UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA Plaintiff-Appellee v. ROBERT L. SCHULZ; WE THE PEOPLE FOUNDATION FOR CONSTITUTIONAL EDUCATION, INC.; WE THE PEOPLE CONGRESS, INC. Defendants-Appellants	)	EMERGENCY MOTION FOR STAY PENDING APPEAL Case No. 1:07-CV-0352 TJM/RFT

APPELLANTS' MEMORANDUM OF LAW IN SUPPORT
OF MOTION FOR STAY PENDING APPEAL

Appellants Robert L. Schulz, who is pro-se, and We The People Foundation for Constitutional Education, Inc., and We The People Congress, Inc., who are represented by attorney Mark Lane (collectively hereinafter "Schulz" or "Appellants" or "Defendants"), state as follows:

RELIEF REQUESTED

Defendants move this Honorable Court for an entry of an Order:

a) staying the enforcement of the Decision, Order and Judgment entered by the District Court on August 15, 2007, pending the appeal, and

b) expediting the appeal, and

c) granting any further relief that to the Court may seem just and proper.

REQUIREMENTS OF RULE 8

On August 21, 2007, Defendants moved in the district court for a stay of the Order and Judgment pending appeal. On August 23, 2007, the motion was denied on the ground that Defendants had not demonstrated a substantial possibility of success on appeal, the public interest compels against a stay, no irreparable harm to Defendants and harm to the United States and the public will continue if a stay is granted. (Record at page 258).

INTRODUCTION: PROCEDURAL HISTORY

On May 2, 2007, Plaintiff United States served Defendants with a Summons and Complaint. Pursuant to the Court's "inherent equity powers" and sections 7402 and 7408 of the Internal Revenue Code, the United States seeks, in general, to permanently enjoin and prohibit Schulz and the two corporate defendants from engaging in Operation Stop Withholding (which consists of the distribution of a certain Blue Folder containing certain printed matter), as conduct allegedly subject to penalty under sections 6700 and 6701, and "any other penalty provision in the Internal Revenue Code." (Complaint, Record at 2-3).

On May 23, 2007, Defendants moved the District Court to dismiss the Complaint on the ground that the Blue Folder fell within the zones of interest to be protected by the First Amendment's Petition, Speech and Assembly Clauses and failure to state a claim for relief under Sections 6700 and 6701. (Motion to Dismiss, Record at 15-44). Defendants supported their motion to dismiss with documentary evidence included in Declarations #1, #2 and #3 by Defendant Schulz (see "Record: Defendants' Affidavits").

On June 18, 2007, Plaintiff opposed the motion to dismiss and cross-moved for a Summary Judgment. (Record at 45-70). Accompanying the cross-motion for Summary Judgment was Plaintiff's Statement of 21 Material Facts which Plaintiff alleged were not in dispute.

(Record at 71-77). Accompanying Plaintiff's motion were eight affidavits and declarations (see "Record: Plaintiff's Affidavits")

On July 16, 2007, Defendants replied to Plaintiff's opposition to the motion to dismiss and opposed the motion for summary judgment. (Record at 78-101). Accompanying Defendants' opposition to summary judgment was Defendants' Statement Of Material Facts. Defendants' Statement denied all 21 facts the Plaintiff alleged were not in dispute. In addition, Defendants' Statement added 42 additional material facts that Defendants alleged were in dispute. (Record at 102-144). In addition, included in Defendants' Opposition were 65 Material Facts that Defendants alleged were not in dispute. (Record at 90-99). Defendants supported their opposition with documentary evidence included in Declarations #4, #5 and #6, #8, #9 and #10 by Defendant Schulz (see "Record: Defendants' Affidavits").

On July 20, 2007, Plaintiff replied to Defendants' opposition to summary judgment. (Record at 145-154). Accompanying Plaintiff's reply was Plaintiff's Response to Defendant's Statement of Material Facts. (Record at 155-174).

