



## PREPARED WRITTEN TESTIMONY OF

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### **U.S. Senate Committee on the Judiciary, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**

July 29, 2015

#### **“Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options”**

Chairman Cruz, Ranking Member Coons, and distinguished Members of the Subcommittee, on behalf of the American Center for Law & Justice and 185,913 of our members who signed our Petition to End IRS Abuse - thank you for allowing me to address the subject of the IRS’s ongoing targeting scandal and the many troubling developments that have recently come to light.

Last week, in an interview, the President “explained that accusations that [the IRS was] specifically targeting conservative organizations was false and that IRS employees were simply implementing laws passed by Congress ‘poorly and stupidly.’”<sup>1</sup> He further stated that the “real scandal around the IRS is that they have been so poorly funded that they cannot go after these folks who are deliberately avoiding tax payments.”<sup>2</sup>

To be clear, we are not here today because the IRS does not have enough money. We are here today to get to the truth about an unprecedented, well-orchestrated scheme to unlawfully target groups because of their political beliefs.

With the ACLJ currently engaged in litigation against the IRS and many of its current and former key officials on behalf of 38 conservative groups from 22 states, I am keenly aware of the importance of this hearing and the real issue at hand. The ACLJ is also pursuing another lawsuit against the IRS based on its failure to comply with its obligations under the federal Freedom of Information Act, so we are uniquely positioned to evaluate the sweeping scope of the IRS’s wrongdoing.

Simply put, the IRS continues to deceive the public about the extent of its misconduct and maintains that deception to this day. In fact, the more we learn – the more evidence we uncover – the clearer it becomes that this scandal continues to grow and continues to threaten Americans even today. Just days ago, a new report from the Government Accountability Office (GAO) revealed that Americans

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<sup>1</sup> *Obama: “Real” IRS Scandal is that It’s “Poorly Funded,”* BREITBART, <http://www.breitbart.com/big-government/2015/07/21/obama-real-irs-scandal-is-that-its-poorly-funded/> (last visited July 23, 2015).

<sup>2</sup> *Id.*

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are still vulnerable to IRS audits. As the GAO put it: “Unfortunately, the IRS has not taken sufficient steps to prevent targeting Americans based on their personal beliefs.”<sup>3</sup>

Even the current IRS leadership fails to take this matter seriously. No one has been fired. No one has been prosecuted. There is no accountability.

This is my fourth opportunity to testify before Congress in the last two years regarding the IRS targeting scandal. The necessity of repeated trips to Capitol Hill on behalf of my clients to bring national attention to this matter is reflective of the Obama Administration’s incredible unwillingness to get to the bottom of this scandal. Rather than seek justice for my clients while holding those responsible accountable, this Administration has engaged in a strategy of stalling. They are trying to run out the clock.

Specifically in this scandal, the IRS admitted to intentionally targeting conservative groups as early as 2011. However, the targeting began as early as December 2009 – if not earlier.

Yet, despite our claims of suspicious practices occurring as early as 2012, followed by the IRS’s repeated denials of any wrongdoing, the agency finally admitted to an unfair targeting practice that centered on searching tax applications for words like “Tea Party” and even “patriot,” in May of 2013.

In this split second of attempted crisis management, the IRS did not give the American people the whole story. The IRS merely glossed over a few minor details, and then continued the harassment of many of the groups involved. Not only did nothing change, but the IRS grossly misrepresented what was actually happening.

The IRS used one of the most powerful arms of the government for a partisan advantage - targeting pro-life and conservative groups in swing states in an attempt to influence the 2012 election. In short, they violated a sacred trust.

One might ask – why am I still coming back to testify time and time again to bring this matter to the attention of Congress on behalf of my clients and our members? I do so because the IRS, from day one, has misled the American public at every turn about years of misconduct. The IRS has continued to ignore repeated requests for answers.

This scandal is not just limited to the IRS. The IRS was also actively engaged in a conspiracy with other government officials and agencies by using thug-like tactics to intimidate anyone who they felt was a threat to their political ideology and power. The IRS continues to this very day to destroy evidence as the Courts and Congress rush to catch up to, and fully address, their unconstitutional harassment of American citizens.

When Lois Lerner admitted the IRS’s unlawful targeting in May of 2013, the IRS thought that it could get out in front of the looming TIGTA report.<sup>4</sup> Lerner and the IRS chose a Friday afternoon at an American Bar Association event to stage an apology. They hoped that it would all just go away.

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<sup>3</sup> Elizabeth MacDonald, *GAO: “American’s Still Vulnerable to IRS Audits Over Personal Beliefs,”* FOX BUS. (July 23, 2015) <http://www.foxbusiness.com/economy-policy/2015/07/23/gao-americans-still-vulnerable-to-irs-audits-over-personal-beliefs/>.

They were very wrong. More than two years later, evidence continues to emerge that confirms the tremendous scope of this inter-agency corruption.

**A SERIES OF CONTRADICTIONS:**

The same President who first reacted in “outrage”<sup>5</sup> to the news of this scandal with a promise that those responsible would be punished is the same President who argued thereafter that the IRS’s targeting scheme was a “phony scandal”<sup>6</sup> and there was not a “smidgen of corruption”<sup>7</sup> to be found.

The same IRS that promised all Americans that the targeting had stopped is the same IRS that is still refusing to issue a determination on the tax-exempt application of one of my clients, five and a half years after their original submission.

The same Lois Lerner who pleaded the Fifth and said in front of a congressional committee, under oath, that she did nothing wrong<sup>8</sup> is the same Lois Lerner whose thousands and thousands of emails were lost, whose back-up tapes of those “lost” emails were also destroyed, and whose few emails that were recovered contained clear, convincing, and damning evidence of her intent to lead and conspire with her colleagues at the Federal Elections Commission (FEC) and the Department of Justice (DOJ) in the targeting of conservative groups and the development of a tactic by which they could effectively intimidate conservative groups with the threat of criminal prosecution based on trumped up charges.

The same DOJ that then-Attorney General Eric Holder announced would appoint a joint DOJ/FBI investigation into the IRS scandal is the same DOJ that has now been shown to have conspired with the IRS in this targeting scheme.

Some of the Members of Congress who wrote letter after letter and made call after call to the IRS after the 2010 midterm elections to encourage them to go after these conservative groups - organizations that they saw as a political threat – are the same Members of Congress who have now repeatedly said that this investigation is a waste of time.

To be very clear, the IRS was—and is still –used as a weapon against the Obama Administration’s political enemies. Those responsible must be held accountable.

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<sup>4</sup> TREASURY INSPECTOR GEN. FOR TAX ADMIN., INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW, Reference No. 2013-10-053 (May 14, 2013), <https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf>.

<sup>5</sup> Lucy Madison, *Obama: IRS Targeting “Outrageous” If True*, CBS NEWS (MAY 13, 2013, 10:21 PM), <http://www.cbsnews.com/news/obama-irs-targeting-outrageous-if-true/>.

<sup>6</sup> David Jackson, *Obama Denounces “Phony Scandals,”* USA TODAY (June 27, 2014, 7:23 AM), <http://www.usatoday.com/story/theoval/2014/06/27/obama-phony-scandals-irs-benghazi-minneapolis-town-hall/11449373/>.

<sup>7</sup> “*Not Even a Smidgen of Corruption*”: *Obama Downplays IRS, Other Scandals*, FOX NEWS (Feb. 3, 2014), <http://www.foxnews.com/politics/2014/02/03/not-even-smidgen-corruption-obama-downplays-irs-other-scandals/>.

