No. 12-16775

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFFORD JOHNSON,

Plaintiff-Appellant

v.

UNITED STATES DEPARTMENT OF THE TREASURY and TIMOTHY F. GEITHNER, in his official capacity as Secretary of the United States Department of the Treasury,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of California
District Court Case No. CV-11-06684 WHA

ANSWERING BRIEF OF FEDERAL DEFENDANTS-APPELLEES

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I. STATEMENT OF JURISDICTION

Plaintiff-Appellant Clifford Johnson ("Appellant") filed his complaint in this case on December 28, 2011, and amended it on February 29, 2012. *See* ERIII 87.[1] The First Amended Complaint ("FAC") asserts a single claim based on alleged violations of his First Amendment rights. ERIII 77-78. The district court dismissed this action in its entirety and entered judgment on June 14, 2012. ERI 12; ERI 13-15. The district court denied Appellant's motion to alter or amend the judgment on October 24, 2012. ERI 1-4.

Defendants-Appellees United States Department of the Treasury and Timothy Geithner ("Appellees" or "Treasury Department") assert, and the district court held, that no federal jurisdiction exists over this action because Appellant does not satisfy the requirements of Article III standing. *See* ERI 14; ERI 3-4. Notwithstanding this jurisdictional defect with respect to Appellant's claim, this Court has jurisdiction to review the district court's final order of dismissal under 28 U.S.C. § 1291. *Wilson v. Kayo Oil Co.*, 563 F.3d 979, 980 (9th Cir. 2009).

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[1] Appellant filed his Excerpts of Record in three volumes, each of which is separately paginated. *Cf.* Circuit Rule 30-1.6(a). In this brief, each citation to Appellant's Excerpts of Record indicates whether the page cited appears in Volume I ("ERI"), Volume II ("ERII"), or Volume III ("ERIII"). Appellant's Opening Brief is cited as "AOB."

II. STATEMENT OF ISSUES ON APPEAL

1. The Supreme Court has held that, in order to invoke the jurisdiction of the federal courts, a civil plaintiff must demonstrate that he has "standing," *i.e.* that he has suffered a "particularized" injury that affects him in a "personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 & n.1 (1992). Did the district court correctly hold that Appellant lacks standing to assert a First Amendment claim on the basis of his disagreement with statements issued by the Treasury Department?

2. The Supreme Court has held that a governmental entity is "entitled to say what it wishes," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), and that "the Government's own speech . . . is exempt from First Amendment scrutiny," *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005). Did the district court correctly hold that Appellant failed to state a claim for relief under the First Amendment based on his allegation that certain statements made by the Treasury Department regarding the country's fiscal policy are "misrepresentations"?

III. STATEMENT OF THE CASE

Appellant's FAC asserts a single claim for declaratory relief based on an alleged violation of his First Amendment rights. ERIII 77-78. The district court issued an order granting the Treasury Department's motion to dismiss and entered judgment on June 13, 2012. ERI 12; ERI 13-15. The district court ruled that Appellant lacked Article III standing and that his complaint failed to state a claim under the First Amendment. ERI 14-15. The district court reaffirmed the grounds for its dismissal in an order denying Appellant's subsequent motion to alter or amend the judgment. ERI 1-4. This appeal followed.

IV. STATEMENT OF FACTS

A. Plaintiff's Allegations and First Amendment Claim

The basis for Appellant's lawsuit is a theory he maintains about what constitutes and should be issued as legal tender in the United States. Specifically, Appellant alleges that there is an important fiscal difference between what he describes as "United States notes" that are issued "by the United States" and what he describes as "bank notes" that are issued by "the Federal Reserve." ERIII 74-75. According to Appellant, the fact that the Federal Reserve issues "bank notes" (as opposed to the Government's issuing "United States notes") results in a "seigniorage tax" that accrues to the benefit of the Federal Reserve. *Id.* Appellant

asserts the Federal Reserve now receives "almost all of the nation's face value seigniorage tax" and that a "great financial benefit . . . would promptly revert to the government by issuing true United States notes." ERIII 75.