On July 24, 2007, Defendants moved for permission to file a Sur-Reply on the ground that Plaintiff's reply included new arguments that Defendants had not had an opportunity to rebute. (Record at 175-177). Plaintiff did not oppose the motion, but the District Court denied the motion on July 25, 2007. (Record at 178).

On August 9, 2007, without a hearing or a trial, the District Court issued a Decision and Order, granting the Government's motion for summary judgment and denying Defendants' motion to dismiss. (Record at 182-206).

On August 15, 2007, the District Court entered its Judgment, granting summary judgment and denying the motion to dismiss. (Record at 207).

On August 20, 2007, Defendants filed a motion for Reconsideration. (Record at 208-240). Defendants supported their motion with significant and important documentary evidence refuting Plaintiff's (and the District Court's) allegations of the harm. That evidence was attached to Schulz Declaration #11. Declaration #11 was added to the Docket, **but without the evidence attached to the Declaration**. Judge McAvoy directed the Clerk's office not to upload any of the exhibits filed by Schulz with the Declaration and to return those exhibits to Schulz. (Record at 258).

On August 21, 2007, Defendants filed a motion for a temporary stay pending a resolution of the post-judgment motions and, in the alternative, for a stay pending appeal. (Record at 241-246). Defendants supported their motion with Declaration #12. ("Record: Defendants' Affidavits").

On August 22, 2007, Defendants filed a motion for a modification and clarification of the Order granting summary judgment. (Record at 247-257). Defendants supported their motion with Declaration #13. ("Record: Defendants' Affidavits").

On August 23, 2007, the District Court denied Defendant's motion for reconsideration. (Record at 258-261).

On August 27, 2007, Defendants moved the District Court for an enlargement of the time to comply with the terms of the Court's Order and Judgment (to allow Defendants time to apply to the Second Circuit for a stay pending appeal). (Record at 263).

On August 27, 2007, the District Court denied Defendants' motion for a modification and clarification of the Order granting summary judgment. (Record at 262).

On August 27, 2007, the District Court denied Defendants' motion for an enlargement of time to comply with the terms of the Court's Order and Judgment. (Record at 263).

THE URGENCY

On August 27, 2007, the District Court denied Defendants' motion to modify the Court's Order and Judgment.

It is not possible for Defendants to comply with the Court's overly broad and vague Order without shutting down Defendants' website.

To avoid actual, threatened and imminent contempt of court charges, Defendants have today been forced to shut down their website.

In addition, Defendants have been threatened by the DOJ with contempt of court charges by if Defendants do not turn over to the DOJ by Thursday evening the names, addresses, telephone numbers and social security numbers of all people who have been participating in any way at all in Defendants' education and civic action programs.

Defendants' Rights to due process, privacy, property, petition, speech and association are being impermissibly restrained. Absent the requested stay pending appeal, the enthusiasm of Defendants and those in association with them to continue the overall Right to Petition program will be significantly and irreparably chilled.

Defendant Schulz and Defendant We The People organization (and its organizational predecessors) have a long, largely successful history of intelligently, rationally and professionally defending their State and federal Constitutions against unconstitutional actions by their local, state and federal governments. (Schulz Declaration #3).

Until 1999, Defendants principle means of challenging unconstitutional and illegal acts by the Government was by petitioning the Judicial branches for Redress of those Grievances.

However, following the federal courts' dismissal of two of Defendant Schulz's Petitions for Redress of constitutional torts in 1995 and 1999 for "lack of standing,"[1] Defendants have been focusing their Petitions for Redress of constitutional torts on the Executive and Legislative branches.

Since 1999, Defendants have been scrutinizing governmental behavior and comparing that behavior with the requirements of the federal Constitution, and wherever Defendants have seen an impropriety or a conflict, Defendants have prepared a Petition for Redress of that constitutional tort and served those Petitions for Redress on the leaders of the Executive and Legislative branches of the federal government.