<sup>8</sup> Ed O’Keefe and William Branigin, *Louis Lerner Invokes Fifth Amendment*, THE WASHINGTON POST (May 22 2013), [http://www.washingtonpost.com/politics/lois-lerner-invokes-fifth-amendment-in-house-hearing-on-irs-targeting/2013/05/22/03539900-c2e6-11e2-8c3b-0b5e9247e8ca\\_story.html](http://www.washingtonpost.com/politics/lois-lerner-invokes-fifth-amendment-in-house-hearing-on-irs-targeting/2013/05/22/03539900-c2e6-11e2-8c3b-0b5e9247e8ca_story.html).

**A TIME FOR ACTION:**

We have already called on multiple occasions for a Special Counsel to be appointed in this matter and I renew that request today.

There is no excuse or defense for turning the full power of the IRS or any other government agency on American citizens for the sole purpose of punishing them in order to remove them as a political threat.

This carefully crafted, and well-orchestrated plan by three of the largest agencies in the United States Government– the IRS, the DOJ, and the FEC – to target conservative organizations all across the country for more than five years and counting is abhorrent, unconstitutional, and illegal.

This Administration and its officials, once and for all, must be held accountable.

What more must happen for my clients to truly see those who targeted them brought to justice? In the course of the last three years of representing dozens of conservative groups from across the country who were targeted, we have uncovered specific instances and uncontestable evidence of wrongdoing.

The negative impacts on some of our clients are significant, and I again ask today for this subcommittee to take decisive action and ensure that something like this never happens again.

**THE ACLJ’S DISCOVERY OF IRS TARGETING:**

In early February 2012, our office began to receive requests for legal representation from dozens of conservative organizations from across the country.

By the end of 2012, the ACLJ ultimately represented more than two-dozen conservative groups, all of which faced profound delays in their tax-exempt applications and intrusive follow-up questioning.<sup>9</sup>

In examining the documents the IRS provided each of our clients, we were outraged at the types of intrusive questions that multiple IRS offices were sending to these groups.

Many of these questions were outside the scope of legitimate IRS inquiry. Further review and comparison of hundreds of documents that our clients began providing us in the weeks that followed revealed that a targeting scheme had been orchestrated by senior officials at the IRS and the Treasury.

In March 2012, immediately after commencing this representation, we also sent a letter to Congressman Darrell Issa, then-Chairman of the House Oversight and Government Reform Committee, regarding these IRS Information Requests to Tea Party and Related Conservative Organizations. In addition, we also sent a letter directly to each of the IRS agents who contacted

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<sup>9</sup>*Tea Party Victory Report: Victory After Victory this Year – Nationwide*, AM. CTR. FOR LAW & JUSTICE (Dec. 17, 2012, 11:25 AM), <http://aclj.org/free-speech-2/tea-party-victory-report-victory-nationwide>.

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our clients, putting them on notice that a number of their questions went well beyond constitutional bounds. We also noted that it appeared as if the letters had been sent as part of a coordinated effort.

We knew something improper was going on. We had the documents to prove it. We spent the next year working with our clients to get their applications in order, completed, and submitted to force the IRS to make a determination on their files.

Throughout this process, we spent thousands of hours filing response after response to the IRS’s request for more information on behalf of 28 of our clients. In our responses, we made it very clear for the IRS what questions were legitimate under the IRC and what questions would go unanswered as they were either onerous, over burdensome, grossly intrusive, and/or unconstitutional.

**THE IRS ADMITTED WRONGDOING -  
LERNER’S ADMISSION AND THE COVER UP THAT FOLLOWED:**

In response to early congressional inquiries in 2012, the IRS *adamantly denied* any wrongdoing. As we now know, the IRS maintained its denials even as agents across the country worked diligently to target conservative groups, and meeting after meeting was held internally at the IRS to refine and perfect that targeting.

On May 10, 2013, the IRS – through Lois Lerner, its former Director of Exempt Organizations – apologized for a systematic practice whereby the IRS selected nonprofit applications from groups bearing specifically conservative sounding names for additional scrutiny; they admitted that the IRS had in fact targeted groups with the words “Tea Party” and “Patriot” in their applications. This unannounced admission intentionally preempted the Treasury Inspector General for Tax Administration’s release of a comprehensive report that followed days later on May 14, 2013 – which detailed the staggering extent of IRS wrongdoing.

In Lerner’s attempt to get out in front of the Inspector General’s forthcoming report, her words were clear. In answering a planted question, Lois Lerner admitted the IRS’s guilt in targeting hundreds of groups who were applying for tax-exempt status:<sup>10</sup>

However, in these cases, the way they did the centralization was not so fine. Instead of referring to the cases as advocacy cases, they actually used case names on this list. They used names like Tea Party or Patriots and they selected cases simply because the applications had those names in the title. That was wrong, that was absolutely incorrect, insensitive, and inappropriate — that’s not how we go about selecting cases for further review. We don’t select for review because they have a particular name.

The other thing that happened was they also, in some cases, cases sat around for a while. They also sent some letters out that were far too broad, asking questions of these organizations that weren’t really necessary for the type of application. In some cases you probably read that they asked for contributor names. That’s not appropriate, not usual, there are some very limited times when we might need that

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<sup>10</sup> Gregory Korte, *Planted Question Gambit Backfires on IRS Officials*, USA TODAY (May 18, 2013, 1:55 PM), <http://www.usatoday.com/story/news/politics/2013/05/18/irs-scandal-planted-question/2216747/>.

but in most of these cases where they were asked they didn’t do it correctly and they didn’t do it with a higher level of review. As I said, some of them sat around for too long.

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So I guess my bottom line here is that we at the IRS should apologize for that . . . <sup>11</sup>

The IRS must have believed that its carefully staged apology would defuse the scandal. But this admission of guilt only confirmed what my legal team and I already knew – and what the rest of the country was about to find out.

At the American Center for Law and Justice (ACLJ), we were not surprised by Ms. Lerner’s apology. Indeed, we had long been aware of the IRS’s targeting scheme.

Once the Inspector General’s report was released, all of our suspicions were confirmed and the Obama Administration went into full crisis management mode as it attempted to walk back this story by blaming any misconduct on “line workers” in Cincinnati.<sup>12</sup>

That excuse was patently false, and I could prove it. I had in my possession at that time a stack of IRS letters received by my clients. Those letters came not just from offices in Cincinnati, but also from at least two offices in California, and the Treasury Department in Washington, DC. *See ATCH A* for examples of these letters.

When we originally compared the voluminous and intrusive demands that the IRS made of these groups, we knew as early as March 2012 that we had evidence of a wide ranging and carefully orchestrated scheme to target American citizens for their perceived political beliefs. It was also clear the trail of evidence established that senior officials in Washington, D.C. were leading this effort to unlawfully target our clients.<sup>13</sup> After the TIGTA report, our evidence directly proved the corruption we originally believed to have existed.

The IRS went to great lengths to deny any wrongdoing before their staged admission. They even went so far as to issue a false response to an on-point FOIA request on January 6, 2011, by responding to a request for documents on the handling of Tea Party matters by declaring there were “no documents” responsive to the request. This was their official position at the same time that “Tea Party” targeting was fully in progress, organized by “BOLO” lists that explicitly named Tea Party groups. *See ATCH B* for a copy of this letter of response from the Department of Treasury regarding this FOIA request.

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<sup>11</sup> Rick Hasen, *Transcript of Lois Lerner’s Remarks at Tax Meeting Sparking IRS Controversy*, ELECTION LAW BLOG (May 11, 2013, 7:37 AM), <http://electionlawblog.org/?p=50160>.

