No. 12-16775

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLIFFORD JOHNSON
Plaintiff - Appellant

v.

UNITED STATES DEPARTMENT OF THE TREASURY
and TIMOTHY F. GEITHNER
Defendants - Appellees

On Appeal from the United States District Court
for the Northern District of California

Hon. William H. Alsup

BRIEF OF APPELLANT CLIFFORD JOHNSON

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ABBREVIATIONS

APA = Administrative Procedures Act

complaint = the current First Amended Complaint for Declaratory Relief (the original complaint was not served)

ER M n = Excerpts of Record, Volume M page n

GAO = Government Accountability Office

Treasury = Department of the Treasury *and* the Secretary of the Treasury acting officially (Geithner's successor, per FRCP Rule 25(d))

I. JURISDICTIONAL STATEMENT

A. JURISDICTION OF THE DISTRICT COURT

The complaint seeks a declaration to mitigate the impairment of Johnson's First Amendment right to petition, by abusive government speech. Jurisdiction arises under 5 U.S.C. § 702 (Administrative Procedures Act), and 28 U.S.C. §§ 1331, 2201 (federal question; Declaratory Judgment Act).

B. JURISDICTION OF THE COURT OF APPEALS

The rulings appealed from granted a motion to dismiss brought under Fed. R. Civ. P. Rules 12(b)(1) and 12(b)(6), for lack of standing and failure to state a claim. The court of appeals has jurisdiction under 28 U.S.C. § 1291.

C. FINALITY AND TIMELINESS

Under Fed. R. App. P. 4(a)(1)(B) (United States a party), by the Notice of Appeal filed August 13, 2012 (ER II 84), appeal was timely taken from the Judgment and from the Order Granting Defendants' Motion To Dismiss First Amended Complaint And Vacating Hearing (ER I 12-15), filed June 14, 2012.

The Amended Notice of Appeal (ER II 1), filed November 23, 2012, also appealed from the Order Denying Plaintiff's Motion To Alter Or Amend The Judgment, entered October 24, 2012 (ER I 1). It was timely pursuant to Fed. R. App. P. 4(a)(4) and the Order herein, filed August 13, 2012. ER I 10-11.

II. ISSUES PRESENTED

A. STANDARDS AND SCOPE OF REVIEW

As *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1156 (9th Cir. 2007) held:

> We review *de novo* dismissals under Rules 12(b)(1) and 12(b)(6) … [and where] no evidentiary hearing has been held, "all facts (alleged in the complaint) are presumed to be true." [Citations.] District court decisions "about the propriety of hearing declaratory relief actions [are] reviewed for abuse of discretion." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289-90 (1995).

Herein, the District Court exercised no such discretion, the dismissal being for lack of subject matter jurisdiction, under Rules 12(b)(1) and 12(b)(6).

If this court finds subject matter jurisdiction de novo, then it should remand the action for the district court to exercise "discretion in the first instance, because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within [its] grasp." *Wilton*, *supra*, at 289.

Also, under 28 U.S.C. § 2106, "because of the firmly expressed views of the assigned district judge," on Johnson's request this court should "direct that, on remand, the case be reassigned to new judge." *Rhoades, supra*, at 1165-1166.

B. LIMITS TO GOVERNMENT SPEECH EXEMPTIONS ARE AT ISSUE

On its face, the complaint particularly raises the following four questions of constitutional doctrine, apparently as matters of first impression.

Are authoritative Treasury misrepresentations of categorical and financial fact exempted as government speech against First Amendment declaratory APA claims, even when designed to suppress a plaintiff's viewpoint?

If so, are such misrepresentations exempted even when:

(i) they are repugnant to the constitution's money powers clauses;

(ii) they are repugnant to the constitution's taxing powers clauses; *and/or*

(iii) they manifest prima facie capture (a form of government identity theft)?

III. STATEMENT OF THE CASE

A. THE NATURE AND SUBSTANCE OF THE CASE

The First Amended Complaint For Declaratory Relief states a First Amendment claim against the Treasury, by particularly alleging the official and authoritative publication of misrepresentations of categorical and financial fact, designed to impair and in fact impairing all petitions for new issues of United States (versus Federal Reserve) currency, including Johnson's petitions. Based on the misrepresentations, four "Government Speech Disqualifications" are alleged, captioned: "Viewpoint Coercion"; "Independent Unconstitutionality: Tax Power"; "Independent Unconstitutionality: Fiat Money Power"; and "Prima Facie Capture." Complaint ¶ 11; ER III 77-78.

To mitigate this impairment of his right to petition, Johnson seeks findings of misrepresentation; and also of unconstitutionality and prima facie capture.

B. PROCEDURAL HISTORY

On February 29, 2012, Johnson filed the First Amended Complaint For Declaratory Relief, sua sponte amending the unserved original complaint to add special circumstances re government speech (paragraph 11). At the April 26, 2012 Case Management Conference, the district court conducted an impromptu hearing, ending it when the Treasury volunteered to file a motion to dismiss. ER I 18-20.

After full briefing, on June 14, 2012 the district court filed the Judgment and Order Granting Defendants' Motion To Dismiss First Amended Complaint And Vacating Hearing. ER I 12, 13-15. The Judgment stated (bold caps in orig.):

> **FINAL JUDGMENT IS HEREBY ENTERED** in favor of defendants and against plaintiff. The Clerk **SHALL CLOSE THE FILE**.

Respectful of the closure, Johnson posted a letter to the court, dated June 23, 2012, titled "Objection to Judgment, insofar as it closes the trial court record," which he asked the court to add to the otherwise closed file. The letter objected to the loss of the opportunity to file a post-judgment motion, such as a motion to clarify issues. The court filed this letter on June 28, 2012. ER II 85.

