IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT A. MCNEIL, MICHAEL B. ELLIS, HAROLD R. STANLEY, LEE C. PRYMMER, BARRY E. BROOKS, WILLIAM B. MCGARVIN, EBENEZER K. HOWE, IV, LYNNE KUCHENBUCH, MARK CRUMPACKER, GARY S. DWAILEEBE, LOUIS R. DEPOLO, GREGORY A. DARST, and MELBA FORD Plaintiffs, v. G. MICHAEL HARVEY, United States Magistrate Judge DALE A. DROZD, United States District Judge, and CHRISTOPHER R. COOPER, United States District Judge Defendants.	)	Case No. 1:17-cv-01720

STATEMENT OF INTEREST OF THE UNITED STATES

Pursuant to 28 U.S.C. § 517, the United States respectfully submits this Statement of Interest. The filing of the current action against two judicial officers in this district, and a judicial officer for the United States District Court for the Eastern District of California, violates an injunction entered by Judge Cooper against Plaintiffs Robert A. McNeil and Michael B. Ellis in favor of the United States. Exhibit A (Order of Permanent Injunction entered in *Crumpacker v. United States*, No. 1:16-cv-01053 (D.D.C.) [Dkt. No. 44]). The United States has initiated

contempt proceedings against McNeil and Ellis for filing this action and suggests that the Court stay any further proceedings pending the outcome of those contempt proceedings.

The United States further suggests that, in the unlikely event that Judge Cooper finds that the filing of this action did not violate the injunction in *Crumpacker*, it should nonetheless be dismissed *sua sponte* under Rules 12(b)(6) and Rule 12(b)(1) of the Federal Rules of Civil Procedure for failure to state a claim and lack of Article III standing.

Background

Plaintiffs McNeil and Ellis are serial filers in this court who have filed (including the case at bar) fourteen civil lawsuits challenging (i) actions taken by the Internal Revenue Service to assess and collect taxes from them; and (ii) actions taken by the Department of Justice to defend those legal challenges and to collect unpaid taxes from them. Ellis has been a plaintiff or co-plaintiff in six of these actions, McNeil has been a plaintiff or co-plaintiff in four. The eleven suits that have been disposed of thus far have been dismissed for the same reason: their actions are barred by the Anti-Injunction Act.[1] They have also assisted others in filing additional actions, duplicative of their own, that were also dismissed for lack of subject matter jurisdiction. Those individuals include Plaintiffs Gary Dwaileebe, Louis DePolo, Melba Ford, William McGarvin, and Mark Crumpacker.

In addition to the suits targeting the Internal Revenue Service, the Department of Justice and its attorneys, McNeil and Ellis have sued former President Obama, former Attorney General

[1] Several courts have also held that McNeil, Ellis, and others who have brought these suits lack Article III standing. *Ford v. Ciraolo-Klepper*, No. 1:17-cv-00034, 2017 WL 2189577, at *6 (E.D. Cal. May 18, 2017), *Ellis v. Jarvis*, No. 1:16-cv-00031, 2016 WL 3072244, at *1 (D.D.C. May 31, 2016), *aff'd*, No. 16-5219, 2016 WL 7335668 (D.C. Cir. Nov. 7, 2016), *DePolo v. Ciraolo-Klepper*, 197 F. Supp. 3d 186, 191 (D.D.C. 2016), *Ellis v. Commissioner*, 67 F. Supp. 3d 325, 332-33, 338 (D.D.C. 2014).

Lynch, and Commissioner of Internal Revenue Koskinen. *Stanley et al. v. Lynch*, No. 1:17-cv-00022 (D.D.C.). They have also sued District Court Judges Berman Jackson, Cooper, and Srinivasan. *Ellis, et al. v. Berman Jackson*, *et al.*, No. 1:16-cv-2313 (D.D.C.)

After years of McNeil and Ellis's campaign of frivolous, vexatious litigation, the United States moved for a permanent injunction against them barring them from filing certain types of legal challenges (like this current case) without first obtaining prior leave of court. *Crumpacker v. Ciraolo-Klepper*, No. 1:16-cv-01053 [Dkt. No. 30]. Judge Cooper, who is named as a defendant in this case in his "personal capacity," entered the injunction on April 19, 2017 in *Crumpacker v. Ciraolo-Klepper, et al.*, 1:16-cv-01053 (D.D.C.). (Dkt. No. 44 ["Order"]).

