IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Z STREET,	:	
Plaintiff,	:	No. 2:10-cv-04307-CMR
v.	:	
DOUGLAS H. SHULMAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF INTERNAL REVENUE,	:	
Defendant.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page**

STATUTES AND OTHER AUTHORITIES

INTRODUCTION

The Government's effort to get this case thrown out rests squarely on a refusal to acknowledge what the case is about. The Complaint here does not seek to prevent the Government from collecting a tax, or from subjecting Plaintiff to a procedure which will result in the collection of a tax. Instead, the Complaint asks the Court to compel disclosure of the substance of an IRS process, and to stop the IRS from impermissibly considering the viewpoint of applicants for charitable organization status. Total victory by Plaintiff in this case will not determine whether or not a tax is due: it will only establish a constitutionally valid process, and publicly disclose what the IRS has been doing, behind closed doors, on this issue until now. Because that is so, the case is not barred by any statutory or other protection of the Internal Revenue Service, and the Complaint should not be dismissed.

The Complaint validates its charge that the IRS is impermissibly considering viewpoint with, among other things, written evidence created by the Government – evidence that the Government's submissions to this Court completely ignore – demonstrating that, as part of its process for determining whether to grant such status, the Service is seeking information, from purely domestic, religious organizations, about the organizations' "religious belief system toward the land of Israel." This is pure viewpoint discrimination, with no connection to any valid terror suppression goal, and it is a clear violation of the First Amendment.

In contrast to the cases the Government adduces in support of its argument, this case seeks nothing but an injunction barring deployment of this tainted process, and revelation to the public of the substance of the policy animating that process. Because no relief sought here would prevent the IRS from determining, or collecting, a tax liability, the Government's cases construing the Anti-Injunction Act are irrelevant.

Indeed an *en banc* decision by the District of Columbia Court of Appeals in July of this year, *Cohen v. United States*, 2011 U.S. App. LEXIS 13382 (D.C. Cir., July 1, 2011), holds squarely that the federal courts do indeed have the power to enjoin the Internal Revenue Service from deploying a legally invalid policy. In numerous, directly relevant holdings – all of which are left curiously ignored by the Government[1] – the *Cohen* case addresses and rejects every one of the arguments made by the Service to this Court. Sovereign immunity, the *Cohen* court holds, is indeed waived, by 5 U.S.C. 702. The Anti-Injunction Act's proscription on courts' enjoining tax collection does not apply when, as here, the claim attacks a generally applicable process rather than a single exercise by the Service of its power to collect tax. For the same reason, the D.C. Circuit explains in *Cohen*, a plaintiff attacking an IRS policy, rather than trying to prevent the IRS from collecting a tax from that specific plaintiff, need not make the showing required by *Enochs v. Williams Packing & Navigation Co., Inc.*, 370 U.S. 1 (1962), upon which the Government spends so much of its own submission to this Court.

A separate line of cases exemplified by *Linn v. Chivatero*, 714 F.2d 1278 (5th Cir. 1983), yields the same result, equally fatal to the Government's arguments here. *Linn* holds that the Anti-Injunction Act does not apply when the gravamen of a claim relates to enforcement of an independent right rather than to an effort to prevent collection of a tax. Applicable specifically to claims that a constitutional right is being violated by IRS action, these cases constitute an independently dispositive reason why the Complaint in this case states a valid claim and should be allowed to proceed.

[1] The Government referenced the case once, in a footnote on page 14 of its brief, for a single, tangentially relevant issue. The holdings of the court, and the D.C. Circuit's scholarly and categorical rejection of every single substantive argument made by the United States in its brief to this Court, are not addressed at all in the Government's submission to this Court.

THE FACTS ACTUALLY AT ISSUE AND THE CLAIMS ACTUALLY PLED

Because the Government distorts the facts and claims at issue in this case, it will be well to begin by making clear what the case is actually about, as pled in the Amended Complaint.

Z STREET is a nonprofit corporation whose sole activity is speech inside the United States. It engages in absolutely no activity of any kind outside of the United States. It funds no activities, anywhere, other than speech in the United States. Nothing on Z STREET's website has ever provided any reasonable basis for the belief that Z STREET engages in any funding activities other than such speech. Amended Complaint ¶9.

