

Testimony of

Dr. John C. Eastman

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Chairman, The Claremont Institute's Center for Constitutional Jurisprudence

Chairman of the Board, National Organization for Marriage

before the

Committee on Ways and Means
U.S. House of Representatives

Hearing on Internal Revenue Service Targeting
of Non-Profit Entities Because of their Political Views

June 4, 2013

Good morning, Chairman Camp and Members of the Ways and Means Committee. I appear before you today as the Chairman of the Board of the National Organization for Marriage (“NOM”), but quite frankly, it is the other hats I wear—as a professor of constitutional law and the founder of a public interest law firm that litigates and appears as *amicus curiae* before the Supreme Court on major constitutional cases—that helps me put perspective on the seriousness of what our government has done to the National Organization for Marriage, illegally using confidential information that must be filed with the IRS to facilitate the intimidation of donors and thereby influence the outcome of a highly contentious political fight.

NOM is a nonprofit organization recognized by the Internal Revenue Service (“IRS”) as a social welfare organization, exempt from taxation pursuant to Internal Revenue Code (“IRC”) § 501(c)(4). As such, it must annually file with the IRS a Form 990 tax return. It must also make portions of that tax return public, and NOM has done so in a timely fashion every year since it was founded.

Portions of NOM’s Form 990, specifically Schedule B, which contains the names and addresses of NOM’s major donors, are not public. Like nearly every other non-profit organization, NOM does not publically disclose its donor information. Indeed, because of the vicious and at times even violent campaign of intimidation that has been waged against supporters of traditional marriage—intimidation that the Supreme Court itself has remarked upon—NOM jealously guards the confidentiality of its donors.

Nevertheless, on March 30, 2012, NOM became aware that its confidential tax information—specifically, its 2008 Form 990 Schedule B—had been obtained by the Human Rights Campaign (“HRC”)—NOM’s principal opponent in the political battles over the redefinition of marriage—published on its website, and republished on numerous other websites such as the Huffington Post. The donor names were not redacted, but there *was* another redaction on the PDF document that had been posted, and NOM’s computer analysts were able to remove the document’s redaction layer and discover that the document had originated *from within the IRS itself*. As the attached copy of that document reflects, the un-redacted original bore two markings that, according to Section 3.11.12.1.26 of the Internal Revenue Manual (01-01-2012), are placed on documents e-filed with the IRS by the IRS’s Central Information System. An identification number, “100560209,” was stamped diagonally across the middle of leaked tax return. More significantly, the header of each page read: “THIS IS A COPY OF A LIVE RETURN FROM SMIPS. OFFICIAL USE ONLY,” making unmistakably clear that the document was a confidential tax return whose source was within the IRS itself.

The willful unauthorized public disclosure of NOM’s 2008 Schedule B by the IRS or its employees is a violation of federal law, 26 U.S.C. § 6103. Indeed, it is a serious felony punishable by a \$5,000 fine and up to five years in federal prison, penalties that apply both to IRS and other government employees and third parties. 26 U.S.C. § 7213(a)(1), (3). Civil remedies are also available to the taxpayer or non-profit entity whose tax return information was

illegally disclosed, pursuant to 26 U.S.C. § 7431, which provides for either actual damages or statutory damages of \$1,000 per illegal disclosure *or inspection*, plus punitive damages, litigation costs and attorneys fees.

NOM filed written requests for investigation on April 11, 2012, with both the Treasury Inspector General for Tax Administration (TIGTA) and the Department of Justice. NOM noted in those requests its belief, based on the computer forensic evidence it had uncovered, that the IRS had to be the source of the disclosure. TIGTA responded in an April 20, 2012 letter that acknowledged receipt of NOM's request and provided NOM with a complaint number, No. 63-1204-0051-C. At the outset of the investigation, investigators from TIGTA sought to determine whether the document with the internal IRS markings might have originated from NOM, but once NOM demonstrated that it had not, we received no further information about the investigation. As of May 31, 2013, however, over a year after making the request, NOM had not received any information resulting from the requested investigation from TIGTA, although IRS officials stated publicly in recent testimony here in Congress that the investigation was not ongoing.