On August 13, 2012 Johnson filed the Notice of Appeal. ER II 84. The same day, the court of appeal filed an Order holding the appeal in abeyance, pending a ruling on said letter, which it deemed a timely post-judgment motion. ER I 10-11.

After two further objections,[1] Johnson obtained the clarification sought, by the Order Denying Plaintiff's Motion To Alter Or Amend The Judgment And Vacating Hearing, filed October 24, 2012. ER I 1-4. The Amended Notice of Appeal, filed November 23, 2012, appealed from this order also. ER II 1.

C. THE DISMISSAL UNDER RULES 12(B)(1) AND 12(B)(6)

In its June 14, 2012 order, the district court's leading and only non-conclusory reason for dismissal was the government speech "limitless-bully-pulpit" rationale, quoted at 13 below. The October 24, 2012 order clarified that limitlessness really was intended, thereby confirming that its rationale indeed embraced misrepresentations and concomitant unconstitutional conduct. The order also clarified that this was not an *immunity* rationale. In particular (ER I 3-4):

> The dismissal order found [a failure] to state a cognizable claim under the First Amendment and that plaintiff lacked standing to pursue his claim because it was based on a "generalized grievance no different from every citizen's interest in the proper application of the Constitution" (Dkt. No. 43) …
> *First*, plaintiff lacks standing … as the dismissal order found neither an injury in fact nor a causal connection between the defendants' conduct and [Johnson's] petitions. Furthermore, the dismissal order found that plaintiff's assertion that a favorable judicial decision would redress his injury was purely conjectural. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

[1] On September 4, 2012, the trial court set a briefing schedule without an opening brief. ER I 8-9. On September 7, 2012, an ECF notice of error issued, which did not fix this. ER I 10. Respectful of the file closure, Johnson posted letters to the court dated September 6 and 9, 2012, which the court filed on September 10 and 13, 2012, protesting the omission of an opening brief. ER II 82-83. On September 17, 2012, the district court filed an Order Re Johnson's Letters, allowing an opening brief. ER I 5-6.

> *Second*, the complaint was also dismissed on its merits. The issue of government speech immunity was not reached. According to the dismissal order, the complaint alleged a "remarkable proposition" with no support in the law (Dkt. No. 43).

Johnson's "remarkable proposition" is that the government can be sued under the First Amendment by an advocate whose viewpoint is intentionally suppressed by authoritatively published misrepresentations of categorical and financial fact. Although touted as "on the merits," Johnson construes the court's above "second" ground for dismissal as a second finding of a failure to state a cognizable claim. In his eyes, a ruling on the merits would decide whether the Treasury statements are misrepresentations, and/or independently violate the constitution, and/or manifest prima facie capture.

Lujan is the only material authority cited in the district court's rulings.[2] *Lujan* has nothing to do with government speech doctrine, misrepresentations, or the First Amendment, and is cited only as an authority for standing's three requirements, namely, injury in fact, causation, and remedial likelihood.

[2] The court cited four other authorities, all procedural, as follows. The Order Setting Briefing Schedule On Plaintiff's Motion To Alter Or Amend A Judgment, filed September 9, 2012, stated: "The Court construes this [June 28] letter as a motion to alter or amend judgment pursuant to FRCP 59(e)" -- rather than as a rule 52(b) motion for clarification. ER I 8. Johnson respectfully followed the court's construction, but in its Order Denying Plaintiff's Motion To Alter Or Amend The Judgment And Vacating Hearing, the court firmly overruled itself, holding that the letter could not be construed as a rule 59(e) motion, and citing said four other authorities in support. ER I 2-3. Except to show Johnson's procedural competence, this catch-22 ruling is immaterial, for the court nevertheless went on to provide the clarification sought.

IV. STATEMENT OF FACTS[3]

A. THE FACTUAL ALLEGATIONS AND RELIEF SOUGHT

Paragraph 5 of the complaint alleges that Johnson is an advocate for new and experimental issues of United States (versus Federal Reserve) currency. Three petitions are alleged,[4] namely (ER III 74; see also Exhibits A-C, ER III 80-83):

> (i) to the so-called deficit "Supercommittee," urging that a few hundred billion dollars of automatic Social Security payments be made with true United States notes [], thus retiring that debt, instead of rolling it over at reset rates of compounding interest, with dealer fees et alia added. ...
>
> (ii) [to the President, Senate, and House, given that a]ll cash (paper notes and coins) is now issued mechanically, to meet demand, [urging] that all paper money forthwith issue as United States notes [which] in 2011 alone would have reduced the debt held by the public by more than $250 billion.
>
> (iii) [to the committee considering] bill S. 2049 [which would] replace all Federal Reserve $1 notes with United States $1 coins [urging adoption] based on the $58 billion taxpayer savings.

Paragraph 6 of the complaint alleges the matter-of-accounting-fact basis for Johnson's dollar sums, stating that, when today's money is issued, it "extracts for the issuer a 'seigniorage' tax equal to its face value," and that by "issuing all of the

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[3] Because the district court and Treasury purported to pin procedural improprieties on Johnson, he includes otherwise distracting excerpts of the record, not addressed below, to show procedural competence, as a discretionary consideration. Re the necessity and success of Johnson's post-judgment motion, by what the district court disparaged as an "improper" "barrage of letters," see the previous footnote, ER I 5, and ER II 11-13, 29. Re an invalid claim of tardy service by the Treasury, see ER III 1-8.

[4] These allegations would be updated on remand, e.g. to add a petition re Senate bill S. 94, introduced Jan. 23, 2013, "to terminate the $1 presidential coin program."

nation's [non-coin] money, the Federal Reserve, which is owned by private member banks, now garnishes almost all of [this] tax." ER III 74-75. Note well that only the tax power contention in paragraph 11(ii) (which is severable) depends on whether such seigniorage accruals constitutionally operate as a "tax."

