No. 12-16775

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLIFFORD JOHNSON
Plaintiff - Appellant

v.

UNITED STATES DEPARTMENT OF THE TREASURY
and JACOB LEW
Defendants - Appellees

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

Hon. William H. Alsup

REPLY BRIEF OF APPELLANT CLIFFORD JOHNSON

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ABBREVIATIONS

AOB = appellant's opening brief

ABD = answering brief of defendants

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* its Secretary acting officially

I. SUMMARY

The Treasury's answering brief is a succession of transparent evasions.

Re government speech designed to suppresses viewpoints, the Treasury agrees that a matter of first impression is raised re judicial review for truth, but avoids the supporting law and particular facts of misrepresentation.

Re standing, the Treasury ignores Johnson's routine showings of First Amendment injury and of commonplace anti-trust causation cum cure.

II. GOVERNMENT SPEECH

1. Introduction

The Treasury drafts the government speech question as follows (ABD 2):

> Did the district court correctly hold that Appellant failed to state a claim for relief under the First Amendment based on his allegation that certain statements made by the Treasury Department regarding the country's fiscal policy are "misrepresentations"?[1]

Johnson concurs with this draft, provided that the quotation marks are construed as reflecting the allegations of authoritatively and obstinately published hard-fact falsehoods that are designed to suppress his viewpoint, and/or are independently unconstitutional, and/or manifest prima facie capture.

[1] The Treasury never uses the words "misrepresentations" or "truth" absent quotation marks. ABD 2, 5, 11, 21, 23. The quotes are pejorative, since no page is cited re "misrepresentations," and the word "truth" is not used by Johnson or any close citation.

The Treasury prefaces the above question with government speech quotes that it reads as exempting *all* germane government speech from First Amendment scrutiny, *regardless* – i.e. regardless of falsehood, viewpoint discrimination, independent unconstitutionality, and prima facie capture (ABD 2, 21):

> [A] governmental entity is "entitled to say what it wishes," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), and [] "the Government's own speech . . . is exempt from First Amendment scrutiny," *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005).
>
> [T]here is no authority for the astonishing proposition that speech by members of the Executive branch should be subject to judicial review for "truth" …

Neither of the cited cases concerned misrepresentation of any sort, and so are no authority as to the question raised. *No other authority or point being cited or argued re government misrepresentation, the answering brief is vapid.*

Nevertheless, on one point both parties and the district court agree, namely, that the alleged misrepresentation-with-special-circumstances limits to the government speech exemption doctrine present a matter of first impression. By feigning astonishment at Johnson's question, the Treasury palms off mere novelty as proof positive of *no* support in law.

What is truly astonishing is that, after 222 years, such a fundamental First Amendment question has yet to be decided.

2. The *Ad Nauseam* Denouncement That Johnson's Claim Against Viewpoint-Suppression By Deceit "Has No Support In Law" Is A Ridiculous Evasion.

In lieu of thinking through the question, the Treasury denounces its mere novelty *ad nauseam*. The phrase "has no support in law" appears at ABD 6, 8, 9, and 10. Emphatic variants, such as the above-astonished "no authority" and the below-adamant "no support whatsoever," sustain the drumbeat until the last couple of pages, in which Johnson's supporting law is purportedly debunked, as follows (ABD 21-22; emphasis added):

> Appellant's theory finds no support whatsoever in the jurisprudence of the First Amendment. … In support of his novel legal construct, Appellant relies principally on … *Caruso v. Yamhill County ex rel. County Commissioner*, 422 F.3d 848 (9th Cir. 2005) [and] *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906 (9th Cir. 2005). Taking these quotations out of context, he then argues that the law in the Ninth Circuit is "primed" for this case of "first impression" and a holding that Government "misrepresentations" are actionable.

Taking the above quote in context,[2] the Treasury is here objecting to no more or less than that these cases decided inapposite issues. Johnson of course recognized this by repeatedly calling both quotations "dicta." AOB 16, 26.

The Treasury lacks integrity in telling the court that Johnson "principally relies on" the only cases that he identifies as dicta. On the merits, Johnson does

[2] The Treasury continues: "But the quoted passages from *Shewry* and *Caruso* stand for only the unremarkable proposition that the Government may not use its powers to compel private speakers to say something they do not wish to say, or to drown out other speech from the marketplace entirely."

not rely on these cases at all. They do not concern misrepresentation, and are cited expressly and only to show that the misrepresentation questions are ripe.

