ORAL ARGUMENT SCHEDULED FOR APRIL 14, 2016

In the

United States Court of Appeals for the District of Columbia Circuit

15-5013

LINCHPINS OF LIBERTY, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia Case No. 1:13-cv-00777-RBW (Hon. Reggie B. Walton, Judge)

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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GLOSSARY OF ABBREVIATIONS

AIA: Anti-Injunction Act

App.: Appendix

APA: Administrative Procedure Act

BOLO: Be On the Lookout

Ind. Br.: Brief for Individual Defendants-Appellees (Doc. 1597512)

Gov. Br.: Brief for the Defendants-Appellees United States of America and Internal Revenue Service (Docket No. 1597426)

IRC: Internal Revenue Code

Pl. Br.: Opening Brief for the Plaintiffs-Appellants' (Docket No. 1587222)

SAC: Second Amended Complaint

TIGTA: Treasury Inspector General for Tax Administration

SUMMARY OF ARGUMENT

Despite Defendants' re-characterization of the issues, Plaintiffs maintain the issues on appeal as set forth in their opening brief. The Government's claim that "[t]he IRS has already done . . . what plaintiffs want the Court to order the IRS to do, in contravention of mootness principles," Gov. Br. 17, could not be further from the truth. The facts cited by the District Court and presented by the Government are subject to reasonable dispute and in any event fail to satisfy the demanding voluntary cessation standard. Also fatal to the Government's mootness arguments are the two Plaintiffs still suffering unconstitutional delay, the Plaintiffs that withdrew applications because of the IRS's unconstitutional conduct, and Plaintiffs' facial and certain as-applied challenges to 26 C.F.R. § 1.501(c)(4)-1 and Revenue Procedure 86-43. The IRS's past conduct, coupled with the legal arguments it has made in this case, highlight the very mentality continuously rejected by courts, including this one. *See Z St. v. Koskinen*, 791 F.3d 24, 29 (D.C. Cir. 2015) (unequivocally rejecting the IRS's "view of a world in which no challenge to its actions is ever outside the closed loop of its taxing authority") (internal quotations omitted). In short, Plaintiffs' claims against the government are not moot.

If the actions of Individual Defendants (rather than IRS policies) are responsible for any of the unconstitutional treatment of Plaintiffs, they should be

remedied through a *Bivens* action. There is no precedent that forecloses such relief (in fact, there is both judicial and legislative authority in support), no special factor that counsels hesitation in so doing (as the IRC nowhere contemplates the unconstitutional conduct at issue), no devastation that will occur to the tax administration system, and therefore no reason for this Court to prohibit Plaintiffs from pursuing their *Bivens* claims. Rather, this is precisely the type of narrow, yet egregious, context in which a *Bivens* remedy should exist.

The District Court's narrow reading, and the Government's attempt to exclude application, of Sections 6103 and 7431 here is also unsupported factually and legally. Plaintiffs clearly alleged that the IRS acquired their return information through unlawful means and subsequently inspected that information in violation of 26 U.S.C. § 6103 and § 7431. This case is easily distinguished from those relied upon by the District Court and the Government. At no point during the chain of custody of the information was the Government rightfully in possession of it. Thus, the information could not have been either obtained ***or*** inspected "for tax administration purposes." 26 U.S.C. § 6103(h)(1). Nor did Plaintiffs *request* the IRS to inspect their sensitive information; rather, the IRS demanded it on pain of forfeiting valuable benefits and even legal rights.

ARGUMENT

I. PLAINTIFFS' CONSTITUTIONAL AND APA CLAIMS AGAINST THE GOVERNMENT ARE NOT MOOT.

A. The Information Relied Upon By the District Court and The Government To Support A Mootness Determination Is Not Proper For Judicial Notice.

In apparent recognition of the glaring weaknesses in the District Court's mootness decision, the IRS relies heavily upon new facts and information, specifically, monthly updates to the IRS's *Path-Forward* Report, *see* Daniel Werfel, *Charting a Path Forward at the IRS*, *available at* www.irs.gov/uac/Newsroom/IRS-Charts-a-Path-Forward-with-Immediate-Actions, and a 2015 update to TIGTA's original report, TIGTA, *Status of Actions Taken to Improve the Processing of Tax-Exempt Applications Involving Political Campaign Intervention*, No. 2015-10-025 (March 2015), available at www.treasury.gov/tigta ("2015 TIGTA Report"), many of which were never considered by the District Court, having been released following its ruling. These new documents, however, are riddled with statements which fail to support the Government's assertion that it has permanently ceased all components of the Targeting Scheme and, at best, simply create a dispute of fact in the face of Plaintiffs' allegations that the Targeting Scheme is ongoing.

Clearly, not all facts are appropriate for judicial notice, and in the present case, the facts judicially noticed by the District Court, like those newly presented

by the Government on appeal, fail the applicable standard. *See* FED. R. EVID. 201(b)(2). First, and as Plaintiffs set forth more fully in their opening brief, *see* Pl. Br. 11-12, neither the unsworn public statements by the IRS nor TIGTA's reports (which rely, in large part, on representations made by the IRS)[1] are "sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b)(2). At this juncture, and in the wake of the unprecedented Targeting Scheme employed by the IRS, resulting in congressional investigations and an internal inquiry, the IRS is hardly entitled to a "presumption of good faith." *See* Gov. Br. 21.