Paragraph 7 alleges "Categorical Misrepresentation," as follows (ER III 75):

> [T]he Treasury … conceals the great financial benefit that would promptly revert to the government by issuing true United States notes. … [I]ts website … thrice dismiss[es] United States notes as obsolete [] by the following categorical falsehood:
>
> > United States Notes serve no function that is not already adequately served by Federal Reserve Notes.
>
> In fact, only United States notes adequately serve the functions of: **(a)** large, direct, prompt debt reduction; **(b)** interest-free financing; **(c)** exact economic tailoring; and **(d)** pay-as-you-go, collection-free, flat-tax funding. In particular, Federal Reserve notes cannot serve the function that United States notes serve in Johnson's petitions, of painlessly reducing the national debt held by the public.

Paragraph 8 alleges "Financial Misrepresentations," stating how, to maintain this deception, the Treasury since 1990 has fostered a continuing series of GAO reports that *vastly* underestimate the seigniorage that would *automatically* accrue to the government, were all Federal Reserve $1 notes to be replaced with United States $1 coins. In particular, for the coin and bill issuing and retirement schedules given in *U.S. COINS: Replacing the $1 Note with a $1 Coin Would Provide a Financial Benefit to the Government*, GAO-11-281 (2011) (ER III 76, emphasis in orig.):

> [T]he 2011 GAO report estimates initial *losses* for four years [], and a net benefit after 30 years of only $5.6 billion, if that. In fact, [] the government would also benefit from: **(a)** an early *gain* of $13.75 billion [], from replacing the present 9.5 billion dollar bills with 150% as many coins; **(b)** a further gain in excess of $30 billion from coins added over the 30 years; and **(c)** a further $14.5 billion gain from 81.5% of the interest relief per note replaced by a coin. Hence, the net government benefit after 30 years would exceed $58 billion.

Excerpts of the 2011 GAO report are at ER III 40-45. Exhibit D to the complaint is a complicit Treasury letter, contained in the report. ER III 76, 84.

Paragraph 9 alleges the authoritative nature of the misrepresentations, and that they impair Johnson's petitions. ER III 76. Paragraph 10 affirms the refusal of the Treasury to correct them. ER III 77. Exhibit C exemplifies how press and Congress, both for and against Senate bill S. 2049, automatically adopt the GAO's fraudulent estimates, despite Johnson's objective objections. ER III 74, 83.

For a remedy, Johnson first and foremost prays that the court declare the misrepresentations false, which would per se mitigate the monopolistic impairment of his petitions for debt-reducing new issues of United States currency.

Johnson also seeks declarations of concomitant unconstitutionality and of prima facie capture, based on said misrepresentations. First alleged as government speech disqualifications, these declarations would add apt literal and legal thrust to Johnson's petitions. ER III 78.

B. THE ALLEGED GOVERNMENT SPEECH EXEMPTION LIMITS

Under the APA, the complaint states a classic First Amendment claim, against abusive government speech.[5] The prerequisite finality of the Treasury's actions is alleged in paragraph 10, per its refusals to correct that speech. ER III 77.

As argued below, regular government speech doctrine presumptively exempts the Treasury from First Amendment claims. To rebut this, paragraph 11 alleges four sets of exceptional circumstances, severally and jointly.

First and foremost, "***(i) Viewpoint Coercion***," states that the authoritative publication of categorical and financial falsehoods designed to suppress Johnson's viewpoint *per se* forfeits the government speech exemptions (ER III 77).

If this court so holds, then the independent unconstitutionality and prima facie capture allegations need not be reached until trial, per the declaratory prayer. Unargued below, here are their core allegations (ER III 77-78; emphasis in orig.):

> ***(ii) Independent Unconstitutionality: Tax Power.*** [M]andated or mechanical [Federal Reserve] currency issues … violate[] the constitution's mandate that taxes only be raised "to pay the Debts and provide for the common Defence and *general* Welfare of the United States." U.S. Const., Art. I, Sec. 8. Said falsehoods [impermissibly] perpetuate a vast face value seigniorage tax for the welfare of the private banks that own the Federal Reserve.

[5] The complaint inadvertently failed to cite the APA. Neither the Treasury nor the district court noticed this defect, and it would have been futile for Johnson to have moved for leave to correct it, since the dismissal was on grounds it could not cure. (Sovereign immunity was expressly not reached; see page 6.) Accordingly, per 28 U.S.C. § 1653, on the ground that the extant facts establish jurisdiction under the APA, Johnson moves for an order that the complaint be amended *nunc pro tunc* and/or on remand, so as to cite the APA. *Snell v. Cleveland, Inc.*, 316 F.3d 822, 828 (9th Cir., 2002).

> ***(iii) Independent Unconstitutionality: Fiat Money Power.*** … Said falsehoods impermissibly suppress the use of public notes as far as they can be safe and proper... U.S. Const., Art. I, Sec. 8, Cl. 4, 11. [Citations.]
>
> ***(iv) Prima Facie Capture.*** Said falsehoods … hijack[] the government, as in the 2011 GAO report's rationale, which brazenly asserts that the Federal Reserve *is* the government...

C. THE PARTIES' ARGUMENTS IN THE MOTION TO DISMISS

In non-conclusory part, the Treasury's motion to dismiss argued the government speech immunity doctrine, as follows (ER III 65-66):

> [T]he First Amendment restricts government regulation of private speech, not government speech. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). The statements on Treasury's website and in Treasury's letters of comment are Government speech. "[T]he Government's own speech … is exempt from First Amendment scrutiny." *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 553 (2005). "A Government entity has the right to 'speak for itself'" and "is entitled to say what it wishes … and to select the views that it wants to express." *Pleasant Grove City*, 555 U.S. at 467-68. "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." *Id.* at 468. Thus, Plaintiff has no legally recognized First Amendment claim against Defendants.

