No. 07-1156

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee.

v.

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

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, Civil No. WMN-05-1297

BRIEF OF AMICI CURIAE G. S. *ET AL* IN SUPPORT OF APPELLANT

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IDENTITY OF AMICI CURIAE

Two amici curiae, G.S. and T.B., citizens of Maryland and Pennsylvania, respectively, are members of the Save-A-Patriot Fellowship (SAPF). The third, T.K., is a citizen of Maryland who is not a member of the Fellowship, but attends meetings of the SAPF and has purchased educational materials. The fourth, K.M., is a citizen of Maryland who is not a member of the Fellowship, but wants to obtain and possess SAPF publications.

Amici curiae file this motion in an alias capacity to preserve their right to privacy in their association with SAPF, and to keep their names from the United States. In light of their interests as set forth herein, their names are protected from disclosure under the First Amendment to the Constitution, and providing their names would render this issue moot.

INTEREST OF AMICI CURIAE

Amici curiae have personal interest in this case when the permanent injunction Order issued by the District Court is a prior restraint upon SAPF's First Amendment right of free speech while simultaneously restricting amici's corresponding and reciprocal rights for political information about U.S tax laws. Further, the District Court injunction order mandates SAPF to produce the

personal information (names, addresses and social security numbers) of all its members and any purchasers of SAPF materials to the government, which will open amici to unwarranted harassment and scrutiny by the government based on mere association with SAPF.

SOURCE OF AUTHORITY TO FILE

Appellants have consented to the filing of this amicus brief. Appellee, the United States, has not consented, and this brief is filed concurrently with amici curiae's motion for leave to file an amicus brief.

PROCEDURAL BACKGROUND AND DECISION OF THE UNITED STATES DISTRICT COURT

The United States ("government') filed a complaint for permanent injunction on May 13, 2005, alleging Save-A-Patriot Fellowship (SAPF) and John B. Kotmair, Jr. (Kotmair) were involved in promoting an abusive tax shelter, subject to penalty under 26 U.S.C. §6700; aided in the understatement of tax liability of others, subject to penalty under 26 U.S.C. §6701; and otherwise obstructed and interfered with the administration of the tax laws. A11–23. The government requested relief in the form of an injunction pursuant to §7408 of the IRC to preclude discrete conduct and activities which are alleged to violate §§6700 and

6701 of the IRC; as well as an injunction pursuant to §7402 of the IRC mandating that the Appellants: (1) furnish the government with the name, social security number and contact information for all SAPF **members and** for **all of those persons who purchased Appellants' products and services**; (2) remove false and fraudulent information from website; and (3) to post a copy of the District Court injunction on the website.

The United States District Court for the District of Maryland (District Court) considered cross motions for summary judgment. Initially, the District Court found that programs and materials proffered commercially by SAPF fall within the meaning of "plan or arrangement" under §6700; and further that the remaining elements of §6700 were satisfied permitting injunction under §7408. The District Court reasoned that programs and materials commercially proffered by SAPF were based upon false or fraudulent conceptions of the U.S. Tax Code.

The District Court further determined that SAPF violated §6701 finding that SAPF, for a fee, prepares correspondence and other materials to assist persons with filings in connection with the internal revenue laws resulting in the known understatement of a tax liability. However no evidence was derived to establish any amount of loss of tax revenues or improperly paid refunds; only that the government expended several hundred hours of time to collect and address known

responses filed with the assistance of the Appellant, SAPF. The Court concluded that an injunction is appropriate to address the ongoing violations of §6701.

Finally, the District Court concluded that an injunction should be issued under §7402. The District Court found that the government satisfied the requisite traditional equitable elements necessary for the issuance of an injunction. It is here that the District Court moved beyond the injunction limited to suspending the alleged unlawful fraudulent commercial conduct to require impermissible disclosure of third party personal information unrelated to the commercial speech. The District Court in this matter concluded that the government was entitled to an injunction under §7402 of the IRC to accord the government with additional and alternate relief not available under IRC §7408. Section 7402(a) generally provides the court with broader powers to "compel compliance with the tax laws" and to "enjoin activities of third parties that encourage taxpayers to make fraudulent claims". *United States v. Ernst & Whitney*, 735 F.2d 1296, 1300 (11th Cir. 1984).

