**SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW**

**OF THE**

**HOUSE JUDICIARY COMMITTEE**

**JUNE 8, 2017 HEARING**

**TESTIMONY OF CLETA MITCHELL, ESQ.**

Mr. Chairman, Members of the Committee:

Thank you for the opportunity to appear here today, to testify on the subject of "A Time to Reform: Oversight of the Activities of the Justice Department's Civil, Tax and Environment and Natural Resources Divisions and the U.S. Trustee Program". My testimony today is directed at the Department of Justice's Tax Division and the experiences with the attorneys in the Tax Division by litigants seeking information and remedial action as a result of the IRS targeting of conservative, tea party and pro-Israel organizations since the beginning of the Obama Administration.

As background, my law practice involves, among other things, representation of conservative non-profit organizations, seeking IRS recognition of exempt status. In late 2009, I prepared and submitted an application for exempt status for a 501(c)(4) organization primarily formed to mobilize grassroots opposition to Obamacare. Over the course of the next three and one half years, I submitted applications for exempt status to the IRS for a number of other conservative organizations, both 501(c)(3) and 501(c)(4) entities. NONE of those applications were for groups involved in political activities. And NONE of the applications were processed in the manner in which I had been accustomed over the many years of practicing law in this area. All of the applications were deliberately redirected by IRS employees from the normal processing and subjected to multi-year delays.

When the Treasury Inspector General for Tax Administration ("TIGTA") issued his report in May 2013 finding that the IRS had deliberately delayed and withheld the granting of tax exempt status of organizations based on their names and their missions – namely that they stood in opposition to the Obama Administration's policies – that merely confirmed what my clients and I had suspected and experienced for several years prior to the TIGTA report.

As a result of the IRS targeting and the agency's unconstitutional viewpoint discrimination against these citizens' groups, several lawsuits were filed against the IRS and individual IRS employees involved in the scandal. All of these cases are defended by attorneys in the Tax Division of the Department of Justice. ("DOJ Tax Attorneys"). I have served as counsel in one of the first cases filed, and I have consulted with attorneys representing other plaintiffs in these cases. In addition, I represented the National Organization for Marriage in its lawsuit filed against the IRS for the illegal release of NOM's confidential tax return information.

My testimony today is to share with you our collective experiences regarding the conduct of the DOJ Tax Attorneys in these cases.

In a word: The DOJ Tax Attorneys have done and continue to do everything in their power to stall, delay, and block the orderly proceedings of these civil cases, and to throw every monkey wrench they can invent, devise, or imagine to keep these plaintiffs from discovering the truth and the facts that resulted in the intentional delay of normal processing of hundreds of applications for exempt status by citizen groups, because of the name, ideology, missions and purpose of those organizations. The DOJ Tax attorneys argue at every turn that none of the plaintiff citizens groups are entitled to *any* relief or remedy or even basic facts and information.

And, I believe strongly, that it is the fault of the DOJ Tax Attorneys that the Lois Lerner emails were not recovered and the backup tapes were erased. The responsibility for those misdeeds fall squarely on the shoulders of the DOJ Tax Attorneys representing the IRS.

In the case in which I served as counsel from 2013 until several weeks ago, *True the Vote v. IRS, et al.*, the most egregious actions by the Tax Division attorneys occurred in the summer of 2014, when all of us learned through the news media that Lois Lerner's emails had supposedly been "destroyed". Our lawsuit against the IRS and the individuals within the IRS responsible for the targeting of True the Vote was filed in May 2013. All litigants in civil proceedings are required to immediately take steps to preserve materials and documents potentially relevant to the litigation.

Recall that the House Committee on Government Oversight and Reform had issued a subpoena to the IRS in August 2013 and again in February 2014 directing the IRS to produce all records, documents, including emails, for the relevant time period of the targeting, which would have gone back to 2009 through the date of the subpoena, and which also prohibited the IRS from destroying any materials or documents relevant to the congressional investigation of the

IRS Scandal. And as we all know, there are multiple federal statutes requiring the IRS to follow certain procedures and protocols to preserve government records and documents.

Imagine then, our surprise to learn in early June 2014 that documents relevant to our lawsuit - -and the lawsuits filed by others and the congressional investigations – had NOT been preserved as required by the Federal Rules of Civil Procedure, not to mention multiple statutory requirements for government records as well as the TWO subpoenas issued by House Oversight Committee.

As soon as my team of attorneys became aware of the fact of the missing Lois Lerner emails, we immediately sent a letter to the DOJ Tax attorneys as well as the attorneys for the individual IRS defendants, whose legal fees are being paid by the taxpayers. A copy of our June 16, 2014 letter is attached to my testimony.

We asked the DOJ Tax attorneys to agree to jointly ask the Court to immediately appoint an independent forensics expert to review the computers, backups, and all potential sources to locate and recover the "missing emails" and other evidence which had been the subject of two subpoenas by the House Committee on Oversight and Government Reform, as well as being the subject of litigation hold notices in at least four separate lawsuits, including ours.

Not only did the DOJ Tax attorneys refuse to agree to our request, they took extraordinary steps to fight our efforts to recover any and all missing evidence. In fact, they took us to task for even referring to the Lois Lerner emails as "evidence". We filed a Motion for Expedited Discovery in June 2014 and asked Judge Walton in the US District Court for the District of Columbia to appoint an independent forensics expert to take whatever steps might be possible to locate and recover the Lois Lerner emails.

But the DOJ Tax attorneys fought us at every turn, arguing to the Court that no outside help was needed, that the IRS and TIGTA had everything well in hand. Their vigorous opposition successfully persuaded the Court not to allow the forensics expertise necessary to find and retrieve the all-important Lois Lerner emails and other evidence that is vital to learning the truth of the IRS targeting.

And what did we learn later? It turned out that at the very time that we sent our letter to the DOJ Tax Attorneys, there WERE backup tapes, just as we argued to the Court in July 2014. And what happened to those backup tapes? They were destroyed. And while we are not certain of the exact date when those backup tapes were erased, we know that it was during that very

time. In other words, the backup tapes, which existed when we asked the DOJ Tax Attorneys to jointly seek the Court's assistance and oversight in locating and recovering any possible backup tapes, which the DOJ Tax Attorneys successfully fended off –were erased.

The DOJ attorneys not only failed to take the steps necessary in 2013 to make absolutely certain that the IRS quarantined and preserved all materials and backups of electronic documents but they fought every step of the way OUR efforts to locate, retrieve and preserve all such documents, records, and materials once it became known that there was a problem.

Had the DOJ Attorneys done their jobs for the American people, they would have joined with us to make certain that the necessary steps were taken immediately to locate and preserve the missing emails and perhaps if they had, the backup tapes would not have been erased.

But the DOJ attorneys didn't do that. And that is emblematic of the manner in which the DOJ attorneys have consistently behaved in their representation of the IRS in our case, in the other IRS targeting cases and, indeed, in all cases involving their representation of the IRS.

Their goal is to make it as difficult as possible to obtain documents, facts and testimony, and to block the truth and protect the IRS from the reach of the very citizens who are paying their salaries.