Johnson's opposition pointed out that the complaint particularly alleged four exceptions to this government speech doctrine, all based on misrepresentations of categorical and financial fact; and that the Treasury had neither mentioned that misrepresentations were at issue, nor cited any authority re misrepresentations.

Johnson cited articles that persuasively proposed just such limits to the government speech doctrine, as ripe matters of first impression, namely: *Deception And The First Amendment: A Central, Complex, And Somewhat Curious Relationship*, 53 UCLA L. Rev. 1107, 1132-1140 2005-2006, "First Amendment Limits On Deceptions Perpetrated By The Government"; *Why Should the First Amendment Protect Government Speech When the Government Has Nothing To Say?*, 95 Iowa L. Rev. 1259, 1288 (2009); and *Why Is Government Speech Problematic? The Unnecessary Problem, The Unnoticed Problem, And The Big Problem*, Denver Univ. L. Rev. Vol. 87:4, 945, especially "The Unnoticed Problem: Institutional Capture," at 956-967 (2010). ER III 24-28.

Quoting *Kearney v. Foley & Lardner*, 590 F.3d 638, 644 (9th Cir. 2009), while accepting that misrepresentation per se is an evil tolerated so as to give the government enough "elbow room" to govern, Johnson argued only against tolerating the special misrepresentations alleged, as follows (ER III 25-26):

> A government agency or official's conduct, even with the additional immunities of a litigant, loses all legitimacy and so immunity, by "intentional misrepresentations," or by "furnishing with predatory intent false information," so as to foil the contrary petitions of a private party.

Re financial matters, Johnson persuasively quoted *Simon & Schuster v. Crime Victims Bd.*, 502 U.S. 105, 116 (1991), as follows (ER III 26):

> In the context of financial regulation, it bears repeating … that the Government's ability to impose content-based burdens on speech raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.

In addition, Johnson showed that the misrepresentations were not only justiciable, but summarily triable; and that all other facts were routinely triable, including standing (per petitions naturally impaired by officious misrepresentation, to be cured by findings thereof), and the Treasury's willfulness (per authoritative issuance and refusal to correct). ER III 17-24.

D. THE DISMISSAL ORDER AND THE CLARIFYING ORDER

In its June 14, 2012 order granting dismissal, the district court's leading and only non-conclusory ground for dismissal affirmed standard government speech rationales, as follows (ER I 14):

> [Johnson] seeks relief in the form of an injunction whereby this Court would regulate what the Treasury can and cannot say on this subject. This remarkable proposition has no support in the law. Our elected leaders necessarily adopt policy positions. By virtue of their "bully pulpit," they necessarily receive more attention than the rest of us. Nonetheless, it cannot possibly be the law that this circumstance violates anyone's right to say whatever they want about public policy. To rule otherwise would invite thousands of lawsuits by those seeking to regulate through the courts what elected officials and their appointees can and cannot say in support of public policy. This would be an unthinkable result. Mr. Johnson's claim is rejected on the merits.

In this recitation of government speech immunity rationales, the decision did not mention that misrepresentations were alleged, let alone address the disqualifying allegations based on their special characteristics herein.

At ER II 26-29, in moving for clarification, Johnson requested that the court explain these omissions, and further substantiated his allegations by exhibiting three anchoring academic papers, namely: *Government Speech in Transition,* by Norton, July 12, 2012 (ER II 33-39); *Lincoln's Populist Sovereignty: Public Finance Of, By, and For the People*, 12 Chap. L. Rev. 561 2008-2009, by Canova (ER II 40-69); and *The Chicago Plan Revisited*, IMF WP/12/202, Introduction, August 2012, by Benes and Kumhof (ER II 70-81).

Johnson further argued that "[o]fficial misrepresentations are a natural exception to the immunity, when designed to deprive the public of the informed consent that pretty much defines republican government," quoting *R. J. Reynolds Tobacco Company v. Bonta*, 272 F. Supp. 2d 1085, 1107 (E. D. Cal.), as follows:

> Government speech that 'drowns out' private speech may violate the First Amendment. [Citation.] "[T]he government may not monopolize the marketplace of ideas, thus drowning out private sources of speech." [Citation.] "The government may not speak so loudly as to make it impossible for other speakers to be heard by their audience."

In support, Johnson cited four Supreme Court cases, as follows (ER II 27):

> *Rosenberger v. Rector And Visitors Of Univ. of VA.*, 515 U.S. 819, 828-829 (1996) and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642-643 (1995) re the especially egregious nature of viewpoint suppression by impaired rights to petition. See also *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 541, 546 (2001), which also points out that government distortions of fact must often carry over to judicial proceedings...

> Perhaps most telling is the Supreme Court's officially first government speech case, *Rust et al. v. Sullivan*, 500 U.S. 173, 186 (1991), which at 186 singularly recognized the critical role of objective, "reasoned analysis" in GAO reports, because it could be relied on by all sides in political disputes, such as the alleged dispute re pending Senate bill S. 2049.

In response, the Treasury quoted the district court's above government speech rationale for dismissal, claiming it perfectly clear, despite adding a full one-page footnote that for the first time mentioned misrepresentations. Without discussion, the Treasury recast these factual falsehoods as arguable "policy" and "message" statements, thus (ER II 13-14):

> [Johnson's above] cases do not support Plaintiff's remarkable theory that the First Amendment is violated when a federal agency articulates a policy with which a private citizen disagrees, even if the private citizen believes it is based on "misrepresentations," and even if the private citizen finds himself overwhelmed by the force of the government's message.

