

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3 ----- X
4 Z STREET, :
5 Appellee, :
6 v. :
7 JOHN A. KOSKINEN, IN HIS : No. 15-5010
8 OFFICIAL CAPACITY AS :
9 COMMISSIONER OF INTERNAL :
10 REVENUE SERVICE, :
11 Appellant. :
12 ----- X

Monday, May 4, 2015
Washington, D.C.

14 The above-entitled matter came on for oral
15 argument pursuant to notice.

16 BEFORE:

17 CHIEF JUDGE GARLAND, CIRCUIT JUDGE TATEL,
AND SENIOR CIRCUIT JUDGE SENTELLE

18 APPEARANCES:

19 ON BEHALF OF THE APPELLEE:

20 JEROME M. MARCUS, ESQ.

21 ON BEHALF OF THE APPELLANT:

22 TERESA E. MCLAUGHLIN, ESQ.
23
24
25

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C O N T E N T S

ORAL ARGUMENT OF:

PAGE

Teresa E. McLaughlin, Esq.
On Behalf of the Appellant

3; 53

Jerome M. Marcus, Esq.
On Behalf of the Appellee

35

P R O C E E D I N G S

1
2 THE CLERK: Case 15-5010, Z Street v. John A.
3 Koskinen, In His Official Capacity As Commissioner of
4 Internal Revenue Service, Appellant. Ms. McLaughlin for the
5 Appellant; Mr. Marcus for the Appellee.

6 ORAL ARGUMENT OF TERESA E. MCLAUGHLIN, ESQ.

7 ON BEHALF OF THE APPELLANT

8 MS. MCLAUGHLIN: May it please the Court, good
9 morning, my name is Teresa McLaughlin, and with me is Ellen
10 DelSole, and we represent the Commissioner.

11 So, with the Court's permission to appeal the
12 Government is contesting the District Court's refusal to
13 dismiss this case on three grounds, that it's barred by the
14 Anti-Injunction Act, that Plaintiff's claims aren't yet ripe
15 or justiceable, and that even if there were something to
16 review now it would really be confined to the special
17 statutory review proceeding of a 7428 action, a Tax Court
18 deficiency action, or a suit for refund.

19 The Plaintiff alleges that the IRS has an Israel
20 special policy whereby no organization can obtain a tax
21 exemption under Section 501(c)(3) unless its views on Israel
22 are consistent with those of the current administration; it
23 wants injunctive relief against this --

24 JUDGE SENTELLE: That may overstate the argument.
25 Are they saying they can't get one, or are they just saying

1 the process is made more burdensome if they disagree of the
2 Israeli policy of the administration?

3 MS. MCLAUGHLIN: Well, one of the things that they
4 asked the Court to do, Your Honor, is to bar application of
5 the Israel special policy --

6 JUDGE SENTELLE: Yes.

7 MS. MCLAUGHLIN: -- to its --

8 JUDGE TATEL: Right.

9 MS. MCLAUGHLIN: -- application.

10 JUDGE SENTELLE: That's not inconsistent --

11 JUDGE TATEL: Right.

12 JUDGE SENTELLE: -- with what I just asked you.

13 JUDGE TATEL: But even if it's, even if that's
14 what it is as modified by Judge Sentelle, how could the tax
15 payer here, the organization, raise that in a 74, what is
16 it, 28 suit?

17 MS. MCLAUGHLIN: Well --

18 JUDGE TATEL: How could that be raised? How would
19 a court in that kind of suit have the ability to get at that
20 issue?

21 MS. MCLAUGHLIN: Well, a 7428 action applies not
22 only to where there's no determination after 270 days, but
23 also --

24 JUDGE TATEL: No, I understand that, but -- right,
25 but --

1 MS. MCLAUGHLIN: -- so --

2 JUDGE TATEL: Go ahead.

3 MS. MCLAUGHLIN: I'm sorry, Your Honor.

4 JUDGE TATEL: No, you finish. I'm sorry.

5 MS. MCLAUGHLIN: If the application were denied
6 because of an Israel special --

7 JUDGE GARLAND: What if it weren't denied?

8 JUDGE TATEL: That's not my question.

9 JUDGE SENTELLE: What if it weren't denied?

10 JUDGE TATEL: I want you to stick with my --

11 JUDGE SENTELLE: That's my point.

12 JUDGE TATEL: -- with my question, which is of
13 course if it's denied they can challenge it, but they sued
14 now, and asking you whether or not, how they could raise
15 this -- one of your arguments is as an alternative remedy,
16 7428, right?

17 MS. MCLAUGHLIN: Yes, Your Honor.

18 JUDGE TATEL: So, how could this, how would a
19 court have jurisdiction under 7428 to get at this question,
20 that is that they are being subject to a different standard
21 based on their viewpoint, which results in delay? That's
22 their argument, right?

23 MS. MCLAUGHLIN: Yes. Well, the --

24 JUDGE TATEL: Okay. So, how could that be raised
25 in a 7428 case?

1 MS. MCLAUGHLIN: Well, the 7428 action is
2 adjudicated on the administrative record.

3 JUDGE TATEL: Right, but --

4 MS. MCLAUGHLIN: Which would --

5 JUDGE TATEL: -- by definition it couldn't deal
6 with the delay problem, because you have to wait 270 days,
7 right?

8 MS. MCLAUGHLIN: Right. Well, delay --

9 JUDGE TATEL: Okay. So, well, stick with that.
10 Doesn't that mean that the 7428 action is by, on its own
11 face inadequate to deal with the delay question?

12 MS. MCLAUGHLIN: Well, at the time that it enacted
13 the 7428 remedy --

14 JUDGE TATEL: Yes.

15 MS. MCLAUGHLIN: -- really in response to the
16 Supreme Court's comment that --

17 JUDGE TATEL: Right.

18 MS. MCLAUGHLIN: -- you know, there is too much
19 delay in the process, Congress at the same time amended the
20 tax exception to the Declaratory Judgment Act to make an
21 exception to the ban on declaratory judgments with respect
22 to taxes in the case of a 7428 action. But if an
23 organization seeking an exemption could avoid the Anti-
24 Injunction Act in the 270 days before it becomes eligible
25 for the 7428 remedy then that amendment to the Declaratory

1 Judgment Act would be surplussage.

2 JUDGE TATEL: Well, but -- no, you're right about
3 that, but we're not talking about any tax payer, we're
4 talking about this tax payer and this complaint, and this
5 complaint alleges differential standards based on viewpoint
6 and a resulting delay, that's the only case we have before
7 us, and since you argue in your brief that, one of your
8 arguments is, is that there's an independent, or an adequate
9 remedy about 7428, I don't see how that's an alternative
10 remedy if for no other reason that you have to wait 270
11 days, and you haven't answered that question for me yet.

12 MS. MCLAUGHLIN: All right. Well, going to the
13 delay --

14 JUDGE TATEL: Yes. I mean, let me -- excuse me.
15 If this were like *Bob Jones* then I would agree with you
16 because, you know, well, maybe. But this is different from
17 *Bob Jones*, isn't it, because in *Bob Jones* it was a direct
18 relationship to the eligibility of the donors to deduct
19 their contributions. Here, they could win their case and
20 still not get a tax exemption for other reasons, correct?

21 MS. MCLAUGHLIN: I guess, I guess it's --

22 JUDGE TATEL: Right.

23 MS. MCLAUGHLIN: -- possible. But we --

24 JUDGE TATEL: Well, of course it's possible.

25 JUDGE SENTELLE: Of course it's possible.

1 JUDGE TATEL: I mean, there might be many defects
2 in their application, I mean even if they had a
3 constitutionally fair process they might well not get their
4 tax exemption, right?

5 JUDGE SENTELLE: Right.

6 MS. MCLAUGHLIN: But what they want to do is they
7 want to litigate an issue that might affect their exemption
8 now, and we submit that this case is actually closer to the
9 banned interference with assessment and collection than was
10 at issue in both *Bob Jones* and *Americans United* because --

11 JUDGE TATEL: Yes, why is that?

12 MS. MCLAUGHLIN: -- both of those organizations
13 actually had exemptions that were recognized, and those
14 exemptions were threatened to be revoked. Here, this is an
15 organization that is seeking a determination in the first
16 instance --

17 JUDGE SENTELLE: But right here they're seeking a
18 constitutionally fair process.

19 JUDGE TATEL: Right.

20 JUDGE SENTELLE: They're not in court seeking to
21 restrain the assessment or collection of a tax, they're in
22 court seeking a constitutionally fair process, aren't they?

