IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Z STREET,	:	
Plaintiff,	:	Civil No. 1:12-cv-00401 (KBJ)
v.	:	
JOHN KOSKINEN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF INTERNAL REVENUE,	:	
Defendant.	:	

MEMORANDUM IN COMPLAINCE WITH THIS COURT'S RULE TO SHOW CAUSE WHY THIS CASE IS NOT MOOT

Plaintiff submits this Memorandum in compliance with the Rule issued by this Court on October 20, 2016, directing Plaintiff to show cause why the case should not be dismissed as moot.

INTRODUCTION

As this Court recognized in denying the Government's Motion to Dismiss, and as the Court of Appeals affirmed, the purpose of this case has never been to obtain certification of Plaintiff as a charitable entity under Section 501(c)(3) of the Internal Revenue Code. *Z STREET v. Koskinen*, 44 F. Supp.3d 48, 66-67 (D.D.C. 2014) explained: "Z Street's complaint does not ask this Court to review or determine whether it is entitled to Section 501(c)(3) status; rather, Z Street has been adamant in its papers and at the motion hearing that it does not seek through this lawsuit to be awarded that status at all." See also 791 F.3d 24, 30 (D.C. Cir. 2015).

Instead, as this Court explained, "Z Street's complaint requests only two things: (1) a declaration that the Israel Special Policy violates the First Amendment, and (2) an injunction that requires disclosure of information regarding the Israel Special Policy, bars the IRS from subjecting Z Street's application for Section 501(c)(3) status to the Israel Special Policy, and that mandates that Z Street's application be adjudicated "fairly" and "expeditiously." (Am. Compl. at 16.)" *Id.* at 60.

The case therefore cannot be rendered moot simply because, almost seven years after it was sought, such certification has now been issued. We still don't know what kind of process Plaintiff's application was subjected to in the last three months. Worse, we know for certain that there has been no Declaration that the Israel Special Policy violates the First Amendment. And we know that that there has been no disclosure of information regarding that policy.

Instead, for over six years Plaintiff's constitutional rights have been violated, and the Plaintiff has, because of these violations, been effectively incapacitated throughout that period. See *infra* at 4, and Declaration of Lori Lowenthal Marcus (hereinafter "Marcus Decl."), attached hereto as Exhibit A. Plaintiff's First Amendment rights were breached, and its capacity to operate were destroyed, throughout that period.

Here it is even more clear that the policies underlying Plaintiff's claim have not ended. In *True the Vote* the DC Circuit was able to rely, without contradiction from the IRS, on the findings of the Treasury Inspector General ("IG") as to what the IRS had done, and what it would cease doing. Here, by contrast, the IRS has informed this Court in a brief on August 31, 2016 (and thus after the *True the Vote* decision was handed down), that it has not acquiesced in certain of the IG's findings. See *infra* at 6. There is accordingly no basis at all for this Court to find that even those practices identified, and condemned, by the IG have in fact ceased at all.

Finally, even if issuance of 501(c)(3) certification did definitively end the suppression of Plaintiff's First Amendment rights, the law is clear that the breach already sustained entitles Plaintiff to a Declaratory Judgment determining that Defendant's conduct constituted a violation of Plaintiff's constitutional rights; to nominal damages, which are an acknowledged remedy for breach of constitutional rights that are otherwise irremediable, even when the breach is no longer occurring; and to attorney's fees and costs. Until those remedies, at a bare minimum, have been attained, the case is not moot.

FACTS

Plaintiff Z STREET was incorporated on November 24, 2009. Amended Complaint ¶3. On December 29, 2009, it applied to the Defendant Internal Revenue Service for status as an organization recognized under Section 501(c)(3) of the Internal Revenue Code for tax exempt status. *Id.* ¶4.