Under Judge Cooper's order of permanent injunction, McNeil and Ellis are enjoined from:

> Filing, or assisting in the filing of, any civil action in any United States District Court . . . asserting, or purporting to assert a claim under the United States Constitution or the Administrative Procedure Act challenging actions taken by the Internal Revenue Service in preparing to assess and assessing income tax liabilities pursuant to 26 U.S.C. § 6020 . . . [and/or] challenging actions taken by the Department of Justice to defend against [such] suits and/or suits to collect income tax liabilities.

Order at p. 5.

In order to bring such a suit, McNeil and Ellis were required to

> File with the court a document titled "Application Pursuant to Court Order Seeking Leave to File," that: (i) certifies that the claims presented are new claims never before raised and disposed of on the merits on or jurisdictional grounds by any court; (ii) describes the allegations of the complaint; and (iii) contains a certification under penalty of contempt that the allegations of the complaint are true; and (iv) attaches a copy of this injunction.

Order at p. 6. The injunction provides that McNeil and Ellis "shall not be permitted to file said action unless and until such application is granted." *Id.*

On August 21, 2017 McNeil and Ellis simply disregarded this injunction and filed this lawsuit against three judicial officers, including the Court that entered the injunction against them, purporting to assert violations of (1) their right of access to the courts under the First Amendment; and (2) their due process rights under the Fifth Amendment.

This action challenges the prior dismissals of the duplicative actions brought by McNeil, Ellis, Ford, McGarvin, Crumpacker, Dwaileebe, and DePolo, and the order consolidating *Ellis v. Jackson, et. al.* and *Stanley, et al. v. Lynch, et al.* Plaintiffs seek a declaratory judgment that:

(i) Each plaintiff "complain[ed] as their core fact content that IRS never prepares substitute income tax returns" as to each of them;

(ii) Each court did not "adjudicate [their] core fact controvers[ies],"

(iii) Each court "falsif[ied] the record by attributing to litigants relief they did NOT seek, then dismiss[ed] the cases on the basis of that fabrication,"

(iv) Each court's "uniform falsification . . . provides strong circumstantial evidence victims' cases, as filed, are meritorious,"

(v) Each court's "uniform falsification . . . violated each Plaintiffs' [*sic*] rights to adequate, effective and meaningful access to courts and due process of law, and constitute, as well, obstruction of the administration of justice,"

(vi) Each court's "uniform falsification" renders their dismissal of no "precedential value or preclusive effect."

Complaint [Dkt. No. 1] at ¶¶ 49(a)-(f).

On September 18, 2017, the United States moved for an order to show cause why McNeil and Ellis should not be held in contempt for violating the injunction.

Argument

The United States provides this statement of interest to the Court in order to recommend that this case be stayed so that Judge Cooper may consider the pending contempt motion in *Crumpacker*, which is determinative of whether this case should be allowed to proceed. The United States further posits that, even if Judge Cooper determines that the filing of this injunction does not violate the injunction, this case is meritless on its face and this court may dismiss it *sua sponte* for failure to state a claim.

I. THE UNITED STATES' INTEREST IN PROTECTING FEDERAL OFFICIALS FROM MERITLESS LITIGATION AND FURTHERING THE ORDERLY ADMINISTRATION OF JUSTICE JUSTIFIES THE FILING OF THIS STATEMENT OF INTEREST

The United States is not a party to this matter and is not entering an appearance on behalf of the federal defendants, but files this Statement of Interest under 28 U.S.C. § 517 to timely protect the interests of federal officials and the orderly administration of justice.

Section 517 states that "any officer of the Department of Justice[] may . . . attend to the interests of the United States in a suit pending in a court of the United States." 28 U.S.C. § 517. This authority provides the Department broad and unreviewable discretion. *See Falkowski v. EEOC*, 783 F.2d 252, 253 (D.C. Cir. 1986) (per curiam) ("We have previously recognized both the entirely discretionary nature of the power and the breadth of that discretion . . . . neither the statute, nor any regulation, nor any administrative practice cabins this discretion or furnishes any standard by which to review the Attorney General's determinations in this area."); *Hall v. Clinton*, 143 F. Supp. 2d 1, 4 (D.D.C. 2001) ("[T]he Court concludes that a decision to provide representation subject to § 517 is non- reviewable or, alternatively, that the government has articulated a sufficient interest to pass muster under the flexible mandate of that statute.").

