defined as "patently improper," whatever that means), "reckless, or a result of gross incompetence," the IRS contends that Banister could have relied on three U.S. Tax Court opinions: *Aiello v. CIR*, T.C. Memo. 1995-40; *Solomon v. CIR*, T.C. Memo. 1993-509; and *Crain v. CIR*, 737 F.2d 1417 (5th Cir. 1984).

In *Aiello*, the argument made by the pro se petitioner was "unclear" and appeared to involve a broad claim that no remuneration for labor could be taxed. *Id.* The Thompson return took no such position. In *Solomon*, another pro se litigant claimed citizens of Illinois were not citizens of the United States. Again, the Thompson return took no such position. Finally, the IRS citation to *Crain* is particularly curious, where Crain, another pro se litigant, claimed he wasn't subject to the jurisdiction of "the state" and failed to support a single assertion of his claim. *See Crain v. CIR*, 737 F.2d at 1417. In each of these cases, the arguments by the pro se litigants were either unclear or unsupported – hardly the sort of cases responsible tax practitioners even read, much less follow.

The IRS has not alleged that Thompson claimed he was not a citizen of the United States or not subject to the jurisdiction of the "state." To the contrary, Banister followed the IRS own recommended procedures in the return preparation, and Thompson filed his return with a detailed explanation of the return's position. No undisputed evidence supports a finding that the return Banister prepared for Thompson was willfully or recklessly frivolous, or the product of gross incompetence. Moreover, the tax code is

anything but clear; it is, as the IRS's own prior Commissioner acknowledged, "unintelligible," an "inexplicable maze," and "equally mysterious" to its own specially trained employees. *See* Former IRS Commissioner Shirley Peterson, Address at Southern Methodist University, April 14, 1993.

Finally with respect to the original complaint, the IRS alleged broadly that Banister engaged in disreputable conduct within the meaning of 31 C.F.R. § 10.51. Those allegations, however, are all grounded loosely on the allegations and minimal supporting facts IRS asserted regarding alleged violations of 31 C.F.R. §§ 10.22 and 10.34. And again, whether Banister "knowingly counseled" Coleman and Thompson "of an illegal plan to evade Federal taxes or the payment thereof" is a material fact in dispute, because Banister's state of mind cannot be known at this stage in the litigation. (*See* Compl., ¶ IV.B.)

Furthermore, the IRS complains of Frank Coleman's request for a due process hearing. Here, the IRS misapplies court pleading standards to a simple request for an administrative hearing before an executive agency enforcing income tax collection. Under 26 U.S.C § 7122, the IRS has the administrative authority to reduce the amount of a tax liability if the taxpayer presents evidence regarding doubt as to liability for the tax demanded by IRS. The statute does not limit those "doubt as to liability" arguments to court-approved assertions. In addition, the IRS's own manual makes clear that any opinion issued by any court other than the Supreme Court are not binding on the IRS. *See* IRM § 4.10.7.2.9.8.

Finally, the very court opinions cited by the IRS show that those courts recommended taking political issues like the alleged fraudulent ratification of the Sixteenth Amendment to the executive branch of government, contrary to the IRS's

claims on brief that numerous Court decisions "rejected" the factual claims and arguments concerning possible fraud in the Sixteenth Amendment ratification process. In fact, the only courts to address the issue of 16th Amendment ratification fraud raised by historians and others, including Banister, have held that issue to be a political question outside the jurisdiction of the courts and best addressed by other forums – such as the executive branch allegedly issuing the fraudulent ratification document in 1913. As the 9th Circuit opined on this important subject:

> Stahl's claim that ratification of the sixteenth amendment was fraudulently certified constitutes a political question because we could not undertake independent resolution of this issue without expressing lack of respect due coordinate branches of government.

United States v. Stahl, 792 F.2d 1438, 1440 (9th Cir. 1986).

Thus, the question of fraudulent ratification, which the Supreme Court has never addressed, was a "nonjusticiable, political question" whereby the Constitution itself reveals a "textually demonstrable" decision to commit the issue "to a coordinate political branch." *Stahl*, 792 F.2d at 1440. By so holding, the courts implicitly directed those concerned with this significant constitutional issue to seek review and remedy with coordinate political branches of government. This implicit advisement was made explicit by the very case cited by the IRS, *Miller v. United States*, 868 F.2d 236 (7th Cir. 1988). There, the court advised those concerned with the issue to "take their objections" to "a more appropriate forum" of which there were "many available." As this record stands, once the IRS apprised Banister in writing that the IRS considered itself an inappropriate forum for resolving this issue – even though the IRS is the agency of the very executive branch the courts held were the only ones who could constitutionally address the issue –

the IRS has provided no evidence that Banister ever raised the issue in any representation of a taxpayer again – and there is none.