23 MS. MCLAUGHLIN: Well, what the --

24 JUDGE TATEL: Right, they're not -- let me just
25 add to what Judge -- they're not seeking tax exempt status

1 in this case.

2 JUDGE SENTELLE: Right.

3 MS. MCLAUGHLIN: They're trying to litigate the
4 standard for judging their --

5 JUDGE SENTELLE: Right.

6 MS. MCLAUGHLIN: -- application, and that --

7 JUDGE SENTELLE: Bingo.

8 MS. MCLAUGHLIN: And we --

9 JUDGE TATEL: Right.

10 MS. MCLAUGHLIN: -- submit that that is banned by
11 the Anti-Injunction Act, they're trying to split their cause
12 of action.

13 JUDGE SENTELLE: That's what we're trying to ask
14 you about.

15 JUDGE TATEL: Right.

16 JUDGE SENTELLE: The Anti-Injunction Act, we held
17 in *Cohen* that it, when it says assessment or collection it
18 pretty much means assessment or collection, and they're not
19 here asking for, they don't want the Court, they're not
20 asking the Court to order that they get the exemption, just
21 that they get due process, they could lose once they get the
22 due process, but they're not seeking to enjoin assessment or
23 collection, are they?

24 MS. MCLAUGHLIN: Well, we think that that is
25 exactly what they are doing. The Supreme Court --

1 JUDGE SENTELLE: Why do you think that?

2 MS. MCLAUGHLIN: Well, because the Supreme Court
3 said in *Bob Jones* that it has applied the terms of the Anti-
4 Injunction Act with, you know, giving them almost literal
5 effect, almost literal effect, and what the Court --

6 JUDGE SENTELLE: But *Bob Jones* said, it actually
7 had to do with the exemption, not the process of obtaining
8 it, isn't that correct?

9 MS. MCLAUGHLIN: Well, just as in *Bob Jones* and
10 *Americans United* the injunctive relief was intended to
11 interfere with, to interpose the Court and prevent the IRS
12 from revoking an --

13 JUDGE SENTELLE: Exactly.

14 MS. MCLAUGHLIN: -- an exception.

15 JUDGE SENTELLE: Exactly. Now, that's not at
16 issue here.

17 MS. MCLAUGHLIN: Well, we have --

18 JUDGE SENTELLE: The revocation or issuance of an
19 exemption is not at issue here, is it?

20 MS. MCLAUGHLIN: Well, the Supreme Court, well,
21 it --

22 JUDGE SENTELLE: Whoa, whoa, whoa, that's, answer
23 the one I'm asking you.

24 MS. MCLAUGHLIN: They want to influence the
25 determination, they want to litigate the standard.

1 JUDGE SENTELLE: They want to establish the
2 process. That's all they're asking for, isn't it?

3 MS. MCLAUGHLIN: Well, they want to intervene in,
4 they want to insert the Court in the midst of the assessment
5 process, and --

6 JUDGE SENTELLE: They want the Court to pass on
7 the constitutionality of the process that's being afforded
8 them, that's all they're asking for, isn't it?

9 MS. MCLAUGHLIN: Well, we submit that the, in *Bob*
10 *Jones* the Supreme Court said you have to look to the
11 purpose, is the suit brought for the purpose of restraining
12 the assessment and collection of tax?

13 JUDGE SENTELLE: And the answer here is no, isn't
14 it?

15 MS. MCLAUGHLIN: No, we submit that it is yes --

16 JUDGE SENTELLE: Well, what do you say to Judge
17 Tatel --

18 MS. MCLAUGHLIN: -- because it is so close --

19 JUDGE SENTELLE: What do you say to Judge Tatel's
20 suggestion that even if they get a fair process they may
21 still not get the exemption?

22 MS. MCLAUGHLIN: Well --

23 JUDGE SENTELLE: This case can't determine the
24 exemption, can it?

25 MS. MCLAUGHLIN: -- it could go very hard, and it

1 could be, it could be conclusive.

2 JUDGE TATEL: Well, let me just ask --

3 MS. MCLAUGHLIN: So --

4 JUDGE TATEL: Well, go ahead, and then I'll ask
5 you my question.

6 JUDGE SENTELLE: Only if they're entitled to it
7 could it be conclusive.

8 MS. MCLAUGHLIN: So --

9 JUDGE TATEL: See, you say the purpose of their
10 case, but the only way we know about the purpose of their
11 case is to look at their complaint, we have no other basis
12 for judging it. And they don't, they don't -- their prayer
13 for relief does not ask for a tax exemption, it asks for a
14 constitutionally fair process.

15 MS. MCLAUGHLIN: Well, they want, they ask for
16 three things --

17 JUDGE TATEL: That's what they want. Now, you say
18 well, but we know what they really want, a tax exemption,
19 and of course they want a tax exemption, I don't have any
20 doubt about that.

21 MS. MCLAUGHLIN: And --

22 JUDGE TATEL: But that's not the complaint they
23 filed here, they're at an antecedent point.

24 MS. MCLAUGHLIN: And one of the things that
25 they're expressly asking for, Your Honor, is to bar

1 application of the Israel special policy to its application.

2 JUDGE TATEL: Right.

3 JUDGE SENTELLE: Yes.

4 MS. MCLAUGHLIN: It's not just --

5 JUDGE TATEL: That's part of the constitutionally
6 fair process they want. They want a court order that says
7 we want the IRS to judge our tax exempt status free of
8 unconstitutional standards.

9 MS. MCLAUGHLIN: All right. Well --

10 JUDGE TATEL: Let me ask you this, so for purposes
11 of my question let's just assume you're right, that the
12 Anti-Injunction Act at least literally applies here, what do
13 you do with *South Carolina v. Regan* and the proposition that
14 what the Court said in there is that Congress didn't intend
15 when it adopted the, passed the Anti-Injunction Act to, for
16 it to apply to tax payers who have no other remedy at all?

17 MS. MCLAUGHLIN: Well, if the Israel special
18 policy, if the application of the Israel special policy
19 results in the denial of an exemption then they can, they
20 can contest that.

21 JUDGE TATEL: No, that's not, but that's not their
22 only argument here.

23 MS. MCLAUGHLIN: Right.

24 JUDGE TATEL: Their argument is that this process,
25 that this, and this is just an allegation, their argument is

1 that the Israel, special Israel policy is subjecting them to
2 a different standard than other tax payers, a standard based
3 on viewpoint, which produces a delay in the process.

4 MS. MCLAUGHLIN: Okay. Well, let me --

5 JUDGE TATEL: Now, that can't be resolved later
6 on, so if they get denied a tax exemption and then they sue
7 for a refund they won't get that issue taken care of, right?

8 MS. MCLAUGHLIN: Certainly someone whose
9 application is denied based on the Israel special policy is
10 harmed in a lasting concrete way in which someone who gets
11 the exemption despite --

12 JUDGE TATEL: But not the delay.

13 MS. MCLAUGHLIN: Well, okay, then --

14 JUDGE TATEL: They can't remedy the delay through
15 a refund action.

16 MS. MCLAUGHLIN: All right. Delay, which gets
17 into is this reviewable now under general principles of
18 administrative law --

19 JUDGE TATEL: Well, no, stick --

20 JUDGE SENTELLE: Presumption.

21 JUDGE TATEL: Don't go onto justiceability. I
22 still haven't heard from the Government in its brief or from
23 you today a response to my concern about they allege
24 unconstitutional delay, and I don't see how either in a
25 refund action or in a 7428 action that could be remedied.

1 If you could give me a reason I would appreciate it. I just
2 don't see it.

3 MS. MCLAUGHLIN: Well, first of all, the Supreme
4 Court in *Bob Jones* addressed delay and said that it was
5 really an unavoidable part of the process, and the situation
6 for organizations has actually improved since the enactment
7 of Section 7428. But Congress set no time period for the
8 IRS to process these applications, and so, where Congress
9 has not set a deadline, the person seeking a benefit could
10 not, you know, obtain relief from a court under Section 706.

11 JUDGE SENTELLE: Well, that would answer if we
12 were talking about a delay that fell upon everybody, or fell
13 upon some for constitutionally irrelevant means.

