[***Editing Note:*** *Page numbers from the reported opinion, 831 F.3d 551, are indicated* ***[*551]****.*]

[Doc. 1628783, filed Aug. 5, 2016]

United States Court of Appeals
For the District of Columbia Circuit

Argued April 14, 2016 Decided August 5, 2016

No. 14-5316

TRUE THE VOTE, INC.
APPELLANT

v.

INTERNAL REVENUE SERVICE, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:13-cv-00734)

John C. Eastman argued the cause for appellant. With him on the briefs were *Kaylan L. Phillips, Noel H. Johnson, Cleta Mitchell, Michael J. Lockerby, William E. Davis, and Mathew D. Gutierrez.*

Judith A. Hagley, Attorney, U.S. Department of Justice, argued the cause for appellees United States of America and Internal Revenue Service. With her on

the brief were *Gilbert S. Rothenberg and Teresa E. McLaughlin*, Attorneys.

Eric R. Nitz argued the cause for Individual Defendant- Appellees. With him on the briefs were *Jeffrey A. Lamken, Brigida Benitez,* and *Catherine Cockerham*.

No. 15-5013

LINCHPINS OF LIBERTY, AT AL.,
APPELLANTS
v.

UNITED STATES OF AMERICA, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:13-cv-00777)

Carly F. Gammill argued the cause for appellants. With her on the briefs were *Jay Alan Sekulow*, *Stuart J. Roth*, *Jordan A. Sekulow*, *Abigail A. Southerland*, *Miles L. Terry*, *Andrew J. Ekonomou*, and *Julian A. Fortuna*.

Judith A. Hagley, Attorney, U.S. Department of Justice, argued the cause for appellees United States of America and Internal Revenue Service. With her on the brief were *Gilbert S. Rothenberg* and *Teresa E. McLaughlin*, Attorneys.

Brigida Benitez argued the cause for Individual Defendant- Appellees. With her on the brief were *Catherine Cockerham*, *Jeffrey A. Lamken*, and *Eric R. Nitz*.

Before: HENDERSON, *Circuit Judges,* and GINSBURG and SENTELLE, *Senior Circuit Judges*.

Opinion for the Court filed by *Senior Circuit Judge* SENTELLE.

[*554] SENTELLE, *Senior Circuit Judge*: Although these cases are not officially consolidated, they were separately argued before the same panel on the same day and are governed by the same legal principles on decision. We have therefore determined that a single opinion is sufficient for the disposition of both. Although there are differences in factual detail, those differences are immaterial to our ultimate decision on all issues, and therefore, all our statements of law hereinafter are applicable to both.

I. BACKGROUND

Appellants appeal from judgments of the district court dismissing some of their claims under Rule 12(b)(6) for failure to state a claim for relief, and others under Rule 12(b)(1) for lack of jurisdiction, by reason of mootness. *See True the Vote, Inc. v. IRS,* 71 F. Supp. 3d 219 (D.D.C. 2014); *Linchpins of Liberty v. United States,* 71 F. Supp. 3d 236 (D.D.C. 2014). Each of the above-named appellants together with numerous co-plaintiffs in the *Linchpins of Liberty* litigation, filed applications with the Internal Revenue Service **[*555]** for recognition of tax exemption as charitable or educational organizations pursuant to 26 U.S.C. §

501(c)(3), (4). As to what happened thereafter, we construe the complaints in the light most favorable to the plaintiffs, *see Missel v. DHSS,* 760 F.3d 1, 4 (D.C. Cir. 2014), although there is very little factual dispute between the parties as to the conduct committed by the IRS.

Instead of processing these applications in the normal course of IRS business, as would have been the case with other taxpayers, the IRS selected out these applicants for more rigorous review on the basis of their names, which were in each instance indicative of a conservative or anti-Administration orientation, as we will set out in more detail below, and as was admitted by the Department of Treasury in the 2013 report of the Treasury Inspector General for Tax Administration (TIGTA).

The appellants before us, plaintiffs below, are applicants who were afforded this unequal treatment. They brought the present actions against the IRS and several of its individual employees, seeking money damages by way of relief under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and equitable relief by way of injunction and declaratory judgment. Additionally, the complaints alleged that the IRS invaded the plaintiffs' statutory rights by violating 26 U.S.C. § 6103, by conducting unauthorized inspection and/or disclosure of tax return information from their applications and the other information improperly obtained from them. The district court held that the *Bivens* action would not lie against the individual defendants or the Service, and granted a Rule 12(b)(6) motion for dismissal as to that relief. *See True the Vote*, 71 F. Supp. 3d at

229-32; *Linchpins of Liberty*, 71 F. Supp. 3d at 242-44. The district court also dismissed the claims for violation of § 6103 under Rule 12(b)(6) for failure to state a claim for relief. *See True the Vote*, 71 F. Supp. 3d at 232-35; *Linchpins of Liberty*, 71 F. Supp. 3d at 247-50.

After the initiation of the suits, the Internal Revenue Service took action to end some unconstitutional acts against at least a portion of the plaintiffs. Based on these actions, the district court dismissed the equitable claims as moot. *See True the Vote*, 71 F. Supp. 3d at 226-29; *Linchpins of Liberty*, 71 F. Supp. 3d at 244-47. *True the Vote* and *Linchpins of Liberty* were decided by the same district court judge on the same day and rely on the same reasoning. Going forward, we will only cite to the *Linchpins of Liberty* decision.

We review the district court's Rule 12(b)(6) dismissals of the *Bivens* actions de novo, taking as true the allegations of the complaint. *See Layman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014). However, our review of the district court's Rule 12(b)(1) dismissals for mootness depends on "[t]he posture in which the motion[s] [were] presented to [the] trial court . . . ." *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992). When a district court relies either "on the complaint standing alone" or on "the complaint supplemented by undisputed facts evidenced in the record," our review is de novo. *Id.* "If, however, the trial court rests not only upon undisputed statements, but determines disputed factual issues, we will review its findings as we would any other district court's factual determinations: accepting them unless

they are clearly erroneous." *Id.* (citation and internal quotation marks omitted).

Accordingly, we affirm the district court's decisions as to the *Bivens* actions and statutory claims, but hold that the equitable actions are not moot. Even if we accord deference to the district court, the **[*556]** government has not carried its heavy burden of showing mootness under the voluntary cessation doctrine. We therefore vacate and remand for further proceedings with respect to the equitable claims of the plaintiff- appellants.

II. ANALYSIS

We once again consider the implications of the Internal Revenue Service affording unequal treatment in the processing of applications for tax exempt status by applicants whose names might suggest certain political orientations. *Cf. Z St. v. Koskinen*, 791 F.3d 24, 28 (D.C. Cir. 2015) (concerning allegations that the IRS had an Israel-special policy "delay[ing] the processing of section 501(c)(3) applications from organizations whose views on Israel differ from the administration's"). This time, appellants allege that their applications for tax exempt status were selected out on the basis of an "IRS targeting scheme" that identified for enhanced scrutiny the applications of applicants with names associated with "conservative" causes, such as "Tea Party" and "patriot," and perhaps "liberty." According to the complaint, this enhanced examination involved, "among other things, a multi- tier review process, . . . harassing and unconstitutional questions and requests for information that often required applicants to disclose donor lists,

communications with members, and internet passwords and usernames." *Linchpins of Liberty*, Pl.-Appellants' Br. at 4 (citing Second Am. Compl. at 32-56). Perhaps most tellingly, the Service sorted the "targeted" names of organizations to be subjected to the allegedly unconstitutional treatment through the use of a "Be-On-The-Lookout" list referred to as BOLO. Because their applications were subjected to extended delay and were not receiving the same processing as those of other organizations, and as they learned from other sources that the IRS might be employing improper and unconstitutional criteria, several applicants brought the present actions.

Also in May of 2013, the Department of the Treasury received what is referred to by the government as the "TIGTA" Report, for the Treasury Inspector General for Tax Administration. *See* J.A. in *Linchpins of Liberty*, at 87-140. That report, which we will often refer to as the Inspector General's Report, to avoid overburdening our opinion with acronyms, from Michael E. McKenney, Acting Deputy Inspector General for Audit, to the Acting Commissioner for Tax-Exempt and Government Entities Division of the Internal Revenue Service, bore the principal heading "Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review."

The Inspector General's Report was produced in response to requests by members of Congress resulting from what had become fairly high profile complaints against the apparently improper failure to normally process exemption applications by applicants like or including appellants. The district court disposed of the action in a judgment supported by a

reported opinion, *Linchpins of Liberty v. United States*, 71 F. Supp. 3d 236 (D.D.C. 2014).

A. The Bivens *Claims*

The court first took up the government's motion to dismiss the *Bivens* actions under Rule 12(b)(6). As to those claims, the district court rightly deemed itself bound by our decision in *Kim v. United States,* 632 F.3d 713 (D.C. Cir. 2011). As we had held in *Kim* that no action would lie against IRS employees in their individual capacities because "no *Bivens* remedy [is] available in light of the comprehensive remedial scheme set forth by the Internal Revenue Code," *Kim,* 632 **[*557]** F.3d at 717, the district court dismissed the present action as required by circuit precedent, *Linchpins of Liberty*, 71 F. Supp. 3d at 244. For this reason, as more fully set out in the district court's opinion, *see id.* at 241-44, we affirm the dismissal of the *Bivens* actions.

B. The Claims Under 26 U.S.C. § 6103

As the district court viewed the statutory claims, the plaintiffs were attempting to turn their grievances for the discriminatory acquisition of information into a claim that the information was improperly "inspected" by one or more IRS employees who had no need to inspect it because the information was not material to their applications for tax exempt status. *See Linchpins of Liberty*, 71 F. Supp. 3d at 247. There is no controlling appellate decision concerning the application of § 6103 to a comparable situation, perhaps in part because there is no factual history of such discriminatory acquisition of taxpayer information prior to the events giving rise to these cases and the *Z Street* decision, *supra.* However, there is

one unpublished district court decision which, while obviously not controlling, is nonetheless instructive.