The IRS's treatment of 16th Amendment ratification case law exemplifies the difficult circumstances practitioners face in representing taxpayers before the IRS. By the direct suggestion of the courts in the very case cited by the IRS, taxpayers with questions like ratification would be "well advised" to "take their objections" to a "more appropriate forum." *Id.* And that is precisely what the IRS alleged Banister did – exactly what the courts recommended. Importantly, the IRS admits Banister's political speech never incited anyone to imminent lawless conduct, (*see* Complainant's Opp'n to Resp't Mot. to Dismiss, p. 12), and Banister directed these important political concerns, at his client's request, to the very government forums recommended by court opinions the IRS now cites as authority against Banister.

And what forum would be more appropriate than the executive branch of government that issued the ratification proclamation, and what agency within that branch more appropriate than the agency charged with conducting collection due process tax hearings? Yet, the IRS's position is that when taxpayers heed the direct admonition of federal courts and bring such matters to the agency's attention, the IRS is justified in seeking disbarment against any taxpayer representative who dared utter these "dangerous" words – all in spite of the fact that the IRS never informed the practitioner that statutory collection hearings were an inappropriate forum to address or adjudicate the issue.

This reflects continuing IRS attempts to impose a pure negligence standard on Banister, when negligence is not the standard. Here, Banister disclosed every possible basis his client had to "doubt" his own liability, as recommended by the "offer in

compromise" process provided for by Congressional mandate. *See* 26 U.S.C § 7122. He submitted the issue for the agency to "resolve." (*See* Complaint and Attached Exhibits.) He asked for a hearing where the IRS could show his client how he was liable for the tax. *See id.* Whether these are bad acts constituting willful, reckless, or grossly incompetent disregard for the law is a material fact in dispute precluding summary disbarment.

Turning to the IRS's amended complaint, the IRS alleged that Banister violated 31 C.F.R. § 10.51(f) by failing to file allegedly required tax returns, and attached thereto were certain IRS transcripts. Although that regulation requires a specific finding of "willfulness," the IRS failed to plead that necessary element in its amended complaint. By agency admission, this element requires the IRS to prove that Banister is guilty of a "voluntary, intentional violation of a known legal duty." (*See* Complainant's Mot. for Sum. Judgment, p. 32.) The Supreme Court has recently clarified the required elements of such "willfulness."

> Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.

United States v. Cheek, 498 U.S. 192, 201 (1991).

Thus there are three separate elements to the offense: (1) the law imposed a duty on Banister to file a return for the years in question; (2) Banister knew that the law imposed a duty on him to file a return for the years in question; and (3) Banister voluntarily and intentionally violated his duty to file such return.[1] An element of the

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[1] Of note, the IRS failed to allege required elements two and three along with supporting facts in its amended complaint, one of the grounds upon which Banister moved for dismissal. Banister again requests dismissal of the complaint for failure to state a claim upon which relief can be granted. Axiomatic rules of civil and criminal

offense of willfulness is "awareness" of the duty at issue, and the Government cannot prove that element if the defendant had any good faith belief that he owed no such duty. *See id.* Moreover, the trier of fact must be "free to consider any admissible evidence from any source" to determine the credibility and sincerity of Banister's beliefs. *Id.* at 203.

Explicating this issue further in overturning the defendant's conviction of willful failure to file tax returns, the Court instructed that:

> [I]f Cheek asserted that he truly believed that the Internal Revenue Code did not purport to treat wages as income, and the jury believed him, the Government would not have carried its burden to prove willfulness, however unreasonable a court might deem such a belief. Of course, in deciding whether to credit Cheek's good-faith belief claim, the jury would be free to consider any admissible evidence from any source. We thus disagree with the Court of Appeals' requirement that a claimed good-faith belief must be objectively reasonable if it is to be considered as possibly negating the Government's evidence purporting to show a defendant's awareness of the legal duty at issue. Knowledge and belief are characteristically questions for the factfinder, in this case the jury. Characterizing a particular belief as not objectively reasonable transforms the inquiry into a legal one and would prevent the jury from considering it…it is not contrary to common sense, let alone impossible, for a defendant to be ignorant of his duty based on an irrational belief that he has no duty.

Id. at 203.

Significantly, the Court held that even if the defendant's belief was "irrational," it would defeat the Government's claim as long as the belief was sincerely held. In this case, the IRS never alleged Banister knew of any duty to file tax returns, much less willfully disregarded it. To the contrary, the sparse evidence that does exist on this record reflects Banister's good faith belief regarding the scope and nature of federal income taxation.