<sup>12</sup> Deirde Shesgreen, *IRS Official Blasted Lerner for Blaming Cincinnati*, USA TODAY (Nov. 18, 2013, 5:57 PM), <http://www.usatoday.com/story/news/politics/2013/11/18/irs-scandal-email-backbiting/3631047/>.

<sup>13</sup> David French, *A Broad-Based Assault on the Tea Party?*, NAT’L REV. ONLINE (Mar. 2, 2012, 3:29 PM), <http://www.nationalreview.com/corner/292475/broad-based-irs-assault-tea-party-david-french>.

### OUR CALL FOR MORE OVERSIGHT:

The ACLJ has long supported congressional oversight of IRS mistreatment of conservative organizations, and our clients’ concerns were thoroughly validated by the IRS’s admissions of wrongdoing. Comprehensive investigations were needed (and still are) to discover all the relevant facts and to hold responsible officials accountable.

We also welcomed the DOJ’s criminal investigation into the matter before it was later implicated as a co-conspirator in this scheme. As discussed in more detail below, we now believe that a Special Counsel is necessary to fully resolve the matter.

The IRS’s admission, and the Inspector General’s report, was merely the start – a process that must fully grapple with the reality of our clients’ ongoing ordeals.

### THE IRS UNDERSTATED ITS WRONGDOING:

Oversight was needed because prior to its admissions, the IRS denied that its agents were targeting Tea Party groups, and many on the Left had ridiculed Tea Party groups’ claims, passing off the IRS inquiries as “standard” and “much ado about nothing.” For example, in an influential editorial, *The New York Times* claimed that the IRS was merely doing its job.<sup>14</sup>

A Friday afternoon apology, in a nearly empty room, when no one was really paying attention, is not enough to atone for the IRS’s misconduct. Where is the compensation for thousands of hours spent by Tea Party groups compiling tens of thousands of pages of documents? Why are some groups still waiting five and a half years later for a determination with their tax-exempt status remaining in limbo?

Again, this unconstitutional targeting was compounded and magnified by unconstitutional intrusive demands for additional information, demands that violated our clients’ First Amendment rights. These information demands followed the organizations’ requests for 501(c)(3) or 501(c)(4) status and included questions like the following:

*Do you directly or indirectly communicate with members of legislative bodies? If so, provide copies of the written communications and contents of other forms of communications.*

*Do you have a close relationship with any candidate for public office or political party? If so, fully describe the nature of that relationship.*

*Please describe the associate group members and their role with your organization in further detail. (a) How does your organization solicit members? (b) What are the questions asked of potential members? (c) What are the selection criteria for approval? (d) Do you limit membership to other organizations exempt under 501c4 of the Code? (e) Provide the name, employer identification number, and address of the organizations.*

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<sup>14</sup> *The I.R.S. Does Its Job*, NEW YORK TIMES (Mar. 7, 2012), <http://www.nytimes.com/2012/03/08/opinion/the-irs-does-its-job.html>.

*Please provide us with a temporary Username and Password that we could use to review your organization’s website.*

*Donations, contributions, and grant income for each year which includes the following information:*

*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”.*

*List each past or present board member, officer, key employee and members of their families who:*

- a) Has served on the board of another organization.*
- b) Was, is or plans to be a candidate for public office. Indicate the nature of each candidacy.*
- c) Has previously conducted similar activities for another entity.*
- d) Has previously submitted an application for tax exempt status.*

Speaking of an educational pro-life organization, the IRS attacked its free speech by stating:

*(1) The presentation of viewpoints or positions unsupported by facts is a significant portion of the organization’s communications; (2) The facts that purport to support the viewpoints or positions are distorted; (3) The organization’s presentations make substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations; and (4) The approach used in the organization’s presentations is not aimed at developing an understanding on the part of the intended audience or readership because it does not consider their background or training in the subject matter.*

These requests and comments were far more intrusive than the information requests strongly condemned by the Supreme Court in *NAACP v. Alabama*, which declared: “Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”<sup>15</sup>

In addition to the problematic substance of many of the IRS’s questions, they were often extraordinarily broad, presenting small organizations with document production demands that would have presented a challenge even to corporations much larger than my clients – and for no other reason than their ideological affiliation was not aligned with that of the current Administration’s.

Each of these questions - in their content, breadth, and vagueness - implicated the free speech and associational rights of my clients and hundreds of other Tea Party and conservative groups across

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<sup>15</sup> See *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (holding the NAACP’s right to freely associate and due process rights were implicated when the state scrutinized its membership lists).



the country.

Critically, these onerous demands were not in response to complaints of wrongdoing but instead in response to applications for tax-exemption. In other words, the IRS conditioned the grant of exemptions on the extensive violation of these Tea Party groups’ fundamental First Amendment freedoms.

As was apparent to us after our initial review of case files, the IRS was using the routine process of seeking and granting tax-exemptions to undertake a sweeping, top-down review of the internal workings of the Tea Party movement in the United States – and they did so in the midst of one of the most significant Presidential elections in our history.

**Three Things Are Disturbingly Clear from the Record:**

- 1. IRS abuse that was directed at Tea Party and conservative groups was not limited to one field office.**

When issuing its so-called apology for intentionally targeting conservative groups for onerous and unconstitutional inquiries, the IRS claimed the targeting was limited to “low-level” IRS agents in a single office in Cincinnati.

This is patently false. As stated previously, the ACLJ’s targeted clients received inquiry demand letters from numerous IRS offices from coast to coast. The ACLJ dealt with IRS officials in Laguna Niguel, California, El Monte, California, Cincinnati, Ohio, and Washington, D.C. However, even if the targeting misconduct were limited to Cincinnati, which it was not, that would not mitigate IRS responsibility. The Cincinnati office is in fact responsible for much of the processing of tax-exempt applications in the country, and the agents based in this office are all tax-exemption specialists.

We have released to the public, members of the media, and Members of Congress multiple letters from not only the Cincinnati IRS office, but also two IRS offices in California, and the main IRS headquarters in Washington, D.C. These letters included inappropriate and intrusive inquiries received in 2012, well after senior IRS officials were aware of the inappropriate targeting.

For example, the Albuquerque Tea Party, which applied for tax-exempt status in 2009, received an intrusive questionnaire from an IRS agent in Washington, D.C. Years later, this same group received a communication from an IRS attorney in Washington, D.C., declining to inform the group about her recommendation on the group’s pending status and declining to give a time estimate for a decision.

I served as a trial lawyer with the Office of the Chief Counsel for the IRS earlier in my career, and it is clear to me – based on my experience – that this targeting occurred on a very broad scale. This intimidation strategy required the approval of IRS superiors, and it was not just confined to a small office in Ohio. Furthermore, we have documentation proving that the IRS’s original assertions were completely false.

This scandal has been an abhorrent breach of the public trust, and IRS officials at all levels must be held accountable for their dishonest and disgraceful conduct. The targeting scheme employed by the IRS not only violated the IRS’s own rules and regulations, but it also resulted in a growing and

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justifiable mistrust of the IRS by the American people. The resignation of the IRS's Acting Commissioner was only the beginning, not the end, of accountability and it provided no real answers to the questions the American people have been asking since knowledge of the scandal became public.

## 2. The constitutional violations implicated in these cases were severe.

The constitutional violations implicated in these cases are serious – extending not just to the targeting of the groups themselves - but also, as stated above, the IRS's document demands and other questions were unconstitutionally intrusive. From the beginning, we referred IRS agents to *NAACP v. Alabama*, 357 U.S. 449 (1958), to demonstrate the wrongful nature of their conduct.