Since 1999, Defendants have Petitioned the plaintiff United States for Redress of constitutional torts in an attempt to reconcile the differences between the Iraq Resolution and the war powers clauses, the USA Patriot Act and the so-called "privacy" clauses, the Federal Reserve System and the money clauses, the direct tax on labor and the tax clauses, undocumented aliens and the "faithfully execute" clause, gun control and the second amendment, and US foreign policy and the "general welfare" clause.

Defendants have an active and effective public education program aimed at raising public awareness about the historical record and purpose of the Petition Clause of the First Amendment (what Defendants call the "Accountability Clause"), the importance of accountability in government, the important role the Clause was intended to play in maintaining the original balance of power between the People, the states and the federal government, and Defendants' progress in Petitioning Government for Redress of constitutional torts. Most importantly, Defendants rely on their website to "institutionalize vigilance" and to reach more People with their message of "civic education" and "civic action."

1

Defendants rely almost entirely on electronic communications. Whenever Defendants have something to say, they post the information on their website.

STANDARD OF REVIEW

In this circuit the standard for issuance of preliminary injunctive relief is well-settled. The movant has the burden of showing irreparable harm *and* (1) either probable success on the merits *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *plus* a balance of hardships tipping decidedly in the plaintiff's favor. *Kaplan v. Board of Education of the City School District of the City of New York, 759 F.2d 256, 259 (2d Cir. 1985); Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979).* The effect of the grant or withholding of such relief upon the public interest must also be considered. *Virginian Railway Co. v. System Federation, 300 U.S. 515, 552, 81 L. Ed. 789, 57 S. Ct. 592 (1937); Stamicarbon, N.V. v. American Cyanamid Co., 506 F.2d 532 (2d Cir. 1974).*

The district court erroneously required a strong showing of success as a prerequisite to a stay pending appeal. The "likelihood" of irreparable harm to Defendants must be balanced against the "likelihood" of harm to the Government; and if a decided imbalance of hardship should appear in Defendants' favor, then the likelihood-of-success test is displaced by the lower "serious questions" standard. "It will ordinarily be enough that [Defendants] have raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation. " *Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d at 740, 743*; *Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970).*

"Likelihood of success" is but one "strong factor" to be weighed alongside both the likely harm to the Defendants and the public interest. *Dino De Laurentiis Cinematografica, SpA. v.*

D-150, Inc., 366 F.2d 373, 375 (2d Cir. 1966) (*quoting* 3 Barron & Holtzoff, Federal Practice & Procedure § 1433 at 493 (1958)).

Defendants have not embarked on frivolous litigation in moving for dismissal and in opposing summary judgment, and thus a stay pending appeal is not improper if Defendants can also show a need for protection that outweighs any probable injury to the Government and a balancing of the public interest that weighs in Defendants' favor.

While "irreparability" may suggest some minimum of probable injury, which is required to get the court's attention, the more important question is the *relative* quantum and quality of Schulz's likely harm.

The decision by the district court not to grant the stay pending appeal could not have been intelligently made unless the court knew how much the precaution will cost the Government. The evidence before the district court showed the cost to the Government if the stay was granted would be virtually non-existant. If the costs are very little the district court should have been able to decide that the threatened injury to Defendants is "irreparable" for purposes of the relief.

Irreparable Harm

The loss of U.S. Const. amend. I freedoms, even for minimal periods of time, constitutes irreparable injury. the victim of a conspiracy to violate First Amendment freedoms has standing to bring suit before the conspiracy has resulted in economic or tangible injury. *LeBlanc-Sternberg v. Fletcher, 67 F.3d 412 (2d Cir., 1995).*

However, this Circuit has not consistently presumed irreparable harm in cases involving allegations of the abridgement of First Amendment rights. Where a party alleges injury from an action that may only potentially affect speech, the party must establish a causal link between the injunction sought and the alleged injury, that is, the party must demonstrate that the injunction

will prevent the feared deprivation of fundamental rights. *Bennett v. Lucier, 2007 U.S. App. LEXIS 15937 (2d Cir., July 5, 2007).* Defendants have met their burden; a stay pending appeal will prevent the feared deprivation of fundamental rights. Loss of the website and the threat of being held in criminal contempt of court constitutes irreparable injury.

