Appellate No. 07-1156

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee.

v.

JOHN BAPTIST KOTMAIR, JR.,
and SAVE-A-PATRIOT FELLOWSHIP,
Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

SAVE-A-PATRIOT FELLOWSHIP'S REPLY BRIEF

George E. Harp
610 Marshall St., Ste. 619
Shreveport, LA 71101
(318) 424-2003

Attorney for Save-A-Patriot Fellowship

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ARGUMENT

Subject matter jurisdiction and scope of injunction

SAPF argues that subject matter jurisdiction does not exist for an injunction of commercial speech, save for a narrow class of speech consisting solely of false statements with respect to the tax benefits resulting from participation in a tax shelter, plan or arrangement. Any wider application of the injunction powers under §§7408 or 7402(a) to commercial speech is outside those statutes' jurisdiction.

Most of the cases cited by the government (Br. 44–47) to support the view that SAPF's "false commercial speech" can be restrained arose from appeals or challenges involving laws or regulations which banned specific types of commercial speech. None of those cases supports the position that false commercial speech, generally, can be enjoined by way of the internal revenue laws. The government's reliance on the mere *classification* of something as "false commercial speech" to justify its prohibition appears to have increased with each recent injunction it manages to obtain under §6700. Despite the recent increase in such cases (*e.g.*, *United States v. Schiff*, 379 F.3d 621 (9th Cir. 2004), *United States v. Bell*, 414 F.3d 474 (3rd Cir. 2005), it appears that defendants in such actions have never challenged the lack of subject matter jurisdiction under §§6700, 6701, 7408, or 7402(a) to ban commercial speech. Therefore, the government's reliance on such cases is misplaced.

Jurisdiction under §7402(a) is premised, by the terms of that subsection, on the existence of some underlying internal revenue law to be enforced.[1] Without the identification of such underlying law, there can be no means of determining the elements necessary to prove a violation thereof, nor to defend against accusations of such violations. The government relies on the acquiescence of prior courts to allow use of that statute without the qualifying conditions inherent in the law itself.[2] It cites anew *United States v. Ernst & Whinney*, 735 F.2d 1296, 11th Cir., 1984), which SAPF argued was an unsound reversal of a well-reasoned decision of the U.S. District Court in Atlanta,[3] and therefore should not be followed. (Appellant's Opening Brief (Op. Br.) 25, App. 332-336). The government also cites *United States v. Kaun*, 633 F.Supp. 406 (1986), yet on appeal (*United States v. Kaun*, 827 F.2d 1144 (7th Cir. 1987)), the higher court did *not* follow the district court's reliance on §7402(a), affirming jurisdiction only under §7408.

The government's reliance on the legislative history of §7408, that "the court will continue to have full authority [under §7402] and will continue to possess the great latitude inherent in equity jurisdiction to fashion appropriate equitable relief" (Br. 39) is unavailing. "Full" does not mean limitless; the

[1] The authority of §7402(a) has been granted insofar "as may be necessary or appropriate for the enforcement of the internal revenue laws."
[2] See *United States v. Ekwunoh*, 813 F.Supp. 168, 171 (1993): "Acquiescence in an invalid rule of law does not make it valid."
[3] 549 F.Supp. 1303 (N.D.Ga. 1982.)

remedies authorized by §7402(a) are limited to only those "necessary or appropriate for the enforcement of the internal revenue laws." If the government is unable (or unwilling) to cite a law for which it seeks enforcement, then there can be no rational basis from which the Court can determine whether said enforcement is necessary or appropriate.

Respecting the lower court's erroneous finding of irreparable harm on improper evidence (Op. Br. 36–37), the government counters that "the record is replete with evidence of the harm SAPF's scheme inflicts on the IRS." (Br. 41). It cites IRS agents Rowe and Metcalfe (App. 75–76, 425, ¶5), who declare only that over 800 letters have been received by the IRS and that those letters are prepared by SAPF. The government's allegation of costs of approximately $1.5 million (Br. 41), citing Rowe as support, is based solely on the same inadmissible chart for which no evidentiary foundation had been laid (Op. Br. 37) and so is no more properly before this Court than before the court below.

The mere fact that letters have been sent to the IRS is not at issue, because no amount of rationalization can render such letters to be harm *per se*, especially in light of the fact that each letter was in response to an IRS notice which requested a response.[4] Likewise, the government's allegations of "lost revenues from

[4] This was also admitted by IRS agent Metcalfe, when he stated the letters "are disregarded" by the IRS and do not impede the IRS, see App. 31:3–12.

uncollected taxes" and the "undermin[ing of] … its overall tax-collection ability" (Br. 41) find utterly no support in the record.