On multiple occasions, and following the 2015 TIGTA Report, numerous members of Congress have expressed doubt regarding the IRS's cessation of illegal targeting and called for IRS Commissioner Koskinen's termination on the grounds that he "obstructed Congressional investigations by failing to (1) comply with subpoenas, (2) testify truthfully, and (3) preserve and produce emails relevant to the investigation." U.S HOUSE OF REPRESENTATIVES COMM. ON OVERSIGHT & GOV'T REFORM LETTER TO PRESIDENT OBAMA, 114th CONG. (July 27, 2015), available at https://oversight.house.gov/wp-content/uploads/2015/07/2015-07-27-UPDATED-JC-to-Obama-WH-Koskinen-Resignation.compressed.pdf (explaining

[1] TIGTA's Inspector General cannot be viewed as wholly independent where, as here, the allegations include discriminatory bias on the part of the individuals to whom the TIGTA IG directly reports. *See* 5 U.S.C. App. § 3(a) ("Each Inspector General shall report to and be under the general supervision of the head of the establishment involved . . . .").

that Koskinen bears responsibility for a number of actions that may have . . . misled Congress").[2] Also following the release of the 2015 TIGTA Report, the Senate Finance Committee released a bipartisan report finding that "[t]he IRS has failed to correct many of the fundamental problems that led to the inappropriate targeting of Tea Party groups." S. REP. NO. 114-119, at 227 (2015), http://www.finance.senate.gov/imo/media/doc/CRPT-114srpt119-pt1.pdf.

Further, the facts contained in the documents presented by the IRS are highly "debatable," *Moore v. Reno*, 2000 U.S. App. LEXIS 35425, *2 (D.C. Cir. 2000), and merely serve to create a dispute of fact, rather than satisfy the Government's formidable burden necessary to moot Plaintiffs' claims. Consider, for example, the 2015 TIGTA Report chiefly relied upon by the Government, but never considered by the District Court. *See* Gov. Br 15. While the Report concludes that the IRS has taken "actions [] *designed to* . . . eliminate the selection of potential political cases based on names" and unnecessary information requests, 2015 TIGTA Report, at 2 (emphasis added), it makes no assurances that such conduct has, in fact, been eliminated or that the conduct alleged by Plaintiffs has

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[2] *See also* STAFF OF HOUSE COMM. ON OVERSIGHT & GOV'T REFORM, 114TH CONG., REP. ON RESOLUTION TO INITIATE PROCEEDINGS IN THE HOUSE OF REPRESENTATIVES TO IMPEACH JOHN A. KOSKINEN, COMMISSIONER (2015), at 3 https://oversight.house.gov/wp-content/uploads/2015/11/Koskinen-Working-Final-VersionJS.pdf (citing Koskinen's obstruction by, *inter alia*, "failing to testify truthfully and providing false and misleading information to Congress").

ceased. Indeed, the Report actually acknowledges that insufficiencies *remain* with regard to the IRS's processing of applications, specifically for 501(c)(4) status:

> Until this guidance [by the Department of Treasury] is finalized, *the IRS does not have a clearly defined test of determining whether an organization's request for exemption as a social welfare organization should be approved. As a result for those applicants, not choosing the optional expedited process [including Plaintiffs], the IRS continues to use a subjective facts and circumstances process."*

Id. at *Highlights* (emphasis added).

Additionally, TIGTA notes deficiencies in the IRS's completion of three of TIGTA's nine recommendations, *see id*. at 7 – directly contradicting the Government's contention that these have been completed since January 31, 2014. *See* Gov. Br. 8. Specifically, TIGTA notes that while the IRS has developed training and workshops to be held, the IRS should take action "to improve the timing and execution of future training" of its employees as well as improve monitoring of attendance at the training sessions. 2015 TIGTA Report, at 7 (explaining that the IRS used inappropriate criteria to identify tax exempt applications for review and sent unnecessary requests for information "because employees lacked sufficient guidance"). *See also id*. at 7-9 (further noting TIGTA's concerns that (1) the IRS's "political campaign intervention training" (scheduled to be completed at the end of every June) "may be too late in the election cycle for the training to be useful"; (2) forty-six IRS personnel required to take the political campaign intervention training did not complete the training

and/or did not attend for the required amount of time; and (3) the IRS failed to complete the process designed to evaluate the effectiveness of the training).

B. There Have Been No Facts Presented Sufficient to Moot This Case.

Regardless of whether this Court takes judicial notice of the Government's factual assertions, the Government falls significantly short of meeting the formidable burden of demonstrating voluntary cessation sufficient to moot this case. *See Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013) ("The defendant 'claiming that its voluntary compliance moots a case bears the formidable burden of showing that *it is absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur.'") (emphasis added) (citation omitted).

First, the Government's documents simply demonstrate that the IRS has completed *some* of the recommendations made by TIGTA but fail to demonstrate that "there is no reasonable expectation that the alleged wrong(s) will be repeated." *D.C. Prof'l Taxicab Drivers Assn'n v. District of Columbia*, 880 F. Supp. 2d 67, 74 (D.D.C. 2012). The documents (even when viewed in a manner most favorable to the IRS—the opposite of the motion to dismiss standard) serve, at best, to create a dispute of fact where Plaintiffs have alleged there are numerous components to the IRS's ongoing Targeting Scheme. App. 15, ¶ 5. At worst, the documents undermine the Government's argument by indicating that the IRS continues to use a subjective test when processing 501(c)(4) applications. 2015 TIGTA Report,

Highlights. Crucially, the fact that an agency's authority is wide-ranging – as is the IRS's authority – only serves to "heighten[] a reasonable expectation of a repeat violation." *Reeve Aleutian Airways, Inc. v. United States*, 889 F.2d 1139, 1143 (D.C. Cir. 1989). Such a repeat violation is precisely the concern of the Plaintiffs that withdrew their applications.

