**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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

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REPLY TO APPELLEE'S OPPOSITION TO MOTION FOR STAY OF MANDATE PENDING APPLICATION FOR CERTIORARI

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Appellant SAVE-A-PATRIOT FELLOWSHIP (SAPF), through undersigned counsel, respectfully submits this reply to Appellee United States of America's response in opposition to Appellants' motion to stay the issuance of this court's mandate until the disposition of their intended application for a writ of *certiorari* to the United States Supreme Court.

## DISCUSSION

Appellee (the government) cites *John Doe, I v. Miller,* 418 F.3d 950, 951 (8th Cir. 2005), with respect to the standard of review for this form of temporary injunction. Appellants make the following reply with respect to this standard:

First impression issues raise reasonable probability of *certiorari* and success on the merits

SAPF raised first-impression issues with respect to the necessary elements required to show violations of § 6700 and § 6701,[1] and has shown that the District Court found no evidence sufficient to prove these necessary elements existed in its case. There is a reasonable probability that at least four to five Justices of the Supreme Court recognize the fundamental principle that each and every element of a statute must be proven before judgment can issue against the accused.

In its recitation of the facts of the case, Appellee cites the District Court's finding that "[c]ourts have … found tax schemes very similar to Defendants' to fall within the reach of §6700." (Opp. 4)[2] Appellants never raised an issue regarding the "plan or arrangement" element of §6700; Appellants have continually challenged the District Court's findings on the grounds that the element required by §6700(a)(2)(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" — is absolutely missing in this case. The District Court, in concluding "that only those that follow SAPF's plan will be able to reap those benefits," relied on "implicit representations" SAPF had made. (App. 489). Under the reduced standard of "implicit representations," the court cited only two

[1] All references to statutory sections refer to 26 U.S.C., the Internal Revenue Code.

statements, neither of which could be construed to imply that *only* SAPF members could reap the benefit of Congressionally enacted tax benefits. (App. 489).

In its opposition, Appellee could cite only the following as constituting the requisite false statements: "taxable income is limited to 'income that has been "earned" while living and working in certain "foreign" countries or in the USA possessions and territories'; that there is no requirement for most Americans to file tax returns or have taxes withheld from their wages; and that one can 'quit' the Social Security program." (Opp. 5). None of these statements concern tax benefits secured by reason of participation in the Fellowship. In that no statement pursuant to this requisite element of § 6700 has yet been identified by the government, this Court, or the court below, there is a reasonable probability that the requisite minority of Supreme Court justices will recognize this manifest error and accept *certiorari*.

The necessary element of "understatement of liability," required by §6701(a)(3), is also missing in this case. The government incorrectly claims in its opposition that the District Court "rejected as 'preposterous' SAPF's argument that its filings on its members' behalf did not result in understatements of liability." (Opp. 6). What the court actually dismissed as preposterous was an argument that

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[2] "Opp." refers to Appellee's response in opposition to motion of Appellants to stay issuance of mandate.

the IRS must rely on documents SAPF prepared for the understatement penalty to apply. (App. 493).

Appellant SAPF has shown that an understatement of tax liability, as that term is used in the Internal Revenue Code, always refers to an amount shown on a filed tax return. (Op. Br., pp. 32–35).[3] In granting the injunction, the lower court incorrectly equated making an understatement of liability under § 6701 with making no statement of liability (i.e., failing to file a tax return). The statutory language of § 6701 does not establish failure to file as an element of § 6701. Therefore, there is reasonable probability that the Supreme Court justices will accept *certiorari* and follow their own precedent of strictly construing penal statutes. See *Commissioner of Internal Revenue v. Acker*, 361 U.S. 87 (1959).

Lack of support for and specificity regarding claims of interference raise reasonable probability of *certiorari* and success on the merits

As noted by the government, the District Court found that SAPF interferes with the administration of the tax laws (Opp., p. 7) and enjoined them from engaging in certain activities. The court's memorandum and order did not explain how any of the activities enjoined did or could interfere with the authority and ability of the IRS to administer the internal revenue laws with the particularity required by FRCP Rule 65(d), nor have any specific laws with which SAPF allegedly interfered been identified.

This lack of specificity was acknowledged by the District Court in its order granting a stay pending appeal, when it said "they may be entitled to some minor modifications or clarifications of this Court's injunction." (Docket # 74, p. 2). Said modifications and clarifications have never occurred, and the injunction thus remains in violation of the requirements of FRCP Rule 65(d). Since Fourth Circuit precedent holds that the terms of this rule "are mandatory and must be observed in every instance," see *CPC International, Inc. v. Skippy Inc.*, 214 F.3d 456, at 459 (4th Cir. 2000), *Thomas v. Brock*, 810 F.2d 448, at 450 (4th Cir. 1987), it is reasonable that a majority of Supreme Court justices will vote to resolve the conflict with Fourth Circuit's own prior decisions created by the *per curiam* affirmance of the injunction, especially in light of its own precedent. See *Schmidt v. Lessard*, 414 U.S. 473 (1974).