14 MS. MCLAUGHLIN: Okay.

15 JUDGE SENTELLE: But if -- you can't possibly be
16 saying that it subjecting one viewpoint to more delay than
17 all other viewpoints, or than some of other viewpoints, is
18 permissible under the statute, can you? You're saying we
19 can't have litigation about delay, maybe that's true, but
20 can't we have litigation about an unconstitutional reason
21 for delay?

22 MS. MCLAUGHLIN: Well, you would still need an
23 established policy, and then you would have to --

24 JUDGE SENTELLE: All right. That's why we have
25 the lawsuit is to find out if there is an established

1 policy.

2 MS. MCLAUGHLIN: And then even if this is just one
3 oral comment in a telephone conversation that this Israel
4 special policy existed, and --

5 JUDGE SENTELLE: You're now going to
6 sufficiency --

7 MS. MCLAUGHLIN: -- there's no written --

8 JUDGE SENTELLE: -- of the evidence. You're now
9 going to sufficiency, this is way, way before that. If they
10 come in and allege that you say all people in particular who
11 want to go to the back of the line, isn't that stating a
12 constitutional, an unconstitutional basis for additional
13 delay?

14 MS. MCLAUGHLIN: Well, I think they would be
15 better positioned if they were saying that the IRS was
16 giving them short shrift, or was not allowing them to create
17 an administrative record.

18 JUDGE TATEL: Why would that make a difference?

19 MS. MCLAUGHLIN: Because as long as the person is
20 going to have a chance, once a concrete policy is applied to
21 them --

22 JUDGE TATEL: Well, wait --

23 MS. MCLAUGHLIN: -- in a fashion that hurts
24 them --

25 JUDGE TATEL: -- you keep going back to concrete

1 policy, we have a complaint with a specific allegation, and
2 it's a motion to dismiss --

3 MS. MCLAUGHLIN: Well, but --

4 JUDGE TATEL: -- so we have to accept -- so for
5 purposes of the way we think about this the IRS has a
6 special Israel policy, right?

7 MS. MCLAUGHLIN: Well, I would just like to point
8 out --

9 JUDGE TATEL: You agree with that?

10 MS. MCLAUGHLIN: -- that for purposes of the
11 *Williams Packing* test because it's a flat ban on
12 jurisdiction that it's actually the person seeking
13 injunctive relief who has the burden of establishing that --

14 JUDGE GARLAND: That's for an exception, right?

15 JUDGE SENTELLE: That's for an exception.

16 JUDGE TATEL: Yes.

17 JUDGE SENTELLE: They're arguing, you all are
18 arguing past each other. Their argument to begin with is
19 that the statute doesn't ban this.

20 JUDGE TATEL: Right.

21 JUDGE SENTELLE: You devote your argument to why
22 this doesn't come within the exceptions. They're not
23 claiming to come within the exceptions, their argument is
24 that the statute didn't cover this in the first place.

25 MS. MCLAUGHLIN: Well, our position is that the

1 Anti-Injunction Act applies to a request for declaratory or
2 injunctive relief that's aimed at the assessment process
3 and --

4 JUDGE SENTELLE: Yes, but this one isn't. This
5 lawsuit is --

6 MS. MCLAUGHLIN: Well, there --

7 JUDGE SENTELLE: -- seeking an injunction for a
8 policy burdening the application for an exemption.

9 MS. MCLAUGHLIN: And a collateral goal of the Act
10 is to protect the Internal Revenue Service from suits about
11 the assessment process pending a suit for refund or other
12 remedy. So, we submit that this case falls squarely
13 within --

14 JUDGE SENTELLE: I wanted to ask you an unfair
15 question that I will also ask the other side, what is the
16 status of this application now?

17 MS. MCLAUGHLIN: There is a litigation hold on
18 this application.

19 JUDGE SENTELLE: Why couldn't the application
20 process have continued during the litigation?

21 MS. MCLAUGHLIN: Well, that's discretionary with
22 the IRS, and --

23 JUDGE SENTELLE: So, you all decided that you're
24 going to hold their application up during this litigation.

25 MS. MCLAUGHLIN: Well, it is a general rule that

1 once somebody brings a suit challenging the exemption
2 determination process that work on the case stops. I think
3 that the IRS in making an exception to that --

4 JUDGE SENTELLE: So, you'll burden them rather
5 than go ahead and perhaps moot the case, that doesn't cover
6 the IRS in glory, Counsel.

7 MS. MCLAUGHLIN: Well, I think the IRS has to look
8 at is expending anymore time on a case that's already in
9 litigation an appropriate use of resources? They have to
10 look at --

11 JUDGE SENTELLE: Okay.

12 MS. MCLAUGHLIN: -- does it promote effective tax
13 administration, and --

14 JUDGE SENTELLE: And it is an unfair question,
15 you're not here to defend that policy, but you might go back
16 and discuss that policy with people at IRS that it's not the
17 way Government usually acts.

18 MS. MCLAUGHLIN: All right. And then we don't
19 think, even if you get past the Anti-Injunction Act we don't
20 think that this unwritten policy is --

21 JUDGE TATEL: I still don't understand why you
22 keep emphasizing that it's unwritten.

23 MS. MCLAUGHLIN: Well, there's a case in this --

24 JUDGE TATEL: Given the stage of this litigation,
25 that is that we have to accept as true the allegation in the

1 complaint that they have a special, we have to accept as
2 true, one, that there's a special Israel policy; two, that
3 it's different from others; and three, that it's causing
4 delay, don't you agree with that? For purposes of deciding
5 this case we just have to assume that's true.

6 MS. MCLAUGHLIN: Well, not the whole case. With
7 the Anti-Injunction Act we are claiming, you know, we are
8 defending the referral to the touch and go group, and when
9 we deny the, the IRS denies that an Israel special policy
10 exists.

11 JUDGE TATEL: I know, but if we were at summary
12 judgment that would be a different question, but we aren't,
13 this was a motion to dismiss on jurisdictional grounds.

14 MS. MCLAUGHLIN: Well, in our brief, Your Honor,
15 we've referred to a decision of this Court called *Worth v.*
16 *Jackson* that you may recall because I think that you were
17 the author complaining that --

18 JUDGE TATEL: Depends on when. When, when did
19 that happen? Then I'll start trying to remember it. Give
20 me a one more clue, what was the subject? One more clue.

21 MS. MCLAUGHLIN: 2006.

22 JUDGE TATEL: Yes.

23 MS. MCLAUGHLIN: And --

24 JUDGE TATEL: I need a better clue.

25 MS. MCLAUGHLIN: -- trying to review an unwritten

1 policy puts the Court in an untenable position because --

2 JUDGE GARLAND: Untenable in a sense of
3 jurisdiction, or untenable in some other sense?

4 JUDGE TATEL: Right.

5 MS. MCLAUGHLIN: Well, that there's nothing
6 concrete --

7 JUDGE GARLAND: Untenable --

8 MS. MCLAUGHLIN: -- the policy is --

9 JUDGE TATEL: Was that a motion to dismiss case?

10 MS. MCLAUGHLIN: -- the metaphor used by the Court
11 was that it's a faceless policy if it's not in writing.

12 JUDGE TATEL: Was it a motion to dismiss?

13 JUDGE GARLAND: We're here on 1292(b), right?

14 JUDGE TATEL: Yes.

15 MS. MCLAUGHLIN: Yes, Your Honor.

16 JUDGE GARLAND: And only one issue was certified,
17 right?

18 MS. MCLAUGHLIN: The entire order was certified,
19 Your Honor.

20 JUDGE GARLAND: But the order does not include a
21 response to that point, does it?

22 MS. MCLAUGHLIN: I don't, no, I don't think so,
23 but it doesn't --

24 JUDGE GARLAND: So, then we're not here to -- this
25 is an interlocutory appeal.

1 MS. MCLAUGHLIN: Yes, Your Honor.

2 JUDGE GARLAND: We're only here to discuss the
3 issues that were decided.

4 MS. MCLAUGHLIN: But its settled law, Your Honor.

5 JUDGE GARLAND: What's settled?

6 MS. MCLAUGHLIN: Well, I think the Court --

7 JUDGE GARLAND: Settled law that on an
8 interlocutory appeal we only consider the issues that were
9 certified, that's the law. We can't decide anything else.

10 MS. MCLAUGHLIN: I think the rule -- Your Honor,
11 with all, with due respect --

12 JUDGE GARLAND: Yes.

13 MS. MCLAUGHLIN: -- I think the rule is the
14 opposite, that the Court can --

15 JUDGE SENTELLE: If the other question is
16 inexplicably intertwined with the question that comes up on
17 the interlocutory review we can review it.