The District Courts based its findings on its review of "dueling affidavits." The record shows there are numerous material facts that are in serious dispute, not the least of which is whether Defendants distributed the Blue Folders for economic gain and whether the Government has suffered any harm at all due to the distribution of the Blue Folders. The District Court should not have granted summary judgment. A hearing or a trial was most definitely required to get to the truth of the material facts in dispute. The District Court's Order is arbitrary and capricious and an abuse of discretion; the Court's findings of fact are clearly erroneous. "When evaluating whether the district court abused its discretion, the court must let its findings of fact stand unless they find that they are clearly erroneous." *Olivieri v. Ward, 766 F.2d 690, (2d Cir., 1985)*

When appellants seek vindication of rights protected under **U.S. Const. amend.** I, the court is required to make an independent examination of the record as a whole without deference to the factual findings of the trial court. Such a fresh examination of crucial facts is necessary even in the face of the clearly erroneous standard of factual review set forth in Fed. R. Civ. P. 52(a). Violations of U.S. Const. amend. I rights are commonly considered irreparable injuries for the purposes of a preliminary injunction. *Bery v. City of New York, 97 F.3d 689, (2d Cir., 1996).*

Without the stay pending appeal, Defendants will be severely restrained from pursuing their determination of the full contours of the meaning of the last ten words of the First Amendment. Without the stay, Plaintiffs will have, in effect, determined an important

constitutional question properly vested in the judiciary. Prior restraints on speech are **particularly** abhorrent to **U.S. Const., amend.** I, in part because they vest in government agencies the power to determine **important** constitutional questions properly vested in the judiciary. *Latino Officers Ass'n v. City of New York, 196 F.3d 458, (2d Cir., 1999)*

The District Court failed to subject Defendants' affirmative defenses to strict scrutiny, which is reserved for those governmental actions, like that in the instant case, that implicate personal **freedoms** implicit in the concept of ordered liberty. see Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, (2d Cir., 1996).

"If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. *Lusk v. Vill. of Cold Spring, 2007 U.S. App. LEXIS 3590 (2d Cir., January 31, 2007, Decided)*.

Sufficiently Serious Questions Going To The Merits To Make Them A Fair Ground For Litigation

Defendants incorporate by reference the questions raised in Defendants motion to dismiss (Record at 15-44) and in Defendants' motion for reconsideration (Record at 208 –240) and Defendants' motion for modification and clarification (Record at 247-257).

Given the facts and circumstances of this case, particularly Defendants' irreparable harm and a balancing of the public interests and hardships, the lesser "serious questions" standard applies. Defendants have raised serious questions going to the merits to make them a fair ground for litigation.

Balance Of Hardships and Public Interests Tips Decidedly In The Defendants' Favor

Harm to the Government, if any, from Defendants' Operation Stop Withholding Program is a material fact that is sharp dispute, certainly requiring discovery and a hearing.

Defendants argue its Operation Stop Withholding Program ("OSW Program") has not, and is not harming anyone. The District Court claimed the Program has the "potential" of putting individuals in harm's way, but has actually harmed the Government. (Order at 15,16) (Record at 183-4).

The District Court committed clear error. There is absolutely no evidence before the Court that Defendants' OSW Program has actually caused any harm by, say causing a company(ies) to stop withholding. Contrary to the District Court's Decision and Order, there is no documentary evidence before the Court to support the Court's assertion that Defendants' OSW Program is causing "insufficient payments to the Treasury" or "significantly increased efforts at collecting taxes" (Order at 15)(Record at page 196).

The District Court relied on demonstratively misleading information provided in the Declaration by IRS Agent David Gordon. Gordon implied that 997 participants in Defendants' OSW Program "have not filed federal tax returns for a period of three years, which represents more than 2,991 unfiled tax returns" and that the estimated cost to the Government "attributable to filing substitutes for returns for the 2991 unfiled returns is $4,806,537." (Order at 15)(Record at page 196).