NOM did file a series of requests pursuant to the Freedom of Information Act ("FOIA") and Privacy Act beginning last August, seeking to ascertain the status and results of the investigation into the felonious disclosure of its confidential tax returns. The IRS and TIGTA declined to provide NOM with the most relevant information, and the most recent response, dated May 3, 2013, declines even to acknowledge the existence of the investigation for which NOM had previously been given a complaint number. Worse, that latest non-responsive "response" from TIGTA even adopts the Orwellian position that the same statute which prohibits the disclosure of a taxpayer's confidential tax return information prevents any disclosure of the culprit of that felony. "Specifically," the Inspector General's response asserted, "records compiled pursuant to a Title 26 investigation, including even the fact of an investigation, are the protect return information of the subject(s) of the investigation." This, apparently, because the IRS code defines "return information" to include investigations conducted against taxpayers for violations of the IRS code, and since the prohibition on disclosure of confidential tax returns is itself part of the IRS code, and since the IRS employee who committed this felony is himself a taxpayer, any such investigation becomes confidential return information that cannot be disclosed. This bizarre interpretation of the relevant IRS code provisions contradicts explicit provisions of the Privacy Act, which recognize that the very information NOM has sought to obtain falls within one of TIGTA's "routine use exceptions" against disclosure. As stated in 75 Fed. Reg. 20715-16 (April 20, 2010):

Disclosure of returns and return information may be made only as provided by 26 U.S.C 6103. Records other than returns and return information may be used to... (12) Disclose information to complainants, victims, or their representatives (defined for purposes here to be a complainant's or victim's legal counsel or a Senator or Representative whose assistance that complainant or victim has

solicited) concerning the status and/or results of the investigation or case arising from the matters of which they complained and/or of which they were a victim, including, once the investigative subject has exhausted all reasonable appeals, any action taken. Information concerning the status of the investigation or case is limited strictly to whether the investigation or case is open or closed. Information concerning the results of the investigation or case is limited strictly to whether the allegations made in the complaint were substantiated or were not substantiated and, if the subject has exhausted all reasonable appeals, any action taken.

75 Fed. Reg. at 20715. I truly hope this Committee will disabuse the IRS of the ridiculous interpretation it has given to its governing statute, with a clarifying amendment if necessary.

Stonewalled in its attempts to discover on its own the source of the felonious conduct against it, NOM has also received no satisfaction from the law enforcement authorities of the United States, whose duty it is to prosecute felonious disclosure of confidential tax returns. According to 26 U.S.C § 7431(e), the Secretary of the Treasury is required to notify an affected entity, NOM in this instance, of any criminal charges made against an individual who disclosed that entity's tax information. NOM has received no such notification, so it can only surmise that no criminal charges have been brought. We therefore strongly urge this Committee to pursue its own investigation of this matter, identify the culprit or culprits, and refer the matter for indictment and prosecution as warranted.

In light of the recent discovery that the IRS has been using additional scrutiny measures to target conservative groups filing for tax-exempt statuses through 501(c)(3) and 501(c)(4) classifications, an investigation into how NOM's 2008 Form 990 Schedule B information was obtained by the HRC and the Huffington Post seems to carry even greater weight. As NOM's President, Brian Brown, stated in a May 13, 2013 press release from NOM, "what NOM has experienced suggests that problems at the IRS are potentially far more serious than even these latest revelations reveal."

Let me turn briefly to the civil liability issue. As I noted previously, federal law does provide a taxpayer with a civil remedy, but current judicial interpretation of those statutory provisions makes the remedy woefully inadequate. Absent proof of actual damages—a difficult evidentiary burden—statutory damages are limited to \$1,000 per unlawful disclosure or inspection, and punitive damages are available only upon a showing of gross negligence or worse. *Scrimgeour v. IRS*, 149 F.3d 318 (4th Cir. 1994). The damages are assessed against the United States itself, not the individual IRS employee who engaged in the felonious conduct. And they are limited to the first disclosure by the IRS employee, not subsequent disclosures by third parties who may have been colluding with the IRS culprit to insure wide dissemination of confidential return information. *See, e.g., Hrubec v. National R.R. Passenger Corp.*, 49 F.3d 1269 (7th Cir. 1995). In other words, were an IRS employee to post a confidential return on a website where it was inspected by ten thousand people, statutory damages of \$10 million would result (although none of it borne by the IRS employee himself). But if that same IRS employee

gave the confidential tax return to a media outlet or even a friend who posted it on a well-trafficked website where it was inspected by ten thousand people, that would be considered a single “disclosure,” with only \$1,000 in statutory damages. *Miller v. United States*, 66 F.3d 220 (9th Cir. 1995). When the Department of Justice declines to prosecute, such a paltry civil liability is not only no incentive against disclosure, but is actually a strong incentive for collusive conduct.