§6700 and "false statements"

The government has attempted in this case to shoehorn the lawful activities of SAPF into the scope of penalty statutes §§6700 and 6701[5] in order to enjoin political speech and activities which it abhors. To fit SAPF's statements into the narrow scope of these statutes, the government misstated the record during the proceedings below, and now reiterates those misstatements, see *infra*. The distortions distract from the key issue: are the statements complained of, or later identified on summary judgment motion, penalizable under §6700? The clear answer is that they are not.

The law is settled that penal statutes are construed strictly, and one cannot be subjected to a penalty unless the words of the statute plainly impose it. (See *Commissioner of Internal Revenue v. Acker*, 361 U.S. 87, 91 (1959)). Although §6700 has been adjudged somewhat broad with respect to what constitutes an "entity, plan or arrangement,"[6] it still starkly circumscribes the conditions under which a penalty may be laid:

[5] All references to statute sections refer to Title 26, unless otherwise indicated.

[6] The court cases often cited by the government and the court below (e.g., *United States v. Raymond*, 228 F.3d 804 (7th Cir. 2000), *United States v. Kaun*, 827 F.2d 1144 (7th Cir. 1987), *Abdo v. United States*, 234 F. Supp. 2d 553 (M.D.N.C. 2002),

"(a) Imposition of penalty

Any person who—

(1)(A) organizes (or assists in the organization of)—

(i) a partnership or other entity,

(ii) any investment plan or arrangement, or

(iii) any other plan or arrangement, or

(B) participates (directly or indirectly) in the sale of any interest in an entity or plan or arrangement referred to in subparagraph (A), and

(2) makes or furnishes or causes another person to make or furnish (in connection with such organization or sale)—

(A) a statement with respect to the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter, …

shall pay, with respect to each activity described in paragraph (1), a penalty equal to the $1,000 or, if the person establishes that it is lesser, 100 percent of the gross income derived (or to be derived) by such person from such activity." [emphasis added].

According to statute's plain language, once the existence of an "entity, plan or arrangement" has been established,[7] each *and all* of the following elements or conditions must be found: (1) a statement must be made, (2) the statement made must be in connection with the sale of an interest in the entity, plan or arrangement, (3) the statement must concern the allowability of any deduction or credit, the

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etc.) stress the broadness of this aspect, while minimizing, if not outright neglecting, the effect of the remaining limiting conditions of the penalty.

[7] Even this essential element has not been properly shown. The government and the court below refer only to schemes generally, and claim that everything that SAPF does is part of the schemes. However, without a positive identification of the plan or arrangement, the remaining elements which depend on its existence (e.g., that

excludability of any income, or the securing of any other tax benefit, (4) the tax benefit must be stated to arise by reason of holding an interest in or participating in the entity, plan or arrangement, and (5) the person making the statement must know or have reason to know that it is false or fraudulent as to any material matter.

To lay the penalty, each and every one of the five conditions must exist for each and every statement made. None of the statements made by SAPF meet all of these conditions, and the court below erred in finding violations of §6700.

There are three categories of findings related to §6700 to be examined, and in each, the court erred: (1) statements identified in the complaint, regarding the tax laws, (2) statements invented by the government or the court below regarding documents SAPF prepares, and (3) "implicit" representations never raised at all in the proceedings, but erroneously found by the court below.

Statements about the tax laws

The government's complaint identified eight statements (App. 13-14) in this category. Two were later acknowledged by the government and the court as not made by SAPF.[8] (App. 483-484). As SAPF has argued, none of the remaining six "respect [] the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by reason of holding an interest in

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statements be made in connection with the sale of an interest in such plan) cannot be determined.

the entity or participating in the plan or arrangement." (§6700(a)(2)(A)). However, the government later invented its own catch-all statement to attribute to SAPF: "that ordinary citizens are not subject to income tax payment or filing requirements for U.S.-source income [the 861 argument]." (Docket 42-2, p. 11, and Br. 24) While nothing in evidence contains this invented statement, it too does not meet these third and fourth conditions, *supra*.[9] The government argues this statement[10] respects the "tax benefits associated with [SAPF's] program," (Br 24), but on its face, it only refers to U.S. citizenship, not in any way to membership in SAPF.

All of the "evidence" adduced by the government confirms that SAPF's statements about the tax laws make no reference to any tax benefits derived from being a member of SAPF. "Federal Tax Law Basics" (SAPF website) contains, and describes itself as, "merely factual statements about the law." (App 123). A Kotmair letter gives his opinion regarding the tax laws with respect to IRA funds. (App. 124-125). Since no statements which relate to a tax benefit secured by reason of participation in SAPF have ever been identified, and since every statement identified by the government relates exclusively to the operation of the

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[8] These two statements were made on www.taxfreedom101.com, a website not controlled by SAPF.

