

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-2948-PAB-NRN

JEFFREY T. MAEHR, Plaintiff,

v.

UNITED STATES Department of State, including Secretary of State Mike Pompeo, in his official capacity,

Defendant.

AMENDED COMPLAINT

Plaintiff Jeffrey T. Maehr, through his attorneys, Polsinelli PC, complains against the Defendant the United States Department of State as follows:

SUMMARY

1. The IRS assessed Mr. Maehr with a roughly \$250,000 tax deficiency for tax years 2003 through 2006. Mr. Maehr does not concede the validity or accuracy of these tax assessments and deficiency, the legality of the Government's tax assessment process, or the Government's right or ability to collect this alleged debt from him. Without waiving these challenges, this amended complaint will not attack the tax assessments, the deficiency determination, or the tax debt generally.

2. The narrower purpose of this amended complaint is to challenge the Government's purported revocation of Mr. Maehr's passport under the FAST Act, 26 U.S.C. § 7345. This recently-enacted statute directs the IRS to provide the State Department with a list of citizens who owe tax debts above \$50,000. The State

Department then revokes the passport of, or does not issue a passport to, any person on that list.

3. The right to travel (including internationally) is an established constitutional right. A citizen cannot travel internationally without a passport; and a passport may soon be necessary for domestic travel as well under the Real ID Act.

4. This new passport revocation regime is plainly unconstitutional. The Government may not deprive citizens of an established constitutional right simply because they owe money to the Government.

5. Before the FAST Act's new passport revocation regime began, the Government's ability to revoke tax debtors' passports was developed through the common law writ of *ne exeat republica*, implemented through 26 U.S.C. § 7402(a). Courts have properly limited the Government's use of *ne exeat* to restrict citizens' constitutional right to travel to situations where the Government establishes that the delinquent taxpayer intends to secrete assets abroad in order to avoid collection of a tax debt, or is capable of but refuses to repatriate assets for this purpose. *See, e.g., United States v. Shaheen*, 445 F.2d 6 (1971) (reversing district court and quashing writ *ne exeat* due to Government's failure to establish adequate predicate for infringing tax debtor's constitutional right to travel).

6. The new passport revocation regime implemented by the FAST Act is unconstitutional as applied to any citizen, including Mr. Maehr, who would not be subject to a writ *ne exeat* under the standards of cases like *Shaheen*.

7. This is not a close call. The Government may collect valid debts through ordinary debt collection process, but it may not revoke citizens' constitutional rights to coerce payment or as punishment for nonpayment. Any attempt by the Government to defend against this as-applied constitutional challenge would lack substantial justification. The Government should confess Mr. Maehr's as-applied constitutional challenge and immediately reinstate his passport.

8. Mr. Maehr therefore notifies the Government that he will seek to recover costs and attorney fees in this action under the Equal Access to Justice Act, 28 U.S.C. § 2412, with the intent of applying the fee award as a setoff against his alleged tax debt. *See Astrue v. Ratliff*, 560 U.S. 586, 593 (2010) (attorney fees award under EAJA is subject to an offset to satisfy the litigant's preexisting debt to the Government).

JURISDICTION AND VENUE

9. This Court has original jurisdiction pursuant to 28 U.S.C. § 1331 because this action arises under the Constitution and laws of the United States.

10. Venue is proper because the Plaintiff Mr. Maehr resides in this district, the State Department has a passport field office in this district, and some of the acts or omissions giving rise to Mr. Maehr's claims occurred in this district.

PARTIES

11. Plaintiff Jeffrey T. Maehr is an American citizen residing at 924 E. Stollsteimer Road, Pagosa Springs, Colorado 81147.

12. Defendant the United States Department of State (State Department) is a department of the federal government with its principal location in Washington D.C. The State Department issues, and where warranted and permitted by law revokes,

United States passports. The State Department has a passport field office in Colorado at 3151 South Vaughn Way, Suite 600, Aurora, Colorado 80014.

FACTS

13. On or about 2010, the IRS determined that Mr. Maehr owed the Government about \$250,000 in federal taxes and penalties based on tax years 2003 through 2006.

14. Mr. Maehr maintains that he does not owe any tax debt, and does not concede the validity or accuracy of these tax assessments and deficiency, the legality of the tax assessment process, or the IRS's right or ability to collect this alleged debt from him. Mr. Maehr has been challenging these matters in court for the past decade, and he does not waive his right to continue pressing such challenges. But this action focuses on the Government's unconstitutional passport revocation regime, not the underlying tax debt. (And for this reason, the precise amounts of the Government's assessment of deficiency, and how that amount has changed over the years due to collection, interest, penalties, etc., is not important for this complaint. Precise amounts may become important later, when the Court offsets Mr. Maehr's alleged tax debt with an EAJA award.)

