

1 Allen Lichtenstein
2 NV Bar No.3992
3 General Counsel
4 ACLU of Nevada
5 3315 Russell Road, No. 222
6 Las Vegas, NV 89120
7 (702) 433-2666 phone
8 (702) 433-9591 fax

9 Robert A. Nersesian
10 NV Bar No. 2762
11 Nersesian & Sankiewicz
12 528 S. 8th St.
13 Las Vegas, NV 89101
14 (702) 385-5454 phone
15 (702) 385-7667 fax

16 Attorneys for the ACLUN, AAP, Inc,
17 ABFFE, FTRF, PEN American Center

18 UNITED STATES)
19) CV-S-03-0281-LDG-RJJ
20 Plaintiff,)
21)
22 v.)
23)
24 IRWIN SCHIFF; CYNTHIA NEUN;)
25 LAWRENCE COHEN, aka Larry Cohen,)
26 individually and all doing business as)
27 FREEDOM BOOKS, ww.livetaxfree.com,)
28 www.paynoincometax.com, www.ischiff.com,)
29 Defendants.)
30)

31
32 **POST HEARING BRIEF BY AMICUS CURIE THE ACLU OF NEVADA,**
33 **JOINED BY THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., THE**
34 **AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, THE**
35 **FREEDOM TO READ FOUNDATION OF THE AMERICAN LIBRARY ASSOCIATION,**
36 **AND THE PEN AMERICAN CENTER**

37 Come now Amicus curie the ACLU of Nevada (ACLUN), joined by the Association of
38 American Publishers, Inc. (AAP), the American Booksellers Foundation for Free Expression
39 (ABFFE), the Freedom to Read Foundation (FTRF) of the American Library Association and the

1 PEN American Center, by and through the undersigned attorneys and files this post hearing brief.

2 The Association of American Publishers, Inc.. (“AAP”) is the national trade association of
3 the U.S. book publishing industry. AAP’s members include most of the major commercial book
4 publishers in the United States, as well as smaller and non-profit publishers, university presses, and
5 scholarly societies. AAP members publish hardcover and paperback books in every field,
6 educational materials for the elementary, secondary, postsecondary, and professional markets,
7 computer software, and electronic products and services. The Association represents an industry
8 whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.
9

10 The American Booksellers Foundation for Free Expression (ABFFE) was organized in 1990.
11 The purpose of ABFFE is to inform and educate booksellers, other members of the book industry,
12 and the public about the dangers of censorship and to promote and protect the free expression of
13 ideas, particularly freedom in the choice of reading materials.
14

15 The Freedom to Read Foundation ("FTRF") is a nonprofit membership organization
16 established in 1969 by the American Library Association to promote and defend First Amendment
17 rights, to foster libraries as institutions fulfilling the promise of the First Amendment for every
18 citizen, to support the rights of libraries to include in their collections and make available to the public
19 any work they may legally acquire, and to set legal precedent for the freedom to read on behalf of
20 all citizens.
21

22 The PEN American Center, the professional association of over 2,600 literary writers (poets,
23 playwrights, essayists, editors, and novelists), is the largest in a global network of 131 Centers around
24 the world comprising International PEN. PEN's mission is to promote literature and protect free
25 expression whenever writers or their work are threatened. In particular, PEN defends writers from
26 censorship, harassment, and imprisonment. In the United States, PEN American Center defends the
27
28

1 First Amendment whenever it comes under attack. To advocate for free speech in the United States,
2 PEN mobilizes the literary community to apply its leverage through sign-on letter campaigns, direct
3 appeals to policy makers, participation in lawsuits and amicus curiae briefs, briefing of elected
4 officials, awards for First Amendment defenders, and public events.
5

6 Dated this 1st day of May 2003.

7 Respectfully submitted by:

8
9

Allen Lichtenstein
10 General Counsel,
11 ACLU of Nevada
12 NV Bar No. 3992
13 3315 Russell Road, No. 222
14 Las Vegas, NV 89120
15 (702) 433-2666 phone
16 (702) 433-9591 fax

17 Robert A. Nersesian
18 NV Bar No. 2762
19 Nersesian & Sankiewicz
20 528 S. 8th St.
21 Las Vegas, NV 89101
22 (702) 385-5454 phone
23 (702) 385-7667 fax

24
25 Attorneys for the ACLUN, AAP, Inc,
26 ABFFE, FTRF, PEN American Center
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Points and Authorities	1
I. Introduction	
II. Legal Standards	1
A. Standards for a preliminary injunction	1
B. Standards for a prior restraint on speech	2
III. The government is unlikely to succeed on the merits in attempting to ban <i>The Federal Mafia</i> .	4
A. <i>The Federal Mafia</i> is not commercial speech.	5
B. <i>The Federal Mafia</i> does not urge and is not likely to lead to imminent lawless action.	9
C. <i>The Federal Mafia</i> cannot be banned for prospectively aiding and abetting crime.	10
D. The proposed injunction would ban pure speech not conduct.	16
1. The distribution of a book is not an “expressive act” under <i>United States v. O’Brien</i> , but pure speech.	
2. The government is seeking a total ban on the book not a time, place or manner restriction.	17
3. The government’s entire argument focuses on the alleged primary effect of the book – that people will believe it. Therefore secondary effects analysis is inappropriate.	18
E. Under the strict constitutional scrutiny that applies, the government is unlikely to succeed on the merits.	20
1. The government has not articulated a compelling interest in banning <i>The Federal Mafia</i> .	20
2. The proposed injunction is not only unnecessary, it is also ineffective.	21
3. An injunction against <i>The Federal Mafia</i> fails the least restrictive	22

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

means test.

IV The balance of hardships tips decidedly in Defendants' favor. 23

V. Conclusion 24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

cases

Alexander v. U.S., 509 U.S. 544 (1993)	2,12,22
Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)	10,11,13
BE & K Construction v. NLRB, 536 U.S. 516 (2002)	12
Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983)	6
Boos v. Barry, 485 U.S. 312 (1988)	17,18
Brandenburg v. Ohio, 395 U.S. 444 (1969)	3,9,10,13
Cantwell v. Connecticut, 310 U.S. 296 (1940)	3
Carey v. Brown, 447 U.S. 455 (1980)	20
Central Hudson Gas and Electric Corp. v. Public Service Com'm. 447 U.S. 557 (1980)	2,5,9
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	13
Cincinnati v. Discovery Network, 507 U.S. 410 (1998)	6
City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002)	18,19
Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984)	17
Consolidated Edison Co. of New York v. Public Service Commission of New York, 447 U.S. 530 (1980)	13,19
Craig v. Harney, 331 U.S.367 (1947)	23
Ebel v. City of Corona, 698 F.2d 390 (9th Cir. 1983)	23
Elrod v. Burns, 427 U.S. 347 (1976)	
Empire News v. Solomon, 818 F.Supp.307 (D. Nev. 1993)	23
Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978)	23

1	Fort Wayne Books v. Indiana, 489 U.S. 46 (1989)	22
2	Freedman v. Maryland, 380 U.S. 51 (1965)	22
3	FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990)	3,16
4		
5	Gaudiya Vaishnava Society v. City of San Francisco, 952 F.2d 1059 (9 th Cir. 1990)	7
6		
7	Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981)	6,17
8		
9	Hess v. Indiana, 414 U.S. 105 (1973)	9,13
10		
11	Kingsley Int'l Pictures Corp. v. Regents of Univ. of N. Y., 360 U.S. 684 (1959)	11
12		
13	Lovell v. Griffin, 303 U.S. 444 (1938)	16
14		
15	Maryland State Board of Motion Picture Censors v. Times Film Corp., 129 A.2d 833 (Md. 1957)	22
16		
17	McIntyre v. Ohio, 514 U.S. 334 (1995)	2
18		
19	Miller v. California, 413 U.S. 15 (1973)	3,22
20		
21	N. A. A. C. P. v. Button, 371 U.S. 415 (1963)	6
22		
23	Near v. Minnesota, 283 U.S. 697 (1934)	4,16,21,22
24		
25	Nebraska Press Association v. Stuart, 427 U.S. 539 (1976)	5,23
26		
27	New York Times, Co. v. Sullivan, 376 U.S. 254(1964)	3,6
28		
	New York Times Co. v. United States, 403 U.S. 713 (1971)	5
	Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)	16
	Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983)	4,20
	Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations, 413 U.S. 376 (1973)	6
	Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972)	3