This is an overly stingy interpretation of the civil liability provisions of the IRS code. Section 7431(a)(2) provides that “if any person who is not an officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103,” the taxpayer is entitled to recover damages. This Committee could—and should—propose a clarifying amendment to make clear that third parties who knowingly further disseminate confidential tax return information unlawfully provided to them by an IRS employee are also subject to the civil liability provisions of Section 7431.

I thank you for your attention to this matter.

As posted by Human Rights Campaign with all masks turned on

Schedule B Form 990, 990-EZ, or 990-PF		Schedule of Contributors		OMB No. 1545-0047	
Attachment to Form 990, 990-EZ, or 990-PF		Attach to Form 990, 990-EZ, and 990-PF		2008	
Name of the organization		Employer identification number			
National Organization for Marriage Inc.		28		424646	
Organization type check one:					
Files of:					
Section:					
Form 990 or 990-EZ		<input checked="" type="checkbox"/> 501(c)(3) () letter-numbered organization			
		<input type="checkbox"/> 4947(a)(2) nonexempt charitable trust not treated as a private foundation			
		<input type="checkbox"/> 527 political organization			
Form 990-PF		<input type="checkbox"/> 501(c)(2) exempt private foundation			
		<input type="checkbox"/> 4947(a)(2) nonexempt charitable trust treated as a private foundation			
		<input type="checkbox"/> 501(c)(2) taxable private foundation			
Check if your organization is covered by the General Rule or a Special Rule. Only a section 501(c)(7), (8), or (10) organization can check boxes for both the General Rule and a Special Rule.					
General Rule					
<input checked="" type="checkbox"/> For organizations filing Form 990, 990-EZ, or 990-PF, during the year, \$1,000 or more in money or property from any one contributor. Complete Form 990.					
Special Rules					
<input type="checkbox"/> For a section 501(c)(2) organization (Form 990, or Form 990-EZ, that met the 50% support test of the regulations under sections 508(b)(1) and 514(b)(1)), received from any one contributor, during the year, a contribution of the greater of (i) \$5,000 or (ii) 2% of the amount on Form 990, Part VII, line 7, or 2% of the amount on Form 990-EZ, line 7. Complete Parts I and II.					
<input type="checkbox"/> For a section 501(c)(7), (8), or (10) organization (Form 990, or Form 990-EZ, that received from any one contributor, during the year, aggregate contributions or bequests of more than \$1,000 for use exclusively for religious, charitable, scientific, literary, or educational purposes, or the promotion of civility to children or adults. Complete Parts I, II, and III.					
<input type="checkbox"/> For a section 501(c)(7), (8), or (10) organization (Form 990, or Form 990-EZ, that received from any one contributor, during the year, some contributions for use exclusively for religious, charitable, etc., purposes, but these contributions did not aggregate to more than \$1,000. If this box is checked, enter here the total contributions that were received during the year for an exclusively religious, charitable, etc., purpose. Do not complete any of the parts unless the General Rule applies to this organization because it received nonexclusively religious, charitable, etc., contributions of \$1,000 or more during the year.)					
Caution: Organizations that are not covered by the General Rule under the Special Rules do not file Schedule B (Form 990, 990-EZ, or 990-PF), but they must answer "No" on Part IV, line 7 of their Form 990, or check the box in the heading of their Form 990-EZ, or on line 7 of their Form 990-PF, to certify that they do not meet the filing requirements of Schedule B (Form 990, 990-EZ, or 990-PF).					
For Private and Nonprofit Sections and Rules, see the instructions. For Form 990, Schedule B (Form 990, 990-EZ, or 990-PF) 2008. For Form 990, these instructions will be bound separately.					

Attachment 2

As posted by Human Rights Campaign with all masks turned off

THIS IS A COPY OF A LIVE RETURN FROM SIRS. OFFICIAL USE ONLY.