The United States has two independent interests at stake in this suit: (i) its interest in ensuring that McNeil and Ellis not be allowed to litigate suits in violation of the injunction entered against them and in favor of the United States; and (ii) its interest in preventing meritless suits against federal officials[2] that interfere with the orderly administration of justice. *See, e.g., Clinton v. Jones,* 520 U.S. 681, 693 (1997) ("In cases involving prosecutors, legislators, and judges we have repeatedly explained that the immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability."); *Pierson v. Ray,* 386 U.S. 547, 554 (1967) (stating that judicial immunity "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.").

II. THE COURT SHOULD STAY FURTHER PROCEEDINGS IN THIS ACTION TO ALLOW JUDGE COOPER TO RULE ON THE PENDING CONTEMPT MOTION IN *CRUMPACKER V. CIRAOLO-KLEPPER*

This Court should stay any further proceedings – including any efforts by plaintiffs to serve the judicial officer defendants in this case – until the Court in *Crumpacker* has adjudicated the issue of whether the filing of this action violates the injunction in that case. This is

[2] It not necessary for the United States to first enter an appearance on behalf of the federal defendants. *See, e.g., Lempert v. Rice*, 956 F. Supp. 2d 17, 20 (D.D.C. 2013) (acknowledging a Section 517 statement of interest in defense of the U.S. Ambassador to the United Nations); *Weixum v. Bo Xilia*, 568 F. Supp. 2d 35, 35 (D.D.C. 2008) (acknowledging a Section 517 statement of interest in defense of a minister for the People's Republic of China); *see also Republic of Aus. v. Altmann*, 541 U.S. 677, 714 (2004) (Breyer, J., concurring opinion with Souter, J.) ("[T]he United States may enter a statement of interest counseling dismissal. Such a statement may refer, not only to sovereign immunity, but also to other grounds for dismissal, such as the presence of superior alternative and exclusive remedies, or the nonjusticiable nature (for that or other reasons) of the matters at issue." (citations omitted)).

appropriate both to: (1) protect Judge Cooper's inherent authority to enforce his order of permanent injunction; and (2) conserve this Court's resources and promote efficiency.

As to the first point, McNeil and Ellis were explicitly enjoined from filing this action without first obtaining leave of court by filing the required "Application Pursuant to Court Order Seeking Leave to File." They did not do so and opted instead to test the Court by filing another meritless action. They are therefore in contempt of Judge Cooper's valid order every day that they do not dismiss this action, and Judge Cooper has the inherent authority (like any Article III Judge) to enforce the order of permanent injunction that he entered against them. *United States v. Shelton*, 539 F. Supp. 2d 259, 262 (D.D.C. 2008); *see also id*. (Court's inherent authority to enforce its order reaches "both conduct before [that] Court and conduct beyond the court's confines."). Were this case permitted to go forward in parallel with Judge Cooper's enforcement proceedings, it would directly interfere with Judge Cooper's ability to enforce his own orders. For that reason, this action should be stayed.

As to the second point, given the near certainty that McNeil and Ellis were enjoined *ab initio* from filing or assisting others in filing this suit, it would be a waste of this Court's time and resources to consider this action at all at this point.[3]

III. IN THE EVENT THAT THIS ACTION IS NOT FOUND TO BE ENJOINED, IT SHOULD NONETHELESS BE DISMISSED *SUA SPONTE*

As noted *supra*, the United States is not at this time entering an appearance on behalf of the federal officials named in this suit at this time because this action was barred *ab initio* by the injunction entered in *Crumpacker*. Nonetheless, should Judge Cooper determine that this action was not filed in violation of his injunction, the United States counsels that this action is so

[3] The complaint in this action has not, to the United States' knowledge, been personally served on any of the defendants.

facially meritless that this Court may dismiss it *sua sponte*. Without prejudicing the federal officials' right to raise additional arguments for dismissal in a motion dismiss if indeed this case proceeds forward, the United States posits that there are at least two grounds on which the Court may dismiss this case *sua sponte*: (1) the complaint fails to state a plausible claim on which relief may be granted; and (2) the Court lacks subject matter jurisdiction over the complaint because the plaintiffs lack Article III standing.