1	Progressive, Inc. v. United States, 467 F.Supp. 990, (W.D. Wis. 1979)	21
2	R.A.V. v. St. Paul, 505 U.S. 377(1992)	3,10,16
3	Regina v. Hicklin, [1868] L. R. 3 Q. B. 360	22
4	Reno v. ACLU, 521 U.S. 844 (1997)	19
5	Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)	18,19
6	Rice v. Paladin Enterprises, Inc. 128 F.3d 233; (4 th Cir. 1997)	13,14,22
7	Riley v. National Fed'n of the Blind of North Carolina, Inc., 487 U.S. 781 (1988)	7
8	Roth v. United States, 354 U.S. 476 (1957)	22
9	S.O.C. v. Mirage Hotel-Casino, 117 Nev. Adv. Rep. 36, 23 P.3d 243 (2001) 5	
10	S.O.C., Inc. v. County of Clark, 152 F.3d 1136 (9 th Cir, 1998)	2,6,7
11	Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115 (1989)	4,20
12	Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd., 502 U.S. 105 (1991)	3
13	Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)	3,4,5
14	Tally v. California, 362 U.S. 60 (1960)	16
15	Texas v. Johnson, 491 U.S. 397 (1989)	3,16
16	Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969)	16
17	Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524 (9 th Cir.1993)	2
18	United States v. Barnett, 667 F.2d 835 (9 th Cir. 1982)	12,13,14,15,22
19	United States v. Buttorff, 761 F.2d 1056, 1066 (5 th Cir. 1985) U.S. 215 (1990)	6,8,9
20	United States v. Dahlstrom, 713 F.2d 1423 (9 th Cir. 1983)	14,15,20
21		
22		
23		
24		
25		
26		
27		
28		

1	United States v. Damon, 676 F.2d 1060 (5 th Cir. 1982)	15
2	United States v. Estate Preservation Services, 202 F.3d 1093 (9 th Cir. 2000)	6,7
3	United States v. Estate Preservation Service, 38 F.Supp. 846 (E.D. Cal. 1998)	7
4		
5	United States v. Freeman, 761 F.2d. 549 (9 th Cir. 1985)	14,15,22
6	United States v. Jenkins, 974 F.2d 32 (5 th Cir. 1992)	22
7	United States v. Kaun, 827 F.2d 1144 (7 th Cir. 1987)	9,10
8	United States v. Kelly, 769 F.2d 215 (4 th Cir. 1983)	15
9	United States v. McDaniel, 545 F.2d 642 (9 th Cir. 1976)	11
10		
11	United States v. Moss, 604 F.2d 569 (8 th Cir. 1979)	15
12	United States v. O'Brien, 391 U.S. 367 (1968)	3,16
13	United States v. Playboy Entertainment Group, Inc. 529 U.S. 803 (2000)	19,20
14	United States v. Raymond, 228 F.2d 804 (7 th Circuit. 2000)	10
15	United States v. Rowlee, 899 F.2d 1275 (2 nd Cir. 1990)	15
16		
17	United States v. Varani, 435 F.2d 758 (6 th Cir. 1970)	10
18	United States v. White, 583 F. Supp. 1118 (D. Minn. 1984)	8
19	United States v. White, 769 F.2d 511 (8 th Cir. 1985)	8
20	Vance v. Universal Amusement Co., 445 U.S. 308, (1980)	22
21		
22	Venetian Casino Resort, LLC v. Local Joint Executive Board of Las Vegas; Culinary Workers Union, Local No.226, 45 F. Supp. 2d 1027 (D. Nev. 1999)	2
23		
24	Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 7 (1980)	
25		
26	Virginia v. Black, 123 S. Ct. 1536, (2003)	2,16
27	Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1975)	6
28		

1	Walnut Properties, Inc. v. City of Whittier, 861 F.2d 1102 (9th Cir. 1988)	2
2	Ward v. Rock Against Racism, 491 U.S. 781 (1998)	17
3	Young v. American Mini Theatres, 427 U.S. 50 (1976)	19
4		
5	statutes	
6	18 U.S.C. 2241	
7		
8	18 U.S.C. 2251	11
9	26 U.S.C. § 6700	10
10	Nevada Constitution, Article 1, Section 9	4,5
11	treatises	
12	M. Nimmer, Nimmer on Freedom of Speech, (1984)	2
13	R. Smolla, Smolla and Nimmer on Freedom of Speech, (1996)	17
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **POINTS AND AUTHORITIES**

2 **I. Introduction**

3 This case involves an attempt by the government to enjoin certain material by Defendants.
4 Among the items that the government wishes to ban is the book *The Federal Mafia: How*
5 *Government Illegally Imposes and Unlawfully Collects Income Taxes*. At the April 11, 2003
6 preliminary injunction hearing, the Court noted several cases that might have bearing on the matter
7 at hand. In order to assess the relevance of these cases, it is important to first clarify what the
8 government is requesting of the Court. The government asks for a wide-ranging injunction against
9 Mr. Schiff and his cohorts to prohibit expression concerning Mr. Schiff's unorthodox theories about
10 the tax system. The Court has already described these theories as frivolous and meritless. As stated
11 previously, we take no position on the truth or falsity of any of Mr. Schiff's theories. Nor do we have
12 a view concerning certain aspects of the proposed injunction.
13
14

15 That is not to say, as the government suggested at the April 11, 2003 hearing, that we concede
16 the appropriateness of such an injunction. Whether Defendants can or should be enjoined from
17 helping people fill out their tax returns or from representing them at IRS hearings is beyond the
18 scope of our concerns. Nor do face to face statements at seminars or promotional material
19 necessarily have the same status as Mr. Schiff's book. However, the attempt to enjoin distribution
20 of *The Federal Mafia* clearly violates rights protected by the First Amendment and the Nevada
21 Constitution.
22

23 **II Legal Standards**

24 **A. Standards for a preliminary injunction**

25 A preliminary injunction should only be issued "upon a clear showing of either (1) probable
26 success on the merits *and* possible irreparable injury *or* (2) sufficiently serious questions going to
27
28

1 the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly
2 toward the party requesting the preliminary relief." *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136,
3 1142 (9th Cir, 1998); *Ebel v. City of Corona*, 698 F.2d 390, 392 (9th Cir. 1983). Under these
4 standards injunctive relief is appropriate when either of this two tests are met. *Venetian Casino*
5 *Resort, LLC v. Local Joint Executive Board of Las Vegas; Culinary Workers Union, Local No. 226*,
6 45 F. Supp. 2d 1027, 1031 (D. Nev. 1999); *Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102
7 (9th Cir. 1988). These are not two separate tests, but "merely extremes of a single continuum."
8 *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1528 (9th Cir. 1993).

11 **B. Standards for a prior restraint on speech**

12 The government is asking for a prior restraint on speech. The Supreme Court has
13 distinguished between prior restraints and punishment of speech after the fact. *Alexander v. U.S.*, 509
14 U.S. 544, 553 (1993):

15 "The term 'prior restraint' is used 'to describe administrative and judicial orders
16 forbidding certain communications when issued in advance of the time that such
17 communications are to occur.' M. Nimmer, *Nimmer on Freedom of Speech*, 4.03, p.
18 4-14 (1984). Temporary restraining orders and permanent injunctions -- i. e., court
orders that actually forbid speech activities -- are classic examples of prior restraints."

