

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

NORCAL TEA PARTY PATRIOTS, *et al.*)
ON BEHALF OF THEMSELVES,)
THEIR MEMBERS, and THE CLASS)
THEY REPRESENT)
)
Plaintiffs,)
)
v.)
)
The Internal Revenue Service, *et al.*)
)
Defendants.)
_____)

Case No. 1:13-cv-00341
Judge Michael R. Barrett

BRIEF OF AMICUS CURIAE JUDICIAL WATCH, INC. IN SUPPORT OF PLAINTIFFS’ REQUESTS TO UNSEAL THE DEPOSITIONS OF LOIS LERNER AND HOLLY PAZ

Judicial Watch, Inc. (“Judicial Watch”), by and through undersigned counsel, files this *amicus curiae* brief in support of Plaintiffs’ request to unseal the deposition testimony of Ms. Lois Lerner and Ms. Holly Paz and in opposition to the blanket seal requested by Ms. Lerner and Ms. Paz. The Court is faced with multiple issues concerning the public’s right to know what its government is up to and the right of access to material in court records. After reviewing and considering these concerns, the Court should order that Ms. Lerner and Ms. Paz’s deposition testimony be unsealed and made available for public review.¹

Judicial Watch and the Public’s Interest

Judicial Watch is a not-for-profit, non-partisan, educational organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. In furtherance of its

¹ Judicial Watch, Inc. does not object to specific redactions to protect personal identifying information.

goals Judicial Watch regularly requests records under the Freedom of Information Act (“FOIA”) to shed light on the operations of the federal government and to educate the public about these operations. Judicial Watch analyzes the agency records and disseminates the results of its analysis, as well as the records themselves, to the public. As part of its mission Judicial Watch also regularly files *amicus curiae* briefs and prosecutes lawsuits on matters it believes are of public importance. Judicial Watch has appeared as *amicus curiae* in multiple federal courts on numerous occasions.

Within days after the Treasury Inspector General for Tax Administration (“TIGTA”) released its report on May 14, 2013 confirming that IRS employees targeted organizations applying for 501(c)(4) tax exempt status with conservative sounding names such as “patriot” and “Tea Party” in their titles, Judicial Watch led the charge and initiated an investigation into the IRS’s conduct toward such organizations. As part of its investigation, Judicial Watch submitted dozens of FOIA requests and since has filed at least nine FOIA lawsuits seeking relevant records from implicated federal agencies.²

² See e.g. *Judicial Watch, Inc. v. IRS*, Case No. 13-1559, D.D.C. (filed Oct. 9, 2013) (seeking records concerning communications between the IRS and any other government agency or official in the Executive Branch and the U.S. Congress about the review process for organizations applying for tax exempt status under 501(c)(4), including Lois Lerner emails, as well as records pertaining to the questionnaires sent to the organizations applying for the tax exempt status, including the preparation thereof) (this matter is still pending before The Hon. Emmet G. Sullivan of the U.S. District Court for the District of Columbia and may also be referred to herein as “Judicial Watch’s main IRS case”);

Judicial Watch, Inc. v. IRS, Case No. 13-1759, D.D.C. (filed Nov. 18, 2013) (seeking records concerning the selection of individuals for audit based on information contained in 501(c)(4) tax exempt applications);

Judicial Watch, Inc. v. IRS, Case No. 14-1956, D.D.C. (filed Nov. 19, 2014) (seeking records about IRS’s release of 12,000 returns of tax organizations to the FBI);

The underlying basis for each of Judicial Watch's lawsuits and FOIA requests was that *the public has a right to know what its government officials are up to*. Judicial Watch's involvement in the investigation and prosecution of lawsuits seeking records related to the IRS targeting has not been insignificant.³ In addition to the revelation of IRS employees' conduct in

Judicial Watch, Inc. v. IRS, Case No. 15-220, D.D.C. (filed Feb. 12, 2015) (seeking records about IRS's selection of individuals for audit based on information submitted by tax-exempt organizations);