18 JUDGE GARLAND: But it's not --

19 JUDGE SENTELLE: Despite Judge Tatel's dissent
20 from my opinion that said so, we can review it under those
21 circumstances.

22 JUDGE GARLAND: But this is not inextricably
23 intertwined, you have, the jurisdictional questions I think
24 you're entitled to raise here, the other questions you're
25 not. So, I actually have a series of questions if my

1 colleagues are finished.

2 JUDGE TATEL: Yes. Sure.

3 JUDGE GARLAND: Okay. So, my first question is
4 this, imagine the IRS announces today a policy that says as
5 follows, no application by a Jewish group, or an African-
6 American group will be considered until one day short of the
7 period under this statute in which it's considered final;
8 all other groups we're happy to consider exemptions for, but
9 because we don't like African-Americans and we don't like
10 Jews we are not going to do that. Now, is your view that
11 that cannot be challenged? We're not going to, that will
12 not affect the result in the case, and in fact, as soon as
13 somebody sues us we will grant them an exemption, now, is
14 your position that that can never be challenged?

15 MS. MCLAUGHLIN: Well, I think --

16 JUDGE GARLAND: Yes or no? Is that your position?
17 It seems to me like --

18 MS. MCLAUGHLIN: Well, you'd still have to weigh
19 the fitness for review --

20 JUDGE GARLAND: No, I'm only talking about under
21 the Anti-Injunction Act, please. That's the only question I
22 have for you, under the Anti-Injunction Act and the
23 Declaratory Judgment Act do you think that cannot be
24 challenged?

25 MS. MCLAUGHLIN: Well, I'm not sure.

1 JUDGE GARLAND: Yes. I take that as a yes. So,
2 you understand why that might make us feel that maybe
3 there's something wrong with the analysis? If you take the
4 assumption of the analysis and come to a result that seems
5 absurd, perhaps the assumption of your analysis is wrong.

6 So, now let's talk about the assumption of your
7 analysis. Imagine that they are only complaining here about
8 the delay, not about anything else, only the delay, do you
9 think the -- so, your view is that the Anti-Injunction Act
10 still bars it even if it's only the delay, is that right?

11 MS. MCLAUGHLIN: Yes, Your Honor.

12 JUDGE GARLAND: And that is because it inhibits
13 the assessment process, is that why?

14 MS. MCLAUGHLIN: Yes, Your Honor.

15 JUDGE GARLAND: Yes, Your Honor. Okay. So, now
16 I'm shocked by something else, only Judges are shocked by
17 these kind of things, this is not a moral shock, it seems to
18 me that the decision that decides completely against you is
19 referred to in footnote four of your reply brief and nowhere
20 else, sort of shocked that the Government would address the
21 most important decision as far as my view in a footnote, and
22 that is the Supreme Court's most recent case on this
23 question, which is direct marketing and association. And in
24 that case the Court says two things, one, that we are going
25 to view the Taxing Injunction Act in the same way as the

1 Anti-Injunction Act; and two, that we are going to reject
2 the Court of Appeals' view that orders that merely inhibit
3 assessment are covered by the Tax Injunction Act. Now, you
4 just told me that your case is premised on the idea that if
5 an action inhibits assessment it is barred, the Supreme
6 Court in March of this year held the opposite, I think it's
7 March, yes, what is your answer to that?

8 MS. MCLAUGHLIN: Well, we think that direct
9 marketing is distinguishable for several reasons.

10 JUDGE GARLAND: But you agree with my, so far my
11 description, A, that the Court says that the Tax Injunction
12 Act, which was at issue there, is to be read the same as the
13 Anti-Injunction Act; and two, that the Court expressly
14 rejects the argument that claims that merely inhibit
15 assessment are barred by the Act, you agree with those two
16 points?

17 MS. MCLAUGHLIN: Well, I think that in general the
18 two acts are to be construed in pari materia, but there are
19 differences in text that would support a different ruling
20 under the Anti-Injunction Act.

21 JUDGE GARLAND: Well, the Supreme Court says we
22 assume that words used in both acts are generally used in
23 the same way. And then they go ahead and discern the
24 meaning of the word restrain, and that is a word in both
25 acts.

1 MS. MCLAUGHLIN: But in the Anti-Injunction Act
2 it's for the purpose of restraining, and before talking
3 about the series of words in the Tax Injunction Act, enjoin,
4 restrain, or suspend, the Court explained that the gerund
5 restraining standing by itself, which in fact it does in the
6 Anti-Injunction Act, there's no suspend or enjoin, that it
7 is much stronger, and so, we would rely on that textual
8 difference.

9 JUDGE GARLAND: Well, the Court says restrain,
10 standing alone, can have several meanings, one is the broad
11 meaning that it merely inhibits; another narrower meaning,
12 however, means to prohibit from action, to put compulsion
13 upon to enjoin. So, you're saying that we should
14 distinguish this case on the ground that its other words in
15 the Tax Injunction Act are different, is that right?

16 MS. MCLAUGHLIN: Partly, and also because when the
17 Supreme Court, the Supreme Court doesn't usually overrule
18 case sub silentio, and the appropriate thing for a court to
19 do is to apply the closer line of precedent, and we submit
20 that the closer line of precedent is --

21 JUDGE GARLAND: *Bob Jones and Americans United.*

22 MS. MCLAUGHLIN: -- *Bob Jones and Americans*
23 *United.*

24 JUDGE GARLAND: But you made the same exact
25 argument to us in *Cohen*, and we said those two cases do not

1 stand for the proposition that the Government claims.

2 MS. MCLAUGHLIN: But, Your Honor, that was a post-
3 assessment, post-collection --

4 JUDGE GARLAND: It was.

5 MS. MCLAUGHLIN: -- procedural injury --

6 JUDGE GARLAND: It was.

7 MS. MCLAUGHLIN: -- involving how to refund to tax
8 payers a conceded tax.

9 JUDGE GARLAND: I agree with that, and it also
10 uses the word *Cohen* in the title, rather than *Z Street*,
11 there are a lot of ways --

12 MS. MCLAUGHLIN: But it also --

13 JUDGE GARLAND: -- to distinguish the case.

14 MS. MCLAUGHLIN: But it also says it's *sui*
15 *generis*, Your Honor.

16 JUDGE GARLAND: But not with respect to this
17 question, with respect to the specific question that you're
18 raising here --

19 MS. MCLAUGHLIN: Well, this would be --

20 JUDGE GARLAND: -- we rejected the -- can you hold
21 for one second? The Government raised exactly the same
22 issue you raise now, and we rejected it, and we said that in
23 *Jones* and *American United* the difference is they both were
24 trying to restrain, to enjoin refusals to provide, or a
25 retraction of exemptions. So, we've already, in a way we've

1 decided every issue before us today --

2 MS. MCLAUGHLIN: But --

3 JUDGE GARLAND: -- against you.

4 MS. MCLAUGHLIN: But you've said that a post-
5 assessment, post-collection procedural injury about
6 refunding a conceded tax is not subject to the Anti-
7 Injunction Act, but that it is also sui generis. This is --

8 JUDGE TATEL: Wait, we didn't --

9 MS. MCLAUGHLIN: -- anterior to --

10 JUDGE TATEL: Yes, we used the word sui generis,
11 but in the en banc decision we took the time to set a
12 standard for evaluating these cases. We said, it says
13 determining whether the Act applies requires a careful
14 inquiry of three things, the remedy sought, the statutory
15 basis for that remedy, and any implications that it might
16 have on the assessment or collection of taxes. So, that's
17 pretty, those are not the words of a decision that's, that
18 is in effect sui generis, we set a standard for how we
19 should look at these cases, didn't we? And if you apply
20 that standard and you look at this case I just haven't heard
21 from the Government why it doesn't fall under *Cohen*, true,
22 it's not quite as, it's not quite *Cohen* because a tax hasn't
23 been collected, but --

24 MS. MCLAUGHLIN: Well, it's anterior to assess,
25 but someone is seeking a tax exemption.

1 JUDGE TATEL: They're not seeking a tax
2 exemption --

3 JUDGE SENTELLE: Yes.

4 JUDGE TATEL: -- in this complaint.

5 JUDGE SENTELLE: Yes.

6 JUDGE TATEL: That's not the complaint we have
7 before us.

8 MS. MCLAUGHLIN: Well, they are seeking, they are
9 virtually doing so, it's part --

10 JUDGE TATEL: No, they're not, they're --

11 MS. MCLAUGHLIN: -- and parcel, they are trying to
12 litigate the one thing that might come between them in a tax
13 exemption.