19 The attempt to ban the book, *The Federal Mafia*, raises a significant constitutional issue. Unlike
20 promotional material, and perhaps the seminars, the book contains significant political discourse
21 caustically and significantly criticizing the government for its "criminal" actions. At least that is Mr.
22 Schiff's contention. Regardless of what the Court may think about this harangue, criticism of the
23 government is fully protected as core political speech, which enjoys the broadest constitutional
24 protection. *See, McIntyre v. Ohio*, 514 U.S. 334, 346 (1995).

25 This is not to say that the book is therefore sacrosanct. Freedom of speech is not absolute.
26 *Virginia v. Black*, 123 S. Ct. 1536 (2003). There is, however, a strong presumption of
27
28

1 unconstitutionality that the government must meet in order to sustain a prior restraint on protected
2 expression. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). *See also, FW/PBS,*
3 *Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990); *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992).

4
5 “The First Amendment generally prevents government from proscribing speech, *see,*
6 *e. g., Cantwell v. Connecticut*, 310 U.S. 296, 309-311, 84 L. Ed. 1213, 60 S. Ct. 900
7 (1940), or even expressive conduct, *see, e. g., Texas v. Johnson*, 491 U.S. 397, 406,
8 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989), because of disapproval of the ideas
9 expressed. Content-based regulations are presumptively invalid. *Simon & Schuster,*
10 *Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 116 L. Ed. 2d
11 476, 112 S. Ct. 501 (1991); *id.*, at 124 (KENNEDY, J., concurring in judgment);
12 *Consolidated Edison Co. of N. Y. v. Public Serv. Comm’n of N. Y.*, 447 U.S. 530, 536,
13 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S.
14 92, 95, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972).” 505 U.S. at 382.

15
16 Speech, however, can be proscribed in a limited number of areas. *Id* at 383. Yet in each of
17 these areas government must demonstrate that the applicable constitutional test is met. Thus, for
18 someone to be punished for obscenity the expression at issue must meet the three-part test set forth
19 in *Miller v. California*, 413 U.S. 15, 24 (1973). Defamation is left unprotected only under the
20 standards set forth in *New York Times v. Sullivan*, 376 U.S. 254, 279-280(1964). Regulations
21 concerning commercial speech must adhere to *Central Hudson Gas and Electric Corp. v. Public*
22 *Service Com’m.* 447 U.S. 557, 566 (1980). Expression considered “fighting words” are protected
23 unless they meet the test in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Even restrictions on
24 expressive conduct are governed by the *O’Brien* test. *United States v. O’Brien*, 391 U.S. 367, 377
25 (1968).

26
27 The particular theory under which the government is attempting to ban *The Federal Mafia*
28 is crucial because each constitutional test is different. Restrictions on commercial speech and
expressive conduct require only intermediate level scrutiny. *See, Central Hudson, supra; O’Brien,*
supra. The content of constitutionally protected speech, however, requires strict scrutiny. It

1 therefore may only be regulated if it is necessary to promote a compelling interest and the
2 government must choose the least restrictive means to further the articulated interest. *Sable*
3 *Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 126
4 (1989). *See also, Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983).
5 Moreover, the standards the government must meet in order to secure a prior restraint against
6 noncommercial political speech are more stringent than the test for criminal convictions.
7 *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-559 (1975).
8

9
10 In the instant case, the government has taken a scattershot approach to defend its attempt to
11 censor *The Federal Mafia*. It has alternately argued that the book is either false commercial speech,
12 incitement to imminent lawless action, or aiding and abetting a crime. The cases cited by the Court
13 at the April 11, 2003 hearing involved these types of situations. In the instant case, the government
14 has attempted to argue that the book fits all of these categories. Unfortunately, it has failed to do the
15 required analysis to see if the cases cited actually apply to the instant circumstance. In fact, they do
16 not.
17

18 **III. The government is unlikely to succeed on the merits in attempting to ban *The Federal***
19 ***Mafia*.**

20 The Supreme Court has long distinguished between a prior restraint, where the government
21 limits or even bans speech before it has the chance to be expressed, and punishment of speech that
22 runs afoul of various laws. This was made clear in the seminal case of *Near v. Minnesota*, 283 U.S.
23 697, 720 (1934).
24

25 “The fact that the liberty of the press may be abused by miscreant purveyors of
26 scandal does not make any the less necessary the immunity of the press from
27 previous restraint in dealing with official misconduct. Subsequent punishment for
28 such abuses as may exist is the appropriate remedy, consistent with constitutional
privilege.”

1 The distinction between a prior restraint and subsequent punishment of speech is also
2 reflected in Article I, Section 9 of the Nevada Constitution – “Liberty of speech and the press.”

3 “Every citizen may freely speak, write and publish his sentiments on all subjects
4 being responsible for the abuse of that right; and no law shall be passed to restrain or
5 abridge the liberty of speech or of the press.”¹

6 The Supreme Court’s aversion to prior restraints has extended even to situations where the
7 government has claimed national security as the rationale. *See, New York Times Co. v. United States*,
8 403 U.S. 713 (1971), and the right to a fair trial, *see, Nebraska Press Association v. Stuart*, 427 U.S.
9 539 (1976). In the former case, the Court refused to enjoin the *New York Times* and the *Washington*
10 *Post* from publishing the *Pentagon Papers*, which consisted of classified documents concerning the
11 Vietnam war. 403 U.S. at 714.

12 *Nebraska Press Association*, while not involving national security claims, invalidated a gag
13 order placed on the press concerning a sensational murder trial. 427 U.S. at 562. Even the Sixth
14 Amendment right to a fair trial untainted by pretrial publicity could not justify a prior restraint. The
15 presumptive unconstitutionality of prior restraints does not mean that there is an absolute prohibition
16 against them. Unless, however, the prior restraint at issue fits into a very narrow group of exceptions
17 to the general rule, the restriction cannot withstand constitutional scrutiny. *Southeastern*
18 *Promotions, supra*, 420 U.S. 558-559. Here, the government has not and cannot establish that the
19 proposed prior restraint of *The Federal Mafia* fits into any of the “exceptions” to the general rule
20 against prior restraints. The injunction, therefore, violates the constitutional guarantee of freedom of
21 expression.
22
23
24

25 **A. *The Federal Mafia* is not commercial speech.**

26
27 ¹ The Nevada Supreme Court has construed this provision as providing protection that
28 is neither more or less extensive than that provided by the First Amendment to the United States
Constitution. *S.O.C. v. Mirage Hotel-Casino*, 117 Nev. Adv. Rep. 36, 23 P.3d 243, 251 (2001).

1 One claim made by the government to bolster its case is that *The Federal Mafia* is
2 commercial speech. If this were so, then the book could be enjoined if it were shown that the
3 commercial speech was false or misleading or if it advertised and illegal product or service. *See,*
4 *Central Hudson, supra.* Thus, false or misleading commercial speech by Mr. Schiff, or anyone else,
5 can be enjoined. *See, United States v. Estate Preservation Services*, 202 F.3d 1093,1106 (9th Cir.
6 2000) and *United States v. Buttorff*, 761 F.2d 1056,1066 (5th Cir. 1985). Simply calling something
7 commercial speech, however, does not necessarily make it so.
8

9 The first inquiry required concerns exactly what content in the book the government claims
10 is false and misleading. This is particularly important because, as the Court has already noted, the
11 book is primarily comprised of autobiographical material and political diatribe, which is clearly
12 noncommercial content. Mr. Schiff's theories concerning the tax code -- whether true or false,
13 frivolous or serious -- are not commercial speech.
14

15 Commercial speech is expression that does no more than propose a commercial transaction.
16 *Cincinnati v. Discovery Network*, 507 U.S. 410,423 (1998); *Bolger v. Youngs Drug Products Corp.*,
17 463 U.S. 60, 66 (1983); *S.O.C., Inc. v. County of Clark, supra*; *see also, Pittsburgh Press Co. v.*
18 *Pittsburgh Com. on Human Relations*, 413 U.S. 376, 385 (1973); *Virginia State Bd. of Pharmacy*
19 *v. Virginia Citizens Consumer Council*, 425 U.S. 748, 772, n.24 (1975). The purportedly offending
20 parts of the book that the government claims are the basis for its attempt to stop distribution are Mr.
21 Schiff's "frivolous" tax theories and examples of forms showing these theories.
22