What is even more infuriating is that the DOJ Tax Attorneys are not consistent in their delaying tactics, often arguing completely opposite legal theories and policies to different judges in the different cases.

For instance, the DOJ Tax Attorneys repeatedly told both the DC trial court and the DC Circuit Court in the case filed in 2010 by a pro-Israel organization, Z Street, that the IRS could NOT grant or take any further action on Z Street's application for exempt status because Z Street had sued the IRS and the lawsuit placed a "litigation hold" on further action by the IRS with regard to Z Street's application. That is the same thing the DOJ Tax Attorneys told the court in the Cincinnati case last fall, in *NorCal Tea Party v. IRS*. That the 'litigation hold' precluded the IRS from taking any further action on the pending applications for exempt status. In the case of Z Street, it was a litigation hold that was in effect for SEVEN years . The Court in the *NorCal Tea Party* case in Cincinnati rejected the DOJ Tax Attorneys' arguments and ordered the IRS to either grant or deny the applications for exempt status of all the organizations identified as being part of that class action. Again, many of those applications had been pending for more than six years.

Contrast that, this 'litigation hold' policy, with what the DOJ Attorneys and the IRS did in the *True the Vote* case.

On the date in September 2013 when the IRS was due to file its answer in response to the True the Vote's complaint, the DOJ Tax Division attorneys on behalf of the IRS notified us that the IRS had granted – *that day* -- the application for exempt status filed by True the Vote three years earlier and, accordingly, the DOJ Tax Attorneys claimed that the True the Vote case was rendered moot. If the DOJ Tax Attorneys had been consistent in their legal positions, we would have proceeded to normal discovery but, instead, the DOJ Attorneys filed motions to dismiss based on mootness grounds, which the Court granted, which the DC Circuit reversed and now, more than four years later, the case is back in the trial court which has finally issued an order granting discovery. FOUR YEARS LATER!

And how is that discovery actually proceeding in these cases?

To put it bluntly, the DOJ Tax Attorneys have thrown and continue to throw every grain of sand they can think of into the wheels of these lawsuits – doing all in their power to withhold information and avoid turning over the facts, the documents, the materials to which these plaintiffs are entitled.

Specifically, in *Z Street v. IRS,* filed in 2010 after Z Street, a pro-Israel organization that filed for its tax exempt status in 2009, was told that the reason for the delay in the processing of its application for exempt status was because Z Street's stated mission – support for Israel – did not comport with the Obama Administration's Israel policies.

Z Street sued the IRS in 2010 for its unconstitutional viewpoint discrimination inflicted on Z Street. The Z Street litigation is now in its *seventh year* and both the trial court and the DC Court of Appeals have ruled in favor of Z Street's right to pursue its constitutional claims against the IRS. The case is now in the discovery phase, and Z Street attorneys issued document requests several months ago, all propounded to the DOJ Tax Attorneys.

One of the document requests is for all documents related to the IRS policy that resulted in the delayed scrutiny of the Z Street application for exempt status. That policy required all cases having to do with Israel to be subjected to special scrutiny," in order to determine whether the applicant's policies were consistent with those of the Obama Administration", as the group was advised more than 7 years ago. However, having requested documents related to that policy, *none* have been produced.

Z Street has also sought documents related to the BOLO policy that ensnared all the conservative and tea party groups. No documents have been produced related to that request.

Z Street has demanded documents related to the "Disputed Territory Advocacy", which we know do exist from other leaked documents during the congressional investigations, but the Tax Division attorneys have produced zero documents in response to this request.

The DOJ attorneys told the Court that the Z Street case was sent for special scrutiny, as a result of a "mistaken" use of an outdated list of the countries associated with terrorism. The IRS claims it discovered this "error" about 8 weeks after the Z Street case was filed in 2010, but they did nothing to correct the "error" and grant the tax exempt status because the matter was in litigation. That is just the opposite of what the same attorneys did in the True the Vote case.

Jerome Marcus, counsel for Z Street, further advises as follows: "We know, from information we received outside of the discovery process, that the State Department was consulted by the IRS regarding funding of organizations that gave charity to Jewish entities operating in Judea and Samaria — what most people call "the West Bank." In the discovery process as conducted by DOJ Tax attorneys, we have received essentially NO discovery on this even though it's obvious that this provided the groundwork for an actual policy by the IRS that manifested the Obama administration's hostility to Jewish presence in this area.
A Palestinian organization called ItsAparteid Inc. was granted 501(c)(3) status within a few months of the filing of its application, even though its application was explicit that the organization was engaged entirely in advocacy for the claim that Israel's actions constitute Apartheid."

No documents regarding this disparate treatment by the IRS of similarly situated nonprofit organizations – with different policy perspectives -- have been produced by the DOJ Tax attorneys.

And, in fact, the DOJ Attorneys actually argued in the DC Court of Appeals that the IRS has the right to simply refuse to process an application for exempt status for 270 days for no reason whatsoever. That is wholly outside the authority of the IRS – but not according to the DOJ Tax Attorneys, who argue with a straight face that the IRS can disregard the constitutional rights of American taxpayers with impunity.

The *NorCal Tea Party* case was filed in 2013 as a class action suit on behalf of all the organizations whose applications for exempt status were unconstitutionally quarantined. There

is much to discuss regarding the DOJ Attorneys' conduct of this case, but suffice to say that the DOJ Attorneys in that case have done everything they can think of to block the litigation, from objecting to the certification of a class (which they lost), to refusing to turn over the list of organizations that were subjected to the IRS targeting program once the Court granted the class certification.

After the trial court in Cincinnati ordered the IRS to turn over to the plaintiffs the complete list of all organizations whose applications had been quarantined pursuant to the BOLO criteria, in order to notify them of their opportunity to participate in the class action, the DOJ Attorneys took the extraordinary step of filing a motion for writ of mandamus to block the judge's order and to avoid turning over the list of organizations that had been targeted.

Twice in the arguments in March 2016 before the Sixth Circuit on the DOJ's motion, Judge Kethledge criticized the IRS as using Section 6103 as a tool to hold back embarrassing information. Judge Kethledge criticized the IRS's conduct in discovery. Judge Kethledge specifically criticized the position of the DOJ Tax Attorneys who argued that it would be "unduly burdensome" for the IRS to disclose who had reviewed the taxpayers' files..." Further, Judge Kethledge characterized the discovery conduct of the IRS and its counsel as "studied obstructionism by the agency".

The Sixth Circuit Court of Appeals then unanimously denied the DOJ motion, and wrote the following:

"The [trial] court began a discovery conference in December 2014 by stating: "It looks like everything in this case seems to be turning into an argument on discovery...In the same conference the court admonished the IRS: "this is class discovery, but you're not willing to give any discovery on the putative class . . . you're just running around in circles and not answering the questions." Those admonitions appeared to have little effect. In October 2015, the court stated as follows:

> My impression is the government probably did something wrong in this case. Whether there's liability or not is a legal question. However, I feel like the government is doing everything it possibly can to make this as complicated as it possibly can, to last as long as it possibly can, so that by the time there is a result, nobody is going to care except the plaintiffs. . . . I question whether or not the Department of Justice is doing justice.