Thus, in sum and substance the Treasury puffs naught but two vapid tautologies -- that a matter of first impression has not been decided, and that dicta comes from cases that do not directly apply. By these twin tactics, the Treasury entirely avoids *all* of Johnson's supporting law.

3. Johnson Has Shown A Solid Suite Of Supporting Law.

Johnson's legal wrong is the impairment/burdening of his First Amendment right to petition, by *exceptionally* abusive government misrepresentation. Under a misrepresentation-with-special-circumstances or hard-fact-falsity-*plus* standard, he alleges four actionable plusses, separately and cumulatively.

First and foremost, he alleges a purposeful viewpoint-coercion exception to the government speech doctrine, under which it is enough that incorrigible hard-fact falsehoods be crafted to suppress a plaintiff's viewpoint.[3] AOB 10-11. What law has Johnson shown in support of this?

First, the First Amendment on its face bars the government from coercively burdening Johnson's right to petition, without any implicit hint of the eviscerating caveat, "…unless the government does so by some sort of speech," Such a caveat

would by a stroke of the judicial pen exempt the great majority of government action from First Amendment scrutiny – even including statutes and regulations. In short, the government speech doctrine would invite the government to freely do whatever it takes to stay in power, by speech and/or spending.[4]

Second, the Administrative Procedures Act (5 U.S.C. § 702) plainly provides a declaratory remedy for invasions of such rights by government actions:

> A person suffering legal wrong because of agency action … is entitled to judicial review thereof. … An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

The Treasury tells the judiciary to trump the APA by adding "…unless the official action is expressive." But the APA does not exempt intentionally injurious falsehoods, and the Treasury argues no law in support of this remarkable proposition, other than the limitless judicial government speech doctrine.

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[3] If this is not enough, then the criteria of independent unconstitutionality and prima facie capture are reached. These criteria were not argued or reached in the district court. Should they be reached herein, Johnson requests further briefing. See AOB 10.

[4] Under the Treasury's government speech doctrine, the government would be "entitled" not only to misrepresent, but to buy votes with mislabeled bribes, since just such spending by big organizations is a figure of speech. *Citizens United v. Federal Election Comm.*, 558 U.S. 310 (2010). The spending issue is of course prominent herein, not only by the dramatic hijacking of face-value seigniorage tax, but by the collateral cost of the extensive series of fraudulent GAO reports, which includes the cost of numerous congressional hearings thereby rendered farcical.

Third, the *Bivens* tort rationales apply,[5] and they apply routinely to injurious misrepresentation. In support, Johnson cited *Christopher v. Harbury*, 536 U.S. 403 (2002). AOB 30. It would not only be outrageously aggrandizing but farcically self-defeating for the judiciary, having so labored to create the *Bivens* tort, to now go to the opposite extreme of nullifying a merely declaratory alternative jurisdiction mandated by Congress, per the APA.

In addition, as recounted below, Johnson argued on point Ninth Circuit case law (to which *Moss*, *infra*, is added), plus dispositive case law from other circuits, plus a few of a "ballooning plethora of law journal articles." AOB 26.

4. The Treasury's Argument Is Frivolous Because It Entirely Avoids The Law Of Misrepresentation.

As in the district court, the Treasury utterly avoids the law and facts of misrepresentation, even though Johnson's claim is wholly based on their coercive effects, and even though the appeal was held in abeyance to clarify the record re misrepresentation in government speech. The post-judgment motion required by this court did result in the district court clarifying that its government speech ruling of course exempted untruths (AOB 6 n.2, 13-15), but neither the district court nor the Treasury discussed misrepresentation, as distinct from other speech.

[5] "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." [Citations.] *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 392 (1971).

The Treasury's appellate brief continues the practice of using the M-word "misrepresentations" only in quoting Johnson's claims. Thus, in stating the issue presented, the M-word is quarantined by an implicitly incredulous pair of quotation marks – see page 1. Ironically, Johnson agrees that the M-word *should* be in quotes, to reflect his alleged hard-fact-falsity-*plus* nuance. But rather than address Johnson's *heightened* misrepresentation standard, the Treasury answers what it first waters down to "conclusory allegations of speech that is 'deceptive'," and then boils down to a trite gripe that Johnson's speech "attract[s] a smaller audience." ABD 21, 23.