Both parties rely on the decision of the Southern District of Ohio in *NorCal Tea Party Patriots v. IRS*, No. 1:13-cv-341, 2014 WL 3547369, at *11-14 (S.D. Ohio July 17, 2014). Both parties are correct that the decision contains a careful analysis of the governing law, though they come to opposite conclusions as to its effects. In *NorCal*, the plaintiffs raised similar claims to those we consider today. As in the cases before us, the IRS moved to dismiss the statutory claims under Rule 12(b)(6). The *NorCal* court considered the relevant sections of the IRS Code, 26 U.S.C. §§ 6103, 7431, and noted correctly that "Section [6103] requires that tax 'returns and return information shall be confidential.'" 2014 WL 3547369, at *11.

The statute defines "return information" as including the following:

> a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense . . .

26 U.S.C. § 6103(b)(2)(A). As the Ohio district court further noted, 26 U.S.C. § 7431 creates a private cause of action for violations of § 6103. That section provides:

> If any officer or employee of the United States knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

26 U.S.C. § 7431(a)(1).

However, we further note, as did the Ohio district court, that §§ 6103 and 7431 provide exceptions. Specifically, § 6103(h)(1) permits "inspection by or disclosure to officers and employees of the Department of the Treasury as official duties require such inspection or disclosure for tax administration purposes." The term "tax administration" is defined broadly as "the administration, management, **[*558]** conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party . . . ." *Id.* § 6103(b)(4).

The *NorCal* court denied the Rule 12(b)(6) motion, but did so noting:

> Plaintiff Groups will have to establish that the IRS officials who inspected or disclosed the return information did so knowing that the infor-

> mation was not necessary for tax administration purposes, regardless of whether the IRS officials who requested the information knew or believed it was necessary for the § 501(c)(4) application.

NorCal, 2014 WL 3547369, at *13.

While the question may be a close one, review of the complaints in the district court in this case does not reveal allegations sufficient to support the statutory requirements which were set forth, we believe correctly, by the *NorCal* court. As the district court correctly noted, unlike in *NorCal*, the complaint in this case makes only conclusory allegations and "general averments" regarding the handling of tax return information. *See Linchpins of Liberty*, 71 F. Supp. 3d at 248 n.18 (observing that "the plaintiffs admit that certain individual defendants were using tax return information 'to conduct official IRS business,'" and paragraph 296 of the complaint "does not allege that any of the defendants improperly inspected or disclosed *the plaintiffs'* tax return information . . ."). Further, "[b]ecause § 7431 represents a waiver of sovereign immunity, it must be 'strictly construed, in terms of its scope, in favor of the sovereign.'" *Snider v. United States*, 468 F.3d 500, 509 (8th Cir. 2006) (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)).

Therefore, we affirm the dismissal of the section 6103 counts of the complaints by the district court.

C. The Other Equitable Claims

None of the above disposes of the other equitable claims of appellants for violation of their constitutional rights by the viewpoint based targeting of their

applications by the IRS. The district court concluded that those claims were moot, depriving it of jurisdiction, and therefore dismissed the claims pursuant to Rule 12(b)(1). We disagree with this conclusion and reverse the district court's judgments on those claims.

As the district court rightly recognized, *see Linchpins of Liberty*, 71 F. Supp. 3d at 244, the courts of the United States, pursuant to Article III of the Constitution, have no jurisdiction to act unless there is "a case or controversy." *See, e.g.*, *Clarke v. United States*, 915 F.2d 699, 700-01 (D.C. Cir. 1990). The IRS has not disputed that this litigation began with a case or controversy. The government contends, however, and the district court agreed, that the case has become moot and therefore no longer comes within the jurisdiction of Article III courts. As the district court properly noted, "[e]ven where a case once posed 'a live controversy when filed, the [mootness] doctrine requires' the Court 'to refrain from deciding it if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'" 71 F. Supp. 3d at 244 (quoting *Clarke*, 915 F.2d at 701) (second alteration the district court's) (additional citations and internal quotation marks omitted).

Here the IRS contended, and the district court agreed, that plaintiffs' claims have become moot because the IRS has stopped using its admittedly improper discriminatory criteria and handling of applications **[*559]** by taxpayers with politically disfavored names. For a fuller understanding of the IRS's

claim of mootness based on its putative voluntary cessation, we need to make a rather full examination of the Inspector General's Report.

1. The Inspector General's Report

At the outset, we note that the Inspector General's Report was properly before the district court in its consideration of the motions to dismiss, and is properly before this court in our consideration of the appeal. In both actions, the plaintiffs attached and incorporated the full report with their complaints. The IRS has, obviously, taken no action to disavow or discredit the report of investigation by its parent department.

On May 14, 2013, the Treasury Inspector General for Tax Administration issued the audit report styled "Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review," and bearing the reference number: 2013-10-053 (citations to the report will be shown as "TIGTA").

The gist of the Inspector General's Report is clear from its name. The first sentence of the 25-page "Results of Review" states, "The Determinations Unit [of the IRS] developed and used inappropriate criteria to identify applications from organizations with the words Tea Party in their names." TIGTA at 5. Elucidating on that point, the audit determined that "according to the IRS, a Determinations Unit specialist was asked to search for applications with Tea Party, Patriots, or 9/12 in the organization's name as well as other 'political-sounding' names." *Id.* at 6.

Indeed, officials from the IRS function in charge of exempt organizations stated to the Inspector General that

> in May 2010, the Determinations Unit began developing a spreadsheet that would become known as the "Be On the Look Out" listing (hereafter referred to as the BOLO listing), which included the emerging issue of Tea Party applications. In June 2010, the Determinations Unit began training its specialists on issues to be aware of, including Tea Party cases. By July 2010, Determinations Unit management stated that it had requested its specialists to be on the lookout for Tea Party applications.

Id. (citation omitted).

The report goes on to remind the IRS that its function is to help American taxpayers to "understand and meet their tax responsibilities and" to "apply[] the tax law with integrity and fairness to all." *Id.* In recognizing that the IRS's handling of exemption applications from persons of disfavored viewpoints utterly failed that mission, the report states, "the criteria developed by the Determinations Unit gives the appearance that the IRS is not impartial in conducting its mission. The criteria focused narrowly on the names and policy positions of organizations instead of tax-exempt laws and Treasury Regulations." *Id.* at 6-7.

Although the TIGTA reports that some change was made in the criteria in June of 2011, the report goes on to observe that by January 2012, "criteria again focused on the policy positions of organizations instead of tax-exempt laws and Treasury Regulations." *Id.* at 7. In the meantime, the employees using

these improper criteria delayed, denied, and generally mishandled the applications of disfavored applicants. "As of December 17, 2012, many organizations had not received an approval or denial letter for more than two years after they submitted their applications. Some cases ha[d] been open during two election cycles (2010 and 2012)." *Id.* at 11.

The audit report is replete with details of discriminatory processing and delay. **[*560]** For example, "[t]he Determinations Unit sent requests for information that we later (in whole or in part) determined to be unnecessary for 98 (58 percent) of 170 organizations that received additional information request letters." *Id.* at 18.

The TIGTA includes specific examples, e.g.:

1. The names of the donors, contributors, and grantors. If the donor, contributor, or grantor has run or will run for a public office, identify the office. If not, please confirm by answering this question "No."
2. The amounts of each of the donations, contributions, and grants and the dates you received them.
3. How did you use these donations, contributions, and grants? Provide the details.

Id. at 19.

The Inspector General went on to list "seven questions identified as unnecessary by the [exempt organization] function."

1 Requests the names of donors.

2 Requests a list of all issues that are important to the organization and asks that the organization indicate its position regarding such issues.

3 Requests 1) the roles and activities of the audience and participants other than members in the activity and 2) the type of conversations and discussions members and participants had during the activity.

4 Asks whether the officer, director, *etc.*, has run or will run for public office.

5 Requests the political affiliation of the officer, director, speakers, candidates supported, *etc.*, or otherwise refers to the relationship with identified political party–related organizations.

6 Requests information regarding employment, other than for the organization, including hours worked.

7 Requests information regarding activities of another organization – not just the relationship of the other organization to the applicant.

Id. at 20.

2. Viewpoint Discrimination

To place in context our discussion of TIGTA's findings, we recall that under the First Amendment, the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015) (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). "Content-based

laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226. A "more blatant" and "egregious form of content discrimination" is viewpoint discrimination, which occurs when a government regulation "targets not subject matter, but particular views taken by speakers on a subject . . . ." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Viewpoint discrimination is based on "the specific motivating ideology or the opinion or perspective of the speaker[,]" *id.*, and, therefore, "plainly offend[s]" the First Amendment, *First Nat'l Bank of Boston v. Belloti*, 435 U.S. 765, 785-86 (1978).

Just last term, we stated directly that, "in administering the tax code, the IRS may not discriminate on the basis of viewpoint . . . ." *Z St.*, 791 F.3d at 30. We **[*561]** went on to say that "to process exemption applications pursuant to different standards and at different rates depending upon the viewpoint of the applicants" is "a blatant violation of the First Amendment." *Id.* at 32. The tax code may not "discriminate invidiously . . . in such a way as to aim at the suppression of dangerous ideas." *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983) (internal quotation marks and alteration omitted).