In reply, Johnson restated his below-argued "government-misrepresentation-with-special-circumstances" legal theory, as follows (ER II 4):

> Johnson accepts that mere misrepresentations are reasonably immunized as government speech, even if intentional, on the ground that the government needs such "elbow room" to operate effectively. Johnson contends only that this tolerance is unreasonable **(a)** where the misrepresentations are officially published as objective fact; *and* **(b)** where the government refuses to correct them; *and* **(c)** where some critical additional criterion is met [as per the four alleged exceptions].

V. ARGUMENT

A. SUMMARY

Johnson has little difficulty showing standing under *Lujan*. His injury is an invasion of his First Amendment right to petition, caused by government misrepresentations that the declaratory relief would flatly contradict.

The action rests on one categorical and two financial misrepresentations. Johnson explains their hard-fact substance sufficiently to satisfy the court as to their routine justiciability, manner of proof, and remedial effect.

There being no developed government *deception* doctrine, Johnson shows that the district court's "limitless-bully-pulpit" government speech doctrine lacks merit, whereas his "government-misrepresentation-with-special-circumstances" claims should be sustained, as a matter of first impression rendered ripe for decision by the dicta of *Caruso*, *infra*, and *R. J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 923 (9th Cir. 2005), as follows:

> "[G]overnment is no more free to disregard constitutional and other legal norms when it speaks than when it acts." *Bonta*, [*supra*] at 1110. For example, there may be instances in which the government speaks in such a way as to make private speech difficult or impossible, or to interfere with some other constitutional right, which could raise First Amendment concerns. See *Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990) ("[T]he government may not speak so loudly as to make it impossible for other speakers to be heard by their audience. The government would then be preventing the speakers' access to that audience, and First Amendment concerns would arise.").

B. JOHNSON HAS STANDING UNDER THE FIRST AMENDMENT

1. Injury In Fact

The district court elaborated that (ER I 14):

> Article III standing has three requirements: (1) an injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

Lujan defines an "injury in fact" as "an invasion of a legally protected interest." Herein, the First Amendment protects Johnson's invaded right to petition.

However, the district court then announced that (ER I 14):

> the fact that the Treasury website contradicts Mr. Johnson's position, and that other sources have adopted the Treasury's views, does not constitute an injury in fact.

But the capture of much of Johnson's potential audience per se frustrates his petitions, and so, per *Lujan*, is per se a cognizable First Amendment injury in fact.

Likewise, after superfluously elaborating that Johnson does not allege that his *own* speech is restricted, the Treasury simply announces that the injury of having his petitions rendered "less plausible or effective … does not rise to the level of a violation under any law." ER III 66. Or does it? That is the multi-billion dollar question raised. Yes or no? Again, under *Lujan*, any substantial frustration of the right to petition is a cognizable injury. So the answer is yes.

Whether that injury gives rise to an actionable constitutional violation is circumstantial. "Heightened scrutiny" is warranted if official conduct "threaten[s] to distort the market for ideas [or] raises suspicions that the objective was, in fact, the suppression of certain ideas." *Turner*, *supra*, at 60. Herein, both a distortion of the market of ideas and an illicit objective of suppression are spelled-out, taken-as-true allegations of fact.

The district court continued (ER I 14):

> Mr. Johnson's interest in petitioning for support of his proposal is a generalized grievance no different from every citizen's interest in proper application of the Constitution.

But "it does not matter how many persons have been injured" as long as the injury is "concrete and personal." *Lujan*, at 581.

Besides, Johnson does not sue on the quality of life and impaired sovereignty injuries that all share when the government lies, owing to inflated climates of distrust and unaccountability. His suppressed viewpoint, favoring new and experimental issues of United States currency, is shared by few, advocated by fewer, and advocated as vigorously by yet fewer. ER III 23 n.11.

The ignorant populace is more fundamentally harmed, by the affront to its right to know and its "First Amendment right to avoid becoming the courier for the State's ideological message." *Wooley v. Maynard*, 430 U.S. 705, 717 (1977). From birth, all see "United States" captions on both sides of every dollar bill, over

national symbols and officious Treasury authentications; and all hear pundits debate whether the government is printing too much or not enough money. The misrepresentations help sustain not a marketplace of ideas but a popular mindset to which it simply makes no sense to propose to *start* issuing United States currency.

On the other hand, no First Amendment injury is suffered either by the private banking interests that promote the mistaking of bank notes for government notes, or by those informed economists and ideologues who ingenuously inveigh that it is unthinkable to trust the government to print its very own paper money, but self-evident that private banks can be trusted to have the government mechanically print their bank notes on demand, for the government and everyone else to borrow.

2. Proximate Causation And Remedial Likelihood

In a similarly conclusory fashion, the district court announced that (ER I 14):

> Mr. Johnson also does not establish a causal connection between the Treasury's conduct and his own petitions. Furthermore, any assertion that a favorable judicial decision would redress Mr. Johnson's alleged injuries by improving the effectiveness of his petitions is purely conjectural and insufficient to justify standing.

But Johnson's capacity to petition for his viewpoint is directly impaired by the distortion of ideas caused by the misrepresentations, since they reaffirm and sustain the widely held but drastically mistaken belief that United States notes and Federal Reserve notes are one and the same, for all intents and purposes. In the preceding paragraph, the district court itself affirmed causation as self-evident, by

lucidly employing the teleological phrase "bully pulpit,"[6] in painting Johnson's complaint as the misdirected pique of just another loser in the jungleplace of ideas that all must share. Together with the Treasury's defense of statements that make Johnson's petitions "less plausible or effective," this shows that causation is not conjectural, but impossible to miss.