[9] Statements along these lines are cited by the government as included in response letters to the IRS, but if any of these are held to be "false," they do not meet the second, third, or fourth condition of §6700(a)(2)(A).

[10] The government argues this is the "gravamen" of the "scheme," but no such statement exists.

tax laws on U.S. citizens *generally*, then the elements of §6700(a)(2)(A), specifically the third and fourth conditions, *supra*, have not been proven by a preponderance of evidence. Since these elements are not met, it is immaterial whether courts have held any of the individual statements about the law as "frivolous" or "stupid." (Br. 24–25).

Statements made about documents SAPF prepares

Whatever statements SAPF makes about *documents* prepared for members' use cannot meet either the second or fourth conditions under §6700(a)(2)(A), *supra*. By definition, statements made with respect to the effect of a document are not made "in connection with the sale of an interest in an entity, plan or arrangement," nor can they secure a tax benefit "by reason of holding an interest." An "interest" is a "right, title, or legal share"[11] or a "share or participation in,"[12] an entity. Common sense attests that one cannot sell such an "interest" or "share" in a mere document, letter, or pleading;[13] hence, statements SAPF may make in connection with the sale of individual documents are already outside the terms of §6700(a)(2)(A).

[11] See *Black's Law Dictionary*, 6th Edition.

[12] *Webster's New World Dictionary*, 2nd College Edition, 1982. (TEFRA established §§6700 and 6701 in 1982). One cannot "participate" in a document either. "Participate" means "to have or take a part or share with others (in some activity, enterprise, etc.)" *Id.*

[13] Such documents are also only prepared for one person at a time, generally.

The court enjoined SAPF from preparing documents (App. 474, ¶ e)[14] by finding that SAPF "represent[s]" its "products and services [] will enable customers legally to stop paying income tax on their U.S.-source income." (App. 479). This erroneous finding is represented by the government as a fact (variously stated, see Br. 5, 24, 25),[15] but neither the government nor the court has ever cited or quoted any such statements *from SAPF materials*, and the materials cited do not contain such statements. Even Agent Rowe (App. 70–71)[16] fails to swear that SAPF says anyone is "enabled" to "stop paying" income taxes, legally or otherwise, by reason of a letter or document of SAPF. Since no such statement exists, the first condition of §6700(a)(2)(A) has not been met.

SAPF offers just two documents for which the government has expressly claimed false statements were made: (1) an Affidavit of Revocation and Rescission ("ARR") relating to signatures on a Form SS-5 application and past returns, and (2) a "Statement of Citizenship" pursuant to 26 CFR 1.1441-5 (1999) ("SOC").

Statements made about the Affidavit of Revocation and Rescission

The lower court found that "according to SAPF" an individual executing an ARR "is no longer obligated to file income tax returns or to have taxes or Social

[14] This is despite the fact that it is only the making of false statements that is subject to penalty under §6700.
[15] The government varies this assertion, but this is its basic meaning.
[16] SAPF objected to Rowe's declaration as containing conclusory allegations and hearsay. (Doc. 54, p. 10)

Security contributions withheld from his or her earnings." (App. 479). Similarly, the government asserts that SAPF "advises" that the ARR "revokes the customer's obligation to file income tax returns" (Br. 5), and that SAPF "falsely stat[es]" that "by filing [the ARR], customers can [] revoke their Social Security numbers to evade employment-tax requirements." (Br. 25). These statements do *not* appear in the record: the court below cited nothing in support; the government's many cites (see, *inter alia*, App. 70–71, 77, 90–91, 126–33, 463–70) contain no such statements *from SAPF materials.* The only comparable statements in the record are the IRS agents' own conclusory claims that SAPF "falsely advises customers that employers cannot legally withhold employment taxes after the 'Affidavit of Revocation' and 'Statement of Citizenship' are filed," (Rowe, App. 77, ¶ 54) and that SAPF "[documents purport] to revoke an individual's application for their Social Security number, in order to discontinue the withholding of income and employment taxes." (Metcalfe, App. 427, ¶ 12). Both assertions are devoid of foundation, supporting exhibits, or cites to SAPF materials.

Since the "false statements" invented by the government do not actually exist, no conditions of §6700(a)(2)(A) have been met with respect to the ARR. Consequently, any court decisions involving such affidavits (Br. 26) are immaterial to this appeal.

Statements made about the Statement of Citizenship

The government asserts that SAPF "falsely stat[es]" that "by filing [the SOC], customers can establish that they are not subject to income-tax withholding …" (Br. 25). The government's assertion that such a statement would be false (apart from whether SAPF actually makes it) is contradicted by regulation 26 CFR §1.1441-5 (1999) itself (App. 370):

> "Claiming to be a person not subject to withholding … For purposes of chapter 3 of the Code, an individual's written statement that he or she is a citizen or resident of the United Sates may be relied upon by the payer of the income as proof that such individual is a citizen or resident of the United States."