14 JUDGE TATEL: Well, but so you think --

15 JUDGE GARLAND: What does that --

16 JUDGE SENTELLE: You want to take that as an
17 admission?

18 JUDGE TATEL: I mean --

19 JUDGE SENTELLE: That this is the only thing
20 standing between them and exemption? Are you really going
21 to --

22 MS. MCLAUGHLIN: Well, I guess --

23 JUDGE SENTELLE: -- say that on behalf of the
24 United States, Counsel?

25 MS. MCLAUGHLIN: Well, maybe that wouldn't be the

1 wisest thing, Your Honor.

2 JUDGE TATEL: No. No.

3 JUDGE GARLAND: I thought you said there was no
4 such policy, right?

5 MS. MCLAUGHLIN: Right, re-deny the --

6 JUDGE GARLAND: With respect to the merits. So,
7 then what element of this case could affect their exemption?
8 You say there is no anti-Israel policy, if that's true the
9 most that they can get out of this is an acknowledgement
10 that there isn't one, how would that affect the disposition
11 of their tax exemption?

12 MS. MCLAUGHLIN: Well, then suppose they could
13 establish that one existed in a refund suit if the IRS were
14 to deny it on --

15 JUDGE GARLAND: I'm not asking that question.
16 Assume they win this case, okay? Assume we let it go
17 through and they win this, whatever is in their complaint,
18 in your view would that make any difference at all to
19 whether they get an exemption? Any difference at all?

20 MS. MCLAUGHLIN: You mean if they establish that
21 an Israel special policy exists, and that is it would, and
22 applying to their situation would constitute --

23 JUDGE GARLAND: Well, you agree there is no such
24 policy, so from the Government's point of view at the most
25 they will get is a statement that there is no such policy,

1 right? This is very different than *Bob Jones* where there
2 was a particular Government policy at issue.

3 MS. MCLAUGHLIN: One of the collateral, the
4 Supreme Court has observed that one of the collateral
5 objectives of the Act is to protect the IRS from judicial
6 interference pending a suit for refund, so --

7 JUDGE GARLAND: Yes, but we rejected that in
8 *Cohen*, we said that the Government's claim that there is a
9 closed loop, and that it can only be resolved by those set
10 of statutes is wrong, right? That's what we said.

11 MS. MCLAUGHLIN: Well, there was no refund at
12 issue there, it was just a method, the adoption without
13 notice and comment was a method --

14 JUDGE GARLAND: Okay.

15 MS. MCLAUGHLIN: -- for dispensing refunds.

16 JUDGE GARLAND: What is the Government's
17 explanation below about what this J.A. 65 means, the
18 document that Opposing Counsel says supports the proposition
19 that there is an ideological content to the IRS's
20 evaluation? I appreciate that you deny that there is one,
21 has there been any explanation of where this document comes
22 from? The additional information requested document, J.A.
23 65.

24 MS. MCLAUGHLIN: Well, that was brought up on a
25 motion to supplement the record, Your Honor, and Opposing

1 Counsel had a conversation with another, a lawyer
2 representing an organization, and who received this letter,
3 and gave him what is in effect a redacted copy that didn't
4 disclose the organization's name.

5 JUDGE GARLAND: Right, but does the Government
6 have an explanation for why they would ask question three,
7 for example?

8 MS. MCLAUGHLIN: Well, they might be inquiring
9 into whether, they might be wanting to see if it's an
10 advocacy organization by checking to see whether it's, the
11 response is even-handed, or taking one side of the question
12 vehemently.

13 JUDGE GARLAND: That's the test for advocacy
14 organization is that you can't take positions vehemently?

15 MS. MCLAUGHLIN: Well, not vehemently, but you
16 can't be biased, Your Honor, so a question like that might
17 have a purpose of eliciting --

18 JUDGE SENTELLE: You can't be biased?

19 MS. MCLAUGHLIN: Well, there's a difference
20 between --

21 JUDGE SENTELLE: And you can't be biased and get
22 an exemption?

23 MS. MCLAUGHLIN: There's a difference between, if
24 you want to be an educational organization you have to
25 educate the public without unduly supporting one side or

1 another.

2 JUDGE GARLAND: So, you're saying this may not be
3 405(1)(c)(3), this may be for a different exemption?

4 MS. MCLAUGHLIN: Well, it might be for a 501(c), I
5 mean, I think the representation might have been that it was
6 for a 501(c)(3), I don't know.

7 JUDGE GARLAND: The Government doesn't know where,
8 or at least has no representation as to where this comes
9 from, is that right? I know you say it comes from the other
10 side, but within the Government there's not an explanation
11 for where this comes from?

12 MS. MCLAUGHLIN: I don't think we checked, but I
13 didn't represent the Government below.

14 JUDGE SENTELLE: You gave us the *Golmar* (phonetic
15 sp.) response, but that question in question three to which
16 the Chief Judge alludes, do you know of any other group
17 seeking the exemption that has been asked that question, or
18 a similar question, that is to say what, describe your
19 group, organization's religious belief system about
20 anything, here it is particularly towards the land of
21 Israel, but do you know of any other group being asked that
22 question?

23 MS. MCLAUGHLIN: Well, I think this group might
24 have been asked the same question.

25 JUDGE SENTELLE: This group might have been asked

1 the same question? Okay. Do you know of anything other
2 than support of Israel that has triggered the Government
3 inquiring into the religious belief system of applicants?

4 MS. MCLAUGHLIN: I'm not aware.

5 JUDGE SENTELLE: So, that would be consistent with
6 the proposition that there is an Israel special policy then,
7 right?

8 MS. MCLAUGHLIN: Well, if it were true.

9 JUDGE SENTELLE: If you seek out Israel and ask
10 them about religious beliefs and don't do that for other --

11 MS. MCLAUGHLIN: Well, you know, the Israel
12 special policy was consistent with this administration's
13 policy regarding Israel.

14 JUDGE GARLAND: And that's a proposition you say
15 the Government does not ask, right? And that is the
16 proposition you say the Government does not ask?

17 MS. MCLAUGHLIN: We don't.

18 JUDGE GARLAND: But the Government's processing of
19 exemptions does not depend on whether there is agreement or
20 disagreement with the administration's position on Israel.

21 MS. MCLAUGHLIN: Right, that is our position.

22 JUDGE GARLAND: No further questions, we'll hear
23 from the other side.

24 JUDGE TATEL: No.

25 ORAL ARGUMENT OF JEROME M. MARCUS, ESQ.

1 ON BEHALF OF THE APPELLEE

2 MR. MARCUS: May it please the Court, Jerome
3 Marcus for the Appellee. Let me begin by answering Judge
4 Sentelle's question. Your Honor, Counsel for the Government
5 accurately but not quite completely answered Your Honor's
6 question, the status is as Counsel said, but what she did
7 not say is that the regulation pursuant to which the case
8 has been stayed is a regulation that authorizes a stay if
9 someone brings a case seeking an exemption. The regulation
10 does not authorize a stay if you bring a case challenging
11 procedure pursuant to which the exemption is brought, so
12 there's a little more wiggle room, and the Government's
13 decision to do what it has done is that much more I think
14 evidentiary of what's actually operating here.

15 JUDGE GARLAND: Can you help me with what you're
16 actually seeking here?

17 MR. MARCUS: Yes. Pleasure.

18 JUDGE GARLAND: So, I would say that the briefs
19 are not 100 percent clear, particularly as comparison to
20 below, I read the briefs at least originally as challenging
21 a policy that delays by extra scrutiny an exemption for
22 certain groups, okay?

23 MR. MARCUS: Yes, sir.

24 JUDGE GARLAND: But not saying that the policy
25 affects the actual exemption in the end, the granting or

1 denial of the exemption, is that correct?

2 MR. MARCUS: Yes, Your Honor, that is --

3 JUDGE GARLAND: Right.

4 MR. MARCUS: -- correct.

5 JUDGE GARLAND: So, you would agree that if we say
6 there's a jurisdiction here and you go back below that you
7 cannot get an order from the Court saying, assume you prove
8 there is a policy, you can't get an order from the Court
9 saying, and you cannot apply this policy to the question of
10 whether you get an exemption or not, but that question, the
11 substance, the merits of the exemptions has to wait until a
12 challenge to be denied.