Second, even if the Government could demonstrate that it is "absolutely clear," *Already*, *LLC,* 133 S. Ct. at 727, that the IRS has effectively eliminated all allegedly unconstitutional aspects of its review process such that the alleged wrong(s) cannot reasonably be expected to recur, there are two Plaintiffs still awaiting a determination on their pending applications. App. 17-18, ¶¶ 21, 26. These Plaintiffs – regardless of whether the alleged conduct has ceased – continue to suffer the "effects of the alleged violation," *County of Los Angeles v. Davis*, 440 U.S. 625, 631-32 (1979).[3]

More than five years have passed since Plaintiffs submitted their applications for 501(c)(4) exemption and, regardless of whether the IRS has permanently ceased the Targeting Scheme, these Plaintiffs continue to suffer

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[3] Importantly, the Government, by not addressing the issue in its brief, concedes that Plaintiffs did *not* concede that the court lacks authority to compel the IRS to immediately issue 501(c)(4) determinations (without specifying the *nature* of such determinations). *See* Pl. Br. 24-26; Gov. Br. 28 (claiming the issue is irrelevant but failing to address the concession issue further).

unconstitutional delay as a direct result of the IRS's actions.[4] App. 17-18, ¶¶ 21, 26. It is simply inaccurate to assert, as the Government does, that "the IRS has already done – under the watchful eye of both Executive and Congressional oversight – what plaintiffs want the Court to order the IRS to do, in contravention of mootness principles." Gov. Br. 17. As Plaintiffs have demonstrated above, Congress and TIGTA are certainly watching, but neither is convinced. *See supra* Part I(A). Plaintiffs' claims are precisely the ones that this Court in *Z Street* recognized must be permitted to move forward. *Z St.*, 791 F.3d at 31 (concluding the IRC offers no remedy to address a 501(c)(3) applicant's alleged injury of delay, and that "the same is true with respect to the remedies offered by sections 6213 (deficiency petition) and 7422 (refund suit)" because "[u]nder either provision, the court would be limited to reviewing taxpayers liability, rather than unconstitutional delay").

It also cannot be said, even as to those Plaintiffs whose applications for exemption were finally granted, that they are free from the effects of the IRS's conduct. These Plaintiffs continue to suffer the chilling effects of the Targeting Scheme on their First Amendment rights to the freedoms of speech and

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[4] Curiously, both the IRS and the District Court acknowledge that the Government's conduct may still impact Plaintiffs with pending applications. *See* Gov. Br. 16 (asserting that "the former, allegedly unconstitutional application process . . . was 'no longer impacting the plaintiffs', *particularly plaintiffs without pending applications*" (emphasis added) (quoting the District Court's opinion (JA284 n.13)).

association. App. 66, ¶ 315. *See Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 558 (1963) (holding that compulsory disclosure of membership information "'tends to impinge upon such highly sensitive areas as freedom of speech . . . freedom of political association, and freedom of communication of ideas. . . .'" (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957))). *See also Bates v. City of Little Rock*, 361 U.S. 516, 517 (1960) (recognizing the "vital relationship between freedom to associate and privacy in one's associations" and holding that "'[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association'" (quoting *NAACP v. Alabama*, 357 U.S. 449, 462 (1958))).

For the reasons provided above, the controversy that remains and the current circumstances are not "so 'attenuated' and 'remote'" as to justify dismissal based on mootness. *Cmty for Creative Non-Violence v. Hess*, 745 F.2d 697, 702 (D.C. Cir. 1984) (quoting *Chamber of Commerce v. Dep't of Energy*, 627 F.2d 289, 291-92 (D.C. Cir. 1980)). Even in the cases cited by the Government, *see* Gov. Br. 17, the courts were unequivocal that – just as in a determination of mootness based on voluntary cessation – there must be no "cognizable danger of recurrent violation"; otherwise, the "court's power to grant injunctive relief survives discontinuance of the illegal conduct." *Chamber of Commerce*, 627 F.2d at 292 (dismissing lawsuit

only after the defendants submitted sworn statements that they were unaware of the plaintiff's religious beliefs/practices and providing assurances they would accommodate those beliefs in the future).

C. Plaintiffs' Challenges to the Tax Regulation and Revenue Procedure Represent Live Controversies For Which The Court Can Provide An Effective Remedy.

Even assuming, *arguendo*, that the IRS could meet its burden to prove that it has permanently ceased the Targeting Scheme and eradicated all of the effects of the unlawful targeting, Plaintiffs' facial and as-applied challenges[5] to the IRS rules in Counts VI and VII of the SAC are not moot. As even the IRS must acknowledge in its reliance upon *Initiative & Referendum Inst. v. United States Postal Service*, 685 F.3d 1066, 1074 (D.C. Cir. 2012), a challenge to a regulation may be moot only after that regulation is amended or superseded. Gov. Br. 13. Both the regulation and procedure challenged by Plaintiffs are alive and well.

The Government's remaining arguments – that Plaintiffs' challenges to the IRS rules are barred by the AIA, Gov. Br. 24-25, and, in the alternative, that they lack standing to bring such challenges, *id.* – are equally unpersuasive. This Court has previously rejected the Government's overly broad interpretation of the AIA. *See Cohen v. United States.*, 650 F.3d 717, 727 (D.C. Cir. 2011) ("[T]he principle

[5] The two Plaintiffs awaiting a determination on their application for exemption under 501(c)(4) and Plaintiffs that withdrew their applications maintain as-applied challenges to 26 C.F.R. § 1.105(c)(4)-1 and Revenue Procedure 86-43.

the case law elucidates is . . . quite simple: The AIA . . . is no obstacle to other claims seeking to enjoin the IRS, regardless of any attenuated connection to the broader regulatory scheme."). *See also Hibbs v. Winn*, 542 U.S. 88 (2004) ("[A]ssessment" is not "synonymous with the entire plan of taxation."); *Direct Marketing Ass'n v. Brohl*, 135 S. Ct. 1124, 1132-33 (2015) (challenge to information gathering and reporting requirements may "inhibit" but would not "restrain" the "assessment . . . or collection" of taxes). Indeed, courts regularly "allow[] constitutional claims against the IRS to go forward in the face of the AIA." *Cohen*, 650 F.3d at 726-27.