At issue in *NAACP v. Alabama* was whether Alabama, consistent with the Due Process Clause of the Fourteenth Amendment, could have compelled the NAACP of Alabama to reveal to the State's Attorney General the “names and addresses of all its Alabama members and agents, without regard to their positions or functions in the Association.”<sup>16</sup>

The government's attempt to obtain membership information was rejected unanimously by the Supreme Court of the United States. The Court held that it was “apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.”<sup>17</sup>

The IRS took the same unconstitutional actions in the targeting scheme we are discussing today. Many of the questions presented in the letters sent to our clients from the IRS were requests for the same type of information that was requested by the state of Alabama in *NAACP v. Alabama*.

Furthermore, the IRS's requests went well beyond anything ever at issue in *NAACP v. Alabama*. The IRS, in one letter, actually demanded from one of our clients the personal resumés of each and every member of their organization's board of directors.

The Court in *NAACP v. Alabama* understood that “effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.”<sup>18</sup> The Court further recognized this “close nexus between the freedoms of speech and assembly” and stated that “it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”<sup>19</sup> Therefore, the Court held the following:

[I]mmunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to

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<sup>16</sup> *NAACP v. Alabama*, 357 U.S. 449, 451 (1958).

<sup>17</sup> *Id.* at 462-63.

<sup>18</sup> *Id.* at 460.

<sup>19</sup> *Id.* at 460-61.

come within the protection of the Fourteenth Amendment. And we conclude that Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have.<sup>20</sup>

In addition to the privacy concerns pursuant to *NAACP v. Alabama*, above, it is clear that the IRS violated the First Amendment rights of countless non-profit organizations. Targeting of non-profit groups because of the content of their viewpoints, whether entirely or in part, is a shocking violation of the First Amendment.

In *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983) the Supreme Court upheld the constitutionality of that portion of the IRS Code that prohibits non-profit, tax-exempt 501(c)(3) organizations from engaging in substantial lobbying efforts, applying it to a group that could have qualified to form a 501(c)(4) entity, thus enabling it to have pursued the desired legislative lobbying had it simply formed that entity in accord with IRS rules, with no free speech impediment.<sup>21</sup> However, the Court also recognized how that is a radically different situation from having the federal government targeting groups because of their viewpoints. The Supreme Court said “[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech.”<sup>22</sup>

“The case would be different if Congress were to discriminate invidiously in its [tax exemptions] in such a way to ‘aim at suppression of dangerous ideas.’”<sup>23</sup> The *Regan* Court emphasized: “We find no indication that the statute was intended to suppress any ideas or any demonstration that it had that effect.”<sup>24</sup> The resulting corollary is that “if [the IRS] were to discriminate invidiously in its [tax exemptions] in such a way to aim at suppression of dangerous ideas,” which is exactly what the record clearly portrays already, then a shocking First Amendment breach has been proven. Further, where the impeding of the processing of 501(c)(4) organizations is an outgrowth of viewpoint discrimination, the same constitutional violation results. In *Regan*, the Court strongly implied that a First Amendment violation in that case could have been found if the claimants showed that they were “unable to operate with the dual structure” of having both 501(c)(3) and 501(c)(4) entities.<sup>25</sup> In this investigation, it is clear that groups wanting to form 501(c)(4) lobbying groups were intimidated and harassed in a way where they “were unable to operate” within the IRS Code structure.

**The Supreme Court has spoken clearly:** the use of federal government power to frustrate groups holding opinions unpopular to federal bureaucrats from forming lawful entities that are recognized under the IRS Code is an outlandish constitutional violation.

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<sup>20</sup> *Id.* at 466 (internal citations omitted).

<sup>21</sup> *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 545 (1983).

<sup>22</sup> *Id.* at 596 (quoting *Speiser v. Randall*, 357 U.S. 513, 518 (1958)).

<sup>23</sup> *Regan*, 461 U.S. at 548 (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959) quoting *Speiser*, 357 U.S. at 519).

<sup>24</sup> *Regan*, 461 U.S. at 548.

<sup>25</sup> *Id.* at 544 n. 6.

### **3. The IRS violated its Mission.**

“The mission of the Internal Revenue Service is to apply the tax law *with integrity and fairness*.”<sup>26</sup> Federal employees (including IRS employees) “*shall act impartially* and not give preferential treatment to any private organization or individual.”<sup>27</sup> Further, IRS “[e]mployees shall not engage in . . . dishonest, or notoriously disgraceful conduct . . . prejudicial to the Government.”<sup>28</sup>

For years, these IRS agents had been violating each of these requirements – and they have done so under the direction of senior officials in Washington, D.C.

First, by singling out Tea Party and other grassroots groups for special scrutiny based on their political views, IRS agents violated the IRS mission to operate with integrity and fairness.

Second, by singling out Tea Party and related groups for special scrutiny based on their political views, IRS agents violated the requirement to act impartially.

Third, by singling out Tea Party and related groups for special scrutiny based on their political views, IRS agents engaged in dishonest, notoriously disgraceful conduct. The same can be said of IRS leaders who knew of, but failed to rein in, such biased, politically motivated, and unconstitutional conduct, thereby allowing the politicization of the IRS.

Each of these actions was prejudicial to the Government and negatively impacted the reputation of the IRS. It is no wonder that, in light of this open and notorious politicization of the IRS, many Americans view with outright alarm the called-for expansion of the IRS to implement the Affordable Care Act (“ObamaCare”).

The IRS must be scrupulously neutral and apolitical to retain the confidence and trust of the American people. It has failed miserably.

### **THE OBAMA ADMINISTRATION, THE IRS, & THEIR REAL AGENDA:**

Simply put, from the beginning, the IRS deceived the public about its real agenda in targeting these conservative groups, the extent of its wrongdoing, and it maintains that deception to this day.

The initial IRS defense turned on three fundamental misstatements. First, that the misconduct was localized to low-level employees in one IRS office, in Cincinnati, which I have already discussed in detail above.<sup>29</sup> But further, that the misconduct was unrelated to the political point of view of the targeted groups and was merely a misguided effort to respond to a “big increase” of 501(c)(4) applications.<sup>30</sup> Third, that the misconduct had been identified and stopped. These assertions were all

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<sup>26</sup> *IRS Internal Revenue Manual 39.1.1.1*, IRS (last visited May 13, 2013) (emphasis added), [http://www.irs.gov/irm/part39/irm\\_39-001-001.html](http://www.irs.gov/irm/part39/irm_39-001-001.html).

<sup>27</sup> 5 C.F.R. § 2635.101(8) (emphasis added).

<sup>28</sup> 31 C.F.R. § 0.213.

<sup>29</sup> Stephen Ohlemacher, *IRS Apologizes for Targeting Tea Party Groups*, THE ASSOCIATED PRESS (May 10, 2013, 6:14 PM), <http://bigstory.ap.org/article/irs-apologizes-targeting-conservative-groups>.

<sup>30</sup> Rick Hasen, *Transcript of Lois Lerner’s Remarks at Tax Meeting Sparking IRS Controversy*, ELECTION LAW BLOG (May 11, 2013, 7:37 AM), <http://electionlawblog.org/?p=50160>.

false.<sup>31</sup>

There was no “big increase” of applications at the time the targeting began. In fact, there were fewer 501(c)(3) and 501(c)(4) applications in fiscal year 2010 – when the targeting began – than in fiscal year 2009.<sup>32</sup>

Also, the IRS misconduct had not stopped but was instead ongoing and if anyone on this committee thinks “So what?” – I’d like for them to explain to me how long a group must wait for a determination. One of our clients is still waiting for an answer from the IRS – after more than five years.

If the IRS targeting scandal was not the result of a few overwhelmed low-level workers whose misconduct was stamped out as soon as it was discovered, then what truly happened?