13 MR. MARCUS: You cannot, I'm just --

14 JUDGE GARLAND: Yes.

15 MR. MARCUS: -- rehearsing the words in my --

16 JUDGE GARLAND: Let me, so let me start over
17 again. I appreciate. Now, I'm being unclear, right? Your
18 challenge is to a policy that affects how long it takes for
19 your group --

20 MR. MARCUS: Yes, sir.

21 JUDGE GARLAND: -- to get the exemption.

22 MR. MARCUS: Yes, sir.

23 JUDGE GARLAND: You are not challenging a policy
24 which decides the merits of whether you're --

25 MR. MARCUS: Emphatically, Your Honor is correct.

1 The penalty questions to the Government were exactly what I
2 would have wanted to say, we are saying that they are taking
3 longer for us than they take for other people because of the
4 substance of our views, but we are emphatically not saying
5 that they are deciding against us, and we, and the Panel
6 made clear from its questions, I know Your Honors
7 understand, we are not asking the Court to say give them an
8 exemption, we're saying give us --

9 JUDGE GARLAND: Or even to say that one possible
10 way of not giving your exemption is unlawful, right?

11 MR. MARCUS: We haven't reached the question what
12 they're doing about the merits of the issue.

13 JUDGE GARLAND: Yes, that issue is not the
14 gravamen of the complaint here.

15 MR. MARCUS: It's not anywhere in the complaint.

16 JUDGE GARLAND: Right. So, there's some
17 discussion of primary purpose, et cetera, that's really not
18 the issue here, the only question is the sole purpose --

19 MR. MARCUS: Yes.

20 JUDGE GARLAND: -- and your sole purpose is a
21 challenge to a policy that you think delays your --

22 MR. MARCUS: Yes, sir.

23 JUDGE GARLAND: -- decision. Okay. Now, let
24 me --

25 JUDGE TATEL: Well, wait, can we just hold on one

1 second?

2 JUDGE GARLAND: Yes.

3 JUDGE TATEL: Would you -- what about your request
4 for declaratory judgment? I'm looking at paragraph 43 of
5 the complaint. It looks to me like you're looking for a
6 declaration that this Israel only policy is itself
7 unconstitutional.

8 MR. MARCUS: Well, I think that --

9 JUDGE TATEL: Isn't that what that says? I mean,
10 I know you're asking, it's very clear throughout this that
11 you're challenging the delay, but when you, but this you
12 say, you say that limitation of the issuance of the tax
13 exempt status to a non-profit based on the substantive views
14 of the persons who operate it constitutes a restriction on
15 speech. Paragraph 44, the existence --

16 MR. MARCUS: We did say that, Your Honor. I --

17 JUDGE TATEL: Paragraph 44, the existence of
18 Israel policy is viewpoint discrimination a violation of the
19 First Amendment.

20 MR. MARCUS: Well, that, I have an easier time
21 with the second thing than I do with the first. Let me go
22 to the first thing, which --

23 JUDGE TATEL: Yes.

24 MR. MARCUS: -- I think is a harder question for
25 me, and I agree with Your Honor that paragraph 43 goes to

1 the merits.

2 JUDGE TATEL: Yes.

3 MR. MARCUS: And I think that --

4 JUDGE TATEL: Wait. Let me just say -- when I
5 asked you --

6 MR. MARCUS: Please.

7 JUDGE TATEL: I agree with you, it's not the
8 merits of your eligibility for a tax exemption, that's not
9 what we're talking about, right?

10 MR. MARCUS: Yes, sir.

11 JUDGE TATEL: It's the merits of the policy,
12 right?

13 MR. MARCUS: Well, I think that paragraph 43 is to
14 put it kindly susceptible at generating confusion as to
15 which of those two things we're talking --

16 JUDGE TATEL: Right.

17 JUDGE GARLAND: Can you clarify for us now?

18 JUDGE TATEL: Yes.

19 MR. MARCUS: Okay.

20 JUDGE TATEL: Yes.

21 MR. MARCUS: I think the place to look to get the
22 right answer is the addendum clause. And where we --

23 JUDGE GARLAND: Okay.

24 MR. MARCUS: Say this is what we want --

25 JUDGE GARLAND: Okay.

1 JUDGE TATEL: Okay, where is that?

2 MR. MARCUS: -- what we want is --

3 JUDGE TATEL: What paragraph --

4 JUDGE GARLAND: What paragraph?

5 JUDGE TATEL: -- number is that?

6 MR. MARCUS: It's at the end of, in the wherefore,
7 at the very end of J.A. 93.

8 JUDGE GARLAND: Yes.

9 JUDGE SENTELLE: Yes A --

10 JUDGE GARLAND: Go ahead.

11 JUDGE SENTELLE: -- A, B, C.

12 MR. MARCUS: Okay. What we say is we want
13 injunctive relief barring application of the special
14 policies with pending application for tax exempt status
15 pursuant to 5(1)(c)(3) of the Code requiring that they
16 disclose --

17 JUDGE TATEL: But isn't the first part of that,
18 how could we bar it unless we found it unconstitutional?

19 MR. MARCUS: I certainly think that applying the
20 Israel special policy to our application, yes, absolutely,
21 we say that's unconstitutional.

22 JUDGE TATEL: Right.

23 MR. MARCUS: That goes to the question, that was
24 the easier question that I think Your Honor also asked,
25 which is is it, and I think your questions to Government

1 Counsel reflected this, as well, is it constitutional to say
2 everybody with green eyes is going to take this much time,
3 and everybody with blue eyes is going to take that much
4 time.

5 JUDGE GARLAND: Can I, I just want to -- this
6 actually could turn this in a different kind of case, so
7 that's why this is important.

8 MR. MARCUS: Okay.

9 JUDGE GARLAND: Is your current view in light of
10 what you know now, and in terms of supporting your
11 complaint, your claim is that there is an Israel only
12 policy, and you define the Israel only policy as one that
13 causes delay, is that correct?

14 MR. MARCUS: Yes, sir.

15 JUDGE GARLAND: You are not now claiming that
16 there is an Israel only policy that affects the merits of
17 a --

18 MR. MARCUS: Absolutely correct. Yes, sir.

19 JUDGE GARLAND: I am right, right?

20 MR. MARCUS: Yes, sir.

21 JUDGE GARLAND: All right. That would be another
22 case later --

23 MR. MARCUS: Yes, sir.

24 JUDGE GARLAND: -- maybe you would try to amend
25 the complaint later, that might create another Anti-

1 Injunction Act argument, correct?

2 MR. MARCUS: Yes, sir.

3 JUDGE GARLAND: All right. But right now the only
4 thing facing us is a challenge to an Israel only policy of
5 delay --

6 MR. MARCUS: Yes, sir.

7 JUDGE GARLAND: -- that's correct?

8 MR. MARCUS: Yes, sir.

9 JUDGE GARLAND: Okay.

10 MR. MARCUS: Okay. So, let me just --

11 JUDGE TATEL: So, when you say, when you tell us
12 to look at the wherefore clause, and you ask us to bar the
13 application of that policy to your application it's just to
14 bar it for purposes of delay?

15 MR. MARCUS: Yes, sir.

16 JUDGE GARLAND: Okay. All right.

17 MR. MARCUS: Yes, sir. And let me just put a
18 finer point on --

19 JUDGE GARLAND: Yes.

20 MR. MARCUS: -- my answer to Your Honor --

21 JUDGE GARLAND: That's a pretty fine point.

22 MR. MARCUS: Okay. Suppose we applied, and the
23 next day they denied it --

24 JUDGE GARLAND: Yes.

25 MR. MARCUS: -- we didn't have to wait 270 days,

1 we didn't have to wait a week --

2 JUDGE GARLAND: Yes.

3 MR. MARCUS: -- they said you know what, you have
4 a position that's inconsistent with Israel's, with whatever
5 the Obama administration believes that Israel --

6 JUDGE SENTELLE: Administration.

7 JUDGE GARLAND: Yes. Yes.

8 MR. MARCUS: -- denied.

9 JUDGE GARLAND: Yes.

10 MR. MARCUS: And we, then it seems to me we could
11 bring a 7420(a) claim.

12 JUDGE GARLAND: Yes, yes.

13 JUDGE SENTELLE: Yes.

14 JUDGE GARLAND: Obviously. They don't object to
15 that. Right.

16 MR. MARCUS: Okay.

17 JUDGE GARLAND: Okay. So --

18 MR. MARCUS: That's not why we're here.

19 JUDGE GARLAND: Okay, I got that. All right.

20 Now, my second question is understanding where you are how
21 do we distinguish this kind of delay from other kinds of
22 delays?

