IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, Appellee	)	
v.	)	No. **07-1156**
JOHN BAPTIST KOTMAIR, JR., and SAVE-A-PATRIOT FELLOWSHIP, Appellants	)	

MOTION FOR STAY OF MANDATE
PENDING APPLICATION FOR CERTIORARI

NOW INTO COURT, through undersigned counsel, come SAVE-A-PATRIOT FELLOWSHIP and JOHN B. KOTMAIR, JR, hereinafter Defendants/Appellants, who respectfully move this Court to stay the issuance of mandate in this cause for the reasons and on the grounds set forth hereinbelow.

1. The telephone numbers and office addresses for the attorneys of the parties are as follows:

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2. Pursuant to FRAP 41(a), the mandate will issue seven days from the denial of the petition for re-hearing. The petition for re-hearing was denied by this Court on October 1, 2007. It is not received into counsel's office, but was known to counsel on October 2, 2007.

3. Defendants/Appellants will be irreparably harmed by the requirement in the affirmed District Court injunctive judgment requiring the disclosure of confidential, First Amendment-protected personal information of SAVE-A-PATRIOT FELLOWSHIP (SAPF) members.

4. The affirmed District Court injunctive judgment is vague and overbroad and will essentially require Defendant/Appellant SAPF, and its members, and Defendant/Appellant JOHN B. KOTMAIR, JR. (Kotmair), to completely cease First Amendment-protected political speech and advocacy or risk piecemeal litigation in a contempt-of-court setting.

5. Both Defendant/Appellant SAPF and Defendant/Appellant Kotmair show that they each intend to apply for a writ of *certiorari* in the United States Supreme Court regarding the subject matter raised in this appeal. There are good grounds for granting the stay of mandate, to wit:

   A. There are legitimate First Amendment-protected rights of speech and association of both Defendants/Appellants and of non-parties;

   B. The injunctive relief set forth in the affirmed district court order is vague and overly broad and will cause cessation of all parties' and non-parties' First Amendment-protected political speech and advocacy; and

   C. Because the District Court granted summary judgment where there were genuine issues of material fact raised, the affirmation by this Court of said order is not only at variance with other Circuits, but is in violation of this Court's own precedents, and presents a genuine issue of denial of due process, *i.e.*, a right to be heard and to present evidence prior to adjudication of material issues of fact.

6. As to Plaintiff/Appellee UNITED STATES OF AMERICA, there would be no irreparable harm caused by the granting of a stay of the mandate.

7. By telephone conversation on October 5, 2007, counsel for the United States notified counsel for Appellants that the United States opposes this motion. Counsel for the United States has been served with a copy of this motion on October 5, 2007.

8. The relief sought in the motion is not available in the District Court. The authority for a stay of mandate pending application for *certiorari* under the Federal Rules of Appellate Procedure Rule 41 is provided to the Court of Appeals, not to the District Court.

9. There has been no previous motion for the relief currently being sought.

10. Pursuant to Local Rule 41, Defendants/Appellants show that this motion is not interposed merely for delay, but to prevent irreparable harm that would be incurred not only by Defendants/Appellants as described herein, but by third parties, namely, those members and subscribers whose personal and private information would be compromised without their consent and without their having been afforded any opportunity to assert or defend their rights to privacy under the Fourth and Ninth Amendments, their freedom of association under the First Amendment and their rights to be afforded due

process under the Fifth Amendment prior to the infringement upon and denial of those rights.

11. Accordingly, Defendants/Appellants show that there are serious and substantial issues presented and yet to be resolved, that the intended and noticed application for writ of *certiorari* meets the requirements for issuance of such, and that there is probable and good cause for a stay.

ARGUMENT

A stay of the mandate is necessary to protect First Amendment rights of speech and association

The issuance of the mandate will infringe, *inter alia*, the First Amendment rights to freedom of speech and freedom and privacy of association of Defendants/Appellants as well as all SAPF members and potential members, who have not been served as parties to this action. The mandate's issuance will require SAPF to provide the government with members' addresses, phone numbers, and even social security numbers, in conflict with the binding precedent of the Supreme Court under *NAACP v. Alabama*, 357 U.S. 449, 462 (1958): "that compelled disclosure of affiliation with groups engaged in advocacy … is likely to affect adversely the ability of [the group] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the [group] and dissuade others from joining it because of fear of exposure of their beliefs shown through their

associations and of the consequences of this exposure." See also *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 544 (1963) ("compelled disclosure of affiliation with groups engaged in advocacy may constitute an effective restraint on freedom of association"), *U.S. v. Hammoud*, 381 F. 3d 316, 328 (4th Cir. 2004), ("It is a violation of the First Amendment to punish an individual for mere membership in an organization that has legal and illegal goals."), and *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966) (holding that a decree resting on 'guilt by association' infringes unnecessarily on protected freedoms.)