Finally, the Sixth Circuit Court of Appeals said, "In closing, we echo the district court's observations about this case. The lawyers in the Department of Justice have a long and storied tradition of defending the nation's interests and enforcing its laws—all of them, not just selective ones—in a manner worthy of the Department's name. The conduct of the IRS's attorneys in the district court falls outside that tradition. We expect that the IRS will do better going forward. And we order that the IRS comply with the district court's discovery orders of April 1 and June 16, 2015—without redactions, and without further delay."

That Order was issued in May 2016 and is attached to my testimony.

Yet, the DOJ Tax Attorneys even a year later continue to aggressively resist discovery, now citing to Tuohy regulations that ostensibly allow the IRS to refuse to comply with court-ordered discovery in civil litigation.

From their contradictory and arbitrary application of a "litigation hold" applied in diametrically opposite manner in these different cases, to the arguments made repeatedly that the IRS cannot possibly comply with normal discovery because Section 6103 of the Internal Revenue Code protects the IRS from disclosing information to the taxpayers who seek it, the DOJ Tax Attorneys have done everything they can think of to thwart, delay and deny access to the facts of the IRS Targeting..

There is a culture in the DOJ Tax Division in which the attorneys there take the view that the rules, the laws, and the procedures that govern other federal agencies and litigants in normal civil litigation simply do not apply to the IRS.

One of the most shocking revelations to me, as counsel in two separate lawsuits against the IRS arising from the targeting scandal AND the case involving the illegal release of confidential tax return information of the National Organization for Marriage, is that the IRS – through their lawyers at the DOJ Tax Division—take a position that turns Section 6103 of the Internal Revenue Code literally on its head. Section 6103 was enacted by Congress to prohibit the IRS or any IRS employee or agent from releasing the confidential tax return information of any taxpayer. The DOJ Tax Attorneys misuse that statute and argue over and over, at every opportunity, that when a taxpayer seeks information from the IRS regarding the treatment,

handling or processing of that taxpayer's own information, that no information can be provided TO the taxpayer because 6103 protects the IRS from providing such information.

In the NOM case, the IRS argued that we could not obtain information regarding the illegal release of NOM's tax return because the IRS employees who committed the violation are taxpayers and to provide information about their actions related to NOM would be a violation of the IRS employees' Section 6103 rights to confidentiality.

In the cases involving the IRS targeting, the DOJ Tax Attorneys have used every conceivable theory -- including going to the Sixth Circuit on a *writ of mandamus* to appeal a non-appealable interlocutory order by the trial court – to stonewall and avoid accountability. And the DOJ Tax Attorneys continue as we speak to resist all efforts to obtain full – and court ordered – discovery.

Discovery is the process by which litigants and aggrieved parties are supposed to be to learn the truth. But not when the DOJ Tax Attorneys are in the mix.

What is distressing is that the same DOJ Attorneys who have demonstrated a complete and total contempt for the truth and have obfuscated and stonewalled all of these cases during the Obama administration continue under the new administration to do the same.

What are some steps this Committee and Congress could and should take:

1. Immediately, ask the Attorney General to direct the Tax Division attorneys to stop fighting discovery, to stop thinking of reasons to avoid producing documents, witnesses and information. And, if the DOJ Attorneys who have been doing that for the past seven plus years cannot change their attitudes and behavior, which is highly doubtful, then those attorneys should be removed from the cases and new attorneys assigned who will see their obligations to the American people and the civil justice system.

2. This Committee should develop comprehensive legislation that eliminates the obstacles employed by the IRS and its hatchet men in the DOJ Tax Division and requires proper conduct in civil litigation, to-wit:

- Affirm that Section 6103 of the IRC protects taxpayers from the IRS, and *not* the other way around

- Specify that the IRS cannot use Tuohy regulations to avoid compliance with court ordered discovery in civil litigation
- Narrow the 'deliberative process' privilege asserted by the IRS in FOIA and other proceedings as the basis for refusing to disclose documents and information to which citizens, taxpayers and litigants are entitled.
- Specify that IRS agents and employees are, indeed, subject to claims for personal liability for violating the constitutional rights of citizens and taxpayers. The Supreme Court recognized the existence of such claims and when Congress considered including such claims as part of the Taxpayers Bill of Rights, the IRS Commissioner testified that it was not necessary to include in legislation, because the Supreme Court had already recognized the existence of such a cause of action in the matter of *Bivens v. Six Unnamed Known Agents.* Fast forward to today, the DOJ Attorneys have successfully argued that, absent legislation, *Bivens* claims are not allowed against IRS employees and agents, regardless of their behavior and conduct violating the constitutional rights of a taxpayer.

President Trump, in his Inaugural Address, said: "What truly matters is not which party controls our government, but whether our government is controlled by the people. January 20th, 2017, will be remembered as the day people became the rulers of this nation again. … At the center of this movement is a crucial conviction, that a nation exists to serve its citizens."

This Committee needs to remind the attorneys in the Tax Division of the Department of Justice that they serve the citizens, who pay their salaries. And that they can properly represent the IRS without disrespecting the rights and interests of the American people.

I am happy to answer any questions. Thank you. ###

# EXHIBIT 1

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June 16, 2014

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RE: *TTV v. IRS et al*, 1:13-cv-00734 (D.D.C.), Litigation Hold – Preservation of Responsive Evidence

Dear Counsel:

As you know, True the Vote ("TTV") filed its lawsuit in the above-referenced matter on May 21, 2013. By the time TTV filed its suit, the Internal Revenue Service ("IRS") and its employees and officials were on notice of the commencement of several congressional

investigations. The House Committee on Oversight and Government Reform ("Oversight"), the House Committee on Ways and Means ("Ways and Means") and the Senate Finance Committee ("Senate Finance") (collectively, "the Committees") have each provided notice to the IRS of their ongoing investigations into the IRS, and specifically, Defendant Lois Lerner and her activities related to the issues involved in the TTV litigation for over a year now.

Late Friday, the IRS apparently advised the Ways & Means Committee that the IRS has "lost" Lois Lerner's hard drive which includes thousands of Defendant Lerner's e-mail records. However, several statutes and regulations require that the records be accessible by the Committees, and, in turn, must be preserved and made available to TTV in the event of discovery in the pending litigation. Those statutes include the Federal Records Act, Internal Revenue Manual section 1.15.6.6 (which refers to the IRS's preservation of electronic mail messages), IRS Document 12829 (General Records Schedule 23, Records Common to Most Offices, Item 5 Schedule of Daily Activities), 36 C.F.R. 1230 (reporting accidental destruction,) and 36 CFR 1222.12. Under those records retention regulations, and the Federal Records Act generally, the IRS is required to preserve emails or otherwise contemporaneously transmit records for preservation.

Therefore, the failure for the IRS to preserve and provide these records to the Committees would evidence either violations of numerous records retention statutes and regulations or obstruction of Congress.