While it was once difficult to answer this question definitively, since the IRS has failed to hand over all requested documents to Congressional investigators<sup>33</sup>, and key IRS officials have been less-than-forthcoming (including asserting the Fifth Amendment privilege against self-incrimination) in response to questions from relevant Congressional Committees<sup>34</sup>, the broad contours of the scandal are growing more apparent as evidence continues to be revealed.

The genesis of the IRS targeting lies not with overwhelmed workers facing a flood of unexpected applications but instead with alarmed politicians and partisan bureaucrats confronting the unexpected emergence of a new political movement – a movement they wanted to stop.

The rise of the Tea Party coincided with (though was independent of) the Supreme Court’s decision in *Citizens United v. FEC*, a decision that affirmed the First Amendment rights of citizens speaking through corporations and thereby broadened free speech opportunities for people of all political persuasions.<sup>35</sup>

Stripped of the ability to explicitly limit corporate free speech, the Obama Administration launched a public-relations offensive against conservative groups with the President himself taking the lead role.

On August 21, 2010, the President warned of “attack ads run by shadowy-groups with harmless-sounding names.” The President also said, “We don’t know who’s behind these ads and we don’t know who’s paying for them . . . you don’t know if it’s a foreign-controlled corporation . . . The

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<sup>31</sup> *White House Claims False: IRS Targeting Ongoing*, AM. CTR. FOR LAW & JUSTICE, (May 22, 2013, 9:23 AM), <http://aclj.org/free-speech-2/white-house-claims-false-irs-targeting-ongoing>.

<sup>32</sup> TREAS. INSPECTOR GEN. FOR TAX ADMIN., 2013-10-053, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW 9 (May 14, 2013) (available at <http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.html>).

<sup>33</sup> Stephen Ohlemacher, *Rep. Issa Accuses IRS of Obstructing Investigation*, YAHOO! NEWS, (Aug. 2, 2013, 3:24 PM), <http://news.yahoo.com/rep-issa-accuses-irs-obstructing-investigation-171420153.html>.

<sup>34</sup> Caitlin Dickson, *As Lois Lerner Pleads the Fifth, the IRS’s Problems Aren’t Just Political*, THE DAILY BEAST, (May 23, 2013), <http://www.thedailybeast.com/articles/2013/05/23/as-lois-lerner-pleads-the-fifth-the-irs-s-problems-aren-t-just-political.html>.

<sup>35</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

only people who don’t want to disclose the truth are people with something to hide.”<sup>36</sup>

On October 14, 2010, President Obama called organizations with “benign-sounding” names “a problem for democracy,” and the next week he complained about individuals who “hide behind those front groups,” called such groups a “threat to our democracy,” and claimed that such groups were engaged in “unsupervised” spending.<sup>37</sup>

President Obama was hardly the only political leader to speak out against the free speech rights of conservative nonprofits. On February 16, 2012, several U.S. Senators sent a letter to the IRS demanding that the IRS investigate tax-exempt organizations for engaging in “political activities.”<sup>38</sup> This demand came just as the IRS was issuing yet another round of intrusive questions to conservative groups.

### ENEMIES OF THE STATE - CONSERVATIVE GROUPS:

Freedom of speech, freedom of assembly, and freedom of association – these are three freedoms the IRS disregarded as it systematically targeted grassroots groups. These grassroots groups consisted of average Americans, many of whom were new to politics, advancing the social welfare of their communities, often through local community education programs emphasizing constitutional education. Like any other social welfare educational group, they sought 501(c)(3) or 501(c)(4) tax-exempt status from the IRS.

Given the climate of political pressure present in 2011 and 2012 created, maintained, and encouraged by the Obama Administration, the nature of the questions the IRS later presented to conservative groups is hardly surprising and indeed appears calculated to answer each of the questions the President himself had raised on multiple occasions before.

It is difficult to overstate the extent and magnitude of federal government misconduct so far uncovered. As for the magnitude of the scandal, on June 20, 2013, Stan Veuger, writing for the American Enterprise Institute, cited a study showing the impact of the Tea Party’s “ground game” on the 2010 election and noting that suppressing the Tea Party could well have provided President Obama his margin of victory in 2012.<sup>39</sup>

In other words, not only was the targeting scheme repugnant to the Constitution, it could well have had decisive real-world effects in a presidential election.

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<sup>36</sup> *Remarks of President Barack Obama: Weekly Address (Aug. 21, 2010)*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/the-press-office/2010/08/21/weekly-address-president-obama-challenges-politicians-benefiting-citizen>; see also *Remarks by the President on the DISCLOSE Act*, WHITEHOUSE.GOV, (Jul. 26, 2010, 2:49 PM), <http://www.whitehouse.gov/the-press-office/remarks-president-disclose-act> (“ [A] group can hide behind a name like ‘Citizens for a Better Future,’ even if a more accurate name would be ‘Companies for Weaker Oversight.’ These shadow groups are already forming and building war chests of tens of millions of dollars to influence the fall elections.”).

<sup>37</sup> *An IRS Political Timeline*, WALL ST. J. (Jun. 6, 2013, 7:40 PM), <http://online.wsj.com/news/articles/SB10001424127887323844804578529571309012846>.

<sup>38</sup> Letter from Charles E. Schumer et al., U.S. Sen., to Douglas H. Shulman, IRS Comm’r (Mar. 12, 2012) (on file with author) (available at <http://www.schumer.senate.gov/record.cfm?id=336270>).

<sup>39</sup> Stan Veuger, *Yes, IRS Harassment Blunted the Tea Party Ground Game*, AM. ENTER. INST. (Jun. 20, 2013), <http://www.aei.org/article/economics/yes-irs-harassment-blunted-the-tea-party-ground-game>.

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Given this reality, it’s hardly surprising that the Administration has proven over the last two years utterly incapable of policing itself. To the contrary – it has sought to do everything in its power to make this scandal go away.

In short, the IRS is institutionally incapable of self-correction.

According to report after report, this Administration has delayed turning over tens of thousands of relevant documents to Congressional investigators<sup>40</sup>, has attempted in multiple district and circuit courts to dismiss litigation filed by groups it has already admitted its officials harmed, and its criminal investigation – announced with much fanfare in May of 2013 – was led by a large donor to President Obama’s two presidential campaigns, a person so close to the President that she was invited to the White House to attend a bill-signing ceremony<sup>41</sup> – and her investigation has gone nowhere.

Millions of Americans with good reason perceive the IRS as inherently partisan, and they have long doubted the Obama Administration’s good faith in faithfully executing the laws of the United States by defending the First Amendment rights of all American citizens. They are now understandably cynical when an avowed partisan accepts the assignment to investigate perhaps our nation’s most politically-significant scandal.

Under such circumstances, Congressional oversight has been absolutely essential – and it still is required.

**THE ONLY THING PHONY ABOUT THIS  
SCANDAL WAS THE INVESTIGATION:**

There has been no real investigation and no one held accountable. Those tasked with investigating were themselves involved in the targeting. Emails discovered last year directly linked the DOJ as potential co-conspirators in the crime that was the focus of its investigation.<sup>42</sup> The DOJ was, and still is, compromised.

The DOJ no longer has the credibility to argue that a Special Counsel should not be appointed.<sup>43</sup> Although former Attorney General Holder had previously denied that any conflict of interest had existed, the conflicts are plain.

The DOJ has previously removed officials from investigations due to their personal or political relationships. The only way for the DOJ to avoid a clear conflict of interest is for Attorney General Lynch to appoint a Special Counsel.

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<sup>40</sup> Stephen Dinan, *Issa: FBI Impeding Inquiry into IRS Targeting of Conservative Groups*, WASH. TIMES, (Dec. 2, 2013), <http://www.washingtontimes.com/news/2013/dec/2/lawmakers-suspect-fbi-is-impeding-irs-inquiry-targ/?page=all>.