The issuance of the mandate will offend this binding precedent and the First Amendment by stripping *all* SAPF members of privacy in association, without a showing of individual intent to further illegal aims. Whether such punishment — involving loss of privacy and governmental blacklisting, increased scrutiny and harassment — can be ordered on a 'guilt by association' basis without probable cause is a significant constitutional question for the Supreme Court. If the mandate is not stayed, however, the question will be rendered moot by the necessity to disclose the private personal information of SAPF's members before a writ of *certiorari* can even be prepared.

The issuance of this Court's mandate will also leave substantial, unanswered questions for the Supreme Court with respect to the extent of the First Amendment protection afforded SAPF's speech and the extent to which an injunction issued

pursuant to §§7402(a) and 7408 of the Internal Revenue Code may restrain it. This Court upheld the injunction on the grounds that "[b]ecause much of the speech … relates to the sale of SAPF products and services, it is commercial speech and it is well established that commercial speech, if fraudulent, can be enjoined." What is missing is a connection between this "well established" precedent of enjoining fraudulent commercial speech and the jurisdiction of the Internal Revenue Code. Until the government began using this premise to enjoin political speech regarding taxation under the guise of preventing the promotion of abusive tax shelters, the restrictions on commercial speech generally proceeded from statutes, regulations or ordinances that established such restrictions. The present case is one where the lack of a precise judicial definition of the term "commercial speech" has been exploited as a means of restraining political speech which is disapproved by the government. There is good cause for the Supreme Court to accept *certiorari* in order to preserve its commercial speech jurisprudence and prevent it from being used as a means to gut the protections of the First Amendment, especially with respect to matters of public concern.

A prior restraint on Appellants' protected political speech also impairs the individual rights of SAPF members and potential members to themselves freely express their opinions through SAPF's publications, to freely and privately associate with others so their collective voice can be amplified beyond what their

separate individual voices might achieve, and to *receive* the newsletters, videos, and correspondence that SAPF produces. Since the Supreme Court has repeatedly recognized that the First Amendment protects the right to *receive* information, there is cause for it to grant *certiorari* in order to see this penumbral right sustained. See *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) ("Constitution protects the right to receive information and ideas"), and *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("This right to receive information and ideas, regardless of their social worth, is fundamental to our free society"), and *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943).

The issuance of the mandate, then, will infringe the First Amendment rights of persons who are not parties to this case and who had no opportunity to defend those rights. The deprivation of rights without opportunity to be heard implicates the Fifth Amendment's guarantee of due process with respect to the majority of persons who will be affected by the injunction, and raises a substantial question for the Supreme Court.

A stay of the mandate is necessary to protect Defendents/Appellants from contempt citations for exercising First Amendment rights while awaiting a writ of *certiorari*

The issuance of the mandate makes the necessity of narrowing the extent of the overbroad injunction urgent. If this Court denies this motion for stay, Defendants/Appellants fear the injunction will be repeatedly returned for piece-

meal determinations of its scope, as any future contempt proceedings have a high likelihood of involving activities — *e.g.*, the right to publish and distribute literature — which the courts have previously acknowledged as protected under the First Amendment.

Since the injunction has not been amended to conform to FRCP 65(d), the issuance of the mandate is highly likely to irreparably harm Defendants/Appellants in precisely the manner the Supreme Court has held is the reason for Rule 65(d)'s requirement that injunctions specify the reasons for issuance and terms in detail — "to prevent uncertainty and confusion on the part of those faced with injunction orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *CPC International, Inc. v. Skippy Inc.*, 214 F.3d 456, 459 (4th Cir. 2000). See also *Schmidt v. Lessard*, 414 U.S. 473, at 476 (1974).

Absent a stay of the mandate, Defendants/Appellants are at the mercy of the district judge's vague and overbroad injunction order. They are on the horns of a dilemma: having to choose between defending themselves against the inevitable contempt charges if they continue their political speech, or gagging and depriving themselves of their political speech and advocacy in order to avoid such charges. The collateral bar rule of *Walker v. Birmingham*, 388 U.S. 307 (1967) eliminates the defense in a contempt proceeding that the injunction itself is unconstitutional; the Supreme Court has held that this is good reason to require the strictest standard

for issuance of such orders. *Madsen v. Women's Health Center, Inc.,* 512 U.S. 753 (1994).