This Court's ruling in *Z Street* forecloses any remaining doubt as to the proper timing of Plaintiffs' as-applied challenges. In *Z Street*, this Court issued a reminder that "*Regan* . . . reaffirmed the requirement of viewpoint neutrality in the Government's provision of financial benefits," *Z St.*, 791 F.3d at 30, and if the AIA barred suits challenging the viewpoint discrimination and unconstitutional delay in the application process, the IRS would be free (for at least 270 days) to continue its blatant violations of the First Amendment. *Id.* at 32 (explaining further that "in situations where a taxpayer elects not to sue under section 7428, the IRS would have even longer [to discriminate] since the taxpayer would be unable to invoke either section 6213 or section 7422 until the agency actually denies an exemption and assesses liability").

Like Z Street, these Plaintiffs are not suing to enjoin the assessment or collection of any tax. Instead, and as another court facing similar challenges properly recognized, "they seek only to enjoin the IRS from subjecting them to viewpoint discrimination during the application process for tax-exempt status with unnecessary delays and intrusive requests for information." *NorCal Tea Party Patriots v. IRS*, 2014 U.S. Dist. LEXIS 97229, at *36 (S.D. Ohio 2014). *See also Z St.*, 791 F.3d at 28 ("Z Street's First Amendment claim . . . cannot properly be characterized as a lawsuit implicating the assessment or collection of taxes because the organization seeks only to have a constitutionally valid process used when its application for Section 501(c)(3) status is evaluated") (internal quotations and citations omitted). Plaintiffs' challenges to the regulations are based on precisely the same objective.[6] *See* App. 75-76, ¶¶ 385-391 (alleging the unconstitutional vagueness of 26 C.F.R. § 501(c)(4)-1 violates the rights of Plaintiffs and all others similarly situated by inviting arbitrary and viewpoint-discriminatory application and enforcement by government officials), and 77-78, ¶¶ 399-404 (alleging same with regard to Revenue Procedure 86-43). The court's review of these regulations,

[6] The argument that these are prohibited pre-enforcement challenges is particularly absurd as to Plaintiffs whose tax-exempt applications have been granted. Clearly, they seek only to challenge the procedure and regulation that permitted the unconstitutional conduct – the effects from which they still suffer but for which they "have no access at all to judicial review," *Z St.*, 791 F.3d at 29 (internal quotations and citations omitted). *Accord South Carolina v. Regan*, 465 U.S. 267 (1984).

and the issuance of a declaration or injunction prohibiting enforcement of these provisions against the Plaintiffs awaiting determinations and those that hope to re-apply will not result in—or affect—a determination of Plaintiffs' tax-exempt statuses or their liability for taxes. *See NorCal Tea Party Patriots*, 2014 U.S. Dist. LEXIS 97229, at *36.

In sum, courts have rejected the very argument made by the IRS here: that these Plaintiffs must dismiss their claims, wait an unspecified, additional amount of time for a determination, and if, and only if, that determination is adverse, bring facial challenges to the very rules that permit viewpoint discrimination and unconstitutional delay in the tax-exempt application process. As this Court recognized in *Z Street*, neither Section 7428 nor Sections 6213 (deficiency petition) and 7422 (refund suit) provide a remedy to address such injuries. *Z St.*, 791 F.3d at 31.[7] *See also Cohen*, 650 F.3d at 726 ("The Supreme Court, this court, and other circuits have allowed challenges to tax laws outside the context of a 26 U.S.C. § 7422(A) proceeding (a refund suit).").

Even as to others similarly situated, the facial invalidation of either the procedure or regulation challenged by Plaintiffs in this case would in no way "restrain" the "assessment . . . or collection" of taxes. *Direct Marketing Ass'n*, 135

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[7] For this reason, the IRS's reliance on *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980) (involving non-profit organization's appeal from the IRS's rejection of its application and challenges to Treas. Reg. § 1.501(c)(3)-1 as unconstitutionally vague) is misplaced.

S. Ct. at 1132-33. The IRS determines tax-exempt status pursuant to 26 U.S.C. §§ 501(a) and (c) (3)-(4). This statute is self-executing. Accordingly, 26 C.F.R. § 1.501(c)(4)-1 and Revenue Procedure 86-43 simply provide guidance to the IRS in implementation of the statutory provisions. Their invalidation would have no effect on whether the IRS could assess or collect any tax; it would merely prevent the IRS from continuing to determine tax-exempt status through an unconstitutional process. *See Z St.*, 791 F.3d at 29 (explaining that the AIA is not an obstacle to claims seeking to enjoin the IRS simply because of an attenuated connection to the broader regulatory scheme).