Conversely, as used by the Treasury, putting the M-word in quotes is misleading, since the Treasury deems *all* misrepresentations exempt from First Amendment scrutiny, simply because they are government speech. Thus no real qualification justifies the Treasury's reserve in placing the M-word in quotes.

One misrepresentation case that Johnson relies on is *Kearney v. Foley & Lardner*, 590 F.3d 638, 644 (9th Cir. 2009), which he summarizes as follows (AOB 12, 27):

> 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.

Another *three* cases are quoted in support of Johnson's "misrepresentation-with-special-circumstances" allegations, as follows (AOB 29):

> 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." [Three citations.]

5. The Treasury's Argument Is Frivolous Because It Entirely Avoids The Facts Of Misrepresentation.

Despite affirming a blanket misrepresentation exemption, the Treasury argues not one factual point re misrepresentation, as distinct from other government speech. Instead, it pretends that (ABD 23):

> Appellant's allegations here suggest nothing more than that the Government speech at issue in this case is "attract[ing] more listeners because the listeners prefer the [Government's] message." [Citation.]

Conversely, Johnson's allegations, *accepting* that routine misrepresentation is reasonably exempted in the interests of effective government operations, detail hard categorical and numeric falsehoods, authoritatively published as objective fact, which the government has refused to correct. AOB 28-29. *At issue are not "routine communications that constitute the everyday work of every federal agency" (ABD 23), but the transcendentally important differences between Federal Reserve notes and United States notes, and precise multi-billion dollar falsehoods promulgated for 22 years through a series of seven GAO reports.*

Besides ignoring Johnson's factual detail re misrepresentation, the Treasury ignores his strong factual points, including the following (AOB 29):

> [G]overnment 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.

The Treasury's presumption, that it needs no argument that *all* government speech is exempt from First Amendment scrutiny, is further rendered frivolous by its failure to mention Johnson's direct, albeit non-binding, precedents, namely, "*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)." AOB 27.

Nor does the Treasury mention any of the law journal articles that Johnson cited in support of First Amendment suits limiting government speech.

6. The Misrepresentations That Federal Reserve And United States Notes Are Equivalent Are Not "Conclusory Allegations That Speech Is 'Deceptive.' "

In its district court argument, the Treasury substituted allegations of mere inaccuracy and policy disagreement for the allegations of misrepresentation. In their answering brief, after reporting that Johnson alleges "misrepresentations," the Treasury without discussion reduces them to "conclusory allegations that the speech is 'deceptive.' " ABD 21.

In so doing, the Treasury makes not the slightest effort to rebut the strong points and authorities particularly set forth at AOB 21-22, under the caption:

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

The complaint itself particularly specifies factual falsity (¶ 7; ER III 75):

> 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.

The Treasury further trivializes these particularized factual allegations of falsity by painting Johnson's vigorous advocacy for United States currency as "eccentric." ABD 15. It does so without mentioning equivalent advocacy by President Lincoln and by contemporary academic and IMF finance experts, as shown by the three Exhibits set forth at ER III 49 and ER II 40-81.

7. The Concealments Of $13.75 Billion, $30 Billion, And $14.5 Billion Are Not "Conclusory Allegations That Speech Is 'Deceptive.' "

Even more damning is the Treasury's avoidance of the $13.75 billion, the $30 billion, and the $14.5 billion cumulative underestimates of the benefit that would automatically accrue to the government were all Federal Reserve $1 bills replaced by United States $1 coins. The word "billion" does not appear in its brief.

The supposedly "conclusory allegations of speech that is deceptive" specify factual falsity as follows (complaint, ¶ 8(iii); ER III 76):

> [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.

Moreover, the complaint specifies how and why the GAO estimates are false, as follows (complaint, ¶ 8(ii); ER III 76):

> The 2011 GAO report trustingly adopts a Federal Reserve model which impertinently presumes that the government must operate in debt, and which misrepresents that: **(a)** when a new $1 coin is put in circulation, the *only* government benefit is the *relief from interest* on $1 of debt; and **(b)** there 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: **(a)** when a new $1 coin is issued, the government's account is credited with $1; and **(b)** 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.