15. In 2015, Congress enacted the Fixing America's Surface Transportation (FAST) Act, P.L. 114-94.

16. The FAST Act contains a provision, codified at 26 U.S.C. § 7345, that directs the IRS (subject to certain exceptions not relevant here) to notify the State Department of citizens who have a "seriously delinquent tax debt," defined as a debt of \$50,000 or more. The law then directs the State Department not to issue a passport to

citizens on this list of seriously delinquent tax debtors; and to revoke passports previously issued to such citizens.

17. On December 4, 2018, the State Department revoked Mr. Maehr's passport pursuant to 26 U.S.C. § 7345, because the IRS certified that he had a seriously delinquent tax debt – *i.e.* because he allegedly owed the Government more than \$50,000. **Exhibit 1.**

18. The State Department's passport revocation letter orders Mr. Maehr to surrender his passport to the State Department. *Id.* The revocation letter also advises Mr. Maehr that he may re-apply for a passport once the IRS certifies that he has paid the alleged tax debt that the Government claims he owes. *Id.*

19. The Government's revocation of Mr. Maehr's passport effectively prohibits him from travelling internationally.

20. Mr. Maehr surrendered his passport as ordered, and as a result is no longer able to travel internationally.

21. Mr. Maehr timely filed this action against the State Department to, *inter alia*, challenge the legality and constitutionality of this passport revocation.

FIRST CLAIM FOR RELIEF - DECLARATORY JUDGMENT

22. Mr. Maehr incorporates all prior paragraphs by reference.

23. Before the enactment of 26 U.S.C. § 7345, the Government could and did revoke citizens' passports due to tax debts pursuant to the common law writ of *ne exeat republica*, which federal courts have express jurisdiction to enforce under 26 U.S.C. § 7402(a). *See United States v. Shaheen*, 445 F.2d 6 (7th Cir. 1971); *IRS v. Mathewson*,

1993 WL 113434 (S.D.Fla. 1993); *United States v. Barrett*, 2014 WL 321141 (D.Colo. 2014).

24. These cases have developed constitutional constraints that apply to the Government's revocation of a citizen's passport due to an unpaid tax debt.

25. These cases recognize that the right to travel, both domestically and internationally, is an established constitutional right. *E.g. Shaheen*, 445 F.2d at 10, citing *Aptheker v. Secretary of State*, 378 U.S. 500, 517 (1964) (the "freedom of travel is a constitutional liberty closely related to rights of free speech and association"); *see also Kent v. Dulles*, 357 U.S. 116, 125 (1958) (the right to travel, both domestically and internationally, is a part of the liberty of which a citizen cannot be deprived without due process of law under the Fifth Amendment; striking down State Department's denial of passports to suspected Communists on this basis).

26. To reconcile the Government's use of *ne exeat* with the constitutionally protected right to travel, *Shaheen* and its progeny restrict the Government from limiting a citizen's right and ability to travel based on a tax debt. Under *Shaheen* and its progeny, the Government must establish more than the fact that a citizen owes the Government money in order to restrict the citizen's constitutionally protected right to travel. The Government must also establish that the citizen intends to secrete assets abroad in order to avoid collection of a tax debt, or is capable of but refuses to repatriate assets for this purpose. *Shaheen*, 445 F.2d at 10-11. *Accord McKenzie et al v. Cowing*, 4 Cranch CC 479 (U.S. 1834) (courts may not use writ of *ne exeat* to compel payment of an ordinary debt; creditor must pursue ordinary legal remedies and collection methods);

Atherton v. Gopin, 355 P.3d 804, 809 (N.M.App. 2015) (“In the absence of a threat to abscond, the writ may not be used as a form of coercing payment of a debt, no matter how just, nor as a form of punishment, no matter how deserved.”) (cleaned up, reviewing common law history of *ne exeat*).

27. A passport is necessary for a United States citizen to travel internationally.

28. As a result of the Real ID Act, possession of a passport may soon be necessary for domestic travel as well, given that some states’ drivers licenses and other forms of identification do not yet satisfy federal requirements. *See* 6 C.F.R. Part 37; www.dhs.gov/real-id-public-faqs.

29. The new passport revocation regime established by 26 U.S.C. § 7345 has the same legal effect as the existing revocation regime under 26 U.S.C. § 7402(a) and the common law writ of *ne exeat*. Both legal regimes purport to authorize the Government to restrict citizens’ constitutionally protected right to travel because they owe the Government money.