This prior restraint of Defendants/Appellants' speech and the threat of contempt under a vague injunction are impermissible infringements on their First Amendment rights, as well as the corresponding rights of SAPF members. The Supreme Court has recognized this danger to free speech in *IDK, Inc., v. County of Clark*, 836 F.2d 1185, 1190 (1988): "[F]irst amendment [] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. *NAACP v. Button*, 371 U.S. 415, 433 (1963)." A substantial question exists as to whether the District Court exceeded its subject matter jurisdiction under the statutes invoked for the issuance of this injunction, and the question as to the permissible scope for a prior restraint on Appellants' speech and activities is good cause for this case to be considered by the Supreme Court before the mandate issues.

A stay of the mandate is necessary to prevent the deprivation of Defendants/Appellants' due process rights

The issuance of the mandate will harm Defendants/Appellants by subjecting them to contempt while simultaneously denying them the due-process right to confront and cross-examine witnesses with respect to genuine controversies of

material fact *before* the issuance of the injunction. This denial of due process presents a substantial question for the Supreme Court concerning the right to be heard prior to adjudication of material issues of fact.

When injunctions are enforced through contempt proceedings, only the defense of factual innocence with respect to the injunction commands is available. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 793 (1994). Thus, even though Defendants can cross-examine witnesses in a criminal contempt hearing, they have still been deprived of their liberty without ever having the opportunity to cross-examine witnesses or to obtain a trial on the facts *underlying* the issuance of the injunction order. In the absence of a stay, the mandate will operate to deprive Defendants/Appellants of liberty in any contempt proceeding which relies on the District Court's improper findings of fact in this case.

The Supreme Court acknowledges that the Confrontation Clause of the Sixth Amendment guarantees a defendant a face-to-face meeting with witnesses appearing before the trier of fact. See *Kentucky v. Stincer,* 482 U.S. 730. In *Kirby v. United States*, 174 U.S. 47, 55, (1899), the Court stated: "[A] fact which can be primarily established only by witnesses cannot be proved against an accused [] except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or

conduct of criminal cases." This right was confirmed as a literal right to look the accused in the face by the Court in *Coy v. Iowa*, 487 U.S. 1012 (1988), and in *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court confirmed that the confrontation requirement was an immutable principle any time an individual may be seriously harmed by governmental action, even in cases where administrative actions such as the denial of welfare benefits were under scrutiny.

By upholding the district judge's improper findings of fact rather than remanding for trial in accordance with the right to confront witnesses, the mandate is at variance with this Circuit's own precedents in *Davis v. Zahradnick*, 600 F.2d 458, at 460 (4th Cir. 1979) (summary judgment is improper where affidavits present conflicting versions of material facts), *Girard v. Gill*, 261 F.2d 695 (4th Cir. 1958) (questions of credibility are not determined by summary judgment), and *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390 (4th Cir. 1950).

Even a cursory review of the record reveals that several specific actions enjoined by the District Court were hotly disputed as to whether they have ever occurred. In spite of sworn denials of witnesses' allegations via affidavit (*e.g.*, App. 337–338) and even in light of Plaintiff/Appellee's witness' sworn admissions of material facts in favor of Defendants/Appellants (*e.g.*, App. 30–31), the District Court failed to draw inferences in favor of nonmovant SAPF. As a result, the issuance of the mandate will prohibit actions SAPF has sworn did not occur or

actions sworn by Plaintiff/Appellee not to have harmed the government, *inter alia*: advising any individual that they are not required to file or pay federal taxes, representing that any of its publications can legally reduce taxes or remove members from the obligation to file or pay federal taxes (material to § 6700[1] charges), impeding the IRS and causing irreparable harm by writing letters, preparing court filings to obstruct IRS examinations or collections, and preparing documents which it knew would be used to understate the taxes due on a return (material to § 6701 charges).

Nonmovants on summary judgment are entitled to have their version of all disputed facts accepted, and all doubts must be resolved against the party requesting summary judgment. See *Charbonnages de France v. Smith*, 597 F.2d 406, at 414 (4th Cir.1979), *Greenebaum Mortg. Co. v. Town and Garden Associates*, 385 F.2d 347 (7th Circuit, 1967).