IRS Publication 515 (1990) informs the withholding agent that if "an individual gives you a written statement … that he or she is a citizen [of the U.S.] … you may accept this statement and are relieved from the duty of withholding the tax." (App. 372, 2nd col.) [emphasis added].

Since SAPF points to and repeats what the regulation says (App. 90, 207), *supra*, such statements are false only if the regulation is false. Thus, conditions two through five of §6700(a)(2)(A) cannot be said to have been met with respect to the SOC. Since these elements are not met, any court decisions involving such statements (Br. 26) are immaterial to this appeal.

"Tax benefits" also a missing element

The court below ultimately found a §6700 penalty violation with respect to an *implicit* representation[17] rather than actual statements (App. 489, Op. Br. 31), and thus erred by ignoring the first and most basic condition of §6700(a)(2)(A), *supra*. The court noted that this implicit representation respected the "tax benefits [SAPF] promotes," but did not identify the type of tax benefit resulting from participation in SAPF, as is required by conditions three and four of §6700(a)(2)(A), *supra*. The tax benefits element of §6700 specifically includes "the allowability of any deduction or credit," "the excludability of any income," and by operation of the *ejusdem generis* canon of statutory construction, "any other tax benefit" of that general class. Neither the government nor the court below has identified any "tax benefits" which fall into this class and simultaneously arise from SAPF membership.

As SAPF argued on summary judgment motion, §6700 was never intended to apply to false statements generally, nor even to all false statements with respect to the allowability of any deduction or credit, or the excludability of any income. It only applies to false statements with respect to the availability of any of these tax benefits *by reason of participation in the shelter*. That is, unless tax benefits are falsely claimed to be derived from participation in the plan or arrangement, that essential element is missing. If Congress had intended the penalty to apply to false

[17] The court inferred a "tax benefit" from the selling of letters and services. App.

statements generally, they could have omitted the explicit condition regarding participation. But since they included it, the statute cannot now be construed so as to render that explicit condition a nullity. (App. 25). As argued earlier (Op. Br. 29-32), the necessity of this element, that the false statements must relate to tax benefits resulting from participation in the entity — wholly lacking here — appears to be one of first impression.

In response to the argument that SAPF has never stated that any tax benefit accrues as a result of being an SAPF member (Op. Br. 31), the government counters, "the undisputed facts show that SAPF asserts that, by purchasing and using its Affidavit of Revocation and Statement of Citizenship, its protest letters, its pleadings and motions in court cases, and its other products and service [sic], customers can legally avoid paying taxes on U.S.-source income, opt out of the Social Security system, and otherwise defeat their obligations under the Code." (Br. 31–32). It cites 25 appendix pages in support; but not one of these pages contains even one instance where SAPF made any such assertions. Instead, they contain vague and *disputed* assertions *made by others* that SAPF did so (see, *e.g.*, App. 245, ¶5, App. 248, ¶5, disputed by App. 338, ¶60). The bottom line is that the record does *not* contain, and government and the court below have *not* cited, any evidence that *SAPF* made these claims. To the contrary, SAPF has always taught

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489 ("implicit in [the] sale of … forms, letters, and 'paralegal' services …)

that one's liability for taxes, or lack thereof, arises solely by operation of laws enacted by Congress, and certainly *not* because of membership in SAPF, nor by way of any "product" or service SAPF offers.

The government continues: "Indeed, its handbook touts SAPF's knowledge of the tax system as a means by which customers lacking such knowledge can obtain these benefits." (Br. 32) By "these benefits," it appears the government does *not* mean the alleged "benefits" quoted above and not found in the record, rather, it recites a new set of "benefits": proper procedure and paperwork to discontinue tax withholding; proper response to an IRS notice of levy or an employer's request for a social security number; educational material respecting analysis of tax liability for citizens; paralegal assistance in quitting Social Security; and letters to build a case opposing assessment or collection of tax liabilities. Again, notably, none of the so-called benefits in this list fall within that general class, discussed *supra*, comprising "tax benefits" as that term is used in §6700.[18]

§6701 and "understatements of tax liability"

With respect to SAPF's challenge of the district court's ruling that an act of omission — failure to file a tax return — is legally equivalent to an act of commission — making an understatement of tax liability — SAPF argued that the

[18] If these statements were respecting a "tax benefit," the element of having an "interest in" SAPF would still be missing. The element of "false or fraudulent" would also need to be identified in the complaint, pursuant to Rule 9(b).

element "understatement of the liability for tax" in §6701 has a specifically defined meaning within the internal revenue laws. As set forth in §6694(e) "understatement of liability" means "any understatement of the net amount payable with respect to any tax imposed by subtitle A or any overstatement of the net amount creditable or refundable with respect to any such tax." SAPF also showed that all of the penalty statutes dealing with understatements of tax liability use this definition; in tax law, an "understatement of liability" always involves a statement of an *amount* of liability on a return.