Judicial Watch, Inc. v. IRS, Case No. 15-237, D.D.C. (filed Feb. 18, 2015) (seeking records related to removal and disposal procedures of IRS employees' hard drives);

Judicial Watch, Inc. v. IRS, Case No. 17-17-0596, D.D.C. (filed April 3, 2017) (seeking records related to IRS records retention policies, including electronic records and emails);

Judicial Watch, Inc. v. Dep't of Justice, Case No. 14-1024, D.D.C. (filed June 17, 2014) (seeking records concerning the time expended by Dep't of Justice Civil Rights Division Attorney Barbara Bosserman investigating the IRS's targeting of conservative organizations seeking tax exempt status);

Judicial Watch, Inc. v. Dep't of Justice, Case No. 14-1239, D.D.C. (filed July 21, 2014) (seeking records of communications between employees in the Department of Justice Public Integrity Section and IRS officials and/or Members of Congress and/or congressional staff regarding 501(c)(4)s or other tax exempt organizations from Jan. 1, 2009 to the present);

Judicial Watch, Inc. v. Dep't of Justice, Case No. 14-1957, D.D.C. (filed Nov. 19, 2014) (seeking records about IRS granting the Federal Bureau of Investigation ("FBI") access to database containing taxpayer information on tax exempt groups).

³ See e.g. Judicial Watch Press Release dated April 16, 2014, "JW Obtains IRS Documents Showing Lerner in Contact with DOJ [in 2013] about Potential Prosecution of Tax-Exempt Groups," available online at <https://www.judicialwatch.org/press-room/press-releases/jw-obtains-irs-documents-showing-lerner-contact-doj-potential-prosecution-tax-exempt-groups/> (last accessed December 7, 2017);

Judicial Watch Press Release dated July 7, 2015, "New Documents Reveal DOJ, IRS and FBI plan to seek criminal charges of Obama Opponents [in 2010]," available online at <https://www.judicialwatch.org/press-room/press-releases/judicial-watch-new-documents-reveal-doj-irs-and-fbi-plan-to-seek-criminal-charges-of-obama-opponents/> (last accessed Dec. 7, 2017);

the emails uncovered, the records obtained by Judicial Watch also sparked investigations into Lois Lerner's emails and the IRS's failure to preserve thousands of emails that were potentially relevant to the various investigations headed by Judicial Watch and the U.S. Congress about the IRS's treatment of conservative groups.⁴ While the federal government has now admitted that the targeting "was wrong" and "for such treatment, the IRS expresses its sincere apology," the IRS continues to withhold email communications to or from Ms. Lerner and/or Ms. Paz on the grounds that the information is deliberative and privileged under FOIA Exemption 5(b). *See* Order entered Dec. 11, 2017 at ¶ 40 in *Linchpins of Liberty v. United States of America*, Case No. 13-777 (D.D.C.) (RBW) (ECF No. 143). The exemption is discretionary and Judicial Watch is challenging its legality in the case. The withheld communications are responsive to the FOIA request at issue in Judicial Watch's main IRS case, *Judicial Watch, Inc. v. Internal Revenue Service*, Case No. 13-1559 (EGS) (D. District of Columbia).

Judicial Watch Press Release dated Nov. 16, 2016, "New Documents Reveal Top Obama IRS Official [Holly Paz] admitted Cincinnati Office Targeted Groups based on 'Guilt by Association,'" available online at <https://www.Judicialwatch.org/press-room/press-releases/new-documents-reveal-top-obama-irs-official-admitted-cincinnati-office-targeted-office-targeted-groups-based-guilt-association/> (last accessed December 7, 2017);

Judicial Watch Press Release dated Sep. 4, 2014, "New IRS Documents Show Lerner did not need Conservative Group Donor List – Emails mention 'Secret Research Project' by Top IRS Official," available online at <https://www.judicialwatch.org/press-room/press-releases/judicial-watch-new-irs-documents-show-lerner-need-conservative-group-donor-lists-emails-mention-secret-research-project-top-irs-official/> (last accessed Dec. 7, 2017).