23 Even if we were to assume that the government is correct in its assertions that those theories
24 are meritless, it still would not mean that the content in question is commercial speech. Neither the
25 theories nor the alleged instructions could be viewed as "proposing a commercial transaction."
26 Falsity alone is an insufficient basis to ban noncommercial expression. *See, New York Times v.*
27
28

1 *Sullivan, supra* at 271 [“The constitutional protection does not turn upon ‘the truth, popularity, or
2 social utility of the ideas and beliefs which are offered.’ quoting *N. A. A. C. P. v. Button*, 371 U.S.
3 415, 445 (1963)]. The fact that Mr. Schiff sells his book is insufficient to render it commercial speech.
4
5 *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981); *Gaudiya*
6 *Vaishnava Society v. City of San Francisco*, 952 F.2d 1059, 1063 (9th Cir. 1990). If it were, then
7 every book, newspaper, movie or other mass medium of communication would similarly be
8 relegated to regulation under intermediate scrutiny, as would many lectures and political speeches.
9 Nor does, as the government argues, the presence of a few pages of advertising at the end of the 304
10 page books render the entire book commercial. If the presence of any advertising at all rendered the
11 entire work commercial, then virtually every newspaper and magazine would be ineligible for full
12 constitutional protection. Courts have been unwilling to rule as such. See, *Village of Schaumburg*
13 *v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). *S.O.C. v. Clark County, supra*, at
14 1144; *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796 (1988).

15
16
17 Thus, *The Federal Mafia*, whatever its merits or lack of them might be, cannot be banned as
18 false commercial speech. The Ninth Circuit’s decision in *Estate Preservation, supra*, does not
19 contradict this. In that decision, the material in question was not a 304 page book primarily
20 comprised of autobiography and political diatribe criticizing the government. Here, the facts and the
21 record do not support a finding that *The Federal Mafia* can be banned as commercial speech. Even
22 the sections that the government objects to are not commercial in nature. As enticing as the
23 commercial speech theory might be to the government, it cannot be commercially applied to the
24 book.
25

26 In *United States v. Estate Preservation Services, supra*, at 1106, the Ninth Circuit upheld
27 an injunction against the defendant issuing its promotional material. The Court of Appeals did not
28

1 discuss the material in question but merely referred to it as commercial speech that can be enjoined
2 if it is false or misleading. The District Court, however, had specified that the material in question was
3 “marketing material” for the sale of “asset preservation” trusts, which was the business those
4 defendants were involved in. *United States v. Estate Preservation Service*, 38 F.Supp. 846, 849
5 (E.D. Cal. 1998). Thus, it was clear the speech proposing a commercial transaction was commercial
6 in nature. Therefore, it was subject to an injunction.
7

8 Similarly, in *United States v. White*, 769 F.2d 511, 518 (8th Cir. 1985) the Court enjoined the
9 Defendant from disseminating certain promotional material. However, unlike the attempt to ban *The*
10 *Federal Mafia* the Court made it clear that the injunction was limited to commercial speech. *Id.* [“In
11 particular, the injunction specifically prohibits only appellant's commercial speech that has been
12 shown to be false or fraudulent, and thus misleading, and that is likely to promote illegal activity.”]
13 In *White*, the District Court, made specific findings that: “Defendant has engaged in the following
14 specific acts: (a) he has organized an entity (MSEC) and (b) he has sold a plan or arrangement (the
15 Patriots Pursuit of Happiness) for the principal purpose of securing material federal tax benefits to
16 his customers through the MSEC/Patriot's Pursuit of Happiness Plan which defendant knows, or has
17 reason to know, is false or fraudulent in nearly all respects.” *United States v. White*, 583 F. Supp.
18 1118 (D. Minn. 1984). The material at issue in *White* related to a commercial “plan” set up by the
19 Defendant. Thus, the commercial material involved is clearly distinguishable from *The Federal*
20 *Mafia*, which cannot be deemed commercial speech.
21
22

23 The situation was also similar in *United States v. Buttorff*, 761 F.2d 1056 (5th Cir. 1985).
24 There the Defendant “promoted, sold, and serviced a trust package” where the price was determined
25 based on the value of the assets placed in the trust. *Id.* at 1057. Again, this was not a case of a court
26 banning a book. Instead, the injunction in *Buttorff* was expressly limited only to specifically
27
28

1 commercial speech. *Id.* at 1065. [“We narrowly construe the injunctive order to enjoin appellant
2 from promoting, selling, or servicing the Constitutional Pure Equity Trust and similar schemes only
3 if the trust or similar scheme is sold, promoted, or serviced in a context which is to some extent
4 commercial, . . .”] The speech in question involved promotional material trying to sell the
5 Defendant’s trusts and personal services. “ *Id.* at 1066.

7 There is no question that under *Central Hudson, supra*, commercial speech deemed false can
8 be enjoined. Here, however, the government has not shown that *The Federal Mafia* is commercial
9 in nature. In fact, both the Court and the government apparently concede that the book is a political
10 diatribe with significant autobiographical content. It clearly does more than propose a commercial
11 transaction. It is therefore not commercial speech and cannot be regulated as such. The book is
12 entitled to full First Amendment protection afforded political speech.

14 **B. *The Federal Mafia* does not urge and is not likely to lead to imminent lawless
15 action.**

16 On page 5 of the April 10, 2003 brief in Reply to the ACLU’s initial brief, the government
17 acknowledges the inapplicability of the constitutional standards set forth in *Brandenburg, supra*, 395
18 U.S. at 447, requiring proscription of speech only to avoid an imminent act of violence or
19 lawlessness. The government, however, asserts that they have not chosen to use a *Brandenburg*
20 theory to attempt to ban *The Federal Mafia*. But *Brandenburg* cannot be disposed of that easily. It
21 is not voluntary doctrine to be used at the government’s discretion, but a constitutional limit on
22 attempts at restricting speech. The Supreme Court made this clear in *Hess v. Indiana*, 414 U.S. 105,
23 108 (1973).

26 “Under our decisions the constitutional guarantees of free speech and free press **do**
27 **not permit** a State to forbid or proscribe advocacy of the use of force or of law
28 violation **except** where such advocacy is directed to inciting or producing imminent
lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*,

1 395 U.S. 444, 447 (1969). (Emphasis added.)

2 Despite their disavowal of *Brandenburg*, the government still argues that banning the book
3 is necessary because it incites people to break the law, even if such incitement is not imminent. This,
4 however, is exactly what the Seventh Circuit warned of in *United States v. Kaun*, 827 F.2d 1144,
5 1151, n. 3 (7th Cir. 1987).

7 “Under *Brandenburg*, therefore, a person may not be prosecuted for merely
8 advocating unlawful activity -- only for speech that leads to “imminent lawless
9 action.’ However, the legislative history of § 6700 makes clear that in order to hold
10 the promoter of an abusive tax shelter liable, ‘there need not be reliance by the
11 purchasing taxpayer or actual under reporting of tax.’ S. Rep. No. 97-494, 97th
12 Cong., 2d Sess. 267, *reprinted in* 1982 U.S. Code Cong. & Admin. News 781, 1015.
It is therefore possible that the broad scope of § 6700 may reach a person who merely
advocates the nonpayment of taxes in general. This result would clearly run afoul of
Brandenburg.”