On July 19, 2010, Plaintiff learned that its application was being subjected to special, and more time consuming, scrutiny because the IRS had special concern about applications from organizations whose activities related to Israel and about organizations whose positions contradict the US administration's Israeli policy. *Id.* ¶18. An IRS agent informed Plaintiff's counsel that "these cases are being sent to a special unit in the D.C. office to determine whether the organization's activities contradict the Administration's public policies." *Id.* ¶25. Z STREET, and its President, Lori Lowenthal Marcus, have publicly taken positions on issues relating to Israel that are inconsistent with positions taken by the Obama administration. *Id.* ¶26.

Because of these disclosures, Plaintiff filed this case, seeking *not* a determination of its entitlement to 501(c)(3) status, but a declaratory judgment that the Government's treatment of

Plaintiff's application constituted a violation of Plaintiff's First Amendment rights; injunctive relief requiring disclosure of the procedures and standards the Government was actually applying to Plaintiff's application; and the application of a constitutionally valid process for the disposition of Plaintiff's application for such status.

Once this case was filed, the Government stopped merely delaying the processing of Plaintiff's application – it ceased handling it altogether. The Government did so pursuant to an IRS regulation that authorized – but did not require – the agency to stop processing applications when litigation had been commenced regarding the applicant's entitlement to tax-exempt status. Yet even after this Court, and the DC Circuit, held that this case did *not* relate to the applicant's entitlement to such status, the Government did not resume processing of Plaintiff's application.[1]

As a result, as explained in the Marcus Declaration, Z STREET was prevented for over six years from engaging in any fundraising. The organization was, by this mechanism, rendered moribund – unable to secure funds for operation, it was unable to operate. It was completely silenced. See Marcus Decl. ¶¶5-6.

After over six years of litigation in this case, and several years of litigation in other,

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[1] As the Court in *Norcal Tea Party Patriots v. Internal Revenue Service*, No.1:13-cv-00341 (S. D. Ohio explained,

> The Government admitted that it has discretion whether to apply the general litigation hold policy in specific cases during oral arguments in the case of Z Street v. Koskinen, No. 15-5010 (D.C. Cir. May 4, 2015), another case in which a tax-exemption applicant alleged viewpoint discrimination by the IRS. Moreover, the litigation hold policy should arise only when an applicant's tax exemption status is at issue in the litigation. (Doc. 212-12 at Page ID 8146–47; see also IRS Revenue Procedure 2014-9 § 4.04.) TPTP is not challenging in this suit whether it is entitled to § 501(c)(4) tax-exempt status.

Tea Party Patriots, slip op. at 22 (attached hereto as Exhibit B). As this Court and the Court of Appeals have recognized, neither was Z STREET "challenging in this suit whether it is entitled to 501(c)([3]) tax exempt status."

similar cases, and after the Government lost in both this Court and the Court of Appeals on its claim that the conduct alleged in this Plaintiff's Complaint did not constitute an actionable violation of Plaintiff's constitutional rights, the IRS was informed by the DC Circuit on August 5, 2016, in *True the Vote* that it could not secure dismissal of any of these cases unless the practices challenged had definitively ended. That decision was issued after counsel for the Government, attempting to persuade the Court of Appeals that that case was moot, admitted that two applications for 501(c) status had still not been processed. See 831 F.3d at 561. Apparently, Z STREET was one of the two; a few days after that decision was issued, Plaintiff was informed by the Justice Department that its processing of its application for 501(c)(3) status would resume. See Marcus Decl. ¶7.

Two months after receiving notice that processing of its application would resume, Plaintiff was informed that its application for 501(c)(3) status had been granted. Marcus Decl. ¶8. At no time had the Government requested any additional information from Plaintiff of any kind. Marcus Decl. ¶10. From this it necessarily follows that the information in the Government's possession in June of 2010 was sufficient to enable it to determine that Plaintiff was in fact entitled to tax-exempt status, and that that determination could be made – because it was made – in about sixty days.

In *True the Vote* itself, the DC Circuit took judicial notice of the findings of the Inspector General without any qualification or limitation of that reliance by the Government. Here, however, it is different. When Plaintiff invoked the Inspector General's findings in Plaintiff's Motion to Compel Discovery, filed after briefing and oral argument in *True the Vote*, the Government explicitly informed this Court that, at least as far as this case is concerned, the IRS has *not* acquiesced in the findings of the Inspector General. Rather, the IRS has taken the

position that "the IRS disputed in part the investigative report [citation omitted], and it is therefore not the proper subject of judicial notice." IRS Mem. In Opposition to Plaintiff's Motion to Compel Discovery, at 9.