⁴ *See* Minute Orders dated July 10, 2014 and Aug. 14, 2014 in *Judicial Watch, Inc. v. IRS*, Case No. 13-1559, D.D.C. (ordering the IRS to submit sworn declarations concerning Lois Lerner's emails and the hard drive crashes); *see also* Congressional Testimonies by the Inspector General for TIGTA, J. Russell George and Deputy Inspector General for TIGTA, Timothy P. Camus, submitted on June 25, 2015 to the Congressional Committee on Oversight and Reform, also available online at <https://oversight.house.gov/wp-content/uploads/2015/06/Mr.-J.-Russell-George-Mr.-Timothy-Camus-Testimony.pdf> (last accessed December 7, 2017).

The deposition testimony of Ms. Lerner and Ms. Paz will not only shed light on the misconduct of government officials, but also is likely to assist Judicial Watch in overcoming the IRS's invocation of the deliberative process privilege. When properly invoked, the deliberative process privilege protects against the disclosure of records that otherwise would reveal "advisory opinions, recommendations, and deliberations comprising part of a process by which government decisions and policies are formulated." *National Labor Relations Board. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (internal quotation and citation omitted). The privilege can be overcome, however, "[w]here there is reason to believe the documents sought may shed light on government misconduct ... on the grounds that shielding internal government deliberations in this context does not serve the public's interest in honest, effective government." *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997); *Hall & Assocs. v. U.S. Env'tl. Prot. Agency*, 14 F. Supp. 3d 1, 9 (D.D.C. 2015); *Convertino v. U.S. Dep't of Justice*, 674 F. Supp. 2d 9, 104 (D.D.C. 2009). Judicial Watch's interest in unsealing and making Ms. Lerner's and Ms. Paz's testimony public is twofold. First, as an organization whose mission is to promote transparency and accountability in government, Judicial Watch believes release of the testimony is in the public interest. Second, as a litigant continuing to battle the IRS for records about the agency's targeting of organizations based on their political views, the depositions may prove crucial to Judicial Watch's ability to challenge the IRS's deliberative process exemption claims. The law and the public interest demand that Ms. Lerner and Ms. Paz's testimony be unsealed.

The law commands that the testimonies of Ms. Lerner and Ms. Paz in court records must be unsealed

"The courts have long recognized, [], a 'strong presumption in favor of openness as to court records. The burden of overcoming that presumption is borne by the party that seeks to seal them. The burden is a heavy one: 'Only the most compelling reasons can justify non-

disclosure of judicial records.⁵ Moreover, the greater the public interest in the litigation’s subject matter, the greater the showing necessary to overcome the presumption of access.”

Shane Grp., Inc. v. Blue Cross Blue Shield, 825, F.3d 299, 305 (6th Cir. June 7, 2016) (internal citations omitted). The subject matter of this case is of profound public interest.

On October 26, 2017, the U.S. Attorney General issued the following statement announcing that the federal government had settled this case and another, *Linchpins of Liberty v. United States*, Case no. 13-777 (D.D.C.) (Oct. 27, 2017 Order granting Joint Motion to Approve Consent Judgment) (ECF Nos. 140 and 141):

Chief Justice John Marshall wrote ‘that the power to tax involves the power to destroy...[is] not to be denied.’ And it should also be without question that our First Amendment prohibits the federal government from treating groups differently based solely on their viewpoint or ideology.

But it is now clear that during the last Administration, the IRS began using inappropriate criteria to screen applications for 501(c) status. These criteria included names such as “Tea Party,” “Patriots,” or “9/12” or policy positions concerning government spending or taxes, education of the public to “make America a better place to live,” or statements criticizing how the country was being run. It is also clear that these criteria disproportionately impacted conservative groups.”