Finally, the IRS's challenge to Plaintiffs' standing – an argument never before raised by the Government or the District Court in this case – is without merit. The single case cited by the Government, *Freedom From Religion Foundation v. Lew*, 773 F.3d 815 (7th Cir. 2014), fails to support the IRS's position that Plaintiffs lack standing to bring a facial challenge to the rules unless they suffer the specific harm of denial of tax exemption. *See* Gov. Br. 24. Unlike the exemption at issue in *Lew*, which caused the plaintiffs no injury because it was never applied to them, *Lew*, 773 F.3d at 820, the rules Plaintiffs challenge have been applied to them, to their detriment. Each of them has experienced viewpoint discrimination, significant delay, intrusive and unnecessary requests for information, and ongoing chilling effects on their First Amendment freedoms.

Plaintiffs have satisfied the applicable standing requirements. *Halbig v. Burwell*, 758 F.3d 390, 396 (D.C. Cir. 2014).[8]

II. THE CONSTITUTIONAL VIOLATIONS ALLEGED HERE WARRANT THE AVAILABILITY OF A *BIVENS* REMEDY.

A. The Internal Revenue Code Does Not Preclude These *Bivens* Claims.

Individual Defendants assert that the IRC serves as an impediment to Plaintiffs' *Bivens* claims because it "includ[es] mechanisms for the *review of decisions on tax-exemption applications*." Indiv. Br. 9. *See also id.* at 15 ("Congress has provided entities *seeking the benefit of tax-exempt status* calibrated mechanisms for *review of IRS action* (or inaction) *on their applications*.") (emphases added). But Plaintiffs' *Bivens* claims do not seek review of tax-exempt decisions. Rather, they seek relief based on the Individual Defendants' viewpoint-based discriminatory actions against them—and the consequent harm they suffered—neither of which is contemplated anywhere in the IRC.[9]

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[8] As the *Halbig* court noted, so long as one plaintiff has standing, the court "need not consider the standing of the other plaintiffs to raise that claim." 758 F.3d at 396 (quoting *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996)).

[9] To the extent such unconstitutional conduct is attributable to agency (as opposed to individuals') action(s), Plaintiffs have raised statutory and constitutional claims against the Government. Absent some initial discovery, however, Plaintiffs lack sufficient information to determine to what extent the unconstitutional conduct is attributable to the Individual Defendants. *See, e.g., The IRS: Targeting Americans For Their Political Beliefs: Hearing Before the Comm. on Oversight & Gov't Reform House of Representatives*, 113th Cong. 113-33 (2013), at 25 (statement of

1. No precedent cited by Individual Defendants forecloses application of Bivens *here.*

Contrary to Defendants' assertions, Indiv. Br. 14, this Court has never held that all *Bivens* claims against IRS employees are prohibited because of the mere existence of the IRC. In fact, in order to make this overly broad assertion, Defendants wholly ignore the crux of the *Kim* decision: all of the conduct on which the Kims based their *Bivens* claims was addressed by *provisions of the IRC*. *Kim v. United States*, 632 F.3d 713, 717 (D.C. Cir. 2011) (agreeing with district court's rationale and affirming its holding that a *Bivens* remedy is unavailable "to redress . . . *due process*[10] violations *stemming from purported violations of the IRC*," *Kim v. United States*, 618 F. Supp. 2d 31, 39 (D.D.C. 2009) (emphases added)).[11]

This Court has defined a "comprehensive remedial scheme" as a statutory scheme that reflects "a considered congressional judgment about which remedies

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Lois G. Lerner), https://www.gpo.gov/fdsys/pkg/CHRG-113hhrg81742/pdf/CHRG-113hhrg81742.pdf (Chairman Issa taking note of Lerner statement indicating that "more or less 9 out of 900" IRS employees were responsible for the Targeting Scheme conduct). This need for discovery is further bolstered by Defendants' continued defiance of Congressional investigations into the constitutional violations alleged here and the identities of any individuals responsible for them. *See supra*, note 2.

[10] In their overly broad reading of *Kim*, Defendants also erroneously assert that this Court has "precluded *Bivens*' expansion to Fifth Amendment suits against IRS employees," Indiv. Br. 7, rather than acknowledging that the *Kim* holding was limited to *due process* violations and said nothing of potential Fifth Amendment equal protection claims, such as those raised by Plaintiffs.

[11] Nor, as Defendants suggest, Indiv. Br. 14-15, was the holding so broad in *Whittington v. United States*, 439 F. Appx. 2 (D.C. Cir. 2011).

should be available *for claims that fall within its ambit*." *Davis v. Billington*, 681 F.3d 377, 383 (D.C. Cir. 2012) (emphasis added). In elaborating on this concept, this Court explained that the First Amendment claims at issue undoubtedly fell "'within CSRA's ambit . . . *because the CSRA itself*, in one fashion or another, *affirmatively speaks to [claims like those] by condemning the underlying actions* as "prohibited personnel practices."'" *Id.* at 387 (emphasis added) (quoting *Spagnola v. Mathis*, 859 F.2d 223, 229 (D.C. Cir. 1988)).

This same rationale underlies each of the other decisions cited by Defendants in which the Supreme Court, this Court, and other appellate courts have declined to extend *Bivens* because of the existence of a comprehensive remedial scheme. Indiv. Br. 18, n.2 (collecting cases regarding the IRC, all of which involved challenges to conduct that either did not allege an actual constitutional violation or was addressed in some manner within the IRC, and none of which addressed the unconstitutional conduct of which Plaintiffs complain); *Id.* at 21-22 (citing *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (challenging "improper *denial* of Social Security disability benefits," *id.* at 414 (emphasis added), which plaintiffs were able to challenge pursuant to provisions of the Social Security Act); *Bush v. Lucas*, 462 U.S. 367 (1983) (raising "[c]onstitutional challenges to agency action" that were "fully cognizable within th[e] system [of civil service statutes]")).