On November 29, 2006, the District Court granted summary judgment in favor of the United States, and issued a broadly-worded permanent injunction Order against SAPF and Kotmair. The Order, *inter alia*, mandates:

> . . . .
>
> 3) That Defendants shall produce to counsel for the United States a list identifying by name, address, e-mail address, telephone number, and

> Social Security number, all SAPF members (both associate and full members) and all persons and entities who have purchased Appellants' tax-fraud plans, arrangements, services, products or materials. A474–475
>
> . . . .

Further, the Order mandates:

> Defendants are enjoined from directly or indirectly "Selling or distributing any newsletter, book, manual, videotape, audiotape, or other material containing false commercial speech regarding the internal revenue service laws or speech likely to aid or abet others in violating the internal revenue code;"

Appellants appealed the Order following the District Court denial of the Appellants' request for reconsideration and hearing to clarify the language of the Order.

FACTUAL BACKGROUND

Since 1984, Save-A-Patriot Fellowship (SAPF), an unincorporated association, publishes written opinions regarding the internal revenue laws. SAPF offers its membership a political forum to join and exercise their free speech right with the sharing of information concerning the IRS and the U.S. tax laws. A55. The Fellowship is recognized by the District Court as a *bona fide* membership

organization that advocates views unpopular with the government. See *Save-A-Patriot Fellowship v. U. S.*, 962 F.Supp 695 (1996). A54, A510, A518–519.

The purpose of SAPF is "a national organization of American Patriots who have joined together to resist the illegal actions of the IRS and other government agencies who knowingly or unknowingly deceive the public." (App. 46). SAPF provides interested persons at no cost with pamphlets and writings which generally discuss the legality of the U.S. tax laws. These writings are based upon constitutional and tax law research and sincerely held beliefs of the SAPF Fiduciaries and its Members. Anyone willing to read, listen and learn is welcome to join and partake in the discourse concerning the government, it processes and laws.

The membership handbook states "SAPF is NOT a "tax protest" organization . . . The Fellowship actively promotes the study of the Law and the assertion of one's rights in accordance with the Law." (App. 86). The handbook defines the purpose of Membership as: "For those wishing to avail themselves of the opportunity to receive the finest 'adult education' currently available with regards to our constitutional heritage, including a thorough and accurate analysis of the limited liability of the U.S. citizen for internal taxation." (App. 86). A "Member" is defined by SAPF as "a Patriot who has paid the annual participation fee to Save-A-Patriot Fellowship . . . and has agreed to abide by the Fellowship

Program Agreement." (App. 48, "Program Agreement"). The Program Agreement is solely to alert the Membership of individual Members who have had property seized by the IRS or who have been incarcerated. Membership therefore provides few, if any, benefits beyond those derived by the general public.

Members and Associate Members are not supplied with commercial products or services; and especially are not provided with any service involving representation or assistance with the IRS without additional charge[1]. Appellant Kotmair in his deposition, which is unrebutted by any other fact of record, stated that all services of the Fellowship, however, must be purchased separately, and are not included in the membership fees. Such services may include the preparation of an "Affidavit of Revocation and Rescission," letters written on a member's behalf, and paralegal work. (See App. 91, pricing list).