3. The Mootness Ruling

It being plain to the Inspector General, the district court, and this court that the IRS cannot defend its discriminatory conduct on the merits, the governing issue is now whether the controversy is moot. The district court held that it was; we conclude that it is

not. The fundamental concept of mootness is quite straightforward. As applied in the context of injunctive litigation, if there remains no conduct to be enjoined, then normally there is no relief that need be granted, the case or controversy has ceased, and the jurisdiction of the court has expired under Article III. However, there is a difference between the controversy having gone away, and simply being in a restive stage. This difference gives rise to the concept of "voluntary cessation." That concept governs the case in which the defendant actor is not committing the controversial conduct at the moment of the litigation, but "the defendant is 'free to return to [its] old ways'—thereby subjecting the plaintiff to the same harm but, at the same time, avoiding judicial review." *Qassim v. Bush*, 466 F.3d 1073, 1075 (D.C. Cir. 2006) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)) (additional citations omitted). For a defendant to successfully establish mootness by reason of its voluntary cessation of the controversial conduct, the defendant must show that "(1) there is no reasonable expectation that the conduct will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id.* at 1075 (quoting *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 459 (D.C. Cir. 1998)). Both the district court and the government acknowledge that the defendant has the burden of establishing that these criteria have been met, and that it is a "heavy burden." 71 F. Supp. 3d at 245; Appellee United States Br. in *Linchpins of Liberty*, at 13.

Here, voluntary cessation has never occurred. The IRS has admitted to the Inspector General, to the district court, and to us that applications for exemption

by some of appellant- plaintiffs have never to this day been processed. The IRS proudly boasts that "no more than 'two' applications for exemption remain pending with the IRS." Appellee United States Br. in *Linchpins of Liberty*, at 14. Further, they claim, "the vast majority of the plaintiffs lack a personal stake in the outcome of the lawsuit . . . ." *Id.* We would advise the IRS that a heavy burden of establishing mootness is not carried by proving that the case is nearly moot, or is moot as to a "vast majority" of the parties. Their heavy burden requires that they establish cessation, not near cessation.

The IRS offers a rather puzzling explanation for why the continued failure to afford proper processing to at least some of the victim applicants should not prevent a finding of cessation. That explanation is that the organizations whose applications were still pending "were involved in 'litigation' with the Justice Department . . . ." *Id.* at 27. The Service's brief further illuminates this point with a footnote explaining that "[u]nder long-standing procedures, administrative action on an application for exemption is ordinarily suspended if the applicant files suit in court." *Id.* at 28 n.4. **[*562]** It is not at all clear why the IRS proposes that not ceasing becomes cessation if the victim of the conduct is litigating against it. The IRS position is reminiscent of Catch-22 from the novel of the same name. Under that "catch," World War II airmen were not required to fly if they were mentally ill. However, anyone who applied to stop flying was evidencing rationality and therefore was not mentally ill. *See* Joseph Heller, *Catch-22* (1971). "You are entitled to an exemption from flying," the government said, "but you can't get it as long as you are asking for it."

Parallel to Joseph Heller's catch, the IRS is telling the applicants in these cases that "we have been violating your rights and not properly processing your applications. You are entitled to have your applications processed. But if you ask for that processing by way of a lawsuit, then you can't have it." We would advise the IRS: if you haven't ceased to violate the rights of the taxpayers, then there is no cessation. You have not carried your burden, be it heavy or light.

The IRS's only further attempt to justify the lack of cessation as to some of the applicants is to refer to its Catch-22 litigation rule as a "longstanding policy." To this we would advise the IRS: if you haven't ceased discriminatory conduct, the fact that you have been failing to cease it for a long time does not create cessation. You still have not carried your burden.

The IRS further calls our attention to a later follow-up report from the Treasury Inspector General for Tax Administration. The IRS argues, with support in the text of the document, that this report evidences further progress toward alleviation of the past discriminatory actions in the processing of the targeted applications. That second report, dated March 27, 2015, is not a part of the record before us. Indeed, it did not exist until over five months after the issuance of the district court opinion under review. While the IRS may be correct that we could consider this extra-record evidence by granting judicial notice to the official document, that does not in itself make the document ripe for consideration in our review. As noted, it is not part of the record. As further evident from the date of the document and the date of the opinions under review, it was not before the district court.

As we noted above, a dismissal under Rule 12(b)(1), unlike a dismissal under Rule 12(b)(6), is not reviewed de novo in its entirety, but only as to legal conclusions. Where, as here, the jurisdictional question before the court is fact-dependent, the first step of the review is a clear-error review regarding the factual decision of the district court. It is hardly possible for this court to determine whether a clear error occurred based on evidence that the district court did not consider, and that indeed did not exist at the time of the decision. Aside from that rather obvious proposition, it is also true that judicially-noticed evidence, like any other evidence, is subject to a trial court's determination as to its weight, effect, and consistency with other evidence. That the evidence in question is documentary rather than testimonial does not change the standard of review. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). The 2015 report may be noticeable, *see* Fed. R. Evid. 201(b), but its evidentiary use is not ripe. As we will be remanding this case for further proceedings, the government is free to offer the document in the district court.

Even if we assumed there was voluntary cessation, we would still conclude that the government has not carried its burden to establish mootness because it has not demonstrated that "(1) there is no reasonable expectation that the conduct **[*563]** will recur [or] (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Qassim*, 466 F.3d at 1075 (quoting *Motor & Equip. Mfrs. Ass'n*, 142 F.3d at 459). As to element 2, it is absurd to suggest that the effect of the IRS's unlawful conduct, which delayed the processing of appellant-plaintiffs' applications, has been eradicated when two

of the appellant-plaintiffs' applications remain pending. Nor can the government satisfy element 1 in light of the IRS's own language, which condemns it. As the district court observed, the IRS relied upon its announcement that "[w]e have *suspended* the use of 'be-on-the-lookout,' or BOLO, lists in the application process for tax exempt status," to show "that there is no reasonable expectation that the alleged conduct will recur . . . ." 71 F. Supp. 3d at 245 (emphasis added).

The IRS's response to the Inspector General's Report further caused the Service to announce that it "specifically . . . has *suspended* the use of BOLO lists in the application process for tax-exempt status . . . ." *Id.* (internal punctuation omitted) (emphasis added). And most tellingly, the IRS announced that "[e]ffective immediately, the use of watch lists to identify cases or issues requiring heightened awareness is *suspended until further notice* . . . ." *Id.* (emphasis added).

A violation of right that is "suspended until further notice" has not become the subject of voluntary cessation, with no reasonable expectation of resumption, so as to moot litigation against the violation of rights. Rather, it has at most advised the victim of the violation – "you're alright for now, but there may be another shoe falling."

To this point, we, like the Inspector General, have focused on the BOLO segment of the targeting scheme. We note that the complaints alleged extensive discriminatory conduct including "delayed processing . . . harassing, probing, and unconstitutional requests for additional information that . . . required

applicants to disclose, among other things, donor lists, direct and indirect communications with members of legislative bodies, Internet passwords and user names, copies of social media and other Internet postings, and even the political and charitable activities of family members." Linchpins Sec. Am. Compl. at ¶ 2. While the Inspector General's Report references many of these discriminatory actions, neither it nor anything else presented by the government meets the heavy burden of establishing that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Qassim*, 466 F.3d at 1075 (citation omitted). While a court's inquiry into possible mootness in response to a Rule 12(b)(1) violation has, as we have noted, a factual component, nonetheless the norm is that at the Rule 12 stage, the allegations of a complaint are taken as true, absent some reason for a rejection. In these cases, as the government has not carried its heavy burden of establishing mootness by voluntary cessation, we apply that normal presumption. The allegations of the complaint are quite sufficient to warrant a merits disposition based on adjudication of substantive evidence, not simply a dismissal at the pleadings stage.

Finally, although not addressed by the district court, the void-for-vagueness challenges raised by appellants in *Linchpins of Liberty*, to 26 C.F.R. § 1.501(c)(4)-1 and Revenue Procedure 86-43 are not moot for the same reasons as above—i.e, they continue to affect those plaintiff-organizations with pending applications and are amply supported by allegations in the complaint. *See* Linchpins Sec. Am. Comp. ¶¶ 298-308, 385-88, 399-401.

[*564] In short, the district court correctly identified the nature of this controversy and the nature of the government conduct subject to equitable relief. However, the court erred in concluding that the litigation over that conduct had been mooted by the government's putative voluntary cessation of the conduct.

III. CONCLUSION

For the reasons set forth above, we affirm the district court's dismissal of appellants' *Bivens* actions and statutory claims, but reverse the district court's dismissal of the actions for injunctive and declaratory relief and remand for further proceedings consistent with this opinion.

So ordered.

[Doc. 1628781, filed Aug. 5, 2016]

United States Court of Appeals
For the District of Columbia Circuit

September Term, 2015
FILED ON: AUGUST 5, 2016

No. 14-5316

TRUE THE VOTE, INC.
APPELLANT

v.

INTERNAL REVENUE SERVICE, ET AL.,
APPELLEES

No. 15-5013

LINCHPINS OF LIBERTY, ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:13-cv-00734)
(No. 1:13-cv-00777)

Before: HENDERSON, Circuit Judge, and
GINSBURG and SENTELLE, Senior Circuit Judges

J U D G M E N T

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgments of the District Court appealed from in these causes are hereby affirmed in part, reversed in part, and the cases are remanded for further proceedings, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

Date: August 5, 2016

Opinion for the court filed by Senior Circuit Judge Sentelle.

[***Editing Note**: Page numbers from the reported opinion, 71 F. Supp. 3d 219, are indicated **[*219]**.*]

[Doc. 103, filed Oct. 23, 2014]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TRUE THE VOTE, INC.,
Plaintiff,

v.

INTERNAL REVENUE SERVICE, et al.,
Defendants.

