IN THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

LINCHPINS OF LIBERTY, *et al.*,	)	
Plaintiffs-Appellants,	)	
-vs-	)	No. 15-5013
UNITED STATES OF AMERICA, *et al.*,	)	
Defendants-Appellees.	)	

PLAINTIFFS'-APPELLANTS' MOTION FOR PARTIAL REVERSAL AND REMAND

On May 8, 2015, this Court issued an order that the instant appeal be held in abeyance pending issuance of a decision in the related case of *Z Street v. Koskinen*, No. 15-5010 (D.C. Cir. argued May 4, 2015). The Court specifically invited the parties to file, within thirty days of such decision, motions to govern future proceedings in this case. In light of the Court's opinion in *Z Street*, issued June 19, 2015, Plaintiffs-Appellants hereby respectfully submit this motion for partial reversal and remand of Counts IV through VII of their Second Amended Complaint ("SAC").

I. INTRODUCTION

The resounding message of this Court's recent decision in *Z Street v. Koskinen*, No. 15-5010, 2015 U.S. App. LEXIS 10326 (D.C. Cir. June 19, 2015), is that the IRS will not be permitted to discriminate on the basis of viewpoint in administering the tax code by cowering behind broad, obscure, or obsolete statutory interpretations, while American taxpayers continue to suffer blatant violations of their First Amendment rights. The Court's determination is particularly relevant in the present case where the IRS is not only *alleged* to have engaged in such unlawful conduct but has actually *admitted* that it did so: intentionally and systematically targeting for additional and unconstitutional scrutiny organizations applying for tax-exemption, including Plaintiffs-Appellants (some of whom are still awaiting a determination), based on their conservative viewpoints. *See* SAC (Doc. 51) (attached hereto as Ex. 1), ¶¶ 1, 292.

The *Z Street* Court was unequivocal in its position that a taxpayer seeking recognition of its tax exempt status under section 501(c)(3) is not required to wait 270 days or until the IRS actually denies an exemption and assesses liability before challenging the agency's blatant constitutional violations. *Z Street*, 2015 U.S. App. LEXIS 10326, at **12, 17. Nonetheless, according to the district court's decision dismissing Plaintiffs-Appellants' claims against the government in the instant case, not only is the IRS permitted to unconstitutionally discriminate for at least 270

days against Plaintiffs-Appellants seeking tax exempt status under Section 501(c)(3), but the district court's ruling effectively permits the IRS to unconstitutionally discriminate *indefinitely* against Plaintiffs-Appellants seeking tax exempt status under section 501(c)(4). However, as Plaintiffs-Appellants demonstrated in their opposition to the government's motion to dismiss, and as the *Z Street* decision confirmed, the law does not allow such blatantly discriminatory conduct.

The *Z Street* opinion addressed two legal issues directly applicable to the instant appeal warranting a partial reversal and remand of the claims of Plaintiffs-Appellants.

First, the *Z Street* Court reiterated the standard of review for motions to dismiss under Federal Rule of Civil Procedure 12(b)(1), which was the same rule applied by the district court in the instant appeal to support its dismissal of Counts IV through VII of the SAC. Importantly, the *Z Street* Court held that the district court correctly assumed the truth of a crucial factual allegation in the complaint: the existence of a specific IRS policy that delays the processing of tax-exempt applications from organizations whose views are at odds with those of the administration. The lower court in this case, however, discredited precisely the same allegation. Additionally, the lower court wholly ignored Plaintiffs-Appellants' remaining factual allegations regarding the other aspects of the IRS

targeting scheme, as well as the reasonable inferences flowing from those facts. Only by misapplying the 12(b)(1) standard, as clearly set forth in *Z Street*, could the district court conclude that dismissal of Counts IV through VII was appropriate.

Second, the *Z Street* panel was faced with allegations of a plaintiff-appellant that, in seeking a fair tax-exempt determination process, had encountered significant delays in that process because of an IRS policy targeting the organization (and other similar groups) based on the viewpoint of its expression, a harm for which this Court held no remedy, other than a constitutional challenge to the policy, exists. Plaintiffs-Appellants find themselves in precisely the same situation as Z Street, alleging that they have suffered numerous harms, including, like Z Street, extensive delays in the processing of their tax-exempt applications under Sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, pursuant to the implementation of a viewpoint-based targeting scheme that in the present case has actually been admitted by the IRS.