Before and after the District Court issued its order Defendants took strong exception to Gordon's claim of such harm. Defendants argued that Gordon was deliberately "mixing apples and oranges" by supplying the District Court with data and information gleaned by him from an entirely different program he was working on.

Defendants argued that the 997 "non-filers" Gordon was referring to had nothing to do with Defendants' OSW program, but came from the list of over 1400 named plaintiffs in the caption of a declaratory judgment action filed in the DC District Court against the United States (*We The People v United States*), and the sworn affidavits filed by most of the Plaintiffs in *We The People*, testifying that they had stopped filing tax returns because of the Government's refusal to respond to their Petitions for Redress relating to the Government's violation of the war, privacy, money and tax clauses of the Constitution. (Record at 221-224).

Defendants in the instant case provided a sworn declaration supporting these facts. Attached to Schulz Declaration #11 was: a) a copy of the complaint from *We The People* with its full caption, showing the 1400 plus named plaintiffs; b) a copy of the affidavits sworn to by most of the 1400 plaintiffs in *We The People*; and c) a copy of sworn affidavits from individual plaintiffs in *We The People* and other associates of Defendants showing that those people were being investigated by Agent Gordon, not because they were participants in Defendants' OSW program, but because they were participants in Defendant's RTP program or were otherwise associating with WTP Defendants.

Arbitrarily and capriciously or with an abuse of discretion, the District Court accepted for filing Schulz Declaration #11 **without the exhibits that were attached**, exhibits that clearly support Defendants claim that no harm has come to the Plaintiff United States as a result of Defendants' OSW program. (Record at page 258).

Defendants respectfully request permission from the Second Circuit to enlarge the Record by adding two of the three exhibits that were attached to Schulz Declaration # 11 but were *not* accepted for filing by the District Court. All three exhibits were returned to Schulz. (Record at page 258). The two exhibits are: 1) the complaint in *We The People* with the full caption; and 2)

the affidavits from plaintiffs in *We The People* testifying about their contact with Agent David Gordon. Copies of the two exhibits are attached to this Memorandum.

The District Court relied entirely on Gordon's testimony about the 997 non-filers in speaking about the "Gravity of the Harm" to the Government. Gordon's testimony was fraudulent as argued by Defendants in their motion for reconsideration. (Record at page 221-224). Defendants supported the claim with Declaration #11 and its exhibits. However, the Court refused to file the exhibits with the Declaration..

The Court should not condone any infringement of Defendants' Due Process rights or any obstruction of Justice in the instant case. It was a fraud on the public for the Plaintiff to knowingly mislead the Court to deny Defendants' Due Process, Privacy and First and Ninth Amendment Rights. Justice is miscarried by a fraudulent finding (without a hearing) that as a consequence of their participation in Defendants' OSW program, 997 people have gotten their companies to stop withholding, and those 997 people then stopped filing and paying their taxes for three years, and that it has cost the IRS over $4 million to assess and collect those taxes from those 997 people. It is a fraud on the Court for the Government to do all this knowing full well that the 2991 un-filed tax returns being pursued by the IRS are not related to any 997 people participating in Defendants' OSW program, but are related to the 997 Plaintiffs in *We The People,* who are actively claiming and exercising their Right to Petition and trying to reconcile the differences between the Iraq Resolution and the war powers clauses of the Constitution, between the USA Patriot Act and the privacy clauses, between the Federal Reserve System and the money clauses and between the direct, un-apportioned tax on labor being enforced by the IRS and the tax clauses.

Balance of Hardships Tips In Favor of Defendants

"[I]mpairment of *First Amendment* rights can undoubtedly constitute irreparable injury, *see Elrod v. Burns, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976)* (plurality opinion)." *Time Warner v. Bloomberg, 118 F.3d 917, 924 (2d Cir. 1997).*

Though there is a need for government efficiency and effectiveness, the injunction is not the least restrictive means for fostering that end, i.e., not the least restrictive means for achieving the goal of implementing policies the Congress sanctioned, and are required to be limited to unprotected speech.