Nor is that all. As Johnson argued below (ER III 23; footnote in orig.):

> Both causation and the injury of impaired petitioning are of precisely the factual ilk routinely adjudicated in anti-trust litigation alleging the abusive exploitation of a monopoly's media dominance to coercively prejudice market counterparties against the disadvantaged competition. Foundational evidence showing the parties' relative market positions and postures, plus a showing of abusive exploitation of market dominance, is usually proof enough. The naturally suppressive effect of the monopoly's conduct, and the natural effect of a limiting judicial order, are generally presumed.[7]

Besides, causation *is* herein concretely particularized, re Senate bill S. 2049, to replace all Federal Reserve $1 bills with United States $1 coins. The injurious effect of the GAO's $5.6 billion benefit estimate, where the correct amount is $58 billion, is concretized by the particular allegation that essentially all political

[6] In coining "bully pulpit," Theodore Roosevelt used "bully" – his favorite superlative – to express glee at its public-petitioning advantages. See dictionary.com.

[7] See, e.g., *Associated Press v. United States*, 326 U.S. 1, 17, 18 (1945):

> [T]he exclusive right to publish news in a given field, furnished by AP and all of its members, gives many newspapers a competitive advantage … AP is a vast, intricately reticulated organization, the largest of its kind, gathering news from all over the world, the chief single source of news.

Cf. The allegations re monopolistic abuse. Complaint ¶¶ 5(iii), 8(v), 9; ER III 74, 76.

participants and press, for and against, adopted the GAO's $5.6 billion estimate, despite Johnson's correctional postings.[8] Complaint ¶ 5(iii); ER III 74.

As for remedial likelihood, the findings of misrepresentation would directly negate the cause of injury; and further findings of unlawfulness would add teeth to Johnson's petitions. Moreover, the misrepresentations are cherry-picked for hard-fact falsity, justiciability, ease of proof, and remedial effect, as next shown.

C. THE MISREPRESENTATIONS ARE SIMPLE AND SUBSTANTIAL.

1. That "United States Notes Serve No Function Not Already Served By Federal Reserve Notes" Is A Plain Deception Of "Transcendent Importance."

Under the banner "What are United States notes and how are they different from Federal Reserve notes?", the misrepresentation that "United States notes serve no function not already served by Federal Reserve notes" could not more squarely squelch public debate as to the interest-free financing and other advantages realized in issuing true United States notes. ER III 39. But the suppressed functional advantages of fiat United States notes are plain, and are plainly set forth in Honest Abe's June 23, 1862 one-page message to Congress, vetoing an issue of fiat bank notes, just like today's Federal Reserve notes, in favor of fiat United States notes. *Lisez* Lincoln. ER III 49.

[8] On remand, Johnson would add a November, 2012 GAO coin-swap report and hearing. The farcical underestimate persisted, although in March 2012 the GAO's report author and witness was directly informed by Johnson of the correct amount, and of this action.

Undivided, Congress promptly concurred, and later made a record of the controversy, as a matter of "transcendent importance … for present and future reference."[9] Today, President Obama's frequent references to the economic marvel that Lincoln wrought underscore the importance of renewed debate re issuing fiat United States notes, rather than fiat bank notes. ER III 20 n. 8.

2. The Face-Value Model Falsehood Is A Gross Misrepresentation At Law.

The GAO's gross underestimates of the benefit automatically accruing to the government by replacing all $1 bills with $1 coins arise entirely from two simple, per-dollar "Model Falsehoods," the first of which is (complaint ¶ 8(iii); ER III 76):

> [W]hen a new $1 coin is put in circulation, the only government benefit is the relief from interest on $1 of debt … In fact: the government's account is [also] credited with $1.

In other words, the GAO estimates fail to include the face value of each new coin, even though they include the interest relief due to this reduction of the public debt. It is pathetic to trace how the (now) 22-year series of seven GAO "coin-swap" reports avoids ever stating the sum by which the public debt is reduced, even though the interest relief on that sum is reported -- and is dwarfed by it.

In sum, the GAO is not reporting principal that accrues to the government, while reporting interest thereby saved. This literally gross misrepresentation is not

[9] *History Of The Legal Tender Paper Money Issued During The Great Rebellion*, Senate Sub-Committee of Ways and Means (1869), at 6. See "Lincoln's Message to Congress in favor of a National Currency, but vetoing irredeemable bank notes," at 36. ER III 46-49.

excusable as an open secret, as a seigniorage accounting peculiarity, or as an on/off-budget convention or convenience, for three reasons. First and foremost, it is deceit under common law, by virtue of the foreseeable and evident gross misunderstanding. Second, the estimates inconsistently include principal *losses*, such as start-up production costs. Third, the GAO itself advises that, to avoid misleading the public, just such estimates of government revenue *must* include both principal and interest, or unmistakably also state the excluded amount. See *IRS Guidance on Economic Analyses*, GAO-02-234R (2002), ER III 34-38.

Each GAO report justifies the exclusion of face-value sums, if at all, in a far more obscure manner that this guidance even conceives. As sources and authority for the "seigniorage" sum there is usually no more than a daunting footnote, nakedly listing every prior report. See ER III 42 n.1. The 2011 GAO report added a conclusory assertion that there is no overall government face-value gain, *because the Federal Reserve is part of the government*, imputing that the $1 Treasury gain from issuing a coin is inevitably negated by a $1 loss to the Federal Reserve from not issuing a note. Complaint ¶ 11(iv); ER III 78.