Civil Action No. 13-734 (RBW)

[*222] MEMORANDUM OPINION

The plaintiff, True the Vote, Inc., filed this civil action against the Internal Revenue Service ("IRS"), the United States of America, and several IRS officials in both their official and individual capacities,[1] alleging

---

[1] The individual defendants are: David Fish, Steven Grodnitzky, Lois Lerner, Steven Miller, Holly Paz, Michael Seto, Douglas Shulman, Cindy Thomas, William Wilkins, Susan Maloney, Ronald Bell, Janine L. Estes, and Faye Ng. For purposes of resolving the several motions to dismiss, these individual de-

violations of the First Amendment, the Internal Revenue Code, 26 U.S.C. § 6103 (2012), the Administrative Procedure Act, 5 U.S.C. § 706 (2012), and seeking declaratory and injunctive relief, as well as monetary damages. See First Amended Complaint ("Am. Compl.") ¶¶ 13, 139-214. Currently before the Court are the Defendants' Motion to Dismiss Counts I, II, IV[,] and V ("Defs.' Mot.") of the Complaint; the Individual Management Defendants' Motion to Dismiss [Count III of the Complaint] ("Mgmt. Mot."); the Motion to Dismiss [Count III of the Complaint] of Cincinnati Defendants Susan Maloney, Ronald Bell, Janine L. Estes, and Faye Ng ("Cincinnati Mot."); and the Plaintiff's Motion to Stay Agency Action ("Pl.'s Mot.").[2] For the following reasons, the Court con-

---

fendants fall into two categories: the Individual Management defendants (Steven Grodnitzky, Lois Lerner, Steven Miller, Holly Paz, Michael Seto, Douglas Shulman, Cindy Thomas, and William Wilkins) and the Cincinnati defendants (Susan Maloney, Ronald Bell, Janine L. Estes, and Faye Ng)

[2] In addition to the submissions already identified, the Court considered the following filings submitted by the parties in rendering its decision: (1) True the Vote's Opposition to the Government's Motion to Dismiss Counts I, II, IV, and V ("Opp'n to Defs.' Mot."); (2) the Reply in Support of Motion to Dismiss Counts I, II, IV[,] and V ("Defs.' Reply"); (3) the Supplement to [the] Motion to Dismiss Counts I, II, IV[,] and V ("Defs.' Supplement"); (4) the Plaintiff's Notice of Supplemental Authority [Regarding Counts I, II, IV, and V] ("Pl.'s Supp'l Authority I"); (5) the Federal Defendants' Response to [the] Plaintiff's Notice of Supplemental Authority [Regarding Counts I, II, IV, and V] ("Defs.' Resp. to Pl.'s Supp'l Authority I"); (6) the Memorandum in Support of [the] Individual Management Defendants' Motion to Dismiss ("Mgmt. Mem."); (7) the Memorandum of Points and Authorities in Support of the Cincinnati Defendants' Motion to Dismiss

cludes that it must grant all of the defendants' motions to dismiss and deny the plaintiff's motion to stay agency action.[3]

[*223] I. BACKGROUND

The plaintiff asserts that it "is a not-for-profit Texas corporation organized and operated exclusively or primarily for a charitable purpose." Am. Compl. ¶ 2. On July 15, 2010, the plaintiff filed an application with the Internal Revenue Service ("IRS") for tax-exempt status pursuant to the Internal Revenue Code, 26 U.S.C. §§ 501(c)(3), 509(a)(1), 170(b)(1)(a)(vi). Id. ¶¶ 3-4; see also id. ¶ 53. After "receiv[ing] no further

("Cincinnati Mem."); (8) True the Vote's Opposition to [the] Individual Defendants' Motion to Dismiss ("Opp'n to Mgmt. and Cincinnati Mots."); (9) the Reply Brief in Support of Individual Management Defendants' Motion to Dismiss ("Mgmt. Reply"); (10) the Reply in Support of the Cincinnati Defendants' Motion to Dismiss ("Cincinnati Reply"); (11) the Individual Defendants' Joint Notice of Supplemental Authority ("Joint Supp'l Authority"); (12) the Plaintiff's Notice of Supplemental Authority [Regarding Count III] ("Pl.'s Supp'l Authority II"); (13) the Federal Defendants' Response to [the] Plaintiff['s] Notice of Supplemental Authority [Regarding Count III] ("Defs.' Resp. to Pl.'s Supp'l Authority II"); (14) the Opposition to [the] Plaintiff's Motion to Stay Agency Action ("Opp'n to Pl.'s Mot."); (15) the Plaintiff's Reply to [the] Federal Defendants' Opposition to Motion to Stay Agency Action ("Pl.'s Reply"); (16) the Plaintiff's Notice of Supplemental Authority ("Pl.'s Supp'l Authority III"); and (17) the Individual Defendants' Joint Response to [the] Plaintiff's Notice of Supplemental Authority ("Mgmt. and Cincinnati Resps. to Pl.'s Supp'l Authority III").

[3] The Court's opinion should not be interpreted as an assessment of the propriety of the alleged conduct by the defendants, as resolution of the motions does not require an assessment of the merits of the plaintiff's claims.

contact from the IRS [d]efendants during [the] calendar year 2010," id. ¶ 54, the plaintiff asked Texas Senator John Cornyn to "inquire[] of the IRS as to the status of [the plaintiff]'s application for tax-exempt status," id. ¶ 55. On February 5, 2011, the plaintiff received a "letter sent from the Cincinnati, Ohio IRS office" requesting "additional information from [the plaintiff] to complete the IRS'[s] consideration of [the plaintiff]'s [a]pplication." Id. ¶ 56. On March 7 and March 8, 2011, that information was "furnished to the IRS." Id. ¶ 57. Then, on October 12, 2011, the plaintiff "contacted the IRS" to follow up on its application for tax-exempt status. Id. ¶ 60. The plaintiff was allegedly told that "the Washington, [DC] office had assumed primary approval responsibility" for the plaintiff's application. Id. ¶ 60. On November 8, 2011, the plaintiff "submitted to the IRS additional information" about itself, as well as "legal precedent . . . . . .that provided the IRS [d]efendants the legal basis" for approving the plaintiff's application. Id. ¶ 61.

The following year, on February 8, 2012, the plaintiff received another letter "from the Cincinnati, Ohio IRS office" stating that "the IRS needed even more information" from the plaintiff to complete its consideration of the plaintiff's tax-exempt application. Id. ¶ 63. That additional information was provided to the IRS on March 20, 2012. Id. ¶ 64. After providing that information, the plaintiff received a third letter on October 9, 2012, from "the Cincinnati, Ohio IRS office," "request[ing] still more information." Id. ¶ 66. The plaintiff complied with that information request on November 30, 2012. Id. ¶ 67.

Based on its correspondence with the IRS, the plaintiff alleges that due to its "mission of promoting election integrity and its perceived association with 'Tea Party' organizations, the IRS [d]efendants systematically targeted [the plaintiff's] application for unwarranted delay and heightened review and scrutiny," thereby subjecting the plaintiff "to numerous unnecessary, burdensome, and unlawful requests for information about its operations, activities, leadership, volunteers, associations, and affiliations." Id. ¶ 5. As support for its position, the plaintiff cites a May 10, 2013 "meeting of the Exempt Organizations Committee of the Tax Section of the American Bar Association," where one of the individual defendants "admitted . . . that the IRS had selected applications for tax-exempt status for further review and scrutiny 'simply because the applications' 'used names like Tea Party . . .'" Id. ¶ 77 (citing reference). During that meeting, the plaintiff contends that the IRS admitted it "sent some letters out that were far too broad, asking questions of these organizations that were[not] really necessary . . . ." Id. ¶ 78 (internal quotations and citations omitted). As further support of the plaintiff's allegation concerning the IRS's selective targeting, the plaintiff cites "a report entitled 'Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review' (the '[Report]')" that was issued "[o]n or around May 14, 2013," by "the Treasury Inspector General for Tax Administration." **[*224]** Id.¶ 80. The plaintiff summarizes the Treasury Inspector General for Tax Administration's conclusion as follows:

> The IRS used inappropriate criteria that identified for review Tea Party and other organizations applying for tax-exempt status based upon their names or policy positions instead of indications of potential political campaign intervention. Ineffective management: 1) allowed inappropriate criteria to be developed and stay in place for more than [eighteen] months, 2) resulted in substantial delays in processing certain applications, and 3) allowed unnecessary information requests to be issued.

Id. ¶ 81 (quoting the Report); see generally id. ¶¶ 82-118 (describing certain IRS actions).

Thus, according to the plaintiff, the IRS defendants engaged in an "unlawful scheme" whereby the plaintiff was "forced to repeatedly furnish the IRS with information, materials, and documents that were not necessary to determine whether [the plaintiff] was entitled to tax-exempt status." Id. ¶ 6. The plaintiff alleges that the "IRS [d]efendants knowingly developed, implemented, and applied the IRS [t]argeting [s]cheme in violation of the United States Constitution, the Internal Revenue Code governing tax-exempt organizations, procedures historically followed by the IRS, and Treasury Regulations." Id. ¶ 124; see also id. ¶ 135. In the eyes of the plaintiff, the "mistreatment and mishandling of [the plaintiff]'s application for tax-exempt status and the refusal of the IRS [d]efendants to issue a determination letter recognizing [the plaintiff]'s tax-exempt status . . . has caused the organization substantial damages and financial hardship," id. ¶ 134, and "has substantially and materially interfered with its ability to engage in

free speech, free association, and activities in furtherance of its charitable purpose," id. ¶ 137.

The plaintiff filed this action on May 21, 2013, ECF No. 1, and amended its complaint on July 22, 2013, Am. Compl. at 48. Count one seeks declaratory relief that the plaintiff is entitled to enjoy tax-exempt status as a charitable organization described in 26 U.S.C. § 501(c)(3) (2012). See Am. Compl. ¶¶ 140-41. Count two also seeks a declaratory judgment that the "IRS [t]argeting [s]cheme" violated the plaintiff's First Amendment rights, and injunctive relief to prevent additional violations. See id. ¶¶ 150-52, 158. Count three seeks monetary damages against certain defendants in their individual capacities for their alleged participation in the "IRS [t]argeting [s]cheme." See id. ¶¶ 164-65. Count four claims violations of 26 U.S.C. § 6103, which relates to unauthorized disclosures and inspections of any tax return or tax return information. See id. And count five asserts violations of the Administrative Procedure Act for the alleged "IRS [t]argeting [s]cheme." Id. ¶¶ 189-206.