Johnson's argument further details these misrepresentations, explaining their nature and manner of proof.[6]

[6] Incidentally, to the three reasons given as to why the exclusion of face-value seigniorage in the 2011 GAO report is inexcusable (AOB 23), can be added a statement affirming such economic inclusiveness within the report itself.

8. The Intervening *Moss* Decision Further Supports Johnson's Claim.

On February 26, 2013, this circuit issued *Moss v. United States Secret Service*, No. 10-36152, which lends further support to Johnson's contention that government misrepresentations are not exempt from First Amendment viewpoint discrimination claims. *Moss* affirmed a *Bivens* viewpoint discrimination tort for damages against individual Secret Service agents, based on misrepresentations that induced state police to move and apply security procedures to anti-Bush but not to pro-Bush demonstrators. In particular (*Id.*, 29):

> The agents assert that they told the police that the reason for these requests was to prevent anyone from being within handgun or explosive range of the President. The protestors allege that any security rationale provided by the agents to the police was false. … The protestors maintain that, in fact, the real motive for the agents' action was the suppression of the protestors' anti-Bush viewpoint.

Not only does this underscore Johnson's arguments re the alternative option of a *Bivens* tort (AOB 30, and above), but in so ruling the *Moss* court found that the government agents were not entitled to qualified immunity because *it was clearly established that such viewpoint suppression would be unconstitutional, and result in liability, if the agents did not have reasonable grounds for the heightened security measures against only the anti-Bush contingent.*

Herein, Johnson likewise alleges that government agents are engaging in misrepresentation to suppress his viewpoint (which is unreasonable per se, absent

some countervailing concern, such as national security). Thus Johnson has alleged sufficient grounds for a *Bivens* tort against unknown Treasury agents, and so, as noted at AOB 30, it makes no sense for the court to disallow this alternative APA suit for declaratory relief, if only on grounds of expediency.

For instance, under Fed. R. App. P. 25, the APA officer-defendant is now not Timothy Geithner but Jacob Lew, without the need to refile/reserve the complaint, which a *Bivens* tort would require. Moreover, should this APA suit be overruled, the decision would presumptively be without prejudice to filing a *Bivens* tort against Jacob Lew, should he refuse the same corrections that Timothy Geithner refused.[7] This would seem a futile and inappropriate delay.

III. STANDING

1. The Treasury Avoids Quintessential First Amendment Injury And Commonplace Anti-Trust Causes And Effects.

Johnson's Summary re standing was appropriately terse (AOB 16):

> 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.

To conjure a lack of standing, the Treasury turns a blind eye to the quintessential constitutional injury and commonplace anti-trust causes and effects.

[7] Based on the facts given at AOB 12 n.8, on remand Johnson would move to add as defendants the GAO and the author of its recent "coin-swap" report, Lorelei St. James.

The Treasury's argument begins with over three pages of quotes re general standing requirements from numerous cases (ABD 11-14), and then litely argues that Johnson does not meet any of them. In so doing the Treasury overlooks the quintessential nature of Johnson's viewpoint burdening injury; and the routinely sufficient anti-trust quintessence of his general factual allegations re cause and cure, herein concretized by numerical tracking per the multi-billion dollar GAO "coin-swap" underestimate, the GAO's precise figure being universally mirrored.

2. The Intervening *Moss* Decision Further Supports Johnson's Standing.

In *Moss*, *supra*, the court likewise had no difficulty in finding standing based on the discriminatory *burden* imposed on political communications. As herein, there was no full *silencing* of the plaintiffs. The plaintiffs were merely resituated and subject to additional security procedures; and this would be wholly legitimate, if for reasonable cause. Wherefore, the case was remanded to try the truth of the secret service agents' representations as to reasonable cause.

IV. CONCLUSION

For all the foregoing reasons, this court should grant the relief prayed for in Johnson's opening brief.

Respectfully submitted,

April 3, 2013 [s/]_____

Clifford Johnson, appellant pro se

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 3,348 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 3,348 words.

Dated: April 3, 2013 [s/]_____
Clifford Johnson, appellant pro se

CERTIFICATE OF SERVICE

Johnson v. Department of the Treasury

No. 12-16775

I hereby certify that on April 3, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Dated: April 3, 2013 [s/]_____
Clifford Johnson, appellant pro se