A. Plaintiffs Cannot State a Plausible Claim For Declaratory Judgment That Reviews the Decisions of Other Article III Courts

This action should be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure because plaintiffs have not stated – and cannot state – a plausible claim for relief against the federal defendants.

Plaintiffs bring this action to challenge other judicial officers' dismissals of their prior lawsuits after the United States moved to dismiss them. Those are plainly judicial acts for which courts have absolute judicial immunity. *See Jenkins v. Kerry*, 928 F. Supp. 2d 122, 134 (D.D.C. 2013) (("[A] judge acting in his or her judicial capacity - *i.e.*, performing a 'function normally performed by a judge' – is immune from suit on all judicial acts, as long as the judge was not acting in the complete absence of jurisdiction.").

Also, this Court is not a "reviewing court" and therefore may not review the decisions of its fellow Article III judges, or declare them erroneous. *Sibley v. United States Supreme Court*, 786 F. Supp. 2d 338, 345 (D.D.C. 2011) ("[t]his court is not a reviewing court and cannot compel . . . other Article III judges in this or other districts or circuits to act."). Accordingly, the requested "declaratory relief" is simply not available to plaintiffs and dismissal for failure to state a claim is warranted. *Dougherty v. Untied States*, 156 F. Supp. 3d 222, 235-36 (D.D.C. 2016) (dismissing action for injunctive relief on behalf of federal defendants because "there is no

cause of action that would allow this Court to vacate judgments, or to order that that Court . . . otherwise take any specific actions regarding its handling of cases[.]").[4]

B. This Court Lacks Subject Matter Jurisdiction Because Plaintiffs' Claimed Injuries Are Not Redressable and They Accordingly Lack Article III Standing

Even if the Court could divine a plausible claim for relief from plaintiffs' complaint, the plaintiffs lack Article III standing to assert those claims. Because lack of standing is a "defect in subject matter jurisdiction," the Court should also dismiss this action under Rule 12(b)(1). *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987).

In order to have Article III standing, a plaintiff must "1) have suffered an injury in fact; 2) that is fairly traceable to the challenged action of the defendant; and 3) that will likely be redressed by a favorable decision." *Newdow v. Roberts*, 603 F.3d 1002, 1009-10 (D.C. Cir. 2010) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Plaintiffs' claimed injury is not redressable. To establish redressability, a plaintiff must show that it is "likely as opposed to merely speculative that the injury will be redressed by a favorable decision of the court." *Spectrum Five, LLC v. FCC*, 758 F.3d 254, 260 (D.C. Cir. 2014). Here, plaintiffs ask for an opinion declaring that the dismissal of other cases was in error. Again, as noted *supra*, this Court is not a reviewing court and cannot overrule or otherwise reverse the decisions about which plaintiffs complain. The only court that could redress their claimed injuries is the Court of Appeals for the D.C. Circuit by means of a direct appeal. Since the requested declaration would provide plaintiffs with little more than "psychic satisfaction," their injuries are not redressable, they lack standing, and this entire action fails

[4] Plaintiffs' sole remedy is to appeal the orders that it claims were erroneous. *Jafari v. United States*, 83 F. Supp. 2d 277, 279-80 (D.D.C. 2015). They did, and the D.C. Circuit summarily affirmed the district court in each instance. There is therefore no avenue for this Court to review those cases further.

for lack of subject matter jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("psychic satisfaction is not an Acceptable Article III remedy because it does not redress a cognizable Article III injury. Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court[.]").

Conclusion

Plaintiffs have violated an injunction requiring them to seek leave of court before filing this action. This Court should immediately stay the action pending the resolution of contempt proceedings against them.

Dated September 21, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 2017, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties registered to received such notice, and that on the same date I have mailed the document by United States Postal Service to the following non-CM/ECF participants:

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