Although the propriety of this ruling is one of the issues on appeal, the government merely reiterates the lower court's premise as if it were true. (Br. 36). As support, the government cites *Geiselman v. United States*, 961 F.2d 1 (1st Cir. 1992); *Schiff v. United States*, 919 F.2d 830 (2nd Cir. 1990); and *Roat v. Commissioner*, 847 F.2d 1379 (9th Cir. 1988). As the government acknowledges, these cases dealt with whether or not a tax deficiency could exist when a return had not been filed. This question arose because §6211(a) defines a tax "deficiency" as, in part, "the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon" [emphasis added]. The arguments in these cases related to the claim that a deficiency could not exist unless a return had been filed. Thus, while it's possible to misconstrue these cases as equating a failure to file a return and a zero return,

the decisions in those cases are really only restatements of the Supreme Court's ruling in *Laing v. United States*, 423 U.S. 161, 174 (1976), quoted by *Roat*, *supra*: "Where there has been no tax return filed, the deficiency is the amount of tax due." Since these cases do not deal with understatements in the context of penalty statutes, the government's reliance on them is misplaced.

The government alternatively argues that "in a number of cases SAPF's customers have submitted returns in which they state their income and tax due as zero." (Br. 36). In support, it cites *Sherwood v. C.I.R.*, 90 T.C.M. (CCH) 512 (also App. 397-402), and *Tolotti v. C.I.R.*, 83 T.C.M. (CCH) 1436. According to the case report, Sherwood filed his zero return for 1998 on April 14, 1999, yet never gave Kotmair power of attorney until April 4, 2000, nearly a year *after* he filed his zero return. (*Sherwood*, *1–*2). In other words, he filed the return before becoming a member of SAPF, and so this case furnishes no support for the claim that SAPF had any part in Sherwood's return. Likewise, *Tolotti*'s case report shows he filed his zero return for 1995 on April 15, 1996, and that Kotmair first wrote a letter to the IRS for him on July 22, 1998, nearly two years later. (*Tolotti*, *supra*, *1-*2). Again, nothing in this case supports the claim that SAPF played any role in Tolotti's filing a zero return.

In dismissing SAPF's reliance on *Commissioner v. Acker*, 361 U.S. 87, the government tries to distinguish the case on the basis that the *Acker* court was

deciding whether Acker could be liable for two penalties for the same omission, that is, his failure to file a declaration of estimated tax. The government asserts that the question of an imposition of a double penalty "is not the case here." (Br. 37).

SAPF does not rely on that presenting issue, however, but on the underlying legal principle in *Acker*, which closely parallels the issue raised here with respect to penalty statutes. There, the government asserted a right to penalize someone for making an understatement, even though they had made no statement at all, and despite the fact that Congress had specifically enacted a separate penalty for making no statement at all. Here, if failure to file is the same as filing a zero return, then the lower court likewise asserts the government has a right to penalize someone for making an understatement, even though they have made no statement at all, and despite the fact that Congress has specifically enacted a separate penalty for making no statement at all. In *Acker*, the separate penalties were for either making an underestimate of tax or failing to make any estimate; in the present suit, the separate penalties relate to either making an understatement of tax liability or failing to make any statement.

SAPF has shown that the various penalties dealing with understatements of tax liability all depend on the existence of an amount of tax stated on a return, and there is no justification for treating the understatement penalty established by §6701 any differently. Meanwhile, §6651(a) establishes a separate penalty for

failure to file. Thus, like in *Acker*, it would be improper here to "authorize the treatment of a taxpayer's failure to file a declaration of estimated tax as, or the equivalent of, a declaration estimating his tax to be zero." (*Acker, supra*, at 91).

One of the essential elements of §6701 is an "understatement of tax liability." Without such an understatement, there can be no violation of that section; without a violation, there can be no injunction arising therefrom. The court's entire ruling for §6701 is based on the false premise that an understatement of tax liability results from failing to file a tax return. Once this prop falls, all the government has to show for the essential element of "understatement" are two tax cases involving zero returns, *supra*, neither of which show any causal connection between SAPF and the returns filed.