The IRS’s use of those criteria as a basis for heightened scrutiny was wrong and should never have occurred. It is improper for the IRS to single out groups for different treatment based on their names or ideological positions. Any entitlement to tax exemption should be based on the activities of the organization and whether they fulfill requirements of the law, not the policy positions adopted by members or the names chosen to reflect those views.

⁵ Ms. Lerner and Ms. Paz allege that their requests for the deposition to remain under seal are based on fear for their safety and the safety of their family members. They do not, however, provide convincing evidence to support their allegations. See Memorandum of Law (1) In support of Certain Former Individual Defendants’ Motion to Seal and (2) In Opposition to the Cincinnati Enquirer’s Motion to Unseal, p. 9 (ECF No. 392-1). The allegations of threats and harassment are from years ago and conclusory statements do not give rise to the level of compelling reasons recognized by the courts to justify non-disclosure of court records. *Shane Grp., Inc. v. Blue Cross Blue Shield*, 825 F.3d 299, 305-506 (6th Cir. 2016). They also certainly do not present a narrowly tailored approach required for consideration to seal court records. *Id.*

There is no excuse for this conduct...

Dep't of Justice, Office of Public Affairs, *Attorney General Jeff Sessions Announces Department of Justice Has Settled with Plaintiffs Groups Improperly Targeted by IRS*, (Oct. 26, 2017), available online at <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-department-justice-has-settled-plaintiff-groups> (last accessed December 8, 2017). The abuse of power by the IRS acknowledged in the U.S. Attorney General's statement lasted years and harmed hundreds of citizen groups.

The public's interest in a lawsuit does not stop with the litigation's result. As the Sixth Circuit has recognized, "[T]he public's interest is focused not only on the result, but also on the conduct giving rise to the case. In those cases, 'secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption.' And in any of these cases, the public is entitled to assess for itself the merits of judicial decisions. Thus, '[t]he public has an interest in ascertaining what evidence and records the District Court and this Court have relied upon in reaching our decision.'" *Shane Grp. Inc.*, 825 F.3d at 305, quoting *Brown v. Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1180 (6th Cir. 1983).

The motion by Ms. Lerner and Ms. Paz, and the IRS's continued withholdings in Judicial Watch's pending FOIA litigation, seek to shield information from the public about the conduct and thinking of two officials central to the IRS's unlawful targeting of organizations based on political ideology. The testimony of Ms. Lerner and Ms. Paz is part of the court record in this case, not merely discovery material. As the Sixth Court notes "there is a stark difference between so-called 'protective orders' entered pursuant to the discovery provisions of Federal Rule of Civil Procedure 26, on the one hand, and orders to seal court records, on the other. Discovery concerns the parties' exchange of information that might or might not be relevant to

their case. “Secrecy is fine at the discovery stage, before the material enters the judicial record.” *Shane Grp. Inc.*, 825 F.3d at 305, quoting *Baxter Int’l, Inc. v. Abbott Labs.*, 297 F3d 544, 545 (7th Cir. 2002). Once the material is in the court record, however, the considerations are very different. “The line between these two stages, discovery and adjudication, is crossed when the parties *place* material in the court record.” *Id.* (emphasis added). Ms. Lerner’s and Ms. Paz’s testimony was placed in the court record during the parties’ summary judgment briefing. It is undisputed that their testimony is part of the court record regardless of whether a settlement was reached before the motions were adjudicated. The testimony must be made public because it is part of the court record.

Conclusion

For the foregoing reasons, Judicial Watch, Inc. respectfully requests that the Court deny Ms. Lerner’s and Ms. Paz’ request to seal the transcripts of their depositions that are part of the court record in this case. While Judicial Watch does not object to specific redactions to protect personal identifying information, the blanket seal requested by Ms. Lerner and Ms. Paz is contrary to the public interest.

Dated: December 14, 2017

Respectfully submitted,

/s/ Mark J. Chumley

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of December, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to counsel of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Mark J. Chumley

Mark J. Chumley