13 The *Kaun* Court issued its injunction because the material in question was commercial
14 speech or involved situations where imminent lawless action was likely. 827 F.2d at 1151-1152. The
15 same situation occurred in *United States v. Raymond*, 228 F.2d 804, 815 (7th Circuit. 2000) including
16 the commercial speech aspect. The Court reiterated its statement from *Kaun* that the injunction was
17 a narrow one and could only be violated if the defendants actually persuaded others directly or
18 indirectly to violate tax laws or in a situation where there was a likelihood of an imminent lawless
19 action. *Id* at 815-816. In contrast, the injunction requested here is much broader. All Mr. Schiff
20 would have to do to be in contempt would be to distribute his book to anybody. Even giving the
21 book to the ACLU, the press or the government itself would be prohibited. Unlike the limitation of
22 the injunction to *Brandenburg* standards, here the government is requesting that the Court engage
23 in straight old-fashioned book-banning. This is constitutionally impermissible.

26 **C. The Federal Mafia cannot be banned for aiding and abetting crime.**

27 There is no doubt that words and even books can be the basis for criminal prosecution if
28

1 they are part of the essential elements of a crime. *R.A.V. supra*, 505 U.S. at 382-383. The fact that a
2 ransom note is expressive does not immunize its maker from prosecution for kidnaping. Nor is a
3 charge of aiding and abetting a crime prohibited when written or spoken material is used to persuade
4 or instruct the principals. *United States v. Varani*, 435 F.2d 758, 762 (6th Cir. 1970). It is equally
5 true, however, that courts have rejected laws restricting speech that were based on how a reader
6 might possibly use the material in the future. *See, Ashcroft v. Free Speech Coalition*, 535 U.S. 234,
7 245 (2002):

8
9 “Congress may pass valid laws to protect children from abuse, and it has. E.g., 18
10 U.S.C. 2241, 2251. The prospect of crime, however, by itself does not justify laws
11 suppressing protected speech. *See Kingsley Int'l Pictures Corp. v. Regents of Univ.*
12 *of N. Y.*, 360 U.S. 684, 689, 3 L. Ed. 2d 1512, 79 S. Ct. 1362 (1959) (“Among free
13 men, the deterrents ordinarily to be applied to prevent crime are education and
14 punishment for violations of the law, not abridgment of the rights of free speech”)
15 (internal quotation marks and citation omitted))”

16 Several of the cases cited by the government involve actual criminal charges. The crime of
17 aiding and abetting, however, does not occur in a vacuum. Nor does it occur hypothetically. Instead,
18 it is determined cases-by-case based on the particular facts and circumstances surrounding the
19 underlying crime and by the relationship between the person or persons allegedly aiding and abetting
20 the underlying crime and the principals who actually committed the crime. *See, United States v.*
21 *McDaniel*, 545 F.2d 642, 644 (9th Cir. 1976).

22 Here, however, there are no principals and no specific crime. The government argues that *The*
23 *Federal Mafia* may entice, persuade or direct people on how to break the law. However, they have
24 not tied the book to any specific act of tax evasion not to any specific principals who committed such
25 crimes. The only testimony at the April 11, 2003 hearing was that the book did not do these things,
26 but merely caused the witnesses to look further into the matters discussed in the book. As in *Free*
27 *Speech Coalition, supra*, an attempt to ban speech because it may possibly be involved in a potential
28

1 crime in the future is insufficient basis for banning speech.

2 There is no dispute about the fact that if the government believes that, in any specific case,
3 Mr. Schiff aided and abetted a particular act of criminal tax evasion utilizing *The Federal Mafia*,
4 alone or in conjunction with other expression, it could bring criminal charges against him for doing
5 so. Then it would be up to a jury to determine if the specific facts and circumstances presented at trial
6 warranted conviction. *See, McDaniel, supra*. What cannot be done, however, is to sustain criminal
7 charges for aiding and abetting simply by presenting certain text from the book and merely
8 presuming that there are some unnamed principals that the book aided and abetted in their crime.
9 Yet, that sort of guilt by presumption is exactly what the government is attempting to do here,
10 despite the fact that the standards for a prior restraint are more stringent than for a criminal
11 conviction. *See, Alexander, supra*, 509 U.S. at 553; *BE & K Construction v. NLRB*, 536 U.S. 516, 530
12 (2002).

13 The government argues that *United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982) serves as
14 the basis for an injunction of *The Federal Mafia*. In that case the Ninth Circuit ruled that the author
15 of instructions on how to manufacture the drug PCP could be charged with aiding and abetting the
16 crime by another individual of actually making the drug. *Id.* at 843. The issue, the Court said, is one
17 for the jury. *Id.*

18 *Barnett* is clearly distinguishable from the instant case in three important ways. The first is
19 that the drug making manual did not contain any of the political or autobiographical material that
20 comprises the Schiff book. This is significant. At the April 11, 2003 hearing, the government called
21 no witnesses. Mr. Schiff called several witnesses, all of whom said that after they read the book they
22 thought about the theories promoted and were prompted to do more research. Moreover, *The*
23 *Federal Mafia* contains descriptions of the legal difficulties Mr. Schiff encountered while pursuing
24
25
26
27
28

1 his unorthodox legal analysis. In fact, the majority of the book, as the title suggests, is that the federal
2 government acts criminally in regard to the income tax system and tries to prosecute those who, in
3 Mr. Schiff's view, stand up for their rights. The book even contains warnings about possible legal
4 problems that may occur if one follows the theories contained therein. In contrast, the book in
5 *Barnett* contained nothing but drug making instructions.

7 The second distinction between the two cases is that *Barnett* was a criminal case. The issue
8 wasn't even about a criminal conviction but concerned the issue of probable cause for a search
9 warrant. The government's burden is lower for a criminal conviction than for the prior restraint
10 requested here. The probable cause standard is much lower still.

12 In *Barnett* the Court ruled that the question of whether the manual's distribution to the
13 person who was charged with manufacturing PCP constituted aiding and abetting the crime was a
14 matter for the jury to determine. *Id.* at 843. Clearly, this determination must be made based on all
15 of the facts and circumstances presented at trial. Here, in contrast no one is accused of a crime.
16 Instead, the government is seeking to enjoin the distribution of the book on the theory that someone
17 somewhere may be aided and abetted to commit the crime of tax evasion in the future. Certainly no
18 aiding and abetting of someone's criminal activity was established at the April 11, 2003 hearing
19 where the government presented no witnesses.

21 In essence, the government is attempting to ban the distribution of *The Federal Mafia*
22 because it may have a tendency to prompt people to commit a criminal act. This, however, is
23 prohibited by *Brandenburg*, which limited the reach of the "fighting words" doctrine set forth in
24 *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). As initially formulated in *Chaplinsky*, the
25 government could proscribe speech that by its very nature caused injury or had a tendency to cause
26 a breach of the peace. *Id.* at 573. *Brandenburg* placed a constitutional limit on that doctrine. *Hess*,

1 *supra*. Thus, for example, in *Free Speech Coalition*, 535 U.S. at 253, the U.S. Supreme Court
2 overturned a law that criminalized pornography that appeared to utilize real children even though it
3 was made using young looking adults or computer generated images. Even though the government
4 claimed that such material was used by child molesters as part of their criminal activities, such a
5 claim was not sufficient justification for a prior restraint. *Id.*

7 *Rice v. Paladin Enterprises, Inc.* 128 F.3d 233; (4th Cir. 1997) presents a similar contrast to
8 the instant case as *Barnett*. In *Rice*, however, the publisher was accused of aiding and abetting
9 murder through an instructional manual. The publisher stipulated that it was his sole intent in
10 providing the book to the principal to assist with the murder. *Id.* The issue presented was whether
11 or not the publisher could be criminally liable for aiding and abetting that specific crime. The Court
12 said that the First Amendment did not bar such a conviction if the facts and circumstances presented
13 to the jury proved the case under the appropriate standards. As in *Barnett, supra*, *Rice* contained
14 no suggestion of an injunction banning the book. While both these cases support the possibility of
15 criminal penalties for those who aid and abet a crime using written material, neither provides any
16 support for the idea that these books can be censored out of existence by enjoining their distribution.