Federal courts have held, in the context of trial, that the bad faith destruction of evidence relevant to proof of an issue gives rise to an inference that production of the evidence would have been unfavorable to the party responsible for its destruction. *See Aramburu v. The Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997). The fact that the IRS is statutorily required to preserve these records yet nevertheless publicly claimed that they have been "lost" appears to evidence bad faith. 18 U.S.C. § 1505 makes it a federal crime to obstruct congressional proceedings and covers obstructive acts made during the course of a congressional investigation, even without official committee sanction. *See, e.g., United States v. Mitchell*, 877 F.2d 294, 300–01 (4th Cir. 1989); *United States v. Tallant*, 407 F. Supp. 878, 888 (D.N.D Ga. 1975).

Further, by letters dated September 17, 2013, TTV provided notice to counsel for the individual IRS Defendants in this litigation. The "Individual Defendants" are: Steven Grodnitzky, Lois Lerner, Steven Miller, Holly Paz, Michael Seto, Douglas Shulman, Cindy Thomas, William Wilkins, Susan Maloney, Ronald Bell, Janine L. Estes, and Faye Ng. TTV's September 17, 2013 correspondence reminded you and your clients of the Individual Defendants' obligation "not to destroy, conceal or alter any paper or electronic files, other data generated by and/or stored on your clients' computer systems and storage media (*e.g.* hard disks, floppy disks, backup tapes) or any other electronic data, such as voicemail." We identified the scope as encompassing both the personal

and professional or business capacity of your clients and involving data "generated or created on or after July 15, 2010." *See* Attached Letters to Ms. Benitez and Messrs. Lamken and Shur.

As the D.C. District Court has found, "[a] party has a duty 'to preserve potentially relevant evidence . . . "once [that party] anticipates litigation."'" *Zhi Chen v. District of Columbia*, 839 F. Supp. 2d 7, 12 (D.D.C. 2011) (internal citations omitted). In fact, "[t]hat obligation 'runs first to counsel, who has a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction[,]'" and "also extends to the managers of a corporate party, who 'are responsible for conveying to their employees the requirements for preserving evidence.'" *Id.* (internal citations omitted).

By letter dated September 25, 2013, Ms. Benitez acknowledged receipt of our "litigation hold" letter, and vociferously objected to our having the temerity to send such a letter, "rejecting" our characterization of documents to be preserved. Indeed, Ms. Benitez, you indicated that you took great offense at having been put on notice to preserve and maintain documents related to the issues of this litigation. You further advised however, that you would continue to advise "your clients as appropriate and, as always, will abide by my legal and ethical obligations." Attached Response of Ms. Benitez.

The public reports released late on Friday, June 13, 2014 stated that the IRS now claims to have "lost" the emails of defendant Lois Lerner. These reports are particularly astonishing in light of your representations, Ms. Benitez, that would "advise your clients, as appropriate, and [would] abide by your legal and ethical obligations." The "lost" emails, from press reports, appear to cover a time period from January 2009 to April 2011. *See* Press Release, Committee on Ways and Means, IRS Claims to Have Lost Over 2 Years of Lerner Emails (June 13, 2014), *available at* http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=384506.

We are deeply troubled by this news and are concerned about the spoliation of information and documents pertaining to this case and the apparent failure on your part to (a) protect and preserve all potentially relevant information and (b) to advise us of such failure and spoliation when you first learned of it. We are even more concerned after receiving your assurances that you would "abide by your legal and ethical obligations."

Accordingly, we hereby request that you advise us of the following:

1. What steps did each of you, as counsel for the Defendants, each of them, take to ensure that any and all documents as described in the litigation hold letter and as required by federal law were, in fact, preserved?

2. When did you learn that the destruction, loss or spoliation of emails of Defendant Lois Lerner had occurred?

3. What steps have you, each of you, taken to restore Ms. Lerner's "lost" emails?

4. Were the "lost" emails from Ms. Lerner's computer at the IRS or her home computer?

5. Are there documents or records, as described in the Litigation Hold letter or the subpoenas issued to the IRS from any of the Committees, belonging to other defendants that have been "lost"?

We are most disturbed to learn this information from media reports and, in particular, after being chastised by Ms. Benitez regarding the fact that she "will abide by her legal and ethical obligations." To Ms. Benitez in particular, were you aware of and/or did you participate in, authorize or otherwise sanction the destruction or "loss" of the Lois Lerner emails?

In addition to seeking responses to the questions in this letter, we also seek your consent to immediately allow a computer forensics expert selected by TTV to examine the computer(s) that is or are purportedly the source of Ms. Lerner's "lost" emails, including cloning the hard drives, and to attempt to restore what was supposedly "lost," and to seek to restore any and all "lost" evidence pertinent to this litigation.

We also seek access to all computers, both official and personal, used by any and all of the Defendants from and after July 1, 2010, in order to ensure preservation of the documents of all Defendants in this action.

We wish to resolve our concerns amicably but, absent your consent, we will file such motions as deemed necessary and appropriate asking the Court to require that you respond to the questions contained in this letter, and to permit such forensic examination described herein and for such other relief as may be appropriate for this egregious breach of legal authority and professional ethics.

Due to the time-sensitive and urgent nature of this request, please respond by noon on Wednesday, June 18, 2014.

Sincerely,

*/s/ Cleta Mitchell*

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# EXHIBIT 2

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 16a0069p.06

# UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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In re: UNITED STATES OF AMERICA.

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UNITED STATES OF AMERICA,

*Petitioner*,

*v.*

NORCAL TEA PARTY PATRIOTS, et al.,

*Respondents*.

No. 15-3793

On Petition for a Writ of Mandamus to the
United States District Court for the Southern District of Ohio.
No. 1:13-cv-00341—Susan J. Dlott, District Judge.

Argued: March 16, 2016

Decided and Filed: March 22, 2016

Before: KEITH, McKEAGUE, and KETHLEDGE, Circuit Judges.

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## COUNSEL

**ARGUED:** Patrick J. Urda, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Petitioner. Edward D. Greim, GRAVES GARRETT, LLC, Kansas City, Missouri, for Respondents. **ON PETITION:** Patrick J. Urda, Gilbert S. Rothenberg, Jonathan S. Cohen, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Petitioner. **ON RESPONSE:** Edward D. Greim, Todd P. Graves, Dane C. Martin, GRAVES GARRETT, LLC, Kansas City, Missouri, Christopher P. Finney, FINNEY LAW FIRM, LLC, Cincinnati, Ohio, David R. Langdon, LANGDON LAW, LLC, West Chester, Ohio, for Respondents.

## OPINION

KETHLEDGE, Circuit Judge. Among the most serious allegations a federal court can address are that an Executive agency has targeted citizens for mistreatment based on their political views. No citizen—Republican or Democrat, socialist or libertarian—should be targeted or even have to fear being targeted on those grounds. Yet those are the grounds on which the plaintiffs allege they were mistreated by the IRS here. The allegations are substantial: most are drawn from findings made by the Treasury Department's own Inspector General for Tax Administration. Those findings include that the IRS used political criteria to round up applications for tax-exempt status filed by so-called tea-party groups; that the IRS often took four times as long to process tea-party applications as other applications; and that the IRS served tea-party applicants with crushing demands for what the Inspector General called "unnecessary information."