SAPF political speech should not be enjoined

In support of the prior restraint on all SAPF speech effected by injunction issued below, the government begins with the premise that "false commercial speech and speech related to illegal conduct are not protected by the First Amendment and thus may be banned." (Br. 44.)[19] The government has never cited any SAPF "commercial passages" (Br. 46) it believes unprotected. Without these passages, identified in context, and with only the injunction commands against

[19] The government notes "prior restraints are not unconstitutional *per se*," *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 558 (1975) (Br. 44), but

types of speech as guidance, the government is unable to distinguish SAPF's speech with respect to the cases it cites. All its cites are thus rendered yardsticks in search of something to measure.

To government argues that the "Supreme Court has not defined the 'precise bounds' of commercial speech," (*Ibid*.); this does not mean commercial speech has no limits. The government argues that linking commercial speech to public debate doesn't remove it from the category of commercial speech; such linking also doesn't move public debate into the category of commercial speech. The government argues that opening sales presentations with prayer doesn't make such presentations religious speech; prayer also does not become a sales presentation. In this vein, the conclusion that "the presence of political passages in SAPF's materials does not bestow First Amendment protections on the commercial passages" is more true in reverse: the presence of some isolated commercial speech in SAPF materials would not deprive the mass of its political speech from protection.

Again, in the abstract, the government concedes that the sale of speech doesn't make it commercial, but then oddly argues that SAPF's non-commercial speech[20] can *become* commercial speech (and so enjoined) because it "is fraudulent

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ignores: "Any system of prior restraint … comes to this Court bearing a heavy presumption against its constitutional validity." *Id.* at 558–559.

[20] Unidentified "tax advice." (Br. 47).

and ... SAPF could communicate any political message it might have without instructing its customers on how to make illegal filings." (Br. 47.) Obviously, either of those conditions, even if true — as they are *not* in this case[21] — could not transform non-commercial into commercial speech.

The government also concedes that falsity does not deprive political advocacy of First Amendment protection, but asserts "the Government may regulate or ban false or misleading commercial speech." (Br. 47.) As SAPF has argued, even if the government can regulate commercial speech by law, the court has no authority to do so under the statutory jurisdiction invoked in this instance. Here, the court's authority is limited to a precise statutory category of speech, that is, a statement fitting all the conditions defined in §6700(a)(2)(A), see *supra*.

The government also asserts the authority to prohibit speech aiding and abetting violations of the tax laws. However, even if "every circuit that has addressed the issue has 'concluded that the First Amendment is generally inapplicable to charges of aiding and abetting violations of the tax laws,' " (quoting *Rice v. Paladin Enters., Inc.,* 128 F.3d 233 (4th Cir. 1997) at 245, Br. 50), the complaint in this suit never alleged — and so SAPF has never had the

[21] No evidence exists on which a finding of fraud can be made. The only evidence is the opposite finding of the court that "[no]body can deny the sincerity of Mr. Kotmair." (App. 52.) Further, there is no evidence that SAPF instructed anyone how to make "illegal filings."

opportunity to defend against — any such charges. Even the words "aid" and "abet" are notably absent from the complaint.

Moreover, even if, *arguendo*, §7402(a) establishes jurisdiction with respect to such aiding and abetting, the government has not cited any statute establishing the necessary underlying violation, nor any principal involved in that violation, for which or whom it claims such aid was provided. Without these, the elements necessary to prove the crime are unknown, and if unknown, the government cannot meet its burden of proof with respect to them.

The government alleges that "[t]he tax-evasion instructions in the SAPF materials are expressly marketed and sold as a how-to-do-it manual, not merely as a set of abstract statements advocating reform of or noncompliance with the tax laws." (Br. 50). The entire record, however, including SAPF materials, is devoid of any "tax-evasion instructions" or *anything* SAPF "expressly markets" as a "how-to manual," nor does the government cite anything here.

Just as egregious is the claim that "SAPF provides its clients with materials, instructions, and counseling on how to make tax filings based on the U.S.-sources argument." (Br. 50). SAPF provides nothing with respect to "tax filings," whatsoever (Op. Br. 5–6); SAPF does not provide any counseling, advice or

assistance with respect to any type of filings to the IRS (App. 88; 340, ¶5; Doc. 43, Ex. 6E (p. 3); Doc. 54, Ex. 1, Attach. A, ¶ 9.11 (the representative agreement)).[22]

The government attempts in this context to tie SAPF's activities to fraud, despite the lack of any evidence in support: "[T]he First Amendment 'does not shield fraud,' because 'the intentional lie' is 'no essential part of any exposition of ideas.' " (quoting *Madigan v. Telemarketing Assocs.*, Inc., 538 U.S. 600, 612 (2003)). As already noted, Defendants are sincere in their belief that the information they make available is true (Op. Br. 38, App. 53).

SAPF has raised a legal issue which was apparently never raised in the §6700 cases cited by the government (Br. 52–55) — a jurisdictional question into the limits of the "commercial speech" penalized by §6700. Therefore, the government's reliance on cited cases such as *Schiff*, *Bell*, and *Kaun*, *supra*, with respect to the commercial speech aspect of this case, is misplaced.