In light of the *Z Street* holding regarding proper application of Rule 12(b)(1) and the Court's conclusion that an organization in Z Street's circumstances "is 'unable to utilize any statutory procedure to contest the constitutionality' of the delay allegedly caused by the IRS[,]" *Z Street*, 2015 U.S. App. LEXIS 10326, at *16 (quoting *South Carolina v. Regan*, 465 U.S. 367, 380 (1984)), it is clear that

the district court in the instant appeal incorrectly dismissed Counts IV through VII of the SAC, as more fully explained below.

II. ARGUMENT

A. The District Court Failed to Adhere to the Correct Standard of Review for Motions to Dismiss Under Rule 12(b)(1), as Clearly Set Forth in *Z Street*.

In *Z Street*, the IRS "Commissioner moved to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6)." *Z Street*, 2015 U.S. App. LEXIS 10326, at *6. The *Z Street* panel thus identified the requisite standard for evaluating a motion to dismiss under these provisions: "at the motion to dismiss stage a court must 'assume the truth of all material factual allegations in the complaint.'" *Id.* at *7 (quoting *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (internal citations and emphasis omitted)). Consequently, this Court held that the district court, faced with the government's motion to dismiss under both 12(b)(1) and 12(b)(6), correctly assumed the truth of the allegations in Z Street's complaint "that the IRS in fact has an 'Israel Special Policy' that delays the processing of section 501(c)(3) applications from organizations whose views on Israel differ from the administration's." *Id.*

By contrast, the district court in the instant litigation, when likewise addressing dismissal under Rule 12(b)(1), failed to assume the truth of the allegations in Plaintiffs-Appellants' SAC that the IRS has in place a scheme for

targeting applicants for tax exemption under Sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code that express a conservative political viewpoint (particularly Tea Party-related organizations)—a scheme that *includes* (but does not consist entirely of) application of a "BOLO" ("Be On the Look Out") policy for identifying potential targeting victims. *See, e.g.*, SAC, ¶¶ 92, 93, 99 (alleging that the IRS Tea Party-related "targeting scheme" began as early as February 2010); ¶¶ 101, 105, 113 (alleging aspects of the overall targeting scheme in place between April and July 2010); ¶ 124 (alleging that the "BOLO" policy was not implemented until *August* 2010); ¶¶ 149-51 (alleging a "multi-tier review process" as part of the overall targeting scheme); ¶¶ 174-75 (alleging adoption of a "template" of questions to be used as a part of the overall targeting scheme); ¶ 170 (alleging that the BOLO policy component of the scheme was in place until January 2013); ¶¶ 262, 264, 268 (alleging continuation of the targeting scheme through the IRS's issuance of intrusive questions to Plaintiffs-Appellants in April and May of 2013). Instead, the district court went out of its way to create a dispute of fact on this issue, and then resolved that dispute against Plaintiffs-Appellants in a manner that resulted in the court's conclusion that it lacked subject matter jurisdiction over Plaintiffs-Appellants' claims against the government.[1]

[1] Even assuming the propriety of the court's independent investigation into its own jurisdiction, this Court has previously held that "though the trial court may rule on disputed jurisdictional facts at any time, if they are inextricably intertwined with

The district court's decision was clearly contrary to the Rule 12(b)(1) standard of review articulated in *Z Street*, as it failed to assume the truth of Plaintiffs-Appellants' allegations regarding the existence and application of the entire IRS targeting scheme and to grant all reasonable inferences therefrom in favor of Plaintiffs-Appellants. The district court's dismissal under 12(b)(1) rested solely on its conclusion that the *BOLO policy* had been suspended. *See Linchpins of Liberty, et al. v. U.S., et al.*, No. 13-cv-777, slip op. at 5, 12-13 (D.D.C. Oct. 23, 2014) (Doc. 96) ("*Linchpins of Liberty* MTD Op.") (attached hereto as Ex. 2). Yet, assuming as true the allegations in the SAC, *see, e.g.*, supra pp. 5-6, and drawing all reasonable inferences therefrom in favor of Plaintiffs-Appellants, would still require acknowledgment of (1) the existence of the broader IRS targeting scheme of conservative (Tea Party-related) organizations, even if one aspect of that scheme (*i.e.*, the BOLO policy) had been suspended (or even affirmatively ceased), and (2) the application of the targeting scheme, including the BOLO policy from the time of its implementation in August 2010, *see* SAC ¶ 124, to all Plaintiffs-Appellants. Thus, even if the BOLO policy were *subsequently* suspended, it (as well as a policy of targeting in place both prior to its August 2010 implementation and

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the merits of the case it should usually defer its jurisdictional decision until the merits are heard." *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 198 (D.C. Cir. 1992). And, even in such circumstances, the court "must still accept all of the factual allegations in [the] complaint as true," *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253-54 (D.C. Cir. 2005) (quotation omitted).

following its suspension) had already been used (as alleged throughout the SAC) to identify *their* applications, based on their conservative viewpoints, for inclusion within the overall targeting scheme, *i.e.*, the process of undergoing heightened scrutiny and suffering unconstitutional delay. In other words, the mere suspension of the BOLO policy, *after* it was used to identify the applications of Plaintiffs-Appellants based on their viewpoints, did nothing to remove them from the *rest* of the targeting scheme and its consequent harms, including inappropriate intrusive inquiries and delays in processing.