19 The requirement for a case-by-case factual analysis for aiding and abetting was set forth by
20 the Ninth Circuit in *United States v. Freeman*, 761 F.2d. 549, 552 (9th Cir. 1985).

22 “Where there is some evidence, however, that the purpose of the
23 speaker or the tendency of his words are directed to ideas or
24 consequences remote from the commission of the criminal act, a
25 defense based on the First Amendment is a legitimate matter for the
26 jury's consideration.”

27 *Freeman* was an aiding and abetting tax case. The Court emphasized the need for specific
28 factual inquiries by the jury in order to sustain a criminal conviction. *Id.* No suggestion of an
injunction banning a book was entertained. The case, in fact, did not involve a book at all, but face

1 to face seminars. Unlike a 304 page book such as *The Federal Mafia*, which takes time to read and
2 digest, live face to face meetings have a greater immediacy and by nature allow less time and
3 opportunity for reflection. The Court noted the importance of the time factor, requiring the jury to
4 determine “if the intent of the actor and the objective meaning of the words used are so close in time
5 and purpose to a substantive evil as to become part of the ultimate crime itself.” *Id.* at. 552. In
6 contrast, no such factual inquiry is attempted here.
7

8 A similar analysis, but with a different result, occurred in *United States v. Dahlstrom*, 713
9 F.2d 1423, 1428 (9th Cir. 1983). There again individuals who created a membership organization were
10 accused of aiding and abetting tax fraud. In this case, however, the convictions were reversed based
11 on the factual record not supporting all of the elements of the crime. The Ninth Circuit noted that
12 mere advocacy of lawless action was insufficient to overcome constitutional protections even in
13 national security cases, much less where the issue is taxes. *Id.*
14

15 Taken together *Freeman, supra*, and *Dahlstrom, supra*, reiterate the Ninth Circuit’s position
16 from *Barnett, supra*. While words can be used to aid and abet crime, a criminal conviction can only
17 be sustained if the specific facts and circumstances surrounding the relationship between the
18 expressive action in question and the criminal acts of the principals are sufficiently connected in
19 terms of time and impact. Nothing in these cases comes close to supporting the government’s
20 contention that the words of certain sections alone can substitute for the aforementioned analysis in
21 establishing aiding and abetting. Clearly none of these cases lend any support to the idea of banning
22 a book because it might be used by some unknown person sometime in the future to commit a crime.
23 In the absence of actual principals who committed actual crimes there can be no censorship based
24 on aiding and abetting.
25
26

27 This ruling is consistent with those in other circuits where individuals have been criminally
28

1 charged with aiding and abetting tax evasion. *See, United States v. Moss*, 604 F.2d 569 (8th Cir.
2 1979); *United States v. Damon*, 676 F.2d 1060 (5th Cir. 1982); *United States v. Kelly*, 769 F.2d 215,
3 217 (4th Cir. 1983); *United States v. Rowlee*, 899 F.2d 1275, 1279 (2nd Cir. 1990). All of these cases
4 are similar in that the all involved criminal prosecutions for aiding and abetting. All of the criminal
5 principals had face to face meetings with the aiding and abetting defendants, usually in the form of
6 a tax advice or tax shelter group. None of these cases involved an attempt to ban a book with
7 extensive political content. While clearly the First Amendment does not provide immunity from
8 charges of aiding and abetting a crime, it is similarly true that noncommercial speech cannot be
9 banned because of a lack of constitutional protection as the government argues.

12 **D. The proposed injunction would ban pure speech not conduct.**

13 The government argues that the proposed ban of the book *The Federal Mafia* should be
14 analyzed as merely a restraint of conduct rather than speech. However, the alleged “non-speech”
15 conduct referred to is the book itself, which is pure speech. The argument made by the government
16 that the distribution of a book, unlike its creation, is not fully protected expressive activity is to tally
17 incorrect. “Liberty of circulating is as essential to that freedom as liberty of publishing; indeed,
18 without the circulation, the publication would be of little value.” *Tally v. California*, 362 U.S. 60
19 (1960), quoting *Lovell v. Griffin*, 303 U.S. 444, 452 (1938). Restrictions on both the sale and
20 distribution of expressive materials are prior restraints subject to strict constitutional scrutiny. *See,*
21 *FW/PBS, supra; Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Near v. Minnesota,*
22 *supra.*

25 **1. The distribution of a book is not an “expressive act” under *United States***
26 ***v. O’Brien*, but pure speech.**

27 In *United States v. O'Brien*, *supra*, 391 U.S. at 376-377, the Supreme Court set forth an
28

1 intermediate level scrutiny test for restrictions on expressive conduct. This test applies when speech
2 and non-speech elements are present in the same course of conduct. *Id.* at 376. This test has been
3 applied to expressive conduct in *Texas v. Johnson*, 491 U.S. 397, 405 (1989)[flag burning]; *Tinker*
4 *v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505 (1969)[wearing of
5 armbands in school]; *R. A. V. supra*, [cross burning]. The common element that all of the expressive
6 conduct cases have is that the conduct at issue is not inherently expressive. If done for an expressive
7 purpose, however, the act takes on a certain level of constitutional protection. *Virginia v. Black*, 123
8 S. Ct. 1536, No. 01-1107, 2003 U.S. LEXIS 2715 (U.S. April 7, 2003) at *41-*42. The reason *The*
9 *Federal Mafia* itself cannot be treated as conduct is obvious. In contrast to the expressive conduct
10 cases warranting intermediate scrutiny, the book is inherently expressive, as opposed to an inherently
11 non-expressive act done for expressive purposes.

14 **2. The government's is seeking a total ban on the book not a time, place or**
15 **manner restriction.**

16 "Government regulation of expressive activity is content neutral so long as it is "**justified**
17 without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S.
18 781, 791 (1998)[emphasis in original]; *see also*, *Clark v. Community for Creative Non-Violence*, 468
19 U.S. 288, 293 (1984); *Heffron supra*, at 648 (1981).

21 While the government attempts to argue that the proposed ban of *The Federal Mafia* is
22 content neutral, it can point to nothing other than the content of the book that it finds objectionable.
23 The entire argument of the government is that people will read Mr. Schiff's book and believe it to the
24 point that some of them may even act based on its theories. Clearly the proposed ban of the book
25 cannot be considered a mere time, place and manner restriction, which regulates "not what is being
26 said, but merely such matters as *when, where and how loud.*" R. Smolla, Smolla and Nimmer on
27
28

1 Freedom of Speech, 4.03, p. 8-57 (1996)[emphasis in original]. In *Ward v. Rock Against Racism*,
2 *supra*, at. 791 the Court noted that the rationale asserted by the government for its attempt to restrict
3 expression determines whether or not the regulation is to be deemed content neutral. In *Boos v.*
4 *Barry*, 485 U.S. 312, 320-321 (1988) the Supreme Court reiterated that once the government provides
5 a rationale for a speech restriction based on the direct effects of the content of that speech, then the
6 governmental action cannot be treated as content neutral.

8 “The principal inquiry in determining content neutrality, in speech cases generally
9 and in time, place, or manner cases in particular, is whether the government has
10 adopted a regulation of speech because of disagreement with the message it conveys.
11 *Community for Creative Non-Violence, supra*, at 295. The government's purpose is
12 the controlling consideration. A regulation that serves purposes unrelated to the
13 content of expression is deemed neutral, even if it has an incidental effect on some
14 speakers or messages but not others. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41,
15 47-48 (1986). . . .

14 Regulations that focus on the direct impact of speech on its audience present a
15 different situation. Listeners' reactions to speech are not the type of "secondary
16 effects" we referred to in *Renton*. To take an example factually close to *Renton*, if the
17 ordinance there was justified by the city's desire to prevent the psychological damage
18 it felt was associated with viewing adult movies, then analysis of the measure as a
19 content-based statute would have been appropriate. The hypothetical regulation
20 targets the direct impact of a particular category of speech, not a secondary feature
21 that happens to be associated with that type of speech. ”

19 Here there is nothing other than the government’s admitted disagreement with the message
20 conveyed by Mr. Schiff’s book used as a justification for the attempt at censorship. The desire to
21 recast this attempted book banning is merely an effort to avoid the strict scrutiny applicable to this
22 case.