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[1] In his deposition, Appellant Kotmair was repeatedly asked about the purpose of the membership. Appellant Kotmair explained that the reason for membership growth is "To disseminate information under the first amendment. ... That's our purpose, is to educate." (Docket 44, Exhibit 43B, p. 84: 13–22). To questions about how people join, and how the membership functions, Kotmair responded: "You have to understand ... these people join to support. ... [it]'s not getting. Some people just join as an associate member and don't buy any materials or anything else. All they do is they get the monthly, little four-page thing that we send on it, the *Liberty Tree*, and a *Reasonable Action* when it goes out. ... That's it. If they want to buy something, they'll buy something." (See Docket 44, Exhibit 43B, pp. 75:18–78:13). The program started with the membership agreement, and remains the membership agreement, the services evolved out of members' requests for help in responding to IRS notices (See Docket 44, Exhibit 43B, p. 78:1–13).

The government acknowledges in its briefs that SAPF sells services and paralegal work for additional fees, exclusive and separate from its membership fee.

Therefore, there are three discrete classes of persons represented by the amici which are adversely impacted by the District Court Order: (1) SAPF dues paid Members; and, (2) generally interested, non-Member Public; and, (3) persons who purchased or intend to purchase the commercial products and services of SAPF.

The District Court classifies third parties when it chose to distinguish and differentiate between "Members" and "persons and entities who have purchased Appellants' tax-fraud plans, arrangements, services, products or materials" when it ordered Kotmair and SAPF to disclose the names, addresses, e-mail addresses, telephone numbers and Social Security numbers. A498. The Order is legally and constitutionally infirm when it requires disclosure of Member personal information without any connection to the commercial function of SAPF; and without any evidence to demonstrate that these persons acted to file fraudulent tax returns or made improper claim for refund.

Further, the Order is overly broad and acts as an impermissible prior restraint when it mandates:

> Appellants are enjoined from directly or indirectly "Selling or distributing any newsletter, book, manual, videotape, audiotape, or other material containing false

> commercial speech regarding the internal revenue service
> laws or speech likely to aid or abet others in violating
> the internal revenue code;"

ARGUMENT

Introduction:

The First Amendment to the Constitution declares "Congress shall make no law. . .abridging the freedom of speech." U.S. CONST. Amend I. The Supreme Court has broadly interpreted this freedom. As Justice Brandeis explained: "even advocacy of [law] violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing that advocacy would be immediately acted on." *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

The core of First Amendment protections include speech which may stir the passions and strike at the heart of "prejudices and preconceptions" with profound and unsettling effects. See *De Jogne v. Oregon*, 299 U.S. 353, 365 (1937). In fact, the First Amendment protections are most preciously demonstrated when the ideas conveyed assert criticism of the government. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 248 (2003)(Scalia, J. concurring in part and dissenting in part).

It is with this backdrop that the District Court's Injunctive Order is legally and constitutionally unsound when it mandates the disclosure of SAPF members' personal information and when it affects a prior restraint upon political speech. The District Court Ordered the Appellant SAPF to produce to the government the **name, social security number** and **contact information** for all SAPF members. The most insidious means to suppress free political speech is to threaten those who would partake in speech with heightened IRS inquiry and the potential for retaliatory audits and reviews.

A. The Preliminary Injunction is an impermissible Prior Restraint on political speech between SAPF and its Membership.

The central tenet of the First Amendment is the protection it affords to political speech involving the government, its processes and the laws. As the Supreme Court in *Mills v. Alabama* stated:

> "Whatever differences may exist about interpretation of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes."

Mills v. Alabama, 384 U.S. 214 (1966). The Supreme Court has sheltered political free speech from improper restraint, declaring that: "[t]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the brining about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Any restriction upon the core right of free political speech can only be justified if the restriction is narrowly tailored to serve an overriding state interest. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

Comparatively, commercial speech is defined as “advertising pure and simple” or speech that “does no more than propose a commercial transaction.” *United States v. Schiff*, 379 F. 3d 621, 626 (App. 9th Cir., 2004). *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748,762 (1976). Commercial free speech derives less Constitutional protection as compared to political free speech. Restrictions on commercial free speech are subject to intermediate scrutiny as annunciated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980); and the commercial advertisement of illegal activities, in contrast, receives no First Amendment protection. *Pittsburgh Press Co. v. Pittsburgh Commission of Human Relations*, 413 U.S. 376, 391 (1973).