Summary judgment is improper even where undisputed material facts are susceptible to divergent inferences. See *Tao v. Freeh,* 27 F.3d 635 (D.C. Circuit, 1994), *Hines v. British Steel Corp*, 907 F.2d 726 (7th Cir. 1990). In order to find a violation of the necessary element of § 6700, i.e., the making of false statements specifically regarding "the excludability of income by reason of participating in the plan or arrangement," the District Court inferred that SAPF's claim that it makes

[1] § 6700 and § 6701 are sections of Title 26 and the penalty statutes invoked for jurisdiction in this case.

the "proper response, protests, and/or requests necessary to obtain relief" from the IRS constitutes an "implicit" representation that SAPF members can *exclude income* by reason of such responses or requests. A489. A more readily drawn inference, especially in light of SAPF's proximate statement that "We request the remedy that is available under the law" (App. 94), is that SAPF understands the regulations and due process rights available with respect to IRS investigations. This divergent and more likely inference does *not* establish a violation of § 6700, and therefore is the inference which should have been drawn in nonmovant SAPF's favor.

Finally, the "state of mind" elements of this case, *e.g.*, "knows or has reason to know is false or fraudulent" under § 6700, require a factual determination outside the province of summary judgment. *Charbonnages*, *supra*, at 414, see also *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). The denial of the right to trial on this essential element of §§ 6700 and 6701, on the divergent inferrences which can be drawn from the facts, and on disputed issues of material fact present substantial due-process questions for the Supreme Court.

Plaintiff/Appellee United States will not be harmed by the brief stay of the mandate

The situation has not changed since the District Court granted a stay of its injunction pending appeal on February 22, 2007, stating that "the potential

immediate impact from enforcement of the injunction on Defendants outweighs the harm to Plaintiff occasioned by a brief delay in enforcement." (Docket 74, p. 2). As then, the government will still not suffer irreparable damage from a brief stay in issuance of the mandate.

In granting summary judgment, the District Court found the government was sustaining irreparable harm by expending time and money to respond to SAPF correspondence and through "lost revenue from SAPF customers who either fail to file returns or file returns understating their tax liability." (App. 495). In the case of returns understating tax liabilities, the IRS is *already* in possession of any such returns, and is empowered to make deficiency assessments with respect to them at any time within the statutory limitations, so a stay in the issuance of the mandate cannot affect "lost revenues" with respect to such filed returns. In the case of a failure to file required returns, no statute of limitations exists for the assessment of deficiencies, so the IRS has the rest of SAPF members' lives to pursue these "lost revenues." Congress has also authorized the addition of substantial penalties and interest in such cases, which it presumably deems sufficient to make the government whole.

At the same time, any costs associated with the processing of "frivolous filings" or correspondence from SAPF members will be borne by the government even when said members are prohibited from receiving SAPF assistance and

subsequently must prepare their own correspondence. Thus, a stay of the mandate will not cause any irreparable harm to Plaintiff/Appellee.

CONCLUSION

For the reasons set forth hereinabove, the issuance of the mandate should be stayed pending the resolution of Defendants/Appellants' application for a writ of *certiorari*.

WHEREFORE, Defendants/Appellants respectfully, but urgently, move the Court to stay the issuance of mandate in this cause pending a ruling by the Supreme Court on Defendants/Appellants' application for writ of *certiorari*.

In the alternative, and considering the adverse and irreversible effect upon the rights of non-parties to this proceeding, Defendants/Appellants respectfully, but most urgently, move the issuance of a stay as to that portion of the underlying order of the District Court requiring Defendants/Appellants to disclose private and protected information regarding innocent third parties.

Dated October 5th, 2007.

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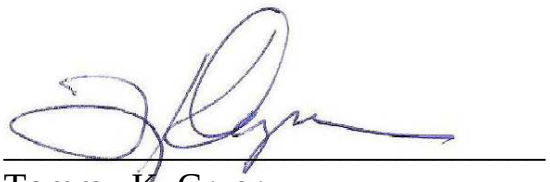

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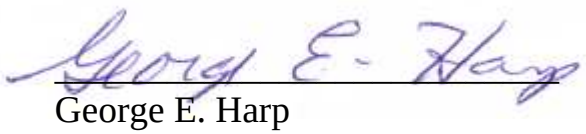
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a printed copy of this MOTION FOR STAY OF MANDATE PENDING APPLICATION FOR CERTIORARI was sent to counsel for the Appellee, Carol A. Barthel, Attorney, Appellate Section, U.S. Department of Justice, P.O Box 502, Washington, DC 20044, by facsimile and priority U.S. mail on October 5, 2007. The undersigned further certifies that a copy of this MOTION was sent to Rod J. Rosenstein, U.S. Attorney for the District of Maryland, 36 S. Charles Street, 4th Floor, Baltimore, MD 21201 by priority U.S. mail on October 5, 2007.



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