THE *True the Vote* DECISION

True the Vote v. Internal Revenue Service challenges the constitutionality of the IRS's treatment of applications for tax exempt status as charitable or educational institutions under Internal Revenue Code Sections 501(c)(3) and (c)(4). "Instead of processing these applications in the normal course of IRS business, as would have been the case with other taxpayers, the IRS selected out these applicants for more rigorous review on the basis of their names, which were in each instance indicative of a conservative or anti-Administration orientation." *True the Vote, Inc. v. Internal Revenue Service*, 831 F.3d 551, 555 (D.C. Cir. 2016) .

"After the initiation of the suits, the Internal Revenue Service took action to end some unconstitutional acts against at least a portion of the plaintiffs." Specifically, "the IRS has stopped using its admittedly improper discriminatory criteria and handling of applications by taxpayers with politically disfavored names." *Id.* at 558-559. Significantly, as the DC Circuit explained, "The IRS has, obviously, taken no action to disavow or discredit the report of investigation by its parent department." *Id.* at 559. Because this was the state of affairs, and in light of the IRS's position admitting it had engaged in the practices at issue, the district court dismissed the Plaintiffs' claims as moot.

With respect to their claims for injunctive and declaratory relief, the Court of Appeals reversed. It did so for two reasons, each of which was sufficient on its own to compel that result.

First, while the IRS claimed it had ended the improper practices that had made it necessary for the plaintiffs to bring the case, the agency conceded that two entities still had not

had their applications for tax exempt status adjudicated – even though the crux of the plaintiffs' claims was delay in such processing. The DC Circuit held that the Government could not claim that its practice of delay had ended if some parties were still being delayed. 831 F.3d at 562.

But this was not the only basis for the Court of Appeals's decision. Rather, the Court noted that the Government had, at best, suggested only that certain improper policies have been "suspended until further notice" 831 F.3d 562-63. That is not enough, as the DC Circuit made clear in that decision, holding

> Even if we assumed there was voluntary cessation, we would still conclude that the government has not carried its burden to establish mootness because it has not demonstrated that "(1) there is no reasonable expectation that the conduct will recur [or] (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Qassim, 466 F.3d at 1075* (quoting *Motor & Equip. Mfrs. Ass'n, 142 F.3d at 459*).

The Court of Appeals explained:

> As applied in the context of injunctive litigation, if there remains no conduct to be enjoined, then normally there is no relief that need be granted, the case or controversy has ceased, and the jurisdiction of the court has expired under Article III. However, there is a difference between the controversy having gone away, and simply being in a restive stage. This difference gives rise to the concept of "voluntary cessation." That concept governs the case in which the defendant actor is not committing the controversial conduct at the moment of the litigation, but "the defendant is 'free to return to [its] old ways'--thereby subjecting the plaintiff to the same harm but, at the same time, avoiding judicial review." *Qassim v. Bush, 466 F.3d 1073, 1075, 373 U.S. App. D.C. 295 (D.C. Cir. 2006)* (quoting *United States v. W.T. Grant Co., 345 U.S. 629, 632, 73 S. Ct. 894, 97 L. Ed. 1303 (1953))* (additional citations omitted). For a defendant to successfully establish mootness by reason of its voluntary cessation of the controversial conduct, the defendant must show that "(1) there is no reasonable expectation that the conduct will recur and (2) interim relief or events have completely and irrevocably [**20] eradicated the effects of the alleged violation." *Id. at 1075* (quoting *Motor & Equip. Mfrs. Ass'n v. Nichols, 142 F.3d 449, 459, 330 U.S. App. D.C. 1 (D.C. Cir. 1998)).*

True the Vote at 561. Thus, even complete cessation of the challenged practice, if it is only cessation "until further notice," is not enough to render a case moot.