The FAC alleges that Appellant has submitted petitions to the United States Government urging the issuance of "United States notes" rather than "bank notes." ERIII 74. The FAC references and attaches three such petitions, including (i) a petition submitted to a congressional committee urging that Social Security payments be made with "true United States notes," ERIII 74 & 80-81, (ii) a petition to the Treasury Department urging "that all paper money forthwith issue as United States notes," ERIII 74 & 82, and (iii) a petition to "congressional committees and to [Appellant's] respective congressmen" urging the replacement of "all Federal Reserve $1 notes with $1 United States coins," ERIII 74 & 83.

The FAC further alleges that the Treasury Department "systematically repudiates, belittles, ignores, and conceals" the benefits of switching from "bank notes" to "United States notes." ERIII 75. The FAC quotes a Treasury Department website stating that "United States Notes serve no function that is not already served by Federal Notes," which Appellant alleges is a "categorical falsehood." *Id.* The FAC also cites a report issued by the Government Accountability Office ("GAO") on the subject of whether one-dollar bills should

be replaced in circulation with one-dollar coins. *Id.* Appellant claims this report and other GAO reports on similar subjects rest on "falsehoods" because they rely on a financial model that does not adequately account for the "seigniorage tax" that he attributes to the use of "bank notes," as opposed to "United States notes." ERIII 76. The FAC alleges that the Treasury Department's website and these GAO reports are examples of "financial misinformation authoritatively published" by the Government. *Id.*

Appellant claims the Government's "misrepresentations" and "misinformation" about the value of United States notes versus bank notes have impaired his constitutional rights. ERIII 77. Specifically, Appellant asserts that the Treasury Department's use of "categorical and financial misinformation ('falsehoods') impair [his] right to petition for new issues of United States currency, in violation of the First Amendment." *Id.*

B. The District Court's Dismissal of the Case

The Treasury Department moved to dismiss this case on April 30, 2012. ERIII 57-72. Appellant filed his opposition brief on May 15, 2012. ERIII 11-28. The Treasury Department filed its reply brief on May 22, 2012. ERIII 6-8.

The district court issued an order on June 13, 2012, granting dismissal on two grounds. ERI 13-15. First, the district court held that Appellant lacked

standing to assert a First Amendment claim. ERI 14. The court explained that "the fact that the Treasury website contradicts Mr. Johnson's position, and that other sources have adopted the Treasury's views, does not constitute an injury in fact." *Id.* (citing *Lujan*, 504 U.S. at 560-61). The district court concluded that "Mr. Johnson's interest in petitioning for support of his proposal is a generalized grievance no different from every citizen's interest in proper application of the Constitution." *Id.* Further, the district court also concluded that Appellant had not alleged "a causal connection between the Treasury's conduct and his own petitions" and had not demonstrated that "a favorable judicial decision would redress [his] alleged injuries." *Id.*

Second, the district court held that Appellant had failed to state a claim on which relief could be granted. The district court explained that the lawsuit was based on the theory that "[Appellant's] own message is being overwhelmed by the more powerful speech of the Treasury and, therefore, his own free speech rights are being suppressed." ERI 13. The district court ruled that there was "no support in the law" for the "remarkable" proposition that a court could "regulate what the Treasury can and cannot say" on the subject of legal tender. ERI 14. Accordingly, the district court dismissed the action in its entirety. ERI 12.

Following the entry of judgment, Appellant filed two documents. On June 23, 2012, he filed a letter to the district court raising objections to the order of dismissal and entry of judgment. ERII 85. On August 12, 2012, he filed a notice of appeal. ERII 84. On appeal, this Court construed Appellant's previously-filed letter to the district court as a "motion for reconsideration" and held appellate proceedings in abeyance so that the district court could resolve that "pending" motion. ERI 10-11. The district court then set a briefing schedule regarding Appellant's post-judgment letter. ERI 8-9. Following further correspondence from Appellant raising objections to the briefing schedule, *see* ERII 83, the district court modified the briefing schedule, *see* ERI 5-6. The parties filed then filed their briefs on Appellant's post-judgment motion. *See* ERII 15-30 (opening brief); ERII 9-14 (opposition brief); ERII 2-8 (reply brief).

On October 23, 2012, the district court issued an order denying Appellant's motion.[2] In the order, the district court reaffirmed the rationale of its prior ruling.