After Z STREET filed an application with the Internal Revenue Service to be recognized as a charitable organization under Section 501(c)(3) of the Internal Revenue Code, Z STREET's counsel received a letter dated May 15, 2010, from IRS Agent Diane Gentry, identifying herself as the IRS agent to whom Z STREET's application had been assigned. Z STREET was required on three separate occasions to provide detailed personal information about each Z STREET board member. Amended Complaint ¶15.

Z STREET's counsel spoke with Agent Gentry on July 19, 2010, and during that conversation Gentry advanced several concerns ostensibly animating the IRS's processing of Z STREET's 501(c)(3) application. None of the concerns had any factual basis in Z STREET's actual activities, its application, its website, or any other manifestation of reality. Thus, for example, Gentry expressed concern that Z STREET engages in "lobbying" or presses for legislation. Amended Complaint ¶18. In fact, however, "none of Z STREET's purposes can be accomplished through legislative action." Amended Complaint ¶19.

The Amended Complaint explicitly alleges that "Agent Gentry also informed Z STREET's counsel that the IRS is carefully scrutinizing organizations that are in any way

connected with Israel." Amended Complaint ¶23. Directly quoting Agent Gentry, the Amended Complaint alleges that Gentry stated: "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." Amended Complaint ¶24.

The suggestion that the Government would so treat 501(c)(3) applications, though obviously quite disturbing, was not without explicit public foundation. A *New York Times* article[2] had run at just this time, reporting that the Obama administration was indeed focused on the extent to which U.S. entities with charitable status might be funding activities inconsistent with the administration's policy goals in the Middle East. The article noted the administration's specific concern over U.S. charities which fund schools, synagogues, recreation centers – but also guard dogs and bulletproof vests – for communities in the disputed territories commonly referred to as the West Bank, which the Obama administration has consistently pressed Israel to turn over to Arabs, for the creation of another Arab state in the region. A "senior State Department official" is quoted by the *Times* as saying that such funding "is a problem" because "[i]t's unhelpful to the efforts that we're trying to make." The article is attached hereto as Exhibit A.

The senior State Department official's quoted statement, of course, is entirely consistent with what the Amended Complaint says Agent Gentry told Z STREET's counsel: that the IRS is concerned about charitable entities using 501(c)(3) status to promote activities inconsistent with "the efforts that we" – i.e., the Obama administration – are "trying to make."

[2] Z STREET's counsel provided this article to her client directly after having her conversation with Agent Gentry, because she understood it to illustrate the point Gentry was making about the Service's concerns with Z STREET's application.

The Amended Complaint further alleges facts making clear that the justification advanced by the Government for its actions, in its various submissions in this case, have absolutely no factual basis. Amended Complaint ¶¶30-35. Thus, statements submitted by the Government in support of its earlier Motion to Dismiss the Complaint suggested that the treatment of Z STREET's 501(c)(3) application was driven by specific concerns about the way applicants handle funds. But the Government has never sought any information about the way Z STREET handles funds (Amended Complaint ¶¶30, 33-36); nor has Z STREET ever received from the Government any of the guidelines which the IRS suggests in this case it must disseminate to applicants when the dissemination of funds is an Agency concern. Finally, neither Z STREET's application or supplementary application for exemption from tax (which are attached hereto as Exhibits B and C), nor Z STREET's website provides, or has ever provided, any reasonable basis for the belief that Z STREET engages in any funding of any person, entity or activity outside of the United States. Amended Complaint ¶39.

This absence of any Agency action consistent with the justification advanced in court for an Agency policy would itself raise serious concerns about whether the Agency was being truthful to this Court. But the Amended Complaint alleges much more: supported by a letter signed by IRS Agent Tracy Dornette, which is attached as an Exhibit to the Amended Complaint, plaintiff alleges that a far simpler, but darker, principle is animating the IRS's action – and it is a principle completely consistent with what Agent Gentry said to Z STREET's counsel.

Addressed to a purely religious United States charity, which engages in no activity outside the United States and no political activity of any kind (Amended Complaint ¶38), Dornette's letter informs an applicant for 501(c)(3) status that in order to process that application the IRS must be told the answers to the following questions:

a. Does your organization support the existence of the land of Israel?

b. Describe your organization's religious belief system toward the land of Israel.