24 **3. The government’s entire argument focuses on the alleged primary effect of the
25 book – that people will believe it. Therefore secondary effects analysis is
26 inappropriate.**

26 The government argues that the injunction sought is not a content based prior restraint by
27 suggesting that an intermediate level of scrutiny is appropriate under *Renton, supra*. That case
28

1 involved the issue of zoning regulations for adult businesses under the secondary effects doctrine.
2 *Id.* at 46.

3
4 “The regulation at issue in *Renton* described prohibited speech by reference to the
5 type of movie theatre involved, treating “theatres that specialize in adult films
6 differently from other kinds of theatres.” *Id.*, at 47. But while the regulation in *Renton*
7 applied only to a particular category of speech, its justification had nothing to do with
8 that speech. The content of the films being shown inside the theatres was irrelevant
9 and was not the target of the regulation. Instead, the ordinance was aimed at the
10 “secondary effects of such theatres in the surrounding community,” *Ibid.*, effects that
11 are almost unique to theatres featuring sexually explicit films, i. e., prevention of
12 crime, maintenance of property values, and protection of residential neighborhoods.”

13 Unlike the instant case, *Renton* did not involve the complete banning of a book or of any expression.
14 *Id.* Instead it was analyzed as a time, place and manner regulation. *Id.* See also, *City of Los Angeles*
15 *v. Alameda Books, Inc.*, 535 U.S. 425, 433-434 (2002).

16
17 “The *Renton* ordinance, like the one in [*Young v. American Mini Theatres*, [427
18 U.S. 50 (1976)] does not ban adult theaters altogether, but merely provides that such
19 theaters may not be located within 1,000 feet of any residential zone, single- or
20 multiple-family dwelling, church, park, or school. The ordinance is therefore properly
21 analyzed as a form of time, place, and manner regulation.” *Renton, supra*, at 46.

22
23 The Court went on to say that under a *Renton* analysis, the question of content neutrality
24 does not even arise until it can be established that the governmental action at issue is a true time,
25 place and manner restriction. *Id.*

26
27 “Describing the ordinance as a time, place, and manner regulation is, of course, only
28 the first step in our inquiry. This Court has long held that regulations enacted for the
purpose of restraining speech on the basis of its content presumptively violate the
First Amendment.” *Id.* at 46-47.

29
30 In the instant case, the government attempts to justify its proposed injunction banning the
31 distribution of *The Federal Mafia* do not involve any allegations of secondary effects associated with
32 the book. Instead, the attempt to ban the book is based on the alleged direct effect that Mr. Schiff's
33 words purportedly have on readers. Thus, strict scrutiny is required. See, *Reno v. ACLU*, 521 U.S.

1 844, 867-868 (1997). “Listeners' reactions to speech are not the type of ‘secondary effects’ we
2 referred to in *Renton*.” *Boos v. Barry, supra*, 485 U.S. at 321. Thus, the government’s arguments that
3 the proposed injunction be analyzed under intermediate level constitutional scrutiny as a time, place
4 and manner restriction must necessarily fail because the injunction would totally ban a book based
5 solely on its content.

7 In *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 447
8 U.S. 530, 536 (1980) the Court reiterated the fact that secondary effects analysis is only appropriate
9 for time, place and manner restrictions. Here the government is seeking a total ban on *The Federal*
10 *Mafia*. Thus secondary effects analysis is inappropriate. Moreover, it is the primary effect of the
11 content of the book itself that the government objects to, not any ancillary effects. *United States v.*
12 *Playboy Entertainment Group, Inc.* 529 U.S. 803, 815 (2000).

14 “We have made it clear that lesser scrutiny afforded regulations targeting the
15 secondary effects of crime on property values has no application to content-based
16 regulations targeting primary effects of protected speech”

17 **E. Under the strict constitutional scrutiny that applies, the government is unlikely**
18 **to succeed on the merits .**

19 Because the attempt to ban *The Federal Mafia* does not fit into any of the limited exceptions
20 to content based speech restrictions, the proposed injunction must be analyzed under strict
21 constitutional scrutiny. “For the State to enforce a content-based exclusion it must show that its
22 regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve
23 that end.” *Perry, supra; see also, Carey v. Brown*, 447 U.S. 455, 461 (1980). The Government must,
24 however, choose the least restrictive means to further the articulated interest.” *Sable, supra*. Thus,
25 in order to withstand strict constitutional scrutiny the government must show that the proposed ban
26 on *The Federal Mafia*: 1) serves a compelling governmental interest, 2) is necessary to serve that
27
28

1 interest, and 3) is the least restrictive means of serving that interest. None of these have been met
2 here.

3
4 **1. The government has not articulated a compelling interest in banning *The Federal Mafia*.**

5 The first inquiry requires examination of the articulated interests the government has put
6 forth to justify its proposed act of censorship. The claim is that there is a compelling interest in
7 preventing people from cheating on their taxes. While this may be substantial interest it is by no
8 means clear that it rises to the level of compelling. In *Dahlstrom, supra*, the Ninth Circuit suggested
9 that tax issues may not rise to the level of a compelling interest to meet strict scrutiny standards.
10

11 “Nothing in the record indicates that the advocacy practiced by these defendants
12 contemplated *imminent* lawless action. Not even national security can justify
13 criminalizing speech unless it fits within this narrow category; certainly concern with
14 protecting the public fisc, however laudable, can justify no more.” *Id.* at 1428.

15 Here, however, at the April 11, 2003 hearing the government stated that its purpose in seeking
16 to ban *The Federal Mafia* is to avoid the time, trouble and expense of actually bringing criminal
17 prosecutions against those who break the law. It also seeks a stronger deterrent than criminal
18 convictions. Saving the government time, trouble and expense may be worthwhile goals, but they
19 hardly meet the compelling standard of strict scrutiny needed to justify a prior restraint. This
20 argument, in fact, is the classic one used to try to justify all prior restraints. It is as unconvincing now
21 as it was in *Near v. Minnesota, supra*. Censorship cannot be used as an expedient to avoid the
22 criminal justice system.

23 **2. The proposed injunction is not only unnecessary, it is also ineffective.**

24 In order to assess whether the proposed injunction meets the strict scrutiny test, it is
25 necessary to evaluate exactly how the ban would operate and what its effect is likely to be. Clearly
26 the injunction would have no impact on those who are not parties to the case. Mr. Schiff and the
27
28

1 other Defendants would be prohibited from distributing *The Federal Mafia*. This, however, would
2 not stop the book from being circulated by others.

3
4 In *Progressive, Inc. v. United States*, 467 F.Supp.990, 995 (W.D. Wis. 1979), an injunction
5 was issued to prevent a magazine from distributing an issue containing instructions on how to
6 construct an atomic bomb. Because other publications not covered by the injunction were able to
7 publish and distribute the same material, the injunction proved ineffective and was subsequently
8 dropped. Even in the case of a national security concern, suppression of the disputed content was
9 impossible. Here, where Mr. Schiff's theories have already been disseminated, an injunction is not
10 going to "put the genie back in the bottle." While obtaining an injunction against the Defendants
11 banning their distribution of the book may provide the government with a symbolic victory, it will
12 not serve their stated aim of preventing dissemination of the material.

14 **3. An injunction against *The Federal Mafia* fails the least restrictive means test.**

15
16 The government does not argue that the proposed injunction against *The Federal Mafia* is
17 the least restrictive means for achieving its end. Clearly, such argument would be obviously false.
18 The Supreme Court has consistently stated that subsequent punishment for speech that violates the
19 law is the proper approach as opposed to a prior restraint. *See, Near v. Minnesota, supra*. As noted
20 in *Barnett, supra, Rice, supra* and *Freeman, supra*, that avenue is open and effective.