1. The District Court Order Mandating Disclosure of Member Personal Information Violates the Members' Right to Privacy and to Freedom of Political Speech.

The District Court erred in issuing a permanent injunction ordering SAPF disclose the private personal information of amici solely because they are members of SAPF. The District Court reasoned that "it [the government] argues that this information is needed because of the possibility that many do not file tax returns. The Court concludes that the production of customer lists is an appropriate means to alleviate some of the harm caused by Defendant' conduct and to mitigate further harm."

In support of its decision, the District improperly relies on *United State v. Hansen*, Civ. No. 05-0921, 2006 WL 2354820 (S.D. Cal. June 1, 2006) and *United Sates v. Hill*, Civ. No. 05-877, 2005 WL 3536118 (D. Ariz. Dec. 22, 2005), because neither Hansen nor Hill were issued with the Court's intention that those cases were to become precedent. The unpublished decision in *Hansen*, moreover, relies solely on the unpublished decision in *Hill*; and, neither *Hansen* nor *Hill* cite to any other **binding precedent** to support their respective decisions to allow the disclosure of member lists. It is respectfully submitted that the Court in both Hansen and Hill failed to cite binding authority because those decisions are in direct contrast to the well-established principal that compelled disclosure of membership lists violates the Constitution when the investigation would likely

impose hardship on associational rights not justified by a compelling interest, or when the investigation lacks a substantial connection to a subject of overriding and compelling state interest. *See, e.g., N.A.A.C.P. v. Alabama (1958)* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488; and *Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539, 83 S.Ct. 889, 9 L.Ed.2d 929 (1963); see also, *U.S. v. Mayer,* __ F.3d ___, 2007 WL 2694846 (C.A.9 Cir. 2007). Accordingly, neither Hansen nor Hill should be construed as being of "precedential value in relation to the material issue [of this] case." Local Rule 32.1.

Furthermore, both Hansen and Hill are clearly distinguishable from the facts of the instant case, and in no manner support the disclosure of SAPF Member identification information on those persons not claimed to have purchased commercial programs and materials.

In *Hansen*, the Defendant conducted business to sell "how-to-guides" and "response letters" which have no political or informational function. Those commercial products were sold on a fee base through an internet site. Further, Defendant Hansen, for a fee, aided and assisted persons in preparing income tax returns and offers administrative and consulting services. The Hansen program is nothing more than a commercial enterprise for the sale and distribution products and services for a fee and nothing more. The district court in *Hansen* found that

an injunction was appropriate under Section 7402 of the IRC and ordered Defendant Hansen to "furnish the Government with the identities of those persons who have **purchased** his tax abusive programs. . . ." (emphasis added). Unlike, SAPF, Hansen's programs were exclusively commercial and did not involve the free discourse and political communication involved with SAPF. The only connection between Hansen and the public was in the commercial sale of products and services. Therefore, production of the identity of person who purchased product would have no adverse impact on the participation of political free speech.

Similarly, in *Hill,* Defendants Beverly and Darrell Hill, operated a business which commercial services included preparation of federal income tax returns or claims for refund. The government sought an injunction to preclude the *Hill* Defendants from acting as federal income tax preparers. The government, also, requested disclosure of **customers** of the Defendants for which they "filed tax returns or claims for refund. . ." (emphasis added). The district court in *Hill* reasoned that customers for purposes of the injunction were those persons who utilized the Defendants to file frivolous returns resulting in improper refunds exceeding $200,000.00. The district court did not order identification of customers, generally. To the contrary, the court only required disclosure of those persons for whom the Defendants *Hill* actually filed tax returns and claims for

refund. The *Hill* court was obviously cognizant of the traditional elements[2] for issuance of the injunction and narrowly restricted information disclosure to those persons who were actual tax return filers. Other wise, the Hill court may have run afoul of the First Amendment protections to require disclosure of personal information of persons who simply purchased materials for political speech purposes. Again, one of the elements of the traditional injunction is to demonstrate injury to the government. It is reasoned to restrict disclosure of to those persons who actually took the affirmative step to file thereby causing the real potential for loss of revenue.