After the plaintiff instituted this action, "an internal IRS memorandum released by the IRS" found that "applications for tax-exempt status continued to be subjected to the . . . IRS [t]argeting [s]cheme until June 20, 2013, when it was allegedly suspended." Id. ¶ 136 (citing Daniel Werfel, Charting a Path Forward at the IRS: Initial Assessment and Plan of Action, Appendix ("App.") C (June 24, 2013), www.irs.gov/PUP/newsroom/Initial%20Assessment%20and%20Plan%20of%20Action.pdf ("IRS Action Plan")). Since the defendants filed their pending motions to dismiss, the IRS has "grant[ed] the [p]laintiff's application for tax-

exempt status . . . and was in the process of issuing a favorable determination letter."[4] Defs.' Supplement **[*225]** at 1. The plaintiff opposes all pending motions to dismiss.

II. STANDARDS OF REVIEW

A. Rule 12(b)(1) Motion to Dismiss

Rule 12(b)(1) allows a party to move to dismiss "for lack of subject-matter jurisdiction." Fed. R. Civ. P. 12(b)(1). When a defendant moves to dismiss under Rule 12(b)(1), "the plaintiff[] bear[s] the burden of proving by a preponderance of the evidence that the Court has subject[-]matter jurisdiction." Biton v. Palestinian Interim Self-Gov't Auth., 310 F. Supp. 2d 172, 176 (D.D.C. 2004); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). A court considering a Rule 12(b)(1) motion must "assume the truth of all material factual allegations in the complaint and 'construe the complaint liberally, granting [a] plaintiff the benefit of all inferences that can be derived from the facts alleged.'" Am. Nat'l Ins. Co. v. FDIC,

---

[4] The plaintiff has provided the Court with a "true and correct copy of the [d]etermination [l]etter[, which] is a self- authenticating document . . . ." Opp'n to Defs.' Mot. at 1 n.1; see also id., Exhibit ("Ex.") A (September 26, 2013 Determination Letter Granting the Plaintiff's Application for Tax-Exempt Status ("Determination Letter")). And in light of the parties' representations, the Court takes judicial notice that the plaintiff's application for tax-exempt status has been approved by the IRS. Fed. R. Evid. 201(b)(2) ("The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.").

642 F.3d 1137, 1139 (D.C. Cir. 2011) (quoting Thomas v. Principi, 394 F.3d 970, 972 (D.C. Cir. 2005)). But a "court must give [a] plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim." Byrum v. Winter, 783 F. Supp. 2d 117, 122 (D.D.C. 2011) (citing Macharia v. United States, 334 F.3d 61, 64, 69 (D.C. Cir. 2003)). And "[a]lthough 'the District Court may in appropriate cases dispose of a motion to dismiss for lack of subject[-]matter jurisdiction under Fed. R. Civ. P. 12(b)(1) on the complaint standing alone,' 'where necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.'" Coal. for Underground Expansion v. Mineta, 333 F.3d 193, 198 (D.C. Cir. 2003) (quoting Herbert v. Nat'l Acad. of Scis., 974 F.2d 192, 197 (D.C. Cir. 1992)). Finally, in determining whether it has jurisdiction, the Court "may consider materials outside of the pleadings." Jerome Stevens Pharm., Inc. v. FDA, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

B. Rule 12(b)(6) Motion to Dismiss

A Rule 12(b)(6) motion tests whether the complaint "state[s] a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). In considering a Rule 12(b)(6) motion, the

Court affords the plaintiff the "benefit of all inferences that can be derived from the facts alleged." Am. Nat'l Ins. Co. v. FDIC, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (internal quotations and citation omitted). But raising a "sheer possibility that a defendant has acted unlawfully" fails to satisfy the facial plausibility requirement. Iqbal, 556 U.S. at 678. Rather, a claim is facially plausible "when the plaintiff pleads factual content that allows the [C]ourt to draw [a] reasonable inference that the defendant is liable for the misconduct **[*226]** alleged." Id. (citing Twombly, 550 U.S. at 556). While the Court must "assume [the] veracity" of any "well-pleaded factual allegations" in the complaint, conclusory allegations "are not entitled to the assumption of truth." Id. at 679. "In determining whether a complaint states a claim, the [C]ourt may consider the facts alleged in the complaint, documents attached thereto or incorporated therein, and matters of which it may take judicial notice." Abhe & Svoboda, Inc. v. Chao, 508 F.3d 1052, 1059 (D.C. Cir. 2007) (internal quotations omitted). And among the documents "subject to judicial notice on a motion to dismiss" are "public records," Kaempe v. Myers, 367 F.3d 958, 965 (D.C. Cir. 2004), which includes records from other court proceedings, Covad Commc'ns Co. v. Bell Atl. Corp., 407 F.3d 1220, 1222 (D.C. Cir. 2005).

III. ANALYSIS

A. Counts One, Two, and Five of the Plaintiff's Complaint

The defendants contend that the Court does not have subject-matter jurisdiction over counts one, two, and five of the plaintiff's complaint because the IRS ultimately approved the plaintiff's application for tax-

exempt status, and thus counts one, two, and five—all of which seek "to correct [the] alleged targeting [of the IRS] and delay during its application process" for tax-exempt status—are now moot as there is no longer any case or controversy for the Court to resolve. Defs.' Reply at 1; see also Defs.' Mot. at 2-4. The plaintiff, on the other hand, insists that there are "ongoing, live controversies" because "[t]his case is about declaring the illegitimacy of the IRS [t]argeting [s]cheme in all its forms [and] enjoining its ongoing implementation." Opp'n to Defs.' Mot. at 9 (emphasis in original). And the plaintiff argues that without this "additional relief, the IRS can continue to employ its [t]argeting [s]cheme." Id.

As the outset, the Court notes that the plaintiff does not contest that count one of its complaint is moot. See id. ("Counts [two] and [five] present, actual ongoing, live controversies" (emphasis added)). Thus, the Court finds that the plaintiff has conceded the motion to dismiss count one for lack of subject-matter jurisdiction. See Lewis v. District of Columbia, No. 10-5275, 2011 WL 321711, at *1 (D.C. Cir. Feb. 2, 2011) (per curiam) ("'It is well understood in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.'" (quoting Hopkins v. Women's Div., Gen. Bd. of Global Ministries, 284 F. Supp. 2d 15, 25 (D.D.C. 2003), aff'd, 98 F. App'x 8 (D.C. Cir. 2004))); Local Civ. R. 7(b).

Unless an actual, ongoing controversy exists in this case, this Court is without power to decide it. See

Clarke v. United States, 915 F.2d 699, 700-01 (D.C. Cir. 1990). Even where a case once posed "a live controversy when filed, the [mootness] doctrine requires" the Court "to refrain from deciding it if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'" Id. (quoting Transwestern Pipeline Co. v. FERC, 897 F.2d 570, 575 (D.C. Cir. 1990)). Here, after the plaintiff initiated this case, its application to the IRS for tax-exempt status was approved by the IRS. See Opp'n to Defs.' Mot., Ex. A (Determination Letter) at 1.[5] The allegedly unconstitutional governmental **[*227]** conduct, which delayed the processing of the plaintiff's tax- exempt application and brought about this litigation, is no longer impacting the plaintiff. See NorCal Tea Party Patriots v. IRS, No.1:13-cv-341, 2014 WL 3547369, at *9 n.11 (S.D. Ohio July 17, 2014) ("The claim for declaratory and injunctive relief cannot be brought by other Plaintiff Groups who have either had their applications for tax-exempt status ruled upon or have withdrawn their applications."). Counts two and five, therefore, are moot.

Notwithstanding the IRS's favorable resolution of the plaintiff's tax-exempt application, the plaintiff wants to forge ahead with these counts of its complaint. The plaintiff attempts to salvage these counts by invoking the "voluntary cessation" exception to the

---

[5] This critical fact renders Z St., Inc. v. Koskinen, _ F. Supp. 2d _, 12-cv-0401(KBJ), 2014 WL 2195492 (D.D.C. May 27, 2014), inapplicable to the Court's analysis.

mootness doctrine.[6] See Opp'n to Defs.' Mot. at 11-15. As the District of Columbia Circuit has explained:

> The rationale supporting the defendant's voluntary cessation as an exception to mootness is that, while the defendant's unilateral cessation of the challenged conduct may grant the plaintiff relief, the defendant is free to return to its old ways—thereby subjecting the plaintiff to the same harm but, at the same time, avoiding judicial review. Accordingly, a case can be mooted by virtue of the defendant's cessation of its allegedly illegal conduct only if (1) there is no reasonable expectation that the conduct will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.

Qassim v. Bush, 466 F.3d 1073, 1075 (D.C. Cir. 2006) (internal alterations, quotations, and citations omitted). "The defendant carries the burden of demonstrating 'that there is no reasonable expectation that the wrong will be repeated,' and 'the burden is a heavy one.'" Am. Bar Ass'n v. FTC, 636 F.3d 641, 648 (D.C. Cir. 2011) (internal alteration omitted) (quoting United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953)). But "'where the defendant is a government actor—and not a private litigant—there is less concern about the recurrence of objectionable behavior.'" D.C. Prof'l Taxicab Drivers Ass'n v. District of Colum-

[6] By invoking an exception to the mootness doctrine, the plaintiff implicitly seems to concede that these claims are moot.

bia, 880 F. Supp. 2d 67, 75 (D.D.C. 2012) (quoting Citizens for Responsibility & Ethics in Wash. v. SEC, 858 F. Supp. 2d 51, 61 (D.D.C. 2012) (citing Circuit cases)).