Further, since there are no facts established with respect to the fraudulent provision of advice or tax-evasion materials, decisions made by the "[s]everal courts [that] have specifically held that tax advice that violates I.R.C. §6700 … is

[22] The court below erroneously refers to letters as "frivolous filings"; it did not identify "tax filings" made by SAPF on behalf of anyone.

fraudulent conduct and as such may be enjoined" (Br. 50) are not controlling here.[23]

Injunction order and FRCP 65(d)

The trial court erred in refusing to particularize its prohibitions against SAPF. The court's order prohibits, *inter alia*, "material containing false commercial speech regarding the internal revenue laws or speech likely to aid or abet others in violating the internal revenue code." (App. 475, ¶ k.).

SAPF is unable to conceive how statements regarding the tax laws can be deemed commercial speech, since they have none of the defining characteristics of that speech: they do not propose a commercial transaction (*Central Hudson Gas & Elec. Corp.*, 447 U.S. 557, 562 (1980)); they do not relate "solely to the economic interests of the speaker and its audience," (*Id.*, at 561); and they are not advertising. Thus, statements made about the tax laws — like the six in the complaint attributable to SAPF (App. 14) — are simply not commercial speech, no matter how many times the government or the lower court says otherwise.

As for statements "likely to aid or abet others in violating the internal revenue code" (App. 475, ¶k.), SAPF is without any objective standard by which to determine what speech is *likely* to aid or abet violations. If the court has determined that some specific statements made by SAPF so "aid or abet," then the

[23] Citing *U.S. v. Bell*, 414 F.3d 474 (2005), *U.S. v. Estate Preservation Services*,

injunction should identify those statements so that they can be withdrawn. Forcing SAPF to make independent determinations of what falls within the court's general categories limits it to the option of either gagging itself totally or subjecting itself to criminal contempt merely for guessing wrong.

Rationalizing the vagueness of the district court's order, the government offers its own interpretation, no more specific than the original. For example, the government says SAPF "must stop engaging in conduct that interferes with the administration and enforcement of the internal revenue laws." (Br. 66) Again, SAPF is forced to make an independent determination as to the conduct deemed to "interfere." The only mention the court below made in this regard was: "As to the merits of the government's case, it is without question that Defendants are violating the tax laws and interfering with the administration of those laws."[24] (App. 495). The injunction order and memorandum are fraught with these types of generalities, as discussed in SAPF's opening brief. (Op. Br. 44–47).

The government argues that other courts have upheld similar injunctions, but in those cases where the injunction was overly broad, the circuits merely construed the injunction so as to keep it within the confines of the authority for it. See *U.S. v. Buttorff*, 761 F.2d 1056, 1065 (5th Cir. 1985) (narrowly construing the injunctive

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202 F.3d 1093, and *U.S. v. Freeman*, 761 F.2d 549 (1982).

24 The word "interference" appears only twice more, both times in a quote from *Ernst & Whinney*.

order to enjoin appellant from selling a specific trust, imposing specific conditions on the sale), *U.S. v. Kaun*, 827 F.2d 1144, 1151 (Cir.7th 1987) (interpreting the order narrowly to avoid constitutional problems posed).

The *Kaun* court also warned of the dangers of prior restraint on speech, and of the care that must be taken by the trial judge in such cases:

> "Conclusory statements by government witnesses must be supported by hard facts. I believe that the experienced district judge was sufficiently cognizant of this obligation to warrant affirmance of the judgment. Yet, I do find disturbing the district court's partial reliance on statements of opinion and conclusions of the government witnesses. It is for the court, not the witnesses, to determine whether the defendant's speech caused disruption to the collection of taxes and, if so, to what degree.
>
> In short, I believe it would be a mistake for the government or for the district courts in this circuit to interpret this case as signaling any diminution in our scrutiny of government submissions aimed at curtailing first amendment rights." *U.S. v. Kaun*, *supra*, at 1154, diss. [Emphasis added].

While district courts continue to issue vague injunctions, courts of appeal are repeatedly forced to narrow the *interpretation* of those orders to prevent unconstitutional restraints on protected speech.

Membership list and First Amendment right to association

The government contends SAPF has no "First Amendment associational rights" because the record shows SAPF operated as a "commercial enterprise, not as a political organization." (Br. 56). The government cites the Member Handbook, which provides the opposite of its contention: "THE SAVE-A-PATRIOT

FELLOWSHIP IS NOT A BUSINESS." [emphasis in original] (App. 100); "The Fellowship is a First Amendment, Unincorporated Association … [it] actively promotes the study of the Law and the assertion of one's rights in accordance with the Law" (App. 86.). The decision in *Save-A-Patriot Fellowship v. United States*, 962 F.Supp 695 (D.Md. 1996) (App 508–516), and the hearing transcript in that case (App. 518–519) show the lower court's acknowledgment that SAPF *is* a political association.