Amended Complaint ¶36. These questions, stated in writing by Agent Dornette and attached to the Amended Complaint, are entirely consistent with Plaintiff's version of Agent Gentry's remarks. They are entirely ***in***consistent with the version of the facts put forward by the IRS's employees in this case, or with the Government's more abstract justification of, and characterization of, the IRS policy here at issue.

Agent Dornette has submitted no statement in this case, so there is no denial here that she wrote what she wrote, and no effort to justify those questions or explain why some special circumstance rendered them appropriate. Indeed, the Government has said absolutely nothing, even through its counsel, about Dornette's letter; about how it could possibly be that the IRS would have a legitimate basis for asking for such information; about how it is possible to square Dornette's letter with the Government's factual account of what is animating the IRS policy here at issue; or about the clear evidentiary support Dornette's letter provides to Plaintiff's account of what the IRS is doing, or of what Agent Gentry said to Z STREET's counsel. The Amended Complaint is accordingly left uncontradicted as far as the details of its allegation "that the substance of the policy governing the IRS's processing of Z STREET's application from tax relates to the content of Z STREET's speech regarding Israel and Zionism and not to any of the concerns espoused by the Government in the Government's defense of this case." Amended Complaint ¶40. That is a factual allegation, which can be proven or disproven through examination of the IRS's documents and witnesses.

The Government has issued a general and global denial of this factual claim, and has asserted the contrary, both through its counsel in its briefs to this Court and in the Declarations submitted by IRS personnel. But at best for the Government, this leaves a factual dispute.

Finally, the claims in this case seek relief not simply for Z STREET, relating to its own 501(c)(3) application or any other individual tax issue. Rather, the Amended Complaint seeks a Declaratory Judgment that the Israel Special Policy violates the First Amendment, and a request "for injunctive relief barring application of the Israel Special Policy to Z STREET's application for tax-exempt status or to similar applications by any other organization; and to compel full public disclosure regarding the origin, development, approval, substance and application of the Israel Special Policy." Amended Complaint, Introduction ¶B.

ARGUMENT

The Government's attack on this case reflects the IRS's claim to an immunity from judicial scrutiny that is far greater than the law actually allows. Although a review of governing cases makes clear that the IRS consistently presses for such an inflated right to engage in unreviewable action, the cases also make clear that the Service's efforts are consistently unsuccessful.

I. TWO LINES OF CASES, THE HOLDINGS OF WHICH THE GOVERNMENT MAKES NO EFFORT TO ACKNOWLEDGE, MAKE CLEAR THAT PLAINTIFF'S CLAIM SHOULD NOT BE DISMISSED

Two lines of cases make clear that, while the IRS routinely presses in court for the complete immunity from judicial scrutiny it seeks in this case, such claims are routinely rejected by the courts.

A. The Cases Hold That the IRS is Properly Subject to Judicial Scrutiny, and that its Actions are Properly Subject to Injunctive Relief, When a Generally Applicable IRS Policy is at Issue.

In a detailed decision handed down on July 1 of this year, the District of Columbia Circuit, sitting *en banc,* rejected every single one of the arguments the Government advances here. *Cohen v. United States,* 2011 U.S. App. LEXIS 13382 (D.C. Cir., July 1, 2011) (*en banc*). The issue in *Cohen* was the validity of a procedure the IRS had created for taxpayers to seek a refund of certain tax payments that earlier litigation had established were improper. The plaintiffs in *Cohen* claimed the procedure was legally inadequate, and sought injunctive relief barring the IRS from subjecting taxpayers to the assertedly infirm process.

As it does in this case, the IRS took the position that the courts were without power to enjoin the Service, and that if taxpayers believed the procedure was invalid they must submit to it and then, when it had concluded, challenge the result in court. In the course of rejecting this argument, the D.C. Circuit's *en banc* opinion evaluates – and disposes of -- every one of the arguments the Service makes here.

A few paragraphs at the beginning of the *Cohen* court's analysis were deemed sufficient to dispose of the sovereign immunity argument advanced there, and here, by the IRS. The D.C. Circuit held that 5 U.S.C. §702 is indeed a formal waiver of sovereign immunity, and that "the IRS is not special in this regard; no exception exists shielding it--unlike the rest of the Federal Government--from suit under" this provision. 2011 U.S. App. LEXIS 13382 at *13. *See also Clark v. Library of Congress,* 750 F.2d 89 (D. C. Cir. 1984) (§702 waives sovereign immunity for non-monetary claims).