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[2] Whereas this Court characterized Appellant's letter to the district court as a "motion for reconsideration," *see* ERI 10 (citing Fed. R. App. P. 4(a)(4)), the district court described Appellant's filing as a "motion to alter or amend the judgment" under Rule 59(e), *see* ERI 8. To the extent that the difference in nomenclature used by this Court and the district court in describing Appellant's post-judgment letter reflects any actual discrepancy, the characterization of Appellant's motion makes no difference at all, since the legal standard that applies to a motion to alter or amend the judgment under Rule 59(e) is, for all practical purposes, identical to the legal standard that governs what is called a "motion for

First, the district court stated that Appellant "lacks standing to bring his claims" because he had alleged "neither an injury in fact nor a causal connection between the defendants' conduct and his petitions." ERI 3. Second, the district court confirmed that the complaint had been dismissed "on its merits." *Id.* The district court stated that the FAC had asserted a claim with "no support in the law" and explained that it had not reached or analyzed the issue of "government speech immunity." ERI 4. The district court also commented that it had not reached or analyzed the "purported four exceptions to government speech immunity" that Appellant described in his FAC and has briefed in this appeal. *Id.*

V. SUMMARY OF ARGUMENT

The Ninth Circuit should affirm district court's order of dismissal for two reasons: (1) Appellant lacks Article III standing, and (2) Appellant has not and cannot state a claim on which relief can be granted.

Article III of the United States Constitution "confines the federal courts to adjudicating actual 'cases' and 'controversies.'" *Allen v. Wright*, 468 U.S. 737, 750 (1984). Standing is "an essential and unchanging part of the case-or-

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reconsideration" under the Civil Local Rules of the Northern District of California. *Compare Ybarra v. McDaniel*, 656 F.3d 984, 998 (9th Cir. 2011) (quoting *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001)) (standard on "motion to alter or amend judgment"), *with* N.D. Cal. Civ. L.R. 7-9(b) (standard on "motion for reconsideration").

controversy requirement of Article III." *Lujan*, 504 U.S. at 560. To establish standing within the meaning of Article III, a plaintiff must show (1) she has suffered an injury in fact that is both concrete and particularized; (2) a causal connection between the injury and the conduct complained of; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable judicial decision. *Id.* at 560-61. Here, Appellant cannot show he has suffered any injury more concrete than the frustration of having the Government issue statements that are contrary to his own views regarding fiscal policy, which is not sufficient to establish standing. Further, Appellant has not alleged and cannot demonstrate that there is any causal connection between the Treasury Department statements he challenges and the fact that his various petitions on the subject of United States notes have been ignored by the various Governmental entities to which he submitted them. Appellant has also failed to establish that his grievance can be redressed by a favorable decision: short of telling the Treasury Department what it can and cannot say about legal tender—a "remarkable" proposition for which the district court correctly held that there is "no support in the law," ERI 14—the judiciary is without power to fashion a remedy that protects Appellant from the alleged harms he has suffered by virtue of the Government statements with which he disagrees.

Appellant fails to state a constitutional claim because the conduct he complains about—Treasury Department statements regarding legal tender and the relative value of "United States notes" versus "bank notes"—is not subject to First Amendment scrutiny. The First Amendment "does not regulate government speech." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009). The Government is entitled to "speak for itself" and to "say what it wishes" without the "heckler's veto" of a citizen who happens to disagree with what it says. *Id.* (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000); *Rosenberger*, 515 U.S. at 833; and *Johanns*, 544 U.S. at 574 (Souter, J., dissenting)). Appellant essentially concedes that the Government speech at issue here is exempt from First Amendment scrutiny, but he argues this case presents an issue of "first impression" because the Treasury Department's statements involve "deception," or what he calls "misrepresentation-with-special-circumstances." AOB 25, 28. Appellant thus contends he should be permitted to sue for a judicial declaration that what he says he is right and what the Treasury Department says is wrong. *See* ERIII 78. This theory finds no support in the law, and this Court should reject Appellant's invitation to disregard well-established principles of constitutional law and to require the United States Government to defend the truth

of its agencies' and officers' statements in district court whenever an aggrieved citizen claims they have said something "deceptive."