This whack-a-mole rationale compounds the misrepresentation, for two reasons. First, the claim that the Federal Reserve's account *is* a government account is not some greyish assertion as to the Federal Reserve acting as a government agency or instrumentality, for the purpose at hand. It is a black and

white affirmation of public ownership, which equates to brazen identity theft and prima facie institutional capture. Second, the whack-a-mole rationale altogether fails to explain the exclusion of the face-value of an *additional* 50% of coins that it projects minting, to accommodate different usage behaviors.

3. The Interest-Relief Model Falsehood Is A Factor-Of-Six Swindle.

The second model falsehood is alleged thus (complaint ¶ 8(iii) ER III 76):

> [T]here is no government benefit when a $1 coin replaces a $1 note, because the interest relief from $1 is offset by the loss of interest from $1 in Federal Reserve profits returned to the government. In fact: [] when a $1 note is replaced by a new $1 coin, the government (when in debt) also obtains relief from interest on 81.5 cents, since the Federal Reserve owns only 18.5% of the debt held by the public.

The 2011 GAO report palms off this less obvious falsehood by "obfuscating mumbo-jumbo" that a motion for summary judgment could shred. Complaint ¶ 11(iv); ER III 78. The model is arithmetically false, *by a factor of six*.

4. Proof Of Intent To Suppress Johnson's Viewpoint Is Conclusive.

Less than a clear and convincing standard is appropriate to prove "intent … to deter public comment on a specific issue of public importance." *Crawford-El Britton*, 523 U.S. 574, 592 (1998). Given the Treasury's touted top priority of financial education, and its authoritative, puffed expertise (complaint ¶ 9; ER III 76), the directly on-point, artfully obfuscated, longstanding, obstinate, and ongoing falsehoods beyond doubt establish intent to suppress Johnson's viewpoint; and

these considerations in any case give rise to a conclusive common law known-or-should-have-known presumption thereof.

D. THERE SHOULD BE A GOVERNMENT DECEPTION DOCTRINE.

Without the right to know, "freedom of the press is a river without water." *In re Mack*, 126 A.2d 679, 689 (Pa. 1956) (Musmanno, J., dissenting). And when the government lies, freedom of the press becomes a river of poison.

"The Framers created a Federal Government of limited powers, and assigned to this Court the duty of enforcing those limits." *National Federation Of Independent Business v. Sebelius*, 11-393, at 59 (U.S. 6-28-2012). Johnson alleges limits to the abusive exercise of the government's natural "bully pulpit" speech monopoly, protecting the First Amendment right to petition.

Freedom of speech is "cut of the same cloth" as the right to petition, as also are the rights to free thought, and to know; and all such rights are equal, *at law*. *McDonald v. Smith*, 472 U.S. 479, 482 (1985). *In fact*, all other communicative rights undergird the right to petition, which is a decisional apex, dependent on all of the First Amendment's factual fruits. As causal chains of facts fail if but one be false; as rivers of information are poisoned by but one toxic source; so the right to petition, being of the widest, must also be of the wisest constitutional weft.

Government Speech in Transition (July 2012) by Professor Norton is a cogent synopsis of the government speech doctrine. ER II 33-39. This, and a

ballooning plethora of law journal articles, make it abundantly clear that there is as yet no government deception doctrine, and that it is high time there was.

Agreeing, but directly contrary to the district court's limitless-bully-pulpit holding, *Shewry*, *supra*, and *Caruso*, *infra*, primed such doctrine for development, by the dicta quoted on pages 16 and 27. As judicial process and equity require and recommend, this case could kick-start a government deception doctrine, per the government-misrepresentation-with-special-circumstances standards alleged.

E. THE DISTRICT COURT'S GOVERNMENT-RIGHT-TO-LIE POLITICAL QUESTION DOCTRINE DANGEROUSLY CONFLICTS WITH NINTH CIRCUIT AND OTHER DECISIONS.

Government Speech in Transition also makes it clear that it is unclear whether the government speech doctrine entails a government *right* to speak, or is entirely an *immunity* doctrine re suits that attack government speech on First Amendment free speech grounds. ER III 36-37. Johnson agrees with the author, that the doctrine is better construed as one of immunity.

But, as recounted at pages 6, 13-14, the district court stressed that it had not reached immunity, in disavowing the propriety of "regulating through the courts what elected officials and their appointees can and cannot say in support of public policy." It thus affirmed an *unqualified government right to lie* – to exploit its bully pulpit even by authoritative misrepresentation crafted to suppress viewpoints, and regardless of independent unconstitutionality and prima facie capture.

That such misrepresentations, made to support public policy, give rise only to "generalized grievances" which "the courts do not adjudicate [because] the political process may provide the more appropriate remedy" (ER I 14) -- is apparently an unprecedented extension of government speech and political question doctrine, in conflict with both *Shewry, supra,* and *Caruso v. Yamhill County Ex Rel. County Com'r,* 422 F.3d 848, 855 (9th Cir. 2005), which ruled (citations omitted):

> We … reject the State's suggestion that no scrutiny is warranted because the speech … is the government's. We have elsewhere identified "several recognized instances of constitutional limitations on government speech." For example, the First Amendment may limit government speech that "make[s] private speech difficult or impossible."

The district court's government-right-to-lie doctrine also conflicts with *Kearny's* holding (page 12) that willful misrepresentation deprives official conduct of legitimacy; and with the advice of *Sorrell v. IMS Health, Inc.*, 10-779 at 22 (U.S. 6-23-2011) that "find[ing] expression too persuasive does not permit [the State] to quiet the speech or to burden its messengers."[10]

Worse, it dangerously decrees that the electorate is competent to vote on what it is deceived about.