Schedule B Form 990, 990-EZ, or 990-PF		Schedule of Contributors		OMB No. 1545-0047	
Attachment to Form 990, 990-EZ, or 990-PF		Attach to Form 990, 990-EZ, and 990-PF		2008	
Name of the organization		Employer identification number			
National Organization for Marriage Inc.		28		424646	
Organization type check one:					
Files of:					
Section:					
Form 990 or 990-EZ		<input checked="" type="checkbox"/> 501(c)(3) () letter-numbered organization			
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		<input type="checkbox"/> 501(c)(2) taxable private foundation			
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General Rule					
<input checked="" type="checkbox"/> For organizations filing Form 990, 990-EZ, or 990-PF, during the year, \$1,000 or more in money or property from any one contributor. Complete Form 990.					
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<input type="checkbox"/> For a section 501(c)(2) organization (Form 990, or Form 990-EZ, that met the 50% support test of the regulations under sections 508(b)(1) and 514(b)(1)), received from any one contributor, during the year, a contribution of the greater of (i) \$5,000 or (ii) 2% of the amount on Form 990, Part VII, line 7, or 2% of the amount on Form 990-EZ, line 7. Complete Parts I and II.					
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For Private and Nonprofit Sections and Rules, see the instructions. For Form 990, Schedule B (Form 990, 990-EZ, or 990-PF) 2008. For Form 990, these instructions will be bound separately.					

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INSPECTOR GENERAL
FOR TAX
ADMINISTRATION

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20005

May 3, 2013

Mr. Brian S. Brown, President
Dr. John C. Eastman, Chairman
National Organization for Marriage
C/O ActRight Legal Foundation
209 West Main Street
Plainfield, Indiana 46168

Dear Mr. Brown and Dr. Eastman:

This is in response to your Privacy Act request, dated April 15, 2013, seeking access to records maintained by the Treasury Inspector General for Tax Administration (TIGTA). The TIGTA Disclosure Branch received your request on April 18, 2013. Specifically, you are requesting that TIGTA provide the following information, including any records related to or supporting the same information:

1. Whether the investigation of Complaint No. 63-1204-0051-C is open or closed.
2. Whether the allegations made in Complaint No. 63-1204-0051-C, including the allegations made in the April 11, 2012 letter from the Requestors to TIGTA, were substantiated or were not substantiated.
3. If the subject(s) of Complaint No. 63-1204-0051-C has/have exhausted all reasonable appeals, any action taken by TIGTA, or any other agency, as a result of Complaint No. 63-1204-0051-C.

You have requested that TIGTA disclose this information pursuant to a routine use in TIGTA's System of Records Notice under the Privacy Act. However, in addition to the Privacy Act, the release of TIGTA Title 26 (I.R.C.) investigative records, if any, is also governed by the confidentiality provisions of I.R.C. § 6103. Specially, records compiled pursuant to a Title 26 investigation, including even the fact of an investigation, are the protected return information of the subject(s) of the investigation. Your complaint (#63-1204-0051-C) concerned allegations of an unauthorized disclosure of return information by a third party, which is an allegation of a potential violation of I.R.C. § 7213. Therefore, pursuant to I.R.C. § 6103, TIGTA can neither admit nor deny the existence of any records responsive to your current request.

Moreover, we note that this request asks for information which was encompassed in previous FOIA requests you made to TIGTA.¹ A review of TIGTA Disclosure Branch indices revealed you previously submitted FOIA requests (case numbers #2012-FOI-00205 and 2012-FOI-00232) to TIGTA on August 9, and September 21, 2012, respectively, seeking information that encompasses items 1-3 of your current request. Furthermore, you appealed TIGTA's initial decisions (2012-APP-00025 and 2013-APP-00004) on September 21, and December 3, 2012, respectively. Your requests and subsequent appeals for this information have been addressed by TIGTA previously and a copy of each decision is enclosed for your reference.

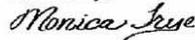
We have enclosed an Information Sheet that explains your administrative appeal rights. You may appeal this decision within thirty-five (35) days from the date of this letter. Your appeal must be in writing and signed by you. You should address the envelope as follows:

Freedom of Information Act Appeal
Treasury Inspector General for Tax Administration
Office of Chief Counsel
City Center Building
1401 H Street, NW, Suite 469
Washington, DC 20005

No fees were assessed in the processing of this request because the cost incurred was less than \$25.00, the threshold set by Treasury's FOIA regulation.

If you have any questions, please contact Government Information Specialist Monica Frye at (202) 622-2738 and refer to case number 2013-FOI-00144.

Sincerely,



Monica Frye
(for) Amy P. Jones
Disclosure Officer

Enclosures

¹ Because it is TIGTA policy to process requests for information under the statute that provides the greatest access to the requested records, we processed your prior requests under the FOIA.