Yet in this lawsuit the IRS has only compounded the conduct that gave rise to it. The plaintiffs seek damages on behalf of themselves and other groups whose applications the IRS treated in the manner described by the Inspector General. The lawsuit has progressed as slowly as the underlying applications themselves: at every turn the IRS has resisted the plaintiffs' requests for information regarding the IRS's treatment of the plaintiff class, eventually to the open frustration of the district court. At issue here are IRS "Be On the Lookout" lists of organizations allegedly targeted for unfavorable treatment because of their political beliefs. Those organizations in turn make up the plaintiff class. The district court ordered production of those lists, and did so again over an IRS motion to reconsider. Yet, almost a year later, the IRS still has not complied with the court's orders. Instead the IRS now seeks from this court a writ of mandamus, an extraordinary remedy reserved to correct only the clearest abuses of power by a district court. We deny the petition.

I.

A.

Every year, thousands of non-profit groups—churches, schools, charities, and other actors in what Tocqueville called America's "civil life"—apply for exemption from federal taxes under section 501(c) of the Internal Revenue Code. In 2014, the IRS considered 117,525 such applications. *See Internal Revenue Service Data Book 2014* at 57. Of those, the IRS rejected 89, or about 0.07%. *Id.*

Most groups apply for 501(c)(3) status, which permits them to receive tax-deductible donations and to engage in limited, issue-based political advocacy. Others apply as 501(c)(4) social-welfare organizations. Tax-exempt 501(c)(4) groups may not collect tax-deductible donations, but they may engage in relatively unfettered political advocacy, including election advocacy. 501(c)(4) groups range from national organizations—including the American Civil Liberties Union, the National Rifle Association, and the Sierra Club—to local neighborhood associations.

Applicants for tax-exempt status submit standardized forms: Form 1023 for aspiring 501(c)(3) organizations, and Form 1024 for aspiring 501(c)(4) organizations. Form 1023 asks applicants to describe their purposes and activities; the compensation of their officers and employees; their fundraising methods; their revenues, expenses, assets, and liabilities; and their plans (if any) to undertake political advocacy. Form 1024 asks applicants about their activities; the names and titles of their officers; their criteria for membership; their publications; and their revenues, expenses, and balance sheets.

Both forms say at the top of page one that the applications, if successful, will be "open for public inspection." That is by Congressional design. The Internal Revenue Code requires that the application of every exempt organization be available for inspection by the general public at the national office of the IRS, as well as at the major offices of the organization. *See* 26 U.S.C. § 6104(a)(1)(A), (d)(1)(A)(iii). Even if the IRS denies an organization's application, the IRS must publish the application and the denial letter, though (unless a court orders

otherwise) it must first remove any identifying information. *See* 26 U.S.C. § 6110(a), (b)(1)(A), (b)(2), (c)(1); *see also* Treas. Reg. § 301.6104(a)–1(f).

Once the IRS has approved an application, the exempt organization must file a yearly information return, using a Form 990. This form asks about the group's governance; the salaries or benefits paid to its employees and members; the amount of contributions and grants it received that year; and the amount it spent on furthering its mission. The form also asks for a detailed report of the group's revenues, expenses, and balance sheet. Often, the group must attach a Schedule B, a list of the names and addresses of its major donors that year. Similar to Form 1023 and Form 1024, Form 990 is marked at the top of its first page, "Open to Public Inspection." The IRS and the group itself must make the group's return publicly available, with the proviso that the IRS must not—and each group need not—disclose the names or addresses of the group's donors as revealed on Schedule B. *See* 26 U.S.C. § 6104(b), (d)(1)(A)(i), (d)(3)(A).

Congress thus created a regime in which all of the information demanded in a successful application for 501(c) tax-exempt status is presumptively open to the public. The same is true of the information revealed in an exempt organization's annual return, save for the identities of individual donors. And the few unsuccessful applications are presumptively open to the public once any identifying information has been redacted. As for pending or dormant applications, the IRS treats the information contained in those applications as confidential "return information," not to be revealed except under limited circumstances. *See* 26 U.S.C. § 6103(a); Treas. Reg. § 301.6104(a)–1(d), (g).

B.

In 2010, the IRS began to pay unusual attention to 501(c) applications from groups with certain political affiliations. As found by the Inspector General, the IRS "developed and used inappropriate criteria to identify applications from organizations with 'Tea Party' in their names." IG Report at 5. The IRS soon "expanded the criteria to inappropriately include organizations with other specific names (Patriots and 9/12) or policy positions." *Id.* As to the policy positions, the IRS gave heightened scrutiny to organizations concerned with "government spending, government debt or taxes," "lobbying to 'make America a better place to live[,]'" or

"criticiz[ing] how the country is being run[.]" *Id.* at 6. The IRS collected these criteria on a spreadsheet that would become known as the "'Be On the Lookout' listing" (or BOLO listing). *Id.* at 6. These "inappropriate criteria remained in place for more than 18 months." *Id.* at 7.

Applicants whom the IRS flagged with the "Be On the Lookout" criteria were sent to a so-called "team of specialists," where the applicants "experienced significant delays and requests for unnecessary information[.]" IG Report at 7. As for the delays, "the IRS's goal for processing all types of applications for tax-exempt status was 121 days in Fiscal Year 2012[.]" *Id.* at 1. "In comparison, the average time a potential political case [*i.e.*, an application from one of the groups targeted with these criteria] was open as of December 17, 2012, was 574 calendar days[.]" *Id.* at 15. Thus, as of that date, "many organizations had not received an approval or denial letter for more than two years after they submitted their applications. Some cases have been open during two election cycles (2010 and 2012)"—and, as of December 2012, some had been open "for more than 1,000 days." *Id.* at 11, 14. These delays themselves brought adverse consequences for the applicant groups: the IG observed that, for "501(c)(3) organizations, this means that potential donors and grantors could be reluctant to provide donations or grants. In addition, some organizations withdrew their applications and others may not have begun conducting planned charitable or social welfare work." *Id.* at 12.

The IRS's application forms for tax-exempt status themselves request detailed information from every applicant group. For groups subject to the IRS's inappropriate criteria, however, the IRS also demanded what the IG called "unnecessary information." Among other things, the IRS demanded that many of these groups provide the following: "the names of donors"; "a list of all issues that are important to the organization[,]" and the organization's "position regarding such issues"; "the roles and activities of the audience and participants" at the group's events (typically over a 12-18 month period), and "the type of conversations and discussions members and participants had during the activity"; whether any of the group's officers or directors "has run or will run for public office"; "the political affiliation of the officer, director, speakers, candidates supported, etc."; "information regarding employment" of the group's officers or directors; and "information regarding activities of another organization—not just the relationship of the other organization to the applicant." *Id.* at 20. These demands,

according to the IG, "created [a] burden on the organizations that were required to gather and forward information that was not needed by the [IRS] and led to delays in processing the applications." *Id.* at 18. Moreover, "[f]or some organizations, this was the second letter received from the IRS requesting additional information, the first of which had been received more than a year before[.]" *Id.* This second round of letters also warned that the IRS would close the applicant's case if the IRS did not receive all of the requested information within 21 days—"despite the fact that the IRS had done nothing with some of the applications for more than one year." *Id.*