It is clear that First Amendment interests are either threatened or in fact being impaired at the time relief was sought in the District Court. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. See New York Times Co. v. United States, 403 U.S. 713 (1971). Since such injury was both threatened and occurring at the time of Defendants' motion for a stay and since Defendants' have sufficiently demonstrated a probability of success on the merits, the Court of Appeals might properly hold that the District Court abused its discretion in denying preliminary injunctive relief. See Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1963).

The immediate harm to Defendants from the force of the injunction is in fact far greater than any (additional) harm caused the Government if the stay is granted.

The harm to Defendants without a stay is actual, imminent harm.

Unless they shut down the website, and effectively the two corporate Defendants, Defendants are under steady threat of significant injury from probable inadvertent violations of the vague elements of the district court's order. This threat was identified in Defendants' post-

judgment motions. Since modification of the order has been denied by the District Court (without explanation) this imminent exposure to prosecution for contempt remains significant.

As the Supreme Court said, in *International Longshoremen's Association, Local 1291 v. Philadelphia Marine Trade Association, 389 U.S. 64, 76 (1967),* "The judicial contempt power is a potent weapon. When it is founded upon a degree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid."

Schulz has argued exhaustively, as the Record shows, the OSW Program falls within the zone of interests protected by the First Amendment's Petition, Speech and Assembly Clauses -- matters of public interest. "A private citizen exercises a constitutionally protected First Amendment Right anytime he or she petitions the government for redress. The petitioning clause of the First Amendment does not pick and choose its causes. The minor and questionable, along with the mighty and consequential, are all embraced."[2]

The subject Educational Program, as expression relating to issues of public concern, "occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection." *Connick v Meyers*, 461 U.S. 138, 145 (1983).

Most disturbingly, if left undisturbed, the flawed ruling of the District Court in granting Summary Judgment and in issuing its Injunction will effectively bar Defendants, and their supporters, of their Right to Petition the government for Redress regarding the income tax system. Again, if Defendants are prohibited in engaging in Speech that articulates details of their tax Grievance, and if Defendants are prohibited from copying, distributing and even selling copies of their Petitions for Redress, and if Defendants are

[2] *Van Deelen v. Marion Johnson,* ___ F.3d ____ (10th Cir. August 14, 2007)(slip opinion at 5).

prohibited from uttering Speech that would tend to incite the general citizenry to Associate with them, and Assemble with them in meetings to debate such Petitions, there is but one inescapable conclusion: Defendants do not enjoy a constitutionally protected Right to Petition the government to Redress their Grievances regarding the tax laws.

The unjustifiable and far-reaching effects of enjoining this particular Speech of Defendants should now be coming apparent. In its zeal to suppress from the People the details of the tax laws that incriminate its fraudulent nature, the Court has effectively ruled that Defendant's enjoy no fundamental Right to Speak, Associate, Assemble or Publish materials which sole purpose is to educate the American populace and effect peaceful *political change* through the very processes provided for, and protected by, by the Constitution and Bill of Rights, and in particular by the Petition Clause of the First Amendment.

To ignore and deny the constitutional context in which Defendants Speech was manifest is nothing less than a denial of Due Process and Justice itself.

The speech was clearly intended to do nothing more than incite workers to take certain written material about withholding of pay to their companies with a request that the companies submit the statements to a “rigorous review” for accuracy by their tax professionals (attorneys, CPAs, accountants, etc.). The material was provided for free. The material presented was based on questions that were included in Petitions to the Government for Redress of Grievances relating to the direct, un-apportioned tax on labor, Petitions that have been formally and respectfully served on the two political branches of the Government, Petitions the Government has refused to respond to, questions that have never been answered by the Executive or Legislative branches or by any Court.

A balancing of the Public interests tips decidedly in Defendant's favor.