The "voluntary cessation" exception does not rescue counts two and five of the plaintiff's complaint from dismissal on the ground of mootness. According to the plaintiff, the IRS publicly "suspended" its "targeting scheme" on June 20, 2013.[7] Am. Compl. ¶ 136 (emphasis added); see also Initiative & Referendum Inst. v. U.S. Postal Serv., 685 F.3d 1066, 1074 (D.C. Cir. 2012), cert. denied, U.S., 133 S. Ct. 1802 (2013) ("It is implausible that the [defendant] would have gone through the cumbersome process of amending its regulation . . . only to [unconstitutionally] re-amend the regulation **[*228]** after this case is resolved"); Coal. of Airline Pilots Ass'ns v. FAA, 370 F.3d 1184, 1191 (D.C. Cir. 2004) (mooting case where government provided "unequivocal assurances" that application of challenged regulation was "effectively dead"); Citizens for Responsibility, 858 F. Supp. 2d at 62-63 (finding that a submission by the plaintiff reflecting

[7] Although the complaint states that the IRS "allegedly suspended" the "targeting scheme," Am. Compl. ¶ 136, the Court takes judicial notice that the IRS has in fact suspended the alleged scheme and taken remedial steps to address the alleged conduct, see IRS Action Plan at 7, 14, App. C; IRS Charts a Path Forward [W]ith Immediate Actions, http://www.irs.gov/uac/Newsroom/IRS-Charts-a-Path-Forward-with-Immediate-Actions (last visited Oct. 23, 2014) ("IRS Path Forward"), as it has publicly stated so on its website, see, e.g., Seifert v. Winter, 555 F. Supp. 2d 3, 11 n.5 (D.D.C. 2008) (Walton, J.) (citing cases that allow the taking of judicial notice of information published on government websites).

defendant's abandonment of challenged policy was enough to provide the Court with "comfort that the [defendant] [wa]s taking seriously [the] [p]laintiff's concerns with the prior policy and [wa]s undertaking efforts to ensure" its "discontinu[ation]"); Mont. Shooting Sports Ass'ns v. Norton, 355 F. Supp. 2d 19, 21 n.1, 23 (D.D.C. 2004) (mooting case where government "rescinded" its challenged action), aff'd, No. 04-5434, 2005 WL 2810686 (D.C. Cir. June 14, 2005); Jean v. Dep't of Labor, No. 89-cv-0611-OG, 1990 WL 515163, at *4 (D.D.C. Jan. 9, 1990) (rendering case moot by defendants' actions and assurances of good faith as to future behavior). And subsequent to that suspension, the plaintiff's application for tax-exempt status was granted. Opp'n to Defs.' Mot., Ex. A (Determination Letter) (approving plaintiff's application on September 26, 2013). Now that the plaintiff has received tax-exempt status, which has "completely and irrevocably eradicated the effects of the alleged violation[s]" by the defendants, Qassim, 466 F.3d at 1075, there is no reasonable expectation that the defendants will "return to [their allegedly] old ways," i.e., utilizing an allegedly unlawful "targeting scheme" on certain organizations seeking tax-exempt status during the tax-exempt application process, and "subjecting the plaintiff to the same harm" again, id. Therefore, the defendants' grant of tax-exempt status to the plaintiff, and the defendants' suspension of the alleged IRS targeting scheme during the tax-exempt application process, including remedial steps to address the alleged conduct, coupled with the reduced "concern about the recurrence of objectionable behavior" by government actors, D.C. Prof'l Taxicab Drivers, 880 F. Supp. 2d at 75, convinces the Court that the

"voluntary cessation" exception is not applicable here.[8]

Endeavoring to prolong the life of counts two and five of the complaint, the plaintiff hypothetically suggests that the IRS could audit the plaintiff at a later point in time and "be singled out [again] for reasons unrelated to the provisions of the Internal Revenue Code." Opp'n to Defs.' Mot. at 13. But not only is this prospect of future harm speculative, see Munsell v. Dep't of Agric., 509 F.3d 572, 581 (D.C. Cir. 2007) ("[E]ven if [the plaintiff] could establish that agency officials violated his First Amendment rights . . . [the plaintiff could not] demonstrate[] a real and immediate threat that [the plaintiff] would be subject to the same conduct in the future."); Don't Tear it Down, Inc., v. Gen. Servs. Admin., 401 F. Supp. 1194 1199 (D.D.C. 1975) (mooting case where challenged governmental conduct "[s]o far as the Court [wa]s aware . . . ha[d] not been duplicated in any other instance," and "that it will be duplicated must be deemed speculative"), it is also a harm that is different than the one identified in the complaint, which is entirely focused on an alleged IRS "targeting scheme" during the plaintiff's tax-exempt application process,[9] Qassim, 466 F.3d at 1075 ("voluntary cessation . . . exception" applicable where plaintiff would be "subject[ed] . . . to

[8] The cases cited by the plaintiff invoking the "voluntary cessation" exception are thus inapposite.

[9] This rationale applies equally to the plaintiff's argument in its motion to stay agency action that the IRS may potentially disclose the plaintiff's confidential information at some point in the future pursuant to 26 U.S.C. § 6104. See Opp'n to Defs.' Mot. at 10-11.

the **[*229]** same harm" (emphasis added)). As such, counts two and five no longer warrant the Court's attention and further use of its resources.[10] Newdow v.

[10] The plaintiff urges the Court to allow it to maintain these counts because "there are indications that the IRS [t]argeting [s]cheme has not ceased, that it has spread beyond the application process, and that it is likely to continue." Opp'n to Defs.' Mot. at 13. This plea is rejected for several reasons. First, this projected harm is contrary to what the plaintiff has alleged in its complaint, which is that the IRS targeting scheme is no longer ongoing. Am. Compl. ¶ 136 (alleging that IRS targeting scheme was "suspended" on June 20, 2013 (emphasis added)). Second, the Court will not allow the plaintiff to amend the already-amended complaint through an opposition brief and recast its claims concerning the IRS's alleged targeting scheme that stalled the approval of its tax-exempt application, e.g., id. ¶ 73 (identifying IRS targeting scheme as limited to a "written and unwritten policy for identifying and subjecting certain applicants for tax-exempt status to additional and heightened review and scrutiny" (emphasis added)), as a broader challenge to a potentially unlawful ongoing scheme or policy at the IRS in carrying out its responsibilities other than reviewing tax-exempt applications. Indeed, "it is a well-established principle of law in this Circuit that [the plaintiff] may not amend [its] complaint by making new allegations in [the] opposition brief." Budik v. Ashley, _ F. Supp. 2d _, _, No. 12-cv-1949(RBW), 2014 WL 1423293, at *8 (D.D.C. Apr. 14, 2014) (Walton, J.) (citing Larson v. Northrop Corp., 21 F.3d 1164, 1173-74 (D.C. Cir. 1994)). And third, even assuming that the defendants continue to implement the IRS targeting scheme against other organizations like the plaintiff in its review of their applications for tax-exempt status—which is contradicted by the plaintiff's complaint, Am. Compl. ¶ 136—the plaintiff filed its complaint on the basis of alleged harm to itself during its application process for tax-exempt status and not on the behalf of others that may have been similarly situated to the plaintiff, i.e., other organizations subjected to the same alleged conduct during their application processes for tax- exempt status, see Qassim, 466 F.3d at 1076 (explaining

Roberts, 603 F.3d 1002, 1008 (D.C. Cir. 2010) (holding that while the constitutionality of certain governmental conduct "may be an important question to [the] plaintiffs, . . it is not a live controversy that can avail itself of the judicial powers of the federal courts[, and the question] is therefore moot"). Accordingly, counts two and five are dismissed for want of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).[11]

---

that constitutional challenge to a government policy can proceed if seeking "relief for individuals similarly situated").

[11] The plaintiff's reliance on City of Hous. v. Dep't of Hous. & Urban Dev., 24 F.3d 1421, 1428 (D.C. Cir. 1994), is misplaced; and in fact, the Court's conclusion is consistent with the case. The District of Columbia Circuit enumerated three possible outcomes when a plaintiff's claim for declaratory relief regarding agency action taken against the plaintiff pursuant to an unlawful policy is moot: (1) the plaintiff can invoke the "capable of repetition, yet evading review" or "voluntary cessation" exceptions to continue the litigation and challenge the policy; (2) the plaintiff "lacks standing to attack future applications of that policy" and "the [C]ourt is unable to award relief"; or (3) the plaintiff "has standing to challenge the future implementation of that policy" and "declaratory relief may be granted if the claim is ripe for review." Id. at 1429-30. Here, the Court has already determined that the "voluntary cessation" exception is inapplicable. And the plaintiff has not properly pleaded imminent future harm in the complaint, as the pleaded future harm is not only different than the one spelled out in the complaint, but the defendants have also suspended the disputed policy, such that the Court could not find standing to challenge future applications of the policy. See Lujan, 504 U.S. at 560-61 (explaining that there must be an injury-in-fact that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical," to maintain standing in a suit).

B. Count Three of the Plaintiff's Complaint

The plaintiff seeks "money damages," also commonly known as a Bivens **[*230]** remedy,[12] against the individual IRS defendants in their individual capacities for their alleged constitutional violations alleged in count three of the complaint. Am. Compl. ¶ 164; see also Opp'n to Mgmt. and Cincinnati Mots. at 24-42. In response, the individual IRS defendants generally argue that count three should be dismissed because: (1) the Court does not have personal jurisdiction over several defendants; (2) even if the Court has personal jurisdiction over all defendants, no Bivens claim can be asserted against the individual IRS defendants; and (3) to the extent any Bivens claim is allowed, the IRS defendants are entitled to qualified immunity. See, e.g., Mgmt. Mem. at 1-2, 6-8; Cincinnati Mem. at 1-2. As explained below, because precedent does not permit the Court to create a Bivens remedy for the plaintiff against the individual IRS defendants, the Court need not address the personal jurisdiction and qualified immunity issues.