The essence of the D.C. Circuit's holding is that the challenge there at issue to an IRS procedure is not an effort to "restrain the assessment or collection of any tax." *Cohen,* at *19. Because that is so, the Anti-Injunction Act is simply inapplicable.

> The AIA has 'almost literal effect": It prohibits only those suits seeking to restrain the assessment or collection of taxes. *Bob Jones,* 416 U.S. at 737 (quoting *Williams Packing*, 370 U.S. at 6-7); *see also Hibbs*, 542 U.S. at 102-03.

Cohen, at *17. Thus the *Cohen* court focused on whether the result of the case, and the substance of the injunctive relief sought, would determine whether a tax was due: if it would, the case would be barred by the Anti-Injunction Act; if it would not, there is no bar. *Cohen* thus also referenced *Alexander v."Americans United" Inc*., 416 U.S. 752, 762 n.13 (1974) (holding a suit for injunctive relief barred by the AIA because "[s]o long as the imposition of a federal tax, without regard to its nature, follows from the Service's withdrawal of § 501(c)(3) status, [injunctive relief is barred and] a refund suit following the collection of that tax is an appropriate vehicle for litigating the legality of the Service's actions under § 501(c)(3)."). *Id.* at *18.

Application of that standard here yields a clear result, because the relief in this case will absolutely not determine whether a tax is due. Contrary to the Government's submission, and as Z STREET has stated in every one of its submissions to this Court, this case does not seek a determination that Plaintiff is entitled to 501(c)(3) status. Rather, as in *Cohen*, this case seeks only a legally valid procedure. The result of that procedure is for another day.

Because this is the actual meaning and scope of the Anti-Injunction Act, and because this case challenges only a generally applicable IRS procedure rather than asking for a specific tax result for the Plaintiff, the entire apparatus created by the Supreme Court in *Williams Packing* is irrelevant here. In *Enochs v. Williams Packing & Navigation Co., Inc.,* 370 U.S. 1 (1962), a taxpayer sought to enjoin the Internal Revenue Service from forcing it to make a specific tax

payment, on the theory that the tax was not due but that, if forced to pay and then sue for a refund, the taxpayer's business would be destroyed. The Supreme Court held that such a suit, which was explicitly for an injunction barring the collection of a tax, was precluded by the clear words of the Anti-Injunction Act. Even then, however, the Supreme Court created an exception to this categorical bar "if it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and **the attempted collection may be enjoined** if equity jurisdiction otherwise exists." 370 U.S. at 7 (citation omitted; emphasis added). [3]

We add the emphasis to the above quotation of the holding in *Williams Packing* to call the Court's attention to a point driven home by the D.C. Circuit in *Cohen*: that the Anti-Injunction Act itself, and therefore the judicially created exception to that statute's command, relate to "the attempted collection" of a tax. *Cohen* makes the force of that limitation clear in its holding that the AIA "prohibits **only** those suits seeking to restrain the assessment or collection of taxes." *Cohen* at *17 (emphasis added).

To be sure, common sense is sufficient to lead courts to include within this mandate those cases seeking to stop the IRS from taking action other than the actual extraction of money from a bank account to pay a tax. Thus, for example, in *Judicial Watch v. Rossotti*, 317 F.3d 401 (4th Cir. 2003), the Fourth Circuit held that the AIA barred an injunction preventing the IRS from auditing an entity, notwithstanding the entity's claim that the audit was commissioned only

[3] Solely on the strength of its version of the facts – namely, its denial that its personnel said what plaintiff says they said, or that the Agency is doing what plaintiff alleges it is doing – the Government argues that plaintiff cannot meet the *Williams Packing* exception to the Anti-Injunction Act. As we show in this section of our brief, the AIA is itself irrelevant here, so no exception from its strictures need be established. Plaintiff also argues, however, below in Section II, that once the evidentiary standard is rightly understood, Plaintiff can satisfy the *Williams Packing* exception if the Court were to deem that necessary.

because the entity was a political opponent of the presidential administration.[4]

This distinction, between an attack on IRS policy – which may go forward -- and an effort to stop IRS action against an individual taxpayer when such action is part of the Service's tax collection process – which may not go forward -- is also reflected in the observation by the *Cohen* court that numerous facial constitutional challenges to IRS action have been permitted:

> this court has allowed constitutional claims against the IRS to go forward in the face of the AIA. Thus, in *We the People Foundation, Inc. v. United States*, we held the AIA "[b]y its terms," did not bar "a straight First Amendment Petition Clause claim," 485 F.3d 140, 143, 376 U.S. App. D.C. 117 (D.C. Cir. 2007) (Kavanaugh, J.), even though it did bar a tax collection claim "couched . . . in constitutional terms," *id.*; *see also, e.g, Foodservice & Lodging Inst.*, 809 F.2d at 846 n.10 (allowing APA challenge to IRS tip regulation).