2. The District Court Erred in Ordering Injunctive Relief under IRC Section 7402 when no Injury to the Government was Demonstrated.

In particular, the government must establish that "the movant will be irreparably injured by denial of the relief" to derive an injunction under IRC §7402. The only means to establish such injury in the context of a tax protestor case is to demonstrate that the government has been substantially impeded in its efforts to administer the tax laws or has incurred actual loss in revenue collection. The district courts in *Hansen* and *Hill* were able to establish injury through substantial evidence not similarly presented in this case.

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[2] An injunction issued under §7402 must satisfy the traditional equitable factors for the issuance of an injunction, including: (1) whether the movant has shown a reasonable probability of success on the merits; and, (2) whether the

Under no circumstance does the SAPF Member who has engaged exclusively in political speech to the exclusion of the commercial aspects of SAPF present a real or discernible exposure of injury to the government for purposes of summary judgment. The District Court made clear error. The record in this matter demonstrates, without evidence to the contrary, that Membership in SAPF does not provide the full Member or associate Member with any commercial product or service. The Member, without additional payment, is provided only a newsletter and access to SAPF Membership and fiduciaries for political speech purposes. There is no compelling government, or for that matter important, interest involving Members; and the only recognizable purpose of such an injunction is to audit, harass, or harm the First Amendment privacy rights of each name produced regardless of their level of involvement if any level at all.

The record further demonstrates that the government, in any case, will not be injured if an injunction mandating disclosure is reversed. The record evidence in this matter indicates that the IRS already has the names of any SAPF customers who may have filed a fraudulent return r other document. See memorandum, Docket 78, page 19.

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movant will be irreparably injured by denial of the relief; and, (3) whether granting relief will result in even greater harm to the nonmoving party; and, (4) whether granting relief will be in the public interest." *Bell* at 478, fn. 4.

3. **Disclosure of Member Identities violates the Members' Right of Privacy in their Association with a Political Speech Groups such as SAPF**

The Members who risk governmental harassment and scrutiny through unwarranted disclosure derive support from restrictions placed upon similar demands made upon political speech organizations. The Supreme Court has repeatedly protected the right of privacy in one's associations. In *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965), the Court said:

> "In *NAACP v. State of Alabama*, 357 U.S. 449, 462, 78 S.Ct. 1163, 1172, we protected the 'freedom to associate and privacy in one's associations,' noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid 'as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association.' Ibid. In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion." [Emphasis added]

See also, *Roberts v. United States Jaycees*, 468 U.S. 609, 681 (1984)("[T]he Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment-speech, assembly, petition for the redress of grievances, and the exercise of religion.")

If this Court upholds the permanent injunction order against SAPF, amici's freedom to associate and their privacy in such associations will be irreparably

impaired, and they will be subjected to increased attention, scrutiny and harassment by the government. This irreparable harm to their rights will occur even though neither the District Court had personal jurisdiction over them, and despite the lack of opportunity to defend their individual rights.

As amici were not parties to the case, no evidence has been presented that they have violated any laws whatsoever, yet the injunction subjects them to a deprivation of their rights, solely on the basis of their association with SAPF. For example, G.S. has obtained and read the materials SAPF makes available, and has filed federal income tax returns for each year through 2006. G.S. has not utilized any commercial product or service of SAPF. Nevertheless, his private personal information has been ordered to be disclosed to the government, which will subject such returns to additional and increased scrutiny, solely on the basis of his association with SAPF.

