

IRS Raked over the Coals in DC Appellate Court Hearings on Viewpoint Discrimination in Z STREET Case



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It's hard enough being a Zionist in the US, given a passive Jewish community supine under the sway of Obama Administration isolating Israel. Especially now that a new allegedly right wing Netanyahu ruling coalition was announced on the stroke of midnight. [Z STREET](#), where I am a member of its board, has fought a special process by the IRS sidelining its application for 501(c)(3) status because- get this- it advocates for an ally where terrorism occurs against it. Call that ultimate chutzpah, and you might come close to what it is. That's absurd. However, that is at the heart of the viewpoint discrimination issue under the First Amendment successfully argued in the filing made by Z STREET's counsel. The IRS had unsuccessfully fought in the DC Federal District court to dismiss the Z STREET case last May. The lower Court granted discovery to Z STREET on the grounds of viewpoint discrimination. The IRS appeal of the lower court ruling granting discovery was heard at a D.C. Circuit Court of Appeals oral arguments proceeding on Monday, May 4th. The three judge Appellate panel virtually raked over the coals the IRS counsel and leadership of the federal tax agency, several of whom were in court witnessing their upbraiding.

Today's *Wall Street Journal* had an editorial lambasting the IRS and the Justice Department for violating the First Amendment rights of Z STREET in an editorial, ["The IRS Goes to Court"](#). The tag line says it all: "The agency suggests it can

discriminate for 270 days. Judges gasp.”

Here’s what drove the three judge Appellate panel to go ballistic in oral arguments:

It isn’t every day that judges on the D.C. Circuit Court of Appeals declare themselves “shocked.” But that happened on Monday when an animated three-judge panel eviscerated the IRS and Justice Department during oral argument in a case alleging the agency delayed the tax-exempt application of a pro-Israel group due to its policy views.

In December 2009, Pennsylvania-based Z Street applied for 501(c) (3) status to pursue its pro-Israel educational mission. In July 2010, when the group called to check on what was taking so long, an IRS agent said that auditors had been instructed to give special attention to groups connected with Israel, and that they had sent some of those applications to a special IRS unit for additional review.

Z STREET sued the IRS for viewpoint discrimination (*Z Street v. Koskinen*), and in May 2014 a federal district judge rejected the IRS’s motion to dismiss. The IRS appealed a maneuver that halted discovery that could prove to be highly embarrassing. Justice says Z Street’s case should be dismissed because the Anti-Injunction Act bars litigation about “the assessment or collection of tax.” Problem is, Z Street isn’t suing for its tax-exempt status. It’s suing on grounds that the IRS can’t discriminate based on point of view.

The three judges—Chief Judge Merrick Garland, David Tatel and David Sentelle—[denied](#) the IRS’s efforts to throw out Z STREET’s lawsuit, clearing the path for the critical phase of the lawsuit to begin: discovery, the portion of a lawsuit in which the parties have to truthfully answer questions under oath and must provide requested critical

documents. At the 11th hour, the IRS filed a special kind of appeal, which the D.C. Circuit Appellate Court granted.

Towards the end of the argument, Chief Judge Garland [said]:

“I would be stunned if the current Attorney General agreed with that. Or the last Attorney General. Or the one before that, or the one before that. Or anyone. That can’t be the position. Now, do you want to think about it again, whether you really want that to be your position,” the Chief Judge stated.

In response, the lawyer for the IRS pointed out that many of her superiors were sitting in the courtroom, listening.

In addition to the drama of a federal agency essentially admitting its best argument was that it is allowed to discriminate against certain groups – in Z STREET’s case, a group whose views about Israel differ profoundly from this administration’s, the purely legal procedural claims made by the IRS were resolutely rejected by the court based on recent and conclusive precedents from both the D.C. Circuit appellate court (in a decision issued by the full court, not just a three judge panel) and from the U.S. Supreme Court.

“We’ve decided every issue before us today, against you,” Chief Judge Garland stated incredulously.

The court finished mopping up the floor with the IRS for the day when Judge Sentelle sought once again to elicit an explanation from the government for its conduct thus far towards Z STREET.

IRS Counsel McLaughlin attempted to paint Z STREET as being in the wrong, because had it waited just 31 more days to file its lawsuit, it would be at 270 days and could have properly brought a 7428 action. Right, that’s

the one that doesn't apply, as the court had repeatedly explained to the lawyer, because Z STREET is not asking the court to grant it tax exempt status.

"And they're years away from it now, due to the actions of the IRS," he thundered.

Given the DC Appellate Circuit hearing on the IRS filing, will the embattled tax agency comply with the original lower court ruling granting discovery to Z STREET on the basis of First Amendment viewpoint discrimination, or engage in more legal shenanigans, as it doesn't to reveal the anti-Israel bias of the Administration? Stay tuned for developments.