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procedure, applicable in all courts, require that a complainant plead all necessary elements or suffer dismissal of the claim, count, or cause of action.

Banister was open and honest. He didn't hide his client's political opinions nor his own. He followed the proper process as outlined by the statute. He outlined his client's personal reasons for questioning his liability for the tax, as required by the statute. He asked the agency to "resolve" his client's tax issue. Indeed, the very authority the IRS cites recommended that people like Banister's clients take their concerns to the appropriate forum, like the administrative agency congressionally authorized to address taxpayer's concerns about their tax liability.

The IRS now calls this behavior disreputable. The IRS interprets its' scope of authority as investing the agency with an inquisitorial power over anyone who was ever a "practitioner" before the IRS even when the practitioner's conduct falls outside the scope of the rules. The only "disreputable" conduct under such circumstances is the conduct of the IRS. Given the IRS's inability to allege requisite elemental facts and the existence of multiple material facts in dispute, summary disbarment should not be granted.

B. The First Amendment Requires Dismissal, Not Summary Disbarment

As a seminal case cited even by the IRS, states, "[i]t is not the purpose of the law to penalize frank difference of opinion." *Spies v. United States*, 317 U.S. 492, 496 (1943). Yet, that is exactly that the IRS seeks to do here. A practitioner risks malpractice if he fails to raise an issue never directly litigated by the Supreme Court. However, if the practitioner offends the political sensibilities of the IRS, the practitioner risks disbarment. The IRS wants to chill advocacy it dislikes and punish speech it disfavors.

Banister contended by affirmative defense that the IRS is attempting to impermissibly punish him for exercising First Amendment rights to free speech. (*See* Answer, ¶ 26(c); Answer to Am. Compl., ¶ 8(c).) Banister's prior history – including his agency record of achievement and leadership, his concerns over agency procedures he

believed unconstitutional, and the agency's sudden decision to demand Banister's resignation after he requested answers to his legitimate concerns – directly relate to the issues of a First Amendment violation and impermissible retaliation defense Banister has a right to present.

The IRS itself does not hide its effort to prosecute Banister for purely political beliefs and private conduct. The IRS, in its own pleadings and exhibits, references Banister's political publications to form the basis of their complaint. Indeed, the IRS concedes it surveillances Banister's talk radio appearances and started its investigation of Banister's purely private conduct based on these political appearances. (*See* Complainant's Opp'n to Resp't Mot. for Discovery, p. 6.) The IRS offers no explanation why one of their lead trial attorneys monitors the political appearances of a former Criminal Investigation Division special agent.

Furthermore, the IRS, through its pre-hearing exchange materials, wishes to introduce evidence of Banister's political commentary in this proceeding to disbar him, including his political texts, statements on talk radio, and a Sixty Minutes. Finally, Banister's prior employment with the IRS and status as a whistleblower triggered this proceeding to disbar him, and alleged the defense of impermissible retaliation for First Amendment speech in his Answer.

Therefore, this case implicates powerful First Amendment rights and the public interest in protecting political speech. Banister exercised this right to unimpeded political speech, and is targeted for punishment because of the political context and implications of that speech. The IRS's attempt to bar Banister from practicing before the agency is subject to special scrutiny by the judiciary. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Banister's private life and political positions is wholly separate from his

mere advocacy before the agency, and his actions did not, as admitted by the Agency, constitute incitement to imminent lawless action as admitted by the Complainant. (*See* Complainant's Opp'n to Resp't Mot. to Dismiss, p. 12.)

It is startling that the Complainant would bring an action of the instant type and cite cases such as *Brandenburg v. Ohio*, 395 U.S. 444 (1969) to support their position. There, the Court overturned its improvident holding of *Whitney v. California*, 274 U.S. 357 (1927), observing in the process that the *Whitney* court had simply permitted the sanction of "ideas which the majority of the Court deemed unsound and dangerous." *Brandenburg*, 395 U.S. at 447. Overturning decades of already thoroughly discredited law, the Court articulated a new standard for measuring protected speech and conduct, striking down the Ohio Criminal Syndicalism Act on grounds it was facially unconstitutional under the First Amendment:

> "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

Id., at 447.

The Act criminalized advocating, among others things, teaching the duty of violence to accomplish political reform. *Id*., at 448. A Ku Klux Klan leader was convicted under the Act for telling a crowd, in so many words, that they must kill "Niggers" and "Jews" to restore the country. *Id*., at 445-47.