<sup>41</sup> *Obama Backer Leading IRS Probe Visited White House in '09, Records Show*, FOXNEWS.COM (Jan. 13, 2014), <http://www.foxnews.com/politics/2014/01/13/obama-backer-leading-irs-probe-visited-white-house-in-0-records-show/>.

<sup>42</sup> See E-mail from Lois Lerner, *supra* note 18.

<sup>43</sup> See Bernie Becker, *Justice: No Need for IRS Special Prosecutor*, THE HILL (July 17, 2014, 12:15 PM), <http://thehill.com/policy/finance/212559-justice-no-need-for-irs-special-prosecutor>.

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We were shocked to learn of the evidence that was uncovered last year in over 1,600 pages of emails that were produced in response to a Judicial Watch FOIA request.<sup>44</sup>

Within these emails were multiple exchanges between Lois Lerner and officials within the IRS where she referenced her conversations with DOJ officials that clearly established a motive, intent, and active scheme to manufacture evidence against conservative groups like our clients to *“piece together”* criminal prosecutions of law-abiding citizens in the absence of any complaints or evidence of wrongdoing.<sup>45</sup>

These emails suggested a troubling coordination between the IRS, FEC, DOJ, and United States Senators and their staff.<sup>46</sup> They also established a coordinated targeting effort between the IRS, DOJ, and certain U.S. Senators.<sup>47</sup> Since then, more emails continue to surface that further proves this collusion.

Again, this cauldron of corruption extends well beyond the IRS.

For example, on March 26, 2013, Ayo Griffin, Counsel for the U.S. Senate Committee on the Judiciary Subcommittee on Crime and Terrorism, sent an email to IRS Legislative Counsel, Suzanne Sinno stating that Senator Sheldon Whitehouse (D-RI) was “interested in investigation and prosecution of material false statements to the IRS regarding political activity by 501(c)(4) groups on form 990 and 1024 under 26 U.S.C. sections 7206.”<sup>48</sup> On March 27, 2013, Lois Lerner sent an email to Nikole Flax (then chief of staff to then IRS Commissioner Steven Miller), Suzanne Sinno, Catherine Barre (IRS staffer), Scott Landes (IRS Legislative Affairs), Amy Amato (Affiliated with the IRS; position unknown), and Jennifer Vozne (Deputy Chief of Staff to then IRS Commissioner Steven Miller) stating that

[T]here are several groups of folks from the FEC world that are pushing tax fraud prosecution for c4s who report they are not conducting political activity when they are (or these folks think they are). One is my ex-boss Larry Noble (former General Counsel at the FEC), who is now president of Americans for Campaign Reform. This is their latest push to shut these down. One IRS prosecution would make an impact and they wouldn't feel so comfortable doing the stuff.<sup>49</sup>

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<sup>44</sup> See *ACLJ: Tainted Investigation into IRS Scandal Makes It Impossible for Targeted Groups to Meet with Federal Investigators*, AM. CTR. FOR LAW & JUSTICE (June 18, 2014, 10:34 AM), <http://aclj.org/free-speech-2/aclj-tainted-investigation-into-irs-scandal-makes-it-impossible-for-targeted-groups-to-meet-with-federal-investigators>.

<sup>45</sup> E-mail from Lois Lerner, Former Dir. of IRS Exempt Orgs., to Nikole Flax, Chief of Staff to Former IRS Comm'r Steven Miller et al. (May 8, 2013, 5:30 PM) (*available at* <http://www.judicialwatch.org/wp-content/uploads/2014/04/JW1559-0001051.pdf>) (emphasis added).

<sup>46</sup> See, e.g., E-mail from Nikole Flax, Chief of Staff to Former IRS Comm'r Steven Miller, to Lois Lerner, Former Dir. of IRS Exempt Orgs. (Feb. 5, 2013, 2:29 PM), *available at* <http://www.judicialwatch.org/wp-content/uploads/2014/07/IRS-Production-3.pdf> (located on p. 596 of PDF document).

<sup>47</sup> See, e.g., E-mail from Ayo Griffin, Counsel for Senate Judiciary, Subcomm. on Crime and Terrorism, to Suzanne Sinno, IRS Leg. Counsel (Mar. 26, 2013, 7:44 PM) (*available at* <http://www.judicialwatch.org/wp-content/uploads/2014/04/JW1559-000243.pdf>).

<sup>48</sup> *Id.*

<sup>49</sup> E-mail from Lois Lerner, Former Dir. of IRS Exempt Orgs., to Nikole Flax, Chief of Staff to Former IRS Comm'r Steven Miller et al. (Mar. 27, 2013, 12:39 PM) (*available at* <http://www.judicialwatch.org/wp-content/uploads/2014/05/IRS-HQ-FOIA-1559-Full-Production.pdf>) (located on p. 39 of PDF document).



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Finally, Richard Pilger, Director of Election Crimes Branch at the DOJ, contacted Lois Lerner. They spoke about the prospect of a DOJ investigation regarding the very organizations that the IRS had already improperly targeted. Lerner emailed a summary of the conversation to Nikole Flax, Joseph Grant (then Commissioner of the Tax Exempt and Government Entities Division), Nancy Marks (IRS Senior Technical Advisor), and Jennifer Vozne. The email stated,

I got a call today from Richard Pilger Director Elections [sic] Crimes Branch at DOJ. I know him from contacts from my days there. He wanted to know who at IRS the DOJ folk s [sic] could talk to about Sen. Whitehouse idea at the hearing that DOJ could piece together false statement cases about applicants who “lied” on their 1024s --saying they weren’t planning on doing political activity, and then turning around and making large visible political expenditures. DOJ is feeling like it needs to respond, but want [sic] to talk to the right folks at IRS to see whether there are impediments from our side and what, if any damage this might do to IRS programs. I told him that sounded like we might need several folks from IRS.<sup>50</sup>

To be clear, these emails were sent mere weeks before the IRS “apologized” for targeting Tea Party and other, similar organizations. Even worse, they were sent well after the time when the IRS claimed that all targeting had ceased. Not only was this statement false, IRS targeting was escalating – in active cooperation with the DOJ – into a concerted effort to manufacture criminal prosecutions.<sup>51</sup> These emails also show that the DOJ is not impartial; rather the DOJ was complicit in illegally targeting conservative groups in concert with the IRS.

I find it bizarre that, after all the revelations and disclosures since the IRS’s “apology” in 2013, there are still some who call it a “phony scandal” or argue that this is much to do about nothing.

In many cases, these are the same people who suggest that there is nothing strange about a DOJ that has one team fighting my clients in federal court one day – aggressively arguing that none of my clients had a claim against the IRS – while another department is assuring our attorneys and clients that their investigation of the widespread targeting and wrongdoing was legitimate and not a sham.

**CALL FOR A SPECIAL COUNSEL:**

Because of this deception, I have previously joined many Members of Congress from both sides of the aisle in calling for an investigation by the DOJ. This seemed to be an obvious next step.<sup>52</sup> This situation had become more acute in light of the revelations that the DOJ was “seeking to piece together” criminal investigations against these groups without evidence to support its claims.<sup>53</sup>

I have always had great respect for the DOJ and spent many years working with former Attorneys General. I served on the DOJ’s teaching faculty, instructing their U.S. attorneys on matters involving First Amendment law. However, the issues surrounding the DOJ’s investigations – and its

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<sup>50</sup> E-mail from Lois Lerner, *supra* note 13, at 4.

<sup>51</sup> See E-mail from Ayo Griffin, *supra* note 14.