In Kim v. United States, 632 F.3d 713 (D.C. Cir. 2011), the Circuit dealt with aggrieved taxpayers who alleged IRS wrongdoing, including unconstitutional conduct by individual IRS employees, and sought Bivens relief as a result of the alleged harm. Id. at

---

[12] In Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court held that a plaintiff could recover monetary damages against federal officials who violated the constitutional rights of the plaintiff while acting under the color of federal law.

714-15. The Circuit affirmed the district court's dismissal of the "Bivens claims against the [d]efendants in their official capacities" pursuant to Fed. R. Civ. P. 12(b)(1), noting that it is "well established that Bivens remedies do not exist against officials sued in their official capacities." Id. at 715. The Circuit also affirmed the district court's dismissal of the "Bivens claims against the [d]efendants in their individual capacities" pursuant to Fed. R. Civ. P. 12(b)(6) because "no Bivens remedy was available in light of the comprehensive remedial scheme set forth by the Internal Revenue Code." Id. at 717.

The plaintiff here attempts to distinguish Kim by characterizing it as "materially different" and suggesting that Kim's holdings are limited to cases involving "Bivens claims [against IRS employees] under [the] Due Process Clause." Opp'n to Mgmt. and Cincinnati Mots. at 40. But that suggestion relies on a strained reading of Kim. In affirming the rejection of the Bivens claims against IRS officials in both their official and individual capacities, the Circuit's language did not limit the scope of its ruling. See Kim, 632 F.3d at 715, 717. And in any event, the plaintiff has not distinguished—through the cases it cites or otherwise—any legally cognizable distinction between Due Process Clause claims and First Amendment Claims such that a Bivens remedy is appropriate in the former context, but not the latter context.[13]

---

[13] "The trend in other Circuits also has been to not recognize Bivens actions against IRS agents." NorCal, 2014 WL 3547369, at *8 (citing Circuit cases, "follow[ing] the majority position," and dismissing Bivens actions).

The plaintiff attempts to blunt the force of Kim by complaining that the Circuit in Kim "omit[ted] an entire[] inquiry into whether Congress ha[d] not inadvertently omitted damages remedies for certain claimants, and ha[d] not plainly expressed an intention that the courts preserve Bivens remedies." Opp'n to Mgmt. and Cincinnati Mots. at 41 (certain internal alterations and quotations omitted). Accordingly, the plaintiff urges the Court to engage in this inquiry. See id. at 42-44. The alleged omission by the plaintiff, however, **[*231]** is belied by a closer reading of the district court opinion as well as the Circuit's opinion.

The district court in Kim undertook the very analysis that the plaintiff asks the Court to conduct. In declining to extend a Bivens remedy to the plaintiffs against the IRS employees in their individual capacities for alleged constitutional violations, the district court recognized that the "existence of a comprehensive remedial scheme" was a "special factor" that counseled against its extension. Kim v. United States, 618 F. Supp. 2d 31, 38 (D.D.C. 2009), aff'd in part, rev'd in part and remanded, 632 F.3d 713 (D.C. Cir. 2011). "That is, when 'Congress has put in place a comprehensive system to administer public rights, has not inadvertently omitted damages remedies for certain claimants, and has not plainly expressed an intention that the courts preserve Bivens remedies,' courts 'must withhold their power to fashion damages remedies' pursuant to Bivens." Id. (quoting Spagnola v. Mathis, 859 F.2d 223, 228 (D.C. Cir. 1988) (per curiam) (en banc)). On appeal, the Circuit "agree[d] with the district court's reasoning" that "no Bivens remedy was available in light of the comprehensive remedial scheme set forth by the Internal Revenue Code." Kim,

632 F.3d at 718; see also NorCal, 2014 WL 3547369, at *5-8; Church By Mail, Inc. v. United States, No. 87-cv-0754-LFO, 1988 WL 8271, at *3 (D.D.C. Jan. 22, 1988) (explaining that declaratory relief for applicants seeking tax-exempt status under 26 U.S.C. § 7428 renders Bivens remedy improper for aggrieved applicants). In light of the Circuit's unequivocal endorsement of the district court's Bivens analysis, the Court cannot take a different approach.

Moreover, a former member of this Court was confronted with a nearly identical case to the one before the Court and refrained from fashioning a Bivens remedy as well. In Church By Mail, the plaintiff, a non-profit church seeking tax-exempt status, filed suit against the defendants, the IRS and various individual IRS agents, for the denial of its tax-exempt status application. 1988 WL 8271, at *1. The plaintiff claimed, inter alia, that the defendants violated the Constitution, including the First Amendment, by "favoring traditional churches over more unusual ones," id., "demonstrat[ing] dislike and intolerance of [the] plaintiff's religion," id. at *2 (internal quotations omitted), and "engag[ing] in invidious discrimination against [the] plaintiff by singling it out for investigation and attack," id. According to the plaintiff, in denying its tax-exempt application, the defendants "exceeded the bounds of the authority given to [the] defendants under existing law." Id.

In dismissing the plaintiff's claims seeking Bivens damages for the constitutional violations alleged against the defendants, the Court in Church By Mail reasoned that "a court- created remedy" was unnecessary where "Congress has created a specific remedy

for challenges to rulings on tax exemption." Id. at *3. Specifically, the Court recognized "that no Bivens-type damages remedy against the individual IRS agents should be created by the Court . . . because Congress has created a specific, meaningful declaratory judgment remedy under 26 U.S.C. [§] 7428 for cases . . . in which an application for tax[-]exempt status has been denied." Id. Had it created a Bivens remedy, the Court opined that it could have "'wre[acked] havoc . . . [on] the federal tax system.'" Id. (quoting Baddour, Inc. v. United States, 802 F.2d 801, 807 (5th Cir. 1986)). The Court reasoned that "[i]t would make the collection of taxes chaotic if a taxpayer could bypass the remedies provided by Congress simply by bringing a damage action against [IRS] employees." Id. (internal quotations and alterations omitted). This Court agrees with Judge Oberdorfer's assessment, and **[*232]** therefore dismisses count three of the complaint with prejudice for the failure to state a proper claim for relief under Federal Rule of Civil Procedure 12(b)(6).[14]

---

[14] The plaintiff asserts that because the IRS pays for the individual defendants' legal representation in a Bivens action, it follows that permitting the plaintiff to proceed on a Bivens claim against the individual defendants is appropriate. See Opp'n to Mgmt. and Cincinnati Mots. at 26. The Court fails to see how this is remotely relevant, let alone a basis to rule contrary to this Circuit's precedent. Moreover, the plaintiff argues that the declaratory relief provided by 26 U.S.C. § 7428 is not an adequate alternative remedy for constitutional injuries. Opp'n to Mgmt. and Cincinnati Mots. at 30-37. But the plaintiff's dissatisfaction with the remedies available to it is not a legally sufficient reason for the Court to create a Bivens remedy. See Spagnola, 859 F.2d at 227 ("[I]t is the comprehensiveness of the statutory scheme

C. Count Four of the Plaintiff's Complaint

In count four of the complaint, the plaintiff seeks relief from the defendants for their alleged violations of 26 U.S.C. § 6103 because "[p]ursuant to the IRS [t]argeting [s]cheme, the IRS [d]efendants knowingly requested information from [the plaintiff] in furtherance of the IRS'[s] discriminatory and unconstitutional" conduct. Am. Compl. ¶ 175. So according to the plaintiff, "the IRS [d]efendants knowingly inspected information provided to the IRS . . . [which was] unnecessary." Id. ¶ 179 (internal quotations and citations omitted). Because the information provided by the plaintiff was unnecessary, the plaintiff claims that the defendants' inspection of that information was not "per se for tax administration purposes." Id. ¶ 178 (internal quotations omitted). Consequently, the plaintiff argues that the defendants are liable under 26 U.S.C. § 7431, which provides damages for violations of 26 U.S.C. § 6103. Am. Compl. ¶¶ 170, 207; see also Opp'n to Defs.' Mot. at 28-42. The defendants contend that the underlying basis for the plaintiff's fourth count is the "nature of the [IRS's] requests for information," which is not actionable under 26 U.S.C. § 6103, as this provision only prohibits "the improper inspection and disclosure" of the information which the plaintiff provided. Defs.' Mot. at 10-11.

26 U.S.C. § 6103 protects the confidentiality of taxpayers' tax "[r]eturns and [tax] return information." Id. § 6103(a). Tax "return information" is broadly defined to include:

---

involved, not the 'adequacy' of specific remedies extended thereunder, that counsels judicial abstention.").

> [A] taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]

Id. § 6103(b)(2)(A); see also id. § 6103(b)(2)(B)-(D). Section 6103 contains numerous exceptions to the general prohibition against disclosure or inspection of tax returns and tax return information, including that:

> Returns and return information shall, without written request, be open to inspection[15] by or disclosure to officers and employees of the Department of the **[*233]** Treasury whose official duties require such inspection or disclosure for tax administration purposes.

Id. § 6103(h)(1). And "[t]he term tax administration"

> (A) means—

---

[15] "The terms 'inspected' and 'inspection' mean any examination of a return or return information." 26 U.S.C. § 6103(b)(7).

> (i) the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party, and
>
> (ii) the development and formulation of Federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions, and
>
> (B) includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions.

Id. § 6103 (b)(4). In short, Section 6103 addresses "improper disclosure of tax return information." Mann v. United States, 204 F.3d 1012, 1020 (10th Cir. 2000); see also Venen v. United States, 38 F.3d 100, 105 (3d Cir. 1994) ("The history of [S]ection 6103 indicates that Congress enacted the provision to regulate a discrete sphere of IRS activity—information handling.").

Section 6103 does not provide a means for the plaintiff to avoid dismissal of count four of its complaint. As just noted, Section 6103 concerns the disclosure or inspection, i.e., the "handling," of tax return information. Venen, 38 F.3d at 105. To the extent the plaintiff takes issue with the defendants' inspection of its tax return information, those allegations are insufficiently pleaded in its amended complaint. See Iqbal, 556 U.S. at 679 (conclusory allegations "are not entitled to the assumption of truth"). The insufficiency of the plaintiff's allegations is highlighted by the plain-

tiff's admission that "[t]he number of unauthorized inspections of [the plaintiff]'s return information and the identity of those who made the inspections cannot be completely and accurately ascertained at this time…"[16] Am. Compl. ¶ 182.