The experience of the lead plaintiff in this case, NorCal Tea Party Patriots, provides an example. NorCal applied for tax-exempt status in April 2010. In July 2010, the IRS sent NorCal a letter requesting additional information to process its application. NorCal promptly replied with 120 pages of responsive material. Eighteen months passed without further word from the IRS. Then, in a letter dated January 27, 2012, the IRS demanded more information from NorCal. The IRS's "Additional Information Requested" ran five pages single-spaced and comprised 19 separate requests, almost all of which had subparts, and many of which had six or more subparts. Among other things, the IRS requested a list of all NorCal events and activities since July 2010, with detailed information concerning the circumstances of each event and the content of any speeches or presentations made at those events; the names of NorCal's donors and whether those donors had run for elected office in the past or intended to run for elected office in the future, along with the amounts and dates of every donation; and copies of all newsletters, emails, or advertising materials that the group had sent to its members or to the general public. The IRS's letter also reminded NorCal that, "[i]f we approve your application for exemption, we will be required by law to make the . . . information you submit in response to this letter available for public inspection." The IRS directed NorCal to respond by February 17, 2012—three weeks after the date of the letter—and told NorCal that, "[i]f we don't hear from you by the response due date . . . we will assume you no longer want us to consider your application for exemption and will close your case. As a result, the Internal Revenue Service will treat you as a taxable entity." NorCal eventually provided approximately 3,000 pages of responsive material.

The IRS's own Taxpayer Advocate seconded many of the findings in the IG's Report. But the response of IRS Management was muted. Although the IRS acknowledged—in the classically passive formulation—certain "mistakes that were made in the process by which these applications were worked[,]" the IRS asserted that "centralization was warranted" in processing the requests, because "[c]entralization of like cases furthers quality and consistency." IG Report at 44-45.

C.

One week after the release of the Inspector General's report, the plaintiffs brought this lawsuit against the IRS and certain IRS officials. The plaintiffs asserted claims under the Privacy Act, 5 U.S.C. § 552a, and under the First and Fifth Amendments to the U.S. Constitution. The plaintiffs also claimed that the IRS's collection and internal exchange of information about their donors, along with other sensitive information not typically requested in an application for tax-exempt status, violated the Internal Revenue Code's prohibition on the unauthorized inspection of confidential "return information." *See* 26 U.S.C. §§ 6103(a), 7431 (creating a cause of action for violations of § 6103). The plaintiffs also sought to certify a class of organizations allegedly targeted by the IRS because of their political beliefs.

To that end, the plaintiffs sought discovery in the form of basic information relevant to class certification, including the names of IRS employees who reviewed the groups' applications for tax-exempt status and the number of applications from similar groups that had been granted, denied, withdrawn, or were still pending. On the record before us here, the IRS's response has been one of continuous resistance. For example, the IRS asserted that the names of IRS employees who worked on the groups' applications were taxpayer "return information" protected from disclosure by § 6103. The IRS eventually abandoned that position, but argued instead that § 6103 barred the Department of Justice's attorneys from even reviewing the groups' application files to find the names of the IRS employees who worked on them. That was true, the IRS asserted, even though § 6103(h)(2)—entitled "Department of Justice"—expressly allows the Department's attorneys to review a taxpayer's return information to the extent the taxpayer "is or may be a party to" a judicial proceeding. *See* 26 U.S.C. § 6103(h)(2)(A). The IRS further objected—this, in a case where the IRS forced the lead plaintiff to produce 3,000 pages of what

the Inspector General called "unnecessary information"—that "it would be unduly burdensome" for the IRS to collect the names of the employees who worked on the groups' applications. The district court eventually intervened and declared the IRS's objections meritless. Yet the IRS objected to still other document requests on grounds of "the deliberative process privilege[.]" That privilege, the IRS acknowledged, can be waived in cases involving "government misconduct"; but in the IRS's reading, the IG's report "does not include any allegation or finding of misconduct."

Eventually the district court's patience wore thin. The court began a discovery conference in December 2014 by stating: "It looks like everything in this case seems to be turning into an argument on discovery. I think we've already had more discovery conferences in this case than I've had in any other case this whole year." In the same conference the court admonished the IRS: "this is class discovery, but you're not willing to give any discovery on the putative class . . . you're just running around in circles and not answering the questions." Those admonitions appeared to have little effect. In October 2015, the court stated as follows:

> My impression is the government probably did something wrong in this case. Whether there's liability or not is a legal question. However, I feel like the government is doing everything it possibly can to make this as complicated as it possibly can, to last as long as it possibly can, so that by the time there is a result, nobody is going to care except the plaintiffs. . . . I question whether or not the Department of Justice is doing justice.

The document requests specifically at issue here concern the plaintiffs' requests for any lists of organizations that the IRS flagged for special attention using the "Be On the Lookout" criteria, as well as two spreadsheets that the IRS provided to the Inspector General in connection with his report. The plaintiffs specified that they wanted "the names of class members as shown on the IRS's internal lists" so that plaintiffs could identify fellow members of the putative class. The IRS refused to produce the lists and instead moved for a protective order from the district court. In support, the IRS argued that any information contained in an application for tax-exempt status, including the applicant's name, is confidential "return information" that the IRS is barred from disclosing to the district court. The district court, for its part, agreed that the plaintiffs' requests encompassed "return information"; but the court held that the IRS could disclose the documents nonetheless under an exception allowing disclosure where "the treatment

of an item reflected on such return is directly related to the resolution of an issue" in a judicial proceeding. 26 U.S.C. § 6103(h)(4)(B). The district court thus ordered the IRS to produce the documents. The IRS moved for reconsideration, and the court modified its order to permit the IRS to redact any employer identification numbers; but otherwise the court again ordered production of the documents.

The IRS then filed this petition for a writ of mandamus.

II.

A.

The writ of mandamus is a "drastic and extraordinary remedy reserved for really extraordinary causes." *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004). Mandamus should issue only in "exceptional circumstances" involving a "judicial usurpation of power" or a "clear abuse of discretion." *Id.* To obtain the writ here, the IRS must show that it lacks any other adequate means of obtaining relief, that its right to relief is "clear and indisputable," and that issuance of the writ is "appropriate under the circumstances." *Id.* at 380-81.

The IRS argues that the "names and other identifying information of" organizations that apply for tax-exempt status—along with the applications themselves—are confidential "return information" under 26 U.S.C. § 6103. IRS Petition at 2, 16. The IRS argues further that the district court lacked authority to order disclosure of those names under a statutory provision for disclosure in judicial proceedings where "the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding[.]" 26 U.S.C. § 6103(h)(4)(B). The IRS contends that the district court's discovery orders threaten to undermine statutory protections for taxpayer privacy, and that a writ of mandamus is therefore appropriate.

B.

In this country taxpayer privacy has a checkered history. The nation's first federal income-tax statute did not keep taxpayer information confidential. To the contrary, when Congress passed an income tax to finance the Civil War, courthouses and newspapers published household tax information as a way of encouraging ordinary citizens to police their neighbors'

compliance with the new law. *See* Office of Tax Policy, Dep't of the Treasury, *Scope & Use of Taxpayer Confidentiality & Disclosure Provisions, Vol. I* at 15 (2000). In the early twentieth century, Congress continued to classify tax returns as public records open to general inspection, subject to regulations promulgated by the Treasury Department. *Id.* at 17-18. Eventually those regulations made individual and corporate tax returns generally available to federal agencies and committees of Congress, but unavailable to the general public. *Id.* at 20.