Id. at *****23-24. Indeed, *Cohen* makes the point quite categorically:

> The principle the case law elucidates is therefore quite simple: The AIA, as its plain text states, bars suits concerning the "assessment or collection of any tax." It is no obstacle to other claims seeking to enjoin the IRS, regardless of any attenuated connection to the broader regulatory scheme.

Id. at *24. That clear statement is sufficient on its own to dispose of the Government's motion, for the simple reason that this case does not ask the Court to bar the assessment or collection of

[4] Even here, for every case refusing an injunction on this ground, there is another granting one. See, *e.g., Davis v. Rucker*, 2002 U.S. Dist. LEXIS 18379 (M.D. Fla., 2002) (permitting Fifth Amendment claim for injunctive relief against the IRS for its unconstitutional use of a blacklist); *Retirement Care Assoc. v. United States*, 3 F. Supp.2d 1434, 1441 (N.D. Ga., 1998) (denying IRS's request for summary judgment because "Plaintiffs are attempting to prohibit illegal actions by IRS agents rather than merely to restrain the collection of taxes"). As the D.C. District Court held in *The Founding Church of Scientology, Inc. v. Director*, 1984 U.S. Dist. LEXIS 17064 at *6 (D. D.C., 1984):

> defendant's approach would shield the IRS not only from those plaintiffs seeking to thwart the tax collection process but also from litigants who do not sue as aggrieved taxpayers and to whom the availability of a tax refund suit means little. The protective purpose of the Act does not require total insulation of the IRS from accountability for its actions, and, in this Court's view, such a result would be untenable.

any tax.

B. The Authorities Also Allow Injunctive Relief, Even to an Individual Taxpayer, When Necessary to Prevent an Ongoing Violation of Constitutional Rights

The *Cohen* decision alludes to another line of cases, centered on the Fifth Circuit's decision in *Linn v. Chivatero*, 714 F.2d 1278 (5th Cir. 1983), which are also independently sufficient to require denial of the Government's motion. Founded on enforcement of the Fourth Amendment right barring the Government's access to personal papers without either a valid warrant or consent, these cases grant injunctive relief, compelling the IRS to return documents, when the Service has obtained them without valid compulsory process if consent is lacking. As the Fifth Circuit explained in a later case applying *Linn* to reject the IRS's invocation of the Anti-Injunction Act,

> a court must look to the "primary purpose" of the lawsuit to decide whether the statute prohibiting courts from restraining the collection of federal taxes would apply. *Linn v. Chivatero*, 714 F.2d 1278, 1282 (5th Cir. 1983). In *Linn* we held the Anti-Injunction Act did not apply because the purpose of the suit was the recovery of unlawfully seized property, with only an incidental connection to taxation

Pendleton v. Heard, 824 F.2d 448, 451-52 (5th Cir. 1987). Numerous cases follow this clear rule, and use it to distinguish cases where the plaintiff's true goal is to impede tax collection from those where some other principle is at stake. If indeed some other principle is driving the case, then injunctive relief will be allowed even if there is some incidental effect on tax collection. *Retirement Care Assoc. v. United States*, 3 F. Supp.2d 1434, 1441 (N.D. Ga. 1998); *Laviage v. Lyons*, 1993 U.S. Dist. LEXIS 7735 (S.D. Tex. March 19, 1993); *Marshall v. Duncan*, 1984 U.S. Dist. LEXIS 15796 (N.D. Tex. June 19, 1984)(denying dismissal on the basis of the Anti-Injunction Act because "Plaintiffs have alleged an interest other than restraining the collection of taxes"); *See also Lowrie v. United States*, 824 F.2d 827 (10th Cir. 1987) (granting dismissal

because "[i]t is clear to us that the purpose behind Lowrie's suit, as it relates to IRS, is not one for the mere return of copies of records then in the possession of IRS * * * [and] he candidly admits that his purpose in seeking the return of the copies now held by IRS is to head off action against him, of whatever nature, by the IRS").