<sup>52</sup> Abby D. Phillip, *Tea Party Rejects IRS Apology, Republicans Vow Investigation*, ABCNEWS (May 10, 2013), <http://abcnews.go.com/Politics/irs-admits-targeting-conservative-groups/story?id=19151646>.

<sup>53</sup> *IRS Emails Indicate Tea Party Groups Could have Faced “Criminal” Charges, Republicans Say*, FOXNEWS.COM (Apr. 17, 2014), <http://www.foxnews.com/politics/2014/04/16/uncovered-emails-show-lerner-talked-with-justice-about-irs-targeting/>.

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involvement in the IRS scandal itself – caused me to lose confidence in Attorney General Holder and his Justice Department. Since Attorney General Lynch has not appointed one yet, my lack of confidence in the DOJ continues.

There is an immediate need for an appointment of a Special Counsel.

Though the authority to appoint a Special Counsel rests solely to the Attorney General, I must continue to underscore the seriousness of this scandal and the immediate need for a Special Counsel who would act independently of the DOJ, not subject to its appointed political leadership.

In my view, it is clear that the DOJ has thoroughly demonstrated that it can no longer fairly and justly oversee any further investigations, and the only opportunity for justice lies with an independent Special Counsel.

President Obama initially made it clear that he was outraged, and former Attorney General Holder said that the DOJ would investigate.<sup>54</sup> Now, more than two years later, where are we with those investigations? Where is the justice promised to us by the President and his former Attorney General? Why has Attorney General Lynch not appointed a Special Counsel to date?

It appears that these initial expressions of outrage were little more than contrived efforts at damage control. The Obama Administration never intended for this scandal to be fully and fairly investigated. Within months, Administration officials quickly retreated back to talking points that the IRS targeting was “just another phony scandal.”<sup>55</sup>

### RECENT DEVELOPMENTS:

#### Destroyed Emails:

Last month, new information was produced by the Treasury Inspector General for Tax Administration (TIGTA) confirming that while the IRS has been engaged for months in a game of hide-and-seek with regard to documents concerning its targeting of conservative organizations, many of those documents may never be found because they were in fact destroyed by the agency in the midst of the ongoing congressional investigation into the targeting scandal.<sup>56</sup>

J. Russell George told the House Oversight and Government Reform Committee last month that TIGTA had confirmed the IRS’s destruction of 422 backup tapes containing up to 24,000 emails in March 2014.<sup>57</sup>

According to Mr. George’s testimony, those tapes likely contained emails from 2010 and 2011 to

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<sup>54</sup> Lucy Madison, *Justice Dept. to Investigate IRS Targeting*, CBS NEWS (May 14, 2013, 3:47 PM), <http://www.cbsnews.com/news/justice-dept-to-investigate-irs-targeting/>.

<sup>55</sup> Dave Boyer, *Obama’s ‘Phony’ Scandals Line Draws GOP Retort*, WASHINGTON TIMES (July 25, 2013), <http://www.washingtontimes.com/news/2013/jul/25/obamas-phony-scandals-line-draws-gop-retort/?page=all>.

<sup>56</sup> Peter Schroeder, *Watchdog: IRS Improperly Destroyed Lerner Email Backups*, THE HILL (June 25, 2015, 11:52 AM), <http://thehill.com/policy/finance/246133-watchdog-irs-improperly-destroyed-backups-containing-lerner-emails>.

<sup>57</sup> *Id.*

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and from Lois Lerner.<sup>58</sup> At the time of the destruction, the congressional investigation was still underway, with a clear order requiring the IRS to preserve those emails having been issued ten months earlier and a congressional subpoena in place for seven months.<sup>59</sup>

While these emails were at the front and center of the scandal investigation, the IRS had them in their possession but failed to take the appropriate steps to ensure that they were preserved and handed over to Congress per their order to do so.<sup>60</sup>

The TIGTA testimony further highlighted the depth of the agency’s apathy and disregard for its legal obligations by revealing that the IRS never looked through the server storing the emails in order to retrieve them, nor any other place where they may have been backed-up.<sup>61</sup> Despite the recovery of tens of thousands of Lerner emails by TIGTA last November, the IRS, contrary to its legal obligations, did not even bother to search those before responding to our client’s FOIA request.<sup>62</sup>

### **Lerner and The DOJ:**

Recently, additional evidence was discovered to prove further that IRS officials, including Lois Lerner, colluded with the FBI and the DOJ on a plan to bring criminal charges against conservative groups as early as 2010.<sup>63</sup>

Evidence of this allegation was discovered in email exchanges between those officials before, but at that time, the evidence was limited only to a few emails. Now, a memo from October of 2010 exists that gives us a better understanding into how the conspiracy was planned.

As the memo details, Lois Lerner and officials at the DOJ and the FBI, were developing plans to criminally prosecute these nonprofit organizations.<sup>64</sup> The memo also revealed that the DOJ wanted IRS employees to turn over sensitive documents to them first before giving them to Congress.<sup>65</sup>

This transfer of sensitive information from the IRS to the DOJ and FBI supplied the FBI with 21 computer disks containing over a million pages of confidential tax-payer information from more than 113,000 tax returns.<sup>66</sup>

Discovered notes also detail an October 8, 2010, meeting held between Lois Lerner, several other IRS officials, the section chief and other attorneys from the DOJ Criminal Division’s Public Integrity Section, and one representative from the FBI to discuss the attention that tax-exempt

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<sup>58</sup> *Watchdog Reveals Evidence Was Destroyed During Probe of IRS Targeting*, FOXNEWS.COM (June 24, 2015), <http://www.foxnews.com/politics/2015/06/24/watchdog-irs-erased-backups-after-loss-tea-party-emails/>.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *IRS, and FBI Plan to Seek Criminal Charges of Obama Opponents*, JUDICIAL WATCH (July 7, 2015), <http://www.judicialwatch.org/press-room/press-releases/judicial-watch-new-documents-reveal-doj-irs-and-fbi-plan-to-see-criminal-charges-of-obama-opponents/>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

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organizations were receiving due to their political activity.<sup>67</sup> The discussions detailed in these notes also focused on their desire to bring criminal charges against these conservative groups.<sup>68</sup> This is outrageous.

Even more outrageous, Lerner and the DOJ had participated in these conversations for years. Three years into this conspiracy, in fact two days before Lerner issued her faux “apology” for targeting conservatives, Lerner had written an email to the Chief of Staff for the acting Commissioner of the IRS explaining their ongoing discussions with senior DOJ officials to “piece together false statement cases about applicants.”<sup>69</sup>

### **Z Street Case:**

In a case involving the same constitutional issue as the ACLJ’s pending Tea Party-related case—whether the IRS may lawfully delay processing tax-exempt applications because of the viewpoint espoused by the applicant—Z Street, a pro-Israel organization, sued the IRS alleging that the agency unconstitutionally subjected its tax-exempt application to special scrutiny in order to determine whether the group’s activities and connection to Israel “contradict[ed] the Administration’s public policies.”<sup>70</sup> In its case, Z Street argued that the IRS had created a “special unit in Washington, D.C.” to make these types of determinations.<sup>71</sup> The facts surrounding at least one of my client’s files supports this assertion.

The Court of Appeal’s ruling in this case has established the possibility that officials from the IRS could finally be held accountable. Now, they would have to answer, under oath, for their discriminatory conduct. As the United States Court of Appeals for the District of Columbia Circuit noted in the *Z Street* case: “The district court, assuming the truth of Z Street’s allegations—as it must at this stage of the litigation—denied the motion, explaining that Z Street was not seeking to restrain the “assessment or collection” of a tax, but rather to prevent the IRS from delaying consideration of its application in violation of the First Amendment.”<sup>72</sup>

Last month, the United States Court of Appeals for the District of Columbia Circuit affirmed the District Court’s decision that rejected the IRS’s motion to dismiss.<sup>73</sup> This ruling is a significant step forward in defense of the rights of those targeted in the IRS scandal.