The dangers of that regime became clear when Congress investigated President Richard Nixon's alleged abuses of power in connection with his 1972 reelection campaign. Congressional committees heard testimony that the White House had obtained from the IRS sensitive tax information on political opponents, and moreover had directed IRS personnel to audit the returns of particular taxpayers. The House Judiciary Committee thereafter approved an Article of Impeachment alleging that President Nixon had, among other things, "endeavored . . . to cause, in violation of the constitutional rights of citizens, income tax audits or other income tax investigations to be initiated or conducted in a discriminatory manner."

In the wake of President Nixon's resignation, Congress enacted the Tax Reform Act of 1976, which overhauled the rules governing disclosure of taxpayer information. No longer would the Executive have free rein over the handling of sensitive taxpayer records; instead, as the Treasury Department's Office of Tax Policy acknowledged, "Congress undertook direct responsibility for determining the types and manner of permissible disclosures." Office of Tax Policy, *Taxpayer Confidentiality Provisions, Vol. I* at 22.

1.

At the core of this statutory regime is the general rule that "[r]eturns and return information shall be confidential[.]" 26 U.S.C. § 6103(a). "Returns" include any "tax or information return," as well as "supporting schedules . . . which are supplemental to, or part of, the return so filed." 26 U.S.C. § 6103(b)(1). Congress has carefully delineated the circumstances in which returns or return information can be disclosed to government officials or to the public. IRS officials may, for example, disclose a taxpayer's own return or return information to that taxpayer. *See* 26 U.S.C. § 6103(c). In certain cases, federal officials must

disclose returns and return information to state tax administrators and local law enforcement. *See* 26 U.S.C. § 6103(d). And the IRS must disclose returns and return information to Congressional committees upon written request. *See* 26 U.S.C. § 6103(f).

Here, the parties and the district court agree—as do we—that applications for tax-exempt status are not "returns." *See* § 6103(b)(1). Rather, the parties say that the applications are "return information," which includes, among other things, "a taxpayer's identity" and "data . . . collected by the Secretary with respect to . . . the determination of the existence, or possible existence, of [tax] liability (or the amount thereof)[.]" 26 U.S.C. § 6103(b)(2)(A). Thus, in the parties' view, the applicant names on the "Be On the Lookout" lists and spreadsheets are "return information." As described above, the district court accepted that proposition, but held nonetheless—per the argument of plaintiffs alone—that the names on the lists and spreadsheets were subject to disclosure under § 6103(h)(4)(B). That subsection provides:

> **(4) Disclosure in judicial and administrative tax proceedings.**—A return or return information may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration, but only—
>
> > (B) if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding[.]

The IRS argues that the district court's application of this subsection was mistaken because § 6103(h)(4)(B) authorizes disclosure only of information reflected on a *return*—and the names at issue here, the IRS says, are instead return *information*. That argument is correct so far as it goes. As defined in § 6103, as shown above, a "return" is something different than "return information"; the applicant names on the "Be On the Lookout" lists and spreadsheets came from applications for tax-exempt status, rather than from "returns"; and hence the names are not an item reflected on a "return." Subsection 6104(h)(4)(B) therefore does not authorize disclosure of those names.

The plaintiffs respond that this interpretation reads the words "or return information" out of the so-called prefatory language of § 6104(h)(4), which again states that "a return or return information may be disclosed" under ("but only" under) the circumstances described in subsections (A)-(D). But that argument is plainly wrong. The prefatory language states that "a

return or return information" may be disclosed as provided in subsections (A)-(D). In Congress's judgment, some of the circumstances described in those subsections warrant disclosure of "return or return information" alike; other circumstances, namely those described in the subsection at issue here, warrant disclosure only of information reflected on a "return." The point becomes clearer when one views subsections (B) and (C) together:

> A return or return information may be disclosed in a Federal or State judicial or administrative proceeding, but only—
>
> ...
>
> (B) if the treatment of an item reflected on such *return* is directly related to the resolution of an issue in the proceeding; [or]
>
> (C) if such *return or return information* directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding[.]

26 U.S.C. § 6103(h)(4) (emphasis added).

It was Congress's prerogative to authorize broader disclosure of taxpayer information under the circumstances described in subsection (C) than in the circumstances described in subsection (B). And the mere existence of subsection (C), not to mention (A) and (D), shows that the words "or return information[,]" as used in the prefatory language, have plenty of meaning in § 6104(h)(4). Thus, reading subsection (B) to mean what it says—to authorize disclosure only of information reflected on a return—does not render meaningless the words "or return information" as used in the prefatory language. Instead that reading honors Congress's choice in crafting the provisions. *See Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another").

We therefore hold that 26 U.S.C. § 6103(h)(4)(B) means what it says: only information that is "reflected on [a] return" may be disclosed under section 6103(h)(4)(B); return information that is not reflected on a return may not be. *Accord In re United States*, 669 F.3d 1333, 1339-40 (Fed. Cir. 2012). The district court was mistaken when it held otherwise.

2.

But that does not mean the IRS is entitled to the extraordinary relief it seeks here. For § 6103(h)(4) provides neither the first word nor the last on the question whether the names of applicants for tax-exempt status are subject to disclosure as ordered by the district court. The first word is on the front of the IRS application forms themselves: "If exempt status is approved, this application"—including of course the applicant's name—"will be open for public inspection." The last word comes from two provisions that the IRS fails to mention in its petition: 26 U.S.C. §§ 6104 and 6103(b)(6).

a.

As discussed above, the IRS contends in its petition that the "names and other identifying information of" applicants for tax-exempt status are generally barred from disclosure under § 6103. IRS Petition at 2, 16. But § 6104 mandates precisely the opposite for applicants whose applications are granted. Under § 6104, any successful application for 501(c) or 501(d) tax-exempt status, "together with any papers submitted in support of such application . . . shall be open to public inspection at the national office of the Internal Revenue Service." 26 U.S.C. § 6104(a)(1)(A). In that respect, among others, applications for tax-exempt status are very different from tax returns. As relevant here, under § 6104, the name of every successful applicant for tax-exempt status is indisputably public in character. The IRS itself says as much in the header of the application forms that every applicant for tax-exempt status must fill out. (See the preceding paragraph.) The IRS said as much when requesting "additional information" from NorCal, when it warned that, "[i]f we approve your application for exemption, we will be required by law to make the application and the information that you submit in response to this letter available for public inspection." The IRS said as much even in this litigation—during the IRS's retreating action through the foothills of § 6103(h)—when it wrote to plaintiffs' counsel that "[s]ection 6104(a)(1)(A) permits the public inspection of any letter or document the IRS issued to an applicant whose application for 501(c) status is approved[.]" And the IRS's lawyer conceded in oral argument before this court that "the names of entities that are approved, I agree, are public." Yet the IRS failed to mention this elementary legal truth in the district court or in its petition for extraordinary relief from this court. We therefore hold the obvious: the names and

identifying information of groups whose applications for tax-exempt status the IRS has already granted are public information under § 6104. And that means the IRS's petition is patently meritless as to the names and identifying information of groups whose applications the IRS has since granted—which is presumably most of the names and information at issue here, given the very high approval rate of tax-exemption applications generally.

b.