VI. ARGUMENT

A. Appellant Lacks Standing To Assert a Claim Based on Alleged "Misrepresentations" by the Treasury Department.

"Standing is a question of law reviewed *de novo*." *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002) (citing *S.D. Myers, Inc. v. City & County of San Francisco*, 253 F.3d 461, 474 (9th Cir. 2001)).

"The judicial power of the United States defined by [Article III] is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). Rather, federal courts are limited to addressing actual "cases" and "controversies," meaning that their power "to declare the rights of individuals and to measure the authority of governments . . . 'is legitimate only in the last resort, and as a necessity in the determination of a real, earnest and vital controversy.'" *Id.* (quoting *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892)). The case-and-controversy requirement of Article III "limit[s] the federal judicial power" to a role that is "consistent with a system of separated powers" and to addressing disputes that are "traditionally

thought to be capable of resolution through the judicial process." *Id.* at 472 (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)).

At an "irreducible constitutional minimum," Article III requires a civil plaintiff to establish "standing" to file a lawsuit. *Lujan*, 504 U.S. at 560. This standing requirement has "three elements," and it is the burden of the plaintiff to prove these elements, which must be "supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Id.* at 560-61. First, the plaintiff must establish that he has suffered an "injury in fact." *Id.* at 560. That is, the plaintiff must allege the "invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent," rather than "conjectural" or "hypothetical." *Id.* (citing *Allen v. Wright*, 468 U.S. at 706 and *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). Second, the plaintiff must demonstrate "a causal connection between the injury and the conduct complained of." *Id.* (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Third, the plaintiff must show it is "likely" that the injury will be "redressed by a favorable decision." *Id.* (quoting *Simon*, 426 U.S. at 38, 43).

Here, Appllant alleges that the Treasury Department's speech has "impaired" his "First Amendment right to petition for new issues of United States currency." ERIII 77. In other words, because the Treasury Department has

allegedly issued "categorical and financial misinformations" that "officially and authoritatively contradict" his views, Appellant claims that his petitions are less effective at getting the Government to do what he wants. ERIII 77. These allegations are inadequate to satisfy the elements of Article III standing.

1. The FAC Does Not Allege an "Injury in Fact."

An "injury in fact" requires more than merely a "cognizable interest" in the subject matter of the litigation. *Lujan*, 504 U.S. at 562-63. Rather, it requires that the plaintiff have been "directly affected" by the defendant's alleged conduct, separate and apart from any "special interest" he may have in the subject matter of the litigation. *Id.* at 563 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735, 739 (1972)). A plaintiff lacks standing when he raises "only a generally available grievance about the government" and when his claim seeks relief that "no more directly and tangibly benefits him than it does the public at large." *Id.* at 573-74; *see also Ex parte Levitt*, 302 U.S. 633, 636 (1937) (holding that a private individual may "invoke the judicial power to determine the validity of executive or legislative action" only when he "has sustained or is immediately in danger of sustaining a direct injury as a result of that action," and that it is "not sufficient that he has merely a general interest common to all members of the public").

Here, the Treasury Department's complained-of conduct—making allegedly false statements about the country's legal tender—does not "directly" affect Appellant any more than it affects any of his fellow citizens, and Appellant therefore lacks standing to challenge it. *Lujan*, 504 U.S. at 562-63; *Valley Forge Christian College*, 454 U.S. at 473 ("The federal courts have abjured appeals to their authority which would convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973))).

Appellant's Opening Brief advances two arguments about why he has suffered an injury in fact, but neither is legally sufficient to sustain his lawsuit. First, Appellant claims he has suffered injury because the Treasury Department's speech "frustrates his petitions." AOB 17. As the FAC affirmatively alleges, however, Appellant freely submitted multiple petitions to the Government about his seigniorage-tax theories. ERIII 74. The FAC makes no allegation that the Treasury Department prevented him from submitting these petitions or from speaking freely when he did so. Thus, Appellant is *not* really saying that the Treasury Department prevented him from petitioning the Government, but rather (as his Opening Brief concedes) that he believes the Treasury Department's statements are making his petitions "less plausible or effective." AOB 17. In this

regard, Appellant's claim falls outside the scope of the Constitution altogether. While the First Amendment protects the right to *petition* the Government, it does not guarantee the right to petition it *effectively*. *See Minn. State Bd. for Cmty. Coll. v. Knight*, 465 U.S. 271, 288 (1984) ("A person's right to speak is not infringed when government simply ignores that person while listening to others."); *Apple v. Glenn*, 183 F.3d 477, 479 (6th Cir. 1999) ("A citizen's right to petition the government does not guarantee a response to the petition or the right to compel government officials to act on or adopt a citizen's views.").