4. The Threat and Chilling Effect of Disclosure of Member Personal Information Violates the Members' Right to Freedom of Speech

The Supreme Court has recognized that compelled disclosure of the membership list of an organization "is likely to affect adversely the ability of [the organization] 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 [organization] 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." *Natl. Assn. for the Advancement of Colored People v. State of Alabama, supra,* at 462. See also *Gibson v. Florida Legislative Investigation Committee, supra,* at 892. ("compelled disclosure of affiliation with groups engaged in advocacy may constitute an effective restraint on freedom of association.")

The disclosure of the private personal information of amici will not only infringe their individual right to privacy, it will also impair their ability to effect the greater impact which results from combining their individual voices into one collective voice, by decreasing the likelihood that others will want to associate with them in light of the increased scrutiny and harassment they will face because of it.

The District Court erred in enjoining the amici's reciprocal rights including, *inter alia*, the right to request and receive SAPF's publications, to request and receive the assistance of SAPF in responding to Internal Revenue Service notices and inquiries, to request and receive the assistance of SAPF in communicating with other members of the public regarding the laws about tax withholding, to request and receive the assistance of SAPF in petitioning the courts for redress of their grievances, and to request and receive notification of the financial needs of

other individuals to whom they wish to contribute because the court erroneously declared this commercial speech. Furthermore, all of these rights are impaired by the permanent injunction Order, even though amici have never had the opportunity to be heard respecting these fundamental rights.

The right of freedom of speech embraced by the First Amendment absolutely encompasses the reciprocal right of the people to hear the protected speech, to request, receive and read protected publications, to possess the protected publications, to associate for the purpose of political debate and action, to petition for redress of grievances, and to form beliefs regarding important social and political questions, all without being put on a list and classified as belonging to a suspect class, being subjected to harassment and punishment, or living in fear of punishment. See *Martin v. City of Struthers, Ohio,* 319 U.S. 141, 143 (1943) (Freedom of speech embraces the right to distribute literature, and necessarily protects the right to receive it.); *Kleindienst v. Mandel,* 408 U.S. 753, 762 (1972) ("Constitution protects the right to receive information and ideas."); *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.") See also *Natl. Assn. for the Advancement of Colored People v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) ("Inviolability of privacy in group association may ... be indispensable to preservation of freedom of association, particularly where group

espouses dissident beliefs."); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 544 (1963); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964) (Protection for speech does not turn upon the truth, popularity, or social utility of the beliefs offered; there is no exception for any test of truth, whether administered by judges, juries, or administrative officials.); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York,* 447 U.S. 530, 538 (1980) ("To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth."); *Lamont v. Postmaster General of United States,* 381 U.S. 301, 308 (1965) ("the right to receive publications is ... a fundamental right"); *Leblanc-Sternberg v. Fletcher*, 781 F.Supp. 261, 270 (S.D.N.Y. 1991) ("one has a right to join with others to pursue goals independently protected by the first amendment"); *King v. Federal Bureau of Prisons*, 415 F.3d 634, 638 (7th Cir. 2005) ("Forbid a person to read and you shut him out of the marketplace of ideas and opinions that it is the purpose of the free-speech clause to protect.").

In the present case, the reciprocal rights asserted by amici include, *inter alia*, the right to request and receive SAPF's publications, to request and receive the assistance of SAPF in responding to Internal Revenue Service notices and inquiries, to request and receive the assistance of SAPF in communicating with

other members of the public regarding the laws about tax withholding, to request and receive the assistance of SAPF in petitioning the courts for redress of their grievances, and to request and receive notification of the financial needs of other individuals to whom they wish to contribute. All of these rights are impaired by the permanent injunction Order, even though amici have never had the opportunity to be heard respecting these fundamental rights.