That leaves the names of organizations whose applications remain pending, or who withdrew their applications, or whose applications the IRS rejected. Presumably none of the applications reflected on the "Be On the Lookout" lists are still pending, since those applications were filed over four years ago. But there are likely some groups who chose to withdraw their applications rather than contend with the IRS's long delays and requests for "additional information." For the most part the information submitted in those applications remains confidential "return information." *See* Treas. Reg. § 301.6104(a)–1(d), (g). And presumably the IRS outright denied the applications of some of the groups it allegedly targeted.

Yet the prospect of any pending, withdrawn, or denied applications only leads us back to a more fundamental question: whether the names and identifying information of applicants for tax-exempt status are "return information" in the first place. As noted above, "return information" as defined by § 6103(b)(2)(A) includes "a taxpayer's identity[.]" That term sounds like it might include an applicant's name. But here again the IRS has failed to mention a relevant statutory provision, this time § 6103(b)(6). That provision states in full: "The term 'taxpayer identity' means the name of a person with respect to whom *a return is filed*, his mailing address, his taxpayer identification number (as described in section 6109), or a combination thereof." (Emphasis added.) The word "return" has a meaning just as concrete in § 6103(b)(6) as it did in § 6103(h)(4); and that meaning does not include an application for tax-exempt status. *See* § 6103(b)(1). Applicants *qua* applicants file applications, not "returns"; and thus the name of an applicant for tax-exempt status does not fall within a "taxpayer's identity" as that term is defined in § 6103(b)(6) and used in § 6103(b)(2)(A). On this point Congress drew a clear line, whose contours follow the meaning of "return." We follow that line here just as we did in interpreting § 6103(h)(4).

The IRS responded at oral argument—as it always seems to respond when seeking to withhold documents in cases involving § 6103—that the names of applicants for tax-exempt status are "other data, received by, recorded by, furnished to, or collected by the Secretary . . . with respect to the determination of the existence, or possible existence, of liability" for a tax. *See* § 6103(b)(2)(A). But that argument would prove too much. If "data collected" by the Secretary includes the name of an applicant for tax-exempt status, so too it includes the name of a taxpayer who files a return. And in that event Congress was wasting its time when it included "taxpayer identity" as a type of return information under § 6103(b)(2)(A), since a taxpayer's name would already be "data collected" (and thus return information) under the IRS's unbounded conception of that term. And Congress was wasting its time yet again when it carefully defined "taxpayer identity" in § 6103(b)(6) to include names on returns but not applications—because again, in the IRS's view, both types of names are data collected (and thus return information). All of which is to say that, as a matter of elementary statutory interpretation, the IRS's assertion that applicant names are return information is meritless.

Section 6104 likewise reveals that the names of applicants for tax-exempt status are not "return information." The point is highly technical but worth making here. Section 6104(c) provides a mechanism by which the IRS may tip off state authorities regarding the IRS's intention to deny tax-exempt status to an organization that has applied for it. *See* 26 U.S.C. § 6104(c)(2). That subsection specifies in one subparagraph that the IRS may disclose to state authorities "the *names, addresses, and taxpayer identification numbers* of organizations which have applied for recognition as organizations described in section 501(c)(3)." 26 U.S.C. § 6104(c)(2)(A)(iii) (emphasis added). The next subparagraph authorizes the IRS to make "*additional* disclosures," namely, "*[r]eturns and return information* of organizations with respect to which information is disclosed under subparagraph (A) may be made available for inspection by or disclosed to an appropriate State officer." 26 U.S.C. § 6104(c)(2)(B) (emphasis added). But Congress would have had no need separately to authorize disclosure of the "names, addresses, and taxpayer identification numbers" in § 6104(c)(2)(A)(iii) if that information was already "return information" subject to disclosure under § 6104(c)(2)(B). The rules of statutory interpretation cut both ways, and the rules that cut in favor of the IRS's reading of

§ 6103(h)(4)(B) here cut against the IRS's reading of "return information" to include applicant names and identifying information.

Still more support for our interpretation comes from the D.C. Circuit's opinion in *Ryan v. Bureau of Alcohol, Tobacco & Firearms*, 715 F.2d 644 (D.C. Cir. 1983) (Scalia, J.). There the court considered a situation analogous to the one presented here: whether a member of the public could access a list of the names of manufacturers that had submitted Forms 4328, which provided notice of intent to engage in the manufacture of domestic liquor bottles. The ATF resisted disclosure on the ground that the names were return information under § 6103 because they had been provided "for ascertaining tax liability." *Id.* at 645. The district court agreed. But then-Judge Scalia, writing for himself and then-Judge Ruth Bader Ginsburg, declined to affirm on those grounds. Instead he concluded that Form 4328 was an "information return" within the meaning of § 6103(b)(1), and that—*because the manufacturers had filed a "return"*—the manufacturers' names fell within the term "taxpayer identity" as defined by § 6103(b)(6) and used in § 6103(b)(2)(A). 715 F.2d at 647. Here, unlike in *Ryan*, the applications at issue—the Forms 1023 and 1024 submitted to the IRS—are undisputedly not returns.

We recognize that, in another case, the D.C. Circuit held that the names of applicants for tax-exempt status are "return information." *See Landmark Legal Foundation v. IRS*, 267 F.3d 1132, 1135 (D.C. Cir. 2001). But that holding is unpersuasive for a simple reason. The *Landmark* court stated that the names of applicants for tax-exempt status are "return information" because § 6103(b)(2)(A) "specifically covers 'a taxpayer's *identity*.'" *Id.* (quoting § 6103(b)(2)(A)) (emphasis in original). But the court *never referenced Congress's express definition of that term* in § 6103(b)(6)—the IRS apparently failed to mention it there too—and thus the court seemed unaware throughout that "taxpayer's identity" includes only names on a *return*, not on an application.

For all of these reasons, we hold that the names, addresses, and taxpayer-identification numbers of applicants for tax-exempt status are not "return information" under § 6103(b)(2)(A). And we otherwise emphasize that the phrase "data, received by, recorded by, furnished to, or collected by the Secretary[,]" as used in § 6103(b)(2)(A), does not entitle the IRS to keep secret (in the name of "taxpayer privacy," no less) every internal IRS document that reveals IRS

mistreatment of a taxpayer or applicant organization—in this case or future ones. Section 6103 was enacted to protect taxpayers from the IRS, not the IRS from taxpayers.

* * *

In closing, we echo the district court's observations about this case. The lawyers in the Department of Justice have a long and storied tradition of defending the nation's interests and enforcing its laws—all of them, not just selective ones—in a manner worthy of the Department's name. The conduct of the IRS's attorneys in the district court falls outside that tradition. We expect that the IRS will do better going forward. And we order that the IRS comply with the district court's discovery orders of April 1 and June 16, 2015—without redactions, and without further delay.

The petition is denied.