ARGUMENT

THIS CASE IS NOT MOOT

SUMMARY OF ARGUMENT

Both this Court and the Court of Appeals denied Defendants' Motion to Dismiss the Complaint in this case because – contrary to the Government's contention – this case was *not* an effort to obtain certification under Section 501(c)(3) of the Internal Revenue Code. Because that is so, award of such certification cannot moot the case: award of that status simply was not what the case was about.

Rather, as this Court recognized in denying the Motion to Dismiss, the case was brought to obtain two entirely different forms of relief: disclosure of what the IRS actually did, for over six full years, with Plaintiff's application for 501(c)(3) status (and what it did not do), and why; and the provision of a constitutionally valid process.

As of today, neither of these forms of relief has been awarded. In addition, along with injunctive relief compelling disclosure of the IRS's actual policy governing Plaintiff's application and those of any other organization connected with Israel, the fact remains that Plaintiff has been subjected for over six years to a categorical and irreparable denial of its First Amendment rights. Plaintiff is entitled to its day in court to prove that it suffered this deprivation; and if it is able so to prove, Plaintiff is entitled to nominal damages; to a declaratory judgment that it has been stripped of its rights in this way; and to award of attorney's fees and costs.

Moreover, the Government has not abandoned the practices challenged in this case. First, in contrast to the *True the Vote* case, the Government in this case does not even admit that it was doing what Plaintiff sued the Government for doing. And second, the Government has taken the

position in this case that it did not acquiesce in the Inspector General's findings – whereas in *True the Vote,* the Court of Appeals specifically noted that the Government was not dissenting in any way from those findings.

Third, even in *True the Vote* itself, the Government simply "suspended" the challenged practices "until further notice," and the DC Circuit held clearly a suspension was not enough to render a case moot.

Lastly, even if none of the above were true, this case is not moot because Plaintiff is entitled to declaratory and injunctive relief compelling the disclosure Plaintiff sought; awarding nominal damages, and awarding attorney's fees and costs.

I. NONE OF THE RELIEF SOUGHT IN THIS ACTION HAS BEEN OBTAINED

As this Court noted in its decision denying the Government's Motion to Dismiss, Z STREET seeks two forms of relief in this case: disclosure of what the Government actually has done to Z STREET's application for 501(c)(3) status, and a constitutionally fair process for adjudication of Z STREET's application.

A. Plaintiff Has Not Received the Disclosure Sought by the Complaint

There can be no possible claim here that disclosure has been obtained: discovery is still ongoing. All processing of Z STREET's application ceased when this case was filed – something which is itself a violation of Plaintiff's rights. Yet the documents produced by the Government in discovery are, overwhelmingly, from the period after this case was filed – and they reveal virtually nothing about what happened to Z STREET's application during the period when the Government was actually doing anything with it. We thus do not yet know what the Government did with Z STREET's application; what standards the application was actually subjected to that resulted in its being sent for special scrutiny; or what information the

Government focused on as the basis for its decision to treat Z STREET's application as it was in fact treated. Until we know all of these things, there can be no possible claim that the remedy of disclosure has been obtained.

B. There Is No Basis For A Determination That Plaintiff Received A Constitutionally Untainted Process

Neither can the government argue that Plaintiff has received the constitutionally valid process to which this Court, and the DC Circuit, have held Plaintiff is entitled. Although the Government has issued Plaintiff its 501(c)(3) status, we don't know why, or how that decision was made. We do know that it was made without the Government having any more information than it had in July of 2010, when it claimed it needed additional data to complete processing. See Marcus Decl. at ¶10. But we do not know what procedures the Government followed or what factors it considered in finally adjudicating Plaintiff's application. Until we know those things we cannot tell whether Plaintiff actually received a constitutionally valid process.