The constitutional right here at issue is violated by what the IRS is doing right now – imposing a different, more intense, more time-consuming process for certain 501(c)(3) applications on the basis of the viewpoint espoused by the applicant.

The Government's brief suggests that a tax exemption is a privilege rather than a right, Br. at 11-12; the implication, though it is unstated, is that because no-one could compel the sovereign to exempt charitable entities from tax, therefore no constitutional right could be abridged if the exemption were denied. The argument is left unstated by the Government because once made explicit, it is clearly wrong. The claim here is not that the Constitution requires grant of a charitable exemption from tax; it is that once the United States decides to grant charitable exemptions from tax, it must do so in a viewpoint neutral manner. *See, e.g., Clark v. Library of Congress,* 750 F.2d 89 (D.C. Cir. 1984) (Government employment, though not an entitlement, may not be allocated on the basis of the political views of the employee); *Sons of Confederate Veterans v. Atwater,* 2011 U.S. Dist. LEXIS 34104 (M.D. FL March 30, 2011) (First Amendment bars viewpoint discrimination in the operation of a vanity license plate regime, even though there is clearly no First Amendment entitlement to a vanity license plate). As the court explained in *Molokai Veterans Caring for Veterans v. County of Maui,* 2011 U.S. Dist. LEXIS 46405, *56-*57 (D. HI April 28, 2011):

> Defendants contend that the alleged threat does not support a plausible claim because MVCV was not legally entitled to the building permit * * * . The United States Supreme Court, however, has recognized that, even where the Government could deny an applicant a benefit for any number of legitimate reasons, the Government may not base

> the denial on a reason that violates the applicant's constitutional rights, such as his First Amendment rights. *See Perry v. Sindermann*, 408 U.S. 593, 597, (1972), overruled on other grounds, *Rust v. Sullivan*, 500 U.S. 173 (1991).

That is also why the "remedies" which the Government claims are adequate, thereby rendering injunctive relief inappropriate, are in fact not adequate at all. The Government points to various procedures by which Z STREET can cause a court to decide whether Z STREET is entitled to a charitable exemption. But entitlement to the exemption is not the issue in this case: entitlement to an unbiased process, and disclosure of the tainted process now in place, are the only things at stake here.

Indeed, the Government does not ever come out and argue that it is constitutionally permissible for the IRS to allocate charitable exemptions in a process that takes longer for entities espousing one political viewpoint than for those espousing other political views. Such a difference in adjudication time, the Government essentially admits, would indeed constitute viewpoint discrimination. This is true, the Government does not deny, even if the longer period, which the disfavored entities were subjected to, is less than the 270-day period established by 26 U.S.C. §7428.

Once that principle is clear, the inadequacy of the "remedies" proposed by the Government is also plain. The lawsuits the IRS wishes Z STREET to bring instead of this case will adjudicate Plaintiff's entitlement to an exemption; but they will leave undone the only two things this case was brought to achieve. They cannot remedy the differential in processing time imposed by the IRS's discriminatory policy; and they cannot yield disclosure of the substance of that discriminatory policy. Yet those two forms of relief are the only remedies sought by Z STREET. Because the claims proposed by the IRS cannot possibly yield the only forms of relief sought by the instant Complaint, those claims are not adequate remedies that justify dismissal of

this case. Indeed, this is the principle underlying *South Carolina v. Regan*, 465 U.S. 367 (1984), which applies the *Williams Packing* exception: when the case being attacked is the only way for plaintiff to obtain meaningful relief, the case will be allowed to go forward.

II. THE GOVERNMENT IMPROPERLY ASKS THE COURT TO REJECT PLAINTIFF'S VERSION OF THE FACTS, AND TO SUBSTITUTE DEFENDANTS', WHEN NO RULE OR CASE PERMITS SUCH A PROCEDURE AND WHERE THE GOVERNMENT'S VERSION OF THE "FACTS" IS INCOHERENT AND TOTALLY UNFOUNDED

Completely misreading cases allowing a factual attack on subject matter jurisdiction to be resolved at a case's threshold, the Government asks the Court to reject Plaintiff's version of the facts and instead to substitute the defendant's version. On the strength of declarations by Defendant's witnesses saying they did nothing wrong, the Court is asked to find as a fact that nothing wrong was done, and therefore that this Court has no jurisdiction over the subject matter of this case.