Failure to address challenge to subject matter jurisdiction raises reasonable probability of *certiorari* and prevailing on the merits

Since the Internal Revenue Code does not confer subject matter jurisdiction over commercial speech — with the exception of that narrow class of commercial speech which consists of falsely advertising tax benefits resulting from participation in a plan or arrangement — the District Court lacked jurisdiction to enjoin any other type of commercial speech. Although the government refers in

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[3] "Op. Br." refers to SAPF's opening appellate brief in this case.

passing to this subject matter jurisdiction challenge (Opp. 11–12), it attempts to side-step the challenge by referring to the Supreme Court cases which have upheld bans on other particular forms of commercial speech. (Opp. 12, referring to government's appellate brief). None of the cited cases have raised the issue of banning commercial speech under the authority of the Internal Revenue Code. No IRC statute restricts commercial speech (with the narrow exception noted above), and there is no corresponding authority to ban such speech under IRC §7402(a). It is the duty of all courts of appeal to ensure that the jurisdiction necessary for the lower courts to act existed, so there is a reasonable probability that the Supreme Court will grant *certiorari* to resolve this issue. See *U. S. v. Huckabee*, 83 U.S. 414, 435 (1872) ("… in an appellate court in cases where the subordinate court was without jurisdiction and has given judgment or decree for the plaintiff or improperly decreed affirmative relief to a claimant … the judgment or decree in the court below must be reversed, else the party which prevailed there would have the benefit of such judgment or decree, though rendered by a court which had no authority to hear and determine the matter in controversy."). See also *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884), *Jackson v. Ashton*, 33 U.S. 148, 149 (1834).

The government's argument that Appellants pointed to no conflict between the courts of appeals with respect to protection of its political speech is misplaced.

Appellants argued (Mot. 5–10)[4] that the conflict is between this panel's decision and the Fourth Circuit's and Supreme Court's prior decisions. It is this conflict which furnishes the probability that the Supreme Court will reverse this Court's judgment.

Irreparable harm

The government cites the District Court's finding that "Kotmair and SAPF 'will not sustain any irreparable harm in being required to obey the law." (Opp. 7), but fails to mention the same court's finding in granting the stay of its order on February 22, 2007: "While the harm to the government caused by Defendants' activities is not unsubstantial, the additional harm caused by a brief delay in the enforcement of the injunction ***is less than the potential immediate harm to Defendants once the injunction is in force***." [Emphasis added][5] The District Court's recognition of this is an explicit acknowledgment that the requisite balance of irreparable harm for an injunction to issue under §7402(a) did not actually support its issuance.

The government also argues that "[p]roducing a customer list does not offend the First Amendment because commercial transactions do not entail the same rights of association as political meetings." (Opp. 13). SAPF has been

[4] "Mot." refers to Appellants' motion for stay of the mandate pending application for *certiorari.*
[5] Docket 74, p. 2

ordered to produce a list of "all SAPF members (both associate and full members)" (App. 476) in addition to any "customers," and so, commercial transactions are not the determining factor for said production, as they were in *United States v. Bell*, 414 F.3d 474, at 485 (3rd Cir. 2005).

The government reiterates the District Court's justification of its prior restraint on SAPF's First Amendment rights, in that Appellants "can express their opinions about the tax laws as long as those opinions are not used to sell products or services," and claiming thereby that "the injunction does not preclude the exercise of protected rights." (Opp. 14). A restriction on using its opinions to sell products — such as books, videos, and newsletters by which it expresses those same opinions — is itself an infringement of protected rights. If the injunction is *not* meant to prohibit Appellants from distributing opinions in the form of books, videos, newsletters, etc., then the vague and overbroad language used in the injunction order places Appellants at risk of defending themselves from an unfounded contempt citation — an immediate and pressing harm to Appellants.

The government states "[Appellants'] suggestion … that SAPF's customers would continue to file protest letters and underpay their taxes without SAPF's assistance is wild conjecture on their part." (Opp. 15) The countering assumption of the government, that members only form these opinions and write letters with

SAPF's assistance, appears unfounded. (See App. 337, ¶¶ 57–58, previous members stopped filing returns two years *before* joining SAPF).

The government's claim that the "customer list is essential" to identify who is "following appellant's illegal advice" is at odds with the record in this case. (Opp. 15). The government has identified hundreds of SAPF members already through its computer matching programs, and has started the process of collection for taxes it claims due. (App. 79).

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

Dated October 22nd, 2007.

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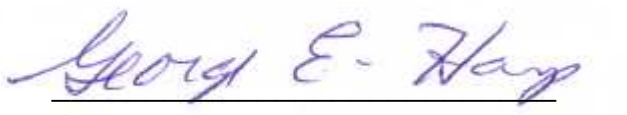
## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a printed copy of this REPLY 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; Rod J. Rosenstein, U.S. Attorney for the District of Maryland, 36 S. Charles Street, 4th Floor, Baltimore, MD 21201; and Tommy Cryer, Attorney, 3415 Seminole Drive, Shreveport, LA 71107 by U.S. mail on October 22, 2007.



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