II. THERE HAS BEEN NO ADEQUATELY DEFINITIVE CESSATION OF THE CHALLENGED CONDUCT

The DC Circuit held clearly in *True the Vote* that the Government cannot establish mootness simply by announcing that, as of this moment, it is not doing the bad act that gave rise to Plaintiff's claims: suspension of the challenged policies as of now, and "until further notice," is not enough. 831 F.3 at 563. This was so, the Court of Appeals made clear, and would preclude a finding of mootness, even if every single applicant for 501(c) status had had its application adjudicated and even if all of the applications had been granted.

That holding is dispositive here all by itself, because the Government has certainly been no more definitive in this case than it was in that one that the practices challenged by this Plaintiff have ceased. There is absolutely nothing before this Court that would enable the Court

to conclude that "that "(1) there is no reasonable expectation that the conduct will recur [or] (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Qassim, 466 F.3d at 1075* (quoting *Motor & Equip. Mfrs. Ass'n, 142 F.3d at 459*)." 831 F.3d at 562-563.

Here, in fact, the situation is even further away from any possible claim of mootness, because the Government has explicitly taken the position that it has not abandoned the practices at issue. First, it claims – contrary to evidence already produced – that there is not, and that there never was, any special policy for handling applications relating to Israel. See Declarations of Diane Gentry (¶9) and Jon Waddell (¶6) submitted in support of the Government's Motion to Dismiss the Complaint.

Second, while the Government said nothing in its briefing or argument to prevent the DC Circuit from relying on, and adopting, the Inspector General's factual findings about the nature of the IRS's policies, in this case the IRS as indeed done just that. It has advised the Court, and the Plaintiff, that it "disputed" certain parts of the Inspector General's report. Brief in Opposition to Plaintiff's Motion to Compel Discovery, at 9. And the parts of the IG's report that the IRS disputed are central to the allegations in this case: they relate to the section of the IG's report entitled "Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review." See *id.*, citing IG Report at 43-48.

At this point it is not clear why the IRS has taken this position in this case while it seems to have taken a different position in *True the Vote*. Perhaps it is because the activities of the Plaintiff here are focused on Israel, while those of the plaintiffs in *True the Vote* were more directed at domestic policy. Perhaps it is that the Plaintiff here applied under Section 501(c)(3) while many of the Plaintiffs in *True the Vote* applied under (c)(4). Perhaps it is some other

factor altogether.

What we do know is that, not only has the government *not* definitively abandoned the practices that drove Plaintiff to bring this case; but that, as to the practices charged in this Complaint, the Government has not even admitted that it engaged in those practices. There clearly cannot be complete abandonment of a policy if the Government won't admit it has the policy in the first place. If the Government wants to defend itself from that charge by arguing that it cannot abandon a practice it never engaged in, then it must prove its factual defense, like any other plaintiff in any other case.

III. EVEN IF DISCLOSURE AND AN UNTAINTED PROCESS HAD BEEN PROVIDED, PLAINTIFF REMAINS ENTITLED TO A DECLARATORY JUDGMENT AND TO THE AWARD OF NOMINAL DAMAGES, AS WELL AS TO ATTORNEY'S FEES AND COSTS.

Even if full disclosure had been provided, and there were no remaining question about the constitutional propriety of the process by which Plaintiffs' 501(c)(3) status had been awarded, Plaintiff would still be entitled to nominal damages.[2]

The law on remedies for breach of a constitutional right was laid out by the Supreme Court in *Carey v. Piphus,* 435 U.S. 247 (1978). The claim there was that high school students had been suspended without having been accorded a hearing, in violation of their due process rights. The Court held that the students would be entitled to nominal damages even if they had no claim at all for actual damages, and even though the suspension had already been imposed

[2]As the Court recognized in *Aref v. Holder*, 953 F.Supp.2d 133, 149 (D.D.C. 2013), "a complaint's request for 'all other relief that the Court deems just and proper under the circumstances' was "sufficient to permit the plaintiff to pursue nominal damages." (quoting *Yniguez v. State*, 975 F.2d 646, 647 n.1 (9th Cir. 1992)). Plaintiff's Complaint makes that request in its WHEREFORE clause, ¶E.

and endured, and even if the evidence established that had been given the process they were due, they still would have been suspended:

> Even if respondents' suspensions were justified, and even if they did not suffer any other actual injury, the fact remains that they were deprived of their right to procedural due process. "It is enough to invoke the procedural safeguards of the *Fourteenth Amendment* that a significant property interest is at stake, whatever the ultimate outcome of a hearing...." *Fuentes v. Shevin, 407 U.S., at 87*; see *Codd v. Velger, 429 U.S., at 632* (STEVENS, J., dissenting); *Coe v. Armour Fertilizer Works, 237 U.S. 413, 424 (1915)*.