And despite Defendants' attempt to undermine the importance of the *Kim* Court's reliance on the *Gibbs* decision, the very pages approvingly cited by *Kim* include the unequivocal holding "that the NCBA may bring a *Bivens* action [against individual IRS employees] for violations of the first and fourth amendments." *Nat'l Commodity & Barter Ass'n v. Gibbs*, 886 F.2d 1240, 1248 (10th Cir. 1989). Because of the paramount nature of the interests and values at stake here, and because nowhere in the IRC has Congress spoken (affirmatively or otherwise) to the underlying actions and injuries Plaintiffs challenge through their *Bivens* claims, the IRC should not serve as a comprehensive remedial scheme prohibiting these particular claims. Indeed, unlike in *Schweiker* and *Bush*, where "the harm resulting from the alleged constitutional violation [could] in neither case be separated from the harm resulting from the denial of the statutory right," *Schweiker*, 487 U.S. at 428, those harms are entirely separate here. Indeed, even those Plaintiffs that have been *granted* tax-exempt status have had—and continue to have—their First Amendment rights to the freedoms of speech and association chilled because of the discriminatory conduct of the Defendants.

2. *The statutory scheme of the IRC does not contemplate the conduct or injuries at issue and is not harmed by the application of* Bivens *here.*

Defendants rely on §§ 7428, 6213, and 7422 as IRC provisions that bar a *Bivens* remedy here, but this Court has already rejected the assertion that those

provisions preclude a constitutional remedy for the type of unconstitutional conduct and injury alleged here. *Z St.*, 791 F.3d at 31 (holding that these provisions "cannot address Z Street's alleged injury . . . unconstitutional delay in processing Z Street's section 501(c)(3) application" based upon its viewpoint).[12] While *Z Street* involved a challenge to an agency policy rather than conduct of individual IRS employees, this Court's acknowledgment that a direct constitutional remedy is available to redress unconstitutional viewpoint-based conduct, resulting in delay in the processing of tax-exempt applications and a chilling of activities protected by the First Amendment, is relevant to the *Bivens* analysis for this reason: to the extent that the unconstitutional conduct alleged here is attributable not to an IRS policy but instead to the actions of any of the Individual Defendants, the only remedy for such harm is through a *Bivens* action. In other words, to remedy any such injury, for Plaintiffs "it is damages or nothing." *Davis v. Passman*, 442 U.S. 228, 245 (1979).

Defendants' contention that allowing a *Bivens* remedy here would destroy—or, in fact, do any harm—to the IRC, Indiv. Br. 16-17, is thus entirely unavailing. That the IRC may require exhaustion, apply shorter statutes of limitations, and

[12] With the possible exception of § 7431, authorizing a damages claim against the government for wrongful inspection of tax return information, which Plaintiffs have raised (but the Government argues is inapplicable here, Gov. Br. 29-39), no other IRC provision cited by Defendants allows a court to review any of the unconstitutional conduct, including the viewpoint-based targeting and delay, alleged by Plaintiffs. *See* Indiv. Br. 16 (citing §§ 7426, 7429, 7431-35).

provide means of redress as to *other conduct*, in no way yields the conclusion that allowing *Bivens* claims for wholly separate unconstitutional conduct (here, viewpoint-based discriminatory actions that chill free speech and association) is detrimental to the Code's regime. Such ramifications (*e.g.*, "[a]llowing organizations to 'bypass the remedies provided by Congress,'" and "wre[a]k[ing] havoc with the federal tax system," Indiv. Br. 17 (quoting *Cameron v. IRS*, 773 F.2d 126, 129 (7th Cir. 1985) and *Baddour, Inc. v. United States*, 802 F.2d 801, 807 (5th Cir. 1986)) would only result if *Bivens* claims were permitted as to conduct *actually contemplated in the Code*. Because Plaintiffs' *Bivens* claims are predicated entirely upon conduct outside the contemplation of the IRC, they pose no threat of interference with its effective administration. Indeed, both *Cameron* and *Baddour* recognized that IRS employees who violate taxpayers' constitutional rights may be liable for *Bivens* damages. *See Cameron*, 773 F.2d at 128, and *Baddour*, 802 F.2d at 808 (citing *Rutherford v. United States*, 702 F.2d 580, 584 (5th Cir. 1983) (suggesting availability of *Bivens* remedy when a complaint "sketches a portrait of a lawless and arbitrary vendetta fueled by the power of the state, designed to harass by unwarranted intrusion into the minutia of [one's] financial affairs, and intended to abuse . . . .")).

Defendants' reliance on the availability of an APA claim as a gap-filler, Indiv. Br. 24-25, also entirely misses the point of the *Bivens* claims here. As

Defendants readily acknowledge, *id.*, an APA claim may only be brought to compel *agency action*; it provides no redress for conduct attributable to individual IRS officials. Again, to the extent the unconstitutional conduct of which Plaintiffs complain is attributable not to any agency action or policy but instead to the actions of Individual Defendants, Plaintiffs' only remedy is in the form of a *Bivens* action.