In *Z Street*, the D.C. Circuit upheld the district court’s decision to deny the IRS Commissioner’s motion to dismiss and allow Z Street—a non-profit corporation awaiting determination regarding its 501(c)(3) tax-exempt application—to move forward with its constitutional challenge to an alleged IRS policy targeting Z Street on the basis of viewpoint and resulting in delay in the processing of Z Street’s application.<sup>74</sup> The court’s message in *Z Street* is crystal clear: “in administering the tax code, the IRS may not discriminate on the basis of viewpoint,” and where an applicant for tax-

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Z Street v. Koskinen*, 44 F. Supp. 3d 48, 52 (D.D.C. 2014) (quoting Complaint ¶¶ 24-25).

<sup>71</sup> *Id.*

<sup>72</sup> *Z Street v. Koskinen*, 2015 U.S. App. LEXIS 10326, at \*2 (D.C. Cir. June 19, 2015).

<sup>73</sup> *Supra* note 61, at \*1, \*2.

<sup>74</sup> *Id.* at 2.

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exemption seeks to obtain relief from unconstitutional delay—and not to restrain the assessment or collection of a tax—the Anti-Injunction Act does not apply to bar a plaintiff from bringing suit.<sup>75</sup>

It is precisely this type of conduct—the abuse of unfettered discretion by the IRS to discriminate in the administration of the tax code and its resulting harms—that our clients are challenging and from which they seek relief in their federal lawsuit against the IRS. Our clients, like Z Street, are all nonprofit organizations seeking tax-exempt status that have been victimized by a discriminatory policy—a “targeting scheme”—by which the IRS “intentionally and systematically targeted for additional and unconstitutional scrutiny conservative organizations applying for tax-exemption,” because their conservative viewpoint is at odds with that of the current administration.<sup>76</sup>

The resounding message of the *Z Street* decision is that the IRS will not be permitted to discriminate on the basis of viewpoint in administering the tax code by cowering behind broad, obscure, or obsolete statutory interpretations, while American taxpayers continue to suffer blatant violations of their First Amendment rights. This holding is especially relevant in our clients’ case, where (1) the IRS is not only alleged to have engaged in such unlawful conduct but has actually admitted that it did so: intentionally and systematically targeting for additional and unconstitutional scrutiny organizations applying for tax-exemption based on their conservative viewpoints; and (2) this disparate treatment has been independently confirmed by TIGTA.

The *Z Street* decision was clear that a taxpayer seeking recognition of its tax exempt status under section 501(c)(3) is not required to wait 270 days or until the IRS actually denies an exemption and assesses liability before challenging the agency’s blatant constitutional violations.<sup>77</sup> In sum, the court concluded, for the IRS “to process exemption applications pursuant to different standards and at different rates depending upon the viewpoint of the applicants” would constitute “a blatant violation of the First Amendment.”<sup>78</sup>

We were encouraged that the judges hearing the *Z Street* case were as outraged by the IRS’s targeting scheme as we and our clients have been, as evidenced by the following remarks made by Chief Judge Garland during oral argument:

I think if I were you I would go back and ask your superiors whether they want us to represent that the government’s position in this case is that the government is free to unconstitutionally discriminate against its citizens for 270 days.

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.<sup>79</sup>

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<sup>75</sup> *Id.* at \*\*12, 15, 17-18.

<sup>76</sup> *See Z Street*, 2015 U.S. App. LEXIS 10326, at \*5 (“Z Street alleges that the IRS has an ‘Israel Special Policy,’ which mandates that applications from organizations holding views about Israel inconsistent with those espoused by the Obama administration be scrutinized differently and at greater length.”).

<sup>77</sup> *Id.* at \*\*12, 17.

<sup>78</sup> *Id.* at \*\*16-17.

<sup>79</sup> *See*, Gammill, *supra* n. 53.

The attorney for the IRS during this oral argument reportedly responded that this was precisely the government’s position.<sup>80</sup>

This contempt for the rule of law exemplified by a government attorney representing the Obama Administration in court only further reflects this Administration’s brazen disregard for the constitutional rights of the citizens of this nation.

**Criteria for Auditing Tax-Exempts Organizations Still Defective:**

Just last Thursday, the Government Accountability Office (GAO) testified before the Subcommittee on Oversight in the House Ways & Means Committee.<sup>81</sup> As outlined in their report and Congressional testimony, the GAO found continuing deficiencies that have increased the risk that the IRS could continue to select organizations for examination in an unfair manner.<sup>82</sup>

Furthermore, the GAO also determined that some examination procedures are still not followed.<sup>83</sup> Important to our discussion today, referrals dealing with political activity allegations are reviewed by a three-person committee, with four out of those fifteen committee referrals reviewed - missing the required description of the allegation.<sup>84</sup> The GAO concluded that the problems observed create practices that cause the IRS to fall short of its goals of fairness and integrity.<sup>85</sup> My clients have suffered from this lack of fairness, integrity, and accountability for years. Yet, we are going to continue to see these problems continue until something is done to implement true reforms at the IRS.

**CONCLUSION:**

The IRS scandal – with its tentacles reaching deep into other federal agencies – is not going away. In fact, with each week, comes new revelations – new evidence – that continues to put a spotlight on the ever expanding unconstitutional targeting scheme.

This hearing is another vital step toward the truth as we learn what happened, hold responsible officials accountable, and take steps to ensure this abuse will never be repeated.

The ACLJ is actively pursuing two federal lawsuits against the IRS—one based on this unconstitutional targeting of conservative organizations, including our 38 clients from 22 different states, the other based on the IRS’s failure to comply with its obligations under the federal Freedom of Information Act. In that case, the IRS has been ordered in the FOIA suit to turn over the documents it withheld so that the court can undertake its own independent review of them. We are working diligently to bring to light the IRS’s flagrant abuses of power and to ensure it answers for its corruption.

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<sup>80</sup> *Id.*

<sup>81</sup> *IRS EXAMINATION SELECTION, IRS Should Strengthen Internal Controls for Exempt Organization Selection: Testimony Before the Subcommittee on Oversight, Committee on Ways & Means, House of Representatives, 114th Cong. (2015)* (statement of Jay McTigue, Director, Strategic Issues, U.S. GAO).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

**Senate Testimony of Dr. Jay A. Sekulow regarding “The IRS Targeting Scandal”**

*July 29, 2015*

The IRS, as well as this Administration, needs to understand that no matter how long it takes to get to the bottom of this scandal, the American People deplore the unconstitutional targeting of their First Amendment rights, continue to demand that it cease immediately, and insist that those responsible be brought to justice. The American people deserve the truth.

Once again, we thank this subcommittee for putting a spotlight on the IRS and its unlawful actions. Only transparency and accountability to the Congress and the American public will root out corruption in the IRS.

The targeting of Americans based upon their personal beliefs or freedoms of association is repugnant to the Constitution. Americans have been outraged for quite some time, and it is time for a complete investigation. We need to know what happened. We need finality and closure. We need accountability. Those responsible for this scandal must be brought to justice.

In this case, the IRS and the DOJ have proven that they are completely compromised on this investigation.

The Constitution requires the President to faithfully execute the laws of the United States by defending the First Amendment rights of all American citizens. If my clients are going to find justice, we must have a Special Counsel.

I thank the Subcommittee and am happy to respond to any questions.