The public interests being defended by Defendants include the preservation, protection and enhancement of self-government, due process, popular sovereignty, accountability in government, the Right to Petition Government for a Redress of constitutional torts, the Rights of Speech and Assembly, and the Right to Constitutional governance carried out in decency and good order.

The public interest being defended by the Plaintiff includes the public fisc.

CONCLUSION

The Record aligns Schulz, if only provisionally, on the side of the public interest and constitutes added weight in favor of precautionary relief.

Since the decision below was entered upon conflicting affidavits, and some agreed facts, without a hearing, the ordinary deference to the district judge's findings of fact is less appropriate. *Aetna Cas. & Sur. Co. v. Hunt, 486 F.2d 81, 84 (10th Cir. 1973)*; *Shumaker v. Groboski Industries, Inc., 352 F.2d 837, 840 (7th Cir. 1965).*

It is hard to conceive how the Government can be economically damaged without the immediate enforcement of the Court's order. A balancing of the public interests and the irreparable harm strongly suggests that Defendants have sufficiently shown that without preliminary relief they will likely be irreparably injured.

Defendants have pleaded a prima facie case. *Cf*. 11 Wright & Miller, Federal Practice & Procedure § 2948 at 452 (1973). There are numerous material issues of fact. **There was no hearing**. The references Defendants have made to the record tend at least to partially dispute the allegations of the complaint. The public interest lies in vindication of the Constitution.

The Defendants have made a sufficiently strong showing that they are likely to prevail on the merits in light of the disparity of probable harm as between the plaintiff and the defendants and the location of the public interest. Since the issues are grave, and the balance of hardship substantially favors Defendants, the denial of the provisional relief in the district court should be reversed.

Defendants claim a competing public interest and a balancing of the public interests that favors the granting of the provisional relief. Defendants urge that the lower "serious questions" standard is more appropriate for this application. In the pending suit, there are public interest concerns on both sides.

In contending that it faces irreparable injury, Defendants merge their claims of injury with claims on the merits. Thus, Defendants contend that the enforcement of the districts courts injunction order will cause irreparable injury to their fundamental rights. Iimpairment of *fundamental Rights* can undoubtedly constitute irreparable injury, *see Elrod v. Burns, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976)* (plurality opinion).

The District Court grounded its injunction order primarily, if not entirely, on the Government's claim of loss of revenue while giving no weight to Defendants' *First Amendment* Right to Petition claims and dismissing Defendants' First Amendment Speech claims on the ground that the speech is prohibited commercial speech. However, in view of the number of

material facts that are at issue **and the absence of a hearing**, the possibility exists that the Plaintiff's requested relief constitutes the type of governmental action that violates the *First Amendment*.

The *First Amendment* prohibits the government from imposing burdens and engaging in a wide variety of conduct that is intended to avoid accountability, discourage associations and encourage or discourage speech because of its content or viewpoint.

There are public interest concerns on both sides of the pending controversy

The interests are not easily weighed. If numbers alone mattered, it is likely that far more People would appreciate the opportunity to have the Government held accountable to the Constitution by requiring it to respond to proper Petitions for Redress of constitutional torts, with formal, specific answers to questions than would be disappointed by some diminution in the government's revenue. But numbers cannot be decisive.

On balance, the public interest favors issuance of the stay pending appeal.

Without the stay pending appeal, Defendants will be forced to comply with the terms of the district court's injunction order, forcing Defendants down the path of no return.

Defendants incorporate by reference the facts and arguments contained in their papers filed in support of the Motions to dismiss and for reconsideration and modification.

There are material facts that are in dispute and material facts that are not in dispute that argue against the summary judgment in the absence of a full adversarial proceeding with a hearing, and in the absence of strict scrutiny of Defendants' First Amendment Petition and Speech claims and affirmative defenses.

The potential immediate impact from enforcement of the injunction on Defendants outweighs the harm to Plaintiff occasioned by a brief delay in enforcement.

Defendants respectfully request an order granting the motion for a stay.

Respectfully submitted,

Dated: August 29, 2007

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