Not only do the authorities not permit such a procedure: Defendant's own cases make clear that this is not the law. Thus in the principal Third Circuit authority on which the Government relies, *CNA v. United States*, 535 F.3d 132 (3d Cir. 2008), the Government argued that the facts were such that subject matter jurisdiction was lacking. (The issue was whether a government-affiliated person had been acting within the scope of his governmental role when he committed the tort at issue.) The Third Circuit affirmed dismissal on the strength of the Government's facts precisely because "[t]here are here no factual disputes that are here relevant to determining subject matter jurisdiction." 535 F.3d at 145.

In this case, by sharp contrast, there are indeed material – indeed, dispositive -- factual disputes. Quoting an explicit statement to this effect by Diane Gentry, an IRS employee, made to Plaintiff's (non-litigation) counsel, the Complaint says the Government considers the political

viewpoint of applicants in determining whether to grant or withhold 501(c)(3) status. Gentry apparently now denies having said what the Complaint alleges she said. *See* Declaration of Diane M. Gentry, at ¶7. This is a factual dispute of the most basic and essential kind. No case requires, or allows, the Court to simply reject Plaintiff's version of the facts and to embrace the Defendant's.[5]

The cases invoked by the Government do say that, when a defendant makes a factual attack on subject matter jurisdiction, plaintiff's allegations, and all inferences logically drawn therefrom, are no longer assumed to be true. But this does not mean that the **defendant's** allegations are assumed to be true; if that were the case then no defendant could ever lose a motion to dismiss making a factual attack on subject matter jurisdiction. The defendant could always have a witness swear to a version of the facts under which subject matter jurisdiction was lacking, and there would be nothing anyone could do in opposition.

The law's reality, as well as the teaching of common sense, is that if a defendant disputes the factual predicate for subject matter jurisdiction, and contravenes factual allegations made by the plaintiff to support subject matter jurisdiction, then the facts must be investigated in discovery. Discovery can even be limited to such factual issue. But – so long as plaintiff has made a factual claim which, if true, would support the exercise of jurisdiction – the factual

[5] Jon Waddell, another IRS employee, justifies the referral of Z STREET's application for 501(c)(3) status to the TAG group by suggesting that the application "indicated that Z STREET could be providing resources to organizations within Israel or facilitating the provision of resources organizations within the state of Israel." Waddell Dec. at ¶3a. In fact the application and supplementary application, which are attached hereto as Exhibits B and C, says absolutely nothing about providing resources to organizations in Israel (or providing resources to anyone anywhere). The only thing the application shows is that Z STREET speaks about Israel – and of course it, and the additional data requested by the IRS, reveal the substance of the viewpoints Z STREET expresses.

dispute must be investigated and resolved. No case says that the Court must take, as dispositive, the Government's word on disputed factual questions.[6]

There is in addition yet another reason why dismissal would not be appropriate here without affording Plaintiff the opportunity to take discovery, so that the Court can make an informed factual determination about whether Plaintiff's version of what the Agency is doing, or the Defendant's, is the truth. That is the principle that if a jurisdictional issue and a factual issue on the merits overlap, a Court cannot make the factual finding on a Rule 12(b)(1) motion because such a finding would also determine a factual issue which is binding on the merits of the case. Such a decision would not comply with the procedural protections mandated by Rule 12(b)(6), which require the court adjudicating a motion to dismiss for failure to state a claim to assume that all facts in the Complaint are true; it would also vitiate the principle that a motion for summary judgment must be denied if there is a genuine issue of material fact. *See CNA*, 535 F.3d at 143-45.

In this case the intertwining and overlapping are complete: whether the IRS has violated the First Amendment, by engaging in viewpoint discrimination among applicants for a 501(c)(3) exemption turns on precisely the same factual inquiry as the one invoked by the Government as the basis for its claim that subject matter jurisdiction is lacking – namely, its claim that it simply is not doing what Plaintiff accuses it of doing.