Examining the instant case in *Brandenburg's* light, Banister's private life and political positions are clearly protected speech. All the statements on talk radio, on Sixty Minutes, and in the political writings provided by IRS in its pre-hearing exchange materials, constitute political speech. On behalf of his clients, Banister followed the

proper process and petitioned the Internal Revenue Service to settle certain tax matters on behalf of his clients. He requested a Collection Due Process Hearing, a hearing the IRS never let happen. (*See* IRS Pre-Hearing Exchange Materials.)

Moreover, other circuits also reject government attempts at abridging protected speech, particularly in the tax area, as evidenced by a thoughtful Ninth Circuit decision. In *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), the defendants were charged criminally under 26 U.S.C. § 7206 for promoting a tax avoidance trust scheme, and were convicted in the district court below. See *id*. The appeals court, however, overturned their convictions on First Amendment grounds:

> Nothing in the record indicates that the advocacy practiced by these defendants contemplated imminent lawless action. Not even national security can justify criminalizing speech unless it fits within this narrow category; certainly concern with protecting the public fisc, however laudable, can justify no more.

Id. at 1428.

Significantly, the *Brandenburg* test does not rise and fall on the actions of listeners, but on the actual conduct of the speaker:

> Even if the defendants knew that a taxpayer who actually performed the actions they advocated would be acting illegally, the first amendment would require a further inquiry before a criminal penalty could be enforced. With the exception of Durst, no defendant actually assisted in the preparation of any individual tax return. Rather, they merely instructed an audience on how to set up a particular tax shelter.

Id. at 1428 (citing *Brandenburg*, 395 U.S. at 444).

If the First Amendment protected Dahlstrom and his co-defendants, who actually advocated aggressive participation in a tax avoidance scheme which they knew could result in criminal and civil penalties against investors, then Banister's mere advocacy of several client asking nothing more than a hearing must be protected from government

attempts to silence his political speech. As Justice Douglas eloquently expressed in his *Brandenburg* concurrence:

> The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts. The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded movie theatre. This is, however, a classic case where speech is brigaded with action . . . . Apart from [those types of] rare instances **speech is, I think, immune from prosecution.** Certainly there is no constitutional line between advocacy of abstract ideas as in Yates and advocacy of political action as in Scales. **The quality of advocacy turns on the depth of the conviction; and government has no power to invade that sanctuary of belief and conscience.**

Brandenburg, 395 U.S. at 456 (citations omitted) (emphasis added).

As the IRS admits, Banister's actions did not intend to incite imminent lawless action. (*See* Complainant's Opp'n to Resp't Mot. to Dismiss, p. 12.) Indeed, if the government cannot proscribe the publication of books that teach how to build bombs or recommend racist death threats against whole groups of people, then Banister's whistle-blowing activities and his public reports on those activities must warrant protection from Government intrusion. In the same vein, Banister's mere petitioning the IRS for an administrative tax collection hearing on behalf of a client with a tax problem must be equally protected speech.

C. Estoppel And Equity Require Dismissal, Not Summary Disbarment.

This particular case emphasizes the relevance of any reliance defense, including reliance on the conduct of another professional or the agency involved. Here, Banister alleged that the IRS was estopped from proceeding against him by virtue of IRS acts of omission and commission. In addition to supporting his estoppel defense, though, reliance on agency conduct also negates the requisite willfulness element of the offenses charged. Willfulness is a required element for any violation of a Treasury Circular 230

regulation where the IRS fails to afford the target an opportunity to comply, and this required element is a disputed material fact which precludes summary disbarment on any of the claims submitted by IRS.

Repeatedly, courts hold that evidence relating to a defendant's reliance upon representations made by government officials, whether judges or executive department officers and agents, are a defense to government sanctions. In *Moser v. United States*, 341 U.S. 41 (1951), the Court held that reliance on government conduct could constitute a defense to actions taken by the government. These decisions are buttressed by others such as *Raley v. Ohio*, 360 U.S. 423 (1959), *Cox v. Louisiana*, 379 U.S. 559 (1965), *United States v. Laub*, 385 U.S. 475 (1967), and *United States v. Penn. Industrial Chemical Corp.*, 411 U.S. 655 (1973).

This circuit in which Banister resides, and would be the appellate court reviewing any agency action in this matter, also addressed this issue. In *United States v. Tallmadge*, 829 F.2d 767, 775 (9th Cir. 1987), the defendant was being prosecuted for possessing firearms after conviction for a felony. In defense, Tallmadge demonstrated that a licensed arms dealer, held to be a government agent, represented to him that it was lawful for him to acquire firearms. Because Tallmadge relied upon the word of this government agent, that court held that it would violate due process to convict him:

> The prosecution and conviction of Tallmadge for the receipt and possession of firearms, after he was **misled by the government agent** who sold him the weapons into believing that his conduct would not be contrary to federal law, violated due process.