Appellant next argues that he should be deemed to have standing because his "suppressed viewpoint" is "shared by few, advocated by fewer, and advocated as vigorously by yet fewer." AOB 18. In other words, Appellant claims he has standing because hardly anybody else thinks like he does. The problem with Appellant's argument—even setting aside that his theory itself constitutes a perverse form of viewpoint discrimination by conferring standing based on the eccentricity of a plaintiff's opinions, *cf. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-94 (1993)—is that it confuses the *nature* of his injury with the *commonness* of his injury. It does not matter that only a few people share Appellant's idiosyncratic views of fiscal policy. What matters is that *none* of the people who share his views suffers a "direct" and "particularized" injury as a

result of the Government's speech. *See Lujan*, 504 U.S. at 561-63 & n.1 ("By particularized, we mean that the injury must affect the plaintiff in a personal and individual way."); *see also Commonwealth of Mass. v. Mellon*, 262 U.S. 447, 448 (1923) (dismissing taxpayer's challenge to federal statute as "essentially a matter of public and not of individual concern" where, as here, "[i]f one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same").

2. *The FAC Does Not Allege a Causal Connection Between the Government's Statements and Appellant's Claimed Injury.*

To establish Article III standing, a plaintiff must also allege an injury that is "fairly traceable to the challenged action." *Allen v. Wright*, 468 U.S. at 751 (quoting *Simon*, 426 U.S. at 38, 41); *see also Lujan*, 504 U.S. at 560 (requiring a "causal connection" to the "conduct complained of"). It is not enough for a plaintiff to complain about an injury "that results from the independent action of some third party not before the court." *Simon*, 426 U.S. at 41-42.

The FAC fails to allege a causal connection here. Appellant's claimed injury is that his right to petition the government has been "impaired," ERIII 76, and that his petitions do not have any "teeth," AOB 21. The FAC cites ineffective petitions that Appellant submitted to a congressional "supercommittee," to unspecified "congressional committees and to [Appellant's] respective congressmen," and to the Treasury Department. ERIII 74; *see also* ERIII 80-83.

The challenged conduct in this case, however, does not relate to the Government's treatment of these petitions. Instead, Plaintiff is challenging only a series of statements allegedly made by the Treasury Department on the subject matter of his petitions. None of the challenged statements is alleged to have referred to Appellant's petitions or to have had anything directly to do with the fact that his petitions have apparently been ignored. The wholly speculative nature of Appellant's claim is shown by his allegation that the Treasury Department's "silence" about "financial misinformation" perpetuates "financial illiteracy" and, in this roundabout way, leaves him unable to petition effectively. ERIII 76.

Appellant's FAC does not sufficiently allege a cause-and-effect relationship between the Treasury Department's supposedly unconstitutional statements and his inability to get his preferred fiscal policies effected by the Government. In this regard, Appellant's claims are analogous to those presented in *Simon v. Eastern Kentucky Welfare Rights Organization*. In that case, the plaintiffs were individuals who alleged they had been denied admission at non-profit hospitals because they were unable to pay for non-emergency services. *Simon*, 426 U.S. at 28. They sued the Treasury Department, challenging regulations under which those hospitals had been granted non-profit status. *Id.* The Supreme Court held that the plaintiffs lacked standing to bring their claims because it was "purely speculative" whether

the hospitals' decisions to deny them care had been made because of the Treasury Department's "favorable tax treatment" or had been made "without regard to the tax implications." *Id.* at 42-43; *see also Allen v. Wright*, 468 U.S. at 758 (holding that it was "entirely speculative . . . whether the withdrawal of a tax exemption from any particular school would lead the school to change its [discriminatory] policies"). In the same way, the FAC here contains nothing but speculation that anything the Treasury Department said has ever had any effect on the Government's treatment of his various petitions.[3]

3. Appellant's Claimed Injury Is Not Likely To Be Redressed by a Favorable Decision.

The requirement of "redressability" means that a plaintiff must show that the "desired exercise of the court's remedial powers" would result in a tangible benefit to him. *Simon*, 426 U.S. at 43. Simply put, a court must be able to "remove the harm." *Warth v. Seldin*, 422 U.S. 490, 505 (1975).