The district court's 12(b)(1) error also extends to Plaintiffs-Appellants' claims challenging 26 C.F.R. § 1.501(c)(4)-1 and Internal Revenue Procedure 86-43, *see* SAC, Counts VI through VII. Once again, the district court failed to comply with the applicable standard of review by failing to assume the truth of Plaintiffs' allegations and instead (mis)construing a single statement from Plaintiffs' Motion to Dismiss Opposition so as to require dismissal based on lack of subject matter jurisdiction. The district court's dismissal of these claims, like its dismissal of Plaintiffs-Appellants' claims directly attacking the overall targeting scheme, hinges solely on its conclusion that the IRS BOLO policy has been suspended and the single summary sentence (found not in the SAC but in Plaintiff's Motion to Dismiss Opposition) that "[p]laintiffs' statutory and constitutional claims in [c]ounts [four] through [seven] are all based upon the

adoption and implementation of the IRS '[t]argeting [s]cheme' *or* 'BOLO [p]olicy.'" *See, Linchpins of Liberty* MTD Op., at 13 (emphasis in original) (italics added).

By use of the word "or," however, this statement clearly delineates between the larger targeting scheme and the specific BOLO policy component of that scheme, as alleged in the SAC. *See supra* pp. 5-6 (citing specific SAC allegations to this effect). Thus, in dismissing the claims challenging the regulation and the revenue procedure, the district court not only misconstrued Plaintiffs-Appellants' statement on its face but also failed to assume the truth of—and, in fact, utterly ignored—the allegations in the SAC regarding the vagueness of these provisions and the implications of that vagueness *within the context of the overall IRS targeting scheme*—both as applied to each of the Plaintiffs-Appellants, and (through the facial challenge) as those provisions might be applied to others similarly situated—*regardless of* the status of the single BOLO policy component of the targeting scheme. *See, e.g.*, SAC, ¶¶ 298-308; 385-88; 399-401.

Because of these failures by the district court to apply the correct standard of review under Rule 12(b)(1), the dismissal of Plaintiffs-Appellants' claims of statutory and constitutional violations by the government, brought pursuant to the Administrative Procedure Act ("APA"), *see* SAC, Counts IV through VII, should

be reversed and the case remanded as directly contrary to this Court's decision in *Z Street*.

B. The District Court's Dismissal of Plaintiffs-Appellants' Claims Seeking Relief From The Unconstitutional Delay in the Processing of Their Tax-Exempt Applications Resulting From An Allegedly Discriminatory IRS Targeting Scheme Is Directly Contrary To This Court's Decision in *Z Street*.

In *Z Street*, this Court upheld the district court's decision to deny the Commissioner's motion to dismiss and allow Z Street—a non-profit corporation awaiting determination regarding its 501(c)(3) tax-exempt application—to move forward with its constitutional challenge to an alleged IRS policy targeting Z Street on the basis of viewpoint and resulting in delay in the processing of Z Street's application. *Z Street*, 2015 U.S. App. LEXIS 10326, at *2. The court's message in *Z Street* is crystal clear: "in administering the tax code, the IRS may not discriminate on the basis of viewpoint," *id*. at *12, and where an applicant for tax-exemption seeks to obtain relief from unconstitutional delay—and not to restrain the assessment or collection of a tax—the Anti-Injunction Act does not apply to bar a plaintiff from bringing suit. *Id*. at **15, 17-18.