B. The District Court Order is an Impermissibly Prior Restraint on Political Speech.

The Seventh Circuit Court of Appeals in *United States v. Raymond*, recognized the unconstitutional effect of broadly worded injunctions upon the right to free speech. The Court of Appeals reminds us that: "We have narrowly construed the provisions of the district court's injunction order to preserve it from the constitutional difficulties that a broader reading would present. However, we caution district courts, wherever possible, to craft injunctions that are not in need of narrowing constructions by this Court. . . . the district court should have drafted in the first instance an injunction that was narrowly tailored to prohibit only those activities that can be restrained consistent with the First Amendment. *Raymond*, 228 F.3d 804, (7th Cir.

2000). An injunction which mandates silence and restricts speech prospectively is a prior restraint.

> "Permanent Injunctions like the one here are 'classic examples of prior restraints' on speech, *Alexander v. United States*, 509 U.S. 544, 550, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993), and prior restraints are generally presumed unconstitutional.[5] (footnote omitted). *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) (per curiam). Prior restraints, however, are not unconstitutional *per se*, and may be permissible depending on the type of speech at issue." (citations omitted).

United Sates v. Bell, 414 F.3d 474, 478(C.A. 3rd Cir. 2005). We are also directed that: "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. *Southeastern Promotions, Ltd v. Conrad*, 420 U.S. 546, 558-59 (1975).

The District Court's order requiring disclosure of Member information and the resultant adverse impact upon Membership and the free right to engage in political speech is an unlawful prior restraint. Again, Members, as distinguished from customers, are those persons who joined SAPF for the purposes of engaging in political free speech concerning the government and the U.S. tax laws. The record is devoid of any evidence that Members engaged in any prohibited speech, were filers of fraudulent returns, or derived improper refunds. Yet, the District Court also Ordered:

> "Appellants are enjoined from directly or indirectly. . .
>
> "Selling or distributing any newsletter, book, manual, videotape, audiotape, or other material containing false commercial speech regarding the internal revenue service laws or speech likely to aid or abet others in violating the internal revenue code;"

Without more, the mere advertisement for sale of publications is not commercial speech and does not render the source document subject to prior restraint. When commercial speech and political speech is shared in the same document, the burden is upon the government to demonstrate that the improper commercial speech is not "inextricably entwined" to derive a prior restraint on the publication. *United States v. Schiff*, 379 F.3d 621, 627-28 (2004)(The subject book was the linchpin and legal foundation for all of the defendant's tax avoidance products.). There is insufficient evidence of record for the District Court to restrain the publication of materials including newsletters, books, manuals, videotapes, audiotapes and other materials simply because some minor portion thereof advertises the sale of commercial products or services separate and a part from the writing.

The record evidence in this case demonstrates that the District Court Order is an overly broad prior restraint of political speech through the denial of amici's right to derive the written materials of SAPF. The record evidence shows that some of SAPF's publications advertise its commercial productions in the first

pages of their books. However, many books, including works of fiction and nonfiction, advertise other books by the same author or publisher on the first or last few pages of the book. It is difficult to imagine a scenario in which the government successfully labels a novel "commercial speech" in order to regulate its contents.

In its appeal brief, SAPF raised constitutional issues regarding the restriction of its rights to freely speak and publish its ideas and opinions and to freely and privately associate with others of like mind to amplify the impact of its collective voice. However, in addition to the prior restraint imposed upon SAPF's protected speech and associations, the permanent injunction simultaneously restricts amicis' corresponding rights, even though they have had no opportunity to defend said rights.

C. The District Court erred in ordering the preliminary injunction because the Amici are deprived of their right to associate with others in furtherance of their own lawful actions

As shown in the record below,[3] SAPF does not establish any separate funds for giving or receiving monies, it only notifies the amici who are SAPF members

[3] SAPF does not hold or distribute funds for anyone, it only notifies members by mail that an individual's claim for a contribution of funds has been approved, so that members (or any interested persons) can contribute directly to each other on their own initiative. A367–368. As summary judgment was granted to the government, this fact must be taken as true. *Charbonnages de France v. Smith*, 597 F.2d 406, at 414 (4th Cir. 1979).

that another member stands in need of contributions. The injunction erroneously restrains the right of SAPF to communicate the identities of persons who are in need of funds for their legal defense or living expenses, and strips amici of the reciprocal right to receive such information.