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[3] This is strictly a First Amendment case, and Appellant does not challenge the failure of the Treasury Department to *accept* his petition or to issue new United States Notes as legal tender. Nor could he: the question of what constitutes legal tender in this country is a decision solely within the control of Congress, whose judgment is not subject to judicial challenge. *See The Legal Tender Cases*, 110 U.S. 421, 450 (1884) (holding that "the currency needed for the uses of the government and of the people" is a "political question" to be "determined by congress" and not amenable to review by "the judicial department").

Here, Appellant seeks a judicial declaration that the Treasury Department's challenged statements are "repugnant" to the Constitution, are "attributable to the private banking interests that own the Federal Reserve System," and "impair [his] First Amendment right to petition." ERIII 78. Even if a court were to issue such a declaration, it is conjectural at best that such a declaration would do anything to further the petitions that Appellant claims have been impaired. Since Appellant seeks relief that would not "likely" remedy the harm he alleges, he lacks standing to assert his claim. *See Warth*, 422 U.S. at 507 (no standing where plaintiffs "rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief"); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998) ("By the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier. But . . . psychic satisfaction is not an acceptable Article III remedy . . . .").

B. Appellant's FAC Fails To State a Valid Claim for Relief Under the First Amendment.

A district court's order dismissing a complaint for failure to state a valid claim under the First Amendment is reviewed *de novo*. *WMX Tech., Inc. v. Miller*, 197 F.3d 367, 372 (9th Cir. 1999). To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

It is a basic principle of constitutional law that the First Amendment "restricts government regulation of private speech . . . [but] does not regulate government speech." *Summum*, 555 U.S. at 467. As the Supreme Court has repeatedly held, "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger*, 515 U.S. at 833 (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)). Under this "government-speech doctrine," the statements of federal agencies and officials (such as the challenged speech of the Treasury Department here) are "exempt from First Amendment scrutiny." *Johanns*, 544 U.S. at 553, 562; *see also Delano Farms Co. v. Cal. Table Grape Comm'n*, 586 F.3d 1219, 1226 (9th Cir. 2009) (government speech is "beyond the restraints of the First Amendment").

Appellant effectively concedes that the statements he challenges are "government speech," *see* AOB 25-30, but he claims that the Treasury

Department's statements at issue in this case are different. First, he says the statements here involve "misrepresentations" and "deceptions." AOB 21. Second, he says these misrepresentations involve matters of "hard categorical or numerical fact" and have been issued "authoritatively" by the Treasury Department as such. AOB 28. Third, he says the Government has refused to correct its false statements. AOB 29. Fourth, he contends that this case involves "special illicit circumstances," specifically, that the Treasury Department's statements are intended "to suppress [his] viewpoint." AOB at 24, 28. Appellant argues that, under these circumstances, there should be a "government deception doctrine" that allows courts to scrutinize the truth of statements made by Government actors.

Appellant's theory finds no support whatsoever in the jurisprudence of the First Amendment. While it is true that the Government's power to speak is not limitless—for example, Government speech must be "consistent with the Establishment and Equal Protection Clauses" *Delano*, 586 F.3d at 1224—there is no authority for the astonishing proposition that speech by members of the Executive branch should be subject to judicial review for "truth," much less based on a plaintiff's conclusory allegation that the speech is "deceptive."