It is precisely this type of conduct—the abuse of unfettered discretion by the IRS to discriminate in the administration of the tax code and its resulting harms—that Plaintiffs-Appellants challenge and from which they seek relief in the present case. Plaintiffs-Appellants are conservative, not for profit corporations which

submitted applications for tax-exempt status during the years 2009-2012. *See* SAC ¶¶ 15-28. While some of the Plaintiffs-Appellants applied under Section 501(c)(3) and others applied under Section 501(c)(4), all of them have alleged, just as in *Z Street*, that they are victims of a discriminatory policy—a "targeting scheme"—by which the IRS "intentionally and systematically targeted for additional and unconstitutional scrutiny conservative organizations applying for tax-exemption," because their conservative viewpoint is at odds with that of the current administration. SAC ¶¶ 1, 124; ¶¶ 74, 92, 93, 99, 101, 105, 113, 124, 149-51, 174-75, 262, 264, 268. *See Z Street*, 2015 U.S. App. LEXIS 10326, at *5 ("Z Street alleges that the IRS has an 'Israel Special Policy,' which mandates that applications from organizations holding views about Israel inconsistent with those espoused by the Obama administration be scrutinized differently and at greater length."). Even more compelling than the situation in *Z Street*, however, is the *admission* of the IRS to the targeting scheme alleged by Plaintiffs-Appellants. *See* SAC, ¶ 1 (alleging admission that "the IRS intentionally and systematically targeted for additional and unconstitutional scrutiny conservative organizations applying for tax-exemption"); *id.* ¶ 292 (alleging that IRS employee admitted that Tea Party applications were not treated the same as other applications).

Plaintiffs-Appellants have alleged that the Treasury Inspector General for Tax Administration (TIGTA) also confirmed that the tax-exempt applications of

conservative organizations were not treated the same as other applications. *See* SAC ¶ 275 (alleging that TIGTA reported that targeting not only occurred but resulted in significant delay in the processing of these applications – with the IRS keeping them open over twice the length of time typically required to process tax-exempt applications, and issuing additional requests for information entirely unnecessary and irrelevant to the IRS's determination). As a result of the targeting scheme, Plaintiffs-Appellants allege they have been subjected to unnecessary and intrusive requests for information, *see, e.g.*, SAC ¶¶ 180, 191, 280, 352, 369, and intentional delay in the processing of their applications. *Id*. at ¶¶ 275, 352, 373. *See also id*. at ¶¶ 271-273 (outlining the different and preferential treatment given to liberal groups whose applications for tax exemption were sometimes granted as soon as six weeks after submission); *Z Street*, 2015 U.S. App. LEXIS 10326, at *5 (explaining that Z Street alleges that because of the IRS's special policy, the IRS has taken longer to process its application than those of other organizations). The unlawful targeting scheme alleged by Plaintiffs-Appellants, despite public apologies (and regardless of the suspension of the single BOLO policy component thereof, *see supra* Part II. A), is ongoing. *See* SAC ¶ 4.

The fact that Z Street was "unable to utilize any statutory procedure to contest the constitutionality of the delay allegedly caused by the IRS's 'Israel Special Policy'" directly informed the Court's decision and resulted in affirmation

of the district court's decision to allow Z Street to move forward with its suit. *Z Street*, 2015 U.S. App. LEXIS 10326, at *16. As this Court acknowledged, "[w]ere it otherwise, the IRS would be free . . . to process exemption applications pursuant to different standards and at different rates depending upon the viewpoint of the applicants—a blatant violation of the First Amendment." *Id*. at *16-17 (citing *Rosenberger*, 515 U.S. 819, 834 (1995) ("*Regan* . . . reaffirmed the requirement of viewpoint neutrality in the Government's provision of financial benefits. . . .")). And, yet, that is precisely what the IRS is being permitted to do in the present case.

Several of the Plaintiffs-Appellants in this case who applied for tax exemption are still awaiting determinations. *See* SAC, ¶¶ 15-28. Other Plaintiffs-Appellants were forced to withdraw their applications because they could not or would not comply with intrusive and unconstitutional information requests from the IRS. *See id.* ¶¶ 51-55. If the district court's dismissal stands, these two categories of Plaintiffs-Appellants will never again have an opportunity to obtain relief from the harms caused by the IRS's illegal targeting scheme because, as this Court noted in *Z Street*, the statutory provisions applicable to tax deficiencies and refunds in Sections 6213 and 7422 of the Internal Revenue Code, respectively, do not provide relief from such harms since "[n]either provision would allow the court to review the allegedly unconstitutional delay in processing" Appellants-Plaintiffs' applications. *Z Street*, 2015 U.S. App. LEXIS 10326, at *16. *See also, Christian*

Coalitions of Florida, Inc. v. United States, 662 F.3d 1182, 1192-93 (11th Cir. 2011).

Plaintiffs-Appellants who have still not received determinations on their applications have now waited years since they provided all of the necessary information for the IRS to issue a determination and yet, in dismissing Plaintiffs-Appellants' Count V, the district court refused, on erroneous grounds, to acknowledge that it had jurisdiction to compel the IRS to cease its unconstitutional delay and act on those applications.