The appropriate solution in such a case, the *Carey* Court held, is the award of nominal damages:

> Common-law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.
>
> Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, see *Boddie v. Connecticut, 401 U.S. 371, 375 (1971)*;*Anti-Fascist Committee v. McGrath, 341 U.S., at 171-172* (Frankfurter, J., concurring), we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury. We therefore hold that if, upon remand, the District Court determines that respondents' suspensions were justified, respondents nevertheless will be entitled to recover nominal damages not to exceed one dollar from petitioners.

435 U.S. at 266-267 (footnote omitted).

This holding has been recognized as establishing the general principle that, where no other form of damage or remedy is available, a plaintiff who has suffered breach of a constitutional right is entitled to nominal damages. Thus, as the DC Circuit recognized in *Davis v. District of Columbia*, 158 F.3d 1342 (1998), "[t]he violation of certain constitutional rights, characterized by the Supreme Court as 'absolute,' *Carey*, 435 U.S. at 266, will support a claim for nominal damages without any showing of actual injury. *Id*. at 266-67." See also *Hobson v. Wilson*, 737 F.2d 1, 63 (DC Cir. 1984)(if plaintiffs "showed no element of compensatory injury,

or because no value could reasonably be placed on the particular injury demonstrated * * * , *Carey* instructs that the court may nonetheless award nominal damages for mere deprivation of constitutional rights"); *Elkins v. District of Columbia*, 610 F. Supp. 2d 52, 63 (D.D.C. 2009)(" Plaintiffs are entitled to nominal damages for the violation of their Fourth Amendment right to be free from unreasonable seizure.)

The same reasoning makes clear that Plaintiff is entitled to a Declaratory Judgment, even when no actual damages have been incurred or sought. "[F]ederal judges have authority to issue declaratory judgments even when, as is the case here, no damages or injunctive relief is sought." *Bowen v. Cheuvront*, 516 F. Supp. 2d 1021, 1026 (D. Neb. 2007). See also *EA Indep. Franchisees Ass'n, LLC v. Edible Arrangements*, 2011 U.S.Dist. LEXIS 78008, at *4 (D. Conn. July 19, 2011) (rejecting the view that "that the complaint does not support redressability because plaintiff limited its claim to declaratory relief and did not request damages").

The Plaintiff in this case suffered the loss of its First Amendment rights for over six years. Unable during that period to raise any funds for operations, the organization was unable to operate and so was completely silenced. There is no more definitive loss of the right to free speech than that.

That injury is irreparable, and no claim for money damages is pressed here. But it cannot be the law—and *Carey* makes clear that it is not the law – that the Government is *better off* causing irreparable harm, that cannot be monetized, than it would be if it had caused some other form of injury that could be reduced to dollars.

That is why a party in Plaintiff's position is entitled to declaratory relief, and to an award of nominal damages, if the Plaintiff can establish the truth of its factual claims. In that situation the Plaintiff would also be entitled to award of its attorney's fees and costs, as a prevailing party.

All such claims are still alive in this case. The Government cannot take these claims away, and render the Plaintiff's claim moot, simply by deciding that it has violated Plaintiffs' constitutional rights for long enough.

CONCLUSION

For all the foregoing reasons, this case is not moot.

Dated: November 11, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 11, 2016, I filed Plaintiff's Memorandum Showing Cause Why This Case Is Not Moot with the Clerk of Court using the CM/ECF system, which will send notice of this filing to all parties registered to receive such notice.

/s/ *Jerome M. Marcus*

Jerome M. Marcus