B. Legislative History Supports the Application of *Bivens* Here.

Individual Defendants rely on excerpts from the Congressional Record regarding Senate Bills 579 and 2223, Indiv. Br. 26-27, but these excerpts do nothing to undermine the significance of the subsequent Senate statements regarding the Technical Corrections Act of 1988, 134 CONG. REC. S. 15073 (1988). It was there that the plain intention to *supplement*, rather than *supplant*, *Bivens* actions was expressed. While the Congressional Record indicates Congress's understanding that courts have not extended *Bivens* claims "to every tort by a federal agent acting under federal authority," *Id.* at 15077, it also clearly acknowledges—despite the existence of the IRC—that "individual IRS agents are not beyond the reach of *Bivens* by taxpayers," *id.*, except as to conduct for which "Congress has already created explicit remedies." *Id.*

Defendants' objections and misplaced reliance on case law from other jurisdictions notwithstanding, Indiv. Br. 28, these statements, while originating in a

staff summary, were expressly "ordered to be printed in the Record" by "unanimous consent" as "an extremely accurate . . . summary of . . . what the taxpayers' bill of rights does and does not do." 134 CONG. REC. S 15073, 15075. In so explaining, Congress expressed its clear understanding that *Bivens* claims were then available for *some* unconstitutional conduct by individual IRS agents and officials. In enacting the Taxpayer Bill of Rights, Congress indicated no intention to replace *Bivens* claims for those situations, like the instant litigation, that involve "shocking constitutional infringements," *id.* at 15077, but merely supplemented such actions with claims for recovery of "ordinary tort damages," *id.*, based on *other* conduct. That such damages remedies are exclusive *in the circumstances to which they apply* should have no bearing on the availability of a *Bivens* remedy understood by Congress to exist in *other* circumstances. *See Passman*, 442 U.S. at 247 (refusing to interpret existence of statutory remedy for some litigants as "foreclos[ing] the judicial remedies of those expressly unprotected by the statute" but instead reading the provision as leaving such remedies "undisturbed").

C. This Narrow Context is Appropriate for Application of *Bivens*.

Defendants assert that the content and context of the alleged constitutional violations are inappropriate for the application of *Bivens* because of the necessity of inquiring into constitutionally-protected conduct in making tax-exempt determinations. Indiv. Br. 29-31. Absent from their catalog of activities in which

IRS employees must engage, however, is any conduct of the type alleged here. While "intensive factual inquir[ies]," including "whether [and to what extent] the organization participates in political campaigns and lobbying," may be required to determine the existence of "disqualifying political activity," *id.* 29-30, there is no set of circumstances in which "appropriate scrutiny" requires IRS employees to consider the *viewpoint* of a tax-exempt applicant's expression (or that of the applicant's associates) in such decision-making.

As Defendants themselves recognize, the availability of a *Bivens* remedy is context-specific, *id.* 11-12, and "even if the plaintiff alleges the same type of constitutional violation, it does not automatically invoke the same context for *Bivens* purposes." *Meshal v. Higgenbotham*, 804 F.3d 417, 423 (D.C. Cir. 2015). This Court has construed "context" narrowly to mean "a potentially recurring scenario that has similar legal and factual components." *Id.* Thus, application of *Bivens* here would in no way "convert[] into a potential damages action for personal liability" every tax-exempt application submitted to the IRS, Indiv. Br. 30-31, but would extend only to the specific scenario presented here: discriminatory treatment of tax-exempt applicants by individual IRS employees

based on the viewpoint(s) expressed by such applicants or persons with whom an applicant is associated. *See, e.g.,* App. 59, ¶ 280.[13]

III. THE DISTRICT COURT ERRED IN DISMISSING COUNT IX OF THE SAC.

A. The District Court Did Not Properly Apply the Rule 12(b)(6) Standard of Dismissal for Failure to State a Claim.

Under the "short plain statement" standard of pleading a plaintiff must merely "allow the United States to determine whether the disclosure [or inspection] was authorized by § 6103 or fits within one of its many exceptions." *May v. United States*, 1992 U.S. Dist. LEXIS 16055, *14 (W.D. Mo. Apr. 17, 1992). Plaintiffs have clearly satisfied that standard. Plaintiffs alleged throughout the SAC that Defendants obtained from them intrusive and unnecessary information, *see, e.g.*, App. 32, 33, 35-36, ¶¶ 106, 114, 129, 132-33, and that such information was "illegally obtained, inspected, handled and disclosed" in violation of Section 6103. App. 81-82, ¶ 412-24. *See also* App. 87 (TIGTA Report); App. 236 (House Interim Report); and App. 62, ¶ 296. Because Plaintiffs' allegations contain sufficient detail to provide Defendants fair notice of their claims, the District Court should have allowed those claims to proceed. *See Gleason v. Cheskaty*, 1995 U.S. Dist.

[13] As rare as "[r]aids, seizures, and similar actions" may be, surely the type of conduct at issue here is even more exceptional, yielding very few lawsuits indeed, and likely even fewer actual findings of liability in light of the availability of the defense of qualified immunity, application of which, as Defendants note, Indiv. Br. 31-32, has yet to be determined here.

LEXIS 9318, *18 (D. Idaho Jun. 22, 1995) ("[p]laintiffs must be allowed to complete discovery before its [sic] claim for wrongful disclosure can be dismissed" and "[a]ny determination on the merits of the [§ 7431] claim or on the defenses is more appropriate at the summary judgment stage than at the pleadings stage."). *Accord NorCal Tea Party Patriots*, 2014 U.S. Dist. LEXIS 97229 at *43.

B. The District Court Did Not Properly Interpret or Apply Sections 6103 and 7431.

Section 7431 as originally enacted provided damages only for unauthorized disclosure of taxpayer information but was later amended to prevent improper inspection or "browsing" of taxpayer information. Taxpayer Browsing Protection Act, Pub. L. No. 105-35, § 3, 111 Stat. 1104, 1105-110 (1997). As the Government acknowledges, this "amendment responded to concerns about 'widespread indications of browsing,'" Gov. Br. 34 (citation omitted), which is exactly what occurred here. The BOLO component of the alleged Targeting Scheme obviously necessitated improper "browsing" through applications for tax exempt status, including those filed by Plaintiffs. The targeted applications were then segregated for additional scrutiny and inquiry based upon inappropriate criteria. Consequently, Defendants engaged in improper inspection in violation of Section 6103 both before and after they requested and inspected the intrusive and unnecessary information from Plaintiffs.