23 MR. MARCUS: Right.

24 JUDGE GARLAND: Now, I think that the Supreme
25 Court's recent decision suggests that everything that might

1 suggest says that everything that might inhibit, slow down
2 assessment, et cetera, is not subject to the Act, but it
3 can't be, I think, that people who just think they're taking
4 too long could bring a case before the time limits set, and
5 not have the Anti-Injunction Act bind them, so how do I --

6 MR. MARCUS: Correct.

7 JUDGE GARLAND: -- distinguish those two?

8 MR. MARCUS: Okay. I think the way you
9 distinguish it is by looking at the allegations of our
10 complaint which allege, and this is not something that we
11 just, you know, a little birdie told us, allege on the basis
12 of statements made to us by the IRS, and since we all are
13 adults and we read the newspapers, an ocean of disclosures
14 to be by the Internal Revenue Service to Congress that make
15 clear, and again, we're only at the motion to dismiss here.

16 JUDGE GARLAND: Don't worry about, I'm not --

17 MR. MARCUS: Okay, so --

18 JUDGE GARLAND: -- on the question of whether this
19 is supportable or not, I'm only --

20 MR. MARCUS: Okay. Well --

21 JUDGE GARLAND: -- on the question of whether,
22 how, assuming it is it would be distinguished from somebody
23 who just thinks it's taking too long.

24 MR. MARCUS: Okay. The short, I'll give you the
25 short answer and the long answer. The short answer is we've

1 alleged a policy, and when you allege a policy that's
2 different from just saying they're being mean to me. If
3 you're saying they're taking, my application is taking too
4 long because it's taking too long, they don't like me,
5 they're not paying attention, that's not a policy that is
6 legally vulnerable, we have alleged --

7 JUDGE GARLAND: And you agree that under those
8 circumstances the words of the Declaratory Judgment Act,
9 which do suggest certain kinds of delay are not relevant
10 would come into play, right? The 270-day rule, et cetera,
11 but that would --

12 MR. MARCUS: In the absence of an allegation
13 policy.

14 JUDGE GARLAND: Yes.

15 MR. MARCUS: Yes, sir.

16 JUDGE GARLAND: Well, what if they announced a
17 policy, we, gee, we're the IRS, they haven't given us enough
18 money, we have too many applications, and we're just never
19 going to be, just like say most federal agencies answer with
20 respect to the Freedom of Information Act --

21 MR. MARCUS: Right.

22 JUDGE GARLAND: -- that statute requires a
23 decision within, I don't know, some amount of days that
24 virtually no agency actually answers, and often for good
25 reason, they have --

1 MR. MARCUS: Right.

2 JUDGE GARLAND: -- a billion requests --

3 MR. MARCUS: Right.

4 JUDGE GARLAND: -- and they have, you know, a
5 billion minus a billion employees to handle that number.

6 MR. MARCUS: Yes, sir.

7 JUDGE GARLAND: So, how would you distinguish it
8 from that?

9 MR. MARCUS: Well, I think that unfortunately we
10 have to allow reality to intrude here to a certain extent.
11 And if you're dealing with a situation in which an agency is
12 just overwhelmed, is it conceivable that a clever law
13 student could draft a complaint that says that this is a
14 violation of due process, yes, I think probably that could
15 happen.

16 JUDGE TATEL: Well, see, I read your complaint, I
17 thought your answer, and this is going to bring it back to
18 the first set of questions Chief Judge Garland asked you,
19 which is I thought your answer was going to be yes, it's a
20 policy, but it's a policy that's based on our viewpoint, and
21 that's why it's not just a normal delay. In fact, you say
22 in your complaint that this delay is preventing Z Street
23 from exercising its First Amendment rights on the
24 subjects --

25 MR. MARCUS: Yes, sir.

1 JUDGE TATEL: -- it cares about.

2 MR. MARCUS: Yes, sir, that's exactly --

3 JUDGE TATEL: That's the difference, isn't it?

4 MR. MARCUS: That's the distinction I was about to
5 draw.

6 JUDGE TATEL: Okay. But then don't we, then
7 doesn't the District Court, if you're right, if this goes
8 back to the District Court doesn't the District Court have
9 to address the constitutionality of that policy --

10 MR. MARCUS: Of course.

11 JUDGE TATEL: -- otherwise this is no different
12 from any other case?

13 MR. MARCUS: Absolutely. And that's exactly the
14 place I was going in response --

15 JUDGE TATEL: Right.

16 MR. MARCUS: -- to Chief Judge Garland's question
17 is precisely that.

18 JUDGE TATEL: Right.

19 MR. MARCUS: If a policy of the Government sits
20 down in the middle of the road and says you know what, we're
21 just not going to do this, does that violate the due process
22 rights of everybody? Yes, it probably does, but there's no
23 discrimination against any individual group of people --

24 JUDGE TATEL: Based on viewpoint, right.

25 MR. MARCUS: -- and it's not viewpoint, it's not

1 race --

2 JUDGE TATEL: Right. Yes.

3 MR. MARCUS: -- it's not gender, it's not any
4 suspect --

5 JUDGE TATEL: Yes.

6 MR. MARCUS: -- classification, and I think that,
7 and this Court knows better than any other Court that, and
8 FOIA is the perfect example, yes, is the statutory mandate
9 being breached? Yes, it's breached every day. Is this
10 Court going to issue an injunction to ever federal agency
11 that doesn't respond to FOIA requests within the deadline
12 that says, you know, drop everything else you're doing and
13 rule on these FOIA requests? No. But where there is a
14 classification that's constitutionally suspect, and
15 viewpoint discrimination obviously is such a classification,
16 then yes, then, then in that I hope limited category of
17 cases yes, it's appropriate for the --

18 JUDGE TATEL: Okay. So, then given your answer to
19 that question, go back and tell me again, let's then go back
20 to the question of exactly what you're seeking.

21 MR. MARCUS: We are seeking an order that says --

22 JUDGE TATEL: Yes.

23 MR. MARCUS: -- that the Government must process
24 our application for 501(c)(3) status without applying the
25 policy which we allege calls for extra delay for

1 organizations --

2 JUDGE TATEL: Okay. And to do that --

3 MR. MARCUS: -- whose activities --

4 JUDGE TATEL: -- we, the Court has to make a
5 judgment about the constitutionality of that policy?

6 MR. MARCUS: Yes, sir.

7 JUDGE TATEL: Okay.

8 MR. MARCUS: And I think that *Cohen* specifically
9 says that that's perfectly appropriate. By the way, the
10 Government is fond of quoting the language on page 733 of
11 the Court's opinion in *Cohen* that says it's sui generis, but
12 I think Your Honor's questions were approaching the
13 following issue, what the genus? The Government wants the
14 Court to believe that the --

15 JUDGE TATEL: Right.

16 MR. MARCUS: -- genus that was at issue in *Cohen*
17 is things that happen after assessment and collection is
18 over, and that is emphatically not what the Court said.
19 What the Court --

20 JUDGE TATEL: But this case is different from
21 *Cohen*. It's --

22 MR. MARCUS: I'm sorry?

23 JUDGE TATEL: This case is different from *Cohen*,
24 it's --

25 MR. MARCUS: Not in any respect I think that

1 matters, Your Honor.

2 JUDGE TATEL: Well, because if you're right and
3 you win you increase the chances, *Cohen* says the three
4 standards -- hold on just a second. Well, I can't find it
5 in my notes. *Cohen* said there's three things you look at,
6 the third one is implications for --

7 MR. MARCUS: Sorry, I can't go through mine.

8 JUDGE TATEL: Here is it. The third one is and
9 any implications that remedy may have on the assessment.
10 This could have implications because if the Court strikes
11 down the policy it increases the likelihood that you get a
12 tax exemption, that's --

13 MR. MARCUS: Well --

14 JUDGE TATEL: -- that was going to lead me to my
15 question. So, is your theory that this case is controlled
16 by *Cohen*, or that what's really going on here is *South*
17 *Carolina v. Regan*, that is that Congress never intended,
18 whatever the implications are for the potential assessment
19 and collection of taxes, Congress did not intend in the
20 Anti-Injunction Act to have it apply to someone who had no
21 remedy for the claim they're bringing?