The plaintiff's real bone of contention is that the defendants allegedly demanded "information [that] was not necessary for determining [the plaintiff]'s [tax-]exempt status," and then inspected it. Opp'n to Defs.' Mot. at 31-32. Although the plaintiff is upset about the defendants' inspection of its tax return information, it is actually the defendants' alleged unconstitutional conduct in acquiring that information that forms the basis of count four of the complaint. But, unfortunately for the plaintiff, Section 6103 is silent as to how tax return information can be acquired. Even assuming that the defendants improperly acquired the plaintiff's tax return information, that does not compel a finding that such information was improperly inspected. In the Court's view, there is a clear dichotomy between the means by which tax return information is acquired and the disclosure or inspection of that information thereafter. The plaintiff, however, attempts to have the Court disregard this dichotomy,[17] which conflicts with cases which **[*234]**

---

[16] As the Court will explain, any alleged inspections of the plaintiff's tax return information by the defendants cannot support a claim for a violation of 26 U.S.C. § 6103, as the predicate for these allegedly unauthorized inspections is the defendants' requests for information that were allegedly "wholly unnecessary" to its application to obtain tax-exempt status. Opp'n to Defs.' Mot. at 35.

[17] Again, the plaintiff attempts to amend its complaint through its opposition brief by contending that its "[S]ection 7431 claim

have found that the propriety of certain conduct separate and apart from the actual handling of tax return information is irrelevant and cannot be the predicate of a Section 6103 violation. Cf. Mann, 204 F.3d at 1020 ("Sections 6103 and 7431 address improper disclosure of tax return information and not improper collection activity. We therefore agree with the district court that the validity of the means by which the return information was disclosed is irrelevant to whether the disclosure of the information violated § 6103. We further agree with the district court and the majority of courts which have considered the issue that there is nothing in § 6103 which requires that the underlying means of disclosure be valid before [a disclosure exception] applies." (emphasis added)); Wilkerson v. United States, 67 F.3d 112, 117 (5th Cir. 1995) (holding that disclosures of tax return information "were not wrongful" notwithstanding "improper levying procedures"); Venen, 38 F.3d at 106 ("Section 6103 and its attendant damages provision, [S]ection 7431, were meant to regulate only one sphere of activity—information handling—and were not intended to interfere with collection actions. Thus, the propriety of the underlying collection action, in this instance the validity of the levy, is irrelevant to whether disclosure is authorized under [S]ection 6103 and the basis for liability under [S]ection 7431." (internal citations, quotations, and ellipses omitted)); Huff v. United States, 10 F.3d 1440, 1447

---

is premised on the improper handling of its information." Opp'n to Defs.' Mot. at 32 n.9. The plaintiff identifies nothing in its amended complaint that supports this position. Nor could it, as this is contrary to the allegations in its complaint. See Am. Compl. ¶¶ 174-80.

(9th Cir. 1993) (finding no liability under Section 6103 "despite the possible procedural lapses involving the actual levy").

Further supporting the Court's maintenance of the dichotomy between the IRS's acquisition of tax return information for assessing tax-exempt status and the IRS's inspection of that information thereafter,[18] is the availability of judicial review and a separate and distinct remedy for an applicant aggrieved during the tax-exempt application process. Cf. Wilkerson, 67 F.3d at 116 ("Congress enacted separate and distinct provisions concerning collection activities and information handling."); Venen, 38 F.3d at 105 ("In a claim such as the present one based on an improper levy, the concern is not improper information handling but rather improper collection activity. Collection activity is a separate sphere of IRS activity governed by a separate body of law."). Under 26 U.S.C. § 7428, an applicant requesting tax-exempt status under 26

[18] The plaintiff asserts that the defendants have violated 26 U.S.C. § 6103 because the defendants did not "per se" inspect the plaintiff's tax return information for "tax administration purposes." Opp'n to Defs.' Mot. at 33; see also id. at 37; Am. Compl. ¶¶ 177-78. At first blush, this argument has appeal. The plaintiff appears to argue that the request and inspection of information allegedly unnecessary to determine an applicant's tax-exempt status is not the result of "tax administration." See Opp'n to Defs.' Mot. at 39-42. However, there does not appear to be a genuine dispute that "tax administration" encompasses the review of return information submitted in conjunction with a tax-exempt application. Again, the basis for the plaintiff's alleged violation of 26 U.S.C. § 6103 is not the inspection of tax return information; rather, it is the defendants' request for allegedly unnecessary information during the tax-exempt application process.

U.S.C. § 501(c)(3) may seek a declaratory judgment that it indeed qualifies for tax-exempt status if either the application has been denied by the IRS or the IRS has failed to act on the application in 270 days. 26 U.S.C. §§ 7428(a)-(b). If the application is denied, the applicant may file suit within ninety days of the mailing of the rejection letter. Id. § 7428(b)(3). Alternatively, if the IRS fails to act on the application within 270 days, the applicant is "deemed to have exhausted its administrative remedies," provided that it, "in a timely manner, **[*235]** [took] all reasonable steps to secure . . . [a] determination" of its tax-exempt status. Id. § 7428(b)(2). In either case, the applicant may file suit in the United States Tax Court, the United States Court of Federal Claims, or the United States District Court for the District of Columbia. Id. §§ 7428(a), (b)(2). In light of the remedies made available under 26 U.S.C. § 7428 for controversies arising out of the tax- exempt application process,[19] which would encompass plaintiff's allegations against the defendants, cf. Church By Mail, 1988 WL 8271, at *3 (hold-

[19] Other avenues of relief may be better candidates than 26 U.S.C. § 7431. For example, the plaintiff acknowledges that the defendants' conduct could potentially be governed by 26 U.S.C. § 7605(b), which generally ensures that "[n]o taxpayer shall be subjected to unnecessary examination or investigations . . . ." Opp'n to Defs.' Mot. at 37 n.14. And in NorCal, the Court identified 26 U.S.C. § 7433 as potentially providing adequate relief to aggrieved applicants for tax-exempt status, as it "creates a damages remedy for the wrongful collection of federal tax." 2014 WL 3547369, at *6. The Court declines to weigh in, however, on the merits of any potential argument under these statutory provisions.

ing that "plaintiff clearly has an adequate remedy under 26 U.S.C. [§] 7428" for constitutional violations during the tax-exempt application process), it must remain separate and distinct from the remedies available under 26 U.S.C. § 7431 for unauthorized inspections of tax return information that occur after the application process has either stalled or concluded. Accordingly, count four of the complaint fails to state a claim for relief and will be dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).[20]

---

[20] In light of the Court's interpretation of the authority cited in this Memorandum Opinion, the Court must respectfully disagree with that portion of the NorCal opinion, which permitted the plaintiffs to take discovery "to establish with evidence that IRS officials inspected or disclosed the [plaintiffs]' return information for improper purposes," 2014 WL 3547369, at *13, even though the plaintiffs' complaint there apparently muddied the dichotomy identified by the Court in this opinion, and thus did not sufficiently plead allegations concerning a violation of 26 U.S.C. § 6103. See 2014 WL 3547369, at *13 (citing "PageID 1046" of the plaintiffs' complaint); Second Amended Class Action Complaint ¶ 247, NorCal, No.1:13-cv-341 (S.D. Ohio Jan. 23, 2014), ECF No. 71("Defendants inspected [p]laintiffs' information and shared it amongst themselves even though they knew it was unnecessary for making a decision on [p]laintiffs' tax-exempt status, and even though they knew it had been sought based on [p]laintiffs' political viewpoint. Accordingly, the inspection, review, and disclosure was objectively unnecessary, and subjectively not undertaken, 'for tax administration purposes' under 26 U.S.C. § [6103(h)]."). Here, the Court will not allow the plaintiff to take discovery where it has not sufficiently pleaded a violation of 26 U.S.C. § 6103. See Am. Compl. ¶ 182 (asserting the need for discovery only because the "number of unauthorized inspections" and "the identity of those who made the inspections cannot be completely and accurately ascertained at this time.").

IV. CONCLUSION

For the foregoing reasons, the Court grants the defendants' motions to dismiss as to all five counts of the plaintiff's complaint and denies the plaintiff's motion to stay agency action.[21]

SO ORDERED this 23rd day of October, 2014.

REGGIE B. WALTON
United States District Judge

Further, because the Order accompanying this opinion closes this case, the plaintiff's motion for a stay of agency action is moot.

[21] An Order consistent with this Memorandum Opinion will be issued contemporaneously.

[Doc. 102, filed Oct. 23, 2014]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TRUE THE VOTE, INC.,
Plaintiff,

v.

INTERNAL REVENUE SERVICE, et al.,
Defendants.

Civil Action No. 13-734 (RBW)

ORDER

For the reasons set forth in the Memorandum Opinion issued contemporaneously with this Order, it is hereby

ORDERED that the Defendants' Motion to Dismiss Counts I, II, IV[,] and V is **GRANTED**. It is further

ORDERED that the Individual Management Defendants' Motion to Dismiss is **GRANTED**. It is further

ORDERED that the Motion to Dismiss of Cincinnati Defendants Susan Maloney, Ronald Bell, Janine L. Estes, and Faye Ng is **GRANTED**. It is further

ORDERED that the Plaintiff's Motion to Stay Agency Action is **DENIED AS MOOT**. It is further

ORDERED that the plaintiff's request for an oral hearing is **DENIED AS MOOT.** It is further

ORDERED that this case is **CLOSED**.

SO ORDERED this 23rd day of October, 2014.

REGGIE B. WALTON
United States District Judge