[10] More direct conflicts are found outside of this circuit. See, e.g.: *Foxworthy v. Buetow*, 492 F. Supp.2d 974 (S.D.Ind. 2007) (government misrepresentation injurious to right to petition deemed actionable); *The Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410, 415 (4th Cir. 2006) (retaliatory government speech actionable as chilling free speech).

F. THE GOVERNMENT-MISREPRESENTATION-WITH-SPECIAL-CIRCUMSTANCES ALLEGATIONS ARE ACTIONABLE.

The government speech doctrine immunizes speech that invades First Amendment free speech rights.[11] "Virtually all governmental activity involves speech,"[12] and so the doctrine threatens virtually all free speech. Moreover, "[i]t is almost impossible to concoct examples of viewpoint discrimination … that cannot otherwise be repackaged ex post as 'government speech.' "[13] Limits must be set.

Johnson construes four government speech doctrine rationales: (1) The government is supposed to express and promote its own viewpoints, the remedy for those who disagree being the ballot box. (2) The more government speech the better, because it increases information and so government accountability. (3) The government needs breathing space to be effective. (4) Not to immunize government speech would invite floods of frivolous litigation.

Accepting that misrepresentations are presumed immunized for breathing space, Johnson contends this presumption is rebutted if: (1) the misrepresentations are matters of hard categorical or numeric fact;[14] (2) they authoritatively issue as

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[11] As expounded by the Supreme Court and this circuit, the government speech doctrine largely comprises cases deciding whether speech was that of the government. If so, immunity has hitherto been found. See, e.g., *Delano Farms v. CA Table Grape Com'n*, 586 F.3d 1219 (9th Cir. 2009). If not, compelled speech issues might be reached.

[12] *United States v. United Foods, Inc.*, 533 U.S. 405, 424 (2001) (dissenters).

[13] *Sutcliffe v. Epping Sch. Dist.*, 584 F.3d 314, 337 (1st Cir. 2009) (partial dissent).

[14] The marketplace of ideas has so many failings that even the hardest facts must often be adjudicated. See Facts and the First Amendment, 57 UCLA L. Rev. 897 (2009-2010).

objective fact; (3) the government refuses to correct them (satisfying APA finality); *and* (4) special illicit circumstances exists, e.g. where misrepresentations (i) are designed to suppress plaintiff's viewpoint; (ii) entail independent unconstitutionality; *and/or* (iii) show institutional capture on the official record.

Criterion (i) suffices. A "purpose to suppress speech [with] unjustified burdens on expression renders it unconstitutional"; "[v]iewpoint discrimination is [] egregious"; and "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."[15]

The four government speech rationales *favor* litigation, since by deception the government *hides* information, the electorate is misled, and government by the people is undermined, while hard-fact falsity with special circumstances precludes harassing litigation. No First Amendment suit need stand against *mere* deceit or mistake, or against *any* opinion, position, deliberative statement, transparent statistic (e.g. unemployment rate / consumer price index), or the like.[16]

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[15] *Sorrell*, *supra*, at 10; *Rosenberger*, *supra*, at 829; and *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). The intention to suppress transforms tolerable misrepresentation into intolerable coercion. For a comprehensive analysis, see Viewpoint Neutrality and Government Speech, 52 B.C. L. Rev. 695 (2011).

[16] The statement as to the equivalence of United States and Federal Reserve notes might be immune, were it not for its canned and FAQ-style presentation in a website that advertises the highest purpose of public education, and the highest standards of clarity and integrity. The GAO's public debt reduction underestimates are unquestionably of the final, authoritative, and objective ilk that should forfeit immunity, if false. See ER III 15; *GAO Answers The Question, What's In A Name?*, at ER III 31-33; and *College Sports Council v. Government Accountabil.*, 421 F. Supp.2d 59 (D.D.C. 2006).

McDonald, supra, held that even speech immunized by the First Amendment right to petition forfeits immunity, even re damages, when it misrepresents without "probable cause." *Id., 485.* Government speech immunity is merely a judicial APA-exemption doctrine, and forfeiture entails no damages. There is thus far less cause to sustain the immunity where the government misrepresents without probable cause, let alone where it misrepresents to suppress a disfavored political viewpoint.

Finally, the alternative availability of a more burdensome *Bivens* tort would seem to make the allowance of an APA action a simple matter of expedience.[17]

VI. CONCLUSION

Wherefore, this court should remand the action for trial by a different judge, award appellant his costs on appeal, and grant him other relief as fit and proper.

Respectfully submitted,

February 19, 2013 [s/]_____
Clifford Johnson, appellant pro se

[17] Misrepresentations by government officials that frustrate the right to petition are actionable as *Bivens* torts against them as individuals, even for damages. *Christopher v. Harbury*, 536 U.S. 403 (2002). Herein, an APA action is far more appropriate, given the 22-year persistence of the falsehoods, and the automatic, procedural roll-over of the Treasury Secretary as defendant, inter alia.

STATEMENT OF RELATED CASES

I know of no related cases pending in this jurisdiction.

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 6,774 words.

I certify that the attached brief is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief complies with Fed. R. App. P. 32(a)(1)-(7) and is proportionately spaced, has a typeface of 14 points or more and contains 6,774 words.

Dated: February 19, 2013 [s/]_____
Clifford Johnson, appellant pro se

CERTIFICATE OF SERVICE

Johnson v. Department of the Treasury

No. 12-16775

I, Clifford Johnson, certify that one copy of this Brief Of Appellant and one copy of the Excerpts Of The Record (Volumes I, II, and III) herein were served by first class priority mail to the below listed party at the address and as dated below:

Name/[Party]	Address	Date Mailed
Paul T. Hammerness [USDOJ]	Supervising Deputy Attorney General, 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-3664	2/19/03

Dated: February 19, 2013 [s/]_____
Clifford Johnson, appellant pro se