Although SAPF sells things, the preponderance of the evidence shows it is not organized for gain or profit and does not have a commercial relationship with customers. Accordingly, the cases cited (*Bell*, *supra*, *IDK, Inc. v. Clark County*, 836 F.2d 1185 (9th Cir. 1988), *In re PHE, Inc.*, 790 F.Supp. 1310 (W.D. Ky. 1992), etc.) are inapplicable here.

The government contends its interest in enforcing the tax laws outweighs any associational rights implicated (Br. 58), and cites *St. German of Alaska E. Orthodox Catholic Church v. United States*, 840 F.2d 1087, 1094 (2nd Cir. 1988) and *Kerr v. United States*, 801 F.2d 1162 (9th Cir. 1986). In both cases, the disclosure of church contributors' names was incidental to the IRS investigation. In the present case, the government directly seeks the names of members of a political organization on the speculation that they may have violated some law. In *First National Bank of Tulsa v. Department of Justice*, 865 F.2d 217 (10th Cir. 1989), the

court held "an evidentiary hearing so that the government could demonstrate its compelling need for the material" sought, in the face of a *prima facie* showing by an association of First Amendment infringement. SAPF has shown a *prima facie* infringement of its rights to association, but has received no hearing.

In *Bell*, *supra*, the court recognized that his preparation of tax returns placed him into a category of regulated persons ("tax preparers") required to keep records of their clients. These records were deemed not protected by the First Amendment. Bell "charged for advice and services in preparing various tax filings … several of Bell's clients obtained unwarranted tax refunds by filing returns according to his methods." *Bell*, *supra*, at 475–476 [Emphasis added]. SAPF never advises or assists in preparing returns, *supra*; it is not a "tax preparer."

The court below justifies its order "because of the possibility that many [members] do not file tax returns." (Br. 21). Conjecture that some members may not file is not a warrant to abrogate all members' rights to free speech, association, and due process. Moreover, "Injunctive relief is historically designed to deter, not to punish." *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975). See, also, *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). The government wants the list of SAPF members, not because it has information that they have violated any law, but because they have chosen to associate with SAPF.

Alleged statements and FRCP 9(b)

The government contends it met the heightened pleading standards of Rule 9(b) because "[t]he complaint includes specific references to [] SAPF's false statements with respect to the tax laws, identifies where they are made, and asserts that this conduct is ongoing." (Br. 63). This confirms the statements (and "implicit representations"), *supra,* relied upon by the court below to find that SAPF acted fraudulently, were never alleged in the complaint. The requirement of particularity under this rule is only satisfied if the complaint sets forth precisely the statement made, the time, place and person responsible for each statement, the content of the statement and its affect, and what the defendant gained from the fraud. See *Official Publications, Inc. v. Kable News Co., Inc.,* 775 F.Supp. 631 (1991). The government, by its own argument above, acknowledges it did not meet this requirement.

Inadmissible evidence

The government states (Br. 65) that the only inadmissible evidence to which SAPF points is the IRS chart setting forth costs of handling letters (App. 228). However, the record shows that SAPF objected numerous times to inadmissible evidence introduced below (Doc. 54, 64). Most of the appendix pages included by the government have been objected to as inadmissible (e.g., App. 68-81, 104-121, 228, 241-297, 377-472).

CONCLUSION

For the reasons set forth above, the permanent injunction order issued by the district court should be vacated, or the judgment of the lower court should be reversed and the case remanded for trial and strict application of the penalty statutes and correct constitutional standards.

Respectfully submitted this 2nd day of July, 2007.

GEORGE E. HARP

610 Marshall St., Ste. 619
Shreveport, LA 71101
(318) 424-2003

Attorney for Save-A-Patriot Fellowship

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel for defendant-appellant SAPF certifies that the foregoing brief complies with the type-volume limitation of Fed. R. App P. 32(a)(7)(B)(i) and contains 7,000 words (using Microsoft Word for Windows, 14 pt. Times New Roman), excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

GEORGE E. HARP

CERTIFICATE OF SERVICE

The undersigned counsel certifies that foregoing brief and appendix was sent to counsel for the Appellee, Carol A. Barthel, Attorney, Appellate Section, U.S. Department of Justice, 3370 V Street NE, Main Room 4333, Washington, DC 20018; and to Defendant/Appellant John B. Kotmair, Jr., 12 Carroll Street, Westminster, MD 21157, by third-party commercial carrier on the 2nd day of July, 2007.

GEORGE E. HARP