Specifically, the district court erroneously concluded that the Anti-Injunction Act ("AIA") and the tax exception to the Declaratory Judgment Act ("DJA") precluded it from granting the requested relief on the basis that it did not have authority to "issue a determination regarding tax-exempt status." *See, Linchpins of Liberty* MTD Op. at 15 n.16 (*citing NorCal Tea Party Patriots v. IRS*, 2014 WL 3547369, at *11 (S.D. Ohio July 17, 2014), *Z St., Inc. v. Koskinen*, _ F. Supp. 2d. _, 2014 WL 2195492, at *7 (D.D.C. May 27, 2014) and *Viet. Veterans Against the War, Inc. v. Voskuil*, 389 F. Supp. 412, 413 (E.D. Mo. 1974)). Plaintiffs-Appellants, however, did not request the court to issue any such determinations but instead requested only that the court issue a mandatory injunction compelling *the IRS* to issue such determinations *without further delay*. The requested mandate would not have required that the IRS issue a favorable ruling—only that it take

immediate action to end the delay. SAC Count V; Prayer for Relief ¶ D (iii). Plaintiffs-Appellants' request in this regard, like that of Z Street, was simply that the district court, upon a finding that the IRS's viewpoint-based targeting scheme was unconstitutional, take the necessary action to put an end to the disparate treatment in the processing of their applications, *i.e.*, that the court require the IRS to subject their applications to a fair process. *See Z Street*, 2015 U.S. App. LEXIS 10326, at *5 (noting that Z Street requested "an injunction . . . requiring that the IRS adjudicate the application expeditiously and fairly . . . .") (internal quotation and citation omitted). Neither the AIA nor the tax exception to the DJA prohibited the relief sought by Z Street because, as the court recognized, "Z Street seeks to prevent the IRS from unconstitutionally delaying consideration of its application—not to obtain tax exempt status. . . . Indeed, even if Z Street obtains all the relief it seeks, the IRS could . . . still deny its application for any number of reasons." *Id.* at *13 (internal quotations and citations omitted). Plaintiffs-Appellants in this case are asking for the very same relief. The mandatory injunction requested by Plaintiffs-Appellants, just like the order requested by Z Street, would not interfere with the assessment or collection of taxes.[2]

[2] The district court also erred in holding that Plaintiffs-Appellants conceded Count V by failing to respond to the government's preposterous arguments that there is no statutory time limit within which it must act to end the discrimination, and that the APA does not permit the court to create one. *See, Linchpins of Liberty* MTD Op. at 15, n.16. The government's argument required no response because, just as

III. CONCLUSION

Applying this Court's decision in *Z Street*, the dismissal of Plaintiffs-Appellants' claims challenging the constitutionality of the IRS's targeting scheme and the regulation and revenue procedure that enable the implementation of such policies, *see* SAC Counts IV through VII (including their claims seeking declaratory and injunctive relief based on the ongoing unconstitutional delay resulting from the IRS's alleged targeting scheme, *see* SAC Counts IV and V; Prayer for Relief ¶ D (i)-(iii)), should be reversed and remanded so they may proceed in the district court.[3]

Dated: July 20, 2015

Respectfully submitted,

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in *Z Street*, Plaintiffs-Appellants' request for a mandatory injunction compelling the IRS to cease further delay in the processing of their applications is based upon the First and Fifth Amendments to the United States Constitution, and the APA simply waives sovereign immunity with respect to Plaintiffs-Appellants' claim. *See*, Plaintiffs' MTD Opposition (Doc. 73), at 44 n.18, 48-49, and 61-62 (attached hereto as Exhibit 3). Plaintiffs-Appellants have never abandoned or withdrawn any of the factual allegations supporting their constitutional claims in Count V; nor have they anywhere conceded the relief they requested based upon those allegations. SAC Count V; Prayer for Relief ¶ D (iii).

[3] The parties have conferred and agreed to request, in the event this Motion is denied in whole or in part such that there is to be briefing in this Court, that the following briefing schedule apply: (1) Plaintiffs file their opening brief within 60 days of the Court's Order disposing of this motion; (2) Defendants file their responsive briefs within 60 days from the date on which Plaintiffs file their opening brief; and (3) Plaintiffs will file any reply brief within 30 days from the date on which Defendants file their responsive briefs.

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Plaintiffs-Appellants' Motion for Partial Reversal and Remand with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on July 20, 2015. Counsel for Appellees are registered CM/ECF users and will be served via the CM/ECF system.

Dated: July 20, 2015

/s/ Carly F. Gammill
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