30. The new passport revocation regime established by 26 U.S.C. § 7345 effects an unconstitutional deprivation of the right to travel unless it satisfies the constraints imposed by *Shaheen* and its progeny on the Government’s similar use of the writ *ne exeat*. That is, to refuse to issue or revoke a passport under 26 U.S.C. § 7345, the Government must establish that citizen intends to secrete assets abroad in order to avoid collection of a tax debt, or is capable of but refuses to repatriate assets for this purpose. Revoking or refusing to issue a passport simply because a person owes the Government money is unconstitutional.

31. The Government has not established that Mr. Maehr intends to secrete assets abroad in order to prevent the IRS collecting his alleged tax debt. Nor has the Government established that he has assets located abroad that he can repatriate and use to pay his alleged tax debt, but refuses to do so.

32. Without conceding the validity, legality or accuracy of his alleged tax debt, Mr. Maehr does not intend to secrete assets abroad in order to prevent the IRS collecting his alleged tax debt. Nor does he own assets located abroad that he could repatriate and use to pay his alleged tax debt.

33. Mr. Maehr therefore asks the Court to render a declaratory judgment that the passport revocation regime established by 26 U.S.C. § 7345 is unconstitutional unless subject to the same limiting construction imposed by *Shaheen* and its progeny; and that the Government's revocation of Mr. Maehr's passport is unconstitutional as applied to him.

SECOND CLAIM FOR RELIEF – MANDATORY INJUNCTION TO REINSTATE MR. MAEHR'S PASSPORT

34. Mr. Maehr incorporates all prior paragraphs by reference.

35. Mr. Maehr requests that the Court order the State Department (and to the extent necessary Secretary of State Mike Pompeo) to reverse its December 8, 2018 decision revoking his passport, **Exhibit 1**; and to reinstate and reissue his passport.

THIRD CLAIM FOR RELIEF – FEES AND COSTS UNDER THE EQUAL ACCESS TO JUSTICE ACT

36. Mr. Maehr incorporates all prior paragraphs by reference.

37. The Government has numerous legal and constitutional methods to collect debts owed by citizens, such as execution on property and garnishment of wages and

government benefits. While Mr. Maehr contests the Government's right to use such methods to collect his alleged tax debt, Mr. Maehr does not challenge here the Government's right or ability to use these ordinary methods of debt collection on valid and legal debts. This action specifically challenges the Government's right and ability to collect an ordinary debt, such as his alleged tax debt, by depriving the debtor of his constitutional rights.

38. The passport revocation regime established by 26 U.S.C. § 7345 deprives citizens of their constitutional right to travel because they owe the Government money.

39. Merely owing the Government money is not a legally or constitutionally sufficient basis for depriving citizens of their constitutional right to travel – or of any constitutionally established right.

40. Some states may impose similar legal regimes for revoking drivers licenses or professional licenses based on delinquent child support debts or tax debts owed to the state. Such regimes may raise serious due process concerns because of the importance of drivers licenses and professional licenses. But whether or not these regimes are legal, they are at least distinguishable because they involve state-issued licenses, not federal constitutional rights.

41. Additionally, governments have a stronger interest in compelling the payment of child support than in collecting ordinary debts because children's lives and welfare may depend on such payments. The Government has no such heightened interest in the collection of ordinary debts, such as tax debts.

42. While federal statutes may enjoy a presumption of constitutionality, the unconstitutionality of the passport revocation regime established by 26 U.S.C. § 7345 is not a close call. The passport revocation regime enacted through 26 U.S.C. § 7345 is obviously unconstitutional absent a *Shaheen*-like limiting construction.

43. If Congress can legally deprive citizens of their constitutionally established right to travel just because they owe the Government money, then Congress could theoretically deprive citizens of any established constitutional right for this reason. By way of example, if the instant passport revocation regime is deemed constitutional, then the following scenario would also be constitutional:

FBI agents walk into your home with no warrant or knock. When you protest, you are told that you are on the IRS's list of tax debtors that have been certified to the Justice Department, so you have no Fourth Amendment rights against unreasonable searches and seizures until you pay up. The agents root around your home until they find some reason to arrest you. You ask for a lawyer at your arraignment, and are told: sorry, no right to counsel for you. And no right to a jury trial either, until you pay up. Now back to jail until your trial, where you will be held incommunicado and maybe tortured a little for good measure, since you have no First or Eighth Amendment rights either – until you get those constitutional rights reinstated by paying your tax debt.

The Government cannot seriously contend that such a scenario would be constitutional. That, however, is the logical consequence of any attempt by the Government to defend the constitutionality of instant passport revocation regime.