Thus the law governing here is that, because the merit issue is intertwined with the jurisdictional issue, the issue must be decided along with the merits issue after the benefit of

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[6] Of course, if, as in *CNA*, the Defendant's factual allegations are not inconsistent with the plaintiff's claims, then the Court could decide the motion, and dismiss the Complaint if the factual tableau composed of both Plaintiff's and Defendant's facts together suggested that subject matter jurisdiction was lacking.

discovery. *Id.* at 145. In *Mortensen v. First Federal Savings and Loan Association*, 549 F.2d 884 (3d Cir. 1977), for example, the Court vacated the district court's dismissal of the plaintiff's antitrust claim because the jurisdictional issue was intertwined with the merits of the case in an antitrust suit. The same result must be reached here.

Finally, the Government's factual argument fails for the additional reason that it is internally incoherent. Even after it has been recharacterized according to the Government's version of the facts, rather than Z STREET's, the Government's bizarre contention remains that Z STREET presents a risk of "hav[ing]" (whatever that means) "ties" (though we do not know what that means either) to a country that "ha[s] a heightened risk of terrorism." Br. at 8. The country of course, is Israel. The claim does not come close to justifying the Government action here at issue for the simple reason that the only "tie" Z STREET can be said to "have" to Israel is that Z STREET speaks – solely inside the United States – **about** Israel. The Government has no factual basis for contending that Z STREET does, or that Z STREET poses any risk that it ever will, engage in or fund any activity in Israel.[7] The Government's claim that it must investigate Z STREET's potential "ties" to something that makes it more likely that Z STREET is committing, or aiding the commission of, terrorist acts is completely irrational and totally imaginary. Because the Government can point to nothing other than Z STREET's speech about Israel, the Government has no factual or logical basis for its assertion that Z STREET has done

[7] We should not pass without comment the irony that, by saying Israel "has" a heightened risk of terrorism, the IRS lumps one of the United States' principal partners in opposing terror together with countries that officially promote terror, or whose residents, when they travel to the U.S., present a higher than normal risk of committing terrorist acts. The suggestion is irrational and without any factual basis. For a brief period, the Department of Homeland Security had actually, officially, placed Israel on the terror watch list. But the categorization was a "mistake" which has since been corrected – at least, it has been corrected outside the Internal Revenue Service. *See* http://www.jta.org/news/article/2011/07/06/3088429/israels-inclusion-on-terrorist-watch-list-was-a-mistake

something, or is something, associated with a heightened risk that Z STREET will commit, or support, a terrorist act. It therefore provides no justification or defense for any Government action at issue in this case.[8]

CONCLUSION

The evidence in Plaintiff's hands provides eminent basis for Z STREET's allegation that the Government is utilizing a gravely tainted process to allocate charitable exemptions from tax to organizations that have any articulated interest in Israel, and which espouse a particular set of views. The D.C. Circuit's decision in *Cohen v. United States*, and the Fifth Circuit's decision in *Linn*, make clear that the federal courts are open to police against such an abuse, if it really is happening, and they can only do so if the relief sought here is allowed. The "remedies" proposed by the Government as alternatives cannot yield the untainted process to which Plaintiff, and the public generally, are entitled; nor can they yield disclosure of whatever it is the IRS is actually doing about this issue.

For the foregoing reasons, the Court should deny the Government's Motion to Dismiss the Complaint. At a bare minimum, the Court should defer resolution of the motion until the parties have had the opportunity to take discovery regarding the factual question which the Government has placed at the heart of its motion: whether the IRS really is doing what Plaintiff says the IRS is doing. That question can only be resolved by this Court, in this case.

[8] It should also go without saying that the Government advances no contention that Z STREET's speech constitutes advocacy of violence, anywhere, by anyone against anyone else.

Dated: September 9, 2011

Respectfully submitted,

/s/

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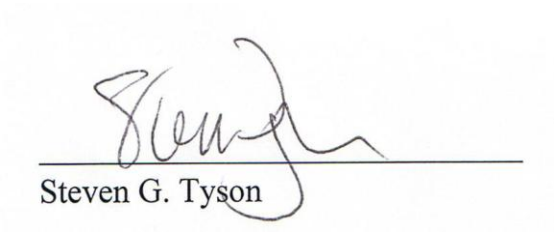
CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2011, I caused the foregoing Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Amended Complaint, along with any exhibits attached thereto, to be electronically filed and served via the CM/ECF system.



Steven G. Tyson