Protected speech does not lose its protection because it is uttered or accomplished with the aid or assistance of another. As amici's actions were not before the District Court, that court made no findings as to the lawfulness of amici's speech or actions. Accordingly, the injunction does not prohibit amici from *separately* and *individually* corresponding with the IRS, filing court actions, or communicating on tax matters with members of the public in exactly the same manner as SAPF. These protected rights, unreached by the injunction, cannot be alienated only because they are accomplished in collaboration with SAPF. Collaboration alone does not render lawful acts unlawful. Thus, the effect of the injunction is to impair and alienate amici's right to associate with and obtain the assistance of SAPF in performing what, for them, are protected and lawful acts.

Similarly, the fundamental right to give one's money to others is not lost because it is accomplished with the aid or assistance of another. As amici's actions were not before the district court, that court made no findings as to the lawfulness of amici's right to give or accept contributions to SAPF members. Accordingly,

the injunction does not prohibit amici from *separately* and *individually* giving funds to SAPF members (or to any other member of the public) from whom the IRS has collected property, or to SAPF members who have been incarcerated.[4] It is elementary law, for example, that a person cannot be an accessory to an alleged crime by mere acts of charity or mercy to a criminal's family after he is incarcerated, since such acts cannot and do not hinder his apprehension, prosecution, conviction, or punishment.[5]

Nor does the injunction prohibit amici from separately and individually *requesting* or *accepting* contributions from SAPF members for their legal defense or living expenses. If amici are not prohibited from either giving to or accepting funds from others, then these protected rights cannot be alienated only because they are partly accomplished by means of receiving written notification of persons in need from SAPF.

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[4] Amici are likewise unaware of any statute making it illegal for an individual to accept gifts from others after the IRS has collected property from them.

[5] See William C. Robinson (Yale Professor of Elementary Law) in *Elementary Law*, Boston: Little Brown & Co., 1882, p. 307. Also Model Penal Code § 242.3 (quoted in David C. Brody *et al*, *Criminal Law*, Boston: Jones & Bartlett, 2000, p. 544).

As shown in the record below,[6] SAPF does not establish any separate accounts for giving or receiving monies; it only notifies the amici who are SAPF members that another member stands in need of contributions. The injunction restrains the right of SAPF to communicate the identities of persons who are in need of funds for their legal defense or living expenses, and strips amici of the reciprocal right to receive such information.

CONCLUSION

For the foregoing reasons, amici submit that the permanent injunction order should be vacated as violative of their individual rights to free speech, free association and privacy, and the right to petition for redress of grievances, as guaranteed by the First Amendment to the United States Constitution, or in the

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[6] SAPF does not hold or distribute funds for anyone, it only notifies members by mail that an individual's claim for a contribution of funds has been approved, so that members (or any interested persons) can contribute directly to each other on their own initiative. A367–368. As summary judgment was granted to the government, this fact must be taken as true. *Charbonnages de France v. Smith*, 597 F.2d 406, at 414 (4th Cir. 1979).

alternative, that judgment should be reversed and remanded to the district court for trial, permitting the amici the ability to intervene and defend their rights.

Dated: November , 2007.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7) AND RULE 29(d)

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel for Appellant-appellant SAPF certifies that the foregoing brief complies with the type-volume limitations of Fed. R. App P. 32(a)(7)(B)(i) and Fed. R. App. P. 29(d) and contains 3,309 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).

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing BRIEF OF AMICI CURIAE G. S. *ET AL* IN SUPPORT OF APPELLANT has been made upon the following by depositing a copy in the United States mail, postage prepaid, this 18th day of November , 2007, to the following:

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