PREPARED WRITTEN TESTIMONY OF

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"The IRS Assault on Dissenting Speech"

Chairman Jordan, Ranking Member Cartwright, and distinguished Members of the Subcommittee, on behalf of the American Center for Law & Justice, thank you for allowing me to address the IRS's recent and ongoing assault on the free speech rights of conservative nonprofits. With the ACLJ currently engaged in litigation against the IRS and key officials from the IRS on behalf of 41 conservative groups from 22 states, we are keenly aware of the importance of this hearing.

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 names for additional scrutiny. Her words were clear: "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."[1] This additional scrutiny not only delayed the processing of their applications for a period of years but also resulted in intrusive questions from the IRS that were far beyond the scope of legitimate inquiry.[2]

At the American Center for Law and Justice, we were not surprised by Ms. Lerner's apology. Indeed, we had long been aware of the IRS's targeting scheme. Beginning in early 2012, a number of conservative organizations contacted us, all reporting the same thing: Long delays in processing nonprofit applications followed by a series of questions breathtaking in their level of intrusion.[3]

By the end of 2012 the ACLJ ultimately represented more than two dozen conservative groups, all of which faced profound delays in their nonprofit applications and intrusive follow-up questioning.[4] Arguably, no group outside the IRS itself had greater experience with the IRS targeting scheme. Thus, we were uniquely positioned to evaluate the IRS's apology and its resulting justifications for its misconduct.

Simply put, the IRS deceived the public about the extent of its wrongdoing and maintains that deception to this day.

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[1] 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.
[2] 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.
[3] 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.
[4] *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.

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.[5] Second, that the misconduct was unrelated to the political point of view of the targeted groups but was merely a misguided effort to respond to a "big increase" of 501c4 applications.[6] And third, the misconduct had been identified and stopped. These assertions were all false.[7]

The misconduct was not localized in Cincinnati. From the moment that Lois Lerner made her apology, at the ACLJ we had in our possession letters from IRS offices in California and from IRS headquarters in Washington, D.C.[8] In addition, we possessed letters signed not just by "low-level" employees but by high-ranking IRS attorneys and officials from Washington, including letters signed by Lois Lerner.[9]

Additionally, we were able to quickly determine that there was no "big increase" of applications at the time the targeting began. In fact, there were fewer 501c3 and 501c4 applications in fiscal year 2010 – when the targeting began – than in fiscal year 2009.[10]

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[5] 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.
[6] 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.
[7] *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.
[8] Matthew Clark, *More IRS Offices than Single Cincinnati Office Sent Inquiry Demands To Targeted Tea Party Groups*, AM. CTR. FOR LAW & JUSTICE (May 13, 2013, 5:48 PM), http://aclj.org/free-speech-2/multiple-irs-offices-cincinnati-sent-inquiry-demands-targeted-tea-party-groups.
[9] Andrew Stiles, *Lois Lerner Directly Involved in IRS Targeting, Letters Show*, NAT'L REV. ONLINE (May 23, 2013, 6:49 PM), http://www.nationalreview.com/corner/349212/%5Btitle-raw%5D.
[10] 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.

We also knew that IRS misconduct had not stopped but was instead ongoing. In fact, one of our clients received additional intrusive questions just weeks before Lois Lerner's apology, and several of our clients were still waiting – years after submitting applications – for IRS approval.[11] Some still wait to this day.

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 is difficult to answer this question definitively, since the IRS has failed to hand over all requested documents to Congressional investigators[12], 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[13], the broad contours of the scandal are growing more apparent.

The genesis of IRS targeting lies not with overwhelmed workers facing a flood of unexpected applications but instead with alarmed politicians confronting the unexpected emergence of a new political movement.

The rise of the Tea Party coincided with (though was independent of) the Supreme Court's

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[11] *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.
[12] 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.
[13] 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.

decision in *Citizens United versus the Federal Election Commission*, a decision that affirmed the First Amendment rights of citizens speaking through corporations and thereby broadened free speech opportunities for political dissenters.[14] Stripped of the ability to explicitly limit corporate free speech, the Obama Administration launched a public-relations offensive against conservative groups.

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 only people who don't want to disclose the truth are people with something to hide."[15]

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.[16]

President Obama was hardly the only political leader to speak out against the free speech rights of conservative nonprofits. On February 16, 2012, Democrat Senators Bennett, Franken,

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[14] *Citizens United v. FEC*, 558 U.S. 310 (2010).
[15] *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").
[16] *An IRS Political Timeline*, WALL ST. J. (Jun. 6, 2013, 7:40 PM), http://online.wsj.com/news/articles/SB10001424127887323844804578529571309012846.

Merkley, Schumer, Shaheen, Udall and Whitehouse, sent a letter to the IRS demanding that the IRS investigate tax-exempt organizations for engaging in "political activities."[17] This demand came just as the IRS was issuing yet another round of intrusive questions to conservative groups.

Given this explicit political pressure, 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 raised.

The IRS asked for the identity of donors, for passwords for websites, the political activity even of family members, and asked broad questions designed to expose every aspect of the groups' First Amendment-protected activity. For example:

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

[17] 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.

membership to other organizations exempt under 501c4 of the Code? (e) Provide the name, employer identification number, and address of the organizations.

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 are 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."[18]

It is difficult to overstate the extent and magnitude of federal government misconduct so far uncovered. The list of senior IRS officials directly involved in the targeting scheme itself seems

[18] *See* 357 U.S. 449 (1958) (holding the NAACP's right to freely associate and due process rights were implicated when the state scrutinized their membership lists).

to grow each day. Indeed, at the ACLJ we've filed suit on behalf of 41 clients from 22 states, naming – and providing specific allegations against -- no less than twelve IRS officials, including the IRS's Commissioner and Chief Counsel. We will provide a copy of this Complaint and attached exhibits to the Committee.

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.[19]

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.

Given this reality, it's hardly surprising that the Administration is proving utterly incapable of policing itself. According to published reports, it has delayed turning over tens of thousands of relevant documents to Congressional investigators[20], it is currently in the process of attempting to dismiss litigation filed against it by groups it admitted it harmed, and its criminal investigation – announced with much fanfare in May, 2013 – is 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

[19] 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.
[20] 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.

House to attend a bill-signing ceremony.[21]

Millions of Americans with good reason perceive the IRS as inherently partisan, doubt 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, and are understandably cynical when an avowed partisan accepts the assignment to investigate perhaps our nation's most politically-significant scandal.

Under such circumstances, Congressional oversight is absolutely essential. The work of this – and other – committees must continue unimpeded and my colleagues and I at the ACLJ stand ready to assist in any way that we can.

[21] *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/.