Tallmadge, 829 F.2d at 775; *see also United States v. Albertini*, 830 F.2d 985 (9th Cir. 1987).

In *United States v. Clegg*, 846 F.2d 1221 (9th Cir. 1988), the defendant was charged with arms smuggling in Pakistan and sought to defend himself with the factual

defense that high government officials approved his activities. While such conduct was clearly illicit under the laws, the court held that the defendant's reliance on government officials constituted a valid defense. State courts also acknowledge this defense. In *Schiff v. People*, 141 P.2d 892 (1943), the defendant received stolen property and informed the police about it, who instructed him to simply retain possession. Later, the state charged him with possessing stolen property. Though he knew the property was stolen and possessed it, the court reversed his conviction for possessing stolen property based on his reliance on the government.

Similarly, in *People v. Markowitz*, 223 N.E.2d 572 (1966), public officials led a defendant to believe that he did not need a license to sell merchandise at Yankee Stadium. Despite his lack of a license, the court vacated his conviction due to his reliance on government officials. Again, in *State v. Ragland*, 233 A.2d 698 (1967), the court vacated a conviction of a defendant for driving without a license based merely upon the fact that he drove a car on the occasion at the request of police officers.

Merely misinterpreting government forms or government practices properly provides a reliance defense to government sanction. In *Connelly v. State*, 351 S.E.2d 702 (1987), a defendant who had relied upon a misleading driver's license form had his conviction for driving offenses reversed. In *State v. Chiles*, 569 So.2d 45 (La.App. 4 Cir. 1990), a pawn shop owner who relied upon the practices of the local sheriff's office had her conviction for failure to abide by record keeping laws reversed.

Finally, silence alone provides a reliance defense whenever such silence would mislead another intentionally or wherever there is either a legal or moral duty to speak. As the court held in *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977):

> **'Silence can only be equated with fraud** where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading' . . . From the facts we find that the agent's **failure to apprise the appellant of the obvious criminal nature of this investigation was a sneaky deliberate deception by the agent** under the above standard and a **flagrant disregard for the appellant's rights.**

Id. (citing *United States v. Prudden*, 424 F.2d 1021, 1032 (5th Cir. 1970).

Hence, whenever an unanswered inquiry would intentionally mislead someone, the law and morality impose a duty to answer. The IRS never corrected any statement Banister made, never answered any questions Banister asked, and never afforded Banister a simple opportunity to achieve compliance. Consequently, the IRS is estopped from proceeding against Banister on the very issues it refused to provide answers on.

Banister and his client followed the rules, petitioned an administrative body for redress, and honestly expressed their beliefs. And, again, the IRS answer was a conspiracy of silence, a deafening scream to ordinary Americans with simple requests. As *Tweel* held, such silence equals fraud. For all these reasons, summary disbarment should not be granted.

CONCLUSION

With Fifth Amendment violations, First Amendment concerns, and multiple material fact issues in dispute as to both the elements of the offense and Banister's defenses, Banister should not be summarily disbarred. The IRS has moved to summarily disbar their former whistleblower, Banister, without answering the questions he asked of them, without affording him an opportunity to achieve compliance with the rules prior to initiating the proceeding, without alleging the requisite facts that constitute the offense, without informing him he was under a parallel criminal investigation, without affording him any discovery, without permitting him to even "argue" as to the merits of the

statements IRS seeks disbarment for, and without even affording him a hearing. Any one of these circumstances demands denial of the IRS motion for summary disbarment; their aggregation necessitates dismissal or abatement of this entire proceeding.

Respectfully submitted this 17th day of November, 2003.

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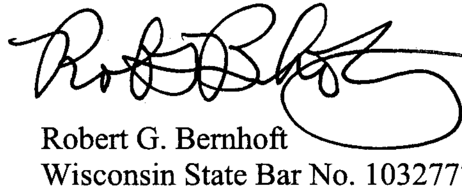
By: 
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UNITED STATES OF AMERICA
THE DEPARTMENT OF THE TREASURY

DIRECTOR OF PROFESSIONAL RESPONSIBILITY,	)	
Complainant,	)	
v.	)	Complaint No. 2003-2
JOSEPH R. BANISTER,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that true and correct copies of the foregoing "Respondent's Brief in Opposition to the IRS's Motion for Summary Disbarment" and "Certificate of Service" were served on counsel for the Director of Professional Responsibility, by both courtesy facsimile transmission on this very date and by placing the same in the custody of Federal Express, a next-day delivery service courier, on November 18, 2003, addressed as follows:

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