21
22 Subsequent punishment for lawbreaking is preferable to prior restraint because it is less
23 restrictive of speech. Even in the area of obscenity, prior restraints are strongly disfavored. *See,*
24 *Alexander, supra; see also, Vance v. Universal Amusement Co.*, 445 U.S. 308, 315-16 (1980) *Fort*
25 *Wayne Books v. Indiana*, 489 U.S. 46, 63 (1989); *United States v. Jenkins*, 974 F.2d 32, 35 (5th Cir.
26 1992). Moreover, in evaluating obscenity the work in question must be viewed in its entirety. *Miller*
27 *v. California, supra; Roth v. United States*, 354 U.S. 476, 488-489 (1957):
28

1 “The early leading standard of obscenity allowed material to be judged merely by the
2 effect of an isolated excerpt upon particularly susceptible persons. *Regina v. Hicklin*,
3 [1868] L. R. 3 Q. B. 360. Some American courts adopted this standard but later
4 decisions have rejected it and substituted this test: whether to the average person,
5 applying contemporary community standards, the dominant theme of the material
6 taken as a whole appeals to prurient interest. The *Hicklin* test, judging obscenity by
the effect of isolated passages upon the most susceptible persons, might well
encompass material legitimately treating with sex, and so it must be rejected as
unconstitutionally restrictive of the freedoms of speech and press.”

7 The requirement that material be viewed as a whole is important because the government has
8 suggested the possibility of an injunction that would, in effect, edit out certain parts of *The Federal*
9 *Mafia*. Courts have found the idea of the government playing editor with expressive works to be
10 repugnant. See, *Maryland State Board of Motion Picture Censors v. Times Film Corp.*, 129 A.2d
11 833 (Md. 1957); see also, *Near v. Minnesota*, *supra*, 283 U.S. at 721-72; *Freedman v. Maryland*,
12 380 U.S. 51, 58 (1965). Even in a heavily regulated medium such as broadcasting the government
13 does not have the right or power to edit the material aired: *Federal Communications Commission*
14 *v. Pacifica Foundation*, 438 U.S. 726, 735 (1978):

17 “The prohibition against censorship unequivocally denies the Commission any power
18 to edit proposed broadcasts in advance and to excise material considered
19 inappropriate for the airwaves. The prohibition, however, has never been construed
to deny the Commission the power to review the content of completed broadcasts
in the performance of its regulatory duties.”

20 Clearly, it is not the role of the Court to act as censor in editing Mr. Schiff’s book in order to
21 meet governmental approval. See, *Nebraska Press Association, supra*, 427 U.S. at 596 quoting
22 *Craig v. Harney*, 331 U.S. 367, 374 (1947) [“There is no special perquisite of the judiciary which
23 enables it, as distinguished from other institutions of democratic government, to suppress, edit, or
24 censor events which transpire in proceedings before it.”] Rather than having any branch of the
25 government take on the role of censor, prior restraint, by imposing an outright ban or by the
26 government editing material there is a clear preference in favor of subsequent punishment of
27
28

1 proscribable speech. The government's attempts at prior restraint here cannot meet the applicable
2 strict scrutiny standard. Thus, the government is not likely to succeed on the merits. For this reason
3 the injunction against *The Federal Mafia* should not be issued.
4

5 **IV The balance of hardships tips decidedly in Defendants' favor.**

6 Clearly the balance of hardships tips decidedly toward the Defendants as it relates to the
7 attempted ban on the distribution of *The Federal Mafia*. The loss of First Amendment freedoms, for
8 even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427
9 U.S. 347, 373 (1976); *Empire News v. Solomon*, 818 F.Supp.307, 309 (D. Nev. 1993).
10

11 In contrast, the government's alleged harm is that it will have to actually criminally prosecute
12 lawbreakers instead of relying on censorship. The number of successful prosecutions cited by the
13 government for tax evasion attest to the fact that such convictions are not impossible to obtain. Thus,
14 the only hardship the government will face if the injunction against *The Federal Mafia* is not issued
15 is that they will have to do their job in prosecuting lawbreakers rather than having to depend upon
16 censorship. The fact that the government nowhere claims that banning the book will result in their
17 not having to engage in criminal prosecutions is an admission that the hardship it will suffer is more
18 symbolic than real. Ultimately, the failure of the government to obtain an injunction prohibiting the
19 distribution of the book will do no more than demonstrate its inability to engage in prior restraint,
20 which is essentially no hardship at all.
21

22
23 **V. Conclusion**

24 With neither a likelihood of success on the merits or a balance of hardships tipping in their
25 favor, the government has not established that it has met the standards to obtain an injunction
26 prohibiting the distribution of *The Federal Mafia*. The book does not fit into any of the exceptions
27 to full First Amendment protection. It is not commercial speech, nor does it meet the *Brandenburg*
28

1 standard for inciting imminent lawless activity. The book is a political diatribe that advocates a legal
2 analysis that the government and several courts have said is incorrect. The book itself acknowledges
3 this fact and warns of possible legal consequences for those who might adhere to these theories. The
4 recounting of Mr. Schiff's own legal difficulties unquestionably puts the reader on notice of the
5 potential pitfalls.
6

7 Nor can the proposed prior restraint be justified on an aiding and abetting theory. Criminal
8 prosecution for aiding and abetting requires a factual analysis of the circumstances of the specific
9 crime and the nexus of the alleged aider and abettor's actions to those of the principals who actually
10 committed the criminal acts. Here, there are no facts, circumstances, principals, specific crime or
11 nexus to evaluate. This is a prior restraint proceeding based on the government's theory that the book
12 could, in certain circumstances, aid and abet some future crime. This is insufficient basis for the type
13 of censorship proposed.
14

15 The government is requesting that this Court ban the distribution of *The Federal Mafia* the
16 based its content. It is requesting a ban rather than a time, place or manner restriction. Moreover, it
17 is the primary effect of the book's content rather than any incidental secondary effect that forms the
18 basis of the government's complaint. Thus, strict scrutiny applies. The government, however, has
19 failed to demonstrate that any of the requirements under strict scrutiny have been met. Thus, the
20 injunction to ban distribution of *The Federal Mafia* could not be issued without violating both the
21 United States and the Nevada Constitutions.
22

23 Any injunction in this case would necessarily have to be limited to either: 1) false commercial
24 speech, or 2) speech that is intended to and actually is likely to incite an imminent action. *The*
25
26
27
28

1 *Federal Mafia* does not fit into either category and therefor should not be enjoined.²

2 Dated this 1st day of May 2003.

3 Respectfully submitted by:

4
5
6
7 Allen Lichtenstein
8 General Counsel,
9 ACLU of Nevada
10 NV Bar No. 3992
11 3315 Russell Road, No. 222
12 Las Vegas, NV 89120
13 (702) 433-2666 phone
14 (702) 433-9591 fax

15 Robert A. Nersesian
16 NV Bar No. 2762
17 Nersesian & Sankiewicz
18 528 S. 8th St.
19 Las Vegas, NV 89101
20 (702) 385-5454 phone
21 (702) 385-7667 fax

22
23
24
25
26
27 Attorneys for the ACLUN, AAP, Inc,
28 ABFFE, FTRF, PEN American Center

² As stated previously, we take no position as to whether there is or is not any other material at issue in this case that might meet the criteria to allow for an injunction.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of May, 2003 I sent via U.S. Mail, first class, postage prepaid, the foregoing brief, to:

Evan J. Davis
Trial Attorney, Tax Division
U.S. Dept. of Justice
P.O. Box 7238
Washington, D.C. 20044
(202) 514-6770 fax

Freedom Books
444 E. Sahara Ave.
Las Vegas, NV 89104

Allen Lichtenstein