44. As a result, any attempt by the Government to defend this passport revocation regime would not be substantially justified. The Government should instead immediately confess the statute's constitutional infirmity, accept a *Shaheen*-like limiting construction to save the statute, and reinstate Mr. Maehr's passport because the

Government has not proven and cannot prove that Mr. Maehr meets the requirements of *Shaheen* for passport revocation.

45. Because any attempt by the Government to defend Mr. Maehr's as-applied constitutional challenge would lack substantial justification, Mr. Maehr will be entitled to an award of attorney fees and costs incurred in this matter, from the time of the filing of this amended complaint until conclusion, under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412.

46. Because Mr. Maehr is represented by *pro bono* counsel in this matter, he will seek EAJA fees in an amount up to his alleged tax debt to the Government, so the EAJA award can offset and possibly eliminate his alleged tax debt. *See Astrue v. Ratliff*, 560 U.S. 586 (2010).

47. While the EAJA imposes certain caps on attorney fees, those caps are increased for inflation and are also increased where the litigation requires counsel with special skills. For the Government's reference at the outset of this challenge, undersigned counsel for Mr. Maehr are experienced constitutional litigators (*see, e.g., Reichle v. Howards*, 566 U.S. 658 (2012)) whose regular hourly rates are above \$500 per hour. Counsel will provide more details to the Government's counsel as requested.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Jeffrey Maehr requests:

- A declaration that the passport revocation regime of 26 U.S.C. § 7345 is unconstitutional absent a *Shaheen*-like limiting construction;
- A declaration that the passport revocation regime of 26 U.S.C. § 7345 is unconstitutional as applied to him;

- An injunction ordering the State Department to reverse its revocation of Mr. Maehr's passport, and to reinstate his passport;
- An award of attorney fees and costs under the EAJA that Mr. Maehr can use to offset his alleged tax debt.

Dated: April 23, 2019.

Respectfully submitted,

s/Sean R. Gallagher

Sean R. Gallagher
Bennet L. Cohen
Megan E. Harry
Polsinelli PC
1401 Lawrence Street, Suite 2300
Denver, Colorado 80202
Telephone: (303) 583-8246
Email: sgallagher@polsinelli.com

Attorneys for Plaintiff Jeffrey T. Maehr

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2019, I served a true and correct copy of the foregoing via CM/ECF, which will send electronic notification to all parties and their counsel, including:

E. Carmen Ramirez
United States Department of Justice, Tax Division

s/ Sean R. Gallagher

Sean R. Gallagher



Exhibit 1

United States Department of State

Washington, D.C. 20520

DEC - 4 2018

Jeffrey Thomas Maehr
924 East Stollsteimer Place
Pagosa Springs, CO 81147

Dear Mr. Maehr:

The Department of State has revoked U.S. Passport number 522932538, issued to you on December 5, 2014, along with any other valid passports issued to you, pursuant to 22 C.F.R. §§ 51.60 (a)(3) and 51.62 (a)(1). These regulations provide that a U.S. passport may be revoked when the bearer is certified by the Secretary of the Treasury as having a seriously delinquent tax debt as described in 26 U.S.C. §7345. The regulations cited in this letter may be found at <http://www.ecfr.gov>.

The Secretary of the Treasury has certified to the Department of State that you have a seriously delinquent tax debt, in accordance with 26 U.S.C. §7345. Therefore, you are not entitled to hold a U.S. passport and your passport is revoked pursuant to 22 C.F.R. §§ 51.60 (a)(3) and 51.62 (a)(1). You may reapply for a passport once the Secretary of the Treasury has certified to the U.S. Department of State that you have satisfied your tax obligations.

Under 22 C.F.R. §§ 51.7 and 51.66, the U.S. passport remains the property of the U.S. Government and must be surrendered upon demand. Please immediately return U.S. Passport number 522932538, along with any other valid U.S. passports issued to you, to the following address: U.S. Department of State, attn.: RJ62, CA/PPT/S/L/LA, 44132 Mercure Circle, P.O. Box 1227, Sterling, VA 20166-1227.

There is no administrative review or appeal before the Department of State. The Department of State has no further information concerning your tax obligations and cannot override the Secretary of the Treasury's determination. All questions regarding your tax obligations must be addressed with the Internal Revenue Service (IRS). If you believe you have satisfied your tax obligations, you may write to the IRS at the following address: Department of the Treasury, Internal Revenue Service, Attn: Passport, P.O. Box 8208, Philadelphia, PA 19101-8208. You may also call the IRS at: (domestic) 1-855-519-4965 or (international) 1-267-941-1004.

Sincerely,

Bureau of Consular Affairs
Passport Services
Office of Legal Affairs and
Law Enforcement Liaison