In support of his novel legal construct, Appellant relies principally on two decisions by this Court, neither of which supports his view of the law. In *Caruso*

v. Yamhill County ex rel. County Commissioner, 422 F.3d 848 (9th Cir. 2005), this Court reviewed the constitutionality of an Oregon statute requiring certain types of ballot initiatives to include a warning that the measures could result in higher taxes. *Caruso* held that the statute passed muster under the First Amendment because it did not infringe on the ability of private citizens to engage in political speech, did not reduce the "total quantum of speech" about political issues, and did not impose an unreasonable burden on the ability of private citizens to speak. *Id.* at 855-62. In *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906 (9th Cir. 2005), the Court reviewed a California statute that imposed a tax on tobacco sales, the proceeds from which were used to support anti-tobacco advertising. *Shewry* rejected a First Amendment challenge to the statute, holding that the advertising scheme was immune from constitutional scrutiny because it constituted protected government speech. *Id.* at 917 (Government may use tax revenue to "speak in the name of the government itself" and "[n]o court has held otherwise").

Appellant ignores the actual holdings of these cases, which are directly contrary to his position, and quotes dicta from these opinions to argue that Government speech becomes actionable when it makes other, private speech "difficult or impossible." AOB at 16 (quoting *Shewry*, 423 F.3d at 923); AOB at 27 (quoting *Caruso*, 422 F.3d at 855). Taking these statements out of context, he

then argues that the law in the Ninth Circuit is "primed" for this case of "first impression" and a holding that Government "misrepresentations" are actionable. AOB 26. But the quoted passages from *Shewry* and *Caruso* stand for only the unremarkable proposition that the Government may not use its powers to compel private speakers to say something they do not wish to say, or to drown out other speech from the marketplace entirely. *See, e.g.*, *Shewry*, 423 F.3d at 923 (citing *Warner Cable Commc'ns, Inc. v. City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990)). Any concern of this sort is entirely "misplaced" here. *City of Niceville*, 911 F.2d at 638. The publication of a Treasury Department website and the issuance of GAO reports—routine communications that constitute the everyday work of every federal agency—do not constitute the type of "drowning out" that even come close to raising a First Amendment concern. *Id.* Rather, Appellant's allegations here suggest nothing more than that the Government speech at issue in this case is "attract[ing] more listeners because the listeners prefer the [Government's] message." *Id.* *Cf. Johanns*, 544 U.S. at 574-75 (Souter, J., dissenting) ("To govern, government has to say something, and a First Amendment

heckler's veto of any forced contribution to raising the government's voice in the 'marketplace of ideas' would be out of the question.").[4]

VII. CONCLUSION

The order of the district court should be affirmed.

DATED: March 20, 2013

Respectfully submitted,

MELINDA HAAG
United States Attorney

/s/ Mark R. Conrad
MARK R. CONRAD
Assistant United States Attorney

[4] Appellant suggests in his opening brief that jurisdiction over his claim lies under the Administrative Procedures Act ("APA"); he claims that his failure to cite the APA in either his original or amended complaint was inadvertent; and he suggests that this Court should order "that the complaint be amended *nunc pro tunc* and/or on remand, so as to cite the APA." AOB at 10 n.3. Whether the APA should have been invoked as the proper jurisdictional avenue for challenging the conduct of the Treasury Department in this case is entirely academic, however, and makes no difference to the outcome of this appeal, since the waiver of immunity set forth in the APA does not transform Appellant's defective First Amendment claim into a cognizable cause of action. *See Califano v. Sanders*, 430 U.S. 99, 107 (1977) (holding that the APA "does not afford an implied grant of subject-matter jurisdiction").

CERTIFICATION OF COMPLIANCE WITH FRAP 32(a)(7)(C) and CIRCUIT RULE 32-1

I certify that this brief complies with the above-referenced rules. It is proportionately spaced, has a typeface of 14 points or more, and contains 5,422 words.

DATED: March 20, 2013

Respectfully submitted,

MELINDA HAAG
United States Attorney

/s/ Mark R. Conrad
MARK R. CONRAD
Assistant United States Attorney

STATEMENT OF RELATED CASES

To the best of Appellees' knowledge, there are no related cases within the meaning of Circuit Rule 28-2.6.

DATED: March 20, 2013

Respectfully submitted,

MELINDA HAAG
United States Attorney

/s/ Mark R. Conrad
MARK R. CONRAD
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Bonny Wong
BONNY WONG
Legal Assistant