Since these components of the viewpoint-based Targeting Scheme were clearly not "require[d] . . . for tax administration purposes," 26 U.S.C. § 6103(h)(1)[14], such conduct, as alleged by Plaintiffs, is actionable under Section 7431. *See also* TIGTA Report, App. 110 (concluding that IRS demanded information that was "unnecessary," *i.e.*, not required for tax administration purposes). The question is not whether the IRS used the information in "processing applications," Gov. Br. 31, but whether, in so doing, IRS officials engaged in inspections of Plaintiffs' return information that was not required for tax administration purposes. Plaintiffs clearly and sufficiently made such allegations.[15]

Nor is it correct to characterize this as a situation in which Plaintiffs requested that the IRS engage in the complained-of inspections such that the Section 7431(b)(2) exception applies. Plaintiffs produced the unnecessary information *solely* as a result of the IRS's demands that they either produce such information or have their applications closed, *see, e.g.*, App. 38, 47 ¶¶ 146, 203,

[14] Section 6103(h)(1) focuses not only the identity of the individual(s) inspecting information, *see* Gov. Br. 1 (characterizing issue as whether Plaintiffs' "information was viewed by unauthorized IRS personnel"), but also on the necessity of the inspection itself. Thus if "such inspection" is not "require[d] . . . for tax administration purposes," 26 U.S.C. § 6103(h)(1), it is not authorized by that subsection.

[15] Plaintiffs need not allege that *all* of their information was improperly inspected to state a § 7431 claim as to *any* unlawful inspection. *See* Gov. Br. 39. In any event, Plaintiffs actually did allege that each additional request for information identified in the SAC required Plaintiffs to provide "irrelevant information to which the IRS was not entitled," *See, e.g.*, App. 32, ¶ 106, that was then inspected in violation of § 6103.

and potentially lose valuable legal rights, including the availability of a claim under Section 7428.

The District Court and Government rely on inapposite cases premising government liability on defects in the validity of underlying tax-collection activities. *See Huff v. United States*, 10 F.3d 1440, 1447 (9th Cir. 1993); *Venen v. United States*, 38 F.3d 100, 104 (3d Cir. 1994); *Wilkerson v. United States*, 67 F.3d 112, 116-17 (5th Cir. 1995); *Mann v. United States*, 204 F.3d 1012, 1018 (10th Cir. 2000). These cases are distinguishable from the case at bar for at least two reasons. First, they involved challenges to the disclosures only because they were a component of an underlying collection action being challenged as invalid. They did not involve allegations that the disclosures themselves were unnecessary to the levy, and Congress expressly authorized disclosure of tax-return information "to the extent necessary" in collection actions. *See Mann*, 204 F.3d at 1018 ("6103(k)(6) and the relevant regulations do permit disclosure of tax return information when made in notices of lien and levy, to the extent necessary to collect on taxes assessed."). Second, Congress created an "exclusive remedy for recovering damages resulting from [collection] actions." 26 U.S.C. § 7433. Since the case at bar does not involve tax collection activities, Section 7433 does not come into play so as to prohibit relief under Section 7431.

In short, Plaintiffs sufficiently alleged that the inspections at issue in this case were not for tax administration purposes, but, rather, for the purpose of carrying out the unconstitutional, viewpoint-discriminatory Targeting Scheme. Accordingly, a determination on the merits of Plaintiffs' Section 7431 claims was inappropriate at the pleadings stage prior to the discovery process. *See Norcal Tea Party Patriots*, 2014 U.S. Dist. LEXIS 97229, at *44 (holding that any determination on these claims is more appropriate at the summary judgment stage).

CONCLUSION

This Court should reverse and remand the case to the District Court so that Plaintiffs may proceed with their claims under Counts I-VII and Count IX of the SAC.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), and the word limit established by this Court's Order of September 23, 2015 (Doc. No. 1574495) because this brief contains 6,950 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 and D.C. Cir. R. 32.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

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Dated: March 5, 2016

CERTIFICATE OF SERVICE

I, Elissa Matias, being duly sworn according to law and being over the age of 18, upon my oath depose and say that: Counsel Press was retained by the AMERICAN CENTER FOR LAW AND JUSTICE, Attorneys for Plaintiffs-Appellants, to print this document. I am an employee of Counsel Press. On March 7, 2016, Counsel for Appellants authorized me to electronically file the foregoing Reply Brief of Appellants with the Clerk of Court using the CM/ECF System, which will serve, via e-mail notice of such filing, to Counsel for Appellees registered as CM/ECF users.

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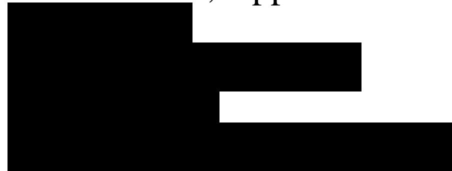

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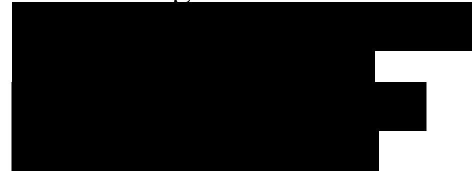

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A courtesy copy has also been mailed to the above-listed counsel.

Eight paper copies have been sent to the Court on the same date as above via Express Mail.

March 7, 2016

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