22 MR. MARCUS: I guess my answer to that question is
23 yes --

24 JUDGE TATEL: Yes.

25 MR. MARCUS: -- and let me explain.

1 JUDGE TATEL: Go ahead.

2 MR. MARCUS: First of all, with respect to *Cohen I*
3 do very firmly believe that the case is controlled by *Cohen*
4 for the following reason, in the part of the opinion where
5 the Court says this is sui generis, the --

6 JUDGE TATEL: Yes.

7 MR. MARCUS: -- genus is those cases in which the
8 Plaintiff is suing to attack a procedure of the agency and
9 not a result. If you're attacking the procedure this Court
10 says at 733, and it relies extensively on the Supreme
11 Court's case in *McCarthy v. Madigan*, and a whole bunch of
12 other cases --

13 JUDGE TATEL: Then why would it, why would when we
14 stated our standard would one of them have been the
15 implications the remedy might have for the assessment or
16 collection of taxes?

17 MR. MARCUS: Well, I think that's another way of
18 asking whether you're really attacking the procedure or
19 something else. I think that to the extent that one
20 encroaches upon the result, maybe what's really going on is
21 not the procedure. But Your Honor's questions to Counsel,
22 Government Counsel I think made the following point, which I
23 think is an effective answer to this problem, and that is
24 since the only thing we're suing about is delay --

25 JUDGE TATEL: Right.

1 MR. MARCUS: -- we really are completely agnostic
2 on what the ultimate impact of this is going to be on the
3 result.

4 JUDGE TATEL: Right.

5 MR. MARCUS: I don't know whether the Government
6 is actually going to deny us an exemption because of the
7 substance of our opinions or not --

8 JUDGE TATEL: Right.

9 MR. MARCUS: -- and that's not what this case is
10 about. All we have said is you're taking longer because of
11 that, so if we win we get a process that doesn't take
12 longer, and that's the beginning of the end of this case.

13 JUDGE SENTELLE: So, once you brought a lawsuit
14 then it not only took longer, but they quit working on it
15 all together at that point.

16 MR. MARCUS: Correct, and which I think --

17 JUDGE SENTELLE: Yes. Okay.

18 MR. MARCUS: -- I mean, you know, one of the
19 ironies of this is that the argument that the Government has
20 made is oh, you don't have a real problem because after 270
21 days you can start a lawsuit and that will solve the
22 problem.

23 JUDGE TATEL: All right.

24 MR. MARCUS: So, we started a lawsuit in 2010,
25 here it is 2015 and here we all are. If the Court has other

1 questions for me.

2 JUDGE SENTELLE: Okay.

3 JUDGE GARLAND: Further questions?

4 JUDGE TATEL: No.

5 JUDGE GARLAND: Thank you.

6 MR. MARCUS: Thank you.

7 JUDGE GARLAND: We'll hear from the Government.

8 How much time does she have?

9 JUDGE SENTELLE: None.

10 JUDGE GARLAND: No time. We'll give you two
11 minutes.

12 ORAL ARGUMENT OF TERESA E. MCLAUGHLIN, ESQ.

13 ON BEHALF OF THE APPELLANT

14 MS. MCLAUGHLIN: Thank you, Your Honor. One
15 statutory basis for denying the relief sought in this case
16 is that the implication of Congress' allowing a suit for a
17 declaratory judgment regarding qualification for exemption,
18 but only after 270 days have elapsed without any action
19 being taken, so that implies that there's a protected period
20 where the IRS, you know, is free to look at --

21 JUDGE TATEL: But, you know, you're still not
22 responding.

23 JUDGE GARLAND: Well, you don't really mean that,
24 right?

25 JUDGE TATEL: Right.

1 JUDGE GARLAND: Because the next couple of words
2 would be the IRS is free to discriminate on the basis of
3 viewpoint, religion, race, you don't actually think that, do
4 you?

5 JUDGE TATEL: For 270 days --

6 JUDGE SENTELLE: Yes.

7 JUDGE TATEL: -- that's what you wanted, right?
8 Right.

9 JUDGE GARLAND: Well, you don't want that to be
10 our take-away here, that the Government's position is, I
11 mean, I think if I were you I would go back and ask your
12 superiors whether they want us to represent that the
13 Government's position in this case is that the Government is
14 free to constitutionally discriminate against its citizens
15 for 270 days. I would be stunned if the current Attorney
16 General would agree with that position, stunned, and the
17 last Attorney General, and the one before that, or the one
18 before that, or anyone, that can't be the position. Now, do
19 you want to think about again whether that's really your
20 position?

21 MS. MCLAUGHLIN: Well, I will take that back, and
22 some of the people are actually in this room, Your Honor.
23 So, I would also point out that it's really hard to
24 distinguish between complaints that other person is going
25 through less red tape than I am, that's, to get the Courts

1 in the middle --

2 JUDGE TATEL: But if the argument is that other
3 person's going through more red tape than I am because of
4 his or her viewpoint, that's a totally different case.

5 JUDGE SENTELLE: It's not hard at all then.

6 JUDGE TATEL: It's very easy to distinguish. I
7 don't see why you have so much trouble making that
8 distinction.

9 MS. MCLAUGHLIN: Well, I just --

10 JUDGE TATEL: Of course you're right that if
11 someone says, you know, everybody else is going faster than
12 me, and that's all you say that's an easy case, but that's
13 not this case.

14 JUDGE GARLAND: And if it turns out that there's
15 no evidence of this policy --

16 JUDGE TATEL: Right.

17 JUDGE GARLAND: -- if it turns out it's
18 misconstruction of what the agent said, turns out that this
19 letter maybe was never even sent, then all that's left is
20 normal red tape and you win.

21 JUDGE TATEL: Right.

22 MS. MCLAUGHLIN: Well, you know, a constitutional
23 allegation of discrimination was also at issue in *Bob Jones*,
24 and the Supreme Court said discrimination can be addressed
25 later, this case falls within --

1 JUDGE GARLAND: But that was because what they
2 were doing was they were moving to challenge a withdrawal of
3 an exemption, right? That's not what happened in *Bob Jones*?

4 JUDGE SENTELLE: Yes.

5 JUDGE GARLAND: Isn't that, I think that's the
6 first --

7 JUDGE TATEL: Yes, that's exactly what happened.

8 MS. MCLAUGHLIN: Yes.

9 JUDGE TATEL: And there was no delay --

10 JUDGE GARLAND: The first sentence of *Bob Jones* --

11 JUDGE TATEL: There was no, the delay here is an
12 unconstitutional delay, that was not an issue in *Bob Jones*.
13 They were arguing that well, withdrawing our tax exemption
14 is unconstitutional, and the Court said well, you know, you
15 can raise that when you seek a refund because --

16 JUDGE GARLAND: I'm just going to read to you --

17 JUDGE TATEL: Sorry.

18 JUDGE GARLAND: -- this is the first paragraph of
19 *Bob Jones*, the question presented is whether a court may
20 enjoin the service from revoking a ruling letter declaring
21 the Petitioner qualifies for tax exempt status. That's, in
22 other words it had already been done, it already had been
23 revoked, and they were challenging that. Now, at that time
24 they didn't have an opportunity to challenge when that was
25 fixed.

1 MS. MCLAUGHLIN: Well, then, Your Honor, the
2 Commissioner could grant all exemptions and then decide to
3 revoke them later, and it would fall within *Bob Jones*.

4 JUDGE GARLAND: I think then there would be no
5 reason to go under, complain directly, you would complain,
6 you would sue immediately, and I don't think they would have
7 any problem with that, they would sue immediately to
8 challenge the revocation of the exemption under the statute.

9 MS. MCLAUGHLIN: And they could -- and that would
10 be consistent with Section 7428, but I just wanted to
11 suggest how close --

12 JUDGE GARLAND: Right. But that's not available
13 right now.

14 MS. MCLAUGHLIN: -- how close they are.

15 JUDGE TATEL: That's not this case.

16 MS. MCLAUGHLIN: Well, they were 31 days away from
17 the 7428 remedy, Your Honor.

18 JUDGE SENTELLE: They're years past it now due to
19 the IRS's discretionary choice to not process it while
20 they're in litigation.

21 JUDGE GARLAND: All right. We'll take the matter
22 under advisement. Thank you very much both sides.

23 (Whereupon, at 11:12 a.m., the proceedings were
24 concluded.)

25

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



Paula Underwood

May 7, 2015

DEPOSITION SERVICES, INC.